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Case Number: TC09334

FIRST-TIER TRIBUNAL
TAX CHAMBER

Tribunal Hearing Centre
Alexandra House
Parsonage
Manchester

Appeal references: TC/2022/11962
TC/2022/14008
TC/2022/14009

INCOME TAX - NATIONAL INSURANCE - Payment of approximately £4.3m to Mr Mellor calculated in accordance with the 'contingent advisory fee' provision of a consultancy agreement between Equity Advisory Limited and a third party relating to litigation between that third party and a bank - Payment declared by Mr Mellor on his SA return as a capital sum exempt from taxation as 'sum obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation" (TCGA s 51(2)) - Whether the payment was capital and not income, and, if capital, exempt from taxation - Income, not capital - Even if capital would not have been within the exemption - Effect of the purported assignment of the benefit of that agreement by EAL to Mr Mellor - Appeals dismissed

Heard on: 22-24 July 2024
Judgment date: 24 October 2024

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL
TRIBUNAL MEMBER SUSAN STOTT

Between

(1) EQUITY ADVISORY LIMITED
(2) CRAIG ALLAN MELLOR

Appellants

and

THE COMMISSIONERS FOR

HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Michael Ripley, of Counsel, instructed by Try Lunn and Co, Accountants, Hull.

For the Respondents: Ms Joanna Vicary, of Counsel, instructed by HM Revenue and Customs' Solicitors' Office and Legal Services.

DECISION

The appeals of both Appellants are dismissed.

REASONS

INTRODUCTION

1. In September 2017, the sum of £4,367,496 was paid into Mr Mellor's bank account (**'the Payment'**). The circumstances of the Payment are set out more fully below.

2. These appeals, heard together, concern the correct tax treatment of that Payment. In brief, the Appellants' position is that the Payment is wholly tax exempt.

3. The appeals are:

(1) An appeal by Equity Advisory Ltd ('**EAL**'), made by way of a Notice of Appeal dated 14 June 2022, against a determination under Regulation 80 of the *Income Tax (Pay As You Earn) Regulations 2003* (made on 18 February 2022 and upheld at departmental review on 27 May 2022) that EAL was liable to pay an outstanding sum of Income Tax as an employer of Mr Mellor for 2017/18 in the sum of £1,954,387.95 (**'the Regulation 80 Determination'**);

(2) An appeal by EAL, made by way of a Notice of Appeal dated 15 November 2022, against a decision pursuant to section 8 of the *Social Security Contributions (Transfer of Functions, etc) Act 1992* (made on 5 July 2022, and upheld at departmental review on 21 October 2022) that the Payment was earnings of Mr Mellor's employment with EAL, and that EAL was accordingly liable to pay primary and secondary Class 1 National Insurance contributions in respect of the earnings of Mr Mellor for the period 6 April 2017 to 5 April 2018 in the sum of £693,747 (**'the Section 8 Decision'**)

(3) An appeal by Mr Mellor, made by way of a Notice of Appeal dated 15 November 2022, against a Closure Notice with Revenue amendment issued to Mr Mellor, pursuant to section 28A of the *Taxes Management Act 1970,* on 21 June 2022, and upheld at departmental review on 21 October 2022, so as to make Mr Mellor liable for Income Tax in relation to the Payment, in the sum of £1,960,708 (**'the Closure Notice'**).

4. It was not disputed that HMRC were entitled to seek tax on different footings from different taxpayers.

5. A charge to tax to income tax takes priority over CGT; and a charge to tax on earnings takes priority over a charge on distributions, which in turn takes priority over a charge to miscellaneous income.

THE BURDEN AND STANDARD OF PROOF

6. An assessment which has been validly made according to the relevant statutory requirements (eg, made in time) "stands good" unless and until the taxpayer displaces it.

7. HMRC bears the burden of showing that its assessments were validly made according to the relevant statutory requirements (eg, made in time). Thereafter, the taxpayer bears the burden.

8. The standard of proof in relation to disputed matters is the usual civil standard, namely the balance of probabilities, or whether something is likelier than not.

THE EVIDENCE

9. We were provided with a hearing bundle (2097 pages).

10. Mr Mellor had filed two witness statements:

(1) A witness statement dated 20 November 2023;

(2) A Supplementary Witness Statement (15 July 2024), with two exhibits (two draft proposed option agreements, unexecuted, but dated July 2015 and January 2017).

11. We were also provided with four witness statements which had been made connection with the proceedings brought by Mr Wall against the Bank:

(1) Mr Mellor: 12 April 2017;

(2) Mr Mellor: 12 May 2017;

(3) Mr Wall: 12 May 2017;

(4) Mr Berry; 11 April 2017.

12. We also heard oral evidence from Mr Mellor, who was cross-examined by Ms Vicary.

13. We did not hear any evidence from Mr Wall, who was a key figure in the overall scenario, or from anyone at the Bank. We do not draw any inference adverse to Mr Mellor from this, because, given the contractual structure, and our view of the force, meaning and effect of the various written contracts entered into by Mr Wall, we do not consider that Mr Wall would have had any admissible evidence to give relevant to this appeal. The same applies to anyone from the Bank. Therefore, the reason (in our view, not a good one) why Mr Wall was not being called to give evidence (which is that Mr Wall was 73, and Mr Mellor did not wish to approach him to "put him through more turmoil") is irrelevant. Regardless of issues of admissibility in these appeals, witness statements from Mr Wall and Mr Berry made in relation to the Claim are, at best, of extremely limited weight because neither person was called to be cross-examined on their contents.

