Neutral Citation: [2023] UKFTT 613 (TC)

Case Number: TC08855

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard in public in London

Appeal reference: TC/2021/02755

INCOME TAX AND NICs – PAYE- payment of £800,000 to an EBT – loan of same amount made to a director of the appellant –real loan, secured with genuine repayment obligation – inevitable that at the time the payment was made to the EBT it would be lent to the director - substantial reason for the payment was to enable the EBT to make the loan – was the loan a reward or benefit? – yes – why was it paid – for the exertions of the director – loan was earnings within s 62 ITEPA – payment to EBT taxable – appeal dismissed

Heard on: 24-26 April 2023
Judgment date: 12 July 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR DUNCAN MCBRIDE

Between

M R CURRELL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Elliott of counsel instructed by Haslers Business Services LLP

For the Respondents: Edward Waldegrave of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The question in this appeal is whether the appellant (or "**the company**") is liable to pay income tax under PAYE and national insurance contributions (**"NICs"**) relating to a payment of £800,000 which it made to the trustee (the **"Trustee"**) of an employee benefit trust (the **"EBT"**) in November 2010, and which the Trustee lent to Mr Mark Currell ("**MC**") a director and shareholder of the company at or around the same time as that payment. That payment was part of a number of arrangements which are set out in more detail below ("**the arrangements**").

2. In relation to the company for the tax year ended 5 April 2011, the respondents (or "**HMRC**") have made the following:

(1) A determination dated 15 March 2015 issued under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 in the sum of £320,000; and

(2) A decision issued under section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 dated 10 March 2015 in the sum of £113,427.33.

3. The company has appealed against these. For convenience we describe them as "**the determinations**".

4. We shall be referring in this decision to a number of cases which we define at this stage namely: *Marlborough DP Ltd v HMRC* [2021] UKFTT 304 ("***Marlborough***"); *Strategic Branding v HMRC* [2021] UKFTT 474 ("***Strategic Branding***"); *CIA Insurance Services Ltd v HMRC* [2022] UKFTT 00144 ("**CIA**"). We shall refer to these cases as the "***Baxendale Walker cases*"** as they all involve trust arrangements promoted by that organisation. Relevant too are the cases of *RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v. Advocate General for Scotland* [2017] 1 WLR 2767 ("***Rangers***") and *Kuehne and Nagel Drinks Logistics Ltd v HMRC* [2012] EWCA Civ 34, [2012] STC 840 ("***Kuehne***").

5. Both Mr Elliott and Mr Waldegrave made clear, eloquent, and helpful submissions, both oral and written, for which we are very grateful. We have carefully considered these, along with all of the evidence, in reaching our decision, but in so doing have not found it necessary to refer to each and every argument advanced by them on behalf of their respective clients nor to all of the authorities cited.

NUTSHELLS

The arrangements

6. Whilst we deal with these in greater detail later in this decision, it is worth setting out a brief synopsis at this stage. We note that the order of the transactions which comprise the arrangements are not necessarily the same as set out below, but they all took place between 17 November 2010 and 26 November 2010. The arrangements comprise the following:

(1) The setting up of the EBT with Haslers Trustee Services Ltd as the Trustee.

(2) An application by MC to the Trustee for a loan ("**the Loan**") stated to be in order to buy 261,437 A Shares in the company.

(3) A loan agreement between the Trustee and MC pursuant to which the Trustee granted

the Loan to MC. The Loan was repayable on demand after 5 years.

(4) A share charge deed pursuant to which MC charged 261,437 A shares in the company as security for the Loan.

(5) A share sale agreement between MC and his wife, Kimberly Currell (**"KC**") pursuant to which MC contracted to purchase 261,437 shares from KC. The sale of the shares was completed by means of a stock transfer form.

(6) A payment of £800,000 by the company to the Trustee ("**the Payment**").

(7) A payment of £800,000 into the company's bank account by KC.

The company's position

7. Briefly stated, the company's position is as follows. The purpose of the EBT was to reward and incentivise employees in the long term. The Loan was consistent with this purpose and was a short-term measure. The relevant legislation does not tax the receipt of the capital of a loan used to purchase shares in a close company. HMRC accept the genuineness of the arrangements. Having set out a prima facie case that the Loan was a genuine loan, the evidential burden shifts to HMRC to show that the Payment was earnings. They need to show that the Payment was, in essence, salary which would have been taken by MC as such and had been redirected to the EBT. They have not done so. There is no evidence whatsoever that either the Payment or the Loan was a reward or benefit for MC's services as a director. *Rangers* is a diverted earnings case. In this appeal there is no evidence of any earnings. The facts in this appeal are much stronger than those in the *Baxendale Walker cases*, all of which were decided in favour of the taxpayer. We should follow these as a matter of judicial comity. In none of those cases was a loan deemed to confer unfettered access to funds. In simple terms, a repayable loan is not, per se, a reward or benefit.

HMRC's position

8. Briefly stated, HMRC's position is this. Income tax on earnings is due on money paid as a reward or benefit for the exertions of an employee. One characteristic of this is that money is put into the unfettered control of that employee. When viewed realistically (and *Rangers* demonstrates that later events can be taken into account when determining the characteristics of earlier events) the arrangements put £800,000 into the unfettered control of MC. Amounts paid to an EBT and then lent to an employee can be earnings. Each case turns on its own facts and the *Baxendale Walker cases* turn on their own facts and do not help the analysis in this case. Given the terms of the Loan, there was no realistic way the EBT could incentivise other employees. The EBT was set up not to provide benefits to employees but to reward MC. We must ask where the £800,000 came from. By a process of elimination, it was not a loan from the company nor was it a dividend. In reality, it was payment as a reward for the services which MC provided to the company as a director over many years in building up the business whilst taking little out of the company in salary or dividends.

THE LAW

The legislation

9. The relevant legislation is set out in the appendix to this decision. Terms defined in that appendix bear the same meaning in the body of this decision.

10. However, given its importance, we set out section 62 ITEPA below:

> "Section 62 - Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is—
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee."

Rangers

11. The parties have confirmed that the statement by Lord Hodge at paragraph 58 of *Rangers* namely that "in summary, (i) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee" is the principle that we should adopt in this, case. We agree.

12. In our view too, any benefit falling within s 62(2)(b) ITEPA is also highly relevant in this case. We shall use the expression "reward or benefit" as shorthand for the provisions of s62 ITEPA as interpreted in *Rangers*.

Kuehne

13. In *Kuehne* Lord Justice Patten said at [56] and [59]:

> "[56] Employment does not have to be the sole cause but it does have to be sufficiently substantial as to characterise the payment as one from employment…
>
> [59] If the employment is a substantial and equal cause of the payment, it becomes open to the judge to say that the statutory test is satisfied. The payment is then from the employment even if it is also substantially attributable to a non-employment cause".

ISSUE

14. The main issue for determination in this appeal, therefore, is whether the sole or a substantial reason why the Payment was paid by the company to the EBT as part of the arrangements was because it was a reward or benefit for MC for his exertions as an employee/director of the company.

THE FACTS

15. We were provided with a considerable number of documents. Oral evidence on behalf of the company was given by MC, his son Mr Luke Currell ("**LC**"), Mr Jonathan O'Shea, a former director of the Trustee, and Mr Paul Reynolds a current director of the Trustee. From this evidence we make the following findings:

The business

(1) MC established his painting and decorating business in the early 1980s. At the outset MC carried on the business alone, but KC joined him as a partner in the business at a relatively early stage. KC carried out the "secretarial role" while MC was "out and about on sites".

(2) Over time the business grew. It began to take on bigger jobs and to recruit subcontractors.

(3) As the business grew (prior to incorporation in 2002) its success increased. The partnership was reinvesting most of its profits back into the business.

(4) In 2002 the company was incorporated and took over that business which continued to operate in the same way. Since incorporation the businesses achieved substantial success and now has a turnover of £7 million. In the period ending 30 April 2009 it made profits for corporation tax purposes of about £440,000. In the period ending 30 April 2010 profits were approximately £330,000 and the period ended 30 April 2011, they were approximately £750,000.

(5) Between 2002 and November 2010, MC and KC were the company's directors.

(6) Whilst MC was clearly a driving force of the business, the success of that business was not achieved by dint of his efforts alone. KC was clearly extremely important in assisting him. However, we find that it was more likely than not that any significant decisions which the business had to make would have been approved by MC.

(7) By 2010, LC and his brother Jay Currell ("**JC**") were becoming increasingly involved in the business and were being given greater responsibility by their father.

(8) In November 2010 the company had a number of important employees including two senior contract managers one of whom was paid £65,000-£70,000 per year, the other being paid slightly less, as well as administrative staff who are important to the business and whose pay is currently around £45,000 a year. We find as a fact that these employees were essential to the success of the business.

(9) In 2010 the business had a culture of paying sizeable bonuses to its contract managers. MC would set targets at the start of the year based on the contracts which they anticipated they would secure and had secured for the following 12 months. If those targets were hit, then bonuses were paid. They were paid in December, and on average approximated to 10% of an employee's basic salary. Bonuses were paid by the company to its employees in all of the years following the setting up of the arrangements.

