[2017] UKFTT 559 (TC)

TC06001

Appeal number: TC/2015/05108

Income tax – Seafarers' Earnings Deduction – Whether Appellant's vessel was an offshore installation – Unilateral relief for income tax paid in the Republic of the Congo – Whether Appellant or Appellant's employer had paid Congolese income tax

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT LOCKHART **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR IAN SHEARER

Sitting in public at Glasgow on 9 January 2017

The Appellant in person

Mr Matthew Mason for the Respondents

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DECISION

Introduction

1. The Appellant appeals against assessments to tax made pursuant to s 29 of the Taxes Management Act 1970 ("TMA"), in respect of tax years 2010-11 and 2011-12.

2. The Appellant's notice of appeal includes an application for permission to make a late appeal. HMRC state that they have no objection to this application being granted, and the Tribunal gives the requested permission.

Background facts

3. The Appellant has been employed by Maersk since 2008. From May 2008 until late 2011/early 2012 he was assigned to the Nkossa II, a Bahamian registered vessel located in waters at Pointe-Noire in the Republic of the Congo. Following this he was assigned to the Maersk Battler, a Danish registered vessel, from 17 February 2012 until at least the end of that tax year.

4. In his self-assessment tax returns for 2010-11 and 2011-12, the Appellant claimed Seafarer's Earnings Deduction ("SED") in respect of his earnings working on both the Nkossa II and the Maersk Battler. SED provides a 100% deduction from the relevant employment earnings.

5. On 4 February 2014, HMRC opened an enquiry into the Appellant's 2011-12 tax return. This was subsequently expanded to other tax years. There followed a series of correspondence between HMRC and the Appellant's agent. On 22 December 2014, HMRC issued the challenged assessments for the 2010-11 and 2011-12 tax years, the effect of which was to deny the claims for SED for those years. HMRC state that although the Appellant had also claimed SED in previous years for his employment on the Nkossa II, assessments for earlier years would have been out of time.

6. The Appellant appealed to HMRC against the assessments, and also provided certain additional information to HMRC. This led to revised assessments for the 2011-12 tax year. An HMRC review decision dated 2 July 2015 otherwise upheld both challenged assessments. In August 2015, the Appellant brought the present appeal before the Tribunal.

7. HMRC now accept that the Appellant is entitled to SED in respect of his employment on the Maersk Battler, and that he would in any event be entitled to double taxation relief under a double taxation agreement between Denmark and the United Kingdom. This appeal is therefore no longer concerned with that period of employment.

8. However, HMRC contend that the Appellant is not entitled to SED in respect of his employment on the Nkossa II. The Appellant contends that he is. That issue is the primary issue in this appeal.

9. There is a further issue arising from this period of employment. While working on the Nkossa II, the Appellant was required to pay income tax in the Republic of the Congo. There is no double taxation agreement between the United Kingdom and the Republic of the Congo, but HMRC accept that tax on the income of individuals is admissible for unilateral relief, even in the absence of such an agreement. However, HMRC contend that the Appellant is not entitled to such unilateral relief, on the basis that the amount of the Appellant's Congolese income tax was paid to the tax authorities in that country by the Appellant's employer directly, in addition to the amounts paid to by the employer to the Appellant. The Appellant disputes this.

Applicable legislation

10. Section 384 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides:

> **384 Meaning of employment "as a seafarer"**
>
> (1) In this Chapter employment *"as a seafarer"* means an employment (other than Crown employment) consisting of the performance of duties on a ship or of such duties and others incidental to them.
>
> (2) In this section *"Crown employment"* means employment under the Crown—
>
> (a) which is of a public nature, and
>
> (b) the earnings from which are payable out of the public revenue of the United Kingdom or of Northern Ireland.

11. Section 385 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides:

> **385 Meaning of "ship"**
>
> In this Chapter *"ship"* does not include an offshore installation.