14. This raises a bigger point. In very large measure, this is a case about the proper meaning and effect of certain written agreements. Although there is a wealth of background detail, it is largely irrelevant, because it has been overtaken by the actual words used by the contracting parties, and especially EAL and Mr Mellor, in their contracts. The Appellants face a significant obstacle, going to the weight which can properly be attached to their evidence (in reality, Mr Mellor's evidence), written and oral, as to contracts which Mr Mellor and/or EAL entered. This is because the parol evidence rule engages - that being the long-established rule which ordinarily prohibits a party to an agreement from giving admissible evidence as to its meaning,

or seeking to gloss, add to, or subtract from, its contents. That rule is especially potent where a contract contains an 'entire agreement' clause.

15. We were also provided with expert evidence in the form of a report from Mr Henry Pocock, a forensic accountant, the purpose of which was to seek to value Mr Mellor's entitlement to the Payment as at 15 May 2017. Mr Pocock was not called to give evidence.

THE ROLE OF THE BANK

16. Before the hearing, the Bank applied for directions that this decision be released only in a redacted form, so as not to reveal what were said to be certain "commercially sensitive matters", namely:

(1) "The identity of the bank ('the Bank')";

(2) "The amount of the payment made by the Bank to settle a claim ('the Settlement Sum'); and

(3) "Any information likely to allow members of the public to identify either the Bank or the Settlement Sum ('the Confidential Information')".

17. That application was refused by the Tribunal, for the reasons set out in a separate decision, reported with neutral citation [2024] UKFTT 784 (TC).

18. Despite refusal of that application, it has not proved necessary in this decision to identify either the Bank or to state the size of the Settlement Sum. In our view, neither is relevant for a proper understanding of the facts and law relevant to this decision.

THE FACTS

19. The parties placed before us a Statement of Agreed Facts and Issues.

20. On the basis of that Statement, the documents which we have considered, and the evidence which we have heard, we find as follows. Further facts will be outlined in our decision discussing the Issues.

21. In September 1997, Mr Mellor qualified as a Chartered Accountant. Immediately on qualification, he went to work with one Mr Wall. Mr Wall was a former academic who had turned his abilities to business, and who was a director of and person with significant control over Opal Group (O Group), which included a company called Opal Property Group Ltd (O Ltd).

22. From that point, throughout Mr Mellor's entire career as an accountant, and until the events in 2013 set out below, he worked for O Group, including as its finance director.

23. O Group became, over the years, a very large provider of student accommodation, owning almost 15,000 units in a number of university cities across the UK. By 2013, Mr Mellor was a director of all companies in the O Group, and was also company secretary for many of those companies, including O Ltd. There is no doubt that Mr Mellor was a very important person in the overall corporate set-up of O Group and O Ltd. But these were businesses owned by Mr Wall, and for which Mr Mellor worked. They were not partnerships or quasi-partnerships between Mr Wall and Mr Mellor.

24. In 2013 O Ltd (and the wider group) entered administration. The background to the administration was a so-called interest rate hedging product ('IRHP') deal, worth several hundred million pounds, which O Ltd had done with the Bank some years earlier.

25. A few days after O Ltd entered administration, EAL was incorporated and, at all relevant times, Mr Mellor was its sole director. EAL's issued share capital of one share was owned by Juvanesco Ltd, a company incorporated on the same day as EAL, and of which Mr Mellor was,

at all relevant times, the sole director. Mr Mellor was Juvanesco's majority shareholder, owning 11 out of 21 ordinary shares (with his wife owning the remaining 10).

The Claim against the Bank

26. On 14 January 2013 O Ltd issued a claim in the Commercial Court against the Bank in relation to the alleged mis-selling of the IRHP (**'the Claim'**) and the Bank's alleged conduct.

27. Administrators of O Ltd were appointed on or about 15 March 2013.

28. In October 2013, Mr Wall bought all of O Ltd's right title and interest in the Claim against the Bank from O Ltd and the administrators, and he was substituted for O Ltd as the sole Claimant.

29. The sole named Defendant was the Bank. Neither EAL nor Mr Mellor were ever parties to the Claim, and neither EAL nor Mr Mellor ever issued any claims of their own against the Bank. The Bank was never sued by EAL or Mr Mellor. The Particulars of Claim sought declarations that certain instruments executed by O Ltd be rescinded, or it be awarded damages in lieu of rescission and/or equitable compensation; interest; further or other relief; and costs. Mr Mellor is identified as having been a director of O Ltd, and as having participated in some of the events giving rise to the Claim. We were not taken to any allegation, or attempt to recover, as against the Bank, in the Claim, any loss or injury said to have been suffered individually by Mr Mellor.

The Consultancy Agreement

30. On 12 April 2017, Mr Wall and EAL (but not Mr Mellor in his own capacity) entered into a so-described "Consultancy Agreement" (**'the Consultancy Agreement'**). It is signed by Mr Wall and Mr Mellor, but Mr Mellor has signed only in his capacity as director of EAL. Mr Mellor, in his own right, was not a party to it.

31. EAL (not Mr Mellor) was named as 'the Consultant' and Mr Wall was named as 'the Claimant'.

32. This is an extremely important document, because it is the only document which ever (i) formally regulated the manner and extent of Mr Mellor's involvement in the litigation; and (ii) imposed any formal binding obligation on Mr Wall to make any payment to either EAL or Mr Mellor if Mr Wall were to achieve any measure of success in the Claim.

33. By Clause 11, Mr Wall acknowledged that EAL "has a particular type of experience and expertise to which [Mr Wall] attaches a commercial value". EAL's experience and expertise were those of Mr Mellor.