(10) As at November 2010, there were five shareholders in the company. The share capital was divided into four classes of shares. MC and KC each owned approximately 31% of the shares, LC 5%, JC 5%, and a share incentive plan owned approximately 28%.

(11) For the three tax years ended 30 April 2009, 2010 and 2011, MC took a salary of £4,800.

For the period between 30 April 2009 and 30 April 2019, the maximum salary that he took from the company was £10,800. In that period, the company declared dividends (payable to all shareholders not just to MC) of between £50,000 and £160,000, most payments being in the region of £60,000-£80,000. MC also received dividends from other sources, and for the year ended 30 April 2009, his income from salary and dividends amounted to £34,750, and for the period 30 April 2009 to 30 April 2019, ranged between £14,599 and approximately £41,000.

(12) MC's evidence was, and we find as a fact, that if the company had not made the Payment, the company would not have paid MC £800,000 as remuneration for his work for the company.

(13) We also find as a fact that the Payment did not replace remuneration which MC had sacrificed or reduced in anticipation of receiving it.

The EBT

Background and documents

(14) At some time in 2010, MC was introduced to a gentleman called Mr Anderson who worked for Haslers which was and is a full-service firm which provides accounting and tax advice, has experience in employee rewards and remuneration trusts, and also provided trustee services by way of the Trustee. Prior to that meeting, MC was in total ignorance of the existence of or use of employee benefit trusts.

(15) Board minutes of the company dated 17 November 2010 record that documents establishing the EBT were tabled at a meeting on that date, and that the "purpose of creating and funding the EBT would be to benefit the trade of the Company by providing a means of rewarding employees and directors and to incentivise those individuals showing potential".

(16) The Trust Deed establishing the EBT ("**Trust Deed**") is dated 18 November 2010 and is made between the company and the Trustee. The Trust Fund was £100. The Beneficiaries were the bona fide employees from time to time of the company together with their relatives and any nominated charity.

(17) On 22 November 2010, three things happened. Firstly, the company issued a memorandum to all its staff which we were told was displayed in the office, telling staff that the company had decided to implement a new employee incentive arrangement known as the EBT, which takes the form of a trust under which funds contributed by the company may be paid out as benefits to employees. "This will have the advantage that bonuses can be provided in profitable years and ring fenced within the Trust for later payment".

(18) Secondly, the directors of the company wrote to the Trustee sending it a copy of the board minutes approving the contribution of £800,000 to the EBT and "drawing the Trustee's attention" to the possibility that the Trustee might, inter alia, use the contribution to make loans on appropriate terms to employees or directors, and pay bonuses and provide other benefits to employees.

(19) Thirdly, MC sent a letter to the Trustee in which he applied for a loan. This was a loan to buy 261,437 A Shares of the company for £800,000. The letter also states that "I also appreciate that the trustees will require security for this loan".

(20) In a letter dated 23 November 2010 Mr Anderson on behalf of the Trustee told MC, that the Trustee had authorised the Loan which would be interest free and repayable on demand. The letter included a loan agreement which MC was asked to sign if he agreed with its terms.

(21) MC signed the loan agreement on 25 November 2010 ("**the loan agreement**"). It sets out the terms on which £800,000 was lent by the Trustee to MC. Repayment of the Loan was on the fifth anniversary of the date of the loan agreement, but MC was entitled to repay early on giving 30 days' notice. The Loan was to be secured by a charge on MC's right, title and interest in and to 261,437 A ordinary shares in the company. The Loan was interest-free save if MC was a bad leaver in which case interest would be charged at the official HMRC rate.

(22) On 25 November 2010 MC and the Trustee entered into a share charge deed ("**the share charge deed**") which referred to the loan agreement and charged the 261,437 ordinary A shares in the company "held by [MC]…" to secure payment of any money owed by MC to the Trustee.

(23) On 26 November 2010, MC and KC entered into a share sale agreement ("**the share sale agreement**") pursuant to which KC agreed to sell 261,437 shares to MC. This sale and purchase were completed by a stock transfer form dated 26 November 2010.

(24) As at that date, the Companies House records did not record that KC owned 261,437 A shares. It reflected that she owned 25,815 ordinary shares of 1p each. The issue of the A shares which took place on 16 December 2009 was not reflected in the 2010 annual return and was thus not recorded at Companies House on 26 November 2010.

(25) The company's bank statement shows that on 24 November 2010, it had a credit balance of £392,833. On 26 November 2010, a number of transactions took place. £800,000 was transferred into the company's bank account from KC's bank account. £800,020 was transferred from the company's bank account as an "EBT contribution". This appears to have been the Payment the £20 being the transfer fee. £800,000 was paid into KC's bank account reference "EBT… Mark Currell".

Rationale for the EBT and the Loan

(26) The oral evidence supported the terms of the board minutes mentioned at (15) above. It was MC's evidence both in chief and in cross examination that the EBT was a means for the company to provide rewards to its employees and their families and could thus be used to incentivise those employees. The contribution to the EBT would be ring fenced within it and thus protected from the trading vagaries which might affect the company. Requests could be made by the company or its employees to the Trustee for benefits to be paid to those employees out of the EBT.

(27) It was Mr O'Shea's evidence that the Trustee actively consider MC's application for a loan and thought that the powers granted to the Trustee under the Trust Deed enabled it to provide a short-term loan to MC as he was an important employee of the company, in the knowledge that in the long term the fund could be used to pay bonuses to all employees of the company.

(28) It was MC's evidence that he understood that the Loan was repayable in accordance with the terms of the loan agreement.

(29) His personal bank account shows that had the Loan been called in in 2015, he had personal resources to settle it.

(30) It was Mr O'Shea's evidence that the Trustee would have been aware of MC's personal resources.

(31) It was MC's, Mr Reynolds', and Mr O'Shea's evidence that the reason why the Trustee did not ask MC to repay the Loan in November 2016 was because of the concern about double taxation. In 2015 HMRC had opened an enquiry into the arrangements, and on 10 March 2015 had issued the determinations. The Trustee and the company were concerned that if the money had been repaid to the EBT which was then used to pay bonuses to employees, there would have been tax on the payment of those bonuses. So, there was little point in repaying the Loan since they did not want to pay bonuses out of the trust fund in view of this concern about double taxation.

The shares and their valuation

(32) It was Mr O'Shea's evidence that notwithstanding the fact that on 26 November 2010, Companies House records at that time showed that KC did not appear to own the 261,437 A shares, the Trustee would have known what the correct shareholdings were. They would not have been able to help with their transactions otherwise.

(33) Furthermore, a valuation was undertaken to calculate the number of shares which needed to be transferred in consideration for the payment of £800,000. Even though no such valuation was provided to us it had still been undertaken by Haslers who were in possession of a great deal of background information, including financial information, regarding the business of the company.

The operation of the EBT

(34) The Trustee had no detailed "day-to-day" knowledge of the company's business. The Trustee was effectively "reactive" as regards applications to pay bonuses to company employees. In other words, they did not make any positive suggestions as to when, and if so in what amounts, bonuses should be paid to those employees. It was up to the company to make proposals to the Trustee which would then consider them in accordance with the discretion given to it by the Trust Deed. Prior to 2019 no such proposals were made by the company. Nor is there any evidence that any of the employees themselves approached the Trustee with a request for a bonus.

The 2019 payments

(35) Following discussions between MC, LC, and the Trustee, during 2019, MC repaid £50,000 of the Loan.

(36) This has been used to pay employee bonuses in December 2019, November 2020 and December 2020 and director bonuses in December 2019, January 2020, July 2020 and December 2020. In each case those bonuses have been paid net of PAYE income tax and NICs which has been accounted for, to HMRC, by the company (as the Trustee does not have a PAYE scheme).

(37) HMRC did not tell either the Trustee or the company that tax and NICs should be deducted from those payments. Such deductions were made on the advice of Mr Reynolds acting on behalf of Haslers.

FINDINGS OF FACT

16. In addition to the findings, we have made in the preceding section, we make the following additional findings of fact:

(1) The decision to contribute the specific sum of £800,000 to the EBT was made after the idea of the EBT had been suggested to MC by Mr Anderson.

(2) By the time that the arrangements were implemented in November 2010, it had been agreed that the funds contributed to the EBT would be lent to MC and that he would use them to purchase shares from KC.

(3) The payment from KC to the company was treated as a loan from KC to the company which could be repaid to her whenever she wanted.

(4) The 261,437 A shares which MC charged to the Trustee under the share charge deed as security for the Loan were the same 261,437 A shares which MC purchased from KC on the following day, 26 November 2010.

(5) The Companies House records on that date showed that KC owned fewer than that number of A Shares.

(6) Prior to making the Loan and entering into the share charge deed, the Trustee had valued the 261,437 A Shares at £800,000.

(7) The Trustee had no right to demand repayment of the Loan from MC prior to November 2015. In reality, therefore, the Trustee had no power to pay bonuses to employees or directors prior to November 2015 unless MC voluntarily chose to repay some of the Loan before that date.

(8) The reason why the Trustee made no demand for repayment in November 2015 was because of the concern about double taxation.

(9) The Trustee would not consider paying bonuses to employees of the company unless approached to do so by MC or other directors of the company.

(10) Before 2019, the Trustee was not so approached and so did not consider paying bonuses to employees of the company.

