[2018] UKFTT 619 (TC)

TC06770

Appeal number: **TC/2014/03430**
TC/2016/02331
TC/2016/06173

INCOME TAX – CAPITAL GAINS TAX – Partnership - Appeal against Amendment to Partnership Return for 2009-2010 – Discovery – attribution of income and turnover to partnership or company – termination payment trading and revenue receipt or non-taxable capital receipt – appeal against amendment to self-assessment return for 2011-2012 – capital gains chargeability - acquisition and disposition of shares – chargeable gain or gift – calculation of gain – joint interest held by Appellant and wife – entrepreneurs relief - Appeal against closure notice and amendment to self-assessment return for 2009-2010

FIRST-TIER TRIBUNAL
TAX CHAMBER

KIERAN LOONEY & ASSOCIATES (PARTNERSHIP) **Appellants**
&
MR KIERAN LOONEY

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
NOEL BARRETT

Sitting in public at Taylor House, London on 16, 17 & 18 July 2018

Nimal Fonseka and R Singh, Senstone Ltd, for the Appellant
Gary Cruddas, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Tribunal heard three appeals.

2. The two Appellants were Mr Kieran Looney and Mr Looney's partnership, Kieran Looney & Associates.

The issues in the appeals

3. There were three primary questions to be determined by the Tribunal within the appeals:

In the partnership appeal

a) was £3 million in income from a contract to provide management training services to a commodities trading company (Trafigura Beheer BV) in 2009 turnover attributable to Mr Looney's partnership (Kieran Looney & Associates) or to his limited company (Kieran Looney and Co. Ltd)?

b) was the termination payment of £1 million under that contract paid in respect of the trade, thus a revenue receipt liable to income tax, or compensation paid to acquire a secret process or intellectual property rights in Mr Looney's training methods, thus a capital receipt or some other form of non-taxable compensation payment?

In the capital gains tax appeal

c) was a payment of US $5 million paid to Mr Looney in January 2012, a gift from a friend or did it represent the proceeds from the sale of Mr Looney's interest in shares in a company holding land in the Caribbean, thus creating a chargeable gain?

4. There are also subsidiary questions to be determined in the capital gains tax appeal: did Mr Looney hold a legal or beneficial interest in the shares? should any chargeable gain be jointly attributed to Mr Looney and his wife? is he entitled to entrepreneurs' relief on any gain? what is the proper method of calculating any gain?

An overview of the appeals

5. The Tribunal heard three appeals of the Appellants against decisions of HMRC, a fourth having been settled by agreement on the morning of the first day of the hearing.

The Partnership Appeal

6. The first appeal is "the Partnership Appeal" – TC/2014/03430 - in which Kieran Looney & Associates ("the KLA Partnership") was the Appellant. While the original appeal also concerned accounting period 31 December 2008 (the tax year 5 April 2008 to 5 April 2009 – "2008-2009") this aspect was settled following agreement reached by the parties on the morning of the first day of the hearing

7. The remaining part of the Partnership Appeal is against a decision of HMRC of 2 January 2014 to amend the partnership return for the accounting period ending 31

December 2009 (tax year 2009-2010) to include £4 million in turnover paid by Trafigura Beheer BV ("Trafigura"). HMRC say the proper treatment is that the money is to be attributed as turnover and income of the partnership. HMRC therefore removed this sum of money paid by Trafigura from the revised accounts of Kieran Looney & Co. Ltd ("the limited company" or "KLCL").

8. HMRC do so on the basis they submit that the payments from Trafigura were attributable to the partnership rather than the limited company and that £1 million of the payment, the termination fee, was a revenue receipt on account of the trade of the partnership and taxable as such rather than a capital payment.

9. HMRC's decision to include £4 million in turnover for the partnership was upheld following an HMRC review on 12 March 2014 which resulted in HMRC amending the net taxable profit of the partnership to be £1,556,743 (later reduced to £1,469,462). As a result, HMRC amended Mr Looney's self-assessment return for 2009-2010 on 2 April 2014 to charge £633,219.88 in Income Tax and National Insurance (later reduced to £597,417.67).

10. HMRC's decision of 12 March 2014 amending the partnership return was appealed by the Appellant to the Tribunal on 20 May 2014.

The Capital Gains Tax Appeal

11. The second appeal is "the Capital Gains Tax Appeal" – TC/2016/02331 - in which Kieran Looney was the Appellant.

12. This is an appeal against HMRC's amendment to Kieran Looney's personal self-assessment return for the tax year 2011-2012 in respect of capital gains tax. On 1 April 2015 HMRC amended Mr Looney's 2011-2012 self-assessment return to include a capital gain of £1,127,551, taxed at 28% being £315,714.28 in respect of the sale of shares in Sandpiper Enterprises Ltd, a Bahamian registered company which owned land on the island of Canouan in St Vincent and the Grenadines in the Caribbean.

13. On 16 July 2015 HMRC issued a closure notice and on 28 September 2015 HMRC upheld the decision that the gain was correctly assessable on Mr Looney and entrepreneurs' relief was not due.

14. On 30 November 2015 an appeal was lodged to the Tribunal on behalf of the Appellant in relation to the closure notice and amendment to the return for 2011-2012.

The Closure Notice Appeal

15. The third appeal is "the Closure Notice Appeal" – TC/2016/06173 - in which Kieran Looney was the Appellant. While the original appeal also concerned accounting period 31 December 2008 (tax year 2008-2009) this part was settled following agreement reached by the parties on the morning of the first day of the hearing.

16. The extant part of the Closure Notice Appeal is against HMRC's decision to issue a closure notice under section 28A of the Taxes Management Act 1970 in respect of

the section 9A enquiry on 15 September 2016 against Mr Looney in respect of his self-assessment return for the year ended 2009-2010.

17. This decision confirmed the reduced amount of £1,469,462 as net taxable profit against Mr Looney personally based upon the inclusion of £4 million as revenue of the KLA partnership from Trafigura. It also included capital gains tax on profits to the extent of £109,276 from the purchase and sale of shares by a Panamanian incorporated company of Mr Looney's, Nower Inc, which held a Swiss bank account. Therefore, HMRC concluded that Income Tax and National Insurance of £597,417.67 and Capital Gains Tax of £17,932.68 was payable.

18. On 20 October 2016 the Appellant appealed against this decision to the Tribunal.

The Partnership Appeal

19. By the beginning of the hearing the scope of the partnership appeal had been narrowed to concern the tax year 2009-2010.

20. There were two issues for the Tribunal to determine in deciding this appeal.

21. The first issue was whether the sums earned under the contract with Trafigura were attributable to the partnership Kieran Looney & Associates ('KLA' or 'the partnership') as the party contracting with Trafigura and thus liable to income tax as HMRC contend. Mr Looney contends that the sums are attributable to Kieran Looney and Co. Ltd (KLCL) a company he subsequently incorporated, not the partnership, and thus liable to corporation tax.

22. Irrespective of the proper entity which is to the account for the sum, the partnership or the limited company, it was agreed between the parties that the earlier payments totalling £3 million paid under the contract for Mr Looney's services as a management trainer were taxable as a revenue receipt or trade income.

23. The second issue was whether a termination payment of £1 million paid by Trafigura to Mr Looney under the contract was a revenue receipt and trade income for the relevant entity. Mr Looney argues that it was not taxable as trade income or a revenue receipt but was a capital or non-taxable compensation payment in respect of a secret process - intellectual property in his coaching methods, his performance management system - that he provided to Trafigura.

The Facts

24. The Tribunal received three bundles of documents together with witness statements from Mr Looney and Officer Mark Hadley of HMRC. The Tribunal received oral evidence from Mr Looney, Nimal Fonseka, his accountant and joint representative, and Officer Hadley of HMRC who were each cross examined. During the course of the hearing Mr Looney disclosed further documents on request from the Tribunal.

25. The Tribunal makes the following findings of fact on the balance of probabilities indicating where it accepts or rejects the evidence given.

Background Facts

26. The Kieran Looney and Associates partnership (KLA) was registered for Self-Assessment under reference 8562753401 and Mr Looney personally under reference 2904371246.

27. The partners were Kieran Looney and Reality Coaching Ltd. No copy of the partnership agreement nor any profit-sharing agreement has been provided to HMRC nor the Tribunal.

28. Kieran Looney ceased as a partner on 22 September 2009 and Reality Coaching Ltd was dissolved on 22 December 2009.

29. The company directors and shareholders of Reality Coaching Ltd were Kieran Looney and his wife Mrs Sandra Looney

30. Kieran Looney & Associates carried on the trade of Business Coaching from 1 October 2003 until the partnership dissolved on 22 December 2009.

31. On 29 January 2010 Mr Looney submitted a partnership return for the year ended 5 April 2009 which contained the following information:

Tax Year		
Accounting Period Ended		
Turnover		£ 105,166.00
Premises costs	£ 185.00	
General Administrative	£ 7,017.00	
Motor expenses	£ 986.00	
Legal and Professional	£ 585.00	
Depreciation	£ 3,503.00	£ 12,276.00
		£ 92,890.00
Allocated to:		
K Looney		£ 31,898.00
Reality coaching		£ 60,992.00

Contract with Trafigura

32. On 14 January 2009 the KLA Partnership entered into an agreement with Trafigura Beheer BV (Trafigura) to provide the "KLA propriety Performance Management System Program." The contract was, in effect, for Kieran Looney to provide management training for the senior management of Trafigura, an oil and commodities trading company. The description of the service provided is explained in further detail below.

33. The agreement between KLA and Trafigura was that the term would commence on 14 January 2009 for a period of 36 months. Specifically, Clause 1.3 provided:

'Term of Agreement – the period of this agreement will commence on 14 January 2009 and, subject to the provisions for cancellation below, will continue in force for 36 months from that date. The Term will cover the initial part of the Curriculum and three years' subsequent use of materials on licence whereupon KLA will assign the license to Trafigura and it may continue to utilize the system at no further cost.'

34. Clause 1.5 provided: 'Manuals/materials – KLA will provide and continue as it sees fit to develop manuals and other materials for the Program (including the 'Train the Trainer Manuals'), which will be and remain the absolute property of KLA during the license period and whose use is subject to the terms of the Materials Agreements. During years 1, 2 and 3 (Licence Period) Trafigura may continue to use the Materials (as defined in the Materials Agreements) within Trafigura as personal and non-assignable licensee of LKA (Materials Licence) on and subject to the terms set out in the Materials Agreements on payment of the licence fee (Licence Fee) of the amounts, payable at the times, set out in the Financials. Without prejudice to any other rights available to it in such event, KLA may by written notice to Trafigura immediately terminate the Materials Licence if Trafigura fails to pay the Licence Fee on the due dates for payment (time being of the essence in this respect) or if there is any breach or non-performance by Trafigura, any Trainer or any Attendee of any of the terms of the Materials licence or the provisions of the Materials Agreement.'

35. Clause 1.12 provided: 'The terms of this agreement including the attachments set out the entire agreement and understanding of KLA and Trafigura Ltd in relation to the subject matter, to the exclusion of any other terms or representations, and may not be varied except in writing signed by a duly authorised signatory on behalf of each party. They are personal to KLA and Trafigura Ltd and may not be assigned or transferred in whole or part by either of them. They are subject to English law and each party submits to the exclusive jurisdiction of the English courts.'

36. Clause 2 of the agreement was titled 'Materials & Confidentiality'. Clause 2.a provided:

'Since the integrity of the materials used in the Program is paramount, Trafigura, the Trainer and the attendees will each be required to agree, sign and deliver to KLA the KLA terms and conditions regarding use of materials (attachment B for Trafigura, C for the Trainer and Attendees) (Materials Terms) before the Start Date. These terms will be regarded as integral terms of this agreement.'

37. Attachment 2 to the Letter of Agreement provided for 'Fees, payment terms, cancellation and other terms (Financials)'. The fees to be paid by Trafigura to KLA were set out in paragraph 1 of the pricing terms & conditions in Attachment 2 to the agreement. An annual fee of £3,000,000 was to be paid for each of the three years of the contract for the 'License Fee' with the first year's fee also to include the fee for 'Train the Trainer'. The agreement provided for the transfer of a non-refundable deposit of £2,400,000 immediately on signing of the contract and £600,000 on 1 August 2009 by virtue of paragraph 3 headed 'Payment terms for KLA Train the Trainer'.

38. Paragraph 5 of the schedule to Attachment 2 also provided for a payment of an early termination fee of £1,000,000 on written notice being received by KLA on or

before 1 November 2009 to be paid to KLA within fourteen days of notification. The early termination clause was contained at clause 1.10 of the agreement. The precise wording of clause 1.10 is considered below.

39. Pursuant to the contract, two payments of £2,343,522.7 and £500,000 were paid by Trafigura to on 4 February 2009 and 5 August 2009. The sums were paid to the Swiss PFK bank account of Nower Inc. Nower was a company incorporated in Panama on 14 January 2009 by Mr Looney of which he was the director and shareholder. The balance of the £3 million had previously been paid by Trafigura directly to Mr Looney.

40. Attachments 3 and 4 to the Letter of Agreement were referred to collectively as the Materials Agreements.

41. Attachment 3, in so far as relevant, provided 'Terms and Conditions for use of KLA Materials'.

42. Paragraph 1.5 of Attachment 3 stated:

'Trafigura will ensure that the Materials are used only by Trafigura or the Trainer or Attendees properly to, during or in the course of the Program or otherwise as expressly licensed in writing by KLA and subject to the terms of any such written licence, and will not be communicated to or used by any other person, division of Trafigura, company or other organisation for any purposes.'

43. Paragraph 2.1 stated: 'Trafigura acknowledges that, except for Confidential Information which is the exclusive property of Trafigura, the Materials are and, will remain the exclusive property and sole copyright of KLA (except where clearly indicated otherwise by KLA) and will ensure that KLA's ownership of and rights to such material is expressly acknowledged on the face of the Materials or in any proposal presentation by Trafigura relating to the use or proposed use of the Materials'. Paragraph 2.7 stated: 'All Materials and copies of them must be returned complete to KLA at the end of the Program or any period of subsequent use expressly licensed by KLA under paragraph 1.5 unless directed otherwise by KLA'.

44. Paragraph 2.9 stated: 'KLA agrees to grant Trafigura a lifetime license provided that the entire 36-month program is completed and the early termination provision is not invoked.'

Early Termination of the contract

45. The early termination provision of the contract, provided at Clause 1.10 of the Letter of Agreement and set out below, was invoked in the following circumstances.

46. On 22 October 2009 Trafigura paid the termination payment of £1 million to the bank account of Kieran Looney T/A K Looney & Associates at the Allied Irish Bank. The circumstances in which this came to pass were the subject of litigation.

47. The termination of the contract was the subject of a claim by Mr Looney against Trafigura heard before Mr Justice Newey (as he then was) in the Chancery Division with judgment handed down on 1 February 2011 - *Looney v Trafigura Beheer BV*

[2011] EWHC 125 (Ch) . The following findings from that judgment provide the factual background to the termination and explanation and interpretation of the relevant termination clause (Clause 1.10) of the contract:

1. In January 2009, the claimant, Mr Kieran Looney ("Mr Looney"), entered into a contract to provide the defendant, Trafigura Beheer BV ("Trafigura") with a performance management programme. Late in the same year, Trafigura purported to bring the contract to an end pursuant to a provision for early termination which the contract contained. It is Mr Looney's case that Trafigura was not in fact entitled to invoke the early termination clause and that it repudiated the contract. In these proceedings, Mr Looney claims damages for breach of contract.

Factual history

Mr Looney and the KLA Program

2. After spending half a dozen years with Lehman Brothers, the investment bank, Mr Looney switched careers in 1995 to leadership development and executive coaching. He worked with management development consultancies for some five years before setting up his own business in 2000. His clients have included BP and Citigroup.

3. One of the programmes which Mr Looney offers is the "Kieran Looney & Associates Performance Management System Program" (or, more shortly, the "KLA Program"). This makes use of a range of materials designed by Mr Looney. They include "performance contracts" (which provide criteria against which an executive's performance can be evaluated), "90-day delivery plans" (which focus, as their name suggests, on things to be achieved over 90-day periods) and "engagement plans" (which identify key individuals who need to be enrolled and partnered to achieve particular results). Among other things, the Program provides for the use of precise and focused language, for clear objectives to be set, for review of whether such objectives are being met, and for taking responsibility and not giving (or accepting) excuses for failure to achieve objectives.

4. Mr Looney prefers to disseminate his training by a "Train the Trainer" approach. This involves Mr Looney sharing the KLA Program's concepts with an organisation's senior leaders and those leaders in turn, having achieved an appropriate level of expertise (known as "accreditation"), passing the concepts on through the organisation (a process known as "cascading").

5. Mr Looney distinguishes between "cascading" and "embedding". As Mr Looney uses the term, "embedding" involves a formal implementation (or "roll out") of the KLA Program to the organisation's employees. This requires detailed implementation and engagement plans, and oversight, from Mr Looney.

The Trafigura group

6. Trafigura is a substantial commodities trading company. It has offices around the world, but its principal offices are in London and Switzerland. The group has some 1,700 employees in total.

7. The president of Trafigura is one of its co-founders, Mr Claude Dauphin. Trafigura's management board also includes Mr Mike Wainwright ("Mr Wainwright"), the chief operational officer, Mr Pierre Lorinet ("Mr Lorinet"), the chief financial officer, Mr Frank Runge ("Mr Runge") and Mr Jose Larocca ("Mr Larocca"), the co-heads of oil trading, Mr Christopher Cox, the global head of concentrates and coal trading, and Mr Jeremy Weir, the head of derivatives and chief executive officer of Trafigura's asset management subsidiary.

Mr Looney's involvement with Trafigura

……...

11. Mr Looney supplied Mr Wainwright and Mr Lorinet with a draft agreement for the provision of the KLA Program. This envisaged that Mr Looney would be employed for three years at an annual fee of £3 million. The draft also, however, included (as clause 1.10) a provision for early termination. This was in these terms:

> "Early termination may only occur on written notice on the basis set out in the Financials. On Trafigura serving written termination notice and paying the early termination fee the Program will be discontinued and Trafigura and KLA will have no further obligations to the other in relation to payment or delivery of the Program respectively except that the confidentiality, Materials terms and other provisions of this agreement intended to apply after termination will continue to apply with full force and effect. If no written notice is served under and in accordance with the timescale set out in clause 2.5 Trafigura will pay the license fee for 2010 by 15th December 2009, and the license fee for 2011 by 15th December 2010."

The reference to the "Financials" related to "pricing terms and conditions" set out in an attachment. Section 5 of this attachment stated the following as regards early termination:

> "Written notice must be received by KLA on or before 1st November 2009
> Non refundable deposit + £1,000,000 early termination fee to be paid to KLA within fourteen days of notification"

13. ……

14. A written contract between Mr Looney (as "Kieran Looney & Associates") and Trafigura was eventually signed on 14 January 2009. For the most part, this was in the terms Mr Looney had drafted. It includes, in particular, the early termination provision (clause 1.10). It also incorporates, however, a small number of manuscript amendments which Mr Wainwright and Mr Lorinet had asked for. One of these was inserted at the end of clause 1.10. The amendment was in the following terms:

> "It is intended that the program is dynamic in nature and will evolve subject to the specific requests (within reason) of Trafigura BV."

Another change concerned the next provision in the agreement, which related to the terms on which materials were to be made available by Mr Looney. In its amended form, the provision was in these terms:

> "The terms of the Materials Agreements will be regarded as internal terms of this agreement, and will continue to apply after early termination of this agreement for any reason. KLA is entitled to refuse to start the Program if this is not done and may refuse to continue the Program if there is evidence of

breach of the terms or conditions of the Materials, whilst acting reasonably in all cases."

The last six words came from Mr Wainwright and Mr Lorinet. Another alteration involved increasing the number of those expected to participate in the KLA Program (referred to as "Attendees") from 20 to 25. The Attendees were to comprise senior management in Trafigura's back/mid office.

15. The financial terms were essentially unchanged; Mr Looney had said early on that these were non-negotiable. The contract thus provided for Mr Looney to be paid an annual licence fee of £3 million. In the first year, 80% of the fee was to be paid at once and the remaining £600,000 by 1 August 2009. However, Mr Looney agreed that the contract should incorporate his coaching agreement with Mr Runge and that he would refund payments received under that agreement (as to which, see paragraph 9 above).

16. The "Materials Agreements", which all participants in the Program were to sign, imposed tight restrictions on the use of materials provided by Mr Looney. A signatory undertook, among other things, to ensure that materials were "used only by [him] as Trainer or Attendee preparatory to, during or in the course of the Program or otherwise as expressly licensed in writing by KLA and subject to the terms of any such written licence, and [would] not be communicated to or used by any other person, division …, company or other organisation for any purpose". Signatories also agreed not to "add to, amend or change in any way any of the Materials or their contents or use the Materials in any amended form except to the extent (if at all) specifically previously agreed in writing by KLA". The word "use" was, moreover, defined in wide terms, to include "any form of utilisation in any program, seminar or training or any copying or other reproduction, summary, abstraction, disclosure, permission/facilitation to any other persons to use or other form of transfer or adaptation of information in any written, electronic or other form now known or subsequently devised". Mr Looney agreed, however, to grant Trafigura a "lifetime license" to use the materials "provided that the entire 36 month program is completed and the early termination provision is not invoked".

17. It is common ground that there was no discussion between the parties of the early termination provision.

…….

34. In this connection, Mr Looney noted in evidence that his relationship with Mr Wainwright and Mr Lorinet "deteriorated rapidly in June 2009". The tensions between the parties at this stage are apparent from an email that Mr Looney sent to Mr Wainwright on 11 June 2009. In it, he said:

> "Mike- valuable time has been lost on both sides. Your message radiates a lack of partnership/trust.
> I am not used to working/being controlled this way, or having to deal with so much dis-trust/upset/confusion/personal slights on my character. My health is suffering as a result.
> The program needs to be exciting and enjoyable, and everyone needs to feel acknowledged and one team. The current tension and stress in our relationship is destructive.
> I would like to meet you alone to discuss the above, including the early termination provision."

35. Despite Mr Looney's reference to the early termination provision, this was not in fact invoked at this point. Instead, the parties entered into a written agreement varying their

January contract. By this agreement, which is dated 16 July 2009 but which the parties appear to have signed on 18 July, Mr Looney agreed, among other things, to provide certain materials in electronic format without extra consideration.

…….

42. By September 2009, Mr Wainwright was coming to think that Trafigura should exercise the early termination provision. He raised the possibility with Mr Lorinet at about the end of September. Mr Wainwright expressed concern that the KLA Program was time-consuming and inflexible and was not evolving. He indicated that he was not convinced that the benefits Trafigura would derive from the Program over the next two years warranted the fees it would have to pay. It was agreed between Mr Wainwright and Mr Lorinet that they would canvass the opinions of others. On 12 October, Mr Wainwright forwarded to Mr Lorinet some email correspondence he had by then had about whether to proceed with the KLA Program, and a decision to cancel the Program was endorsed at an impromptu meeting of members of Trafigura's board on 15 October. A little later that day, Mr Wainwright told Mr Looney at a meeting that a forthcoming offsite would be cancelled because Trafigura wanted to terminate its agreement with him. Mr Wainwright described Mr Looney's reaction as one of shock.