34. Clause 2.4 read as follows:

> "The Claimant recognises the expertise of the Consultant in, inter alia, assisting with the handling of data relevant to the Claim and generally assisting with the preparation of the Claim in the most legally robust manner possible [...]. The Claimant wishes to engage the Consultant to carry out these functions and all and any further functions, deemed necessary by the Consultant and as agreed to by the Claimant, in order to maximise the strength of the Claim for presentation to the Court and/or to the Defendant"

35. Clause 2.5 read as follows:

> "The Consultant agrees to assist the Claimant to procure a successful outcome in court or by way of negotiated settlement with the Defendant on behalf of the Claimant [...].

A fee shall be payable for all of the Consultant's work as described, as detailed further in section 4 below"

"The Support Fee"

36. By Clause 4.1, Mr Wall agreed to pay EAL an annual "Support Fee" of £100,000 plus VAT if/as applicable and disbursements (where agreed in advance) with effect from 1 March 2016.

37. This provision of the Consultancy Agreement superseded an earlier (verbal) arrangement whereby Mr Wall, from May 2014, was paying about £10,000 a month to EAL.

"The Contingent Advisory Fee"

38. Over and above the "Support Fee", Clause 4.1.2 provided that EAL was to entitled to receive a percentage of the net proceeds of the Claim, described as a 'Contingent Advisory Fee'. The percentage varied according to the net proceeds of the Claim. Mr Wall promised to pay that to EAL. He did not promise to pay it to Mr Mellor. Indeed, on that very same day that the Consultancy Agreement was signed, Mr Mellor made a witness statement in the Claim in which he explicitly acknowledged, and described, that EAL ("this company") was to be entitled to a certain percentage of "the residual claim proceeds" ("residual" meaning net of funding and other costs).

39. Leaving aside the "contingent" descriptor, the "advisory fee" (which is not further explained in the agreement itself, but was referred to by Mr Mellor in his oral evidence as a "waterfall payment") was only ever payable in consideration of the services which EAL had agreed to provide: see Clauses 2.4 or 2.5.

40. Hence, and even if any payment by the Bank to Mr Wall were compensation or damages the advisory fee - even though the sum was explicitly geared with reference to the payment by the Bank to Mr Wall - was not being paid to EAL as compensation or damages of any kind. Going further, the fact that the payment by Mr Wall happened to come from the same moneys which Mr Wall had received from the Bank did not automatically operate to make those moneys in the hands of EAL or Mr Mellor compensation or damages. It was payable as an advisory fee, in consideration of EAL's performance of the services under the Consultancy Agreement.

41. Clause 8 provided:

> "Neither party shall assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights and obligations under this agreement without the prior written consent of the other party (such consent not to be unreasonably withheld or delayed)"

42. Hence, the Consultancy Agreement expressly provided for how an assignment (etc) was to be effected.

43. Clause 13 of the Consultancy Agreement is headed "Entire Agreement / Variation / Continuity". It reads:

> 13.1 This agreement constitutes the entire agreement between the Parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter of this agreement.

13.2 Any variation or waiver of any terms of this agreement shall be in writing and signed by both parties to this agreement, and otherwise any purported variation cannot be relied upon by the party asserting them.

13.3 Any notice or communication required or seeking to vary or amend this agreement shall be in writing.

[...]

The Assignment

44. On 15 May 2017, EAL and Mr Mellor entered into a written contract whereby EAL disposed, or purported to dispose, to Mr Mellor, its entire interest in the potential outcome of any financial settlement or court-awarded damages, in consideration of a peppercorn ('**the Assignment'**). That was said to be because '[the Bank] continue to deny any liability whatsoever'. Mr Mellor signed on behalf of EAL and on his own behalf.

45. Mr Wall was not a party to the Assignment. Mr Mellor had not told Mr Wall about it, and had not shown him a copy of it.

46. Clause 2.2 of the Assignment said:

> "The reason for the transfer of the financial benefit to Craig Mellor being because it is Craig Mellor who suffered the individual wrong done by [the Bank] and this is to correct an error in the drafting".

The value of the Contingent Advisory Fee at 15 May 2017

47. With the Tribunal's permission (its approval on 7 December 2023 of a consent order containing directions) the Appellants were permitted to rely on a "statement from an expert concerning valuation". HMRC were given leave to ask questions.

48. In this regard, the Appellant relies on an expert report from Mr Pocock FCA, a forensic accountant, dated 5 February 2024, concluding that the market value of the contingent advisory fee as at the date of the Assignment was nil.

49. HMRC did not require Mr Pocock to attend for cross-examination, and very little reference was made to this report during the hearing.

50. We decline to place any weight on Mr Pocock's report. Principally, it simply does not seem to us that the issue of the likely market value of the contingent advisory fee at the date of the Assignment (which in turn feeds into whether a notional consideration only for the Assignment was appropriate) is relevant to the decision which we have to make.

51. Even if his report were relevant, we observe that Mr Pocock does not seem to have expressly considered the two (unexecuted) option agreements, from 2015 and 2017 (ie, bracketing the Assignment) wherein Mr Mellor was willing to pay thousands of pounds for the 'Option Share'.

52. Moreover, the Consultancy Agreement which Mr Pocock was shown was redacted, so he could not form any view as to the thresholds at which the various percentages would engage: but those threshold figures are relevant, insofar as they show the size of the potential yield of the Claim - a nine figure sum - and thereby the size of the potential yield of the Contingent Advisory Fee.

53. Mr Pocock also proceeds on the footing that the purpose of the Assignment was to "correct an error in the drafting of the Consultancy Agreement": an argument which we do not accept.

Mr Wall's settlement with the Bank

54. On 11 August 2017, the Claim was settled by way of a written agreement between Mr Wall and the Bank (**'the Settlement Agreement'**) which included provision for the Bank to pay Mr Wall a certain sum of money (**'the Settlement Sum'**).

55. Neither EAL nor Mr Mellor were parties to the Settlement Agreement. It does not matter if Mr Mellor had been named as a party on a draft settlement agreement. Any draft was superseded by the Settlement Agreement actually signed.

