[2020] UKFTT 0271 (TC)

TC07755

INCOME TAX – settlements legislation – chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005 – meaning of "settlement" – meaning of "settlor" – multiple settlors – application of s644 and s645 Income Tax (Trading and Other Income) Act 2005 – whether dividend or distribution taxable under s383 Income Tax (Trading and Other Income) Act 2005 – whether taxpayer subject to tax by reference to the income of the settlement under transfer of assets abroad regime – chapter 2 Part 13 Income Tax Act 2007

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04867

BETWEEN

MARK DUNSBY **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Taylor House, Rosebery Avenue, London on 1 and 2 October 2019

Michael Jones, counsel, instructed by Reynolds Porter Chamberlain LLP for the Appellant

Laura Poots, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to an appeal by the appellant, Mr Mark Dunsby, against the amendments made by the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), to his self-assessment tax return for the tax year 2012-13 by a closure notice dated 31 March 2017.

2. The amendments made by the closure notice related to matters arising from Mr Dunsby's participation in a tax avoidance scheme (the "scheme"), which was devised and promoted by De Sales Promotions Limited ("De Sales"). The scheme was designed to allow shareholders in trading companies with distributable profits to receive those profits free of income tax.

3. The amendments made by the closure notice included in Mr Dunsby's taxable income the amount of £195,400, which had been received by Mr Dunsby as a result of the transactions that formed part of the scheme.

4. This appeal has been designated as a lead case under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs").

THE EVIDENCE

5. I was provided with agreed bundles of documents for the hearing. There were no witnesses.

THE FACTS

6. I have set out the facts in the paragraphs below. They are not in dispute.

The scheme

7. The issues before the Tribunal relate to the tax avoidance arrangements to which Mr Dunsby was a party and which were marketed by De Sales. The particular scheme was known as "Project Scimitar".

8. The scheme was designed to allow shareholders in private companies to extract profits from those companies without paying income tax on the receipt of those profits. There were three main elements to the scheme:

> (1) the creation of a new class of shares and the issue of a share (or shares) in that new class to a non-resident individual;
>
> (2) the transfer by the non-resident individual of that share (or shares) to a trust in which the non-resident individual retained an interest, but from which the original shareholder could benefit;
>
> (3) the declaration of a dividend on the new class of shares, in circumstances where, under the terms of the trust, the original shareholder received almost all of the benefit of the dividend.

9. The scheme was notified to HMRC under the rules contained in Part 7 of the Finance Act 2004 relating to the disclosure of tax avoidance schemes (which is commonly referred to as "DOTAS"). HMRC allocated a scheme reference number under those rules.

Mr Dunsby's implementation of the scheme

Background

10. At all material times, Mr Dunsby was the holder of 2 ordinary shares of £1 each ("ordinary shares") in Majordegree Limited (the "Company"), which comprised all of the issued ordinary shares in the Company. He was also the sole director of the Company.

11. The Company was incorporated in England and Wales and was resident in the UK for tax purposes. It carried on business providing computer and management consultancy services.

12. On a date between 15 October 2012 and 11 March 2013, the Company engaged De Sales in relation to "a tax planning arrangement designed to allow the payment of dividends from UK resident companies free of income tax". Under the terms of that engagement, the total costs payable by the Company were £17,000, or "8.5% of dividend".

13. From 11 March 2013 onwards, the Company and Mr Dunsby implemented the scheme, using generic documents provided by De Sales.

Step 1: The creation and issue of the new S share

14. On 11 March 2013:

(1) the board of directors resolved to approve:

(a) the creation of a new class of "S" ordinary shares of £100 each (the "S shares") and the related amendments to the articles of association;

(b) the form of a written resolution of the shareholder to create the new S shares and amend the Company's articles of association

(2) the Company resolved by written resolution of the sole shareholder to create the new S shares and to make the related amendments to the articles of association; and

(3) the board of directors approved the allotment and issue of one new S share as fully paid to Mrs Fiona Gower for a subscription price of £100.

15. These steps were implemented by Mr Dunsby as the sole director and shareholder in the Company before these steps.

16. Mrs Gower paid £100 to the Company, by way of subscription monies, on 18 March 2013. Mrs Gower was an individual who was not resident in the UK. She was not known to Mr Dunsby or to the Company before these steps. She was introduced to the Company by De Sales. She undertook the same role in implementing Project Scimitar for other scheme users.

17. The rights attaching to the S share were, in summary as follows:

(1) the S share carried a right to participate in the income profits and distributions either as a single class or together with all existing shares in the Company (i.e. the ordinary shares), as the board may recommend;

(2) the S share carried no voting rights;

(3) the rights of the S share on a return of capital (on a liquidation, reduction of capital or otherwise) were limited to the nominal value of the share (i.e. £100).

Step 2: The transfer of the S share to the trust

18. On 14 March 2013, Mrs Gower entered into a deed of settlement with the Plectron Trust Company Limited ("Plectron"), as trustee. Plectron is a trust company incorporated in Jersey. Under the deed, Mrs Gower created a trust known as the FMG 2911646 Settlement (the "Trust") and settled the S share on the terms of the Trust.

19. The principal terms of the Trust were as follows.

(1) During the Initial Period, the income of the Trust was held:

(a) as to the first £500, for Jersey Hospice Care (the "Charity");

(b) as to the next £100, for Mrs Gower;

(c) as to any further income:

(i) 0.5% for the Charity;

(ii) 1.5% for Mrs Gower;

(iii) 98% upon protective trusts for the benefit of Mr Dunsby during his life.

The "Initial Period" was defined as beginning on 14 March 2013 and ending on 5 April 2013 or such earlier date as the trustee specified in writing.

The protective trusts, in summary, gave Mr Dunsby an immediate right to the relevant income during the "Protected Period" (broadly, Mr Dunsby's life), but were subject to being determined if Mr Dunsby took steps to dispose of his beneficial interest.

(2) After the Initial Period, the trustee held the income of the Trust on discretionary trusts for the beneficiaries, with a power to accumulate.

The beneficiaries of the Trust included:

(a) Mr Dunsby;

(b) the spouse, children and descendants of Mr Dunsby.

(c) Mrs Gower;

(d) the Charity.

(3) Subject to those trusts and various powers, any income was to be held by the trustees on trust for Mrs Gower absolutely; or in default of her, for the Charity; or in default of the Charity, for charitable purposes generally.

20. Also on 14 March 2013, Mrs Gower transferred title to the S share to the trustee.

21. On the same day, the trustee wrote to Mr Dunsby, as director of the Company, giving an irrevocable instruction that any dividend declared on the S share on or before 28 March 2013 should be remitted to the beneficiaries directly. In particular, the trustee directed the Company to pay 98% of any such dividend to Mr Dunsby, after paying out the first £600 to the Charity and Mrs Gower.

Step 3: Payment of the dividend on the S share

22. On 15 March 2013, the board of directors resolved to pay an interim dividend of £200,000 in respect of the S Share.

23. The Company paid £195,400 to Mr Dunsby, by way of bank transfer, on 18 March 2013.

Mr Dunsby's return and the HMRC enquiry

24. Mr Dunsby disclosed details of the arrangements in his tax return for the tax year 2012-13. He did not include any amount of the dividend paid by the Company in his taxable income on the grounds that the income was treated as being the income of Mrs Gower alone (as settlor of the Trust) under the settlements legislation in Chapter 5 of Part 5 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

25. On 29 May 2014, HMRC opened an enquiry under s9A of the Taxes Management Act 1970 into Mr Dunsby's return for the 2012-13 tax year.

26. On 31 March 2017, HMRC closed the enquiry and amended Mr Dunsby's return. By that amendment, HMRC sought to bring the £195,400 received by Mr Dunsby into account as taxable income.

27. Mr Dunsby appealed against the amendment to HMRC on 25 April 2017. HMRC set out their view of the matter in a letter dated 16 May 2017. Mr Dunsby notified an appeal to the Tribunal on 13 June 2017.

THE ISSUES IN DISPUTE

The settlements legislation in outline

28. The issues in this appeal primarily concern the application of legislation applicable to settlements in Chapter 5 of Part 5 of ITTOIA. (I will refer to that legislation as the "settlements legislation" or the "settlements code" in this decision notice.)

29. I will deal in some detail with certain aspects of the settlements legislation – and will set out the relevant provisions – as I address the points at issue in this appeal. But, it may assist my explanation if I set out a brief summary of the scheme of the provisions at this stage.

30. The settlements legislation operates to treat income arising under a "settlement" (as defined in s620 ITTOIA) as income of the "settlor" (also defined in s620 ITTOIA).

31. Section 619 ITTOIA contains the charge to tax on income, which is treated as income of the settlor under the settlements legislation. At all material times, so far as relevant, it was in the following form:

> **619 Charge to tax under Chapter 5**
>
> (1) Income tax is charged on–
>
> (a) income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest),
>
> …
>
> (2) For the purposes of Chapter 2 of Part 2 of ITA 2007 (rates at which income tax is charged), where income of another person is treated as income of the settlor and is charged to tax under subsection (1)(a) or (b) above, it shall be charged in accordance with whichever provisions of the Income Tax Acts would have been applied in charging it if it had arisen directly to the settlor.

32. By s622 ITTOIA, the person liable for any tax charged is the settlor.

33. Under s624 ITTOIA, income, which arises under a settlement, is treated as income of the settlor and of the settlor alone if it arises (i) during the life of the settlor and (ii) from property in which the settlor has an interest. Section 624 is central to Mr Dunsby's case so I will set out in full. At the material time, it was in the following form:

> **624 Income where settlor retains an interest**
>
> (1) Income which arises under a settlement is treated for income tax purposes as the income of the settlor and of the settlor alone if it arises–
>
> (a) during the life of the settlor, and
>
> (b) from property in which the settlor has an interest.
>
> (1A) If the settlement is a trust, expenses of the trustees are not to be used to reduce the income of the settlor.
>
> (2) For more on a settlor having an interest in property, see section 625.
>
> (3) For exceptions to the rule in subsection (1), see–
>
> section 626 (exception for outright gifts between spouses or civil partners),

section 627 (exceptions for certain types of income), and

section 628 (exception for gifts to charities).

34. Section 625 sets out the circumstances in which a settlor is to be regarded as having an interest in property. They include where the property or any related property (including income from that property) is or may be payable to the settlor or applicable for the settlor's benefit.

35. There are specific provisions, which deal with the relative priority of provisions within Part 5 ITTOIA and other provisions of the tax legislation. These are found in s575 ITTOIA. In relation to dividend income from shares in UK resident companies, s575(3) provides:

> (3) Any income, so far as it falls within–
>
> (a) any Chapter of this Part, and
>
> (b) Chapter 2 or 3 of Part 4 (interest and dividends etc. from UK resident companies etc.),
>
> is dealt with under the relevant Chapter of Part 4.