43. The 15 October meeting with Mr Looney was followed up by a letter dated 20 October 2009, in which Trafigura gave Mr Looney "notice of early termination and cancellation of the Agreement with immediate effect" and stated that arrangements had been made for the early termination fee of £1 million to be remitted to him. The £1 million was paid on 29 October (so that, in total, Mr Looney had received £4 million pursuant to his contract with Trafigura). Trafigura also returned KLA Program materials to Mr Looney.

44. The decision to terminate was taken when it was because a third offsite was due to be held on 16 and 17 October 2009 and also because the early termination provision could not be exercised after 1 November.

45. As regards the decision to terminate, Mr Lorinet said in his witness statement:

> "It was clear to me … that the negatives of the KLA Program had started to outweigh the positives. The question was whether we really thought that we were going to learn more and get value for money from the KLA Program over the next couple of years. We were battle-weary and fed up with the constant tug of war with [Mr Looney] and the time [Mr Wainwright] and I had to devote not only to the KLA Program but also to dealing with [Mr Looney's] issues, such as his copyright concerns."

In one of his witness statements, Mr Wainwright said:

> "[W]hat we had hoped for, but did not receive, was more focus, structure and development of the KLA Program from [Mr Looney …. [T]he KLA Program … had become repetitive, and had failed to develop and evolve as [Mr Lorinet] and I had been led to believe it would. If anything was too complex, it was my day to day dealings with [Mr Looney] and his attitude to his [intellectual property] rights. His needy style was all encompassing and his sense of priorities warped; he considered the KLA initiative to be the most important thing in Trafigura. The simple fact is that [Mr Lorinet] and I did not consider that the KLA Program offered value for money and we could no longer justify to ourselves or the board the time and expense required for the KLA Program to continue for a further two years."

48. The High Court therefore dismissed Mr Looney's claim for damages for breach of contract. Mr Justice Newey held that Trafigura had lawfully invoked the termination clause (Clause 1.10) of the letter of agreement as it was entitled to do. The Judge held there was no restriction on Trafigura's ability to terminate the contract with KLA so long as it complied with terms of clause 1.10, which it did. There was no implied term requiring it to terminate on 'proper and reasonable grounds'. Mr Justice Newey gave his reasons at paragraph 90 of his judgment which included the following:

'ii) Clause 1.10 makes commercial sense as it stands. Mr Morpuss' construction of the clause does not, in my view, flout "business commonsense", and there is no necessity to read in a qualification such as Mr Collings contended for. There is nothing nonsensical about Trafigura being given an unfettered right to terminate if it paid Mr Looney £1 million. As Mr Collings said in his submissions, £1 million "buys you a lot". There was, moreover, a rational basis for allowing Trafigura to bring the contract to an end without having to show that it had a good reason. Mr Lorinet touched on this in cross-examination. He said:

"[Y]ou are talking here about a delivery of what I would call 'soft skills' which is performance management, it's very hard to quantify. If things don't go as planned it's very hard to apportion blame, in my mind, to say, well, is it Trafigura was not committed enough? Is it Kieran Looney was too difficult? What is it?

Therefore it's a lot simpler, to avoid any argument, to have something that is very transparent and that's how I read the break clause as a very transparent mechanism which said what was in the contract";

…..

vi) *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* was a very different case. What was at issue there was the circumstances in which a contract could be terminated for breach. No such question arises in the present case: the termination clause is not tied to breach. Moreover, there is provision for Mr Looney to be compensated to the tune of £1 million;'

49. The Tribunal, on request, was provided with the Particulars of Claim for the claim where Mr Looney was named as the personal and only Claimant. In the Particulars Mr Looney claimed damages including the £6 million in balance of fees and at paragraph 104 Mr Looney reserved: 'rall of his rights and remedies concerning infringement of copyright and breach of confidentiality (including damages and interlocutory relief to prevent any continuing breach or infringement) in respect of the KLA Program, the Materials and the Additional Materials pending clarification of the precise ambit of TrafiTalent'.

50. TrafiTalent was a separate training program delivered to other staff of Trafigura which Mr Looney alleged had been derived from the KLA Program. However, at paragraph 95 of his judgment Mr Justice Newey held that he 'did not consider that the KLA Program had any significant impact on the development of TrafiTalent'.

HMRC's enquiry

51. On 9 April 2009 Mr Looney incorporated the company Kieran Looney and Co Limited of which he was a director and shareholder.

52. On 2 January 2011 Mr Looney submitted his 2009-10 Self-Assessment Tax Return which contained no partnership pages.

53. Following the judgment of Mr Justice Newey in February 2011, on 26 May 2011 HMRC advised Mr Looney that both he and Kieran Looney & Co Limited ("the limited company" or "KLCL") had been registered for investigation under Code of Practice 8 – "Cases where Civil Investigation of Fraud procedures are not used".

54. On 26 May 2011 HMRC opened an enquiry under section 9A Taxes Management Act (TMA) 1970 into Mr Looney's self-assessment return for the year ending 5 April 2010. On the same date an enquiry under Paragraph 24 of Schedule 18 to the Finance Act 1998 was opened into KLCL's self-assessment returns for the periods ended 8 April 2010 and 30 September 2010.

55. No enquiry under Section 12AC Taxes Management Act 1970 was opened into the partnership returns for 2008-2009 or 2009-2010. Hence it is argued that a discovery assessment was later made.

56. On 23 June 2011 HMRC Officers Sherrin and Cashmore met Mr Looney and his agent Mr Nimal Fonseka. The meeting notes state at paragraphs 40-42 that Mr Looney had received a £3 million fee and £1 million termination payment from Trafigura Ltd (sic) but that:

"Mr Fonseka was not sure if Trafigura could sue for the return of the money and there was a question mark over the income so he left it out because the downside was that Mr Looney could lose millions….Mr Fonseka said he regarded the £1 million as compensation so not taxable. Sherrin said that there was plenty of case law to support the fact that compensation for contract terminations were in fact taxable".

57. On 5 September 2011 Mr Looney submitted the Partnership return for the year ended 5 April 2010 showing no income or expenses.

58. On 17 January 2013 HMRC opened an enquiry under Code of Practice 8 into KLCL's self-assessment return for the accounting period ending 30 April 2011.

59. On 18 April 2013 HMRC officers met Mr Fonseka, during which meeting Mr Fonseka agreed that:

a) the income from Trafigura was proper to the accounts of the partnership; and

b) should be recognised in the accounts for the period ending 31 December 2009.

60. This agreement was conditional on HMRC accepting that only £3 million in revenue was attributable to the partnership as income.

61. On HMRC refusing to accept that only £3 million was attributable on the basis that the £1 million termination payment was also taxable as income of the partnership, Mr Fonseka subsequently rescinded the agreement in a letter dated 24 January 2014.

62. Therefore, there was no agreement as to the tax treatment of the early termination fee paid by Trafigura or whether the sums paid under the contract (whether £3 million or £4 million) were attributable to the partnership or the limited company, KLCL.

63. On 12 June 2013 Mr Looney submitted revised partnership accounts for the years ended 31 December 2008 and 31 December 2009.

64. The revised partnership accounts showed:

	31/12/2008			
	Original		Revised	
Turnover		£105,166.00		£381,760.00
Expenses Reimbursement		£276,594.00		
Motor/premises	£1,171.00		£185.00	
Administrative expenses	£7,017.00		£68,747.00	
Finance expenses	£585.00		£534.00	
Depreciation	£3,503.00	£12,276.00	£3,502.00	£349,562.00
Net Profit		£92,890.00		£32,198.00
Allocated to :				
K Looney		£31,898.00		£1,000.00
Reality coaching		£60,992.00		£31,198.00

	31/12/2009		
	Original		Revised
Turnover	£0.00		£3,050,372.00
Expenses Reimbursement			
Motor/premises			
Administrative expenses		£2,612,043.00	
Finance expenses		£96.00	
Depreciation	£0.00	£2,627.00	£2,614,766.00
Net Profit	£0.00		£435,606.00
Allocated to:			
K Looney			£435,606.00
Reality coaching			£0.00

65. HMRC was unable to reconcile the amounts shown in the revised accounts with the analysis previously supplied by Mr Looney.

66. On 2 January 2014 the HMRC Officer conducting the investigation, Officer Margaret Mousley, amended the partnership return for the accounting period ended 31 December 2009 as follows:

Accounting Period Ending 31/12/2009

Turnover	£4,000,000.00		The amount paid by Trafigura Ltd and removed from the accounts of the company
Expenses	£2,443,257.00		The expenditure removed from the revised accounts of the company.
Net Profit		£1,556,743.00	
Allocated to :			
K Looney	£1,556,743.00		Balance attributable to Mr Looney
Reality coaching	Nil		As revised partnership accounts

67. On 24 January 2014 Mr Fonseka lodged formal appeals against the amendments made to the partnership returns for 2008-2009 and 2009-2010 on behalf of Kieran Looney & Associates. Mr Fonseka requested a statutory review of HMRC's decision.

68. On 12 March 2014 HMRC issued a review conclusion letter upholding the decision to amend the partnership returns and the amounts by which the returns had been amended.

69. On 2 April 2014 HMRC issued a Notice of Assessment for 2008-2009 to Mr Looney charging the tax due on the revised partnership profits and amended Mr Looney's self-assessment return for 2009-2010 to reflect the revised partnership profits chargeable for that year.

70. On 20 May 2014 Mr Looney appealed against the amendments to the partnership returns for the years ending 31-12-2008 and 31-12-2009. Only the amendment to the accounting period to 31 December 2009 and self-assessment return for the tax year 2009-2010 remain under appeal.

Mr Looney's evidence on the partnership appeal

71. Mr Looney gave evidence regarding the Trafigura contract relying upon his witness statement, which stood as his evidence in chief. He was cross examined. The Tribunal finds the following facts on the balance of probabilities and indicates where it rejects his evidence as appropriate.

The Trafigura Contract

72. In January 2009, Mr Looney stated that KLA entered into a contract to provide consultancy work for a Trafigura, a commodities trading company which is based in Switzerland. Mr Looney decided to operate this contract through Nower Inc. ("Nower"). He set up Nower specifically for this purpose. He was the sole director and shareholder of Nower, which was a company based in Panama. He claimed that a bank

account for Nower was opened in Switzerland in order to facilitate the receipt of funds from Trafigura.

73. Although he could not remember precisely when, he recalled that Nimal Fonseka of Fonseka & Co Ltd (Mr Fonseka), advised him to account for these monies (from Trafigura) in the UK through a UK company to avoid any allegations of tax evasion by HMRC. He claimed he was keen to do things properly and he followed his advice in declaring the income from Trafigura as set out below.

74. In April 2009, he set up a UK company of which he was also the sole director and shareholder. This company was called Kieran Looney & Co Ltd ("KLCL"). KLA's VAT registration was then terminated and final accounts for KLA were prepared and submitted to HMRC on the 22 December 2009. Mr Looney also closed down Reality Ltd and submitted the final accounts for this company to HMRC and Companies House on the same day.

75. During this period, Mr Looney stated he agreed with Trafigura to change the terms of the contract and to effectively novate the rights and obligations in the contract over to Nower. In the circumstances, Trafigura paid the first tranches of fees- £3 million to Nower.

76. As is set out above, on the 14 January 2009, KLA entered into an agreement with Trafigura to provide the latter with the "KLA Propriety Performance Management System Program". The agreement provided for the transfer of a non-refundable deposit of £2,400,000 to "KL Account" on 21 January 2009 and £600,000 on the 1 August 2009. The agreement also provided for a payment of £1,000,000 in respect of an early termination of the contract by Trafigura.

77. Once the contract was signed, as above, Mr Looney stated that it dawned on him that the best way of operating the business was probably through a company and therefore he set a company called Nower Inc. (Nower), for this purpose. This was incorporated on the same day the contract was signed. He was the sole director and shareholder of Nower, which is based in Panama. A bank account for Nower was opened in Switzerland in order to facilitate the receipt of funds from Trafigura.

78. The Tribunal does not accept Mr Looney's evidence that he assigned, transferred or novated the rights of the KLA partnership to Nower (or any other entity such as KLCL). There was nothing in writing which evidenced the alleged transfer variation or assignment of the contract, as required by Clause 1.12 of the agreement and no reason was put forward for why Trafigura would agree to this occurring. There was no evidence as to: who on behalf of Trafigura agreed the alleged variation, transfer, novation or assignment; when Trafigura made the alleged agreement to vary; and why there was no independent or written evidence of this alleged agreement to vary.

79. It also has to be borne in mind that Trafigura sought to terminate the contract as early as October 2009 and paid their termination fee of £1 million to the bank account of KLA and not Nower Inc. Further, during the hearing of the appeal, in his oral evidence, the Appellant did not suggest that the contract was novated to Nower but suggested that it was novated to the company, KLCL.

80. Trafigura terminated the contract after one year of its operation and paid £1 million as compensation into the bank account of Mr Looney (trading as the KLA partnership). The Tribunal does not accept that this was an error by Trafigura as Mr Looney claimed, nor that the monies should have been paid to Nower because Nower were the contracting party at this point. The fact that the original £3 million in payments under the contract were paid in February and August 2009 to Nower does not determine it as the contracting party at that time.

81. It is apparent from the face of the contract, the letter of Agreement, the nature of the Appellant's claim against Trafigura and the judgment of the High Court that the KLA partnership, was the contracting party with Trafigura. Mr Looney claimed personally against Trafigura in his High Court claim, there was no suggestion that KLCL or Nower were the contracting party.

82. Further, KLCL was not incorporated until April 2009 some three months after the contract was signed in January 2009. At no time did KLCL receive any of the payments under the contract.

83. KLCL later accounted for the payments of the money under the contract (£3 million and £1 million) in the company accounts of KLCL which were submitted to HMRC. HMRC issued an amendment to the partnership accounts, and they included £3 million in the partnership income, the turnover from income that had been assigned to KLCL. HMRC also included the £1 million compensation payment that Mr Looney received from Trafigura. Mr Looney claimed these actions of HMRC were wrong.

84. For the reasons set out below the Tribunal rejects this evidence of Mr Looney and is satisfied on the balance of probabilities that HMRC were right to include the £4 million as income of the partnership in their accounts.

85. For the reasons set out above the Tribunal rejects Mr Looney's claim that the contract was varied by agreement to transfer, assign or Novate Nower (or KLCL) as the party performing the obligations and receiving the benefit of the agreement.

86. The fact that Trafigura paid the initial tranches of £2,400,000 and £600,000 to the Nower bank in Switzerland does not evidence any variation to the contracting parties. The Tribunal is satisfied that the terms of Clause 1.12 of the contract on variation were clear in that they required signed written agreement of both parties but they were not fulfilled. Mr Looney's case that the contract was novated to Nower, a Swiss incorporated company, does not sit comfortably with his assertion that KLCL, a later incorporated UK company was the correct entity in which to declare his income. The original intention behind the payment to Nower appears to have been to avoid payment entering the UK jurisdiction.

87. Mr Looney claimed that he elected which entity through which he should declare this income, and that he recognised this income in KLCL, a UK based company that he owned, on the advice of Mr Fonseka. However, as above, KLCL was only later incorporated, and an attempt only latterly made to declare the payments for tax purposes on returns (whether through the partnership or the company).

88. Mr Looney stated that the Trafigura income should remain in KLCL, where it was initially declared by him.

Termination payment of £1 million from Trafigura

89. Mr Looney claimed that Trafigura terminated the contract unilaterally and paid £1 million as compensation and that the compensation payment was paid by error by Trafigura to his personal / KLA bank account and not to Nower.

90. Mr Looney claimed that the compensation was received as a payment for the continued use of the secret processes used (or intellectual property) in his performance management system program. He claimed it was not a trading or revenue receipt in any way. He confirmed that he used a computerised management performance system which was unique (this is known as the "KLA Proprietary Performance Management System Program"). Trafigura used that management performance system during the period of his engagement with them, and also after the period of engagement.

91. Mr Looney claimed he placed the compensation term in the agreement with Trafigura precisely to compensate for the usage of the management performance system. He realised that once it was in place it would be very difficult to ensure that it was not being used by Trafigura after the contract was terminated. He also confirmed that the £1 million sum was intended to be net of taxation and not gross of taxation. Mr Looney claimed the sum itself in fact vastly under compensated him for the use of this proprietary product. The contract with Trafigura was for the provision of services in order to properly utilise and run the system.

92. The Tribunal rejects Mr Looney's evidence on the balance of probabilities for the following reasons.

93. It is apparent both from the face of the contract, the plain wording of Clause 1.10, and from the judgment of Mr Justice Newey, that the purpose of £1 million termination payment was simply to compensate or provide consideration to Mr Looney for the early termination of the contract. The contract terms do not suggest that that the £1 million is anything other than an early termination payment.

94. Mr Looney has failed to satisfy the Tribunal that HMRC's view of the termination clause was incorrect. The Tribunal is satisfied that the purpose of the payment was to be compensatory to KLA for the lost opportunity to trade and profit from the remaining two years anticipated under the contract.

95. Clause 1.10 was not expressed in the contract to be in anyway compensatory in respect of the acquisition of any intellectual property right or secret process contained in the KLA program. Mr Looney's particulars of claim do not suggest that the termination fee was any such form of compensation. Nor did Mr Justice Newey find the termination payment so to represent.

96. The particulars of claim in effect allege that Trafigura was in repudiatory breach of contract by terminating it without reasonable cause and they claim damages for the loss of earnings on the remainder of the contract. To the extent that they make any

claim in respect of any intellectual property rights they do so in relation to the unrelated allegation that Trafigura drew on the KLA program to develop their other training program, TrafiTalent, a claim rejected by the Judge as set out above. Thus, the Tribunal's finding that the early termination payment was not connected to any acquisition of any asset or in respect of capital, is consistent with the finding of High Court.

97. Indeed, the numerous contract provisions dealing with intellectual property and copyright, some of which are set out above, specifically excluded Trafigura from the use, acquisition or licensing of the KLA Program except in the circumstances where Trafigura paid for and received the service for the full three years anticipated by the contract at which point Trafigura were to obtain a continuing licence to use the program. The Tribunal rejects Mr Looney's evidence and submission that the payment of the termination fee was in any way connected to the acquisition by Trafigura of any secret process or intellectual property – the terms of the contract make no such connection.

Law

98. Pursuant to section 31 Taxes Management Act 1970 ("TMA 1970") a person may appeal any amendment of a partnership return under section 30B(1) of the (amendment by HMRC where loss of tax is discovered). The terms of section 30B are set out below.

99. An assessment involving a loss of income tax brought about carelessly by a person may be made at any time not more than 6 years after the end of the year of assessment to which it relates.

100. The burden of proof is upon the Appellant partnership to prove that: the amendment to the partnership return charges it to the incorrect level of tax; HMRC incorrectly attributed the income from Trafigura to the partnership rather than to KLCL or Nower or any other entity; and the £1 million termination payment was not trading income or a revenue receipt.

First Issue – attribution of income to the partnership or the KLCL?

101. Sections 847-850 of the Income Tax (Trading and Other Income) Act 2005 ("ITOIA 2005") provide for: the income tax treatment of partners in partnerships, whether the partners are resident in the UK or abroad; the calculation of the firm's profits or losses; and allocation between partners. They do so in the following terms:

847 General provisions

(1) In this Act persons carrying on a trade in partnership are referred to collectively as a "firm".

(2) The provisions of this Part [which are expressed to apply to trades also apply, unless otherwise indicated (whether expressly or by implication)]—

(a) to professions, and

(b) in the case of this section and sections 849, 850, 857 and 858 to businesses that are not trades or professions.

(3) In those sections as applied by subsection (2)(b)—

(a) references to a trade are references to a business, and

(b) references to the profits of a trade are references to the income arising from a business.

[(4) For the purposes of this Part, a person is an indirect partner in a partnership ("the underlying partnership") if the person is a partner in—

(a) a partnership which is a partner in the underlying partnership, or

(b) any partnership which is an indirect partner in the underlying partnership by virtue of the preceding application of this subsection.]

848 Assessment of partnerships

Unless otherwise indicated (whether expressly or by implication), a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners.

Calculation of partners' shares

849 Calculation of firm's profits or losses

(1) If—

(a) a firm carries on a trade, and

(b) any partner in the firm is chargeable to income tax,

the profits or losses of the trade are calculated on the basis set out in subsection (2) or (3), as the case may require.

(2) For any period of account in which the partner is a UK resident individual, the profits or losses of the trade are calculated as if the firm were a UK resident individual.

(3) For any period of account in which the partner is non-UK resident, the profits or losses of the trade are calculated as if the firm were a non-UK resident individual.

[(3A) For any tax year that is a split year as respects the partner, this section has effect as if the partner were non-UK resident in the overseas part of the year.]

[(4) In calculating under subsection (2) or (3) the profits of a trade for any period of account no account is taken of any losses for another period of account.]

[850 Allocation of firm's profits or losses between partners]

[(1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period.

This is subject to sections 850A [to 850D] [and section 12ABZB of TMA 1970 (partnership return is conclusive)].

(2) In this section and sections 850A and 850B "profit-sharing arrangements" means the rights of the partners to share in the profits of the trade and the liabilities of the partners to share in the losses of the trade.]

102. Thus the calculation of the profits and losses of a partner uses the same principles as if the firm is an individual. In order to calculate the partner's profits or losses of the trade then general accounting practice must be followed as provided in section 25 of ITOIA 2005:

25 Generally accepted accounting practice

(1) The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes.

(2) This does not—

(a) require a person to comply with the requirements of [the Companies Act 2006 or subordinate legislation made under that Act] except as to the basis of calculation, or

(b) impose any requirements as to audit or disclosure.

(3) This section is subject to [section 25A (cash basis for small businesses)].

(4) This section does not affect provisions of the Income Tax Acts relating to the calculation of the profits of Lloyd's underwriters.

Validity of no oral modification clauses of a written contract

103. At paragraph 10 -17 of his Lordship's judgment in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 Lord Sumption gave the reasoning for the majority decision of the Supreme Court that 'no oral modification clauses' should be given effect in English Law. Therefore, a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties is legally effective. The Supreme Court's recent judgment provides binding authority and overrules earlier judgments of the Court of Appeal such as *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] 1 CLC 712, para 101-107, relied upon on behalf of Mr Looney, which suggested that such clauses may be ineffective.