THE CONFIDENTIALITY AGREEMENT

56. On the same day, Mr Mellor (but not EAL) entered into a confidentiality agreement with the Bank ('**the Confidentiality Agreement'**).

57. It provided that Mr Mellor, in consideration for a payment by the Bank of £1:

(1) Was not to commence, voluntarily aid in any way, fund, prosecure or procure or cause to be commenced any action relating to the Claim, the underlying facts relating to the Claim and/or the relationship between the Bank and Mr Wall;

(2) Was to keep the fact, existence and terms of the Settlement Agreement, and all information relating to the negotiations leading up to it, confidential (subject to specific exemptions, including disclosure to HMRC).

58. EAL was never a party to any agreement with the Bank.

THE PAYMENT

59. Mr Wall's solicitors wrote to Mr Mellor advising him of the Support Fee to be paid to EAL, and the "Payment from Proceeds", which the solicitors noted as due to EAL.

60. In September 2017, the sum of approximately £4.367 million was paid, at Mr Mellor's request, by Mr Wall's solicitors into a bank account in Mr Mellor's name (**'the Payment'**).

61. The Payment was calculated in accordance with the Consultancy Agreement.

62. The Payment was not recorded in EAL's accounts for the year ending 31 March 2018.

63. On 30 January 2019, Mr Mellor submitted his tax return for y.e 5.4.2018 electronically. The Payment was treated as a capital receipt, but was said to fall expressly within one of the exemptions from CGT, and hence was claimed as a non-taxable gain. He made a 26 page white space disclosure which included the amount of the Payment and the rationale for treating it as non-taxable. In summary, this argued:

(1) The administration of O Ltd meant that Mr Mellor regarded himself professionally as being unemployable;

(2) Mr Mellor was part to the settlement of a claim against the Bank. His part in that settlement was his entry into the Confidentiality Agreement;

(3) Mr Mellor and Mr Wall agreed to split whatever settlement, net of costs, that Mr Mellor and Mr Wall obtained from the Bank;

(4) The Payment to Mr Mellor was his "share" of the settlement;

(5) The Bank had committed numerous criminal offences against Mr Mellor, which caused him "huge" "wrong" and "injury", "huge massive distress embarrassment loss of

reputation and dignity", meaning that the Payment to him was tax exempt within TCGA 1992 s 51(2) and ESC D33 Paragraph 12

64. For the reasons which we shall set out further below, the above propositions are replete with inaccuracy and misconception, and we reject them.

DISCUSSION

65. The Agreed Issues are stated as follows:

Issue 1

66. Whether the Payment was taxable as earnings from Mr Mellor's employment with EAL.

Issue 2

67. If Issue 1 is answered in the affirmative, whether the amendment made by the Closure Notice must nevertheless be set aside on the basis that any liability is EAL's and not Mr Mellor's.

Issue 3

68. If Issue 1 is answered in the negative, whether Mr Mellor is liable for tax on the basis that the Payment was taxable as a distribution within CTA 2010 s 1000(1)B- Not applicable, but if Issue 1 falls for reconsideration, then the answer to this would be yes.

Issue 4

69. If Issue 1 and Issue 3 are answered in the negative, whether Mr Mellor is liable for tax as "income not otherwise charged" pursuant to Chapter 8, Part 5, ITTOIA 2005.

Issue 5

70. If either Issue 1, 3 or 4 are answered in the affirmative, what is the amount of tax and National Insurance for which EAL, or, as the case may be, Mr Mellor, is liable.

THE PARTIES' ARGUMENTS

71. In summary, HMRC argues:

(1) The Regulation 80 Determination and Section 8 Decision stand or fall together;

(2) The Payment is liable to tax and NICs as an emolument of, or derived from, Mr Mellor's office or employment with EAL;

(3) If not income from employment, then the Payment was either a payment to Mr Mellor as a shareholder, or a distribution;

(4) The Payment was not referable to any wrong done by the Bank to Mr Mellor personally.

72. In summary, the Appellants argue:

(1) The Payment was neither employment income nor a distribution. It was a share in the proceeds from the settlement of the Claim;

(2) The real reason for the Payment was that it reflected the career which Mr Mellor had lost as a result of the administration, and as an executive in the O Group;

(3) In his hands, the Payment was a one-off capital sum, and was not income of any kind, including miscellaneous income;

(4) As a capital sum, it was a payment of damages for wrongs done to Mr Mellor, and was thereby exempt from taxation pursuant to section 51(2) of the *Taxation of Chargeable Gains Act 1992.*

73. As seen, the parties' positions are diametrically opposed.

ISSUE 1

74. All income must have a source to be taxable. We must therefore identify the source of the Payment.

75. In his tax return, Mr Mellor declared the Payment, not as income but as a capital receipt, which he claimed was thereby exempt from taxation by virtue of TCGA section 51(2) which provides that "sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains".

76. In broad terms, if a payment is chargeable to income tax, then it is not capital. Therefore, the appropriate starting point is whether the Payment was chargeable to income tax or not, which involves consideration of its source.

77. ITEPA s 62(2) defines "earnings" as "(a) any salary, wages, or fee"; "(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth"; or "(c) anything else that constitutes an emolument of the employment".

78. Courts have repeatedly observed that section 62 is expansively drawn.

79. The employment provisions of ITEPA expressed to apply to "employments" apply equally to "offices", such as directorships: section 5. Therefore, it does not matter that Mr Mellor did not have a written contract of employment with EAL.

80. Liability for NICs parallels this analysis, and (as the Appellants accept) there is no difference in the test to be applied for income tax and NIC purposes to determine whether the Payment is taxable as employment income earnings.