The appellant's case in outline

36. In summary, Mr Dunsby's case is that relevant income falls within the ambit of the settlements legislation and so, under s624 ITTOIA, is treated as the income of another person (Mrs Gower) and not as his income. I will set out Mr Jones's detailed arguments on behalf of Mr Dunsby below, but, in short, he says:

(1) that the Trust was a settlement for the purposes of the settlements legislation;

(2) that Mrs Gower was the settlor of that settlement because she made the settlement when she contributed the S share to the Trust;

(3) that Mrs Gower retained an interest in the settlement in that she was entitled to a share in the income of the Trust; and

(4) that, under the provisions of the settlements code, and in particular s624 ITTOIA, the dividend paid by the Company on the S share was Mrs Gower's income and only Mrs Gower's income for income tax purposes.

For these reasons, the dividend on the S share could not be treated as Mr Dunsby's income for income tax purposes (whether under s383 ITTOIA or the transfer of assets abroad provisions, or otherwise).

HMRC's case in outline

37. The issues before the Tribunal relate to HMRC's alternative arguments that, for various reasons, s624 ITTOIA should not apply to prevent the amount received by Mr Dunsby from the Trust being taxed as his income. Again, I will set out Ms Poots's arguments in more detail below, but, in summary, Ms Poots says that either:

(1) the settlements legislation applies and prevents a charge under other provisions, but Mr Dunsby is either the settlor or one of the settlors of any settlement that arises under the arrangements and the income arising to the settlement is therefore to be treated as his income under the settlements code; or

(2) the settlements legislation does not prevent a charge to income tax on the amount received by Mr Dunsby from the Trust under certain other provisions of the income tax code, in particular, either as a distribution on the ordinary shares held by Mr Dunsby under section 383 ITTOIA, or, in the alternative, under the transfer of assets abroad regime in Chapter 2 of Part 13 of the Income Tax Act 2007 ("ITA").

Rule 18: common or related issues

38. As I have mentioned, this appeal is a lead appeal for the purposes of FTR rule 18. Pursuant to directions made by this Tribunal on 1 May 2018, the parties have agreed a statement of common or related issues of fact or law that are common to the appeals, which are subject to the FTR rule 18 direction.

39. Translated into the context of this appeal, the issues that fall to be determined pursuant to that direction are as follows:

(1) whether the dividends paid by the Company in respect of the S share held by the trustee of the Trust was a distribution made to Mr Dunsby and taxable on him under s383 ITTOIA;

(2) whether Mr Dunsby was a "settlor" of a "settlement" for the purposes of Chapter 5 Part 5 ITTOIA;

(3) whether, if Mr Dunsby was a "settlor" of a "settlement" for the purposes of Chapter 5 Part 5 ITTOIA:

(a) any income arising under the "settlement" in question should be treated as income of Mr Dunsby under Chapter 5 Part 5 ITTOIA (applying section 644 ITTOIA or otherwise); and

(b) if so, how much of that income should be treated as income of Mr Dunsby under Chapter 5 Part 5 ITTOIA; and

(4) whether Mr Dunsby is taxable under the transfer of assets abroad provisions in Chapter 2 of Part 13 ITA, on the basis that the income of the Trust should be treated as arising to Mr Dunsby under s720 and s721 ITA.

This decision notice

40. I will address these issues in turn under this decision notice. I will deal first with whether or not the amount received by Mr Dunsby is taxable as a distribution under section 383 ITTOIA (the issue set out at [39(1)] above); second, with the issues relating the application of the settlements legislation (i.e. the issues set out at [39(2)] and [39(3)] above); and finally, I will consider the application of the transfer of assets abroad regime (i.e. the issue set out at [39(4)] above).

41. As will become apparent, in relation to the question as to whether the amount received by Mr Dunsby is taxable as a distribution under section 383 ITTOIA, the issue between the parties as argued before me did not correspond precisely with its description in the agreed statement of common or related issues, as set out above.

DISTRIBUTION: S383 ITTOIA

42. As her principal argument, Ms Poots submitted that the amount received by Mr Dunsby is taxable as a distribution on the ordinary shares in the Company under s383 ITTOIA. This is the first issue that I will address.

The relevant legislation

43. The relevant legislation is found in s383 to s385 ITTOIA. So far as relevant, and at the material time, those provisions were in the following form.

383 Charge to tax on dividends and other distributions

(1) Income tax is charged on dividends and other distributions of a UK resident company.

(2) For income tax purposes, such dividends and other distributions are to be treated as income.

(3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection.

384 Income charged

(1) Tax is charged under this Chapter on the amount or value of the dividends paid and other distributions made in the tax year.

(2) …

385 Person liable

(1) The person liable for any tax charged under this Chapter is–

(a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and sections 386(3) and 389(3)), or

(b) the person receiving or entitled to the distribution.

(2) …

44. In these provisions, "distribution" has the meaning given by Chapters 2 to 5 of Part 23 of the Corporation Tax Act 2010 ("CTA 2010") excluding s1027A (see s989 ITA). The relevant provisions for present purposes are in paragraphs A and B of s1000(1) CTA 2010. At all material times, those provisions were in the following form:

1000 Meaning of "distribution"

(1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.

A. Any dividend paid by the company, including a capital dividend.

B. Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—

(a) represents repayment of capital on the shares, or

(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

For the purposes of this paragraph it does not matter whether the distribution is in cash or not.

…

The parties' submissions

45. Ms Poots made the following submissions for HMRC.

(1) On a purposive construction of the legislation, if the facts are viewed realistically, the payment received by Mr Dunsby must be treated as a dividend (within s1000(1)A CTA 2010) or a distribution (within s1000(1)B CTA 2010) in respect of the ordinary shares in the Company held by Mr Dunsby. The amount of the dividend or distribution is the net amount received by Mr Dunsby.

(2) The source of the income received by Mr Dunsby was the ordinary shares. That was the substance of the transaction. The steps were designed to produce tax free dividends for Mr Dunsby. This can be seen from the scheme documents. The various

steps in the arrangement were just machinery designed to produce that result. Ms Poots referred to the judgment of Moses LJ in *PA Holdings Limited v Revenue & Customs Commissioners* [2011] EWCA Civ 1414, [2012] STC 582 ("*PA Holdings*") at [39]-[41], [59], [68]-[70] as authority for the proposition that it was appropriate to ascertain the source of the payment by reference to the substance of the matter and not the form.

(3) The settlements code did not apply. The ordinary shares were the true source of the payment and not the settlement comprised by the Trust. As a result, s624 ITTOIA was not in point.

(4) In the alternative, the fact that the dividend on the S share was treated as income of Mrs Gower, did not affect the tax treatment of a distribution on the ordinary shares.

46. Mr Jones made the following submissions on behalf of Mr Dunsby.

(1) The legislation applicable to dividends and distributions was susceptible to a purposive construction. However, it was not a realistic view of the facts to say that a dividend or distribution was paid in respect of the ordinary shares in the present case. In fact, and in law, a dividend was paid on the S share held by the trustee.

(2) The decision in *PA Holdings* did not assist HMRC. The case concerned the nature of the receipt (i.e. whether it was an emolument or a dividend). It was not authority for the proposition that it was possible to disregard the company law analysis in determining the true source of payment.

(3) The true source of the payment was the dividend on the S share. That dividend was income of the Trust and treated as the income of Mrs Gower and Mrs Gower alone under s624 ITTOIA.

(4) HMRC's argument that the distribution was a distribution on the ordinary shares was an argument that there was no income at all under the settlement. That did not accord with the facts.

(5) HMRC's alternative argument – that the dividend on the S share may be treated as income of Mrs Gower but that did not prevent the taxation of the amount received by Mr Dunsby as a distribution on the ordinary shares – was an argument that there were two parallel dividends or distributions. There was no legal basis for that assertion.

(6) Mr Jones noted that HMRC had dropped an argument that s383 ITTOIA applied in priority to the settlements code as a result of the priority rule in s575 ITTOIA. He pointed out that it was clear from the Explanatory Notes to ITTOIA that the priority of the settlements code was not affected by the priority rules in s575 ITTOIA.

Discussion

47. As I have mentioned, Ms Poots's principal argument was that the payment received by Mr Dunsby should be treated as a dividend or distribution on the ordinary shares which he held in the Company and that he should pay tax on that amount under s383 ITTOIA.

Background

48. Section 383 ITTOIA charges income tax on dividends and distributions of UK resident companies. There is no definition of "dividend" in the tax legislation but, for this purpose, "distribution" has the meaning given in Part 23 CTA 2010, subject to certain exceptions, which are not relevant for present purposes. The charge to income tax is imposed on the

person to whom the distribution "is made or treated as made" or on the person "receiving or entitled to the distribution" (s385 ITTOIA).

49. There is no dispute between the parties in the present case that the transactions that formed the scheme involved a dividend or distribution by the Company. There are, however, considerable differences between them as to the nature of the distribution, the identity of its recipient and the interaction of the settlements code with any potential charge to income tax under s383 ITTOIA. Mr Jones says that the only distribution is the dividend paid on the S share to the Trust and, as a result, the settlements code applies to govern the taxation of that dividend. Ms Poots's submission is that the transactions involved a distribution to Mr Dunsby on or in respect of the ordinary shares, which he held at the time. She says that distribution is subject to income tax in Mr Dunsby's hands and the settlements provisions do not apply to it.

50. I should explain the background to Ms Poots's submission.

51. As I have set out above, there are rules in s575 ITTOIA, which govern the priority of other provisions in the tax legislation over the provisions in Part 5 ITTOIA, which include the settlements code. Those rules contain a provision, s575(3), which gives priority to the tax charge on dividends from UK companies in Chapter 3 Part 4 ITTOIA (in s383 ITTOIA) over the provisions of Part 5.

52. Mr Jones submits that s575(3) does not apply to displace the settlements legislation. He submits that the settlements code provides a separate code which applies to income which arises under the settlement: it determines the manner in which such income is to be taxed (see, for example, s619(2) ITTOIA) and who is to bear the tax (see, for example, s619(1) and s624). There is no real overlap between the settlements code and the other provisions listed in s575 (including Part 4 ITTOIA). Any other interpretation would deprive the settlements code of any real function.