Second issue – termination payment – trading revenue or capital payment

104. In *Evans Medical Supplies, Ltd v Moriarty (H M Inspector of Taxes)* [1957] UKHL TC_37_540 Viscount Simonds considered the issue of when a payment in respect of a secret process might be a trading receipt or capital payment. His Lordship set out the factual background to the Appellant's contract at 37 TC 573:

On 20th October, 1953, it entered into an agreement with the Government of the Union of Burma under which it became entitled to receive and received the sum of £100,000 and certain other sums therein mentioned. It will be necessary for me to refer in some detail to this

agreement. The Company was duly assessed in respect of its profits as wholesale druggists for the year 1954-55 under Case I of Schedule D, and in this assessment the sum of £100,000 was treated as a receipt of its trade liable to be included in the computation of its profits. Against this assessment the Company appealed to the Commissioners for the Special Purposes of the Income Tax Acts, who upheld the assessment but at the instance of the Company stated a Case for the opinion of the High Court. The case came on for hearing before Upjohn, J., who allowed the appeal of the Respondent Company and reversed the determination of the Special Commissioners. From his judgment the Crown appealed to the Court of Appeal. That Court discharged the Order of the learned Judge and ordered that the case be remitted to the Special Commissioners with the direction " to ascertain in accordance with the judgments and subsequent proceedings o f the Court of Appeal what part, if any, of the amount of One hundred thousand pounds (£100,000) should be attributed to the imparting of the secret processes to the Government o f Burma, such part to be treated as a capital receipt, ^nd to adjust the assessment accordingly, and with power to the parties to call such evidence as they may consider necessary ",

105. His Lordship continued at 576:

The operative part of the agreement is divided into five parts, and again I think it desirable to set out the provisions of part I in full. They are as follows: " In consideration of the payment to Evans Medical by the Government of the Union of Burma of the capital sum of £100,000 (One hundred thousand pounds sterling) payable in the United Kingdom free from any deduction whatsoever (A) Evans Medical will provide and make available to the Government of the Union of Burma all drawings designs and plans and technical and other data and ' know-how ' necessary for the establishment erection and installation of the factory and the commencement of production thereat of the pharmaceutical and other products mentioned in the Schedule hereto (B) Evans Medical will supply to the Government of the Union of Burma designs and lay-out for the erection of plant including machinery and equipment and all other requisites and shall supply full data and specifications with drawings and instructions and all other information relating to the sources and manufacturers and suppliers of such machinery and equipment (C) Evans Medical will make available to the Government o f the Union of Burma all information relating to the supply of prototype machinery and equipment for the manufacture of the pharmaceutical and other products mentioned in the Schedule hereto (D) Evans Medical hereby undertake that during the currency of this Agreement the facilities hereby agreed to be furnished to the Government of the Union of Burma under the preceding sub-clauses of this clause shall be exclusive to the said Government and shall not during the currency hereof be furnished to any other person or corporation in Burma ".

106. His Lordship concluded at 579:

It still remains to ask whether, assuming that the £100,000 was in whole or in part consideration for the sale and purchase of an asset or assets, such assets were, to use the language of the Company's first contention, " items of fixed capital This is a question frequently arising in Income Tax cases, and I should be disposed in general to accept the determination of the Commissioners. For the line is often difficult to draw. But in the present case, bearing in mind particularly what Lord Radcliffe said in Edwards v. BairstowQ), [1956] A.C. 14, I come to the conclusion that the view of the Commissioners cannot be sustained. It was perhaps a doubt in the mind of the Inspector of Taxes whether this sum could be regarded as an income receipt of the Company's trade as " wholesale druggists " which led to the alternative suggestion of a new trade. But, however that may be, the evidence—I am now looking at the question propounded in the Case—is overwhelming that the Company parted with a capital asset and received for it a capital sum. Of paramount, if not decisive, importance is the agreement itself. I need not repeat its recitals or its terms. The Company parted with something for which the Government

was prepared to pay no less than £100,000. Its possession had secured for the Company a substantial share of the Burmese m ark et: its loss will mean, in the words of the Commissioners, that " the Company's Burmese agency will become progressively less important" , or, in other words, that the Company has parted with an asset which was the source, or one of the sources, of its profit. I venture to repeat the question stated by Bankes, L.J., in British Dyestuffs Corporation (Blackley), Ltd. v. Commissioners of Inland Revenue, 12 T.C. 586, at page 596: ". . . looking at this matter, is the transaction in substance a parting by the Company with part of its property for a purchase price, or is it a method of trading by which it acquires this particular sum of money as part of the profits and gains of that trade? "

Submissions on behalf of the Appellant

107. Mr Fonseka and Mr Singh both made submissions on behalf of Mr Looney.

Which entity is the relevant entity to attribute the income from Trafigura for tax purposes?

108. They submitted that on 14 January 2009, KLA entered into an agreement with Trafigura to provide the latter with the "KLA Propriety Performance Management System Program". The agreement provided for the transfer of a non-refundable of £2,400,000 deposit to "KL Account" on 21 January 2009 and £600,000 on the 1 August 2009. The agreement also provided for a payment of £1,000,000 in respect of an early termination of the contract by Trafigura.

109. They submitted that the general provisions to this contract stated the following-

(a) These terms set out the entire agreement and understanding of KLA and Trafigura in relation to their subject matter, to the exclusion of any other terms or representations, and may not be varied except in writing signed by a duly authorised signatory on behalf of each party.
(b) These terms are personal to KLA and Trafigura and may not be assigned of transferred in whole or part by either of them
(c) These terms are subject to English Law and each party submits to the exclusive jurisdiction of the English courts.

110. They submitted that having taken into account the size and complexity of this contract Mr Looney decided to operate this contract through Nower Inc. (Nower), which he set up for this purpose. Mr Looney was the sole director and shareholder of Nower which is based in Panama, A bank account for Nower was opened in Switzerland in order to facilitate receipt of funds from Trafigura. Mr Looney informed Trafigura of this change to the contract. They submitted that Trafigura agreed to this change as they sent the initial tranches of £2,400,000 and £600,000 to the Nower bank in Switzerland.

111. They relied upon the case of *Globe Motors v TRW Lucas*, in which the Court of Appeal decided that inclusion of a clause intended to prevent variation of the contract other than in writing would not prevent future variation of a contract orally or by conduct. *MWB Business Exchange Centre v Rock Advertising* confirms the decision in *Globe.*

112. They also submitted that the case of *Multiplex Construction v Honeywell Control Systems* confirmed that variation is permitted by conduct.

113. They submitted that the transfer of income can be effected by a simple cross (management) charge and is not designed to circumvent taxation. Mr Looney was entitled to elect as to which entity should declare this income, especially as he controlled and owned all the entities concerned.

114. They submitted that Mr Looney recognised this income in his UK based company he owned (KLCL) on the advice of Mr Fonseka. They accepted that HMRC had contested this treatment of the income and held that it should be recognised in KLA. They submitted that all the entities concerned are wholly owned by Mr Looney and based in the UK. They accepted that HMRC officer Mousley removed this income and the related expenses from KLCL and inserted these into KLA (although this entity had ceased trading and had deregistered from VAT).

115. They submitted that during a series of meetings that Mr Looney and his accountant had with HMRC Officers Hadley and Brown, Officer Hadley argued that the income should be declared in the entities that had received these monies. In these circumstances they submitted the initial £3 million should be reflected in the accounts for Nower.

116. They submitted that Mr Looney's accountant (Mr Fonseka) produced the accounts for the years ended 31.12.2009 and 31.12.2010 in respect of Nower, which incorporated the Trafigura income (Set out below).

NOWER INC	Y/E 31.12 2009	Y/E 31.12.2010
Turnover- Trafigura	3,000,000	
Turnover – Other Income	303,274	155,099
Total Turnover	3,303,274	155,099
Administration Costs	2,593,488	45,823
Taxable Profit	709,786	109,276

117. As set out in paragraphs above, they submitted that HMRC Officer Mousely incorrectly removed the income and the related expenses from KLCL and transferred these to KLA. The result of this was that the taxable income of KLCL was reduced accordingly. Officer Hadley made the corresponding reductions in the Corporation Tax due for the APE 30 April 2011.

118. On 14 October 2015, they submitted that Officer Hadley unilaterally reversed his decision stating:

> "(1) You have knowingly submitted accounts that you consider to be incorrect.
> (2) By accepting your amendments there should be a corresponding knock-on effect to the partnership accounts, but you do not accept this.
> (3) We do not accept amendments to accounts which are the subject of an ongoing enquiry.
> In the circumstances the Corporation Tax remains due & payable.

119. They submit that Officer Hadley had totally ignored the fact that it was Officer Mousley who made these amendments to the accounts of KLCL. In the circumstances the accounts submitted by Mr Looney in respect of KLCL for the accounting period ending 30 April 2011 should remain unaltered. This results in the accounts constructed by Officer Mousley in respect of the accounting period ending 31 December 2009 should be reversed.

120. They submitted that Officer Hadley reversed the amendments made by Officer Mousely on the 20 December 2013. The result of this is that the corresponding amendment to the partnership accounts of KLA for the year ending 31 December 2009 are reduced to nil, as HMRC cannot insist that the same income be declared in two different entities.

121. They submit that Officer Hadley has refused to change his stance on this matter. The only reasonable conclusion is that the Trafigura income should remain in KLCL, where it was initially declared by Mr Looney.

Trafigura Payment termination of £1 million

122. Mr Fonseka and Mr Singh submitted that Trafigura terminated the contract unilaterally and paid Mr Looney £1 million as compensation. Despite HMRC's claims that this payment is taxable, Mr Looney's case was that this payment is not taxable.

123. They submitted that the compensation payment was paid by Trafigura to Nower. They relied upon the case of *O'Dwyer v Irish Exporters and Importers Limited* [1943] IR 176 in which the Court held that compensation paid to the parent company of a company that suffered loss as a result of the actions of the Ministry of Agriculture was not taxable in the hands of the parent company.

124. They relied upon the principles set out in (a) the case of *Evans Medical Supplies Ltd v Morarity* and (b) the provisions of the Business Income Manual published by HMRC.

125. It was submitted that a lump sum received by a UK company for disclosing certain secret processes and other information to the Burmese Government was held to be a capital receipt in *Evans Medical Supplies Ltd v Moriarty [1957] 37 TC 540*. This was submitted to be precisely the case in this appeal, where Trafigura were effectively compensating the Appellant for the use of his secret processes used in management performance recording.

126. They invited the Tribunal to apply the decision of the House of Lords in *Evans Medicals Supplies Ltd v Moriarty* where their Lordships stated:

> "'*The effect of the contract was this: the company parted with its secret processes to the Burmese Government for ever, but upon the terms that the Government would not without the consent of the company impart such information to another, such consent not to be unreasonably withheld. The company remained at liberty to carry on its wholesale trade there, and, in legal theory, could no doubt have thereafter set up a competing factory in Burma. In addition, the company was to supply technical data, drawings, designs and plans for the erection of a factory and of the installation of*

machinery appropriate and suitable for the manfacture of these known pharmaceutical products and for their processing by these secret processes…."

127. They relied on the following passages from the speeches:

"*As appears from the passage I have read, in his view the company was' parting for ever with an asset. So again, he says: 'the company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation... it was parting for ever with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry established by the skill and know-how of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection."*

128. They submit that the Master of the Rolls, Lord Evershed, set out the test as being:

"*But the right to treat the Pounds 100,000 as capital must be limited to the extent to which it was referable to secret processes properly so called; that is, to formulae or secret processes truly analogous to the subject-matter of letters patent, copyright and things of that kind. It would not, for example, include the sort of information recorded in the plans which were shown to us illustrating the way in which the company would lay out the factory and dispose the apparatus therein. Plans and designs of that kind only represent, I think, the recorded fruit of practical manufacturing or operational experience. "*

129. Lord Justice Birkett stated as follows:

"*The position then is, in my opinion, that at the date of the agreement the company was in possession of certain secret knowledge relating to pharmaceutical products; that that knowledge constituted property of a capital nature; that under the agreement it bound itself to communicate that knowledge to the Burmese Government; and that the obligation which the company so incurred constituted a part, at least of the consideration for which the company was to receive Pounds 100,000….*

The value of the processes to the company lay in the fact that they were secret; and those in question ceased to be secret from the moment when they were communicated to the Burmese Government pledged itself not to divulge the information to anyone else without the company's consent; but they became possessed of the information themselves and they would possess it for ever."

130. They submitted the facts of the instant appeal were on all fours with *Evans*. The £1 million payment from Trafigura was paid to Mr Looney for loss of a secret process that he had spent many years inventing, preparing and honing as a highly effective

business tool. The loss of his Performance Management System was akin to the loss of an asset and the payment was made for the loss of that proprietary secret process.

131. Further, they relied on HMRC's Business Income Manual (under the heading "Specific receipts: compensation and damages: capital or revenue: summary**")** which states that an amount received by a trader in consideration of the cessation, in whole or in part, of his business may be a capital receipt.

132. It was submitted that if Mr Looney (or his company for that matter) were to be taxed on two years of £3 million income, he would have significantly more that the £500,000 per remaining contract year no matter how highly he was taxed. In other words, HMRC cannot logically state that he should be taxed as this compensation is a fair reflection of lost actual or potential earnings; a key element to the '*Gourley*' Principal applied in the *British Transport* Case.

133. In conclusion they submitted that in Mr Looney's case the £1 million termination payment was a fraction of the lost contract value and was more accurately to be considered a form of tax-free capital resource to be used to sustain the business. They submitted that the only logical and legal conclusion remained that the compensation was not subject to tax.

Discussion and Decision on the Partnership appeal

The two issues in dispute

134. HMRC contend that for the accounting period ended 31 December 2009 the turnover figure for the KLA Partnership should be £4,000,000. This is based on the income received from Trafigura between January and November 2009 (£3 million in payments received by Nower Inc in February and August 2009 and £1 million received by Mr Looney / KLA in October 2009). HMRC submit they properly amended and revised the KLA partnership return for 2009-2010 to include this sum as turnover and hence calculate profits which were subject to income tax.

The first issue – are payments made by Trafigura attributable as income and turnover to the KLA Partnership or the company KLCL or any other entity

135. The burden of proof is upon the Appellant partnership to demonstrate that HMRC wrongly revised the partnership accounts to include the payment made by Trafigura as income and turnover and demonstrate that it was attributable to the company KLCL.

136. The contract pursuant to which Trafigura made the payments, being the letter of agreement dated 14 January 2009, was made between Kieran Looney & Associates (the partnership) and Trafigura Beheer BV.

137. Clause 1.12 of that contract states: "The terms of this agreement including the attachments set out the entire agreement and understanding of KLA and Trafigura Ltd in relation to the subject matter, to the exclusion of any other terms or representations, and may not be varied except in writing signed by a duly authorised signatory on behalf of each party. They are personal to KLA and Trafigura Ltd and may not be assigned or transferred in whole or part by either of them".

138. There is no dispute between the parties but that there was no written assignment, transfer or variation of the parties to the contract. There was nothing in writing from either party, let alone any agreement, assigning, varying, novating or substituting the KLA partnership with any other entity such as KLCL or Nower Inc. There is no dispute that clause 1.12, requiring a written variation to the contract, was not satisfied or attempted to be engaged by either party to the contract. The Supreme Court judgment in *Rock Advertising* is binding authority that clause 1.12 of the contract is and was effective.

139. For the reasons set out above the Tribunal has not accepted Mr Looney's oral evidence that a novation, variation or assignment took place. He provided no detailed evidence of any attempt to vary the contract orally with Trafigura let alone any evidence of written variation. He gave no evidence of the time, date or reason or any independent contemporaneous evidence of there being a change of contracting party from KLA to KLCL (or Nower Inc).

140. Indeed, on 17 December 2009 Particulars of Claim were filed on Mr Looney's behalf in his personal name suing Trafigura for repudiatory breach of contract and damages alleging the contract was unlawfully terminated. Mr Looney conducted litigation up to February 2011 as the named Claimant on behalf of himself and / or KLA claiming damages for breach of that contract. The judgment of Mr Justice Newey provides further persuasive, if not binding, support for the fact that the KLA partnership, or Mr Looney, was the proper party to the contract.

141. Further, Mr Looney at the subsequent meeting with HMRC in 23 June 2011 accepted that the contract was between Trafigura and himself (or at least the partnership) and not the limited company, KLCL. KLCL had no right to sue because there was no privity of contract between itself and Trafigura. There is no written or credible or reliable evidence even that there was any assignment of the benefit of the contract from the partnership to the company. The income is proper to the partnership and not the company.

142. The Tribunal has not accepted Mr Looney's evidence that Trafigura paid the termination fee to the KLA partnership in October 2009 by mistake. Further and in any event, the recipient of the payment does not determine the identity of a contracting party.

143. Even if Mr Looney or KLA had asked Trafigura to pay sums to different entities on his / their behalf that does not mean the contract would be with those entities. All the payments made by Trafigura went to the KLA partnership or to Nower Inc (although not initially declared). No payments were made to KLCL. KLCL did not receive any payment on the contract, nor declare any payment under the contract in the company's 2009-2010 or 2010-2011 accounts as originally presented. This is unsurprising as it cannot agreed to have receive monies - KLCL was not a contracting party and not in existence at the time the contract was formed in January 2009.

144. Mr Looney's company, KLCL, did not exist when the contract was entered into in January 2009. The company was incorporated in April 2009 with Mr Looney as the sole shareholder and director. KLCL could not make the original agreement with

Trafigura and there was no subsequent variation, substitution, novation or assignment effective to transfer the benefit of the contract to KLCL.

145. At the time KLCL was incorporated, 9 April 2009, the majority of money paid pursuant to the contract (around £2.3 million) had already been paid by Trafigura.

146. The Tribunal is satisfied that the sums paid by Trafigura to the Nower Inc and KLA bank accounts was attributable and due to the KLA Partnership and no other entity, particularly not the companies KLCL or Nower Inc.

147. The Tribunal notes that on 19 August 2016 Mr Fonseka agreed to HMRC proposal that £3 million of the Trafigura income would fall within the partnership for the year ended 31 December 2009 but not the £1 million payment which was disputed as being taxable. However, the Tribunal places no weight on this concession as it was subsequently withdrawn by Mr Fonseka.

148. The Tribunal is satisfied that the partnership was entitled to and received payment under the contract between Trafigura and Kieran Looney & Associates. The payments made by Trafigura are income and turnover of the partnership under the terms of the contract between Trafigura and Kieran Looney & Associates. Mr Looney received all of the payments as his share of the KLA Partnership profits. Neither HMRC nor the Tribunal were provided with any copy of any partnership agreement between Mr Looney and Reality Coaching Limited nor any evidence as to any profit-sharing arrangement which could demonstrate that profits would be shared on any other basis.

149. The Tribunal is satisfied on balance that HMRC's decision to revise the partnership accounts to include as turnover income from Trafigura was lawful and that the profit consequent on the turnover was subject to income tax.

150. Mr Looney has not discharged the burden on proof upon him to demonstrate that payments were properly attributable to KLCL rather than the KLA partnership. Mr Looney did not demonstrate as a matter of fact and law why the sums should be included in the company accounts and should not appear in partnership accounts based on general accountancy practice for the purpose of sections 25 and 849 ITOIA.

151. There is no dispute as to the expenses allowed by HMRC in computing the profits of the Partnership for 2009-2010. The expenses were based on those attributable to the income from Trafigura which Mr Looney had included in the company accounts of Kieran Looney & Co Ltd. On 2 October 2015 HMRC revised the allowable amounts following an analysis of credit card payments and Mr Fonseka wrote to HMRC on 19 August 2016 agreeing the computation of allowable expenses.

The second issue – was the £1 million termination payment a revenue receipt and trading income or a capital receipt or some other type of compensation and non-taxable?

152. Clause 1.10 of the Contract provided:

> "Early termination may only occur on written notice on the basis set out in the Financials. On Trafigura serving written termination notice and paying the

> early termination fee the Program will be discontinued and Trafigura and KLA will have no further obligations to the other in relation to payment or delivery of the Program respectively except that the confidentiality, Materials terms and other provisions of this agreement intended to apply after termination will continue to apply with full force and effect. If no written notice is served under and in accordance with the timescale set out in clause 2.5 Trafigura will pay the license fee for 2010 by 15th December 2009, and the license fee for 2011 by 15th December 2010."

153. The reference to the "Financials" related to "pricing terms and conditions" set out in an attachment. Section 5 of this attachment stated the following as regards early termination:

> "Written notice must be received by KLA on or before 1st November 2009 Non-refundable deposit + £1,000,000 early termination fee to be paid to KLA within fourteen days of notification"

……

154. The Contract also incorporated a manuscript amendment at the end of clause 1.10:

> "It is intended that the program is dynamic in nature and will evolve subject to the specific requests (within reason) of Trafigura BV."

155. Clause 5 of the "Pricing Terms & Conditions" section of the contract provided for the early termination fee of £1,000,000 to be paid to KLA within 14 days of notification.

156. Clause 1.10 therefore provided for the payment of an early termination fee. Trafigura's right to terminate the contact under the clause was found to be unfettered by Mr Justice Nugee as set out at paragraphs 89-90 of his judgment:

> 89. I have concluded that there was no relevant restriction on Trafigura's ability to terminate the contract under clause 1.10. In particular, I have not been persuaded that Trafigura was entitled to terminate the contract only on "proper and reasonable grounds" or in "proper and reasonable commercial circumstances".
>
> 90. My reasons include these:
>
> i) The construction of a contract involves looking at the meaning which the language would have conveyed to a reasonable person. Here, there is nothing in the language of clause 1.10 itself to indicate that **Trafigura's** right to exercise it was to be qualified as Mr Collings suggested. To the contrary, the wording of the clause suggests, on its face, an untrammelled entitlement to terminate up to November 2009, subject to paying Mr Looney £1 million. Nor, to my mind, is anything to be found elsewhere in the contract to indicate to a reasonable reader that Trafigura's right to terminate was circumscribed. This point is reinforced to an extent by the fact that the contract contains references to "reason" and "reasonably". Thus, clause 1.10 provides for the KLA Program to evolve "subject to the specific requests (within reason) of Trafigura", and clause 1.11 entitled Mr Looney to refuse to continue the Program if there was "evidence of breach of the terms or conditions of the Materials agreement, whilst acting reasonably in all cases" (emphases added). I agree with Mr Morpuss that the fact that the parties included express requirements as to reasonableness in the contract, but not in the termination provision, tends to suggest that Trafigura's right to terminate was not intended to be subject to such a requirement;

ii) Clause 1.10 makes commercial sense as it stands. Mr Morpuss' construction of the clause does not, in my view, flout "business commonsense", and there is no necessity to read in a qualification such as Mr Collings contended for. There is nothing nonsensical about Trafigura being given an unfettered right to terminate if it paid Mr Looney £1 million. As Mr Collings said in his submissions, £1 million "buys you a lot". There was, moreover, a rational basis for allowing Trafigura to bring the contract to an end without having to show that it had a good reason. Mr Lorinet touched on this in cross-examination. He said:

> "[Y]ou are talking here about a delivery of what I would call 'soft skills' which is performance management, it's very hard to quantify. If things don't go as planned it's very hard to apportion blame, in my mind, to say, well, is it Trafigura was not committed enough? Is it Kieran Looney was too difficult? What is it?
> Therefore it's a lot simpler, to avoid any argument, to have something that is very transparent and that's how I read the break clause as a very transparent mechanism which said what was in the contract";

iii) Mr Collings made the point that Trafigura had invoked clause 1.10 before Mr Looney had become entitled to even half of the £9 million fees for which the contract provided, despite the fact that (as Mr Collings submitted) what Trafigura received under the contract was "hugely front-loaded". Since, however, the contract provided for the termination clause to lapse within the first year, the right to terminate necessarily had to be exercised, if at all, at a time when the majority of the £9 million had not yet fallen due. That Mr Looney had received only £3 million of the £9 million cannot of itself, therefore, have precluded Trafigura from terminating. Moreover, it is easy to exaggerate the extent to which the contract was front-loaded: Mr Looney's work came to an end with the contract, and, as regards the materials with which Trafigura had been supplied by Mr Looney, these had to be returned;

iv) Clause 1.10 can be likened to a break clause in a lease. As Mr Collings recognised, a tenant will normally have an unqualified right to exercise such a provision;

v) Mr Collings argued that the reasonable person would say that Trafigura could not be bound to make the £1 million payment for which clause 1.10 provides if there had been fault on the part of Mr Looney. It was thus apparent, Mr Collings submitted, that clause 1.10 could not be read literally. For my part, however, I found Mr Morpuss' answer to this submission convincing. Mr Morpuss' position was that, had Trafigura considered Mr Looney to be in repudiatory breach of contract, it could have sought to bring the contract to an end by accepting the repudiation rather than by invoking the termination clause, but that if, on the other hand, Trafigura chose to operate the termination provision it had to pay £1 million in accordance with the clause. I agree;

vi) *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* was a very different case. What was at issue there was the circumstances in which a contract could be terminated for breach. No such question arises in the present case: the termination clause is not tied to breach. Moreover, there is provision for Mr Looney to be compensated to the tune of £1 million; and

vii) Mr Lorinet and Mr Wainwright accepted in cross-examination that they would have expected to act reasonably when deciding whether to terminate. It by no means follows, however, that the contract required them to do so.