81. Whether payment comes from employment, rather than a non-employment source, is not always an easy question to answer. But the answer to that question is binary - a payment is either from employment, or it is not.

82. Employment does not have to be the sole cause, but it does have to be sufficiently substantial so as to properly characterise the payment as one from employment. The assessment is one of substance, and not of form.

83. Where there is more than one operative cause for the payment, then there is an element of value judgment in deciding on which side of the statutory line the payment falls: see Carnwath J (as he then was) in *Wilcock (Inspector of Taxes) v Eve* [1995] STC 18 at 25.

84. Our process of evaluation requires us to make findings of primary fact based on the evidence as to the reasons and background to the payment, and then to apply a judgment as to whether the payment was from the employment rather than from "something else": *Kuehne & Nagel Drinks Logistics Ltd v HMRC* [2012] EWCA Civ 34, at [53].

85. We have had regard to the submissions made to us as to the meaning of the word "from" in ITEPA and "derived from" in relation to NICS, which involve looking at the substance and purpose of a payment in light of all the circumstance to determine whether it was provided as a reward for an employee's services. We remind ourselves that "from" is not the same as (the looser) "in connection with".

86. The Payment was made by Mr Wall pursuant to the provisions of the Consultancy Agreement. EAL - and not Mr Mellor in his personal capacity - was providing the services to Mr Wall under the Consultancy Agreement. This remains the position even though, as is clear, EAL was providing its services to Mr Wall through the human agency of Mr Mellor.

87. The Payment was made because of what EAL, directed by Mr Mellor, had done for Mr Wall.

88. In our view, looked at in the round, the source of the Payment was Mr Mellor's employment with EAL. Payment to Mr Mellor:

(1) Was a payment "from" his employment with EAL for income purposes;

(2) Was a remuneration or profit "derived from" an employment for NICs purposes.

89. That analysis and conclusions are unaffected by the fact that the Payment was paid as a lump sum, and was paid only on the occurrence of the settlement of the Claim. Those features do not change the source (Mr Mellor's employment) or nature of the Payment.

90. PAYE and NICs should have been paid by EAL. Mr Mellor was, for those purposes, an employee: directing EAL's activity, which activity included EAL's fulfilment of its obligations to Mr Wall under the Consultancy Agreement.

91. The money was coming from Mr Wall not through some sense of altruism or philanthropy, but because Mr Wall, acting to protect and advance his own commercial interests, and with the assistance of his lawyers, had engaged EAL under the Consultancy Agreement, and thereby was contractually bound, by the Consultancy Agreement, to pay the Contingent Advisory Fee if Mr Wall received something from the Claim.

92. The form - a formal written document, professionally drawn up, with legal advice, including express non-variation and entire agreement clauses - and potentially the instrument giving rise to EAL receiving a contingent advisory fee of many millions of pounds - is a very important part of the overall picture. It is a potent feature that the Consultancy Agreement was the only way in which Mr Wall and Mr Mellor (through EAL) decided to deal with the matter as to what Mr Wall, if he benefitted from the Claim, would be paying to those who had assisted him.

93. As a matter of substance, we are entirely satisfied that the Payment as coming into the hands of Mr Mellor was Mr Mellor's remuneration for his services to EAL; or, put differently, as a reward to Mr Mellor for his services as a director of EAL.

94. We reject the submission that the Payment was not intended as a reward for Mr Mellor's services. It is inconsistent with the substance of the matter, and, it seems to us, would also entail the identification of some other instrument or mechanism whereby Mr Mellor, if not rewarded for his services, was still seeking to vindicate his 'reward'.

95. There may well be borderline cases as to whether a payment is on one side of the statutory line or the other. But this is not one of them. In our view, the only identifiable cause of the Payment was Mr Mellor's directorship with EAL; and EAL's performance (through him) of its duties under the Consultancy Agreement. The sole express motive for entering into the Consultancy Agreement and for agreeing to pay was EAL's performance of its services.

96. We reject any argument that the Consultancy Agreement should actually be treated for tax purposes as a vehicle whereby Mr Mellor was to be compensated for his loss of position as an executive with the O Group. That is not what the Consultancy Agreement says; and Mr Mellor's subjective hopes or aspirations are not admissible aids to its interpretation. The Consultancy Agreement makes no mention of the various matters which Mr Mellor asserts were the substantial cause of the Payment - namely, Mr Wall's alleged (but otherwise unevidenced) wish to assist Mr Mellor following the corporate failure of O Ltd.

97. Although there is some material indicative that there had been discussion about Mr Mellor buying an 'option share' in the proceeds of the Claim, as a separate agreement, namely

the two option agreements attached to Mr Mellor's supplementary witness statement, that is not what actually ended up happening. The reasons are not important. Neither of those option agreements (one from 2015, and one from 2017) were ever signed, by anyone, and so never gave rise to any enforceable agreement. Moreover, in terms of evidential weight, both are excluded from consideration by virtue of Clause 13.1 of the Consultancy Agreement.

98. It is not relevant:

(1) That there had been earlier discussions between Mr Wall (and his legal advisers) and Mr Mellor about two agreements: one (with EAL) to direct the support fee to EAL; and one (with Mr Mellor) to direct the contingent advisory fee to Mr Mellor personally;

(2) That Mr Mellor intended that money directed to him personally was to compensate him for the "destruction of [his] career", or it was viewed by Mr Mellor as a form of personal compensation;

(3) That Mr Mellor says that the Consultancy Agreement was put before him (in his role as a director of EAL) to sign, "with little option but to sign", even though it did not reflect his earlier discussions with Mr Wall, and was "very rushed".