53. In support of his submission, Mr Jones refers to the Explanatory Notes to s575 ITTOIA. They state (at paragraphs 2244 to 2246 and paragraph 2248):

> 2244. Particular types of income which, in the source legislation, are charged to tax under Schedule D Case III have been given separate charges to tax in Parts 4 and 5 of this Act. As the general annual payments charge in Chapter 7 of Part 5 of this Act takes effect only if an amount is not otherwise charged to income tax there can be no overlap between this charge and the ex-Case III charges in Part 4 of this Act.
>
> 2245. Subsection (3), therefore, provides a rule where there could potentially be an overlap between Chapters within Parts 4 and 5 of this Act. It ensures that the interest charge in Chapter 2 of Part 4 takes priority over any of the charges in Part 5 that are based on Schedule D Case VI. This maintains the priority in the source legislation of Case III over Case VI which charges amounts that do not fall under any other Case of Schedule D.
>
> 2246. It also provides the priority between Chapter 3 of Part 4 of this Act (dividends etc. from UK resident companies) and Part 5 of this Act. This rewrites the effect of section 20(2) of ICTA which provides specifically for Schedule F to take priority over the other Schedules.
>
> …
>
> 2248. The non-schedular charges rewritten in Part 5 of this Act in Chapter 5 (Settlements: amounts treated as income of the settlor) and section 656 (Beneficiaries' income from estates in administration: Income charged: UK estates) do not have the potential to overlap with Chapter 2 of Part 2 of this

> Act (trade profits) or Chapter 3 of Part 3 of this Act (UK property business) or any of the charges in Part 4 of this Act or ITEPA. There is therefore no need to exclude these charges from the priority rules.

54. Mr Jones says that the Explanatory Notes confirm that there is no need for a separate provision to determine the priority between the settlements code and Chapter 3 Part 4 ITTOIA because there is no overlap between them. The dividend income on the S share is "income which arises under a settlement". If the settlement code applies to the dividend on the S share, then, pursuant to s624 ITTOIA, the dividend income is the settlor's income and the settlor's income alone for income tax purposes. There is no room for a separate charge under s383 ITTOIA on Mr Dunsby.

55. Ms Poots does not seriously challenge Mr Jones's submission. And I accept it. Instead, Ms Poots submits that, on the current facts, a distribution was made on or in respect of the ordinary shares – either to the exclusion of a distribution taking the form of a dividend on the S share or in addition to it – and that distribution is not "income which arises under a settlement" and so does not fall within the ambit of s624 ITTOIA.

56. There is an inevitable interaction between this submission and the issues that arise in the context of Ms Poots's submissions regarding the scope of the settlements legislation. I will address those issues and that interaction later in this decision notice. For now, I will focus on Ms Poots's submissions on the distribution issue.

The Ramsay principle

57. The parties agree that the relevant legislation (ss383 to 385 ITTOIA and s1000 CTA 2010) is susceptible to interpretation under the principles identified in the line of cases beginning with decision of the House of Lords in *W T Ramsay Limited v Inland Revenue Commissioners* [1981] STC 174 (the "*Ramsay* principle"). In this regard, Ms Poots referred me to the judgment of Lord Nicholls in *Barclays Mercantile Finance Limited v Mawson* [2004] UKHL 51, [2005] STC 1 ("*BMBF*") in which he articulated the principles of construction that should be applied to tax statutes. She directed me in particular to Lord Nicholls's statements at [32] and [36] of that judgment where he said:

> **32.** The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8:
>
> > "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case."
>
> …
>
> **36.** Cases such as these gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what

transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 , para 35:

> "[T]he driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

58. Ms Poots also referred me to the decision of the Supreme Court in *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] STC 934 ("*UBS*"). She pointed to a passage in the judgment of Lord Reed at [61] to [65], and in particular to [64] where Lord Reed said:

> **64.** This approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in *Barclays Mercantile* at para 34. First, "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, 'in the real world'". Secondly, tax avoidance schemes commonly include "elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge". In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile,* [2002] EWCA Civ 1853; [2003] STC 66 , para 66, taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that "to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic." Accordingly, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46; (2003) 6 ITLR 454 , para 35, where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always.

Application to this case

59. Ms Poots says that if the transactions are "viewed realistically" they constitute a pre-ordained series of transactions, which is designed to deliver a distribution to Mr Dunsby. The creation of the S share, the subscription by Mrs Gower and the transfer to the Trust were simply the machinery by which the distribution was delivered to Mr Dunsby; the payment to Mr Dunsby retained its character as a distribution notwithstanding the inserted steps.

60. In support of this submission, Ms Poots referred me to the judgment of Moses LJ in *PA Holdings*. That case concerned a scheme in which steps had been taken to pay employees in the form of dividends. The Court of Appeal dismissed the taxpayer's appeal against the decisions of the First-tier Tribunal and the Upper Tribunal that the payments received by the employees retained their character as emoluments and should be taxed as such.

61. Moses LJ said this at [59]:

> **59**. In my view, neither the First Tier Tribunal nor the Upper Tribunal acknowledged the impact of those principles on their conclusion that the payments were emoluments from employment. In concluding that the payments were emoluments in the hands of PA's employees, they hit the nail

> on the head. But they failed to drive it in. They concluded that the payments were emoluments by having regard to all the circumstances of the case and by looking to the substance and purpose of the payments and not to the mere form in which they were received. In reaching their conclusion, they followed a long-accepted, traditional approach to the facts. That approach enabled them, within accepted limits, to look beyond the form of distributions, mere machinery, by which the intention to pay bonuses was fulfilled.

And in his conclusions, he said this at [68]:

> **68.** The insertion of the steps, which created the form of dividends or distributions, did not deprive the payments of their character as emoluments. The insertion had no fiscal effect because section 20, construed in its statutory context, does not charge emoluments under Schedule F. The exotic attempt advanced orally by Mr Mullan to classify both the award of the shares and the distributions as income and thereby raise the spectre of double-recovery fails for the same reason. The award of the shares and the declaration of the dividend were, in reality not separate steps but the process for delivery of the bonuses.

62. Mr Jones challenges this analysis. He accepts that the relevant legislation is susceptible to interpretation under the *Ramsay* principle. However, he says that, rather than viewing the facts realistically, Ms Poots's construction ignores the true facts and does not accord with the company law treatment of the transactions. *PA Holdings* is not authority for the proposition that the source of the payment is the ordinary shares. It is a case about the nature of the receipt in the hands of the employees; not the source of the payment.

63. I agree with Mr Jones on this issue.

64. The question for the Tribunal is whether the receipt in the hands of Mr Dunsby was a "dividend or distribution" for the purposes of s383 ITTOIA and, if so, for the reasons that I have given, whether that dividend or distribution is on or in respect of the ordinary shares held by Mr Dunsby.

65. As I have mentioned above, "distribution" in s383 has the meaning given in Part 23 CTA 2010. That definition has various heads or classes, which are set out in the various paragraphs of s1000(1), the interpretation of which are then supplemented by the other provisions of Part 23. Ms Poots suggested that the amount received by Mr Dunsby could fall within paragraph A or paragraph B of s1000(1) CTA 2010.

66. Paragraph A of s1000(1) refers to dividends. To an extent there would appear to be an element of duplication in s383: s383 refers specifically to dividends, but dividends are also part of the concept of distributions to which s383 also refers. Ms Poots did not seek to argue that the meaning of "dividend" in s383 ITTOIA was any different to that in s1000(1)A CTA 2010. I have proceeded on that basis.

67. There is no separate definition of the term "dividend" in the tax legislation. However, given the context, its meaning must be informed by the understanding of that term for company law purposes. The case law also suggests that the corporate form is an important factor in determining whether a particular payment or transaction amounts to a "dividend" (see, for example, the decision of the Court of Appeal in *First Nationwide v Revenue and Customs Commissioners*, [2012] EWCA Civ 278, [2012] STC 1261 to which I was not referred by the parties). In the present case, the only dividend in company law terms was the dividend paid on the S share. It was not a sham. There was no dividend paid on the ordinary shares.

68. Paragraph B of s1000(1) refers to "any other distribution out of the assets of the company in respect of shares" in the company.

69. Ms Poots says that the payment received by Mr Dunsby is a distribution within paragraph B and that it is in respect of the ordinary shares in the Company. She says this on the basis that, when applying the principles in *BMBF* and *UBS* and viewing the facts realistically, it is appropriate to ignore the inserted steps (the creation of the S share, and the transfer into trust). Mr Dunsby receives value, which has originated from the Company and, if the creation of the S shares is ignored, that leaves only the possibility that the distribution was made in respect of the ordinary shares held by Mr Dunsby.

70. In my view, that analysis goes too far. The concept of a distribution in paragraph B is not so closely tied to a particular form of corporate action as paragraph A, but it is still grounded in the corporate transactions that are undertaken and their effect on the capital structure of the company. This can be seen from the other detailed concepts within definition in Part 23, in particular, the concept of a repayment of capital and the requirement that the distribution is "in respect of shares" in the company.

71. In *PA Holdings*, the question was whether the amounts received by the employees, although they took the legal form of dividends, should be treated as emoluments for tax purposes. As Moses LJ describes in his judgment (as set out at [61] above), the approach taken by the First-tier Tribunal and the Upper Tribunal in *PA Holdings* enabled them to "look beyond" the corporate form of the payments in deciding that question. In this case, the question is whether the payment received by Mr Dunsby was a "dividend" or "distribution" on the ordinary shares. In my view, that is not a question, which can be easily answered without reference to the corporate form. Whether or not the receipt in Mr Dunsby's hands is a distribution on or in respect of the ordinary shares is informed by the company law procedures by which the payment is made.

72. In my view, therefore, when I apply the legislation construed purposively to the facts viewed realistically, the only "dividend or distribution" within s383 ITTOIA that is made as part of the transactions is the dividend that was paid on the S share. The holder of the S share, the trustee, put in place arrangements to ensure that the dividend was paid directly to the beneficiaries, and so predominantly to Mr Dunsby, but that does not mean that it can be viewed as a distribution in respect of the ordinary shares held by Mr Dunsby.

Conclusion

73. For these reasons, in my view, the payment received by Mr Dunsby was not a dividend or distribution on the ordinary shares. I reject Ms Poots's submission.

THE SETTLEMENTS LEGISLATION: CHAPTER 5, PART 5 ITTOIA

74. The second collection of issues that I will address are those relating to the application of the settlements legislation. There are two main issues between the parties that I need to address:

(1) first, the scope of any settlement that arises under the arrangements;

(2) second, the identity of the settlor or settlors of any such settlement – that is, whether Mr Dunsby was a settlor and, if so, whether Mrs Gower was also a settlor of any settlement.

The relevant legislation

75. I will first set out a summary of the relevant legislation.

76. The definitions of "settlement" and "settlor" for the purposes of the settlements code are both found in s620 ITTOIA. It provides, so far as relevant:

(1) In this Chapter–

"settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets …, and

"settlor", in relation to a settlement, means any person by whom the settlement was made.