12. Section 1001 of the Income Tax Act 2007 ("ITA 2007") provides:

> **1001 Meaning of "offshore installation"**
>
> (1) In the Income Tax Acts *"offshore installation"* means a structure which is, is to be, or has been, put to a relevant use while in water (see subsections (3) and (4)).
>
> (2) But a structure is not an offshore installation if–
>
> (a) it has permanently ceased to be put to a relevant use,
>
> (b) it is not, and is not to be, put to any other relevant use, and
>
> (c) since permanently ceasing to be put to a relevant use, it has been put to a use which is not relevant.
>
> (3) A use is a relevant use if it is–
>
> (a) for the purposes of exploiting mineral resources by means of a well,

(b) for the purposes of exploration with a view to exploiting mineral resources by means of a well,

(c) for the storage of gas in or under the shore or the bed of any waters,

(d) for the recovery of gas so stored,

(e) for the conveyance of things by means of a pipe, or

(f) mainly for the provision of accommodation for individuals who work on or from a structure which is, is to be, or has been, put to any of the above uses while in water.

(4) For the purposes of this section references to a structure being put to a use while in water are to the structure being put to a use while–

(a) standing in any waters,

(b) stationed (by whatever means) in any waters, or

(c) standing on the foreshore or other land intermittently covered with water.

(5) In this section *"structure"* includes a ship or other vessel.

13. Section 686(1) ITEPA relevantly provides:

686 Meaning of *"payment"*

(1) For the purposes of PAYE regulations, a payment of, or on account of, PAYE income of a person is treated as made at the earliest of the following times—

Rule 1

The time when the payment is made.

Rule 2

The time when the person becomes entitled to the payment. …

14. Section 29 TMA relevantly provides:

29 Assessment where loss of tax discovered.

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income … which ought to have been assessed to income tax … have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax. …

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

15. Section 36(1) TMA provides:

> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

16. Section 50(6) TMA provides:

> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment; …
>
> or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

The documentary evidence

17. The documentary evidence relevant to the two issues in this appeal includes the following.

18. A document issued by The Maersk Company Ltd, dated 29 September 2010, states that from 18 August 2010 to 29 September 2010, the Appellant worked on the "FGSO Nkossa II" as a "cargo engineer officer".

19. A document issued by Maersk Crewing Ltd, dated 6 December 2011, gives certain details of the Appellant's employment by Maersk between 15 February 2008 and 19 January 2012. This indicates that during specified periods between 14 May 2008 and 19 January 2012, the Appellant was working on the Nkossa II, from 14 May 2008 to 27 May 2008 as a "supernumerary", and thereafter as a "gas engineer". The letter confirms that "whilst onboard, the officer carried out watch keeping duties of 8 hours each day".

20. A certificate dated 7 June 2012, issued by the Ministry of Finance, the Budget and the Public Purse of the Republic of Congo, certifies as follows: "la société GAS MANAGEMENT (CONGO) LTD, s'est acquittée pour le compte de Monsieur Robert LOCKHART, de l'impôt sur le revenu des personnes physiques au titre de l'exercice de 2011 pour un montant global de … [2,783,634] francs CFA". At the hearing, HMRC produced an English translation of this certificate, which rendered this text as meaning: "the company GAS MANAGEMENT (CONGO) LTD, was acquitted on behalf of Sir Robert Lockhart, the income tax of individuals under the 2011 financial year amounting comprehensive … [2,783,634] CFA". A better translation of the words "s'est acquittée pour le compte de Monsieur Robert LOCKHART" might in fact be "paid on behalf of Mr Robert Lockhart". From HMRC's submissions, the Tribunal understands that HMRC accepts that the sense of this document is that Gas Management (Congo) Ltd paid the Congolese tax on the Appellant's behalf. It is not entirely clear what was the relationship between Gas Management (Congo) Ltd and

the Appellant's employer. The Appellant said at the hearing that this was a company to which Maersk outsourced various services. HMRC appears to accept that in paying any such amounts to the Congolese authorities on behalf of the Appellant, this company acted for or on behalf of the Appellant's employer.