DISCUSSION

Burden of proof

17. The burden of establishing that the determinations are valid in time determinations rests with HMRC. The standard is the balance of probabilities. Once that has been established, then the legal burden of showing that they are wrong switches to the appellant. It must show that it has been overcharged by the determinations. Again, the standard of proof is the balance of probabilities.

18. However, as Mr Elliott submits, if the appellant has produced sufficient prima facie evidence to show that the determinations are incorrect, the evidential burden then switches to HMRC to show why the determinations are correct and properly charge the appellant in the amounts set out therein. We do not believe that Mr Waldegrave demurs from this proposition.

Submissions

19. In summary Mr Elliott submitted as follows:

(1) The purpose of establishing the EBT was set out in the board minutes and was to provide a means of rewarding employees and their families.

(2) There are two relevant transactions here, the Payment and the Loan.

(3) Generally speaking, a loan to participator such as MC can only be taxed under section 455 ITEPA when a loan is paid by a company to a participator. A payment equivalent to 25% of that loan is payable to HMRC which is repayable if and when the loan is repaid. This does not apply if the payment is made by the EBT.

(4) There might be an income tax charge on the interest foregone on a cheap loan, However, if the loan is used to purchase shares in the close company, there is no such charge. That is the case here.

(5) HMRC have not alleged that either the Loan, or its application to purchase those shares, is a sham. They have accepted that the Loan is a real loan with a genuine obligation to repay.

(6) The question in this case is whether the £800,000 paid by the company to the EBT was remuneration of MC. In other words, was it paid as a reward or benefit for his services as an employee or a director.

(7) There is no evidence whatsoever that it was so paid. He was not contractually entitled to it nor is there any document suggesting a link between those services, and the Payment. There was no indication that had the sum not gone into the EBT, MC would have taken it as salary. The Loan was not intended as a replacement for a sum which would have been paid to him directly as remuneration. MC was not entitled to the £800,000 in the form of remuneration. He did not sacrifice salary for which he was compensated by way of the Loan.

(8) Indeed, the evidence shows that MC took very little out of the company by way of salary, and sums of a far smaller magnitude than the Loan by way of dividend.

(9) This distinguishes the appellant's position from *Rangers*, in which it was found that the amounts paid to the EBTs were earnings. In those circumstances, it was decided that they were still earnings no matter how, or to whom, they were paid. So, *Rangers* is redirected earnings case, and sheds no light on whether, on any particular facts, payments are earnings in the first place.

(10) The *Baxendale Walker cases* show that *Rangers* doesn't help in deciding whether payments are earnings. In all three cases the tribunal rejected HMRC's submissions that *Rangers* applied, and that payments made to trusts, followed by loans to employees, constituted earnings. We should follow this approach as a matter of judicial comity.

(11) These cases also show that a loan is still not remuneration even if it is paid to the sole proprietor of business, nor if, at the time payment is made to an EBT, it is inevitable that a loan will be made to that individual. Nor is it relevant that the loan might be made on non-commercial terms.

(12) In *Marlborough,* which was "riddled with implementation issues" (for example documents in the wrong order and no evidence of a request for a loan). The tribunal still found in favour of the taxpayer. In this case the tribunal indicated that HMRC had not pointed to any material factor indicating that the relevant sums were sufficiently linked with the individual's role as a director to constitute earnings. The tribunal indicated that there is no presumption that

a sum coming out of a company is earnings and this is the case even if ; (1) it is paid to the sole employee of the business (in this appeal there are 8/9 employees); (2) there are multiple payments into the trust and multiple loans (in this case there is only a single payment into the EBT and a single loan); (3) it is inevitable that once a payment has been made into the EBT, it will be lent to the individual.

(13) *Strategic Branding* shared many of these characteristics. The proprietor to whom the loans were made took no salary or dividends during the period of the loans. There were multiple payments into the trust. It was inevitable that the trust would make a series of loans to the proprietor. The transactions were preordained. Yet the tribunal held that they were not earnings.

(14) In *CIA* there were multiple payments into the trust and multiple loans. There were three individuals to whom payments were made who, having received the loans, acted consistently with those sums being their own money. The loans were repayable after 10 years and at the date of the hearing none of the loans had been repaid even though some were past their due date for repayment. At the time that the shareholders requested that loans be made to them from the trust, it was inevitable that those loans would be made.

(15) In all three cases the decisions to make the payments into the trusts were made by the controlling mind of the company. In each case the payments to the trusts were the fruits of an employees work i.e., the work they had undertaken which generated the profits of the company from which it made payments to the trust. In two cases that was a single individual and in *CIA* there were three individuals who provided that work. In each case it was inevitable, at the time the payments were made to the trusts, that they would be used to provide loans to the relevant individuals. In none of those cases were the loans treated as earnings. In this case, the Loan has to be respected, there is a genuine repayment obligation, and this is wholly different from receiving an outright payment.

(16) The double tax point is that if the determinations are valid, then the company will be assessed to tax on the Payment. If that amount is then repaid by MC, and paid out as bonuses to members of staff, then it would be subject to a second charge to taxation when it is so paid (as is evidenced by the fact that this is what has occurred in relation to the £50,000 paid out as bonuses in 2019). Such double taxation has been described by Lord Hodge as remarkable. This suggests that, given the acceptance that the Loan is a real one and there was a genuine intention for it to be repaid, there should be no tax on the payment into the EBT. The Loan was a short-term arrangement, and the tax liability should arise if and when, it having been repaid, the EBT pays sums as bonuses to the company's employees or their families.

(17) In this case, MC did not get an outright sum, he simply received a sum which was a benefit on a temporary basis. It is clear that MC accepted that he had to repay the Loan and it is equally clear that he had the wherewithal to do so once the five-year non-repayment period had elapsed. It is entirely credible that, given that HMRC had by then raised the determinations, the Trustee did not call in the Loan because of the double taxation issue.

(18) There are a number of ways in which a director/shareholder of a small company can reward him/herself. Dividends, loans, growth in value of shares, remuneration. HMRC in this case need to show that the arrangements provided remuneration to MC. There is no evidence that they did.

(19) The purpose of the EBT, and the contribution of £800,000 to it had a short-term objective of enabling the EBT to make a loan (perhaps of the whole amount) to MC, and the longer-term objective of using it to pay bonuses to staff and their families. These included the contract

managers who performed an extremely important role in the business. The company had a culture of paying bonuses to its employees, and the contribution to the EBT ring fenced £800,000 so that it could be used in the future to make those bonus payments.

(20) The reference in the share charge deed to the security being over 261,437 A shares does not mean that they were the shares which MC had purchased from KC. At the time of entering into that deed, MC owned, in his own right, more than that number of A shares.

(21) The fact that this is a very precise number of shares supports the oral evidence that a valuation had been undertaken prior to their transfer from MC to KC.

(22) Furthermore, the introduction of the £800,000 by KC into the company might be relevant to any corporation tax deduction which the company might seek to make (which it has not) but it is not relevant to whether the £800,000 is earnings of MC.

20. In summary Mr Waldegrave submitted as follows:

(1) When viewed realistically the arrangements were a device to put money into the unfettered control of MC. That money, namely the £800,000 payment, was referable only to MC's services as a director of the company. It was not referable to anything else.

(2) When deciding whether a payment has been made as a reward or remuneration for the exertions of an employee we must concentrate on the facts of our specific case. We must also concentrate on the statutory question and not be distracted by judicial gloss.

(3) Case law serves as a source of principle which can then be applied to the particular facts of a case. Unless the facts in one particular case are identical to another, then a decision in one case is unlikely to provide an answer in another case.

(4) We must apply a purposive approach to the interpretation of legislation as Lord Hodge set out in *Rangers*. We must also consider the facts realistically. This is very different from alleging that, for example, the Loan in this case was a sham or that it was not a real loan.

(5) Furthermore, HMRC do not need to show that there was a pre-existing entitlement to salary which then gets diverted into a scheme.

(6) In some cases, there may be two reasons for a payment. If one of them is an employment reason, then that is enough for the tribunal to find that there is remuneration from employment.

(7) It is not enough for HMRC to say that he would not have received the Payment if he had not been a director.

(8) When considering the position realistically, we must look at the effect of the arrangements together, and this includes what happened after the Payment was made to the EBT. That is helpful in answering the question whether there is remuneration in the first place. This is reinforced by Lord Hodge's approach set out in *Rangers*. He looked at what happened once the money had been placed into the trusts and the risks that things might not have gone as planned to see whether that shed light on the question as to whether the money which was paid to the trusts in the first place comprised remuneration which had been diverted to the trusts.

(9) Once a decision has been made that a payment is remuneration, then what happens

"downstream" is irrelevant. So, if we were to decide that the Payment was earnings, then whether the Trustee decided to demand repayment, or appointed funds to subtrusts, makes no difference. However, the activities of the Trustee can be taken into account when considering whether the Payment is remuneration in the first place. In this case, therefore, we can take into account the Loan (and its terms), the fact that it was used to purchase shares from KC, and the fact that the £800,000 ultimately ended up back in the company and was available to KC to withdraw as she pleased, since it had been contributed by way of director's loan account.

(10) Whilst the evidence of the witnesses was broadly credible, it was inevitable that memories had faded and that there were certain areas on which the witnesses were not able to help the tribunal at all.