99. The reasons why these things are not relevant, in short, are that:

(1) Mr Mellor, on behalf of EAL, signed the Consultancy Agreement, capturing both the Support Fee and the Contingent Advisory Fee in a single agreement, with all payments under it payable to one payee, rather than in two agreements payable to two payees;

(2) Mr Mellor - an experienced financial professional - was responsible for safeguarding and advancing his own financial interests as he saw fit. Whether reluctantly or not, and whether trusting Mr Wall "implicitly" or not, Mr Mellor took the decision that EAL (and not Mr Mellor) was to be party to the Consultancy Agreement;

(3) Mr Mellor has not alleged (which allegation would have had to be against Mr Wall) that there was some operative vitiating factor whereby the Consultancy Agreement should not be treated as binding on EAL, or that its terms should be taken other than at face value;

(4) Regardless of reason or motive, it was Mr Mellor's decision to sign the Consultancy Agreement, on behalf of EAL, and not in his own right, when and how he did, without taking independent legal advice.

100. But even if we were wrong, and it were shown that there was more than one cause for the payment, with other causes extending to altruism or philanthropy by Mr Wall, or Mr Wall's desire to 'do right' by Mr Mellor, the facts are still, in our view, well over the employment side of the statutory line.

101. At times in his evidence, Mr Mellor suggested that he had some understanding with Mr Wall whereby Mr Wall was, at some point, to give Mr Mellor, an equity share (he described it as a "quasi equity upside" to the "book-side potential") in O Group and/or O Ltd which, calculated out at the capital values of its tangible fixed assets, on the basis of a 0.9% share in net asset uplift, would have been worth up to (on Mr Mellor's figures) up to £20 million, had O Group not gone into administration. On that footing, as we understood it, it was suggested that we could treat the Payment as reflective in some way of that understanding, and to treat it as capital.

102. We decline to do so. It is sufficiently clear - and unsurprising - that Mr Wall valued Mr Mellor's work, and his contribution to the business, and Mr Mellor's evidence that he had been

provided in 2003 with a 10 year "incentive contract" (which we have not seen) was not challenged. Mr Mellor might well have been right that, had O Ltd not entered administration, another incentive contract might have been put to him, from 2013, potentially yielding what he referred to as a 'substantial equity upside' of several million pounds a year.

103. But this is a fundamentally misconceived analysis, because it proceeds in a counter-factual world: that is to say, it simply disregards what actually happened. O Ltd entered administration; claimed against the Bank; and Mr Mellor's involvement thereafter was limited, through EAL, within the four corners of the Consultancy Agreement.

104. Nor does it matter that Mr Wall's solicitors directed (at Mr Mellor's request) the Payment to Mr Mellor directly, rather than to EAL, because the core question is why that payment was being made at all. There was only one reason for that: EAL's fulfilment of its contractual obligations under the Consultancy Agreement. No-one has sought to argue that the choice of payee for the Payment had any implications for Mr Wall's tax affairs.

105. For the sake of completeness, we simply note that if Mr Mellor's position, in his second witness statement, was that the payment was to "compensate"[him] "for the destruction of his career", that this seems to be an acceptance that the Payment would have fallen within the provisions of ITEPA sections 401-406 (which deal with payments on termination of employment) but (i) that is not the basis on which Mr Mellor has been assessed; and (ii) liability under those sections yields to liability under section 62.

106. As a cross-check, we do not consider the Payment to have been capital. Although the distinction between capital and income receipts is sometimes easier to recognise than to define, and "there is a place for the intuitive common sense of judges or tribunals well versed in tax law" (per Sir Launcelot Henderson in *HMRC v BlueCrest Capital Management LP* [2023] EWCA Civ 1481 at Para [114]) we struggle to identify how the Payment could ever properly have been treated as capital, because it would only have represented Mr Mellor's unfulfilled, unevidenced, wishes for the "quasi-equity upside" which Mr Wall never gave him.

107. Given our view that the Payment was not capital, then whether it is within the exemption in TCGA s 51(2) falls away. But, even if it were capital, we would not have considered the Payment to have been within the exemption.

108. The Payment (even though the money ended up actually coming directly to Mr Mellor) was not a payment of compensation or damages for any wrong or injury done to him. The Claim does not name Mr Mellor as a Claimant, and Mr Mellor never sued the Bank for anything. The remedy and relief sought in the Claim does not include anything relating to Mr Mellor; nor is any loss or damage to Mr Mellor averred in the body of the extremely extensive Particulars of Claim.

109. TCGA 1992 section 51(2) simply does not apply. Mr Mellor - a natural person, and an individual - had not suffered any wrong within the proper meaning and effect of that provision; and the provision does not shelter payments made other than to individuals. For that reason, section 51(2) would not have sheltered any capital payment to EAL.

110. Finally, we are fortified in our conclusion as to the correct tax treatment of the Payment by noting that a payment *was* made by the Bank to Mr Mellor: it was £1, which was the consideration for his obligations under the Confidentiality Agreement. The Confidentiality Agreement and the payment made under it cannot be ignored. On the face of it, all that Mr Mellor had to sell or release to the Bank which the Bank wanted to buy or acquire were the matters referred to in the Confidentiality Agreement, and the price for that was nominal.

The status and effect of the Assignment

111. EAL's Assignment of its rights under the Consultancy Agreement was not done in accordance with Clause 8 of the Consultancy Agreement, because Mr Wall had not given his prior written consent.

112. The Consultancy Agreement also contained an entire agreement clause (Clause 13.1), and that could only be varied or waived in writing, signed by both parties to it.

113. The Assignment was not signed by Mr Wall. Therefore, and as far as Mr Wall was concerned, and objectively, in contractual terms, the Consultancy Agreement was with EAL (not Mr Mellor), and any payments made pursuant to it were being made to EAL (and not Mr Mellor).