21. There are similar certificates to that referred to in the previous paragraph, in respect of Congolese tax years 2008, 2009 and 2010.

22. Payslips for the Appellant for June 2009, and for the period April 2011 to January 2012, refer to the Appellant as a "gas engineer", to the vessel as "Nkossa", and describe the vessel type as "floating gas storage unit C".

23. A document dated 1 October 2009 issued by Bureau Veritas describes the Nkossa II as a "Floating storage unit".

24. A contract of employment dated 15 February 2008 provides that the Appellant is employed as a Third Engineer on Maersk vessels, and that he was "required to serve in any vessel in a capacity for which you are experienced or qualified and agree to transfer between vessels as may be required by the company".

25. An undated "Factsheet" entitled "N'Kossa II", apparently produced by Maersk FPSOs, states that the Nkossa II was converted to an FPSO in 1996 and that "Nkossa II is moored in the N'Kossa field 50 kilometres southwest of Djeno, Congo". A section of this document describes the mooring of the ship, and says that it has a swivel stack in its turret "enabling the FGSO to freely weathervane around the geostationary part of the turret under all conditions".

26. An extract from a "Sustainability Report 2011", apparently produced by Maersk FPSOs, gives details of the company's FPSOs, including the Nkossa II. It states that an FPSO vessel "is designed to receive hydrocarbons produced from nearby platforms or subsea templates, process them, and store oil until it can be offloaded onto a tanker". It states that the Nkossa II "is located off the coast of Congo".

27. A printout from the lloydslistintelligence.com website indicates that the Nkossa II arrived at the N'Kossa terminal in the Republic of the Congo on about 1 November 1996, that it did not leave until some time "before 31/03/13", and was then back at the N'Kossa terminal on 31 March 2013. It states that in the period from 1996 to 2013, it was "being used as floating production storage offloading vessel".

The Appellant's oral evidence

28. At the hearing, the Appellant appeared in person. He said in his evidence amongst other matters as follows.

29. He considers that HMRC are harassing him and his wife. He has given HMRC every piece of information they have requested, and has not tried to hide anything. He has used a reputable accountant and has done nothing wrong. While working in the Republic of the Congo he paid tax there, and he cannot pay tax twice. For 3 to 4 years HMRC accepted his claims, and then suddenly shifted the goalposts.

30. The Nkossa II was originally a gas tanker. In 1996 it was taken to Pointe-Noire as a gas storage tanker. At Pointe-Noire, gas was extracted from the earth by an oil rig. The gas was then transferred by pipeline to a barge, and then by pipeline to the Nkossa II. In bad weather the pipeline would be disconnected for safety reasons. It arrived on the Nkossa II in the form of gas, and then on the Nkossa II it was liquefied and stored. From the Nkossa II, it was then subsequently transferred to other ships.

31. The Nkossa II is a ship of a gas tanker design, and has one propeller. It can travel under its own power, at a speed of about 1 knot. It stayed within the same local area, but manoeuvred to a degree depending on the weather. It never sailed into port. The anchor was lifted for repair.

32. The ship had about 36-38 mainly British officers and Congolese personnel. There were 12 officers, 6 per shift. The Appellant's job included responsibility for the valves for releasing pressure in the gas tanks. He was a seaman not an oil worker, and if he had been an oil worker he would have been paid much more.

33. The Appellant worked on the ship from 2008 to 2011. The whole time he claimed SED and the crew were advised that they were entitled to do so. For years HMRC accepted this, then at one point they disputed it. Around November 2015, the Appellant had a conversation with an officer at HMRC who said that there were two others in the same position as him against whom HMRC had dropped the matter, and that the matter might be dropped against the Appellant also. Since the Appellant ceased working for the company, the company has now accepted the HMRC position, and UK workers on the ship now pay UK tax and have been given a 12.5% pay increase.