(11) It was his view that MC was the significant contributor to the success of the business and that no important decisions would have been taken without his approval. Yet notwithstanding this, he drew little from the company by way of salary or dividends.

(12) It is clear that by the time the EBT was set up, a decision has already been made that once the £8000,000 had been introduced into the EBT it would be lent to MC and he would use it to purchase shares from KC.

(13) At the time that MC applied for a loan and entered into the share sale agreement with KC to buy 261,437 shares from her, Companies House documents show that she only owned 232,000 shares. Furthermore, MC apparently charged those shares to secure the Loan before he had acquired them. Indeed, at the time of the charge, MC owned only 232,000 shares. And this is relevant when considering how the EBT operated and how we should characterise the arrangements. Furthermore, on 26 November 2010 there was a rapid movement of £800,000 through various bank accounts. It is clear from the bank statements that at the start, the company did not have £800,000 in its bank account.

(14) It could hardly be said that the £800,000 had been "ring fenced" by it having been contributed to the EBT, since it ended up back in the company bank account.

(15) The role of the Trustee was essentially reactive. There is no evidence that any approach was made to the Trustee by the company or by any of its employees (other than MC), for a loan or a bonus.

(16) The purpose of the arrangements was not intended to create a bonus pot out of which future bonuses could be paid to members of staff and their family. Viewed realistically they were intended to put money into the unfettered control of MC. The company had a long-established practice of paying bonuses out of the company which did not require the establishment of an EBT. It is unclear whether the company even had the money in full which it contributed to the EBT in the first place, so the suggestion that it was to ring fence £800,000 doesn't really work. It was a very large sum to commit to a bonus pot for a business which typically paid bonuses to a handful of employees of only a few thousand pounds a year. The decision to set up the EBT was taken first and the amount of £800,000 was then determined thereafter. One would have expected that if the company was looking to ring fence spare cash to secure its use in the future to benefit employees, then the amount would be determined first. Ring fencing is wholly consistent with the funds being lent to MC personally and then ending up back in the company. There is little evidence that the Trustee regarded itself as having meaningful obligations to the employees in general. Lending the entire trust fund to MC on soft terms is hardly consistent with looking after the employees generally.

(17) There is no documentary evidence of the purported valuation of the shares.

(18) Payment of the Trustee fees in a single payment was unusual if the real purpose of the EBT was to operate well into the future for paying bonuses to employees. It is much more consistent with a decision to make a one-off payment to MC, and not to use the funds for the stated purpose of paying future bonuses to members of staff and their families.

(19) Indeed, until November 2015 the Trustee could not have paid any bonuses unless MC voluntarily chose to repay some or all of the Loan. And even thereafter, the reality was that repayment of the Loan would always be at MC's option or at the option of members of his family.

(20) The double taxation issue was not a concern of the Trustee. Payment of the bonuses was always going to be subject to tax whether it was paid by the company or whether by the Trustee. So why, he asks rhetorically, would the Trustee not pay a bonus simply because it was taxable. In his view the inference is the reason for the repayment of £50,000 in 2019, and its subsequent payment to employees by way of bonus, was self-serving. The Trustee self-assessed that tax was payable on the bonuses, and this enabled the appellant to run the double tax argument in these proceedings.

(21) So, the truth of the matter was that the arrangements were not intended to operate to provide a ring fenced pot for payment of future bonuses to employees and their families. It was intended to put value into MC's effective control. The cavalier attitude towards money movements and documents makes sense if the arrangements were concerned with moving value into MC's hands. This theory is also consistent with the fact that the money ended up with the company in a form which could be withdrawn without tax by KC. There was only a theoretical right to repayment of the Loan before 2015. There was no prospect of a non family member complaining about the arrangements.

(22) The main question, therefore, is the reason for the decision to put the £800,000 into the unfettered control of MC. Was it referable to his services as a director or was it referable to something else.

(23) There are a limited number of candidates. As Mr Elliott had said, there are only a number of ways in which the value can be extracted from a family company. These include salary, dividends, loans, and an increase in the capital value of shares.

(24) It is clearly permissible to approach this question by process of elimination (see the approach adopted by Judge Morgan at [128] of *Marlborough*). In that case the tribunal started identifying the possibilities and then asked which way the evidence pointed between those possibilities and came to a particular conclusion based on that evidence. We should adopt the same approach.

(25) It is clear in this case that the Payment was not made to MC by reference to his shares. No other shareholder received any form of distribution. It was not a dividend or other distribution so that can be ruled out. Indeed, this is not a submission made by Mr Elliott.

(26) As regards Mr Elliott's possibility that it might reflect an increase in value shares, that is simply irrelevant in the context of these £800,000 payments.

(27) The next suggestion is that there might be a loan from a company to a director. There is no such loan here (notwithstanding that is clearly the Loan from the Trustee to MC). However,

there is no loan from the company to MC. So that can be ruled out.

(28) So, the fact that these alternatives have been ruled out constitute a strong indication that the Payment must be referable to MC's services as a director.

(29) And there are five positive points which are consistent with the evidence and which point towards the conclusion that this was payment for MC's services to the company.

(30) Firstly, MC was the (or at the very least a) driving force behind the business. He had particular help from KC, but he was principally responsible for building the business from a one-man band in the early 1980's to the very substantial business that it constituted in 2010.

(31) Secondly, it is clear that he was going to be highly important to the business for the foreseeable future.

(32) Thirdly, he had worked extremely hard, working long weeks and subject to considerable stress.

(33) Fourthly, prior to incorporation in 2002 most profits were reinvested; after incorporation MC took a minimal salary and very little by way of dividend. He was being paid considerably less than his contract managers. He had essentially forgone significant rewards which he might have been paid by the company.

(34) Finally, in these circumstances, it is wholly unsurprising that MC should seek some substantial reward for the very many years of hard work that he had put into the company for comparatively little reward.

(35) There is no need for HMRC to show that MC would have received the £800,000 by way of salary and has sacrificed that in consideration for receiving the £800,000 by way of the Loan. The essential question is where the money came from. In HMRC's view it must come from and be referable to his services as a director which is unsurprising given that MC had worked very hard to build a successful business for minimal reward.

(36) There are a number of factual distinctions between this appeal and the Baxendale Walker cases. Those cases are all subject to further appeal, and are decisions made on the basis of the facts in those cases. Furthermore, in *Strategic Branding* the tribunal does not appear to engage with HMRC's critical submission that the purpose of the contributions was to channel remuneration to the relevant individual. That decision is not authority for the proposition that if there is a real obligation to repay a loan then the loan cannot be earnings. That is not right (see *Rangers*). The same criticism can be made of the tribunal in its decision in *CIA*. The tribunal did not appear to engage with the submission made by HMRC that the payments were earnings. And the principle, if any, which Mr Elliott suggests stem from those decisions (namely that if a loan is generally repayable, it cannot be earnings) is simply not right. Any conclusion to that effect is inconsistent with *Rangers* where the loans were seen to be real loans with real repayment obligations, yet still treated as earnings. If we were to conclude that the source of the payment was MC's services as a director, then it is irrelevant whether the Loan was repayable or not.

(37) Finally, as regards double taxation, the question as to whether the Payment in 2010 was paid by reason of the services as a director supplied by MC to the company cannot be affected by any subsequent possibility of double taxation in future years. Indeed, in any event it is difficult to see there is double taxation in that bonuses paid to employees will be subject to tax

when paid from the company or from the EBT.

21. In summary, Mr Elliott replied as follows:

(1) HMRC's positive arguments are pretty feeble and basically boil down to the submission that MC could have taken the Loan by way of a salary had he wanted to, and the fact that MC had been the driving force in the business and was likely to be important in the business in the future. These are the "fruits of labour" point which had been rejected in *Marlborough*.

(2) Their negative arguments are equally feeble and essentially boil down, as a process of elimination, to the submission that if the Payment was not a dividend, it must be remuneration. And they also say, in particular, that because it was not a loan from the company, it cannot be a loan. If this is right, then it is surprising that the *Baxendale Walker cases* all went in favour of the taxpayer.

(3) The *Baxendale Walker cases* answer the questions that HMRC correctly posed at the start of their submissions in the right way. They have respected the purpose for which the Payment was made in the first place, and the benefit received by the employee at the end. There is no case, including *Rangers* which suggests that a repayable loan comprises unfettered access to the loan capital.

(4) He agreed that one had to look at the entirety of the arrangements when considering whether a payment was earnings, and this means that one can look at subsequent events to the extent that they cast light on an earlier payment which is said to be earnings. He also agreed that there was no need for there to have been an entitlement to the payment. If there was such an entitlement, then it was very likely that HMRC would succeed. In *Rangers* there were many factors which contributed to the finding that the payments to the trusts were earnings.

(5) The *Baxendale Walker cases* have fact patterns which are much more similar to this appeal than to *Rangers* and are therefore of more help and relevance. The judges in those cases did address the submissions made by HMRC, and in each case came to the conclusion that soft and multiple loans made to the individuals were not earnings. These cases were correctly decided.

(6) In *Strategic Branding* the judge acknowledged that the payment of the contributions to the trust were intended to deliver payments to the individual in the form of loans, and furthermore there was a link between the payments and his employment. But the money was paid to the individual by way of genuine loans which had an obligation to repay and HMRC had not established that they were emoluments.