114. Insofar as the Assignment is said to have had effect, although it was done in a way not authorised by Clause 8 of the Consultancy Agreement:

(1) Any waiver or variation of Clause 8 of the Consultancy Agreement is prima facie precluded by Clause 13.1 of the Consultancy Agreement unless that waiver or variation is done in accordance with Clause 13.2 of the Consultancy Agreement (ie, in writing and signed by EAL and Mr Wall). There is no such writing signed by EAL and Mr Wall;

(2) Neither Clause 13.1 or 13.2 can have been effectively waived or varied, for the same reason.

115. The Assignment did not effect a legal assignment of EAL's rights.

116. For these reasons, we agree that the Assignment has no operative effect on the issues before us because it has no operative effect on EAL's rights and obligations vis-a-vis Mr Wall - ie, no effect on EAL's entitlement to be paid by Mr Wall; nor on Mr Wall's right to receive the services from EAL.

117. In our view, the fact that the Assignment (even if invalid as between Mr Wall and EAL) may nonetheless have been valid at common law as between EAL and Mr Mellor (see *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 108 per Lord Browne-Wilkinson) does not affect the position.

118. But, lest our contractual analysis were wrong, it is also appropriate to deal with the significant emphasis placed by Mr Mellor on the Assignment, which seems to lie at the heart of his case.

119. In his witness statement, Mr Mellor said:

> "I did not think that anything further needed to be established for it to be clear that any settlement sum or judicial award of damages would, as I had originally in 2013 considered it to be, be mine personally in return for the damage caused to me. However, having thought about this during April and May 2017, I decided that the simple way to put right the position so that any settlement matched the source of the information which might give rise to it was to enter into an agreement between myself and EAL, and this I did. This is my 15 May 2017 agreement. I took no legal or other advice on this; and the May 2017 agreement was to correct the position, so it accorded with the reality and how it was meant to have been documented. I wrote the agreement myself for this was a simple matter of transferring or assigning the potential 'settlement element' of the agreement between EAL and Mr Wall to myself, which in fact I believe already resided with myself personally in any event".

120. This is either inadmissible as a form of evidence from a contracting party seeking to explain the meaning of the contract which they entered, or just wrong. For example, Mr Mellor cannot have had any genuine belief that the potential 'settlement element' of the agreement 'already resided with [him] personally in any event' because it self-evidently did not. The 'settlement element' (sic) was represented by the Contingent Advisory Fee, and the Consultancy Agreement directed that exclusively to EAL, in an agreement which Mr Mellor, on behalf of EAL, signed. Second-thoughts or reluctance or doubts had no bearing on that contractual position.

121. Clause 2.2 of the Assignment said:

> "The reason for the transfer of the financial benefit to Craig Mellor being because it is Craig Mellor who suffered the individual wrong done by [the Bank] and this is to correct an error in the drafting."

122. Although this is to some extent consistent with the witness statement, this does not matter either. It is no more than Mr Mellor's subjective explanation, several months after the event (the event being EAL's entry into the Consultancy Agreement) of what the Consultancy Agreement meant or accomplished, or was supposed to mean or accomplish. The meaning of the Consultancy Agreement, and the words which it uses, and the obligations which it imposes on the parties to it, and its effect, are all clear. Mr Mellor's view or wish that it should have, or perhaps might have, said something different was just not relevant, then, or now.

123. Mr Mellor's explanation in his oral evidence was that the error in drafting was that the Consultancy Agreement provided for all payments, including the Contingent Advisory Fee, to go to EAL, rather than that fee going (whether by virtue of the Consultancy Agreement, or by virtue of a separate agreement) to Mr Mellor. We do not consider that an 'error in drafting' as such. But, even giving Mr Mellor, as the draftsman of the Assignment, and as a non-lawyer, the benefit of the doubt when it came to the expression 'error in drafting', there is no arguable error.

124. Indeed, the explanation of alleged error is inconsistent with a witness statement which Mr Mellor made in the Claim, signed and dated 12 April 2017, in which Mr Mellor was extremely clear that the decision that EAL (and not Mr Mellor personally) should be the contracting party in the Consultancy Agreement, was made entirely deliberately, and there is no suggestion of any error at all. Mr Mellor said that he (personally) was to take on a consultancy role, but that "for the purpose of these arrangements, I have utilised my own consultancy company ... EAL ... I understand the importance of the statement of truth at the end of this statement and the oath which I will give as a witness at trial". It is clear that Mr Mellor had made the choice that EAL was to be the contracting party.

125. Even if, for the sake of argument, Mr Mellor could give admissible evidence about the Consultancy Agreement, his explanation (i) would still be unilateral and/or (ii) would still be inadmissible because of the "parol evidence" rule and/or (iii) would be excluded because of Clause 13.1 of the Consultancy Agreement (namely, the entire agreement clause).

126. The Entire Agreement clause also excludes from consideration the email from Mr Wall to his lawyers, copied to Mr Mellor, mentioned by Mr Mellor in his oral evidence and produced on the morning of the second day of the hearing. It dates from 13 September 2016, and, amongst other matters, indicates that Mr Wall's lawyers were aware that he and Mr Mellor had what was described as an agreement whereby Mr Mellor's consultancy arrangements were to be dealt with by way of an options agreement. That email made it clear that those lawyers could not give Mr Mellor legal advice, and that he should take his own.

127. But, and in any event, even if admissible, that email (i) antedates the Consultancy Agreement; (ii) Mr Wall's terse "Sounds OK to me" cannot be treated as an agreement to vary the Consultancy Agreement; (iii) there is ample evidence that a split between the Support Fee (to EAL) and another, potentially much bigger, fee (to Mr Mellor) was in discussion, but did not actually come about.