34. In about 2010, the captain of the Nkossa II had given a talk to the crew on board the ship. The captain said that there was a "grey area" under UK tax law as to whether the Nkossa II was an offshore installation, but that at the time the Appellant was entitled to SED. The Appellant was not entirely reassured by this, so he raised the matter with HMRC in the UK. HMRC told him that he was entitled to SED in respect of his earnings on the Nkossa II. (In a letter dated 2 October 2015 included within the bundle, the Appellant's agent stated that he had also checked the position with HMRC in November 2010 at the request of the Appellant, and had likewise been informed that the Nkossa II was not on HMRC's "restricted list" (i.e. that earnings on board were entitled to SED)).

35. The Appellant paid the Congolese tax to the shore-based company manager annually, by traveller's cheques. The company then paid the tax to the local Congolese authorities, and received a letter from the Congolese authorities confirming that the tax had been paid. The tax was paid out of the Appellant's earnings. The amount was different, but similar, each year.

The Appellant's case

36. The Appellant's grounds of appeal state as follows:

> A) The Congo tax appears to have been added to [the Appellant's] salary, when he claims to have paid it himself.
>
> B) Your treatment of the 5 days from 1-5 April 2012 does not appear consistent with normal practice or figures on P60's.
>
> C) [The Appellant] claims to have spoken to HMRC in Glasgow regarding the status of NKossa II and was informed that it was not listed as a restricted vessel.
>
> D) Our question regarding the open tax returns, once an enquiry has commenced it would appear that all the returns are rendered in time from the date of commencement until resolution.

37. The Appellant's submissions are otherwise set out above.

The HMRC case

38. The HMRC case presented at the hearing was as follows.

39. Not only sailors but anyone whose work is carried out on ships, such as cooks, entertainers and couriers, would qualify as a seafarer under s 384 ITEPA. It does not matter if some of the duties are not performed on board as long as they are incidental to those that are. However, work on an "offshore installation" does not qualify.

40. To be an "offshore installation" a structure must be standing or stationed in waters (or on the foreshore or certain other land which water covers intermittently). Offshore installations include fixed and floating production platforms, floating production, storage and offloading vessels ("FPSO"s), floating storage units, mobile drilling rigs, drill ships and floating accommodation units.

41. Information on the Maersk internet site and information provided by the Lloyds Register of Ships shows that the Nkossa II was once an LPG tanker (then known as the Inger Maersk) and that in September 1996 it was converted to an FPSO, and that at that time it was renamed the Nkossa II and its flag state was changed to the Bahamas. Since 1 November 1996 the Nkossa II has been positioned as an FPSO at the N'Kossa terminal in the Republic of the Congo. For UK tax purposes it is an "offshore installation", and the Appellant is therefore not entitled to claim SED in respect of his earnings while working on this vessel. Reliance was placed on *Gouldson v HMRC* [2011] UKUT 238 (TCC) and *Torr & Ors v Revenue & Customs* [2008] UKSPC SPC00679.

42. HMRC accept that the Appellant is entitled to SED from 17 February 2012, when he began working on the Maersk Battler. He can thus claim SED pro rata for his earnings in February 2012, and in respect of the whole of his earnings in March 2012. The Appellant is not entitled to SED in respect of his earnings for work undertaken from 1-5 April 2012, the last days of that tax year. This is because he was only paid for that work at the end of April 2012, such that his earnings for those days' work were received by him as income in the 2012-13 tax year: reliance was placed on s 686(1) ITEPA.