(7) The same is true in *CIA* where the judge (the same judge as in *Strategic Branding*) found that amounts paid to shareholders under loan agreements which included an obligation to repay did not comprise a reward or benefit even though there was a connection with the shareholders employment. And accordingly, the contributions were not earnings.

(8) Whilst the concept of unfettered access might be consistent with a reward or benefit, it is important not to confuse the two. We must concentrate on whether the Payment was a reward or benefit and not whether the terms of the Loan conferred unfettered access to the £800,000.

(9) A sub question is whether, if there was an arrangement which results in an individual receiving a soft loan with a genuine repayment obligation, that comprises a reward or benefit? *Strategic Branding* and *CIA* say that it does not.

(10) The truth of the matter in this case is that MC has received a loan, not from the company but from the EBT. It is not a distribution, nor is it a reward for his services as a director. And this is the case even if the purpose of the arrangements was to enable him to receive the Loan, and that, at the time the EBT was established, it was inevitable that the Trustee would make the Loan to him. It is clear that there was a repayment obligation, and equally clear that in 2015 he had independent resources to affect that repayment.

(11) At the end of the day, the £800,000 is in the company's bank account. So how, in any real sense, can it be suggested that MC has taken that money out of the company as salary. The Loan was not used by MC to buy cars, jewellery, or other consumables or services. It was used as working capital by the company.

(12) Whilst it might have been eminently sensible for MC to have withdrawn a large sum from the company, there is no justification for drawing the inference that this must have been earnings (as HMRC are asking us to do). That sensible decision is a very long way from HMRC showing that the Payment or the Loan was remuneration, and the fact of its reinvestment in the company points in the opposite direction.

(13) The concern about double taxation was clearly, subjectively, a real one. This is borne out by the fact that HMRC's position on double taxation has altered not just between the time of their skeleton argument, and the hearing but immediately prior to and at, the hearing. This concern is a highly credible reason why the Trustee did not demand repayment of the Loan from MC in 2015.

(14) There is no evidence from which the tribunal can properly draw an inference that the reason why the 2019 repayment of £50,000 was made, and subsequent thereto, bonuses were paid to employees, was to better the company's position in this appeal.

(15) In conclusion, money has moved from the company to the EBT. The Trustee was obliged to, and did, consider and properly exercise its discretion as to whom the money should benefit. The money remains, from an accounting perspective, a resource of the company and payment did not give rise to a corporation tax deduction. The evidence shows that it was going to be used to pay bonuses. The only extraction was by MC, by way of the Loan. The income benefit of this is potentially subject to income tax but it is safe harboured dint of the share acquisition. If any payments are made from the EBT they would then be subject to tax. The reasonable and sensible outcome is that the Payment is not taxed as salary of MC, but that there is a tax charge each and every time a bonus is paid from the EBT.

Our approach

22. It is clear that the focus of our enquiry must be to establish the reason or substantial reason why the Payment of £800,000 was made by the company to the EBT. As mentioned above, if that Payment was made as a reward or benefit for the services provided by MC to the company, then it is earnings and the determinations must stand.

23. It is equally clear, and Mr Elliott accepts, that when considering this enquiry, we are not fettered by looking solely at the circumstances surrounding the setting up of the EBT and the making of the Payment. We can also consider subsequent events (and in particular the making of the Loan, the purchase of KC's shares, and the introduction of £800,000 into the company by KC by way of loan account). This is simply viewing the facts realistically and applying a purposive approach to the interpretation of the relevant legislation.

24. We start therefore by looking at the reasons why the company made the Payment, and then move on to consider the reasons why the EBT made the Loan to MC.

25. Whilst we are not bound by it, we gratefully adopt the clear synopsis provided by Judge Morgan in *Marlborough* where, at [127] she stated:

> "To recap, it is plain from the caselaw that sums constitute earnings if they are paid as remuneration or a reward in return for a person's services as an employee. The courts have consistently recognised that, given the test is centred on why or in return for what a payment is made, establishing the purpose of an employer in making a payment is key to assessing, as it was put in *PA Holdings*, its character in the hands of the recipient "looking at its substance and not its form". As summarised in *Kuehne* the courts have also recognised that this may be a difficult finely balanced exercise where there is more than one reason for a payment. As it was put at [52] of that case, a tribunal or court needs to be satisfied that the payment is from employment rather than from a non- employment source. That involves evaluating the reasons and background to the payment and applying a judgment as to whether the payment was from the employment rather than from something else. Whilst employment "does not have to be the sole cause" of the payment "it does have to be sufficiently substantial as to characterise the payment as one from employment" (see [56] of *Kuehne*)".

26. In her case the question was whether the payments to the relevant trust were paid because of the relevant directors' services or whether they were paid for a different reason, namely by way of a distribution.

27. One of the difficulties faced by Judge Morgan in *Marlborough* was that "in the circumstances of this case, there is little to tell us what underlying purpose [the company] had in enabling the relevant sums to flow into [the individuals] hands". We face a similar difficulty in this case. Whilst there is a substantial amount of evidence regarding the reasons why the company made the Payment, there is little evidence of primary fact regarding the reasons why the EBT (or rather the Trustee) made the Loan. There are no trustee minutes, for example, as to the reason why it exercised its discretion to grant him the Loan.

28. So, we have had to make a number of inferences from primary fact, and when making those inferences, we have adopted the principle set out by Lady Justice Arden in *Barlow Clowes International Limited v Henwood* [2008] EWCA C IV 577 ("***Henwood***") where at [68] she stated:

> "To ascertain whether such an intention was shown on the evidence, the judge had to make primary findings of fact and then make a global evaluation of all the relevant facts. The ultimate fact in issue was Mr Henwood's intention. This had to be a matter of inference from all the relevant facts, giving such weight to Mr Henwood's declarations as to his own intention as the law allows. An inference of this kind must be drawn on the balance of probabilities, and thus the judge had to be satisfied that the inference that he drew as to Mr Henwood's intention was more likely than not on all the relevant and proved facts".

The Payment

29. It was Mr Elliott's submission that there were three reasons for establishing the EBT in November 2020, and for the company to make the Payment to it on 26 November 2020. Firstly, in the short term, it was to make the Loan to MC. Secondly, at that time, the company had

funds which it wanted to ring fence in order to enable it (the third reason) to provide a source of funds to make future bonus payments to members of staff and their families. This was the longer-term objective.

30. It is our view, having viewed the facts realistically, that the substantial reason for the company making the Payment on 26 November 2020, was to enable the Trustee to fulfil the commitment it had made to MC to lend him £800,000.

31. We say this for the following reasons:

(1) The reasons for making the Payment, and the reasons for setting up the EBT may differ. Whilst they are clearly interrelated, our enquiry is on the reasons why the Payment was made. The straightforward answer is in order to put the Trustee in funds. But this then leads onto the question as to why the Trustee needed to be put in funds. And that is the focus of our enquiry.

(2) We look first at the chronology. The evidence is clear that during the earlier part of 2010, MC had discussed the possibility and rationale for establishing the EBT with Mr Anderson of Haslers. During that time, it was agreed that a specific amount, £800,000, would be contributed. MC also knew, as a result of his discussion with Mr Anderson, that the EBT had power to grant him a loan, "… it's all part of the initial conversations I've had with Mr Anderson that he said everyone including directors can benefit from the EBT. And use the facility of the loan, which was obviously quite attractive to myself. And so, it was sort of discussed, again discussed, me and my wife as directors, and decided that's what we would do".

(3) So, by the time that the paperwork was put in place, it had already been agreed, in principle, that once the EBT was established, it would make the Loan to MC.

(4) The company held a board meeting on 17 November 2010 at which it resolved to establish the EBT and to pay £800,000 to it. The EBT was established by dint of the Trust Deed on 18 November 2010. On 22 November 2010 the company wrote to the Trustee sending with it a copy of the board minute and "reminding" the Trustee as to how the Trustee might apply the contribution of £800,000. On the same day, MC in a personal capacity applied to the Trustee for a loan of £800,000 to buy 261,437 shares.

(5) The following day, on 23 November 2010, Mr Anderson on behalf of the Trustee wrote to MC telling him that the Trustee had authorised a loan to him of £800,000 which would be interest free and repayable on demand. The Loan Agreement was signed on 25 November 2010 as was the Share Charge Deed. The Share Sale Agreement pursuant to which MC purchased those shares from KC was signed on 26 November 2010.

(6) All these events took place before the Payment was made on 26 November 2010.

(7) So, by the time the Payment was made on that date, the Trustee was obliged to fulfil its obligations under the Loan Agreement (which in turn reflected the commitment to grant the Loan to MC).

(8) This strongly suggests to us that the substantial and significant reason why the Payment was made was in order to make the Loan to MC. It was prewired. The Trustee had exercised its discretion to make the Loan and in order to fulfil its commitment, had to pay the £800,000 which was received from the company to MC by way of that Loan.

(9) We now consider the two other reasons for the Payment suggested by Mr Elliott. The first of these is that the company was sitting on surplus funds which it wanted to protect, and so pay £800,000 to the EBT in order to "ring fence" those funds, thus making them available for bonuses to members of staff at a later date.