128. Even if Clause 2.2 were an operative provision (or even an admissible guide to interpretation) it still has no real bearing because, evidentially, Mr Mellor could not satisfactorily explain:

(1) Why Mr Mellor had not entered into a direct consultancy agreement with Mr Wall in the first place (whether instead of or together with EAL);

(2) What the 'error' (sic) in 'drafting' (sic) was;

(3) If there was such an error, why Mr Mellor could not simply have gone back to Mr Wall, asking him to amend (or scrap) the Consultancy Agreement, and enter into an amended (or new) one naming Mr Mellor (whether on his own, or alongside EAL).

129. No obvious reason emerged why none of these courses of action were pursued by Mr Mellor. His oral evidence was muddled and confusing. It seems to us to come to no more than provision for payment of the Contingent Advisory Fee was done in one way, when Mr Mellor did, or might have, preferred for it to have been done in another way. But neither EAL, nor he, can, in these proceedings, go behind what the Consultancy Agreement actually said and did.

130. For all the above reasons, we reject the explanation that the purpose of the Assignment was to correct "an error in drafting".

131. We cannot identify an obvious business purpose to the Assignment - ie, a purpose needed as part of the overall contractual framework. Rather, it seems to us as if the purpose of the Assignment was to seek to take advantage of the section 51(2) exemption. We reject Mr Mellor's evidence that he had not drawn up the Assignment with that in mind. The similarity between the wording of section 51(2) ("any wrong or injury suffered by an individual") and the wording of the Assignment ("it is Craig Mellor who suffered the individual wrong") is simply too striking to be coincidental. We reject his evidence, as not credible or reliable, that, when he did the Assignment, he was expecting the Payment to be taxed as capital, and only became aware later on, through his accountants, that there might be an applicable exemption.

Paragraph 12 of Extra-Statutory Concession D33.

132. ESC D33 Paragraph 12 refers to "Personal compensation or damages", and articulates that "in his person" includes "distress, embarrassment, and loss of reputation or dignity".

133. This was not a Ground of Appeal. Even if the same had been included in the Grounds of Appeal, we do not have any jurisdiction to consider the application of the ESC.

134. Accordingly, and for the above reasons, the answer to Issue 1 is "Yes".

ISSUE 2

135. Issue 2 is "If Issue 1 is answered in the affirmative, whether the amendment made by the Closure Notice must nevertheless be set aside on the basis that any liability is EAL's and not Mr Mellor's."

136. In their Skeleton Arguments, the parties were in essential agreement that the question of whether or not HMRC can pursue both EAL and Mr Mellor is not one within this jurisdiction.

137. Insofar as there is any argument about a PAYE adjustment, we have no jurisdiction to deal with it.

ISSUE 3

138. Given our conclusion in relation to Issue 1, Issue 3 does not arise. A charge to tax as employment income takes priority over other potential charges to tax.

139. Nonetheless, and lest our conclusion in relation to Issue 1 should fall for reconsideration, if (contrary to our findings and conclusion) the Payment were not taxable as earnings from Mr Mellor's employment with EAL, then we would have nonetheless agreed that Mr Mellor would have been liable to income tax on it on the basis that the Payment was taxable as "a distribution" within the proper meaning and effect of CTA 2010 sections 383(2) and 1000(1)B.

140. Although Mr Mellor did not hold a share in EAL, he did hold shares in Juvanesco Ltd, which held all the shares in EAL. EAL and Juvanesco therefore formed a 90% group within the meaning and effect of CTA 2010 s1113.

141. The purpose of the distribution provisions is to tax shareholders on value which a company delivers to them out of its assets, directly or indirectly, by some non-prescribed means. The relevant asset has to be put into the shareholder's hands in his capacity as such - that is, as a return on or by reference to his shareholding as an investment in the company, and not in some other capacity or for some other reason.

142. The Payment was not a dividend, but in our view would have been "Any other distribution out of assets of the company in respect of shares of the company", which is widely expressed statutory language, including a distribution intended to reach, and which in fact reached, shareholders by a more circuitous route via steps inserted into the overal transaction that have no business purpose and have as their sole aim the avoidance of tax: see *Clipperton and others v HMRC* [2024] EWCA Civ 180 at Para 30 per Nugee LJ.

143. For the purposes of Part 23 of CTA 2010, "a distribution is to be treated as made out of assets of a company if the cost falls on the company": s 1117(3).

144. If Issue 1 had not been answered by us in the way that it has been, then our view would have been that the Payment was being made as an equity-type return in relation to EAL, which seems to have had no other substantial activity or value other than as the vehicle intended to receive the Support Fee and the Contingent Advisory Fee under the Consultancy Agreement. The fact that the Payment was not directed to Juvanesco and/or to Mrs Mellor does not matter.

145. As such, the Payment to Mr Mellor should be treated as if made from EAL, and was in his capacity as shareholder, and because of his status as shareholder, and not for some other reason.

Issue 4

146. Because both Issues 1 and 3 have been answered affirmatively (albeit Issue 3 on the basis as set out above), then Issue 4 does not fall for determination.

147. However, and lest our conclusions fall to be reconsidered, we would nonetheless have considered this, if the Payment were neither employment income, nor, if not employment income, a distribution, to have been "miscellaneous income" chargeable in Mr Mellor's hands to income tax under ITTOIA 2005 section 687(1). It is in the nature of income under first principles; and analogous with some other head of charge; and arising from an identifiable source: see *HMRC v BlueCrest Capital Management LP* [2023] EWCA Civ 1481 at Para [101].

Issue 5

148. Given that Issue 1 has been answered in the affirmative, then PAYE and NICs are due from EAL.

149. The sums are £1,954,387.95 (PAYE) and £693,747.34 (NICs).

Outcome

150. The Appeals are dismissed.

Right to apply for permission to appeal

151. 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 released. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 24th OCTOBER 2024