157. The purpose of £1 million termination payment was simply to compensate or provide consideration to Mr Looney for the early termination of the contract. This is apparent both from the face of the contract, its natural meaning and the plain wording of Clause 1.10, and from the judgment of Mr Justice Newey. The contract terms do not suggest that that the £1 million is anything other than an early termination payment.

158. Mr Looney has failed to satisfy the Tribunal that HMRC's view of the termination clause was incorrect. The Tribunal is satisfied that the purpose of the payment was to be compensatory to KLA for the lost opportunity to trade and profit from the remaining two years anticipated under the contract and that money paid under it was trading income and a revenue receipt.

159. Clause 1.10 was not expressed in the contract to be in anyway compensatory in respect of the acquisition of any intellectual property right or secret process contained in the KLA program. Mr Looney's Particulars of claim do not suggest that the termination fee was any such form of compensation. Nor did Mr Justice Newey find the termination payment so to represent.

160. Mr Looney's Particulars of claim in effect alleged that Trafigura was in repudiatory breach of contract by terminating it without reasonable cause and they claimed damages for the loss of earnings on the remainder of the contract. To the extent that they make any claim in respect of any intellectual property rights they do so in relation to the unrelated allegation that Trafigura drew on the KLA program to develop their other training program, TrafiTalent, a claim rejected by the Judge as set out above.

161. Thus the Tribunal's finding that the early termination payment was not connected to any acquisition of any asset or in respect of capital, is consistent with the finding of High Court.

162. Indeed, the numerous contract provisions dealing with intellectual property and copyright, some of which are set out above, specifically excluded Trafigura from the use, acquisition or licensing of the KLA Program except in the circumstances where Trafigura paid for and received the service for the full three years anticipated by the contract at which point Trafigura were to obtain a continuing licence to use the program.

163. The Tribunal rejects Mr Looney's evidence and submission that the payment of the termination fee was in any way connected to the acquisition by Trafigura of any intellectual property right or secret process. The terms of the contract make no such connection. For the same reasons it was not to be considered a compensatory payment for an asset on the end of a business but for the loss of continued trading and profit form the contract.

164. The reliance by the Appellant upon the authority of *Evans Medical Supplies Ltd* was misplaced. The case is manifestly distinguishable on its facts. In *Evans* the contract expressly provided for payment in return for an explicit agreement to make available and acquire the secret processes including the following terms:

"In consideration of the payment to Evans Medical by the Government of the Union of Burma of the capital sum of £100,000 (One hundred thousand pounds sterling) payable in the United Kingdom free from any deduction whatsoever (A) Evans Medical will provide and make

available to the Government of the Union of Burma all drawings designs and plans and technical and other data and ' know-how ' necessary for the establishment erection and installation of the factory and the commencement of production thereat of the pharmaceutical and other products mentioned in the Schedule hereto……."

165. The contract terms in *Evans* could not be further from those provided under the termination clause of KLA's letter of agreement. Clause 1.10 did not provide for KLA to part with a capital asset (the KLA program or any other intellectual property or right to a secret process) and receive in return a capital sum. The transaction was not a parting by KLA with part of its property for a purchase price, but instead a method of trading by which KLA acquired a particular sum of money as part of the profits and gains of its trade.

166. The Tribunal is satisfied that an amount received by a trader in consideration of the cancellation, breach or variation of a trading contract constitutes a revenue receipt. The termination fee was in effect an early release compensation payment made when Trafigura opted to end the contract early. It was consideration for the cancellation of a trading contract and a trading receipt of revenue, not a capital payment nor any other type of non-taxable compensation.

Discovery amendment to the partnership return

167. The burden of proof was upon HMRC to demonstrate that they had made a discovery and were entitled to amend the partnership return for the tax year 2009-2010 under section 30B(1)(a) TMA 1970 in line with *Burgess & Brimheath Developments Limited and HMRC* [2015] UKUT 578 TCC. While this issue was agreed between the parties, the Tribunal records its reasons for being satisfied that HMRC had discovered that any profits which ought to have been included in the partnership's statement had not been so included.

168. On 26 May 2011 HMRC opened enquiries for 2009-2010 into the self-assessment return of Mr Kieran Looney and the company tax return of Kieran Looney & Co Ltd, the primary focus of which was the income from Trafigura.

169. On 6 February 2013 Officer Margaret Mousley of HMRC's Specialist Investigations Directorate undertook a review of the enquiries that had been opened on 26 May 2011. Officer Mousley identified a number of matters which required clarification including the income from Trafigura and further expenses claims for Kieran Looney & Associates.

170. On 18 April 2013, HMRC met Mr Nimal Fonseka of Fonseka & Co Ltd, the agent representing Mr Looney. The notes of that meeting state that the income from Trafigura was appropriate to Kieran Looney & Associates as opposed to Kieran Looney & Co Ltd and Mr Fonseka would re-write the accounts.

171. At the meeting on 18 April 2013 other issues were also discussed including the VAT Return for quarters ending 12/08 and 06/08 and the expenses claimed in the amended accounts of Kieran Looney & Associates for 2008.

172. On 7 August 2013 HMRC wrote to Fonseka & Co Ltd. In that letter Officer Mousley stated that she was unable to reconcile the amounts included in the revised 2008 accounts that had been submitted and set out what she believed to be the correct figures. Officer Mousley stated that as no supporting documentation or breakdown had been provided to support the revised 2009 accounts, she proposed that the 2009 accounts be based solely on the income and expenses arising from Trafigura and which had been accounted for in the accounts of Kieran Looney & Co Ltd for Accounts Period Ended 30 April 2011.

173. No agreement to HMRC's proposals of 7 August 2013 were received.

174. On 2 September 2013 Fonseka & Co Ltd advised Officer Mousley that they did not agree with her computations for the years ended 31 December 2008 and 31 December 2009.

175. On 20 December 2013 Officer Mousley wrote to Fonseka & Co Ltd setting out the amounts she proposed to assess for 2008-2009 and 2009-2010.

176. On 2 January 2014 Officer Mousley advised the Nominated Partner of Kieran Looney & Associates that she had amended the Kieran Looney & Associates Partnership Return for the period 01 January 2009 to 31 December 2009 (tax year 2009-2010). The amendment was made pursuant to section 30B(1) TMA 1970. It is this amendment which is subject to appeal.

177. On 6 January 2014, Officer Mousley advised the Nominated Partner of Kieran Looney & Associates that she had amended the Kieran Looney & Associates Partnership Return for the period 01 January 2008 to 31 December 2008. The amendment was made under section 30B(1) TMA 1970. The appeal in relation to the amendment for this period is no longer before the Tribunal.

178. No partnership enquiry for 2009-2010 having been opened by HMRC under section 12AC of the TMA 1970, an amendment to the partnership return of Kieran Looney & Associates for 2009-2010 under section 30B(1) TMA 1970 may only be made if section 30B(4) is satisfied.

179. The Tribunal is satisfied that section 30B(4) TMA 1970 is satisfied because HMRC have established that one of the conditions at section 30B(5) or 30B(6) has been met.

180. The Tribunal is satisfied Mr Looney's actions for 2009-2010 were "careless" for the purposes of section 30B(5) TMA 1970. The £4 million income from Trafigura arose as a result of a contract between Kieran Looney & Associates and Trafigura. Mr Looney failed to account for this income in the legal entity that was entitled to payment, KLA. Mr Looney attributed the income through his company, Kieran Looney & Co Ltd that had no entitlement to payment and even then only declared £3 million in income and did not include the £1 million termination payment.

181. Further, section 30B(6)(a) is engaged. At the time an officer of the Board ceased to be entitled to give notice of his intention to enquire into the representative partner's partnership 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 in section 30B(1)(b). This was discovered by virtue of the VAT enquiry and the enquiries into the self-assessment of Kieran Looney and the company return of Kieran Looney & Co Ltd for 2009-2010.

182. It was only because of the enquiry into the personal return of Mr Looney and the company return of Kieran Looney and Co Ltd that HMRC became aware and discovered the material facts it relied upon to amend the partnership return of Kieran Looney & Associates.

183. The Tribunal is satisfied that once Officer Mousley had identified that the income arising from Trafigura had not been accounted for in the partnership of Kieran Looney & Associates, section 30B(1)(a) TMA 1970 was met in that the income from Trafigura was not included in the partnership statement when it should have been and this was sufficient for HMRC to have made a discovery.

184. In *Revenue & Customs Commissioners v Charlton & Ors [2012] UKUT 770 (TCC)*, the Tribunal emphasised the following:

"At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed" [28].

185. The Tribunal is satisfied that the conditions of Section 30B TMA 1970 are satisfied and that HMRC was entitled to amend the partnership return for the year 2009-2010.

Conclusion on the Partnership Appeal

186. The Tribunal is satisfied that the revised Partnership profits and tax due for the year 2009-2010, based on the accounts for the calendar year 1 January to 31 December 2009, are as revised by HMRC and shown in the table below:

Accounting period	01/01/2009 to 31/12/2009	
	Original return	HMRC revised
Turnover	Nil	4,000,000
Cost of Sales		Nil
Expenses		87,281
Admin Costs		2,443,257
Net Profit	Nil	1,469,462
Tax due	(refund) £17.00	597,417.67

187. The £3,000,000 payment from Trafigura is taxable income of the partnership. The £1,000,000 termination payment from Trafigura was a revenue receipt from trade and

is also taxable income of the partnership. The turnover of the partnership in the relevant year was £4 million.

188. The cost of sales, allowable expenses and resulting net profits as calculated by HMRC are confirmed:

Tax Year	2009/2010
Turnover	£4,000,000.00
Cost of Sales	£2,443,257.00
Expenses	£87,281.00
Net Profit	£1,469,462.00

189. The partnership appeal is dismissed. The decision of HMRC revising and amending the partnership return of Kieran Looney & Associates for 2009-2010 is confirmed.

The Capital Gains Tax Appeal

190. The Capital Gains Tax appeal is an appeal against HMRC's closure notice and amendment to Mr Looney's self-assessment tax return for the year 2011-12 in respect of Capital Gains Tax (TC/2016/02331).

Facts

191. The Tribunal makes the following factual findings on the balance of probabilities having considered the witness statements and oral evidence of the witnesses, Mr Looney, Mr Nimal Fonseka and HMRC Officer Hadley, indicating where it rejects any of the evidence given.

192. On 17 September 2012 Mr Looney's self-assessment tax return for the year 2011-2012 was submitted (the first return). No capital gain was declared on that return.

193. On 5 February 2013 Mr Looney submitted an amended self-assessment return for 2011-2012 (the second return) which included a capital gain of £1,127,551.00. The gain was said to be based upon the purchase and sale of Mr Looney's interest in property or land in the Caribbean.

194. On 11 March 2013 Mr Fonseka sent Officer Mousley copies of statements from Mr Looney's Allied Irish Bank (AIB) GB, UK Bank account with Private Banking at Berkley Square, London to show the amounts sent to the Caribbean.

195. The statements were accompanied by three letters from AIB. The first evidenced a payment of $80,000 USD (£40,526.33) to Canounan Reality Ltd (sic) on 31 May 2007. The second letter evidenced a payment of $1,200,000 (£591,153) to Canouan Resort Development (sic) on 13 July 2007. The third letter evidence a payment of $3,079,000 to Canounan Resorts Development (sic) on 22 October 2007.

196. Thus, a total payment of $4,359,000 USD (£2,139,514.79 at the various exchange rates then prevailing) was made by Mr Looney to bank accounts of limited companies

with similar names. Canouan is an island within St Vincent and the Grenadines in the Caribbean.

197. On 15 March 2013 Mr Looney submitted a further amended self-assessment return (the third return) for 2011-2012 showing half of the capital gain previously declared ie £563,775.5. This was on the basis that the capital gain chargeable on the sale of Mr Looney's interest in the Caribbean property or land was to be attributed jointly to him and Mrs Looney.

198. On 18 April 2013 Mr Fonseka attended a meeting with HMRC.

199. On 2 July 2013 HMRC opened an enquiry into the return under section 9A of the TMA 1970.

200. On 17 October 2013 Mr Looney's agent, Mr Fonseka wrote re 'Mr KJ & Mrs SA Looney' stating:

"The expenses claimed in respect of the purchase and sale of the property related to the costs incurred by my client's travelling, subsistence and accommodation etc.

My clients bought this property for development purposes. They intended to build a high spec holiday complex and sell it at a profit. Their plans were delayed due to a complicated legal dispute that Mr Looney had with a major client that went for over two years. This dispute ended in the High court in London.

My clients were offered a very good price for the property in late 2011 by the owners of another property on the island, which they decide to accept in view of the worldwide recession. They are entitled to claim Entrepreneurs' relief."

201. Officer Nolan of HMRC phoned Mr Fonseka on 25 November 2013. Mr Fonseka said that when Mr Looney purchased the property the property was never legally passed on to Mr Looney, it was an error by Mr Looney's solicitors which he was taking against. The Officer asked if Mr Looney received the proceeds on sale as the property was never in his name and Mr Fonseka said Mr Looney did and wanted to pay the correct taxes.

202. On 2 December 2013 Mr Fonseka submitted a computation of the capital gain on behalf of Mr & Mrs Looney based on the gain arising for each. This stated the date of disposal (of the property or land) was 1 February 2012. The letter listed the cost of the asset to be £1.344 million for each tax payer (therefore total cost of purchase being £2.688 million). The half share of the disposal proceeds was said to be £1,920,000 (therefore total proceeds from sale being £3.84 million). Less other incidentals costs, the gain was said to be £569,075 minus the annual relief of £10,600 meaning the chargeable gain was said to be £558,475. It was submitted that capital gains tax was payable on this chargeable gain at 10% based on entrepreneurs' relief.

203. By this stage, there had been three different submissions to HMRC by Mr Fonseka on behalf of Mr Looney; that Mr Looney had incurred no chargeable gains for the tax year 2011-2012 (17 September 2012 return); that he had incurred a chargeable gain based upon his sole ownership of an interest in land or property in the Caribbean (5 February 2013 amended return); and that he had incurred a chargeable gain based upon

joint ownership with his wife (15 March 2013 further amended return). There then occurred a further change of approach by Mr Fonseka on behalf of Mr Looney.

204. On 21 December 2013 Mr Fonseka wrote to HMRC stating "Mrs Looney had no connection with the property transaction." and raised the question of Mr Looney's ownership**.**

205. On 17 February 2014 Officer Nolan called Mr Fonseka. Mr Fonseka stated that Mr Looney bought the property in the Caribbean but his solicitors made a mistake with the contract and the property was never transferred to his name. Officer Nolan explained that Mr Looney would still be the beneficial owner as he received the proceeds and the Capital Gain would still be due on him as beneficial owner. Mr Fonseka accepted this and agreed Capital Gains tax was due on Mr Looney but that Entrepreneurs' relief (ER) would be due as Mr Looney bought the property to do up and sell on at a profit so that ER was due. Officer Nolan told Mr Fonseka that he didn't believe ER to be due as the property was not part of any business or trade.

206. On 18 February 2014 Mr Fonseka, on behalf of Mr Looney, submitted yet another amended self-assessment return for 2011-2012 (the fourth return) which again showed a half share of the capital gain from the sale of property.

207. On 10 April 2014 HMRC issued an Information Notice under Paragraph 1 of Schedule 36 to the Finance Act 2008.

208. In response to HMRC's Information Notice, Mr Fonseka wrote on 14 April 2014 stating that his client had been advised there was no capital gain as the investment did not legally belong to him and a yet a further amended return dated 14 April 2014 (a fifth return) was submitted showing no capital gain.

209. In a covering letter Mr Fonseka stated: 'My clients have been advised that there is no CGT liability as the investment did not legally belong to them.'

210. On 9 May 2014 HMRC wrote to Mr Fonseka asking for evidence relating to the disposal that had prompted the original capital gain entries in Mr Looney's return and evidence to confirm the advice that there was no capital gain.

211. On 11 June 2014 Mr Fonseka wrote to HMRC stating that Mr Looney had been informed that due to the unusual nature of the transactions they did not fall within the capital gains tax (CGT) regime.

212. On 15 July 2014 HMRC issued an Information Notice under Paragraph 1 of Schedule 36 to the Finance Act 2008 requesting a full capital gains computation, a breakdown of any costs or reliefs claimed and an explanation of why entrepreneurs' relief was due.

213. On 21 July 2014 Mr Fonseka wrote to HMRC again stating that no CGT was due as the asset did not fall within the parameters of Capital Gains.

214. On 12 August 2014 HMRC wrote to Mr Fonseka advising that HMRC had an enquiry open into Mr & Mrs Looney's self-assessment returns for 2011-2012 and

asking for an explanation as to why a capital gain on the asset in question was originally declared and why the asset was now not considered to be a capital gain. HMRC again requested a full reply to HMRC's letter of 9 May 2014**.**

215. On 12 October 2014 Mr Fonseka replied to questions of HMRC dated 29 September 2014 stating:

(1) The purchase of property (said to be at Waterside Development) was made by Mr Looney alone;

(2) There was no available purchase or sale agreement as the purchase was not completed;

(3) The acquisition cost (of £2,688,000) was met from Mr Looney's own funds; and

(4) The disposal proceeds (of £3,840,000) were paid to Mr Looney.

216. Mr Fonseka's letter went on to state:

'Due to the negligence of my client's agents the property was not transferred to my client. My client had forfeited the monies he had paid up front for the property. In fact he was not able to sell or transfer the property as he did not own it.

One of his close friends and business associates stepped in and bought the property from the original owners and although he had no obligation to do so, paid my client.'

217. On 10 January 2015 Mr Fonseka stated the friend was "Mr Antonio Saladino" of Canouan Resort Development Ltd, Carnage Bay, Canouan Island, St Vincent & the Grenadines.

218. On 26 January 2015 Mr Fonseka provided copies of e-mail correspondence from Mr Looney and others with the Minerva Trust in 2011. Mr Fonseka stated that Minerva Trust failed to transfer the property to Mr Looney.

219. This correspondence evidences Mr Looney's attempt to transfer his believed ownership of shares in Sandpiper Enterprises Ltd (which company owned the land in Canouan) to the SE (Sandpiper Enterprises) Trust, a trust to be administered by Minerva Financial Services Limited (Minerva Trust) in Jersey.

220. In an email exchange dated 26 May 2011 Paul Tyrell, a Trust Officer at Minerva Trust, emailed Mr Looney to say Minerva had been in correspondence with the administrators or the company BSI Trust Corporation (Bahamas) Ltd in relation to the outstanding issues with regard to Sandpiper Enterprises Ltd (the owner of the land in Canouan).

221. Mr Tyrell noted that that Canouan Resort Developments remained the shareholders of Sandpiper Enterprises Ltd (which in turn owned the land). His contact with the BSI Trust Corporation (Bahamas) Limited ("BSI") confirmed that before they would be able to make any changes to the share ownership of Sandpiper Enterprises Ltd, they required clear instructions from the current beneficial owners informing them of the change in ownership with further instructions to make the necessary changes to

the share register. Mr Tyrell asked Mr Looney to get in touch with his contact at BSI and ask them to instruct / confirm to BSI Trust that the SE (Sandpiper Enterprises) Trust holds the shares of Sandpiper Enterprises Ltd.

222. In an email titled 'Re: Sandpiper Enterprises Ltd' in reply to Mr Tyrell, Mr Looney stated: 'I take it from your message that the current beneficial owners are myself and Sandra. The trust is not yet operable. Is this correct'.

223. Mr Tyrell replied by email to state that due to client confidentiality BSI would not confirm this. He stated that the trust was existing, the outstanding point was BSI, formerly Gottardo Trust Co Ltd, had never changed the share register and issuance of new shares to reflect the change of ownership to the trust.

224. In a letter dated 29 April 2012 Mr Fonseka had written to Derek Le Brun, director of Minerva Trust & Corporate Services Ltd regarding Mr Looney and the SE Trust. The letter stated that the SE (Sandpiper Enterprises) Trust was settled on 28 & 27 March 2008 by Mr and Mrs Looney. The sole trustee was the Minerva Trust Co Ltd. The beneficiaries of the trust were the settlors (Mr and Mrs Looney) and their children.

225. Mr Fonseka went on to state:

'7) SE Trust received as the settled property for the trust, the shares of Sandpiper Enterprises Ltd, a Bahamian company administered by Gottardo Trust in the Bahamas. The shares were held by Gottardo's nominee company and we understand that instructions were given by the settlors to transfer the share to the trustee on 28 March 2008. Sandpiper Enterprises owns a property in the Bahamas purchased on May/July/October 2007 for a consideration of US$4,359,000 (£2,139,264). The property was sold in June 2011 for a consideration of $1 million deposit and balance of $5 million in January 2012. The property was used by the family for vacation purposes only.

8) Canounan Resort Developments (CRD) were the shareholders of Sandpiper Enterprises Ltd (Bahamas company managed by Gottardo Trust Company) that owned the plot of land – e22. The necessary changes were never made to the share register as to the change of ownership.

As such no nominee declaration or share certificate was ever received to confirm that the trustee was the beneficial owner of the share and not CRD.'

226. On 10 March 2015 Officer Karen Russell of HMRC wrote to Mr Fonseka explaining that HMRC considered Mr Looney to be the beneficial owner of the asset and that he was liable to CGT on the disposal and included the resulting tax calculation. She referred to Mr Looney's email dated 13 May 2011 to Paul Tyrell of Minerva Trust and Corporate Services in which Mr Looney stated: "I am considering the sale of one of my properties TM or SE trust".