43. There is no double taxation agreement between the UK and the Republic of the Congo. However, tax on the income of individuals is subject to unilateral relief. The certificates issued by the Congolese tax authorities indicate that the tax in that country was paid by the Appellant's employer on his behalf. A letter from the Appellant's agent dated 17 May 2014 states that his employer "paid tax for all sea staff whilst in African waters". It should be inferred that the Appellant's employer handled tax for the Appellant under the Congolese PAYE system, and that the payslips produced to the Appellant represent net pay. Alternatively, if the employer paid the Congolese tax for the Appellant, this would be a benefit in kind which would be chargeable to tax under s 62 ITEPA. In this case there would be no foreign tax credit relief available to the Appellant as he would not have paid the taxes out of his own emoluments.

44. HMRC have no record of a telephone conversation in which the Appellant was advised that he was entitled to SED in respect of his employment on the Nkossa II. It would not be normal practice for HMRC to give such advice on the telephone as additional research would be required. HMRC likewise have no record of any similar conversation in 2010 by the Appellant's agent with HMRC, and HMRC would not in any event have given such advice to the agent.

45. HMRC has not charged a penalty in this case and has treated the case as a mistake despite taking reasonable care.

46. HMRC "discovered" that the Appellant's self-assessment tax returns for 2010-11 and 2011-12 were insufficient within the meaning of s 29(1) TMA: reliance was placed on *Hankinson v HM Revenue and Customs* [2011] EWCA Civ 1566. The assessments were made within the statutory time limit in s 36 TMA.

47. The onus of proof is on the Appellant to bring evidence and facts to support his appeals. The effect of s 50(6) TMA is that the assessments shall stand good unless the Appellant is able to produce evidence to show that he has been overcharged by such assessments.

48. In its written post-hearing submissions, HMRC submitted as follows.

49. The Appellant is liable to UK tax on his earnings while working on the Nkossa II, a Bahamian registered vessel operating in the Republic of the Congo, on the basis that he is considered to have been UK resident during the period in question. The Appellant is not entitled to double taxation relief under the UK/Denmark double taxation agreement for the period that he worked on the Nkossa II, as the Nkossa II was not registered in Denmark. HMRC contend that the Nkossa II was a vessel "for the storage of gas in or under the shore or the bed of any waters" within the meaning of s 1001(3)(c) ITA 2007. It is "a floating production storage and offloading vessel ('FPSO') and has been for some time and is specifically excluded from being a ship".

50. HMRC have no record of a call by the Appellant to HMRC in 2010, seeking advice/confirmation of his SED status. They have a record of a call to HMRC on 4 September 2014, in which the Appellant stated that "he had telephoned HMRC about four years ago and discussed with an officer the Nkossa II and was told it was OK",

and in which HMRC responded that "at the time the Nkossa and the N'Kossa II were both FPSOs and this was well known and has been for some time". The Appellant has not sufficiently established by evidence circumstances that could give rise to a legitimate expectation on the part of the Appellant.

51. In his written post-hearing submissions, the Appellant submitted that although the Nkossa II flies a Bahamas flag, in many portions of legislation the ultimate test is the ownership of the vessel. The Appellant was entitled to rely on what he was told by the HMRC official in the circumstances, and a case relied on by HMRC is not comparable.

The Tribunal's findings

52. The Tribunal must make findings of fact on the basis of the evidence before it, applying the standard of proof of a balance of probabilities.

53. The evidence is clear and consistent that at the time that the Appellant was working on the Nkossa II, it was used to receive gas extracted by a nearby rig, and then to liquefy and store that gas until it was offloaded onto another ship for transport. The Appellant's own evidence confirms this.