(2) A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.

(3) A person is, in particular, treated as having made a settlement if the person–

(a) has provided funds directly or indirectly for the purpose of the settlement,

(b) has undertaken to provide funds directly or indirectly for the purpose of the settlement, or

(c) has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.

(4) This Chapter applies to settlements wherever made.

(5) …

77. Section 644 ITTOIA deals with circumstances where there is more than one settlor. In broad terms, it provides that the settlements legislation applies to each settlor as if that settlor were the only settlor and by treating references in the settlements code to "the property comprised in the settlement" and to "income arising under the settlement" as references only to property and income originating from the settlor in question. It provides:

644 Application to settlements by two or more settlors

(1) In the case of a settlement where there is more than one settlor, this Chapter has effect in relation to each settlor as if that settlor were the only settlor.

(2) This works as follows.

(3) In this Chapter, in relation to a settlor–

(a) references to the property comprised in a settlement include only property originating from the settlor, and

(b) references to income arising under the settlement include only income originating from the settlor.

(4) For the purposes of sections 629, 631 and 632 only the following are taken into account in relation to a child of the settlor–

(a) income originating from the settlor, and

(b) in a case in which section 631 applies, payments which under that section (as adapted by subsection (5) below) are treated as payments of income.

(5) In applying section 631 to a settlor–

(a) the reference to income arising under the settlement includes only income originating from the settlor, and

(b) the reference to any payment made in connection with the settlement includes only a payment made out of property originating from the settlor or income originating from the settlor.

(6) See section 645 for the meaning of references in this section to property or income originating from a settlor.

78. Section 645 ITTOIA sets out the meaning of "property or income originating from a settlor". At all material times, it provided:

645 Property or income originating from settlor

(1) References in section 644 to property originating from a settlor are references to–

(a) property which the settlor has provided directly or indirectly for the purposes of the settlement,

(b) property representing property so provided, and

(c) so much of any property which represents both property so provided and other property as, on a just and reasonable apportionment, represents the property so provided.

(2) References in sections 627 and 644 to income originating from a settlor are references to–

(a) income from property originating from the settlor, and

(b) income provided directly or indirectly by the settlor.

(3) In this section references to property or income which a settlor has provided directly or indirectly–

(a) include references to property or income which has been provided directly or indirectly by another person under reciprocal arrangements with the settlor, but

(b) do not include references to property or income which the settlor has provided directly or indirectly under reciprocal arrangements with another person.

(4) In this section references to property which represents other property include references to property which represents accumulated income from the other property.

The scope of the settlement

The parties' submissions

79. For HMRC, Ms Poots submits that the transactions in the scheme involve a "settlement" within section 620 ITTOIA. The settlement involves all of the steps in the scheme.

> (1) The definition of settlement is wide, and includes an "arrangement". That concept is very broad. The limiting factor is whether or not the arrangements involve an "element of bounty". In general, an element of bounty means that, under the arrangement, a benefit is provided which would not have been provided in a transaction at arms' length (*Jones v. Garnett* [2007] UKHL 35, [2007] STC 1536 ("*Jones*") per Lord Hoffman at [7]).
>
> (2) A broad and realistic view of the matter has to be taken. There will be an arrangement where there is "sufficient unity" about the whole matter to justify it being called an arrangement.

(3) The relevant steps were identified and decided upon in full at the outset. There is no doubt that there is "sufficient unity" about the steps to justify their being called an arrangement.

80. For Mr Dunsby, Mr Jones makes the following submissions.

(1) The structure involves a settlement, but the only settlement is the Trust.

(2) The definition of a settlement in section 620 ITTOIA is broad. However, it has limitations. It must involve an element of bounty and it must be of a type contemplated by the legislation. It must comprise property which is the subject of the settlement and must confer the income of the property on others (*Chamberlain v. Inland Revenue Commissioners* [1943] 2 All ER 200 ("*Chamberlain*") per Lord Macmillan at page 204H).

(3) The formation and structure of a company cannot be a settlement (see *Chamberlain* at page 205A).

(4) In addition, it is important not to confuse the steps, which are taken with a view to making a settlement with the settlement itself (*Chamberlain* per Lord Macmillan at page 205D). In the present case, the settlement was made by Mrs Gower when she created the Trust and transferred the S share to the trustee. The other steps in the scheme prior to the creation of the Trust by Mrs Gower were merely the steps taken with a view to making the settlement.

(5) The "property comprised in the settlement" is critical in defining the settlement. The only property in the settlement in this case was the S share. Mr Dunsby never had an interest in the S share. It is not possible to treat the assets of the Company as belonging to Mr Dunsby.

Discussion

81. The definition of "settlement" in section 620 ITTOIA is indeed very broad. It encompasses "any disposition, trust, covenant, agreement, arrangement or transfer of assets". However, the case law authorities tell us that there are limits on the concept of settlement. In particular, for any arrangement to be regarded as a settlement, it must involve an "element of bounty". That is a rather antiquated phrase. It was translated into more contemporary language by Lord Hoffman in *Jones* as meaning that "under the arrangement, the settlor must provide a benefit which would not have been provided in a transaction at arm's length" (*Jones*: [7]).

82. The parties do not dispute this basic principle. However, there are considerable differences between them on its application to the facts of this case. In support of their submissions, the parties have referred me to various authorities and, before turning to the facts of this case, I will briefly review the main authorities to which they have referred.

The case law authorities

83. I will begin with the House of Lords decision in *Jones*. Ms Poots relies on this case in support of her arguments for HMRC.

84. *Jones* involved an appeal by a taxpayer (Mr Jones) against an assessment to income tax under the settlements legislation on dividends paid to his wife by a company through which the Mr Jones carried on his information technology consultancy business. Mr Jones and his wife each held one ordinary share in the company, having acquired their shares at the time of its incorporation. Mrs Jones worked for the company as company secretary and undertook certain administrative tasks, for which she was paid a salary. Mr Jones was also paid a salary by the company. However, that salary was much lower than he would have been expected to

be paid as an employee of a third party business. The result was that the company made substantial profits from contracts with various clients under which it provided the services of Mr Jones. The company then paid dividends to Mr and Mrs Jones.

85. The Special Commissioners dismissed Mr Jones's appeal against the assessment. Mr Jones's appeal to the High Court was also dismissed. The Court of Appeal reversed that decision on the grounds that there had been no "settlement" within the terms of the settlements legislation. The House of Lords dismissed HMRC's appeal, but on rather different grounds: the House of Lords found that the arrangements did involve a "settlement", however, the dividend income was not assessable on Mr Jones because an exception for gifts between spouses should apply.

86. On the question as to whether the arrangements involved a settlement, having recited the principle that the definition of "settlement" was limited to cases where there was an "element of bounty", Lord Hoffman rejected the Court of Appeal's analysis that the arrangement was limited to the acquisition of the shares in the company by Mr and Mrs Jones, which did not involve an element of bounty. The Court of Appeal's view was that it was not permissible to derive the element of bounty from the future dividends paid to Mrs Jones out of profits derived entirely from Mr Jones's work as they were uncertain and so could not form part of the arrangement.

87. Lord Hoffman said this at [10]:

> **10.** I must respectfully disagree. In my opinion, the analysis is divorced from reality. Mrs Jones could not have been issued with a share without the agreement of her husband and when he agreed to that arrangement, it was expected that he would take a low salary and that substantial dividends would be distributed. That was the advice which they had received from the accountant. And that was what happened. Each year the salaries were set at a level suggested by the accountant and the rest retained or distributed as dividend. The decisions were tax driven and not commercially driven. And it was necessary, in order to gain the tax benefit, that Mr Jones should, in a broad sense, transfer some of his earnings to his wife.

88. It was, to adopt Lord Hoffman's phrase, necessary to take "a broad and realistic view" of the matter (*Jones*: [11]). Lord Hoffman therefore accepted HMRC's argument that the incorporation of the company and the acquisition of a share by Mrs Jones, which carried the right to receive the future dividends, was an "arrangement" and the expectation of substantial future dividends funded from Mr Jones's work provided the necessary element of bounty, which brought the arrangement within the definition of a "settlement".

89. Lord Hoffman referred to various other cases to illustrate this approach. These included *Crossland v. Hawkins* [1961] Ch 537 ("*Crossland*"). In that case, an actor, Mr Hawkins, agreed to make his services available to the company for a low salary. Mr Hawkins was a director of the company, but he was never a shareholder. Shares in the company were acquired by a trust established by Mr Hawkins's father-in-law for the benefit of Mr Hawkins's children. The Court of Appeal found that the series of transactions including the formation of the company, the service agreements between Mr Hawkins and the company, and the deed of settlement together constituted an "arrangement" which was a "settlement" within the settlements legislation. There was "sufficient unity" about the arrangements to justify the operation of the settlements legislation. Even though the final step in the arrangements was decided upon at a later date, it was not sufficient to deprive the scheme of the unity required to justify its falling within the settlements legislation (*Crossland* per Donovan LJ at pages 549 to 550, cited by Lord Hoffman in *Jones* at [13]).

90. As Lord Hoffman points out in *Jones*, the Court of Appeal in *Crossland* appears to suggest that all of the steps in the proposal could form part of an "arrangement", which constituted a settlement under the settlements code. This was the case even if some of the steps were uncertain at the time of the first step.

91. A rather different approach was taken in *Butler v Wildin* (1988) 61 TC 666, [1989] STC 22 ("*Butler*"), another case to which Lord Hoffman refers in his judgment in *Jones*. In *Butler*, two brothers arranged for their children to acquire shares in a company, which they had established to negotiate the terms of a lease of land and undertake a development. In the High Court, Vinelott J decided that the brothers should be taxed under the settlements legislation on the dividends paid to the children on those shares out of the profits of the development. Lord Hoffman's analysis of the decision (*Jones*: [15]-[21]) is that Vinelott J regarded the acquisition of shares by the children as the "settlement". However, the later steps, which were a mere expectation at the time of the settlement, could provide the hope of future profits, which constituted the necessary "element of bounty", to bring the arrangement within the settlements legislation (*Jones*: [22]).

92. This point is summarized by Lord Neuberger in *Jones* at [79] where he said:

> **79.** It seems to me clear that, when considering whether there was an "arrangement" within the meaning of the sections, i.e. an arrangement, which involved an element of bounty, one should assess the position at the time that the alleged arrangement was made, but, in carrying out that exercise, one should not disregard what happened thereafter. In particular, if the parties intended an element of bounty to accrue, and that element of bounty does indeed eventuate, then, absent any other good reason to the contrary, there is indeed an "arrangement" within the meaning of section 660G(1).