227. She stated the gain was included on Mr Looney's 2011-2012 tax returns and in Mr Fonseka's letter of 17 October 2013. She stated that in the subsequent telephone call and correspondence Mr Fonseka clearly stated that Mr Looney received the funds and incurred expenses in relation to the purchase and sale, which is unlikely if he did

not own the property or have a reasonable expectation to benefit from the property and its future sale. She referred to section 21 of the Taxation of Chargeable Gains Act 1992 (TCGA 1992) on Assets and Disposals which provides:

21 Assets and disposals

(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—

(a) options, debts and incorporeal property generally, and

[(b) currency, with the exception (subject to express provision to the contrary) of sterling,] and

(c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

228. Officer Russell stated: 'Mr Looney put into effect a series of transactions that whilst they were not executed correctly do not appear to have disadvantaged him as he retained the right to receive the proceeds of the sale. At no time have you claimed that the monies expended by your client and received by him were for anything other than acquisition and sale of the property. The right to the proceeds is an asset, Section 21 paragraph (1)(a) in defining assets includes incorporeal property generally, paragraph (1)(c) refers to assets "otherwise coming to be owned without being acquired".

21. On 24 March 2015 Mr Fonseka wrote to HMRC stating that his client's position was set out in previous correspondence and that it would be best if the matter was referred to the Tribunal.

229. On 1 April 2015 HMRC wrote to Mr Looney advising him that HMRC were unable to close the enquiry as enquiries into Mr Looney's partnership income were continuing and that HMRC were amending Mr Looney's 2011-2012 self-assessment return to include the whole gain arising on the disposal of the asset in question**.**

230. On 15 April 2015 Mr Fonseka appealed against the amendment on behalf of Mr Looney.

231. On 22 April 2015 HMRC wrote to Mr Fonseka seeking clarification of the grounds of appeal.

232. On 19 May 2015 HMRC issued a view of the matter letter to Mr Looney and offered a statutory review of HMRC's decision.

233. On 26 May 2015 Mr Fonseka requested a review.

234. On 16 July 2015 HMRC issued a closure notice under section 28A(1) & (2) TMA 1970 in relation to Mr Looney's self-assessment tax return for the year ended 5 April 2012. As previously indicated in the letter of 1 April 2015 HMRC's decision was to increase the taxable Capital Gain arising from the sale of the asset (said to be property at Waterside development) from £547,875 to £1,127,551 and to disallow the claim for

entrepreneurs' relief. This amendment to the return resulted in a requirement for Mr Looney to pay £320,401.88 in tax.

235. On 20 July 2015 Mr Fonseka confirmed that a statutory review of the decision was required.

236. On 31 July 2015 HMRC wrote to Mr Looney confirming receipt of the appeal against the capital gain for 2011-2012 and indicating that the decision would be reviewed by an officer of HMRC who had not previously been involved in the case.

237. On 5 August 2015 Mr Fonseka wrote to HMRC informing them that Mr Dermot Desmond paid the money to Mr Looney and Mr Saladino was the owner of the property and he did not make any payment to Mr Looney. Mr Fonseka stated that the transaction was a gift and as such not liable to CGT.

238. The Review Officer, Mr Charles Agg, sought further information from Mr Fonseka as part of the review process. During this exchange of correspondence it was clarified that the disposal was not of a property as previously thought but shares in a company (Sandpiper Enterprises Ltd) that owned land.

239. Officer Agg in his letter dated 27 August 2015 sought clarification from Mr Fonseka of his understanding that the asset in question was not the Waterside development property, Canouan, West Indies but the ownership of the shares in the company called Sandpiper Enterprises Ltd (which owned land). He sought clarification that the shares in Sandpiper were supposedly acquired by Mr Looney from BSI Trust Corporation (Bahamas) Ltd (formerly Gottardo Trust Co Ltd) and settled by Mr Looney to the SE (Sandpiper Enterprises) Trust and that during 2011, it transpired that the documentation required to register the changes in ownership of the shares had not been produced.

240. On 28 September 2015 HMRC Review officer Agg upheld the decision that the gain was correctly assessable on Mr Looney for the purposes of CGT and entrepreneurs' relief was not due.

241. On 2 October 2015 Mr Fonseka notified HMRC of a formal appeal against the decision stating that HMRC had failed to pay any regard to the evidence placed before them that Mr Looney did not at any time become the legal or beneficial owner of the shares in Sandpiper Enterprises Ltd. Mr Fonseka stated Mr Looney and his family never went to the land. The land was, at the time, a completely undeveloped plot of land. Mr Fonseka stated that HMRC had failed to produce any legal authority in support of the position that Mr Looney became the beneficial owner of she shares.

242. On 9 October 2015 HMRC Review Officer Agg clarified his view on the use of the property as stated in his review conclusion letter. Namely he pointed to the inconsistency between the letter sent by Mr Fonseka to Mr Le Brun of Minerva Trust and Corporate Services Ltd of 29 April 2012 in which Mr Fonseka had said 'The property was used by the family for vacation purposes only.'

243. On 14 October 2015 Mr Fonseka wrote to HMRC stating that "Mr Looney and his family visited the island and stayed at the resort hotel there in order to view the land they erroneously thought they owned".

244. On 30 November 2015 Mr Fonseka appealed to the Tribunal on behalf of Mr Looney in respect of the amendment to self-assessment return for 2011-2012 charging CGT.

Mr Fonseka's evidence on the Capital Gains tax appeal

245. Mr Fonseka accepted that he made mistakes in dealing with Mr Looney's tax affairs in relation to CGT.

246. Mr Fonseka stated that he now understood that in 2008 the Appellant, Mr Looney, entered into a transaction to buy a piece of land – Plot e22 in the Canouan Resort Development, Carnage Bay, Canouan Island, St Vincent & the Grenadines. Mr Looney paid the owner - Mr Antonio Saladino (Mr Saladino) - £2,688,000 for the shares in a company – Sandpiper Enterprises Ltd (Sandpiper) – which owned this plot.

247. He stated that Mr Looney instructed Minerva Trust & Corporate Services Ltd (Minerva) of St Helier, Jersey, to set up a trust - SE Trust- the beneficiaries of which were the Appellant, his wife and children and to ensure that the shares in Sandpiper were transferred to this trust. Mr Looney paid Minerva for these services. Mr Looney believed that he owned (through the SE Trust) this plot of land. In fact, he even included this property in his statement of Assets and Liabilities submitted to Mr Sherrin of the Specialist Investigation Department of HMRC.

248. Mr Fonseka stated that Mr Looney, the Appellant spent most of his time after the end of the case against Trafigura (in February 2011) abroad prospecting for new clients. He kept in touch with Mr Fonseka by telephone, which led to certain confusion. In 2011 Mr Looney informed Mr Fonseka that he intended to sell Plot e22 as he had financial problems due to the costs he had incurred in the Trafigura case.

249. In 2012, Mr Looney had a conversation with Mr Fonseka stating that he had obtained £3,840,000 and that he had settled his legal costs. Mr Fonseka assumed that these monies were the proceeds from the sale of Plot e22 and amended the Appellant's and his wife's (Sandra Looney's) tax returns for 2011-2012 to include a CGT computation for each. The asset was thought by Mr Fonseka to be a property at Waterside Development, Canouan, West Indies. The CGT Computation for each spouse was set out as follows-

		£
Disposal Proceeds ($2,500,000 @ 1.302) 1,920,000		
Incidental costs of disposal		2,846
Net disposal proceeds		1,917,154
Cost ($1,750,000 @1.302)	1,344,000	
Incidental costs of acquisition	4,079	
Total Costs		1,348,079
Gain		569,075
Annual exempt amount		10,600
Taxable Gain 558,475		
CGT @ 10%- (Claiming- Entrepreneurs Relief)		55,848

250. As Officer Nolan was raising queries on the CGT computations, Mr Fonseka decided to allocate the entire Capital Gain declared to Mr Looney as Mr Looney did not want Mrs Sandra Looney to get embroiled in a tax enquiry. The 2011-2012 tax returns were re-amended accordingly. When it transpired that there had been no sale of the asset, as it did not exist, Mr Fonseka withdrew the capital gain declared on Mr Looney's 2011-2012 tax return.

251. On 10 March 2015 Officer Karen Russell took over the enquiry from Officer Nolan. As no progress was made, Mr Looney requested Officer Russell to submit the file to a higher officer for review. The file was taken over by Officer C W Agg. Officer Agg made his decision on 28 September 2015. On 2 October 2015 Mr Looney made a formal appeal against the decision reached by Review Officer Agg by submitting an appeal to the Tax Tribunal.

252. HMRC did not cross examine or challenge Mr Fonseka's evidence that he had operated under a mistaken belief that Mr Looney told him that monies received in 2012 were from the sale of the asset. Mr Fonseka stated he had simply been confused by what Mr Looney had told him on the phone and assumed he had been told the money received was from the sale of the property. Therefore, Mr Fonseka, when submitting returns and correspondence on behalf of Mr Looney suggesting that Mr Looney had received large sums of money and a chargeable gain in relation to the disposition of his interest in the shares or land in the Caribbean had done so on the basis of a mistaken assumption or belief.

253. Given that Mr Fonseka's evidence was not challenged in cross examination, the Tribunal is bound to accept the following. Mr Fonseka was not acting on the direct instructions of Mr Looney in submitting returns and letters to HMRC which suggested, as Mr Fonseka thought or assumed without instructions, that Mr Looney and/or his wife had received money and profited from the sale of the interest in the shares or land and therefore made chargeable gains.

Documents provided by Mr Looney during the course of the hearing

254. During the course of the hearing the Tribunal requested Mr Looney provide certain documents. Mr Looney assisted and did so.

255. Mr Looney provided a copy of a Share Purchase Agreement which HMRC accepted they may have seen before but was not included in the hearing bundles. The Share Purchase Agreement was dated 12 July 2007 between Kieran Looney and Sandra Looney ("Buyer") and Canouan Resorts Development Ltd ("Seller").

256. The "Landco" was identified to be Sandpiper Enterprises Ltd, a company incorporated in the Commonwealth of the Bahamas with registered office at Gottardo Trust Company Limited, Bahamas.

257. The "Estate Lot" was defined to be the real property of approximately 3.2 acres identified as Lot E22 at Schedule A to the agreement – a plot of land on Canouan Island, St Vincent and the Grenadines in the Caribbean.

258. By virtue of Article 2.2 the Seller (Canouan Resorts Development Ltd) agreed it 'shall sell assign, transfer, convey bargain, grant and deliver to Buyer (Mr and Mrs Looney) and Buyer shall purchase and obtain from Seller, all on the terms and condition hereafter set forth all right, title and interest in and to all of the Landco (Sandpiper Enterprises Ltd) Shares.'

259. Article 2.3 provided that the aggregate purchase price for the sale of the Landco shares to Mr and Mrs Looney was to be USD $4.375 million. This was to be paid as an initial payment of USD $80,000, thereafter USD $1.2 million was to be paid by Mr and Mrs Looney on signing of the Share Purchase Agreement and the balance of the purchase price (USD $3,095,000) to be paid at the closing by wire transfer of immediately available funds.

260. The Share Purchase Agreement also provided at Article 3.2 paragraph (a)(5) that at the closing the seller (Canouan Resorts Development Ltd) would deliver the share certificates representing the Landco (Sandpiper Enterprises Ltd) shares to Mr and Mrs Looney duly endorsed for transfer or evidence that the Landco shares had been deposited on the Looneys' bank account as per their instructions.

261. The Share Purchase Agreement was signed by both Mr and Mrs Looney dated July 2007, albeit the copy provided to the Tribunal named Achille Pastor-Ris and Katya Marchetti, President & CEO as signatories on behalf of the seller (Canouan Realty Ltd, a Bahamian Company). The copy of the agreement provided to the Tribunal did not include any signatures on behalf of the seller.

262. The Tribunal was also provided with an earlier reservation agreement dated 30 May 2007 in regards to the same Estate Lot E22 providing for the deposit of USD $80,000 and signed by Mr Looney as proposed Purchaser and Achillo Pastor-Ris as President and CEO of Canouan Realty Ltd.

263. The Tribunal was further provided with an earlier Lots sale and purchase agreement whereby Mr and Mrs Looney were to purchase the same plot - Estate Lot E

22 – directly (without the mechanism of buying shares in the Landco which owned the land) for a sum of USD $4 million. This agreement was signed by the Looneys and Achille Pastor-Ris for Canouan Realty Ltd. It is apparent that this agreement was not proceeded with so did not evidence the agreement or transaction that was completed.

264. Mr Looney also provided a copy of the bank statement for the US Dollar current account of Nower Inc at the PKF bank in Lugano Switzerland. The bank statement is dated between 1 January 2012 and 31 March 2012 and reveals a credit of USD $5 million received on 17 January 2012 from Orchestra Holdings Ltd. Mr Looney accepted in evidence, as set out below, that this payment was made from Dermot Desmond directly to him but the transfer between companies was simply the mechanism in which the claimed gift was effected.

Mr Looney's evidence on the Capital Gains Tax appeal

265. Mr Looney gave evidence and was cross examined. He stated that HMRC had misunderstood the position in relation to the plot of land in Canouan, St Vincent and the Grenadines. HMRC had alleged that Mr Looney had received £3,840,000 from Dermot Desmond "in respect of the Asset". Mr Looney stated that this was utterly incorrect and demonstrated a clear lack of appreciation of the facts that had been explained to HMRC.

266. Mr Looney stated that the position was that in 2008, he entered into a transaction to buy a piece of land – Plot e22 in the Canouan Resort Development, Carnage Bay, Canouan Island, St Vincent & the Grenadines. He paid the owner - Mr Antonio Saladino (Mr Saladino) - £2,688,000 for the shares in a company – Sandpiper Enterprises Ltd ("Sandpiper") – which owned this plot.

267. He instructed Minerva Trust & Corporate Services Ltd (Minerva) of St Helier, Jersey, to set up a trust – the SE Trust - and to ensure that the shares in Sandpiper were transferred to this trust. The beneficiaries of the SE Trust were himself, his wife and children. He paid Minerva for these services.

268. Mr Looney stated that he believed that he owned (through the SE Trust) Plot e22 in Canouan Island. In fact, he even included this property in his statement of Assets and Liabilities submitted to Mr Sherrin of the Specialist Investigation Department of HMRC.

269. From February 2011, after the end of the case against Trafigura, Mr Looney spent most of his time abroad prospecting for new clients. He kept in touch with Mr Fonseka by telephone, which led to certain confusion. Sometime in 2011, Mr Looney claimed he informed Mr Fonseka that he intended to sell Plot e22 as he had financial problems due to the costs he had incurred in the Trafigura case.

270. In 2012, Mr Looney claimed he informed Mr Fonseka that he had obtained £3,840,000 and that had settled his legal costs. Mr Looney claimed that Mr Fonseka had mistakenly assumed that these monies were the proceeds from the sale of Plot e22 and amended his and his wife's tax returns for 2011-2012 to include a CGT computation for each. The asset was thought by Mr Fonseka to be a property at Waterside Development, Canouan, West Indies.

271. Mr Looney stated that Mr Fonseka informed him that HMRC opened enquiries into these two tax returns on 2 July 2013. HMRC Officer Nolan was the officer handling these enquiries. Officer Nolan requested details of the costs of acquisition and disposal and also refused to allow entrepreneurs' relief.

272. Mr Looney stated that the position was that the asset was the entire share capital of Sandpiper Enterprises Ltd, a Bahamas company, managed by Gottardo Trust Company, which owned Plot e22.

273. Mr Looney stated he had paid Mr Saladino of Canouan Resort Development Ltd, who owned the shares in Sandpiper, £2,688,000. He stated that he had instructed Minerva to effect the transfer of these shares to the SE Trust, and paid Minerva for these services. He continued to pay Minerva their charges for managing the SE trust, which he believed owned the shares in Sandpiper.

274. When Mr Looney decided to sell Plot e22 to raise monies to pay the legal costs of the Trafigura case, he was informed by Mr Saladino that neither Mr Looney nor the SE trust owned the shares in Sandpiper as Minerva had not effected their transfer to the SE trust in 2008. The monies that Mr Looney had paid were forfeited.

275. Mr Looney stated that neither himself, nor the SE Trust had legal or beneficial ownership of the shares in Sandpiper. Nor were there any side agreements or other devices that would have enabled him or the SE Trust to conduct a lawful sale of the shares in Sandpiper to any potential buyer and receive the sale proceeds of such a transaction.

276. Mr Looney claimed that he informed Mr Dermot Desmond (Mr Desmond), who is an international businessman and someone that Mr Looney had known for a long time as a friend from Ireland, that he was experiencing cash flow problems due to the Trafigura case.

277. Mr Looney claimed that Mr Desmond made a gift to him of $5 million (said to be £3,840.000) to help him get over his financial problems. Mr Looney was not expecting the gift and it was very generous of Mr Desmond. They hoped to do business together in the future, and Mr Desmond made it clear that should Mr Looney find himself in the position where he could pay him in the future or work in a business venture with Mr Desmond, that Mr Looney should make repayment. Mr Looney claimed that there were no terms for any such repayment, it was just an agreement between friends. This is why Mr Looney had referred to the sum as a gift, because that is effectively what the money was.

278. Mr Looney claimed he had suffered a loss of £2,688,000 due to the negligence of Minerva. He had instructed Mr Fonseka to appraise Minerva that they had been grossly negligent. The ensuing correspondence had been given to HMRC.

279. Although Mr Looney claimed that he realised that he could have entered into litigation with Minerva, he did not do so for a number of reasons. Firstly, he did not have the money to sue them at the time. Secondly, he had just finished the litigation with Trafigura, which had not gone well and which had absolutely exhausted him and prevented him from earning during the whole of the litigation because of the time and

effort that he had to spend on the litigation. Finally, Mr Looney stated he would have to have issued proceedings in Jersey and therefore he could not pursue an action for negligence against them, especially in a foreign jurisdiction.

The Tribunal's assessment of Mr Looney's evidence

The Tribunal's findings

280. The Tribunal is satisfied on the balance of probabilities that Mr Looney's account that he received £3.84 million as a gift is not accurate, reliable or credible. Mr Looney therefore failed to discharge his burden to prove on the balance of probabilities that the receipt of £3.84 million was a gift so did not represent the proceeds of disposal of an asset in which he had an interest nor a chargeable gain. The Tribunal is satisfied that the sum did indeed represent the proceeds of disposal of an asset in which Mr Looney held an interest and thus there was a chargeable gain.

281. Mr Looney's evidence was that USD $5 million paid from Orchestra Holdings Ltd on 17 January 212 into the PKF Swiss bank account of Nower Inc, his Panamanian incorporated company, represented a gift to him from Dermot Desmond. Mr Looney also gave evidence that the amount of the gift was £3.84 million.

282. On the balance of probabilities, the Tribunal rejects this account and finds the payment was made in respect of the acquisition of Mr Looney's rights or interest in the shares in Sandpiper Enterprises Ltd, which in turn owned the land in the Caribbean. The Tribunal need not make any finding whether the money was indeed paid by Mr Desmond through Orchestra Holdings Ltd to Mr Looney or was paid on behalf of party other than Mr Desmond.

283. The Tribunal is satisfied to a high degree of probability that the payment of USD $5 million made to him on 17 January 2012 was not a gift as Mr Looney claimed. The Tribunal is satisfied on the balance of probabilities that the payment of USD $5 million to Mr Looney, paid to his company Nower Inc in January 2012, represented the proceeds of disposal of his interest in the shares in Sandpiper Enterprises Ltd which owned Plot e22, in Canouan, St Vincent and the Grenadines. Further, the Tribunal is satisfied that Mr Looney received £3.84 million in total for the proceeds of the disposal which equated to USD $6 million at the then prevailing exchange rates.

The Tribunal's reasons

284. The Tribunal relies on the following reasons for rejecting Mr Looney's account.

Late raising of the account now relied upon

285. The late raising of the account now relied upon. The proposition that the sum of £3.84 million or USD $5 million was a gift from Mr Desmond was first raised by Mr Fonseka in September 2015, two years into the enquiry which had begun in 2013.

Inconsistent explanations

286. Further, the account now relied upon raised at a late stage also followed a number of inconsistent accounts as to the identity of who paid the money, whether Mr Looney had made a chargeable gain and the nature of the asset in question.

287. Shortly before the introduction of Mr Desmond's name it had been implied by Mr Fonseka that it had been paid by Mr Saladino, the owner of Canouan Resorts Development Ltd, rather than by Mr Desmond.

288. The proposition that the sum was a gift also followed the submission by Mr Fonseka of numerous amended personal self-assessment tax returns on behalf of Mr Looney for the year 2011-2012. These variously represented that: Mr Looney had received no chargeable gain; a full gain on the sale of a property; then half the gain on the sale of a property. This was finally followed by representations that the asset in question on which the gain had previously been accepted was not in fact owned by Mr Looney at all and there had been no chargeable gain. Thus, the representations came full circle.

289. It was not even clear what asset had been disposed of despite two years of correspondence between HMRC and Mr Fonseka on behalf of Mr Looney. The first amended tax return for 2011-2012 indicated that the gain arose on the disposal of a property at Waterside Development and all of the correspondence was based on that premise. However, the correspondence which was sent to HMRC under cover of Mr Fonseka's letter of 26 January 2015 made no reference to the title to such a property, it all referred to the shares in Sandpiper Enterprises Ltd.

290. The only reference to the property was in Mr Fonseka's letter of 29 April 2012 to the Minerva Trust, in which he mentioned that Sandpiper Enterprises Ltd owned a property in the Bahamas (rather than St Vincent and the Grenadines). It was therefore not clear whether the Waterside Development property was the same asset or whether it was a different property altogether. Officer Agg was understandably confused by the conflicting and muddled explanations of what happened in 2012 when Mr Looney sold or sought to sell the property or land.

291. The e-mail exchange between Mr Fonseka and Minerva Trust & Corporate Services Ltd in 2011, demonstrate that it was Mr Looney's intention that SE Trust was to have received the shares of Sandpiper Enterprises Ltd, which Mr Looney believed he owned, and that the shares were to be transferred to the SE Trust.

292. The e-mail exchanges between Mr Looney and Minerva Financial Services Limited evidence that Mr Looney believed that the current beneficial owners of the shares were "myself and Sandra".

293. In Mr Fonseka's letter of 29 April 2012 he stated the following:

"SE Trust received as the settled property of the trust the shares of Sandpiper Enterprises Ltd

we understand that instructions were given by the settlors to transfer the shares to the trustee on 28 March 2008

Sandpiper Enterprises owns a property in the Bahamas purchased on May / July / Oct 2007 for a consideration of US$4,359,000 (£2,139,264)

The property was sold in June 2011 for a consideration of $1 million deposit and balance of $5 million in Jan 2012.

The necessary changes were never made to the share register as to the change of ownership."