(10) And when we say a later date, we take into account that one of the terms of the Loan was that it was not repayable for five years, and so it would not have been possible, in the absence of agreement for early repayment with MC for the Trustee to have paid bonuses out of the EBT until that five year period had expired.

(11) So, given that the company had, as Mr Elliott submitted, a culture of paying bonuses, it was almost inevitable that the bonuses for those first five years would have been paid by the company.

(12) As submitted by Mr Waldegrave, the history of bonuses paid to employees is dwarfed by the £800,000 ostensibly set aside for future bonuses. There is little evidence of why or how the company and the EBT arrived at the sum of £800,000 but had it been computed by reference, however roughly, to payment of future bonuses in light of the projected success of the business and past bonuses, we have no doubt that the appropriate evidence would have been adduced to us.

(13) We say this notwithstanding that the EBT has, as a matter of fact, paid bonuses to members of staff in 2019. It is clear that the EBT has power to do so. But we must consider the position at the time at which the Payment was made. And at that time, it would not have been possible for the Trustee to have made any such payments as the entire trust fund had been lent to MC.

(14) Furthermore we are wholly unconvinced by the "ring fencing" justification for making the payment to the EBT. It is clear from MC's evidence that the company needed the £800,000 as working capital. When asked why KC was paying the money back into the company he stated, "we wanted the funds in the business at the moment and it was going to be drawn at a later date, like a directors loan account". His evidence, too, was that KC was lending money to the company and would be able to obtain repayments whenever she wanted.

(15) We do not find it at all surprising that the company could not simply part with £800,000 of working capital and then carry on as before. We find as a fact that the company require that working capital in its business, and thus it was inevitable that it would find its way back into the company once it had been paid to the EBT.

(16) And when the arrangements are looked at as a whole, we find that this commercial reality was reflected in them. They were prewired. The stated purpose of the Loan was to purchase KC's shares. However, even if it had not been, it is our view that MC would still have paid the £800,000 into the company by way of a directors account. The purchase of the shares from KC was a neat tweak which enabled MC to fall outside the income tax charge on a soft loan since it was used to purchase shares in a close company. But it was inevitable that KC would introduce the £800,000 into the company so that it could be used as working capital.

(17) And once it was back in the company (although we're not sure of the sequence of payments, and whether the £800,000 might have gone into the company first from some other source, and then be paid out by way of the Payment) then, as Mr Waldegrave submitted, it is hard to see how it had been "ring fenced" in the EBT.

(18) Although KC was an unsecured creditor, that £800,000 was just as much at risk from a business failure after its payment to the EBT as it was before. If the business had failed, it would have been lost. Indeed, that is the case at the moment. The appellant might state that the EBT has the benefit of a charge over the shares. But frankly, if the business fails, that security will be as worthless as the business. If the EBT genuinely wanted security, it could have taken security over other assets (for example those evidenced in MC's Coutts investment report which, according to Mr O'Shea were known to the Trustee when considering exercising its discretion to make the Loan).

(19) So, we do not accept either Mr Elliott's submission, nor MC's evidence, that ring fencing £800,000, in order to put it beyond the reach of creditors, was a substantial reason for the Payment on 26 November 2010.

32. In summary therefore: the ostensible reason for establishing the EBT was to provide a pot of money out of which bonuses could be paid to staff members and their families; however the substantial reason for the Payment on 26 November 2010 was to provide the funds to the Trustee in order to make the Loan to MC; whilst the objects of the EBT included payment of bonuses to staff and their families, this was not possible for the first five years of the Loan; we reject the submission that the reason for the Payment was to ring fence and thus safeguard from creditors, the £800,000; it was inevitable that that money would be returned to the company and thus was just as much at risk after the Payment had been made to the EBT as it had been before payment.

Was the Loan a reward or benefit?

33. Before we consider the reasons why the Loan was paid to MC, we first need to consider whether, as a matter of law, a genuinely repayable loan can be a reward or benefit in the first place (whatever the reasons for its payment), and more importantly whether the Loan was a reward or benefit in this case.

34. Mr Elliott submitted that a genuinely repayable loan could not be a reward or benefit as a matter of legal principle, and this was demonstrated by the *Baxendale Walker cases.* However, later in his submissions he accepted that the Loan was of temporary benefit to MC.

35. He also submitted, contrary to the submission made by Mr Waldegrave, that *Rangers* did not show that a repayable loan could be a reward or benefit.

36. It is our view that a genuine loan of money ("**a money loan**") with real repayment obligations can, as a matter of legal principle, comprise a reward or benefit. And in this particular case, the Loan was a reward or benefit. We say this for the following reasons:

(1) In nearly all cases a money loan is sought by the borrower. It is not imposed by the lender. This of itself suggests that the borrower considers a money loan to be of benefit to it. And this is the case whatever terms of that money loan. Consider someone buying a house with a mortgage. That person will, over the term of the mortgage, pay back considerably more than the capital borrowed. The borrower receives a considerable benefit since without it he or she could not afford to buy the house for which it is borrowed. That mortgage is a benefit even though it is on full commercial terms.

(2) In general terms, a money loan provides money which the borrower would not otherwise be able to access. Or it provides money as an alternative source of funds which the borrower considers a more attractive proposition to using alternative funds. For example, if one can

borrow at 2% but then invest at 5% a person might borrow even if it was sitting on cash which it could also invest. Indeed, borrowing might be a simple way of gearing up to increase investment return.

(3) It seems to us that whilst it is impossible to describe the infinite number of reasons why a borrower might seek a loan, a common denominator is that the borrower benefits from that loan. And this is true whatever the terms of the loan.

(4) Mr Elliott suggested that the Loan was only a temporary benefit. We will consider whether five years is temporary in a moment, but a money loan even for a short time can confirm a permanent benefit or advantage on the borrower. Consider a company in cash flow difficulties which is about to go into an insolvency process. A money loan repayable a month later might solve those cash flow difficulties and enable the company to survive. That is a permanent benefit. A person might seek a money loan in order to exploit a commercial opportunity, which, once exploited, might provide benefits well into the future. In this case the Loan was used, as always intended, as working capital in the company's business as it was paid into the company by KC as a director's loan account. That was a permanent benefit to the company.

(5) There is also a semantic point. It is no coincidence that someone who benefits from a trust is called a beneficiary. It is because that person benefits from the trust fund. A payment out of the trust fund confers a benefit on the recipient, and a money loan, on whatever terms, to a beneficiary is just such a benefit.

(6) As far as case law is concerned, we do not think that it is clear from either *Rangers*, or the *Baxendale Walker cases*, that a repayable loan cannot be a reward or benefit.

(7) In *Rangers* the loans were repayable, and Lord Hodge found that they were a component of the redirected earnings. However, it is certainly not authority for the proposition that a repayable loan can never, as a matter of law, be a reward or benefit.

(8) Nor do we think the same is true of the *Baxendale Walker cases*. In those cases, the judges, in our view, elided the analysis of whether a loan could be, as a matter of principle, a reward or benefit, with their analysis of whether in those particular circumstances, it provided a reward or benefit for services supplied by the relevant director. If the ratio of those cases was that as a matter of legal principle a genuinely repayable loan could not be able to benefit, we disagree with it for the reasons set out above. In our view such a money loan can as a matter of law be a reward or benefit.

(9) Turning now to the Loan. This was repayable only after the fifth anniversary, and provided MC was not a bad leaver, carried no obligation to pay interest. Whilst it was repayable after that date, repayment was not demanded by the Trustee save as regards the £50,000 in 2019.

(10) We accept it was a genuine loan with a real repayment obligation. We also accept that MC had the independent funds to settle it once that five year period ended. We also accept that he was fully conscious of his obligation to repay on that date.

(11) That notwithstanding, it clearly conferred a benefit on him. This is true both subjectively and objectively. It is clear from the evidence that the possibility of making a loan to MC once the EBT had been established had been discussed for some months before it was set up in November 2010. It was MC's evidence that taking a loan from the EBT was something that

was attractive to him, and that it was financially advantageous compared with borrowing from a commercial lender. Indeed, we ask ourselves, if MC did not think it was of benefit to him, why did he apply for a loan in the first place.

(12) We have no doubt that an employee of the company, such as a contract manager, who applied for a loan from the EBT would consider that if a loan was made in his or her favour, that would be a benefit.

(13) But objectively too, the Loan conferred a benefit on MC. It provided him with the sum of £800,000. Although the ostensible purpose of the Loan was to purchase the shares from KC, the reinvestment of that money into the company, and the ability to draw it out of KC's directors loan account cash free, had been prewired into the arrangements. The Loan had to be reinvested in the company which needed it as working capital. But the benefit to MC was that it could then be withdrawn and used as he wished. There was no fetter on the use of the money withdrawn from KC's loan account.

(14) There was no obligation on MC to repay the Loan for five years. We do not consider this to be a mere temporary benefit. Indeed, as at the date of the hearing, only £50,000 of that £800,000 had been repaid. Whilst we have accepted that one reason for that is the double tax concern, it still means that MC has had the benefit of £750,000 for almost 13 years. Again, we do not consider that to be a temporary benefit.