93. The next case to which I will refer is *Chamberlain*. Mr Jones, for Mr Dunsby, relies particularly on this case.

94. In *Chamberlain*, the taxpayer formed an investment company and transferred shares in another company (the "investee company") to the investment company for a consideration comprising an amount in cash and an issue of new preference shares by the investment company. The taxpayer then established a trust in favour of his wife and their children and settled a cash sum which the trustees invested by subscribing ordinary shares in the investment company. The taxpayer also created further trusts for the benefit of his children. Sums settled on those trusts were used by the trustees to acquire further shares in the investment company. The Inland Revenue sought to assess the taxpayer on the income of the investment company, which comprised dividends paid by the investee company, less the amounts of the dividends paid to the taxpayer on the preference shares in the investment company. The House of Lords found that the formation and structure of the investment company was not a settlement. The only settlements on these facts were the various trusts created by the taxpayer.

95. Mr Jones relies on *Chamberlain* to illustrate three particular points.

96. The first is that the settlements code can only apply to an arrangement, which is of a type contemplated by the legislation.

97. In *Chamberlain*, Lord Macmillan referred (at page 204H) to arrangements in which "the settlor charges certain property of his with rights in favour of others"; it must "comprise certain property which is the subject of the settlement" and must "confer the income of the comprised property on others".

98. I accept the basic principle - that the settlements code can only apply to an arrangement, which is contemplated by the legislation – and therefore should only extend to arrangements under which income from property (of any kind) becomes payable to another person. However, Lord Macmillan's words should not be read too narrowly. For example, it is clear, from later cases, such as *Jones* and *Crossland*, that it is not necessary for the property, which comes to be comprised in the settlement, to be property which was previously held by the putative settlor. The limiting factor on the broad definition contained in s620 ITTOIA is whether there is an element of bounty (*Jones*: [7]).

99. The second is that it is important to distinguish between the steps taken with a view to creating a settlement and the settlement itself.

100. So, in *Chamberlain*, the transfer of the shares in the investee company to the investment company was not part of the settlement, it was merely a preparatory step which was taken with a view to the creation of the settlement. Lord Macmillan says this in *Chamberlain* at page 205D-E:

> I have already pointed out that the Appellant has never settled the whole of the shares in the Staffa Investment company [the investment company]. And further shares might still be issued. It is, I think, fallacious to confuse the steps taken by the Appellant with a view to effecting a settlement or arrangement with the settlement or arrangement itself. When the Appellant created the Staffa Investment company, and sold to it his 470 shares in Commercial Structures, Ltd. [the investee company], he made no settlement or arrangement such as the Statute contemplates. In point of fact, he never settled any shares of the Staffa Investment company. What he did was to settle certain sums of money, with the intention, which he was in a position to carry out, that these sums should be invested in shares of the Staffa Investment company [the investment company]. It was not until he granted the trust deeds that he entered the legal stage of the settlement. All that he did previously was preparatory to making settlements.

101. Mr Jones says that the concept of a "settlement" for the purposes of the settlements legislation is confined to the end-product and does not encompass the steps that lead up to the creation of that product.

102. Whilst I accept that there are limits to the steps, which might be regarded as part of an arrangement that is regarded as a settlement, I do not read the legislation or the case law so narrowly. The later cases demonstrate that, in appropriate circumstances, steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the "settlement" (see, for example: Lord Walker, *Jones*: [50]; Lord Neuberger, *Jones*: [83]; Donovan LJ, *Crossland* pages 506-507). Furthermore, it is implicit in the reasoning of Donovan LJ in *Crossland* that this was the case even where the putative settlor was not a party to certain steps in the arrangement that created the settlement.

103. The third is the importance of identifying the property, which is comprised in the settlement. This can be seen from the passage in Lord Macmillan's judgment in *Chamberlain*, which I have quoted above. So, in *Chamberlain*, the shares in the investee company were not property comprised in the settlement and the income derived from those shares was not income of the settlement. (See also the judgment of Lord Thankerton in *Chamberlain* at page 202H to page 203B.)

104. The principles that I draw from the case law authorities are, therefore, as follows:

(1) The definition of "settlement" in s620 ITTOIA is very broad and can encompass any arrangements under which income on property becomes payable to others. However, it is limited to cases that involve an "element of bounty" or, as Lord Hoffman put it in *Jones*, the arrangement must involve the provision of a benefit, which would not have been provided in a transaction at arm's length.

(2) It is possible to find the element of bounty in a future uncertain event, which is not part of the arrangements that form the settlement, but was within the contemplation of the parties at the time of the settlement.

(3) Steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the "settlement".

(4) It is important to identify the property comprised in the settlement as this will also define the income of the settlement, which is subject to tax under the settlements legislation.

Application to the facts of this case

105. As I have described above, there are three main steps in the scheme: the creation of the S share and the issue of the S share to Mrs Gower; the creation of the Trust and the transfer of the S share by Mrs Gower to the Trust; and the payment of the dividend on the S share. Mr Jones says that only the creation of the Trust and the transfer of the S share into trust by Mrs Gower comprise a "settlement" within the terms of s620 ITTOIA. Ms Poots says that all of the steps form a "settlement".

106. In my view, the creation of the S share and its allotment to Mrs Gower, and the creation of the Trust and the transfer of the S share to the trustee by Mrs Gower are all part of an arrangement that meets the requirements to be treated as a "settlement" within section 620 ITTOIA.

107. All of these steps were planned and implemented as a coherent whole. If they are viewed realistically, all of those steps were part of an arrangement under which potentially valuable property – the S share – was made subject to the Trust. Against that background, it is not appropriate to distinguish between, on the one hand, the steps in which the S share is created and allotted to Mrs Gower and, on the other, the Trust is established and the S share is transferred to it, on the basis that the former are merely preparatory to the creation of the settlement. To use the words of Donovan LJ in *Crossland*, the steps had sufficient unity to bring them within the term of an "arrangement" for the purposes of the settlements legislation. I therefore reject Mr Jones's submission that the steps in the scheme that took place before the creation of the Trust by Mrs Gower should not be regarded as part of the "arrangement" for the purposes of s620(1) ITTOIA.

108. The arrangement involved an "element of bounty". This is not an arrangement into which Mr Dunsby would have entered if he had been dealing on arm's length terms. The element of bounty was provided by the prospect of future dividends on the S share being paid to the trustee of the Trust and held on behalf of the beneficiaries. Whilst the question as to whether an arrangement constitutes a settlement has to be determined at the time at which the arrangement is made, the expectation of a future dividend can be taken into account in determining whether or not the arrangement involves the necessary element of bounty (Lord Hoffman, *Jones*: [22] and Lord Neuberger, *Jones*: [79]).

109. I have not treated the payment of the dividend on the S share as part of the "arrangement". The S share became subject to the Trust. It was the property comprised in

the settlement. The dividend on the S share was the income, which arose under the settlement, rather than one of the steps in its creation.

The identity of the settlor

110. The next issue, which I need to address, is the identity of the settlor.

The parties' submissions

111. Ms Poots made the following submissions on behalf of HMRC.

> (1) The definition of "settlor" includes a person who made the settlement (s620(1) ITTOIA), which, in turn, includes a person who indirectly provides funds to the settlement (s620(3)).
>
> (2) Mr Dunsby made the settlement. He was the settlor. He made the arrangements and he provided the element of "bounty". Mr Dunsby was in control of the arrangements. He shifted value into the S share, which came to be held by the trustee. He therefore provided funds indirectly to the settlement.
>
> (3) It is not necessary for a person to have had an interest in the property, which becomes comprised in the settlement, in order to be treated as a settlor. This can be seen in a number of cases, for example, in *Jones, Crossland* and *Butler*. In all of those cases, the shares, which became the subject of the settlement were issued directly to a person who was not the settlor.
>
> (4) It can make no difference whether funds are provided to the settlement after the settlement is made, as in *Jones, Crossland* and *Butler*, or whether the value existed in advance as in *Copeman v. Coleman* (1939) 22 TC 594.
>
> (5) Mrs Gower was not a settlor. She provided no value to the settlement. The only true settlor was Mr Dunsby. The provisions in the settlements legislation related to multiple settlors (s644 and s645 ITTOIA) do not attribute any value or income to Mrs Gower.

112. Mr Jones makes the following submissions on behalf of Mr Dunsby.

> (1) Mrs Gower was the settlor. She held the property, which became the subject of the settlement, i.e. the S share.
>
> (2) It was not possible to say that Mr Dunsby provided funds indirectly. It was not possible to lift the corporate veil and treat the income and reserves of the Company as if they were assets of Mr Dunsby. The assets and reserves of the Company could have been distributed to Mr Dunsby before the steps in the scheme. They were not.
>
> (3) HMRC's argument confuses the making of the settlement and the definition of the settlor. The settlor does not have to be the person who provides the bounty. The requirement for an element of bounty is a gloss on the definition of settlement. It is not a gloss on the definition of settlor. It is not a requirement that every transfer has to have an element of bounty in order for the transferor to be treated as a settlor. The settlor may provide bounty but does not have to do so.
>
> (4) HMRC's argument does not respect the distinction between the property comprised in the settlement and the income of the settlement. It is the income derived from the property of the settlement that is deemed to be the income of the settlor. The reserves of the Company were pre-existing and belonged to the Company not the settlement.
>
> (5) If Mr Dunsby was a settlor, Mrs Gower was also a settlor and the provisions of s644 and s645 ITTOIA must apply. In applying those sections, Mr Dunsby had no

interest in the property contributed to the settlement (i.e. the S share). He may have had an interest in the profits of the settlement once it was created but that is not sufficient.

Discussion

113. A settlor is defined in s620(1) ITTOIA as "any person by whom the settlement was made". This definition is expanded upon in s620(2) and (3). Section 620(2) provides that a person who has "made or entered into the settlement directly or indirectly" is treated as having made a settlement. Section 620(3)(a) sets out various circumstances in which a person is treated as having made a settlement. They include, inter alia, where a person "has provided funds directly or indirectly" to the settlement (s620(3)(a)). The list in s620(3) is not exclusive.

The case law authorities

114. I have been referred to a number of authorities by the parties. I need only refer to two of them.

115. The first is *Crossland*. In that case, Mr Hawkins was treated as the settlor of the settlement pursuant to which a trust established for the benefit of his children acquired shares in a company, which provided Mr Hawkins's services to clients. From the reasoning of the members of the Court of Appeal, it would appear that that conclusion – that Mr Hawkins was the settlor – could be reached on one of two bases.