294. Officer Agg therefore wrote to Mr Fonseka on 27 August 2013 setting out why he was unclear on these points and quoting the relevant paragraph from Mr Fonseka's letter of 26 January 2012 to Minerva Trust and asked some specific questions. Mr Fonseka replied by letter dated 29 August 2015 that the asset was the property owned by Sandpiper Enterprises Ltd. Mr Fonseka had stated Mr Looney's intentions were that he would pay the owner of the shares of Sandpiper Enterprises Ltd and the shares would be transferred to the SE Trust by Minerva Trust & Corporate Services Ltd.

295. The Tribunal is satisfied that the payments made by Kieran Looney from his Allied Irish Bank (GB) on 31 May 2007, 13 July 2007 and 22 October 2007 totalling USD $4.359 million were made to purchase the shares in Sandpiper Enterprises Ltd. This was in accordance with the terms of the 2007 share purchase agreement between him and his wife and Canouan Resorts Development Ltd.

296. Mr Looney stated that Mr Saladino was the original owner of the property as of 2007 through his ownership of Canouan Resorts Development Ltd. Mr Looney claimed he had paid the original owners £2.688 million but was unaware if any further monies were paid to the owner.

297. Mr Looney also claimed that in 2012 Dermot Desmond had paid him an amount of £3.84 million as a gift but Mr Desmond was not the original owner of the property nor the person who acquired it in 2012. Mr Looney claimed he had no idea of who purchased the property in 2012, if indeed there was such a transaction.

298. On 17 October 2013, Mr Fonseka advised HMRC that Mr and Mrs Looney "were offered a very good price for their property in late 2011 by the owner of another property on the island which they decided to accept in view of the world wide recession".

299. The Tribunal notes that it emerged in evidence that Dermot Desmond did hold existing property, business interests and assets in Canouan. This increases the likelihood that Mr Desmond would have sought to acquire an interest in shares owning land on the island rather than making an unrelated gift to Mr Looney.

300. The Capital Gains Tax computation submitted by Mr Fonseka on 2 December 2013 shows the disposal proceeds as £3,840,000 split equally between Mr & Mrs Looney.

301. Mr Fonseka advised on 12 October 2014 that the proceeds of £3,840,000 were paid to Mr Looney.

302. On 5 August 2015 Mr Fonseka finally claimed that: Mr Saladino had been the owner of the property, the person who paid the money to Mr Looney in 2012 was Mr Dermot Desmond and the transaction was a gift.

303. Mr Fonseka stated that the previous owner of the shares was Mr Saladino whereas the correspondence enclosed with his letter of 26 January 2015 indicated that it was Canouan Resorts Developments. HMRC came to understand that Mr Saladino owned Canouan Resorts Development. The revised identity of the original owners of the shares in Sandpiper Enterprises is ultimately of no consequence.

304. As a result of these various representations, it took HMRC some time to ascertain and understand Mr Looney's explanation. This was that the land or property in Canouan was legally owned at all relevant times by Sandpiper Enterprises Ltd, was said to have remained registered in Sandpiper's possession and that the asset with which HMRC was therefore concerned was the shares in Sandpiper Enterprises Ltd.

305. The chronology of these various and inconsistent accounts put forward by Mr Fonseka as to what the asset was, whether it had been acquired and sold by Mr and Mrs Looney, whether there was a chargeable gain and what the receipt of £3.84 million represented is set out above in the chronology.

306. During the course of the enquiry by HMRC various explanations were put forward. It was first suggested that the asset in question which had been purchased and sold by Mr Looney was an interest in a resort. Then it was said to be ownership of property in the Caribbean. Latterly it was suggested that the asset in fact consisted of shares in a company, Sandpiper Enterprises Ltd, which owned land in the Caribbean but then that these shares had not in fact been acquired by Mr Looney as the legal registration and title transfer had never been effected.

307. The Tribunal therefore relies upon the various previous inconsistent accounts put forward on behalf of Mr Looney as undermining the reliability of the account now sought to be relied upon.

Mr Looney's approval or failure to correct the accounts put forward on his behalf and acceptance of a chargeable gain

308. The Tribunal is bound to accept Mr Fonseka's explanation that he put forward these various representations to HMRC in good faith as to the ownership of the property / land, its sale and the acceptance of a chargeable gain but that these were nevertheless based on a misunderstanding and assumption.

309. Nonetheless, Mr Looney at no point objected to both the submission of the various tax returns to HMRC (which he would have had to approve) and the correspondence from Mr Fonseka to HMRC detailing how Mr Looney acquired and sold the asset. If Mr Looney had chosen, he could have corrected Mr Fonseka's representations in correspondence and tax returns submitted throughout the period 29 April 2012 to 5 August 2015, which are now disavowed, but at no point did he do so.

310. The Tribunal is satisfied that there is a good reason that Mr Looney made no corrections to Mr Fonseka's representations and submitted tax returns during this

period is that, even though they were based on Mr Fonseka's misunderstanding of a conversation Mr Looney and he had had. This is because the assumption Mr Fonseka made, that Mr Looney's interest in the asset had been sold and a chargeable gain had accrued, was essentially correct.

311. The Tribunal relies on Mr Looney's failure to correct the acceptance by Mr Fonseka in correspondence and tax returns that Mr Looney had acquired and sold land or shares and made a chargeable gain.

312. HMRC did not challenge Mr Fonseka's evidence that he had misunderstood Mr Looney instructions and relied upon this misunderstanding when he wrote letters to HMRC and filed accounts and CGT returns on the basis that Mr Looney's shares or property had been acquired and sold. Nonetheless, Mr Looney approved the letters and various returns and amended returns filed and the various inconsistent accounts put forward on his behalf. The Tribunal is satisfied Mr Looney would have corrected the position or not approved the correspondence and returns if he believed Mr Fonseka to be presenting an entirely erroneous account to HMRC.

313. Further, the Tribunal is satisfied that Mr Looney would not have approved a payment or paid £110,000 to HMRC in CGT as a result of those returns if he believed he had never made a chargeable gain. Mr Looney was an experienced businessman who was at all times careful to attempt to minimise his tax obligations. It is very unlikely he would not question Mr Fonseka as to the basis on which he was agreeing to pay CGT tax or any large sum so as to be sure of the basis of the payment. This is all the more so if he believed he had received a gift of £3.84 million rather than made a chargeable gain.

314. Irrespective of any mistake on the part of his accountant, it is unlikely Mr Looney would consent to submitting tax returns setting out the sum as a gain in two different measures, first alone and then with his wife. It is highly unlikely he would then agree to pay £110,000 in tax, the sum calculated as payable in CGT in one of his returns, if the receipt of £3.84 million was truly a gift. This is all the more so when there were multiple opportunities to present the true position in the various returns and amendments.

The lack of credibility of the account now relied upon

315. The Tribunal relies upon the lack of credibility of the account now relied upon that Mr Looney made no chargeable gain. Mr Looney's explanation for a lack of chargeable gain is that he received a gift of £3.84 million from Mr Desmond, which he had not asked for but was volunteered. This is unlikely to be true. It would require extraordinary generosity on the part of any person to give away such a large sum of money, even though Mr Looney asserts he is childhood friends with Mr Desmond and Mr Desmond is a billionaire.

316. More importantly, Mr Looney provided no written or oral evidence from Mr Desmond in support of this account. There was no witness statement, document or letter produced by Mr Looney from Mr Desmond or any independent evidence of the gift of USD $5 million (or £3.84 million) being made by Mr Desmond. Such a high

value of gift is likely to need to be recorded in writing in some manner, such as for tax purposes, and the absence of any independent documentary evidence regarding the alleged gift is striking.

317. The Tribunal further notes that the amount of the supposed gift in January 2012 – USD $5 million - is of a similar order of value to the acquisition price paid for the shares of USD $4.359 million. This supports the payment being consideration for an interest in the shares rather than a gift. On Mr Looney's account, Mr Desmond volunteered to give him a gift in the sum of $5 million and it is a coincidence that this sum is of the same measure as the value of shares on acquisition.

318. The timing is also relevant. On Mr Looney's account the gift was also paid at a time in early 2012 when Mr Looney had been seeking to sell his interest in the shareholding in Sandpiper because of his financial difficulty resulting from the Trafigura litigation in 2011. Mr Looney's account does involve the admission that he was at least seeking to sell his believed interest in the shares.

319. These factors lend further support to the Tribunal's finding that the payment of £3.84 million to Mr Looney was not a gift but was for the acquisition of Mr and Mrs Looney's interest in the shares in Sandpiper Enterprises Ltd and the land the company owned in Canouan.

The identity of the payment maker

320. Having provided his bank statement from Nower Inc to the Tribunal Mr Looney suggested that the USD $5 million paid by Orchestra Holdings Ltd represented the gift from Mr Desmond. However, Mr Looney did not even provide any evidence that Orchestra Holdings Ltd is connected to Mr Desmond, nor why Mr Desmond would make a personal gift from a company bank account. The money was paid to the bank account in Switzerland of Nower Inc, Mr Looney's Panamanian incorporated company.

321. Even if the sum of USD $5 million was ultimately paid to Mr Looney by Mr Desmond, through Orchestra Holdings Ltd, the Tribunal is satisfied that the sum of money was to acquire the Looneys' interest in the shares in Sandpiper Enterprises Ltd and was not a gift.

Mr Looney's failure to pursue the loss of his money or interest in the shares

322. There are further matters that undermine the credibility of Mr Looney's evidence. On his account, he believed that he had been deprived of his interest in the Sandpiper shares, for which he had paid US $4.359 million, on their not being registered or transferred into his name and his ownership not otherwise being recognised. The Tribunal is satisfied that it is extremely unlikely Mr Looney would make no serious attempt to enforce the acquisition of an interest in the shares, or alternatively, to seek to recover such a large sum he had paid.

323. Mr Looney's evidence is that he made no such attempts to enforce his interest or recovery of the sum of money other than to consider suing the Minerva Trust Corporation. However, Minerva Trust were not involved in the original transaction in which Mr Looney believed he had acquired an interest in the shares in Sandpiper

Enterprises Ltd. If the transfer of his interest in the shares had not been legally registered, or his beneficial interest not recognised, then the appropriate parties for Mr Looney to claim against would have been Canouan Resorts Developments Ltd, the Gottardo Trust and Mr Saladino, the parties to the transaction in 2007.

324. The later non-transfer of the shares in the SE Trust would be a far less important issue which only flowed from the fact that the shares were said not to have been registered in Mr Looney's name and not beneficially owned by him in the first place.

325. The Tribunal does accept Mr Looney's evidence that in 2011 he instructed Minerva Trust and Corporate Services to register the shares in Sandpiper in the name of the SE Trust of which Mr Looney was the settlor and a beneficiary. It appears they stated they were unable to do so for lack of confirmation the shares were registered in his name. This much is apparent from the correspondence in 2011. Subsequently, Mr Looney claimed that the transfer of the shares into the SE Trust had not taken place and he had pursued the matter with Minerva. The final outcome of any dispute or correspondence between Minerva and Mr Looney is not known and was not provided to the tribunal.

326. However, whether or not the Sandpiper shares were capable of being transferred into the SE Trust for lack of Mr Looney holding legal title does not determine whether or not Mr Looney held a beneficial interest in the shares.

327. The fact that Mr Looney did not attempt to write any letters nor take any other steps requiring the transfer of the shares to be effected or sum repaid, let alone threaten to sue or even actually sue the relevant parties in order to reclaim his investment of USD $4.359 million, is telling. It supports the likelihood that Mr Looney did not need to take any such action as his (and his wife's) beneficial interest had been recognised and protected and was subsequently acquired from him for a substantial sum.

328. Mr Looney has demonstrated that he is not slow to resort to litigation, as he did in relation to the Trafigura contract, and it is very unlikely he would not seek to protect his interest in some way if he had been deprived of it. He had a signed share purchase agreement with Canouan Resorts Development Ltd in 2007 and had made the relevant payments pursuant to that agreement in order to acquire the Sandpiper shares.

329. It is highly likely that Mr Looney would have pursued the loss of the $4.359 million he had paid if he had not acquired a beneficial interest or ownership of the Sandpiper shares but had lost out on the sum without acquiring an interest in the shares.

330. Mr Looney had entered into a share purchase agreement with Canouan Resorts Development Ltd and would have been likely to sue either for the recovery of the money or to protect his interest in the shares just as he had sued Trafigura for a large sum of money when he believed his contractual rights had not been protected. It is very unlikely Mr Looney would let himself be deprived of such a large amount of money without any form of redress, even if the Trafigura litigation had been an unsuccessful and traumatic process.

331. Mr Looney stated that he would not have sued Mr Saladino, the owner of Canouan Resorts Development Ltd, in respect of his lost interest in the shares as Mr Saladino

was not the type of Italian businessman he would sue. If that is right, then one asks rhetorically, what was Mr Looney doing entering into a business deal with Mr Saladino in the first place?

332. Alternatively, and much more likely, there was no need to sue Mr Saladino, Canouan Resorts Developments Ltd or the Gottardo Trust as Mr and Mrs Looney's interest in the Sandpiper shares had been recognised and protected and Mr Looney was well aware of this. He then benefited from the disposition of his interest in the shares on receipt of £3.84 million.

Failure to establish conclusive ownership of the shares in 2007 and 2011

333. Mr Looney's evidence bordered on fanciful. On his account he did not even know if he had actually bought, shares, property or land in 2007. Such disregard for the security of an investment of USD $4.359 million seems unlikely. It is unlikely Mr Looney would not have looked carefully at the paperwork at the time, or sought professional advice upon it, given the size of his investment, to discern whether and what asset he had actually acquired. Any reasonable person, on paying USD $4.359 million, would demand to see some proof of purchase of an asset such as a share certificate or property registry entry or title deeds (if they believed they had bought land). The share purchase agreement provided for this.

334. It is also telling that Mr Looney did not provide any evidence or suggest that in 2011 he had attempted to contact any property, company or share registries in the Bahamas or St Vincent and the Grenadines to check whether the transfer of title to the Sandpiper shares had been effected, who the legal owner of the shares might be and who might be the legal or registered owner of the land in 2011. If he truly believed he had been deprived of his interest in the shares and land having paid US $4.359 million it is not credible that he would have not conducted extensive investigations.

335. On Mr Looney's evidence he took no further action to secure or made no further checks to ensure that his interest had been recorded and established in accordance with the share purchase agreement he had signed (and only provided on request during hearing). It is very unlikely that he would have not conducted an exercise in 2007 to confirm he had acquired the asset for which he had paid so much money but let the issue arise for the first time in 2011.

336. Mr Looney's evidence and initial correspondence on his behalf with HMRC stated that he sought to purchase the shares in Sandpiper Enterprises Ltd by paying £2,688,000 or USD $3.5 million for the shares. In fact, his AIB bank statements evidence he paid a total of £2,139,514.79 (US$4.359 million at the various exchange rates then prevailing). The actual sum was revealed by his AIB statements and was in line with the payments required under the share purchase agreement. There is no explanation for this discrepancy which suggest the representations made on his behalf that he had paid US $3.5 million for the shares were not accurate.

337. In 2012 Mr Looney claimed he wished to dispose of his shareholding but on discovering that his interest was not registered Mr Dermot gave him a payment of US$5 million (this was claimed to be a receipt of £3.84 million in all the representations but

in fact would be £3,256,268.32 at the exchange rate of 1.5355 pounds per dollar then prevailing).

338. Therefore the Tribunal is not satisfied by Mr Looney's account that: Canouan Resort Developments (Mr Saladino's company) received a payment of £2.688 million (in fact about £2.2 million) in exchange for the shares but due to an administrative oversight continued to own the shares legally and beneficially from 2007 until 2012 and Mr Looney had no interest to dispose of when he came to attempt to transfer the shares to the SE Trust or to sell them. This account is unlikely to be true.

339. It is very unlikely that Mr Looney would never seek redress for any frustration of his interest in the shares directly with the counterparties to the share purchase agreement. Such redress might have been to sue them for a declaration of ownership or return of the money paid or to seek to correct the registration of legal ownership or title to the shares. Whether or not Canouan Resorts Development Ltd transferred the legal ownership and registered title in the shares to Sandpiper Enterprises Ltd to Mr Desmond in 2012 or not it is not credible that the payment of US $5 million to Mr Looney was in turn totally unconnected to the disposal of his interest in the shareholding.

340. It is more likely than not Mr Looney sold or disposed of his and his wife's beneficial ownership or interest in the shares in Sandpiper Enterprises Ltd for a sum of £3.84 million. The Tribunal is satisfied that the payment of US$5 million in January 2012, whether or not it was made by Mr Desmond, Orchestra Holdings Ltd or any other party, was not a gift but part of a payment made to Mr Looney in respect of the acquisition of Mr and Mrs Looney's interests in the shareholding of Sandpiper Enterprises Ltd and hence ownership of the land, plot e22 in Canouan.

Disposal proceeds - $5 million or £3.84 million

341. The Tribunal finds that in total Mr Looney received £3.84 million for the disposal of his and his wife's interests in the Sandpiper shares rather than USD $5 million.

342. Both Mr Looney and Mr Fonseka suggested that Mr Looney received £3.84 million as a gift which equated to USD $5 million. The sum of USD $5 million paid on 17 January 2012 does not equate to £3.84 million but approximately £3,256,268 at the prevailing exchange rate on 17 January 2012 (being USD $1.5355 to £1 sterling). The sums vary significantly.

343. The Tribunal is satisfied Mr Looney received the sum of £3.84 million as accepted by him in his evidence and by Mr Fonseka in his evidence and in correspondence with HMRC but this was from the sale proceeds from Mr Looney's joint interest in the shares.

344. In his correspondence of 29 April 2012 Mr Fonseka referred to an earlier USD $1 million deposit having been paid in June 2011 in addition to the $5 million paid in 2012 although he disavowed the accuracy of his letter in his oral evidence. Mr Fonseka stated that this mention of the earlier payment of USD $1 million was his mistake, again made without instructions, and he should not have made any reference to USD $1 million deposit as there was simply a USD $5 million gift. The Tribunal accepts that Mr Fonseka acted under a false assumption but that it is likely to be accurate nonetheless.

345. The Tribunal was not given and did not therefore see Mr Looney's or Nower's 2011 bank statements to disprove that USD $1 million was in fact paid to Mr Looney or one of his company's around June 2011. The Tribunal is satisfied that this explanation, even if based on Mr Fonseka's assumption rather than instructions, is likely to be accurate.

346. USD$1 million at the prevailing exchange rate in June 2011 (taking 15 June 2011 as an example when the exchange rate was 1.6194 pounds per dollar) equates to £617,512. If this sum is added to £3,256,268 (USD$5 million in January 2012) this arrives at £3,873,780 – close to the sum of £3,840,000 accepted as having been received.

347. Therefore, the sum Mr Looney accepted receiving, £3.84 million, is likely to equate to USD $6 million rather than USD$5 million at the exchange rates then prevailing (it is not clear when exactly in June 2011 the USD $1 million was likely to have been received so the precise exchange rate cannot be derived).

348. Mr Looney's evidence that USD $5 million and £3.84 million equated to the same sum, when they do not but are likely to equate to USD $6 million, was revealing. It would undermine Mr Looney's account of the sum of £3.84 million being a gift if there were in fact two payments totalling USD $6 million, USD $1 million in June 2011 and $5 million in January 2012. The receipt of two payments is more likely to suggest a deposit and balance being received on a sale than receipt of two separate gifts. Mr Looney was clear in suggesting there was only one gift made by Mr Desmond. This further supports the Tribunal's finding that the money received by Mr Looney was not a gift.

349. The Tribunal is satisfied on the balance of probabilities, that Mr Looney received £3.84 million as he stated in evidence. Nonetheless the Tribunal is satisfied that this was not a gift but the proceeds from his disposal of his interest in the Sandpiper shares.

Law

350. Section 8 Taxes Management Act 1970 ("TMA 1970") provides for the filing of personal return by taxpayers.

351. Section 9A TMA 1970 provides for HMRC to enquire into a return filed under section 8 if the officer gives notice within the relevant time allowed, up to the end of the period of twelve months after the day on which the return was delivered if it was delivered on or before the filing date (31 October or 31 January).

352. Section 28A TMA 1970 provides that the completion of enquiry into personal or trustee return or Non-Resident Capital Gains Tax return occurs when an officer informs the taxpayer in a closure notice that he has completed his enquiries and states his conclusions, either that no amendment is required or that no amendment is required.

353. Section 31 TMA 1970 provides right of appeal against closure notices, assessments to tax and amendments to partnership returns.

354. The burden of proof is upon the Appellant to demonstrate that amendments to the return are incorrect and any lesser sum of tax should be charged. The standard of proof is the balance of probabilities.

355. Section 1 of the Taxation of Chargeable Gains Act ("TCGA") 1992 provides for capital gains tax (CGT):

General - 1 The charge to tax

(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.

(2) Companies shall be chargeable to corporation tax in respect of chargeable gains accruing to them in accordance with [section 2 of CTA 2009] and the other provisions of the Corporation Tax Acts[, subject to the exception in subsection (2A)].
[(2A) But companies are chargeable to capital gains tax, and not corporation tax, in respect of chargeable gains accruing to them to the extent that those [gains are—

(a) ATED-related gains in respect of which the companies are chargeable to capital gains tax under section 2B, or

(b) NRCGT gains in respect of which the companies are chargeable to capital gains tax under section 14D or 188D].]

(3) Without prejudice to [subsections (2) and (2A)], capital gains tax shall be charged for all years of assessment in accordance with the following provisions of this Act.

356. Sections 21 and 22 of the TCGA define Assets and Disposals:

21 Assets and disposals
(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—

(a) options, debts and incorporeal property generally, and

[(b) currency, with the exception (subject to express provision to the contrary) of sterling,] and

(c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

(2) For the purposes of this Act—

(a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and

(b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of.

22 Disposal where capital sums derived from assets

(1) Subject to sections 23 and 26(1), and to any other exceptions in this Act, there is for the purposes of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to—

(a) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset,

(b) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets,

(c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and

(d) capital sums received as consideration for use or exploitation of assets.

(2) In the case of a disposal within paragraph (a), (b), (c) or (d) of subsection (1) above, the time of the disposal shall be the time when the capital sum is received as described in that subsection.

(3) In this section "capital sum" means any money or money's worth which is not excluded from the consideration taken into account in the computation of the gain.

[(4) Subsection (1) does not apply where a company receives, or becomes entitled to receive—

(a) a capital distribution within the meaning of section 122 (see instead subsection (1) of that section), or

(b) a distribution to which the charge to corporation tax on income under Part 9A of CTA 2009 (company distributions) applies or would apply were the distribution not exempt for the purposes of that Part.]

357. Section 60 of the TCGA 1992 applies the principles of chargeable gains if nominees or bare trustees are dealing with property on behalf of beneficiaries.

60 Nominees and bare trustees

(1) In relation to [property] held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, or for any person who would be so entitled but for being an infant or other person under disability (or for 2 or more persons who are or would be jointly so entitled), this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the [property] were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).

(2) It is hereby declared that references in this Act to any [property] held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right, subject only to satisfying any outstanding

charge, lien or other right of the trustees to resort to the [property] for payment of duty, taxes, costs or other outgoings, to direct how that asset shall be dealt with.