54. The Tribunal accepts that it appears that the Nkossa II is capable of travelling under its own steam. The lloydslistintelligence.com document refers to it having a speed of 1 knot, and the Appellant also said this in his evidence. However, the Tribunal finds on the evidence that in the period in which the Appellant worked on the ship, it was stationary in a fixed location. The lloydslistintelligence.com document indicates that it did not move from the N'Kossa terminal between 1996 and 2013. The "Factsheet" refers to the Nkossa II as being "moored in the N'Kossa field", and refers to its turret as being "geostationary", suggesting that it remained in this period in one fixed place. The Appellant said in his evidence that the ship manoeuvred to a degree depending on the weather, but the Tribunal is not satisfied that the ship did more than weathervane around the geostationary turret, as described in the factsheet. In any event, in *Gouldson* at [14] it was held that "'stationed' does not require a vessel to be fixed rigidly in one immoveable position, but allows of minor movement in relation to a fixed point", and in *Torr* at [50] it was held to be sufficient that a ship is "substantially stationary". On the evidence, the Tribunal finds that at the times material to this appeal, the Nkossa II was either "standing" or "stationed" in the waters of the N'Kossa field within the meaning of s 1001(4) ITA 2007.

55. HMRC was specifically asked to identify the provisions of s 1001(3) ITA 2007 on which they rely. HMRC confirmed that their case is that the Nkossa II was being used "for the storage of gas in or under the shore or the bed of any waters" within the meaning of s 1001(3)(c). The Tribunal has doubts that this can be correct. HMRC have not pointed to any statutory definitions of the terms used in this provision, or any case law dealing with their interpretation. The word "shore", on its ordinary meaning, refers to the land at the edge of a body of water. Gas stored on the Nkossa II was clearly not being stored in or under the land adjacent to the sea. Furthermore, gas

being stored on a ship floating on the top of the sea is not being stored in or under the seabed, which is at the bottom of the water.

56. However, the Tribunal raised with the parties at the hearing the question whether the Nkossa II was being used "for the purposes of exploiting mineral resources by means of a well" within the meaning of s 1001(3)(a) ITA 2007.

57. *Gouldson* was concerned with a different statutory provision to s 1001 of the ITA 2007, but which was in materially similar terms (see *Gouldson* at [5]-[6]). In that case at [15], the Upper Tribunal held that the objective of the provisions restricting the availability of SED "is to deny relief to those who are working on essentially fixed installations used, *directly or indirectly*, for mineral exploitation" (emphasis added), and that "The use of the phrase 'is, is to be, or has been' makes it clear that an immediate temporal connection with mineral exploitation is unnecessary: the plain purpose of the legislation is to bring within the net of the exclusion any structure with a connection to such exploitation".

58. On the evidence, the gas stored on the Nkossa II was extracted from a nearby well in the N'Kossa field. The sole purpose of the Nkossa II was to receive, process and store such gas until it could be offloaded to another ship for transport. A document from the onepetro.org website included in the bundle refers to floating storage/offshore units, including specifically the Nkossa II, as "an established alternative to piping product ashore". The "Sustainability Report 2011" states that FPSOs are used in "frontier offshore regions" as they "do not require a local pipeline infrastructure to export oil". The Tribunal considers that the act of "exploiting mineral resources by means of a well" does not end at the well-head, and that this expression includes the further infrastructure and processing that gets the mineral resources from the well head to the point that it is loaded onto a ship for transport away from the field in which the well is located.

59. Such a reading of s 1001(3)(a) does not render redundant the wording of s 1001(3)(e) ("for the conveyance of things by means of a pipe"). Section 1001(3)(e) would apply to a structure which is for the conveyance of things by means of a pipe, regardless of whether or not it has anything at all to do with exploiting mineral resources by means of a well. In cases where there is a structure for the purposes of exploiting mineral resources by means of a well, and where its use involves or includes conveying things by means of a pipe, there may be a certain overlap between s 1001(3)(a) and (e). However, the two provisions do not overlap completely in such a way that one makes the other redundant.

60. On the evidence before it, the Tribunal therefore finds that by virtue of s 1001(1) and (3)(a) ITA 2007, the Nkossa II was at times material to this appeal an offshore installation, and therefore not a ship for purposes of ss 384-385 ITEPA. The Appellant is accordingly not entitled to SED in respect of his earnings while working on the Nkossa II.