(1) The first was that Mr Hawkins made the settlement: the arrangements were part of a coherent set of steps, which included the creation of the trust and the acquisition by the trust of the shares in the company, and which were orchestrated by Mr Hawkins, even if he was not party to some of the steps. In the words of Peace LJ, it was "his arrangement" (*Crossland*, page 508).

(2) The second was that Mr Hawkins indirectly provided funds to the settlement either by concurring in the acquisition of shares in the company by the trust or the payment of the dividends on the shares, which came to be held by the trust (Donovan LJ, *Crossland*, pages 506-7).

116. The second is *Butler*. In that case, two brothers put in place arrangements by virtue of which dividends on shares in a company which carried out a lucrative development became payable to their children. Vinelott J decided that the brothers should be regarded as settlors of the settlement created by those arrangements on the basis that they directed the relevant steps (*Butler*, page 36b-e). Once again, it would appear – although this is not expressly stated – that Vinelott J regarded the brothers as having made the settlement (and so as settlors) because they had put in place the arrangements.

Application to the facts of this case

117. Ms Poots argues that the only settlor in these arrangements is Mr Dunsby. He is the only person, who has provided any real value to the trust.

118. Mr Jones says that Mrs Gower is the only settlor. She is the person who had an interest in the property, which became subject to the settlement (i.e. the S share), or if Mr Dunsby is a settlor, Mrs Gower is also a settlor and she must be regarded as the person who provided the property comprised in the settlement for the purposes of s644 and s645 ITTOIA.

119. I will turn first to the question of whether Mr Dunsby was a settlor of the settlement. On this issue, I agree with Ms Poots. On any realistic view of the facts, Mr Dunsby is a person who "made" the settlement (within s620(2) and so s620(1)).

120. Mr Dunsby made the arrangement, which I have regarded as the settlement. He (as shareholder in the Company) passed the resolutions, which created the S share. He (as shareholder in the Company and the sole director) permitted Mrs Gower to subscribe the S share at its nominal value. Mrs Gower transferred the S share to the Trust under arrangements put in place by Mr Dunsby through De Sales. But when she did so, there was no real value in the S share; whether or not any value would accrue to the Trust remained entirely under the control of Mr Dunsby.

121. Mr Dunsby was in control of all of these steps. The arrangement was as much a settlement made by Mr Dunsby as if Mr Dunsby had transferred ordinary shares to the Trust himself or had reorganized the share capital of the Company to create the S share and had transferred that share to the Trust himself. This was the case even though Mr Dunsby did not, at any stage, acquire the property (i.e. the S share) which came to be subject to the Trust. In this respect, Mr Dunsby was in much the same position as Mr Hawkins (in *Crossland*) or the Wildin brothers (in *Butler*).

122. As I have described above, there was an element of bounty in that arrangement in that there was a hope and expectation of future dividends of the S share. But that element of bounty was, again, entirely within the control of Mr Dunsby: he (as a director in the Company) approved the payment of the dividend on the S share and, I infer, must, in his role as shareholder, also have consented to the payment of the dividend on the S share and not on the ordinary shares. If it is a requirement that a settlor is a person who provides an element of bounty to the arrangement, which Ms Poots argued, and to which I refer below, Mr Dunsby was such a person.

123. Mr Jones submitted that Mr Dunsby could not be regarded as having provided funds directly or indirectly to the settlement; the funds made available to the settlement (the dividend), were provided by the Company not by Mr Dunsby. The profits and reserves in the Company could not be attributed to Mr Dunsby for this purpose so Mr Dunsby could not regarded as indirectly providing those funds to the settlement for the purposes of s620(3)(a).

124. There is some force in Mr Jones's argument in relation to the payment of the dividend. However, those submissions do not preclude my conclusion that the settlement was "made" by Mr Dunsby for the purposes of s620(2) (and so s620(1)) for the reasons that I have given. The examples in s620(3) are not an exhaustive list of the circumstances in which a person is treated as having made a settlement (as the opening words of that subsection and the use of the words "in particular" make clear). Nor, in my view, do they address the argument that Mr Dunsby should be regarded as providing funds directly or indirectly to the settlement by arranging for the Trust to acquire the S share from Mrs Gower (in much the same way as Mr Hawkins in *Crossland*). Furthermore, without deciding the point, I note that, in some of the cases to which I have been referred, judges have regarded funds taking the form of distributions on shares in a company, which became comprised in a settlement, as being indirectly provided by a person who has put in place the relevant arrangements (see, for example, Donovan LJ, *Crossland* pages 506-7).

125. I must now turn to the question of whether Mrs Gower was a "settlor" of the settlement.

126. Mrs Gower acquired the S share, established the Trust and transferred title to the S share to the Trust. However, she was little more than a functionary in the process. She undertook the steps that she was expected to undertake as part of the pre-planned scheme under which she stood to benefit through the terms of the Trust. She did not provide any real value to the Trust (and so did not directly or indirectly provide funds to the settlement (within s620(3)(a))). The S share was allotted to her on the basis that she would immediately transfer the S share to the Trust. If she had not transferred the S share to the Trust, no dividend would

have been paid on the S share and she would not have received any distribution from the Trust.

127. Ms Poots argues that Mrs Gower did not "make" or "enter into" the settlement (within s620(2) and so s620(1)) on any realistic view. I see the force in that argument. However, the definitions in s620 of "settlement" and "settlor" are deliberately broad; they are intended to bring a wide range of arrangements within the scope of the provisions. HMRC has not sought to argue that the steps in which Mrs Gower was involved – the issue of the S share, the creation of the Trust and the transfer of the S share to the Trust – were in any way a sham. On that basis, I should also treat Mrs Gower as a settlor either on the basis that she also "made" the settlement or that she "entered into" the settlement (for the purposes of s620(2) ITTOIA and so s620(1)).

128. I should at this point also briefly address Ms Poots's submission that Mrs Gower cannot be a "settlor" because she did not provide any element of bounty to the settlement. She referred to *Jones* and *Butler* (amongst other cases) as examples of cases in which the courts had treated the person, who provided the element of bounty, as the settlor of the settlement. She advanced the proposition that the settlor must be the person who provides the "bounty". That is indeed so in most of the cases. For example, and as I have mentioned, in *Jones* (at [7]), Lord Hoffman referred to a settlement as an arrangement under which "the settlor must provide a benefit". However, as Mr Jones points out, those comments were made in the context of a discussion of the definition of a "settlement" and the requirement for an element of bounty is a gloss on the definition of the settlement not the definition of "settlor".

129. The definitions of settlement and settlor are, of course, inextricably linked. While I accept the proposition that in the majority of cases, the person who provides the element of bounty will be a settlor, in the absence of clear authority, I am reluctant to conclude that a person who does not provide an element of bounty cannot also be a settlor. In this case, for the reasons that I give below, I do not need to decide that point and I do not do so.

Multiple settlors

The relevant legislation

130. Where a settlement has more than one settlor, each settlor is to be treated as the settlor of a separate settlement for the purposes of the settlements legislation (s644(1) ITTOIA). Sections 644 and 645 ITTOIA then contain the rules to determine the property and income, which is to be attributed to each separate settlement.

131. In summary, the "property comprised in" each separate settlement is treated as being the property originating from the relevant settlor and "the income arising under" each settlement is treated as being the income originating from that settlor (s644(3)).

132. Section 645 (1) provides, in summary, that, for these purposes, "property originating from a settlor" means (i) property which that settlor has provided directly or indirectly for the purposes of the settlement (s645(1)(a)), (ii) property representing that property (s645(1)(b)), and (iii) a just and reasonable apportionment of any property which partly represents property which that settlor has provided directly or indirectly for the purposes of the settlement (and partly other property) (s645(1)(c)). Under s645(2) "income originating from a settlor" means income from property originating from that settlor or income provided directly or indirectly by that settlor.

Application to the facts of this case

133. In the present case, for the reasons that I have given, the S share is the property comprised in the settlement. This is property, which both Mr Dunsby and Mrs Gower might be regarded as having provided directly or indirectly to the settlement: Mr Dunsby made all

the arrangements as a result of which the S share became subject to the Trust; and Mrs Gower established the Trust and transferred title to the S share to the trustee.

134. The legislation does not deal easily with circumstances in which more than one person could be regarded as providing the same property to the settlement. One reading of s645(1) might be that, in such circumstances, both Mr Dunsby and Mrs Gower must each be treated as having provided the entire property in the S share to the settlement (under s645(1)(a)), in which case, the full amount of the dividend income could be treated as the income of either or both of them under s645(2). That approach could, in other circumstances, result in the same income being taxed in the hands of multiple settlors. To my mind, that cannot be the correct construction of s645, which is clearly designed to allocate property within a settlement (and so the income derived from that property) between the various settlors. In my view, the better construction is that, in circumstances where property may have been provided directly or indirectly by more than one settlor, the property should be regarded as provided partly by each such settlor and the provisions of s645(1)(c) should apply to require a just and reasonable apportionment of the property between them.

135. In the present circumstances, that apportionment can only lead to one answer. All or substantially all of the value in the S share has been provided to the settlement by Mr Dunsby. As I mentioned above, Mrs Gower was a mere functionary in the process of the creation of the settlement. On that basis, a just and reasonable apportionment would treat all or substantially all of the property in the settlement (i.e. the S share) as originating from Mr Dunsby (s645(1)) and accordingly all or substantially all of the income from that property (i.e. the dividend income on the S share received by the trustee) as income originating from Mr Dunsby (s645(2)). I can see little basis for attributing any of the property to Mrs Gower.

136. Accordingly, if the rules in s644 and s645 ITTOIA are applied to determine how the settlements legislation should apply to a settlement in respect of which both Mr Dunsby and Mrs Gower are settlors:

> (1) the S share should be treated as property which Mr Dunsby has provided directly or indirectly to the settlement (and so as property originating from Mr Dunsby);
>
> (2) the dividend income on the S share received by the trustee should be treated as income from property originating from Mr Dunsby (and so as income originating from Mr Dunsby).

Conclusions

137. It follows that my answers to the questions before the Tribunal are therefore:

> (1) Mr Dunsby was a "settlor" of a "settlement" for the purposes of Chapter 5 Part 5 ITTOIA;
>
> (2) the income arising under the "settlement" (being the dividend income on the S share) should be treated as income of Mr Dunsby under Chapter 5 Part 5 ITTOIA.

138. Mr Dunsby has retained an interest in the settlement (s624 and s625 ITTOIA) and he is therefore subject to tax on the income of the settlement (s619 ITTOIA).

THE TRANSFER OF ASSETS ABROAD REGIME: CHAPTER 2 PART 13 ITA

139. I will now turn to the final issue before the Tribunal: whether Mr Dunsby is subject to income tax under the transfer of assets abroad regime in Chapter 2 Part 13 ITA on the basis that the income of the Trust is treated as arising to him.