(15) There is also benefit in that there was no obligation to pay interest. It is clearly better not to pay interest than to pay tax on interest foregone. A payment of interest of 10 is greater than a tax charge of 4. And indeed, the arrangements meant that there was no obligation to pay tax at all as the Loan was used, initially, to purchase KC's shares. However, as we have already found, it was always intended that the money would find its way back into the company and be used as working capital. And to be available for withdrawal without a tax drag. When considering the facts realistically we find that this ultimate use of the Loan was also an objective benefit to MC.

37. In summary, therefore, it is our view that as a matter of law there is nothing which prevents a genuine money loan on commercial terms conferring a benefit on the borrower. It is our view that in the vast majority of cases in practice, such a loan will confer a benefit. And in the context of this case, the Loan conferred a benefit on MC. Its payment to MC, therefore, was potentially within the ambit of section 62 ITEPA Whether it was earnings depends on the substantial reason for its payment.

Why was the Loan made to MC?

38. We now turn to the second stage of the enquiry; namely an enquiry into the reasons why the Loan was made by the Trustee to MC.

39. The trite answer is that the Trustee had a discretion as to how it should apply the trust fund and decided to exercise that discretion by making the Loan to MC. And the Trustee exercised that discretion in light of the purpose for which the Loan was ostensibly to be put, namely the purchase of shares from KC.

40. But we do not think this is the real or substantive reason for the Loan, nor the reason why the Trustee decided to exercise its discretion to make the Loan.

41. We start this enquiry by making a number of preliminary points.

42. Firstly, as submitted by Mr Elliott, there is no evidence that the Trustee exercised its discretion to make the Loan anything other than perfectly properly.

43. Secondly, again as submitted by Mr Elliott, the Loan was a real loan with a genuine obligation to repay which was accepted by MC.

44. Thirdly, as submitted by Mr Waldegrave, and as we have said above, a real loan with a genuine obligation to repay does not, as a matter of law, mean that it simply cannot be earnings. The enquiry is still the same. What is the reason for payment of the Loan. If it was paid as a reward or benefit for MC for his exertions as an employee/director of the company, then it is earnings even though there was a genuine obligation to repay it. *Rangers* is authority for this proposition.

45. So, what was the reason why the Trustee made the Loan to MC?

46. We must look at the facts realistically.

47. We have found as a fact that it was inevitable that the £800,000, once paid by the company to the EBT, would end up back in the company. This is clear from the evidence.

48. One intends the inevitable consequences of one's actions. So, the Trustee's intention when exercising its discretion to make the Loan was that it would end up back in the company.

49. The ostensible reason for making the Loan was to enable MC to purchase shares from KC. But this was simply a conduit to enable the money to end up back in the company. As previously mentioned, the purchase of shares enabled MC to fall outside the income tax charge on soft loans. And, as previously mentioned, we have no doubt that if these provisions did not apply, the £800,000 would simply have been introduced into the company by MC himself.

50. But the way in which it was so introduced by KC (by way of loan account which she could draw down whenever she wanted) meant that £800,000 (which had it been paid direct from the company to MC or KC would fall under the loan to participator tax provisions and thus would have incurred tax drag) had been extracted from the company without (on the appellant's case) the tax liability and put at the unfettered disposal of KC. It is clear from the evidence that KC and MC acted together in building up the business of the company and we see no reason why, in purchasing the shares from KC (who was inevitably going to contribute the proceeds to the company) MC had any misgivings that KC would not draw down on her loan account for their mutual benefit.

51. Given that the establishment of the EBT had been orchestrated by Mr Anderson, and the evidence shows that the grant of the Loan was inevitable at the time of the Payment, and that it was equally inevitable that the £800,000 would remain with the company, we infer that the Trustee knew that the £800,000 would be available to MC and KC to draw from the company when they chose.

52. So why did the Trustee exercise its discretion to provide £800,000 to MC which they knew would become available to MC to draw from the company without a tax liability?

53. To our mind, the only reason was because of the work which MC had done over the years in building up the business firstly as a sole trader, then in partnership, and then via the medium of the company.

54. We say this for the following reasons:

(1) The beneficiaries under the Trust Deed are the "bone fide" employees of the company and members of their family. We think "bone fide" here has two meanings. Firstly, they must be genuine employees. Secondly, and more importantly in this context, the Trustee can only exercise a discretion in favour of such a beneficiary if they are rewarding that beneficiary in his or her capacity as an employee.

(2) The Trustee's discretion must therefore be exercised to reward employees for their qualities as employees rather than for any other personal or private qualities or reasons.

(3) It is clear from the evidence that the company has a strong history of paying bonuses to staff. The bonus targets are set at the beginning of the year end bonuses paid around December of that year depending on how and whether those targets have been met. In other words, the bonuses are paid to reward employees for the work that they have done. They are clearly work-related.

(4) It is also clear from the evidence that the Trustee would not initiate the payment of a bonus to an employee but would be reactive. The Trustee would only pay a bonus to an employee on the recommendation of the company. And that chimes with the way in which bonuses have been paid from the company. It would not be the employee who would approach the company asking for a bonus. It would be the paying party, namely the company, who would determine the parameters within which a bonus would be paid, and then decide whether those parameters have been met.

(5) The Trustee was fettered by the Trust Deed. Although the Trustee had a discretion, it could only exercise it in favour of an employee.

(6) But being paid simply because one is an employee, is not enough for HMRC to establish that a payment is earnings. Being an employee is a causa sine qua non. To be earnings, the causa causans for the payment must be the services provided to the company by the employee.

(7) In this case the evidence clearly shows that an employee would only be granted a bonus as a reward for meritorious services provided to the company. It is our view too, that the evidence shows that the Trustee would only exercise its discretion to pay a bonus to an employee (if it was approached by the company to do so) in favour of an employee who had provided meritorious services to the company which deserved a bonus. Indeed, the trust fund was intended to provide a pot from which bonuses could be paid to employees. The evidence shows that the regime for payment of such bonuses would have been the same as for bonuses paid from the company. We have no doubt that the company would only approach the Trustee to ask it to exercise its discretion in favour of an employee if that employee had provided sufficiently meritorious services to justify a bonus.

(8) In our view the same is true when the Trustee considered its discretion to grant the Loan to MC. The Trustee could only make a loan to MC because he was an employee of the company (an important employee according to Mr O'Shea) and not because of any personal qualities or domestic or other reason (causa sine qua non). But in the same way that the Trustee would have awarded a bonus to other employees because of meritorious service, the same is true for MC (causa causans).

(9) MC had clearly built up the business (along with KC) over a number of years. They were the driving forces behind the business. In 2010 the business, conducted by the company, was

significant and employed eight or nine people. MC had worked extremely hard to achieve this. Prior to incorporation most of the profits had been reinvested, and thereafter, it is clear from the evidence that MC was paid little by way of salary, and although this was made up to a reasonable level by dint of dividends, between 2009 and 2019, his combined salary and dividends averaged around the £40,000 mark and did not exceed £41,000. We think it is a reasonable inference that his combined salary and dividends before then would have been at or around the same levels. This was below the salaries of his contract managers.

(10) Mr Elliott submits that there is no evidence that if the £800,000 had not been paid to MC by way of a loan, it would have been paid to him by way of salary, or other remuneration, by the company. We accept this.

(11) But it is precisely because MC has been "under rewarded" that the Trustee considered that MC should be granted a loan which the Trustee knew would be introduced into the company in a form which MC could access without payment of tax.

55. There is no direct primary evidence in the form of oral evidence from a then current trustee, or contemporaneous trustee minutes, that the foregoing matters were actually taken into account by the Trustee when exercising its discretion. But we are satisfied that it is more likely than not, based on the primary facts, that the reason why the Trustee made the Loan to MC was because of the services that he had provided to the company, and the Loan was a reward for those services.

Conclusion

56. We have found that it was inevitable, at the time at which the Payment was made by the company to the EBT, that it would be paid by the Trustee to MC by way of the Loan. We have also found that it was more likely than not that the Loan was paid to MC as a reward for the services which he had provided to the company. In our view there is no legal principle which prevents a genuine money loan on commercial terms with a real repayment obligation from being a reward or benefit.

57. In these circumstances is our view that the Payment, therefore, was paid by the company as a reward for the services supplied by MC to the company. It therefore comprises earnings and thus taxable as asserted by HMRC.

Baxendale Walker cases

58. Mr Elliott submits that we should follow the *Baxendale Walker cases* as a matter of comity. In other words, although these decisions are not binding on us, the convention is that we should follow the decisions of another judge of the same level unless we are satisfied that the decision or the reasoning which led to it is wrong.

59. As far as *Marlborough* is concerned, the main issue which Judge Morgan had to decide was whether the payments made to the director constituted earnings or a distribution, and she concluded that it was the latter. Mr Elliott makes no such submission in this case.

60. As regards *Strategic Branding* and *CIA*, both of which are under appeal, the issues are more aligned with those in this appeal, and we agree with Mr Elliott that the facts in those cases are "worse" as far as a taxpayer is concerned, than those in this appeal. We have to say however, with the greatest respect to Judge Zaman, we would have come to a different conclusion on

those facts than she reached in those cases based on the reasoning that we have set out in this decision.