358. Neither party put forward any evidence as to the law of contract, or beneficial interests in property in St Vincent and the Grenadines or the Bahamas or suggested that it was different from English law. In the absence of satisfactory evidence of foreign law, UK courts and tribunals apply English law, see Dicey & Morris, *The Conflict of Laws* (15th Ed) at Rule 25(2).

359. As far as beneficial interests in shares or property are concerned, the Tribunal follows the principles expounded in *Jones v Kernott* [2011] UKSC 53; *Stack v Dowden* [2007] UKHL 17; *Gissing v Gissing* [1971] A.C. 886 and *Oxley v Hiscock* [2004] EWCA Civ 546. Where property is purchased in the joint names of a married couple and where there is no express declaration of their beneficial interests, there is a presumption that the beneficial interests coincide with the legal estate. That presumption could be rebutted by evidence of a contrary intention, which might more readily be shown where the parties had contributed to the acquisition of the property in unequal shares, but each case would turn on its own facts. It is for the court to ascertain the parties' common intention as to what their shares in the property would be, in the light of their whole course of conduct in relation to it.

Entrepreneurs' Relief

360. Entrepreneurs' Relief provides relief on gains arising from qualifying business disposals by individuals provided certain conditions are met.

361. Qualifying business disposals are defined at S169H (2) TCGA as: (a) a material disposal of business assets (b) … [relates to trust assets] (c) a disposal associated with a relevant material disposal.

362. Section 169I(1) provides there is a material disposal of business assets where: (a) an individual makes a disposal of business assets, and (b) the disposal of business assets is a material disposal.

363. Section 169I(2) defines a disposal of business assets as: (a) a disposal of the whole or part of the business, (b) a disposal of (or of interests in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business, or (c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

364. Section 169I(5) defines a disposal within paragraph (c) of subsection (2) as a material disposal if condition A, B, C or D is met.

365. Section 169I(6) states Condition A is that, throughout the period of 1 year ending with the date of the disposal—

the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

366. Section 169I(7) states Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company—

ceases to be a trading company without continuing to be or becoming a member of a trading group, or

ceases to be a member of a trading group without continuing to be or becoming a trading company,

and that date is within the period of 3 years ending with the date of the disposal.

367. Section169I(7A) provides Condition C is that—

the assets disposed of are relevant EMI shares,

the option grant date is, or is before, the first date of the period of 1 year ending with the date of the disposal, and

throughout that period of 1 year—

(i) the company is either a trading company or the holding company of a trading group, and

(ii) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

368. Section 169I(7B) states Condition D is that—

(a) the assets disposed of are relevant EMI shares acquired by the individual

before the cessation date,

(b) the option grant date is, or is before, the first date of the period of 1 year ending with the cessation date,

(c) the conditions in paragraph (c) of subsection (7A) are met throughout that period of 1 year, and

(d) the cessation date is within the period of 3 years ending with the date of the disposal.

Appellant's submissions

369. Mr Fonseka and Mr Singh made submissions on behalf of Mr Looney, the Appellant in the Capital Gains Tax appeal. They submitted that HMRC opened enquiries into these two tax returns on the 2 July 2013. Mr J Nolan (Officer Nolan) was

the officer handling these enquiries. He requested details of the costs of acquisition and disposal and also refused to allow Entrepreneurs' Relief.

370. Mr Fonseka investigated the history of this matter and made the following submissions: -

(a) The asset was the entire share capital of Sandpiper Enterprises Ltd, a Bahamas company, managed by Gottardo Trust Company, which owned Plot e22.

(b) The Appellant had paid Mr Saladino of the Canouan Resort Development Ltd, who owned the shares in Sandpiper, £2,688,000.

(c) The Appellant instructed Minerva to effect the transfer of these shares to the SE Trust, and paid Minerva for these services. The Appellant continued to pay Minerva their charges for managing the SE trust, which he believed owned the shares in Sandpiper.

(d) When the Appellant decided to sell Plot e22 to raise monies to pay the legal costs of the Trafigura case, he was informed by Mr Saladino that he nor the SE trust owned the shares in Sandpiper as Minerva had not effected their transfer to SE trust in 2008. The monies he had paid were forfeited.

(e) The Appellant, nor the SE Trust had legal ownership in the shares in Sandpiper. Neither were they the beneficial owners in any form. Nor were there any side agreements or other devices that would have enabled the Appellant or the SE Trust to conduct a lawful sale of the shares in Sandpiper to any potential buyer and receive the sale proceeds of such a transaction.

(f) The Appellant informed Mr Dermot Desmond (Mr Desmond), an international businessman who was a multi-millionaire, a fellow Irishman and a long-time friend of his dilemma.

(g) Mr Desmond made a gift of $5 million (£3,840.000) to the Appellant to help the latter to get over his financial problems.

(h) This transaction cannot be construed as anything else but a gift, as the Appellant nor the SE Trust were unable to provide any corresponding value for these monies, as the Appellant and/or the SE Trust did not own the shares in Sandpiper either legally, beneficially or by possession of a side letter or other device.

(i) If Mr Desmond wished to purchase the shares in Sandpiper, he would have approached Mr Saladino directly and merely paid £2,688,000 or any other sum requested to him (Mr Saladino). There was no valid reason for him to pay an additional $1.5 million to anyone else, let alone the Appellant.

(j) Due to the negligence of Minerva, the Appellant has suffered a loss of £2,688,000. This loss should be set off against the taxable income of the Appellant.

371. Mr Fonseka and Mr Singh relied upon *TCGA 1992 (Assets & Disposal)* which provides:

"(1) All forms of property shall be assets for the purposes of this Act, whether situated in the UK or not, including – (a) Options, debts & incorporeal property generally, (b) currency with the exception of sterling, and (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired."

372. They submitted that the Appellant, in 2008, paid £2,689,000 for the shares in Sandpiper Enterprises Ltd, which owned a plot of bare land-e22-in Canouan, St Vincent's & the Grenadines. Due to the negligence of his agents – Minerva - these shares were not transferred to the SE Trust**,** nor anyone else connected to the Appellant**.**

373. They submitted that the Appellant was now, not the legal owner of these shares nor did he have a beneficial interest in any form, in these shares. He did not possess a side letter or any other communication that he could rely upon to convince a potential buyer of the shares in Sandpiper that he had the capacity or the ability to effect a legal transfer of these shares.

374. In short, the Appellant did not own these shares and was unable to receive the proceeds of a sale of these shares. As explained by Mr Looney, he received a gift from an old friend of his, Mr Dermot Desmond, who is a multi-billionaire and a fellow Irishman. This transaction did not fall into the Capital Gains Tax regime.

375. They relied on the case of *Simpson v John Reynolds & Co [1975] 1 WLR 617* in which the Court of Appeal decided that where a payment made to a taxpayer by a third party was "unsolicited and unexpected" the payment was a gift and was not taxable. In that case an insurance broker provided brokerage services to one of its important clients for a number of years. The client decided to move its business elsewhere and in recognition to the insurance broker made a payment of £5,000 by annual instalments of £1,000. The £5,000 was not deemed to be a trading receipt, because it was in recognition for past services after the business relationship ceased. It was seen as a gift, therefore unsolicited and unexpected. Walton J stated at page 621E-H:

> "*..... but when a payment is made purely voluntarily, on the termination of a trading relationship, that termination being so far as the parties can possibly foresee a permanent termination and is made for no other reason than the party making the payment is sorry that the relationship had to terminate .... then it appears to me to be quite clear that the payment does not arise or accrue to the payee by reason of any trade carried on by it.... to my mind these payments have none of the indicia of trading receipts whatsoever ....*

376. They submitted that the case law indicates that genuinely voluntary payments or gifts are not taxable unless they can be attached to a pre-existing source (see *Beynon v Thorpe* [1928] 14 TC 1) or they are recompense for services provided that have not

otherwise been adequately remunerated, or to make good a loss of profit (see *Severne v Dadswell* [1954] 35 TC 649 and *Rolfe v Nagel* [1981] 55 TC 585).

377. In the circumstances, they submitted that Mr Looney had incurred an allowable capital loss of £2,689,000 in the tax year 2007- 2008 and incurred no chargeable gain in the tax year 2011-2012 such that HMRC's decision to amend his self-assessment return should be quashed and no capital gains tax was due or chargeable.

Discussion and Decision

378. For the reasons set out at paragraphs 284-349 above, the Tribunal has rejected Mr Looney's evidence on the balance of probabilities that USD $5 million paid on 17 January 212 into the PKF Swiss bank account of Nower Inc, Mr Looney's Panamanian incorporated company, from Orchestra Holdings Ltd was a gift from Dermot Desmond to Mr Looney. The Tribunal is satisfied that is likely that Mr Looney received £3.84 million in total but this was not as a gift.

379. The Tribunal has found that it is more likely than not that the sum of £3.84 million was received in the period 2011-2012 in respect of the disposal and acquisition of Mr and Mrs Looney's joint beneficial interest in the shares in Sandpiper Enterprises Ltd, which in turn owned the land in Canouan. Mr Looney has failed to discharge the burden to prove on balance that the receipt of £3.84 million was a gift and therefore did not represent the disposal of an asset nor a chargeable gain for the tax year 2011-2012.

380. It is perfectly likely that USD $5 million was indeed paid from Mr Desmond to Mr Looney using the mechanism of a payment from Orchestra Holdings Ltd to Nower Inc. However, it is unnecessary for the Tribunal to make any conclusive findings as to the identity of the purchaser of the Looneys' interest in the Sandpiper shares or Canouan land. It is sufficient to find that there was a chargeable gain on the disposal of Mr and Mrs Looney's interest for the sum of £3.84 million.

381. The Tribunal has therefore found that it is more likely than not the £3.84 million received by Mr Looney represents the proceeds of a disposal of an asset for the purposes of section 1 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992") upon which he has made a chargeable gain. It represents a chargeable gain on the acquisition price of Mr Looney's interest in the shares which is an asset for the purposes of section 21 of TCGA 1992.

382. The Tribunal is satisfied that the person chargeable to Capital Gains Tax includes the `beneficial' owner of the asset of which has been disposed. Any actions by:

- nominees;
- bare trustees;
- receivers, liquidators or trustees in bankruptcy, mortgages or charge holders or any other persons entitled to the asset by way of security;

are attributable to the beneficial owner so that any gain or loss accruing on an actual disposal of the asset by the nominee etc. accrues to the beneficial owner.

383. If the transfer of the Sandpiper shareholding to Mr and Mrs Looney was never legally registered in their name, then it may well be that the entry in the appropriate register would show that the legal and registered ownership of the Sandpiper shares remained registered in the title of Canouan Resorts Development Ltd (the 2007 owner) until 2012. It may also be that legal title to the shares then passed directly to a new owner, whether that be Mr Dermot Desmond or some other person. If this is the case, the previous owner of the shares as of 2007 continued to be the legal owners of the shares up to the time of their sale and transfer in 2011-2012.

384. Nevertheless, the Tribunal is satisfied that even if the shares were never transferred into Mr and Mrs Looney's names, the legal title holder was holding them on trust for Mr and Mrs Looney or as their nominee as from October 2007, when the terms of the share purchase agreement between the Looneys and Canouan Resorts Development Ltd were fulfilled, until 2011-2012 when the shares were sold.

385. Even if the original owner of the Sandpiper shares in 2007, Canouan Resorts Development Ltd, remained their legal title holder during the interim period until 2012, that company would have held the Sandpiper shares on trust or as a nominee for Mr and Mrs Looney, the holders of the beneficial interest, for the purposes of section 60 TCGA 1992.

386. For Capital Gains tax purposes what matters is that Mr Looney was the joint beneficial owner with his wife of the shares in Sandpiper Enterprises Ltd from 2007. Therefore, Mr Looney acquired a beneficial interest in the shares in 2007 (even if it was not also a legal interest) and disposed of that interest in 2011-2012. He and his wife signed the share purchase agreement and made the relevant payments totalling USD $4.359 million by October 2007 in compliance therewith to Canouan Resorts Development Ltd. It was the common intention of all parties that the Looneys should become the owners of the shares, consideration was given and relied upon.

387. Having paid for the shares in good faith Mr Looney and his wife became the beneficial owners of the shares and that was clearly understood both by them and the previous owner even if legal title did not pass or it was never recorded in the appropriate register. The identity of the legal and registered owners of the shares from 2007 to 2012 has not been established by Mr Looney – if it was not him and his wife. He could have provided the share title register or whichever relevant documents to prove the history of the legal title to the shares in Sandpiper and disprove any suggestion that Mr Desmond or one of his companies had subsequently acquired the shares in 2011-2012. There was no suggestion that this evidence would not be available to him.

388. The beneficial ownership of the shares had to be determined as at the date when the shares were originally acquired in 2007. It is unknown if there was any transfer or registration of legal title to the shares in Mr Looney's (and his wife's) name. The Tribunal was not provided any share certificate or entry from registry from any jurisdiction.

389. Nonetheless, the Tribunal is satisfied that a share purchase agreement had been agreed between Canouan Resorts Development Ltd with Mr and Mrs Looney and payment made pursuant to its terms such that there was a common intention they would

acquire the joint beneficial ownership of the shares. In the absence of a legally binding express agreement as to beneficial ownership or registration of the legal title in the Sandpiper shares the Tribunal has ascertained from all the surrounding circumstances the intentions of those who participated in the transactions and other relevant events. The circumstances include the share purchase agreement and payments made by Mr Looney pursuant to it. The Tribunal is satisfied that the receipt of the sale proceeds upon disposal was a further indicator that Mr Looney had a beneficial interest or joint ownership of the Sandpiper shares.

390. The collective common intention is objectively established by means of reasonable inferences from evidence of what the participants actually did and what they said to one another: see *Gissing v. Gissing* [1971] AC 886 at 906 per Lord Diplock. The Tribunal has applied the presumption that the law of the Bahamas and St Vincent and the Grenadines is the same as English law in respect of contract law and beneficial ownership in line with *Dicey* on *The Conflict of Laws*. Therefore, the Tribunal is satisfied that irrespective of legal ownership, Mr and Mrs Looney jointly acquired the beneficial ownership or interest in the Sandpiper shares in 2007 and each held the beneficial interest in 50% of the shares until their disposition in 2012.

391. It is unlikely that the original owner of the Sandpiper shares, Canouan Resorts Development Ltd, having accepted payment from Mr Looney would have been free to sell or dispose of the shares to another purchaser without accounting to Mr and Mrs Looney for the value on disposition.

392. It is likely that if Mr Dermot Desmond was behind the payment of USD $5 million from Orchestra Holdings Ltd to Mr Looney through Nower Inc, he made the payment to purchase Mr and Mrs Looney's beneficial interest in the Sandpiper shares. There was a clear connection between the purchase and the payment.

393. Mr Fonseka amended and submitted Mr Looney's tax returns to include a capital gain upon the sale of shares (or land or property as the asset was believed to be) on more than one occasion. The gain was premised first as being attributable entirely to Mr Looney's and then jointly with his wife before this was later retracted. This remained his position at least until Mr Looney chose to rely on an argument that because of a failure to register the transfer legal registration of the shares he might not be liable to any chargeable gain.

394. The fact that Mr Looney approved these returns suggests that Mr Looney accepted the gain was assessable on him and or his wife at some stage. The fact that Mr Looney approved different amended tax returns with the measure of the chargeable gain varying supports the Tribunal's findings.

395. The Tribunal is satisfied that Mr Looney is liable to Capital Gains Tax on the disposal of an asset, his joint interest with Mrs Looney in the shares in Sandpiper Enterprises Ltd which owned land in the Canouan, for which they received £3.84 million. Mr Looney held the beneficial interest in 50% of the shares and is chargeable on the proceeds of their disposal.

396. Thus, there was a chargeable gain in Mr Looney's disposition of his interest in the shares whether or not this interest was acquired by Dermot Desmond, a company of Mr Desmond's or any other person. The Tribunal is satisfied that Mr Looney received £3.84 million in respect of the disposal of his joint interest in the shares.

Entrepreneurs' Relief.

397. Mr Looney's original claim to entrepreneurs' relief was made on the basis that the asset sold was a property which Mr Looney had bought for development purposes and sold after changing his mind and it was disallowed because the property was not an asset of any trade carried on by Mr Looney. Then it was claimed that the asset disposed of was actually the shares in the company, Sandpiper Enterprises Ltd. Then it was claimed that Mr Looney did not acquire any asset or interest in any asset but that the $5 million he received was not the proceeds of disposal or sale of his interest but a gift from Dermot Desmond. The Tribunal has rejected this final claim for the reasons set out above.

398. Officer Haley of HMRC wrote to Mr Fonseka on 3 September 2015 to ascertain whether the conditions for relief were satisfied. The reply dated 9 September 2015 was to the effect that as the purchase of the shares in Sandpiper did not go through, Mr Fonseka could not say whether the first condition was satisfied but accepted Mr Looney could not be an employee of the company; and Mr Looney did not acquire any of the share capital. Nonetheless the alternative submission was still pursued at the hearing that Mr Looney remained entitled to entrepreneurs' relief should the Tribunal find that he had benefited from a chargeable gain.

399. The Tribunal is satisfied that entrepreneurs' relief does not apply to the chargeable gain of Mr Looney upon the disposition of his interest in the shares of Sandpiper Enterprises Ltd.

400. The requirements of the Taxation of Chargeable Gains Act 1992 at Section 169H are not met for the following reasons.

401. Section169H(2) provides for three qualifying business disposals which would enable entrepreneurs' relief to be claimed. Section 169H(2)(a) does not apply as there has not been a material disposal of businesses assets for the purposes of section 169I.

402. Section 169I (2) (a) does not apply as Mr Looney has not disposed of the whole or part of a business; section 169I(2)(b) does not apply as Mr Looney has not disposed of one or more assets in use in the business; and section 169I(2)(c) (disposal of one or more assets consisting of shares in or securities of a company) does not apply as Mr Looney has not disposed of an asset that satisfies the conditions of Section 169I(5), namely conditions A to C.

403. Condition A does not apply as Sandpiper Enterprises Ltd was not Mr Looney's personal company nor a trading company or the holding company of a trading group nor was Mr Looney an officer or employee of the company. Therefore, disposal of the shares in Sandpiper Enterprises Ltd would only have been a material disposal for Entrepreneurs' relief if all of the following sub-conditions of Condition A were satisfied:

a) The company was a trading company (or the holding company of a trading group);

b) Mr Looney were either an officer or an employee of the company (or one or more companies within the group);

c) Mr Looney held at least 5% of the ordinary share capital of the company; and

d) that gave Mr Looney at least 5% of the voting rights.

404. These conditions have not been satisfied in respect of the shares in Sandpiper Enterprises Ltd. It was not a trading company and Mr Looney was not an officer or employee of the company.

405. Condition B does not apply because Condition A was not met through the period of 1 year ending with the date on which the company ceased to be a trading company. Condition C does not apply as the assets disposed of were not relevant EMI shares.

406. Section 169H(2)(b) does not apply as there has not been a disposal of trust business assets.

407. Section 169(H)(2)(c) does not apply as there has not been a disposal associated with a relevant material disposal – this is defined under S169K which provides that there is a disposal associated with a relevant material disposal if conditions A, B and C are met.

408. The requirements section 169K are not met for the following reasons. The appellant has not met condition A as defined by section 169K(2) because he has not disposed of assets of a partnership or shares in or securities of a company. Condition B as defined at section 169K(3) has not been met as the individuals have not made a disposal of business assets as part of the withdrawal of the individual from participation in the business carried on by the company. The time limit in condition C is not relevant as neither condition A or B have been met.

Calculation of the chargeable gain

409. The Tribunal is satisfied that the acquisition price for the interest in the shares was $4.359 million (approximately £2.1 million at the prevailing exchange rate) not $3.5 million or £2.688 million relied upon by the Appellant.

410. This is based upon the primary evidence contained within the share purchase agreement and relevant bank statements and banking documents for purchase in 2007.

411. The Tribunal is also satisfied that the disposal price in 2011-2012 was £3.84 million for the reasons set out above.

412. The calculation of any chargeable gain should be based upon the increase in the value of the asset. HMRC withdrew their initial submission that the acquisition price was USD $3.5 million and accepted it was USD $4.359 million as revealed by the bank

documents and share purchase agreement. While Mr Looney did not accept the £3.84 million was derived from disposal of the asset, the Tribunal has found that it was and was not a gift.

413. Both parties agreed that the Tribunal should therefore value the chargeable gain as the difference in values between $4.359 million and $5 million being $641,000. They invited the Tribunal to apply to this sum the sterling exchange rate on 17 January 2012, the date of receipt of the USD $5 million, to derive the value of the gain. They submitted that they had examined the HMRC guidance and this was the appropriate method of calculation.

414. The Tribunal is satisfied that this is not the lawful way to value the gain. The Tribunal should subtract the acquisition price in dollars converted into sterling at the exchange rate at the time of acquisition from the sale or disposal price in dollars converted into sterling at the exchange rate prevailing at the time of disposal. The difference in these two values in sterling produces the valuation of the chargeable gain.

415. Such an approach is in accordance with that set out in *Bentley v Pyke* and *George Knight & Ingeborg Knight v Revenue & Customs Commissioners)* 2016 UKFTT (TC) 819. Judge Jonathan Richards stated the following at paragraphs 35 to 37 of the latter decision:

35. This question has come before the courts on two occasions previously: before the Court of Appeal in *Capcount Trading v Evans (HM Inspector of Taxes)* [1993] STC 11 and before the High Court in *Bentley v Pike (Inspector of Taxes)* [1981] STC 360. Both authorities are binding on me and both reached the clear conclusion that Method B is correct. I will focus my analysis on *Capcount Trading* since that is the decision of the superior court and, moreover, the authority in which the issue was considered in the greater detail.

36. The *ratio* (or principle) of the Court of Appeal's decision in *Capcount* was that, since foreign currency (as distinct from sterling) was a distinct asset for CGT purposes (under what is now s21(1)(b) of the Taxation of Chargeable Gains Act 1992), expenditure incurred in a foreign currency is expenditure that consists of giving up a distinct asset, and not expenditure in "money". Similarly, receipts of foreign currency are receipts of separate assets for CGT purposes. Since sterling is the proper unit of account for CGT purposes, expenditure that is incurred by giving up foreign currency needs to be valued by converting the foreign currency into sterling at the exchange rate prevailing on the date of expenditure. Similarly, receipts in a foreign currency need to be converted into sterling at the rate prevailing on the date of receipt. That emerges clearly from Nolan LJ's judgment (on page 24 of the reported decision) and from Staughton LJ's judgment (on page 28 of the reported decision). Mann LJ agreed with the conclusions of both Nolan LJ and Staughton LJ.

37. Mr Knight argued that *Capcount* could be distinguished as relating only to situations in which numerous currencies were involved, leaving open the possibility for Method A to apply in situations where expenditure was incurred (and consideration received) in the same foreign currency. That argument is simply not compatible with the actual decision in *Capcount*. I consider the Court of Appeal's decision to be absolutely clear, but even if there were room for doubt, Nolan LJ states in terms that his reasoning applies to a situation involving a purchase and a sale in the same currency in the following passage of his judgment:

> Therefore when the taxpayer company acquired the Canadian shares for Canadian dollars it gave a consideration in money's worth which fell to be valued in sterling terms for the

purposes of computing both the gain (if any) on the disposal of the dollars and the cost of acquisition of the shares. By the same token, when the shares were sold for Canadian dollars the consideration for United Kingdom tax purposes was not money, but another asset whose value fell to be translated into sterling terms for the purpose of computing the gain or loss on the disposal of the shares.