61. According to the Appellant's own evidence, in 2010 he was aware that it was at least questionable whether he was entitled to SED in respect of his time on the

Nkossa II. He says that his captain informed him that it was a “grey area”, and the Appellant himself says he subsequently called HMRC to confirm the position.

62. A major concern of the Appellant appears to be the way in which he says he has been treated by HMRC. According to his evidence, although he was aware in 2010 that this was a “grey area”, his captain told him at the time that he would be entitled to claim SED, and HMRC confirmed to him in a telephone conversation that this was the case. His evidence suggests that HMRC subsequently had a change of heart, and that UK residents on the Nkossa II now pay UK tax and have received a pay rise to compensate for this. However, the Appellant considers that others who claimed SED prior to this change of heart by HMRC are not being pursued by HMRC retrospectively in the way that he is. The Appellant feels that HMRC have shifted the goalposts and are now harassing him.

63. Unfortunately for the Appellant, this Tribunal only has jurisdiction to determine the correct application of the tax law to the facts and circumstances of his case. In respect of SED, it has done this in paragraphs 52-60 above. The Tribunal has no general jurisdiction to deal with complaints about the conduct of HMRC. In any event, on the evidence before it, the Tribunal is not able to find that HMRC gave any assurance to the Appellant that he would be entitled to SED, or that HMRC have allowed others in relevantly comparable circumstances to the Appellant to claim SED. The oral evidence given by the Appellant in relation to these matters has not been sufficiently precise or detailed, and HMRC say that they have no record of the claimed conversations with him and his agent. (In fact, an HMRC file note indicates that on 2 October 2014, it was the Appellant himself who informed an HMRC officer in a telephone conversation that two other colleagues on the Nkossa II had successfully submitted SED claims, and that the HMRC officer had responded that “not all returns are checked/enquiries”.) If the Appellant feels that he has a legitimate complaint in relation to the way he has been treated by HMRC, he will need to raise this through a different avenue.

64. In his post-hearing written submissions, the Appellant has additionally claimed that the flag State of the Nkossa II should not be conclusive as to whether or not the UK-Danish double taxation agreement applies. The suggestion is that the Appellant should be entitled to relief under that agreement, even though the Nkossa II was registered in the Bahamas rather than Denmark. However, the Appellant has presented no developed arguments or evidence in this respect. From an initial look at that treaty, it does indeed appear that the flag state of the vessel would not have been decisive to its application. It would seem from its Article 15(4) that the Appellant’s pay for his work aboard the Nkossa II would not have been subject to UK income tax if the company “operating the ship” was resident in Denmark, and if the Appellant’s remuneration was subject to income tax in Denmark. However, apart from anything else, there was no evidence or argument that the Appellant’s pay was subject to income tax in Denmark. There was also no evidence that the particular company “operating the ship” at the time was resident in Denmark, it being noted that even if the vessel was at the time operated by Maersk (which is in fact unclear, given that it is said to have been “on charter” to Total), that would not mean that it was necessarily

operated by the Maersk parent company, as opposed to a subsidiary company that may or may not have been resident in Denmark.

65. The Tribunal is also satisfied that HMRC, for purposes of s 29 TMA, made a "discovery" that the Appellant was not entitled to SED in relation to his employment on the Nkossa II. His 2011-12 tax return indicated in the white space that he worked that year on the Maersk Traveller, and did not mention the Nkossa II. His 2010-11 tax return stated that he was working on the "NK0SSA11". However, even if this was sufficient identification of the ship, it did not describe the nature of the ship or the use to which it was being put at the time. For purposes of TMA s 29(5) and (6), the question is not whether the inspector would have been aware that there had been an understatement of tax if the inspector had undertaken his or her own investigations into the use to which the Nkossa II was being put, but whether the inspector would have been aware of the understatement of tax from the information contained in the return itself. The inspector would not have been.