140. My decision on the application of the settlements legislation in the previous section of this decision notice decides this appeal in favour of HMRC. However, given that this is a

lead case and that I have heard argument from both parties on this issue, I have set out my views below.

The relevant legislation

141. The transfer of assets abroad regime can only apply if there is a "relevant transfer". The tax charges within the regime, including the charge to income tax under s720 ITA which is relevant in this case, then operate by reference to income of a person abroad that is connected with the transfer or another "relevant transaction" (s714 ITA).

142. A "relevant transaction" includes both a "relevant transfer" and an "associated operation" (s715 ITA).

143. A "relevant transfer" is defined by s716(1) ITA in the following terms:

> **716 Meaning of "relevant transfer" and "transfer"**
>
> (1) A transfer is a relevant transfer for the purposes of this Chapter if–
>
> (a) it is a transfer of assets, and
>
> (b) as a result of–
>
> (i) the transfer,
>
> (ii) one or more associated operations, or
>
> (iii) the transfer and one or more associated operations,
>
> income becomes payable to a person abroad.

144. A "transfer", for these purposes, "in relation to rights, includes the creation of the rights" (s716(2)) and "assets" includes "property or rights of any kind" (s717 ITA).

145. The terms "a person abroad" and "associated operation" are defined in s718 and s719 respectively. At the relevant time, they provided as follows:

> **718 Meaning of "person abroad" etc**
>
> (1) In this Chapter "person abroad" means a person who is resident or domiciled outside the United Kingdom.
>
> (2) For the purposes of this Chapter, the following persons are treated as resident outside the United Kingdom–
>
> (a) a UK resident body corporate that is incorporated outside the United Kingdom,
>
> (b) the person treated as neither UK resident nor ordinarily UK resident under section 475(3) (trustees of settlements), and
>
> (c) persons treated as non-UK resident under section 834(4) (personal representatives).
>
> **719 Meaning of "associated operation"**
>
> (1) In this Chapter "associated operation" , in relation to a transfer of assets, means an operation of any kind effected by any person in relation to–
>
> (a) any of the assets transferred,
>
> (b) any assets directly or indirectly representing any of the assets transferred,
>
> (c) the income arising from any assets within paragraph (a) or (b), or
>
> (d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).

(2) It does not matter whether the operation is effected before, after or at the same time as the transfer.

146. Section 720 ITA imposes a charge to income tax for the purpose of "preventing the avoiding of income tax by [UK resident individuals] by the means of relevant transfers" (s720(1) ITA).

147. Subject to the other provisions of Chapter 2 Part 13 ITA, where these provisions apply, the UK resident individual (the transferor) is charged to income tax on income, which is treated as arising to him or her under s721 ITA (s720(2) ITA).

148. At all material times for the purpose of transactions in this appeal, s721 ITA was in the following form:

> **721 Individuals with power to enjoy income as a result of relevant transactions**
>
> (1) Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A and B are met.
>
> (2) Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of–
>
> (a) a relevant transfer,
>
> (b) one or more associated operations, or
>
> (c) a relevant transfer and one or more associated operations.
>
> (3) Condition B is that the income would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom.
>
> (4) For the purposes of subsection (2), it does not matter whether the income may be enjoyed immediately or only later.
>
> (5) It does not matter for the purposes of this section–
>
> (a) whether the income would be chargeable to income tax apart from section 720,
>
> (b) whether the individual is ordinarily UK resident at the time when the relevant transfer is made, or
>
> (c) whether the avoiding of liability to income tax is a purpose for which the transfer is effected.
>
> (6) For the circumstances in which an individual is treated as having the power to enjoy income for the purposes of this section, see section 722.

149. There have been various changes to s721 since the time of the transactions, which are the subject of this appeal. I note, in passing, that s721(5)(a) was repealed in by the Finance Act 2013. The changes made in that Act included the insertion of new sub-section (3C) in s721 which provided that s721(1) does not apply if the relevant individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in the transfer of assets abroad regime and has paid all of the tax under that provision.

The parties' submissions

150. For HMRC, Ms Poots says:

(1) The transactions fall within the scope of s720 ITA: the allotment and issue of the S share to Mrs Gower was a "relevant transfer", the transfer of the S share to the Trust

was "an associated operation", and as a result of the relevant transfer and associated operation, income became payable to a person abroad (the trustee).

(2) Mr Dunsby should be treated as a transferor because he procured the transfer (*Inland Revenue Commissioners v Pratt* [1982] STC 756 per Walton J at page 792).

(3) The income of the Trust is treated as arising to Mr Dunsby under s721.

(a) Condition A is satisfied. Mr Dunsby had power to enjoy the income of the Trust; he was entitled to receive the vast majority of the Trust's income. His power to enjoy that income resulted from the allotment of the S share and its subsequent transfer to the Trust.

(b) Condition B is also satisfied. If the dividend income were Mr Dunsby's, it would be chargeable to income tax.

(4) Section 624 ITTOIA does not exclude the application of the transfer of assets abroad regime. Section 721(5)(a) ITA expressly states that it does not matter "whether the income would be chargeable to income tax apart from section 720".

(5) This is not a surprising result. Both sets of provisions are concerned with preventing the avoidance of tax. It is unsurprising that they should result in overlapping taxation powers (*Inland Revenue Commissioners v McGuckian* [1997] STC 908 per Lord Steyn at page 918). However, as explained in Revenue Interpretation 201 (published in April 1999) income, which could be fully assessed under both regimes "will not in practice be charged under both".

151. For Mr Dunsby, Mr Jones says:

(1) If Mr Dunsby is subject to tax on the dividend income under s383 ITTOIA or the settlements legislation, there is no role for the transfer of assets abroad regime to play.

(2) If the dividend income is treated as Mrs Gower's income under the settlement legislation, s624 ITTOIA provides that income is treated "for income tax purposes as the income of [Mrs Gower] and of the [Mrs Gower] alone". On this basis:

(a) s624 excludes the possibility of an income tax charge under the transfer of assets abroad regime;

(b) Condition B is not met because the income would not be chargeable to income tax if it were Mr Dunsby's.

Mr Jones referred to the most recent edition of Kessler, *Taxation of Non-residents and Foreign Domiciliaries* (18th Edition) at paragraph 35.16 in support of this submission.

Discussion

Background

152. As I have mentioned above, this final issue is only of practical relevance if Mr Dunsby does not pay tax on the dividend income under s383 ITTOIA and the settlement provisions apply so that Mrs Gower is treated as the only settlor of any settlement that is created as a result of the transactions. I have approached this issue largely on that basis - although I will deal briefly with one issue, which arises in circumstances where Mr Dunsby is treated as a settlor under the settlements code.

153. On that hypothesis, the dividend income arising in the Trust would be treated as the income of Mrs Gower for UK tax purposes under s624 ITTOIA. As that dividend income was derived from a UK resident company, Mrs Gower would be subject to income tax on that income but would, at the time, be entitled to a credit for the tax. There is a rather

complicated mechanism for dealing with the fact that the trustee would also pay tax on that income, but it is not relevant for present purposes. The important point is Mrs Gower would be liable to UK tax on the dividend albeit that her liability would be satisfied by the associated credit.

154. That means that – if Mr Dunsby is otherwise subject to tax under the transfer of assets abroad regime by reference to the dividend income arising to the trustee – the issue before the Tribunal is not a question about the relative priority of the tax charges under the transfer of assets abroad regime and the settlements code in circumstances where they might both otherwise impose a charge to tax on the same person. The question in this case is whether different people can be charged to income tax on or by reference to the same income: Mr Dunsby under the transfer of assets abroad regime and Mrs Gower under the settlements legislation.

The conditions for a charge under s720 ITA

155. The first question to address, however, is whether the pre-conditions for a charge to tax on Mr Dunsby under the transfer of assets abroad provisions are met.

Relevant transfer

156. For there to be a charge under the transfer of assets abroad regime, the arrangements must involve a "relevant transfer" (s714(2) ITA). A relevant transfer is a transfer of assets whereby income becomes payable to a person abroad either as a result of the transfer or as a result of one or more associated operations or a combination of the transfer and one or more associated operations. For this purpose, "assets" includes property or rights of any kind (s717 ITA) and "transfer" has an extended meaning in that the creation of rights can be treated as a transfer (s716(2) ITA).

157. Ms Poots submitted that issue of the S share to Mrs Gower was a "relevant transfer" and that Mr Dunsby should be treated as a transferor in relation to it because he procured the transfer. Ms Poots relied upon a passage from the judgment of Walton J in *Pratt* at page 792 in support of that submission. On her analysis, the subsequent transfer of the S share was an associated operation and, as a result of the relevant transfer and the associated operation, income became payable to a person abroad (the trustee).

158. There are two aspects of this submission which I need to address. The first is whether the issue of a shares can be a "transfer".

159. The issue of a share would not ordinarily be described as a "transfer" of assets. The only basis on which the issue of a share can be treated as a transfer for the purposes of the transfer of assets abroad regime is if it falls within the extended meaning of "transfer" in s716(2) ITA. That definition includes "the creation of rights". Those words are perhaps more apt to apply to circumstances in which a person creates rights over an existing asset, for example, by granting a licence over intellectual property rights. The issue of a share is, of course, a more complex transaction involving not only the creation of rights as between the new shareholder and the company but also between the new member and the existing members. Nevertheless, the issue of a share by a company confers upon the new shareholder rights, which are enforceable against the company. I can see no reason for taking a restrictive view of this definition and so I will treat the issue of the S share as a creation of rights and accordingly as a transfer of assets made by the Company to Mrs Gower.

160. This leads to the second issue that I should address; that is, whether a relevant transfer can be made by a person other than the individual to whom HMRC seek to attribute income under s720.

161. In his judgment in *Pratt*, Walton J refers to the House of Lords decision in *Vestey v Inland Revenue Commissioners* [1980] STC 10 ("*Vestey*") and notes that, in that case, the House of Lords decided that the provisions of s412 of the Income Tax Act 1952 (a predecessor of the current s720 ITA) can only apply to individuals who themselves transfer assets to a person abroad (*Pratt*, page 791). In his judgment, Walton J goes on to consider the circumstances in which that principle can be extended to apply to cases in which a person other than the individual on whom HMRC seeks to charge tax makes the actual transfer.