61. By parity of reasoning, it is our view that the substantial reason why payments were made to the trusts in the *Baxendale Walker cases* was to enable the trustees to pay the loans to the relevant individuals. Those loans were legally capable of being a reward or benefit, and we consider that the reason for those loans was to reward the relevant individuals for services supplied to their respective companies.

Double taxation

62. Mr Elliott submits that as a consequence of this finding, there will be double taxation which is, according to Lord Hodge "remarkable".

63. There will only be double taxation to the extent that the EBT fund, having been taxed on the way in (in accordance with this decision) may also be taxable when it is applied to bonuses made to the employees. There will be tax, in accordance with these principles, paid by the company on behalf of those employees. If our decision is correct, then the tax paid by the company on the Payment will be paid (other than employers NICs) on behalf of MC.

64. Furthermore, the company may be in a worse position than had it retained the funds and paid the bonuses direct, since in those circumstances it would clearly get a tax deduction for the bonus payments which it does not appear to be getting by dint of the Payment to the EBT, nor when payments of bonuses are made to the employees.

65. But these situations are wholly insufficient to dissuade us that our analysis is incorrect. They are simply a consequence of the arrangements that have been put in place by the appellant. We have found that the Payment should be treated as redirected earnings (in shorthand) and taxed accordingly. Whatever other tax consequences flow from that are not something which affects our conclusion.

DECISION

66. We dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 12th JULY 2023

APPENDIX

RELEVANT LEGISLATION

1. Section 6 Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**") (and statutory references set out in paragraphs 2-9 below are to references in ITEPA unless otherwise stated) charges tax on "employment income", which includes general earnings:

> "Section 6 – Nature of charge to tax on employment income
>
> (1) The charge to tax on employment income under this Part is a charge to tax on—
>
> (a) general earnings…".

2. Pursuant to section 7(3)(a), general earnings include earnings within Chapter 1 of Part 3:

> "Section 7 – Meaning of "employment income", "general earnings" and "specific employment income".
>
> (1) This section gives the meaning for the purposes of the Tax Acts of "employment income", "general earnings" and "specific employment income".
>
> …
>
> (3) General earnings" means—
>
> (a) earnings within Chapter 1 of Part 3…" .

3. Chapter 1 of Part 3 consists of section 62 which defines "earnings" for the purposes of calculating employment income:

> "Section 62 - Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> (3) For the purposes of subsection (2) "money's worth" means something that is—
>
> (a) of direct monetary value to the employee, or
>
> (b) capable of being converted into money or something of direct monetary value to the employee.
>
> …"

4. Pursuant to section 9, the amount of employment income which is charged to tax in the case of general earnings is the net taxable earnings:

"Section 9 – Amount of employment income charged to tax.

(1) The amount of employment income which is charged to tax under this Part for a particular tax year is as follows.

(2) In the case of general earnings, the amount charged is the net taxable earnings from an employment in the year.

(3) That amount is calculated under section 11 by reference to any taxable earnings from the employment in the year (see section 10(2)).

…".

5. Section 11 provides that the net taxable earnings consist of the taxable earnings less certain allowable deductions:

"Section 11 – Calculation of "net taxable earnings".

(1) For the purposes of this Part the "net taxable earnings" from an employment in a tax year are given by the formula—

TE − DE

where—

TE means the total amount of any taxable earnings from the employment in the tax year, and

DE means the total amount of any deductions allowed from those earnings under provisions listed in section 327(3) to (5) (deductions from earnings: general).

…".

6. Pursuant to sections 10(2) and 15(2), taxable earnings consist of general earnings.

"Section 10 – Meaning of "taxable earnings" and "taxable specific income."

(1) This section explains what is meant by "taxable earnings" and "taxable specific income" in the employment income Parts.

(2) "Taxable earnings" from an employment in a tax year are to be determined in accordance with Chapters 4 and 5 of this Part.

…".

Section 15 – Earnings for year when employee resident, ordinarily resident and domiciled in UK.

(1) This section applies to general earnings for a tax year in which the employee is resident, ordinarily resident and domiciled in the United Kingdom.

(2) The full amount of any general earnings within subsection (1) which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

…".

7. Pursuant to section 13, the person liable for any tax in relation to general earnings is the person to whose employment the earnings relate:

"Section 13 – Person liable for tax

(1) The person liable for any tax on employment income under this Part is the taxable person mentioned in subsection (2) or (3). This is subject to subsection (4).

(2) If the tax is on general earnings, "the taxable person" is the person to whose employment the earnings relate.

…".

8. In summary (and so far, as is relevant to the present appeal), a person is liable to tax in relation to their general earnings, which includes "earnings" as defined in section 62 ITEPA 2003.

PAYE

9. Section 683 provides that "PAYE income" includes 'taxable earnings":

"Section 683 – PAYE income

(1) For the purposes of this Act and any other enactment (whenever passed) "PAYE income" for a tax year consists of—

(a) any PAYE employment income for the year,

(b) any PAYE pension income for the year, and

(c) any PAYE social security income for the year.

(2) "PAYE employment income" for a tax year means income which consists of—

(a) any taxable earnings from an employment in the year (determined in accordance with section 10(2)), and

(b) any taxable specific income from an employment for the year (determined in accordance with section 10(3))".

10. Pursuant to regulations 4 and 21 of the Income Tax (Pay As You Earn) Regulations 2003, an employer is obliged to deduct tax by reference to the employee's code on the making of a relevant payment, which means payments of PAYE income (less pension contributions and allowable donations to charity):

"Regulation 3 — Net PAYE income

(1) "Net PAYE income" means PAYE income less any–

(a) allowable pension contributions, and

(b) allowable donations to charity.

Regulation 4 — Relevant payments

(1) In these Regulations, any reference (however expressed) to relevant payments means payments of, or on account of, net PAYE income…".

Regulation 21 — Deduction and repayment of tax by reference to employee's code

(1) On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employee's code, if the employer has one for the employee. (2) The employer must deduct or repay tax by reference to the employee's code, even if the code is the subject of an objection or appeal".

11. Regulation 68 provides a formula for calculating the amount that the employer must pay to HMRC, which includes taking account of the total amount of tax which the employer is liable to deduct from relevant payments:

"Regulation 68 — Periodic payments to and recoveries from the Revenue

(1) This regulation applies to determine how much an employer must pay or can recover for a tax period.

(2) If A exceeds B, the employer must pay the excess to the Inland Revenue.

(3) But if B exceeds A, the employer may recover the excess either–

(a) by deducting it from the amount which the employer is liable to pay under paragraph (2) for a later tax period in the tax year, or

(b) from the Board of Inland Revenue.

(4) In this Regulation–

A is–

(a) the total amount of tax which the employer was liable to deduct from relevant payments made by the employer in the tax period, plus

(b) the total amount of tax for which the employer was liable to account in respect of notional payments made [or treated by virtue of a retrospective tax provision as made,]1 by the employer in that period under regulation 62(5) (notional payments);

B is the total amount which the employer was liable to repay in the tax period".

12. If the employer fails to pay tax under regulation 68, HMRC may determine the amount of that tax:

"Regulation 80 — Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 68 by an employer which has neither been–

(a) paid to the Inland Revenue, nor

(b) certified by the Inland Revenue under regulation 76, 77, 78 or 79.

(2) HMRC may determine the amount of that tax to the best of their judgment and serve notice of their determination on the employer.

…

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if–

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer, and those Parts of that Act apply accordingly with any necessary modifications".

NICs

13. Primary and Secondary Class 1 NICs are payable on "earnings" paid to or for the benefit of an "earner" pursuant to sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 ("**SSCBA 1992**"):

"Section 6 — Liability for Class 1 contributions

(1) Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment—

(a) a primary Class 1 contribution shall be payable in accordance with this section and section 8 below if the amount paid exceeds the current primary threshold (or the prescribed equivalent); and

(b) a secondary Class 1 contribution shall be payable in accordance with this section and section 9 below if the amount paid exceeds the current secondary threshold (or the prescribed equivalent).

…

Section 7 — "Secondary contributor".

(1) For the purposes of this Act, the "secondary contributor" in relation to any payment of earnings to or for the benefit of an employed earner, is—

(a) in the case of an earner employed under a contract of service, his employer;"

14. Pursuant to section 3 SSCBA 1992, "earnings" include any remuneration or profit derived from employment:

"Section 3— "Earnings" and "earner"

(1) In this Part of this Act and Parts II to V below—

(a) "earnings" includes any remuneration or profit derived from an employment; and

(b) "earner" shall be construed accordingly.

…".

15. Regulation 67 of the Social Security (Contributions) Regulations 2001 provides that earnings-related contributions are accounted for and recovered under the PAYE regime:

"Regulation 67 — Collection and recovery of earnings-related contributions, and Class 1B contributions

(1) Subject to the provisions of regulations 68 and 70, earnings-related contributions and Class 1B contributions shall be paid, accounted for and recovered in like manner as income tax deducted from the general earnings from an office or employment by virtue of regulations under section 684 of ITEPA 2003 (PAYE Regulations).

…".

16. Pursuant to section 8(1)(c) Social Security Contributions (Transfer of Functions, etc.) Act 1999, HMRC may decide whether a person is liable to pay NICs:

"Section 8 — Decisions by officers of Board

(1) Subject to the provisions of this Part, it shall be for an officer of the Board…

(c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,

…".