66. The Tribunal is further satisfied that HMRC were correct not to allow SED to be claimed in the Appellant's 2011-12 tax return in respect of his earnings for work undertaken in the period 1-5 April 2012, at the time he was working on the Maersk Battler. The Appellant's contract of employment states that he is paid monthly in arrears. His earnings for the period 1-5 April 2012 would thus have been paid at or after the end of April, which was after the 2011-12 tax year had already ended. Any SED in respect of the period 1-5 April 2012 would have fallen to be claimed in the Appellant's 2012-13 tax return.

67. As to the tax paid on the Appellant's behalf to the tax authorities of the Republic of the Congo, the Tribunal finds as follows.

68. A letter from the Appellant's agent to HMRC dated 17 May 2014 states that "Whilst working on Nkossa II, Mr Lockhart was on charter to 'Total' who paid tax for all sea staff whilst in African waters". A letter from the Appellant's agent to HMRC dated 2 October 2015 states that "Mr Lockhart's company Total, pay £4,000 per year local tax in the Congo. We had been under the impression that the Congo tax was paid by Maersk". These letters can be read as suggesting that the tax was not paid by the Appellant himself, but was paid by either Maersk or Total out of the company's own funds.

69. The Appellant's payslips are issued by Maersk, suggesting that whether or not he was "under charter" to Total in this period, Maersk remained his employer and he was paid by Maersk. The payslips show payments made to the Appellant in respect of basic pay, travel day payments, leave pay, pool pay, course pay and uniform allowance. They also show deductions from the Appellant's pay in respect of "pension, own contrib", travel expenses, medical expenses, and "radio account on boa". The Tribunal finds it unlikely that the Appellant's employer would have been deducting Congolese PAYE from the Appellant's pay without this being indicated in the payslips.

70. The Appellant's contract of employment does not contain any provision dealing expressly with liability for local income tax. If the employer was assuming responsibility for paying, in addition to the Appellant's salary, the Appellant's Congolese income tax liability, it would be expected that this would have been included as a term in the contract of employment. It seems unlikely that the employer would pay the Appellant's Congolese income tax liability if the employer was under no contractual obligation to do so. Similarly, if another company (such as Total) was assuming responsibility for payment of the Appellant's Congolese income tax liability, it could be expected that this would also be mentioned in the contract of employment.

71. The Tribunal therefore finds it more likely than not that the Congolese income tax was paid out of the amounts shown in the payslips as having been paid to the Appellant.

72. The Appellant's evidence was that he paid Congolese income tax annually. On the information before it, that appears plausible. There is nothing in the evidence to suggest that a Congolese PAYE scheme existed and would have applied to a person in the circumstances of the Appellant.

73. The Appellant's evidence was that he paid the Congolese tax to a company manager, who then paid this to the Congolese tax authorities, and received the certificate of confirmation.

74. The Tribunal finds it entirely plausible that in circumstances where the Appellant was an expatriate living and working on a ship offshore the Congolese coast, the company he was working for would have undertaken the task of physically getting the payment to the Congolese tax authorities on his behalf. The certificates issued by the Congolese tax authorities indicate that payment was made to them on the Appellant's behalf by Gas Management (Congo) Ltd, and the Tribunal is satisfied that this company, if not itself the Appellant's employer, was acting on behalf of Maersk or Total in physically making this payment on behalf of the Appellant.

75. Considering the evidence as a whole, the Tribunal finds that although the Appellant's employer may have physically got the money to the Congolese tax authorities, payment of the tax was in fact made by the Appellant himself out of his own funds, and that the Appellant's employer did not make any additional payment in respect of Congolese tax above and beyond what it paid the Appellant by way of salary and emoluments.

Conclusion

76. For the reasons above, this appeal is allowed in part, to the extent indicated in paragraph 75 above. The appeal is otherwise dismissed.

77. The assessments will need to be recalculated to give effect to paragraph 75 above. If the parties cannot agree on the correct amount of that recalculation, either party is at liberty to request the Tribunal within 90 days of the date of release of this decision notice to determine the correct amount of the assessments.

78. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2017