162. As part of that analysis, Walton J adopts language used in the Court of Appeal's decision in *Congreve v. Inland Revenue Commissioners* [1947] 1 All ER 168 ("*Congreve*") (at page 173) to the effect that an individual, who is not the actual transferor of assets may nonetheless be treated as a transferor and within the charge to tax, if he or she "procured" the transfer. (The relevant passage in the judgment of Walton J in *Pratt* is found at pages 791 to 792). This is the passage to which I was referred by Ms Poots. This passage forms part of the judgment of Walton J in which he recites the arguments of counsel for the Inland Revenue in that case. However, Walton J restates the principles which he draws from his review of the case law at page 793 where he says:

> "But formulae, divorced from the wording of section 412, are not of the slightest assistance. What the Special Commissioners had to decide on this topic was, quite simply, notwithstanding that the transfer was a transfer made by [the company] itself, was the reality of the matter that somebody else was the real transferor? To that question, nobody has so far produced a better suggestion than that of "procurement". It may not be completely apt, but it is far nearer an apt definition than anything else which has so far been suggested."

163. My starting point, based on the House of Lords decision in *Vestey*, is therefore that a transfer made by the Company cannot fall within the provisions of s720; the tax charge under s720 is imposed on an individual and that individual must be the person who transfers assets to a person abroad. However, the judgment of Walton J in *Pratt* contemplates that the charge might also apply in circumstances in which, although the transfer is made by one person (which could include a company), there is another person who should be regarded as the "real" transferor.

164. Walton J describes those circumstances as circumstances in which the real transferor has "procured" the transfer. That is not language that is used in the statute. Whether that is the most appropriate description is open to argument as indeed is the precise scope of the circumstances in which an individual can be regarded as the real transferor in relation to a transfer undertaken by a company. However, without entering into a detailed review of the case law – including, *Congreve*, *Vestey* and *Pratt* – it is clear to me that those circumstances must include circumstances such as these, where the individual concerned is the sole shareholder and director of the company and the steps concerned form part of a pre-ordained scheme, which is designed to ensure that part of the share capital of the company – which at the start of the scheme is wholly-owned by the individual concerned – is placed in the hands of offshore trustees in a manner in which the dividend income from those shares accrues primarily for the benefit of the individual.

165. In any event, Mr Jones did not seek to contest Ms Poots's submission and so I have proceeded on that basis.

The other conditions

166. The remaining requirements of section 720 are also met. The transfer was made to a person abroad (Mrs Gower) and as a result of the transfer and an associated operation (the

transfer of the S share to the trustee) income (the dividend on the S share) became payable to a person abroad (the trustee).

Income treated as arising to the transferor under s721 ITA

167. The next question that I have to determine is whether the dividend income should be treated as arising to Mr Dunsby. The rules which determine this question are set out in s721 ITA.

168. There are two conditions which have to be met, condition A and condition B. Condition A is that Mr Dunsby has power to enjoy income of a person abroad as a result of a relevant transfer and/or one or more associated operations. If I leave to one side the potential application of s624 ITTOIA, this condition is clearly satisfied: under the terms of the Trust, Mr Dunsby has power to enjoy the dividend income of the trustee derived from the S share.

169. Condition B is that the dividend income would be chargeable to income tax if it were Mr Dunsby's income and received by Mr Dunsby in the UK. Ms Poots says that condition B is a purely hypothetical test and so condition B must be satisfied as Mr Dunsby would be subject to income tax if he received dividend income in the UK. I agree with her submission. Condition B applies in circumstances where the income which it treats as arising to the individual transferor is in fact the income of another person (the income of the person abroad). It is asking the hypothetical question as to whether that income is of a nature, which would have been taxable in the individual transferor's hands if he or she had received it in the UK. On that basis, and once again ignoring the potential application of s624 ITTOIA, condition B would be satisfied in this case: the dividend income would be chargeable to income tax in the hands of Mr Dunsby if he were to receive it in the UK.

170. The two conditions are therefore met and the dividend income on the S share is treated as arising to Mr Dunsby under section 721. So the answer to my first question is that, absent s624 ITTOIA, Mr Dunsby would be subject to a charge to income tax under s720 on the dividend income on the S shares.

The interaction of the transfer of assets abroad regime and the settlements legislation

171. That leads to the question as to whether a charge to income tax under the settlements code precludes a charge to tax under the transfer of assets abroad regime on an amount calculated by reference to the same income.

172. Although it is not the central assumption, I will begin with the case in which Mr Dunsby is treated as a settlor under the settlement provisions.

173. In that case, in my view, the settlements code must take priority. Section 624 ITTOIA provides that income of the settlement is treated as income of the settlor alone for income tax purposes. This means that the dividend income on the S share must be treated as income of Mr Dunsby. In those circumstances, condition A in s721(2) is not met; the income of the settlement is income payable to a person abroad within s716(2) (the trustee) but it is not income of a person abroad for income tax purposes as it is deemed to be the income of a UK person (Mr Dunsby). (A change was made to the legislation in FA 2013 to provide expressly that income on which a transferor was subject to income tax otherwise than under the transfer of assets abroad regime is not also charged under s720 if that income tax has been paid (see s721(3C) ITA).)

174. What is the position if Mrs Gower is treated as a settlor under the settlements code? In those circumstances, the income of the settlement (the dividend on the S share) is treated as income of Mrs Gower and Mrs Gower alone under s624 ITTOIA. Mrs Gower is subject tax on that income under s619(1)(a) ITTOIA in accordance with the provisions of the tax legislation which would have applied if the dividend income had arisen directly to her. Even

though Mrs Gower was not UK resident, she was in theory subject to UK income tax on that income albeit that, at the time, the associated tax credit would have met that liability and under current law she would be treated as having paid that tax (s399 ITTOIA).

175. In my view, the treatment of the dividend income as income of Mrs Gower does not however affect the liability of Mr Dunsby under s720.

(1) The requirements of s720 continue to be met; as a result of a relevant transfer and associated operations, the dividend income on the S share became payable to a person abroad (the trustee).

(2) That income is treated as arising to Mr Dunsby under s721.

(a) In particular, condition A in s721(2) is met as under the terms of the Trust, Mr Dunsby has power to enjoy income of a person abroad, in this case, the income which is deemed to be the income of Mrs Gower under s624 ITTOIA.

In my view, that must remain the case, even if the "person abroad" referred to in s721(2) ITA (in this case, Mrs Gower) is a different person from the person to whom the income becomes payable as referred to in 716(1) ITA (in this case, the trustee). The different wording of the two provisions – "income … payable to a person abroad" in section 716(1) and "income of a person abroad" – permits of that possibility.

(b) Condition B is also met: as I have mentioned above, in my view, condition B in s721(3) ITA is simply asking the hypothetical question as to whether dividend income would be chargeable to income tax in the hands of Mr Dunsby if he were to receive it in the UK.

176. I should address some of the points that were put to me in argument.

177. Mr Jones argued that, in effect, where the deeming rule in s624 ITTOIA applies to treat income of the settlement as the income of Mrs Gower, it precludes a charge to tax on Mr Dunsby on the same income under s720 ITA. I reject that argument. Section 624 ITTOIA simply treats income of a settlement as the income "of" a particular person (the settlor) for income tax purposes. The charge to tax under s720 ITA does not tax the income of the person abroad. It simply treats that income as arising to another person (the transferor) for the purposes of computing a charge to tax on that person. The income does not become income of the other person (the transferor). Indeed, as will be apparent from the analysis that I have set out in the paragraph above, it is a necessary requirement of the charge to tax on an individual under s720 that there is income of another person, which is then treated as arising to that individual.

178. There is a more general question as to whether it is appropriate for two separate regimes to seek to impose a charge to tax by reference to the same income. Ms Poots directed me to the provisions of s721(5)(a) ITA which, at the time, provided that it did not matter for the purposes of s721 that the income treated as a arising to a transferor would be chargeable to income tax apart from s720, which, I agree, supports my conclusion above.

179. She also pointed to the decision of the House of Lords in *Inland Revenue Commissioners v McGuckian* [1997] STC 908 in support of her argument that this should not be regarded as a surprising result. She referred me, in particular, to a passage in the judgment of Lord Steyn (at page 918) where he said:

> "The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax.

> That the revenue authorities should have overlapping taxation powers is an unremarkable consequence. And such a construction cannot cause any unfairness to the taxpayer since he cannot be taxed twice in respect of the same income."

180. I have not relied on this particular passage. The issue which Lord Steyn was addressing at this point in his judgment was an argument that s478 of the Income and Corporation Taxes Act 1970 ("ICTA 1970") (a predecessor to s720 ITA) could not apply in circumstances in which a taxpayer was also potentially liable to tax under another anti-avoidance provision, contained in s470 ICTA 1970, which applied to sales of the right to interest payable on securities without selling the underlying securities. Whilst s470 also contained a provision which deemed income to be the income of particular person and that person alone for income tax purposes, the House of Lords held that s470 did not apply (*McGuckian* per Lord Browne-Wilkinson at page 914 and Lord Steyn at page 918). Furthermore, as is evident from the passage from the judgment of Lord Steyn which I have quoted above, the argument was raised in the context of two provisions which sought to impose tax on the same person, which is not the case on these facts.

Conclusion

181. For the reasons that I have set out above, in my view:

(1) to the extent that the settlement provisions apply to treat Mr Dunsby as the settlor (and accordingly to treat income of the Trust as Mr Dunsby's income for income tax purposes), Mr Dunsby is not taxable on that income under the transfer of assets abroad provisions in Chapter 2 of Part 13 ITA; and

(2) to the extent that the settlement provisions apply to treat Mrs Gower as the settlor and accordingly to treat income of the Trust as Mrs Gower's income for income tax purposes, Mr Dunsby is taxable under the transfer of assets abroad provisions in Chapter 2 Part 13 ITA, on the basis that the income of the Trust should be treated as arising to Mr Dunsby under s720 and s721 ITA.

DISPOSITION

182. In summary, therefore, my conclusions are:

(1) the payment received by Mr Dunsby was not a dividend or distribution on the ordinary shares within s383 ITTOIA;

(2) Mr Dunsby was a "settlor" of a "settlement" for the purposes of Chapter 5 Part 5 ITTOIA and accordingly the income arising under the "settlement" (being the dividend income on the S share) should be treated as income of Mr Dunsby under Chapter 5 Part 5 ITTOIA;

(3) if I am wrong on the issue in sub-paragraph (2) above, Mr Dunsby is taxable under the transfer of assets abroad provisions in Chapter 2 Part 13 ITA, on the basis that the income of the Trust (being the dividend income on the S share) should be treated as arising to Mr Dunsby under s720 and s721 ITA.

183. I dismiss this appeal.

184. Further to my decision at [137(2)] and [183(2)] above and in accordance with s50 of the Taxes Management Act 1970, the amount chargeable under the assessment should be increased to £200,000 (being the full amount of the dividend on the S share).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

185. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMENDED VERSION

186. Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 17 August 2020.

ASHLEY GREENBANK

TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2020