Putting the matter more broadly, I accept the Crown's proposition that, for better or worse, the capital gains tax which forms the basis of the corporation tax on chargeable gains is a tax measured on differences computed in pounds sterling and in no other way.

416. The chargeable gain is therefore to be calculated as follows:

Acquisition expenditure paid from Mr Looney's AIB bank account

$80,000 USD (£40,526.33 at an exchange rate of 1.975 pounds per dollar) paid to Canounan Reality Ltd (sic) on 31 May 2007.

$1,200,000 USD (£591,153 at an exchange rate of 2.03 pounds per dollar) paid to Canouan Resort Development (sic) on 13 July 2007.

$3,079,000 USD (£1,507,835.46 at an exchange rate of 2.042 pounds per dollar) paid to Canounan Resorts Development (sic) on 22 October 2007.

Thus, a total payment of $4,359,000 USD (£2,139,514.79 at the various exchange rates then prevailing) was made by Mr Looney to acquire the interest in the Sandpiper shares which owned the land at Plot e22.

417. The disposal or sale proceeds received on 17 January 2012 into Nower Inc's PKF bank account (by Mr Looney) from Orchestra Holdings Ltd (said to be from Dermot Desmond) was USD $5 million (£3,256,268.32 at the exchange rate of 1.5355 pounds per dollar then prevailing). However, the Tribunal has also found that there was an earlier payment of USD $1 million received in respect of the disposal in June 2011 and that the total receipt was £3,840,000.

418. The total chargeable gain upon disposition of the Looneys' interest in the shares and land was therefore £1,700,485.21 (£3,840,000-£2,139,514.79). Half of this sum is to be attributed to Mr Looney because the Tribunal has found him to be the joint beneficial owner of the shares with Mrs Looney. Mr Looney's chargeable gain is therefore £850,242.61.

419. After subtracting the annual exemption allowance of £10,600 for Mr Looney from his gain of £850,242.61 and applying the higher rate of 28%, the capital gains tax payable upon Mr Looney's gain for 2011-2012 is therefore £235,099.93.

420. This sum is somewhat less than that of the capital gain of £1,127,551, taxed at 28% being £315,714.28 in CGT calculated by HMRC in its amendment to Mr Looney's return for 2011-2012. While the Tribunal has found the total gain to be larger it has been split between Mr Looney and his wife.

Conclusion on the Capital Gains Tax appeal

421. The Tribunal finds that the sum received by Mr Looney of £3.84 million was not a gift from Mr Desmond but represented the disposal of Mr Looney's interest in the shareholding in Sandpiper Enterprises Ltd (without making any finding as to the identity of the purchaser). The gain from the acquisition valued is chargeable to capital gains tax. The calculation of the gain is set out above. Only 50% of the gain is to be attributed to Mr Looney as his interest in the shares of Sandpiper was jointly held with Mrs Looney. Entrepreneurs' relief is not available.

422. The appeal is allowed in part. The Tribunal's reduces the chargeable gain and capital gains tax payable from that set out in HMRC's amendment to Mr Looney's 2011-2012 return to that set out above. The Tribunal's calculation is to replace that set out in HMRC's closure notice and amendment to Mr Looney's return for 2011-2012.

Closure Notice appeal

423. The Closure Notice appeal is an appeal against a closure notice and amendment to return issued by HMRC under section 28A Taxes Management Act 1970 on 15 September 2016 against Mr Looney for the tax years 2008-2009 and 2009-2010. Only the amendment to Mr Looney's return for the tax year 2009-2010 remains under appeal.

The Facts

424. The Tribunal makes the following findings on the balance of probabilities having heard the evidence as set out above in relation to the partnership appeal.

425. On 26 May 2011 HMRC wrote to Mr Looney advising him that HMRC were opening an investigation under Code of Practice 8 (Cases where Civil Investigation of Fraud procedures are not used).

426. Mr Looney was advised in the letter of 26 May 2011 that part of the investigation was an enquiry under Section 9A Taxes Management Act 1970 into his personal tax return for 2009-2010.

427. On 23 June 2011 HMRC officers met Mr Looney and his agent Mr Fonseka, explaining the main reason for the meeting was to discuss the income that Mr Looney had received from Trafigura which HMRC believed had not been reflected in either Mr Looney's personal or company (Kieran Looney & Company Ltd) tax returns.

428. The meeting notes state at paragraph 40 that Mr Looney had received a £3 million fee and £1 million termination payment from Trafigura Ltd but that "Mr Fonseka was not sure if Trafigura could sue for the return of the money and there was a question mark over the income so he left it out".

429. Following the meeting on 23 June 2011, on 11 July 2011 HMRC wrote to Fonseka and Co providing HMRC's current view of the matters under enquiry, a copy of the notes of meeting and a schedule of documents required as part of the enquiry. The documents requested and issues and of concern were as follows:

Copies of Mr Looney's bank statements;

The income from Trafigura Ltd;

Details of Mr Looney's Trusts;

The Kieran Looney & Associates Partnership; and

Authorship losses.

430. On 1 November 2011 HMRC issued a notice to Mr Looney under Paragraph 1 of Schedule 36 to the Finance Act 2008 formalising the request for the documents that HMRC had requested on 11 July 2011 as they had not yet been provided.

431. On 2 December 2011 Fonseka & Co Ltd replied to the Schedule 36 Information Notice. The bank statements supplied included a Swiss bank account statement for Nower Inc.

432. On 26 January 2012 Fonseka & Co Ltd advised HMRC that Mr Looney had been dealing in shares and that a summary of the share transactions would be provided by the end of February 2012.

433. On 7 March 2012 HMRC wrote to Fonseka & Co Ltd requesting further information and documents concerning: the Trafigura income; the Kieran Looney & Associates partnership; land in the Caribbean; the signed certificate of bank accounts operated; Mr Looney's authorship losses; bank accounts information; Mr Looney's trusts; VAT repayments; legal expenses and Film Partnerships.

434. On 10 May 2012 Fonseka & Co Ltd provided additional information and documents following HMRC's request of 7 March 2012. This included confirmation that no accounts had been prepared for Nower Inc at that time.

435. On 6 February 2013 HMRC wrote to Fonseka & Co Ltd setting out HMRC's view of the outstanding matters in the enquiry, namely:

- Trafigura income and termination payment;
- Legal expenses;
- VAT on Trafigura Income;
- Kieran Looney & Associates – Further expenses claim;
- Authorship;
- Trust re property in Spain;
- Land – Caribbean;
- Reality Coaching Ltd – Bank accounts;

- Certificate of bank accounts operated; and

- Film Partnership income.

436. On 18 April 2013 HMRC met Mr Fonseka to discuss the outstanding issues.

437. On 24 April 2013 HMRC wrote to Fonseka & Co Ltd enclosing a copy of the notes of meeting and setting out what information and documents were outstanding.

438. On 12 June 2013 Fonseka & Co Ltd responded to HMRC's letter of 24 April 2013. This included providing financial statements for the company Kieran Looney & Co Limited with revised accounts dated 12/05/13 showing turnover and other income of £24,486 for 2009-2010 and £122,944 for 2010-2011.

439. Accounts for Nower Inc for January to December 2009 were also prepared and provided showing £2,848,568 in turnover. Income from Trafigura was included in the turnover of Nower Inc along with other income. The accounts included a number of administrative expenses including a bad debt provision of £2,688,000.

440. On 10 May 2012 Mr Fonseka had previously written to HMRC stating that no accounts had been prepared for Nower Inc and he had advised Mr Looney to maintain the company (Nower) should Mr Looney's income be allocated to it.

441. On 7 August 2013 HMRC wrote to Fonseka & Co Ltd on a "without prejudice" basis setting out HMRC's proposals on the next steps with a view to reaching a settlement in the case.

442. On 2 September 2013 Fonseka & Co Ltd responded to HMRC's proposals.

443. On 20 December 2013 HMRC wrote to Fonseka & Co Ltd setting out how HMRC was going to deal with: the VAT issue for Kieran Looney & Associates; the accounts of Kieran Looney & Co Ltd; the amendments that would take place to the Kieran Looney & Associates Partnership returns; and Mr Looney's authorship losses.

444. On 2 April 2014 HMRC wrote to Mr Looney setting out HMRC's position on the various issues under enquiry, enclosed copies of assessments made in respect of Mr Looney's self-assessment returns for 2008-2009 and 2009-2010 and setting out amendments made to Mr Looney's self-assessment return.

445. On 24 September 2015 HMRC met Mr Looney and Mr Fonseka of Fonseka & Co Ltd. Details of the areas under enquiry were discussed.

446. On 2 October 2015 HMRC wrote to Senstone Ltd (formally Fonseka & Co Ltd) concerning Nower Inc and Kieran Looney & Associates.

447. On 16 March 2016 HMRC met Mr Looney and Mr Fonseka to discuss the outstanding issues.

448. On 21 June 2016 Senstone wrote to HMRC setting out the issues that needed clarification.

449. On 8 August 2016 HMRC again met Mr Looney and Mr Fonseka to discuss the outstanding issues.

450. On 16 August 2016 HMRC e-mailed Mr Fonseka setting out their position on the income of Nower Inc. namely that: the accounts to the year end 31 December 2009 were to be treated as 2008-2009 and year ending 31 December 2010 were to be treated as 2009-2010; none of the claimed expenditure would appear to be an allowable expense; and the profits figures arising (excluding the bad debt) would be treated as the gains arising.

451. On 19 August 2016 Mr Fonseka replied stating that he did not accept the compensation payment of £1 million was taxable but otherwise the figures were acceptable.

452. On 15 September 2016 HMRC issued a Closure Notice under section 28A Taxes Management Act 1970 in respect of the section 9A enquiry into Mr Looney's Self-Assessment return for 2009-2010. They amended the return to assess total tax due of £615,350.35.

453. HMRC Officer Hadley gave notice that Mr Looney's income included the turnover from Kieran Looney & Associates partnership of £4 million from Trafigura. This was therefore to be removed from the accounts of Kieran Looney & Co Limited. Officer Hadley stated the net taxable profit was £1,469,472 with income tax and National insurance of £597,417.67 due from Mr Looney.

454. In relation to the £1 million termination payment, the Officer stated: 'The contract was terminated two years early and accordingly £1 million compensation was paid by way of recompense for the lost opportunity to profit from the remainder of the contract. As the compensation derives from a revenue matter then it will be on revenue account. It was the price paid for sterilising the asset (the contract) from which otherwise profit might have been obtained.'

455. The Closure Notice of 15 September 2016 also recorded £17,932.68 in Capital Gains Tax to be paid by Mr Looney for 2009-2010 on the basis of capital gains received by Nower Inc.

456. The notice stated: 'Nower is a Panamanian company with operation in Switzerland. It was incorporated on 14 January 2009. The majority of the transactions relate to the purchase and sale of shares. You have agreed that you control the company and any income/gains are assessable/chargeable on you personally. Accounts have been provided for the periods ended 31/12/09 and 31/12/10. The accounts include income from Trafigura which you agreed were proper to the partnership…..On a pragmatic basis I have treated the profits arising as gains for the years…2009-10. After adjusting for Trafigura income and bad debt relief the profits are £109,276 respectively.'

457. The gains arising and chargeable to Mr Looney for 2009-2010 were derived from the share transactions and foreign dealings undertaken by Nower Inc of £109,726.00.

458. On 13 October 2016 Senstone Ltd lodged formal appeals with HMRC against their decisions (assessments, closure notices and amendments) for the years 2007-2008, 2008-2009 and 2009-2010. The grounds of appeal were that HMRC had not taken into account the profits and losses relating to the Film Partnerships in each of which Mr Looney was a partner and that HMRC had not given Mr Looney the relief available on his investment losses. On 14 October 2016 HMRC clarified the position regarding Mr Looney's appeal dated 13 October 2016.

459. Only the appeal in relation to the closure notice for the year 2009-2010 remains before the Tribunal.

Law

460. Section 8 Taxes Management Act 1970 ("TMA 1970") provides for the filing of personal return by taxpayers.

461. Section 9A TMA 1970 provides for HMRC to enquire into a return filed under section 8 if the officer gives notice within the relevant time allowed, up to the end of the period of twelve months after the day on which the return was delivered if it was delivered on or before the filing date (31 October or 31 January).

462. Section 28A TMA 1970 provides that the completion of an enquiry into personal or trustee return or Non-Resident Capital Gains Tax return occurs when an officer informs the taxpayer in a closure notice that he has completed his enquiries and states his conclusions, either that no amendment is required or that no amendment is required.

463. Section 31 TMA 1970 provides right of appeal against closure notices, assessments to tax and amendments to partnership returns.

464. The burden of proof is upon the Appellant to demonstrate that amendments to the return are incorrect and any lesser sum of tax should be charged. The standard of proof is the balance of probabilities.

465. Section 13 Taxation of Capital Gains Act 1992 TGCA 1992 'Attribution of gains to members of non-resident companies' in so far as relevant provides as follows:

13 Attribution of gains to members of non-resident companies

(1) This section applies as respects chargeable gains accruing to a company—

(a) which is not resident in the United Kingdom, and

(b) which would be a close company if it were resident in the United Kingdom.

……..

(2) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident . . . in the United Kingdom [and] [is a participator] in the company, shall be treated for the purposes of this Act as if a part of the chargeable gain had accrued to him.

[(3) That part shall be equal to the proportion of the gain that corresponds to the extent of the participator's interest as a participator in the company.

[(3A) Subsection (2) does not apply in the case of a participator who is an individual if—

(a) the tax year in which the chargeable gain accrues to the company is a split year as respects the participator, and

(b) the chargeable gain accrues to the company in the overseas part of that year.]

(4) Subsection (2) above shall not apply in the case of any participator in the company to which the gain accrues where the aggregate amount falling under that subsection to be apportioned to him and to persons connected with him does not exceed [one quarter] of the gain.]

(5) This section shall not apply in relation to—

(a) . . ., or

[(b) a chargeable gain accruing on the disposal of an asset used, and used only—

(i) for the purposes of a trade carried on by the company wholly outside the United Kingdom, or

(ii) for the purposes of the part carried on outside the United Kingdom of a trade carried on by the company partly within and partly outside the United Kingdom,]

(c) . . . or

[(ca) a chargeable gain accruing on the disposal of an asset used, and used only, for the purposes of economically significant activities carried on by the company wholly or mainly outside the United Kingdom, or

(cb) a chargeable gain accruing to the company on a disposal of an asset where it is shown that neither—

(i) the disposal of the asset by the company, nor

(ii) the acquisition or holding of the asset by the company,

formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax, or]

(d) to a chargeable gain in respect of which the company is chargeable to tax by virtue of section [10B].

…….

(7) The amount of capital gains tax paid by a person in pursuance of subsection (2) above (so far as [neither reimbursed by the company nor applied under subsection (5A) above for

reducing any liability to tax)] shall be allowable as a deduction in the computation under this Act of a gain accruing on the disposal by him of [any asset representing his interest as a participator in the company].

[(7A) In ascertaining for the purposes of subsection (5A) or (7) above the amount of capital gains tax or income tax chargeable on any person for any year on or in respect of any chargeable gain or distribution—

(a) any such distribution as is mentioned in subsection (5A)(b) above and falls to be treated as income of that person for that year shall be regarded as forming the highest part of the income on which he is chargeable to tax for the year;

……..

(10) The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include [the trustees of a settlement who are participators] [in the company, or in any company amongst the participators in which the gain is apportioned under subsection (9) above,] if when the gain accrues to the company the trustees are [not resident] in the United Kingdom.

…….

(14) For the purposes of this section, where—

(a) the interest of any person in a company is wholly or partly represented by an interest which he has under any settlement ("his beneficial interest"), and

(b) his beneficial interest is the factor, or one of the factors, by reference to which that person would be treated (apart from this subsection) as having an interest as a participator in that company,

the interest as a participator in that company which would be that person's shall be deemed, to the extent that it is represented by his beneficial interest, to be an interest of the trustees of the settlement (and not of that person), and references in this section, in relation to a company, to a participator shall be construed accordingly.

……..

Discussion and Decision on the closure notice of appeal

466. The extant appeal is against HMRC's closure notice and amendment to the return of Mr Looney under section 28A TMA 1970 for the tax year 2009-2010. There are no remaining issues in dispute after resolution of the partnership appeal.

467. HMRC accepted that the closure notice should not have included the year 2008-2009 as no enquiry under section 9A TMA 1970 was opened for that year and that 2008-2009 was no longer under appeal.

468. HMRC accept that the closure notice should not have included details of the Kieran Looney & Associates Partnership income which is subject to the separate appeal against the amendment to the partnership return.

469. To that extent the appeal should be allowed.

470. The amendments to the partnership return of Kieran Looney & Associates for 2009-2010 are the subject of the partnership appeal (TC/2014/03430) which were heard as part of the proceedings before the Tribunal. In the partnership appeal against HMRC's amendment to the returns of Kieran Looney & Associates Partnership above the Tribunal has considered and determined Mr Looney's income. The Tribunal determined that the payments made by Trafigura were attributable to the partnership and not to any other entity, Kieran Looney and Co Limited ("KLCL") nor Nower Inc. The Tribunal determined that the profits of the partnership were solely attributable to Mr Looney.

471. For the same reasons as set out above the treatment of the income from Trafigura is not properly attributable to Nower Inc but to the KLA partnership and hence Mr Looney personally. The income that Nower Inc and Mr Looney received in 2009 from Trafigura was under a contract between Kieran Looney & Associates and Trafigura.

472. The Tribunal is satisfied that Mr Looney has not proved that the income from Trafigura should have been accounted for in any other entity than the partnership accounts of Kieran Looney & Associates.

473. The amendment to the partnership return of Kieran Looney & Associates for 2009-2010 relied upon the discovery provisions of section 30B Taxes Management Act 1970. It took account of the fact that the income from Trafigura is that of Kieran Looney & Associates and not income of Nower Inc or KLCL. The outcome of the partnership appeal has determined the correct treatment of the Trafigura income and the tax consequences for Mr Looney.

474. Therefore, the Tribunal is satisfied that HMRC's amendment to Mr Looney's self-assessment return for the tax year 2009-2010 charging Mr Looney income tax on the profits derived from the £4 million income from Trafigura should be confirmed.

475. In the capital gains tax appeal concerning his 2011-2012 return, Mr Looney did not argue that the chargeable gain on the sale of shares and land in the Caribbean was proper to Nower Inc rather than him personally. Rather he argued there was no chargeable gain but he had received a gift of US $5 million.

476. Nevertheless, the Tribunal is satisfied, for the reasons set out above in the capital gains tax appeal, that it was Mr Looney who had paid the owner of the shares of Sandpiper Enterprises Ltd US$4.359 million to acquire an interest in the shares in July to October 2007. Mr Looney had intended that they would be transferred to SE Trust by Minerva Trust & Corporate Services Ltd. The advice notes from Allied Irish Bank (GB) confirm that the payments were made by Mr Looney personally.

477. The Tribunal has found that $5 million received by Mr Looney in February 2012 through the Nower Inc bank account was not a gift but paid by Dermot Desmond for

the sale or disposition for Mr Looney's interest in the shares and land in the Caribbean. Hence the difference between acquisition and disposal values has been found to be a chargeable gain.

478. Nower Inc was not incorporated until 14 January 2009 and it was not therefore possible for Nower Inc to have made the payments to purchase the shares in Sandpiper in 2007. Nower Inc did not make the payment of USD $4.359 million for the shares of Sandpiper Enterprises Ltd but that payment was made by Mr Looney personally.

479. Mr Looney's chargeable gain, calculated as the difference in sterling between the purchase and disposal prices of Mr Looney's interest in shares in Sandpiper Enterprises Ltd is subject to capital gains tax for the 2011-2012 tax year. This has been determined in the above capital gains tax appeal (TC/2016/06173).

480. Even if Mr Looney's capital gains tax appeal had been successful then the bad debt claimed to have been incurred by Nower Inc would not have become bad in the year ended 31 December 2009 but rather when it was established that it had become irrecoverable. Likewise, even if Mr Looney had been successful in his capital gains tax appeal, there is no bad debt relief due in the accounts of Nower Inc for the year ended 31 December 2009. Thus the determination of the capital gains tax appeal has no bearing on the closure notice appeal for the tax year2009-2010

481. In relation to the tax year 2009-2010, the Tribunal is satisfied HMRC properly treated the gains arising from the sale of Mr Looney's shares and foreign transactions by Nower Inc. Nower Inc is a Panamanian company incorporated by Mr Looney on 14 January 2009 with operations in Switzerland. Nower Inc is not chargeable in Panama.

482. Section 13 Taxation of Chargeable Gains Act 1992 sets out how the "attribution of gains to members of non-resident companies" will be dealt with. Section 13(2) Taxation of Chargeable Gains Act 1992 provides that:

"Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident in the United Kingdom and is a participator in the company, shall be treated for the purposes of this Act as if a part of the chargeable gain had accrued to him".

483. The Tribunal is satisfied that the gains returned as belonging to Nower inc from the sale of shares and foreign exchanges are assessable on Mr Looney under section 13 Taxation of Chargeable Gains Act 1992 as the resident participator in the company. This was not in dispute between the parties. Therefore the Tribunal is satisfied HMRC's amendment to Mr Looney's return charging £17,932.68 in capital gains tax on the gains of £109,726.00 in the tax year 2009-2010 should be confirmed.

484. The Tribunal is satisfied that the section 9A enquiry only covered the 2009-2010 tax year and it is the gains rising for that year that HMRC contend are assessable on Mr Looney.

Conclusion on the Closure Notice appeal

485. In respect of the appeal against the 2009-2010 closure notice issued to Mr Looney the Tribunal is satisfied:

i) in line with the determination of the partnership appeal, the £4 million income from Trafigura is taxable income of Kieran Looney & Associates and hence Mr Looney personally not Nower Inc nor Kieran Looney & Company Limited; and

ii) the gains arising from the share transactions and foreign dealings undertaken by Nower inc of £109,726.00 are taxable upon Mr Looney for the tax year 2009-2010.

486. Therefore Mr Looney has not satisfied the Tribunal that the amendments to his return charging £597,417.67 in income tax and £17,932.68 in capital gains tax for the year 2009-2010 are incorrect.

487. The capital gains chargeable upon the sale of Mr Looney's interest in the shares and land in the Caribbean fall within the tax year 2011-2012 and have been determined in the capital gains tax appeal.

488. The Tribunal allows the appeal in respect of the closure notice in part (in respect of 2008-2009) for the reasons set out above. It upholds the capital gains tax on Mr Looney for 2009-2010 arising from the share transactions and dealings of Nower Inc and income tax on the profits arising from the termination payment of £4 million received by his partnership from Trafigura.

489. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 16 OCTOBER 2018