[2014] UKFTT 457 (TC)

TC03584

Appeal number: TC/2013/06496

INCOME TAX – forgivable loan – when was loan waived – timing of tax charge – carelessness – penalties – special circumstances - section 62 ITEPA 2003 and Schedule 24 Finance Act 2007

COSTS – wasted costs – party acting unreasonably – power of Tribunal to award costs – section 29, Tribunals, Courts and Enforcement Act 2007 – Rule 10, Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANCOIS BERRIER **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
MS ELIZABETH BRIDGE

Sitting in public at Brighton on 14 March 2014

Peter Clarke, of Clarke & Co, Accountants and Practitioners in Revenue Law, for the Appellant

Matthew Mason, an officer of HM Revenue and Customs for the Respondents

DECISION

1. This appeal relates to the taxation of a loan made to Mr Berrier by his employer, and the subsequent release of that loan in accordance with the terms on which it was originally made. The Appellant, Mr Berrier, appeals against an adjustment made to his tax return for 2010/11 by a closure notice dated 12 September 2012 and penalties for carelessness imposed by a penalty notice dated 11 September 2012.

2. Mr Berrier was represented at the hearing of this appeal by Mr Clarke. We note that on 20 March 2014 Mr Clarke wrote to HMRC stating that he was no longer instructed by Mr Berrier, this letter was copied to the Tribunal by HMRC and received by the Tribunal on 26 March 2014.

3. The respondents, HMRC were represented by Mr Mason. We heard oral evidence from Mr Berrier. We noted that Mr Berrier's mother tongue is French, but it was apparent during the course of the hearing that Mr Berrier's command of English was excellent, and we have no doubt that it was more than sufficient for him to be able to participate fully in the hearing. A bundle of documentary evidence was also presented to the Tribunal. Following the conclusion of the hearing, on 17 March 2014 we gave directions for the production of further documents by the parties.

4. We mention that Mr Berrier did not give evidence on oath. Although the Tribunal has power under its Rules to require witnesses to give evidence on oath, the overriding objectives of the Tribunal's Rules require the Tribunal to deal with appeals in a proportionate manner, and avoid unnecessary formality. The practice of the Tribunal is therefore normally not to "oath" witnesses, unless any of the parties ask that witnesses be oathed, or there are other factors apparent to the Tribunal which indicate that administration of the oath is appropriate. In such cases, all witnesses are then oathed.

5. As neither of the representatives asked that witnesses give evidence on oath, and we did not consider that there were any circumstances present which indicated that an oath was appropriate,. Mr Berrier gave his evidence without having been "oathed". During the course of his final submissions (well after Mr Berrier had concluded giving his evidence), Mr Clarke stated that he was concerned that Mr Berrier had not given his evidence on oath, and raised an objection to the fact that the Tribunal had not administered the oath when Mr Berrier was called to give evidence. We confirmed to the parties that Mr Berrier's credibility as a witness was not diminished merely because he did not give evidence on oath.

6. However we should also mention that when Mr Clarke examined Mr Berrier in chief, many of his questions were "leading". We warned Mr Clarke on several occasions that although the Tribunal was not bound by the same formal rules of evidence as a court, answers to leading questions may not carry the same weight as answers to questions that

were not leading. Notwithstanding this (and subsequent) warnings, some of Mr Clarke's questions continued to be leading. We also record that Mr Clarke complained that the Tribunal was discriminating against the Appellant in permitting Mr Mason to ask leading questions during cross examination, and we had to explain to Mr Clarke that leading questions were permitted in cross-examination. We address other issues in relation to Mr Clarke's conduct of this appeal later in this decision.

The law

Employee loans

7. Section 174 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") defines the term "employment-related loan" as follows:

> (1) For the purposes of this Chapter an employment-related loan is a loan—
>
> (a) made to an employee or a relative of an employee, and
>
> (b) of a class described in subsection (2).
>
> (2) For the purposes of this Chapter the classes of employment-related loan are—
>
> A A loan made by the employee's employer.
>
> B A loan made by a company or partnership over which the employee's employer had control.
>
> C A loan made by a company or partnership by which the employer (being a company or partnership) was controlled.
>
> D A loan made by a company or partnership which was controlled by a person by whom the employer (being a company or partnership) was controlled.
>
> E A loan made by a person having a material interest in—
>
> (a) a close company which was the employer, had control over the employer or was controlled by the employer, or
>
> (b) a company or partnership controlling that close company.

8. Section 175 ITEPA defines a "taxable cheap loan" as being an employment-related loan where either no interest is paid on it in a tax year, or the interest paid is less than the interest that would have been payable at the official rate. There are exceptions, none of which are relevant in this case. The "cash equivalent" of an employment related loan is the difference between the amount of interest that would have been payable at the official rate and the amount of interest (if any) actually paid.

9. The release or writing off of a loan made to an employee by an employer is taxable as "earnings" within section 62 ITEPA if the writing off can only be ascribed to the fact

that the borrower is an employee. It is earnings for the year the loan is written off. This follows from the case of *Clayton v Gothorp* (47TC168) to which we were referred. In this case a county council made a loan to an employee to enable her to take a full-time training course. It was agreed that the obligation to repay the loan was to be cancelled if she worked for the council for a further period after the end of the course. She did so. The High Court held that the waiver of the loan was income from her employment for the year of assessment in which the obligation to repay ceased.

10. For completeness we would add that section 188(1) ITEPA provides that

> If—
>
> (a) the whole or part of an employment-related loan is released or written off in a tax year, and
>
> (b) at the time when it is released or written off the employee holds the employment in relation to which the loan is an employment-related loan ("employment E"),
>
> the amount released or written off is to be treated as earnings from the employment for that year.

11. Section 188 only applies in circumstances where the amount of a loan written off or released is not charged under section 62.

Penalties

12. Penalties for errors in tax returns are governed by Schedule 24, Finance Act 2007. We have set out the paragraphs of Schedule 24 that are relevant to this appeal in an appendix.

Background Facts

13. The background facts are for the most part are not in dispute, and we find them to be as follows.

14. In 2009 Mr Berrier was looking for a job as a quantitative analyst with investment banks in London. He had an offer from Citibank at a basic salary of £75,000 per annum and an offer from Nomura International plc at a basic salary of £58,000. Mr Berrier told us that Nomura had an internal policy of not paying a basic salary of more than £58,000 to new employees. However they were prepared to pay Mr Berrier £25,000 as what was described as a forgivable loan. Mr Berrier said that this was a "golden hello" – in effect a sign-on or welcome bonus, and although it was described as a loan, he was told by Nomura that in reality it was a one-off payment and not a loan. Our findings in relation to this payment are given later in this decision.

15. Mr Berrier decided to accept Nomura's offer and started employment with them on 15 September 2009.

16. Included in the Bundle of evidence was correspondence between HMRC and Mr Clarke relating to the matters under appeal. Enclosed with Mr Clarke's letter to HMRC dated 21 March 2013 were copies "of the relevant pages of my clients contract of employment with Nomura". With the letter (and included in the Bundle) was a document headed "Principal Statement of Employment" and a document headed "Promissory Note". The Principal Statement of Employment (which Mr Berrier signed) included the following terms:

> You will be provided with a forgivable loan of £25,000 (the "Loan"). To obtain the Loan you must complete and return one copy of the attached promissory note (the "Promissory Note") within three months of your written acceptance. The Loan will be provided to you shortly after receipt of the duly signed Promissory Note and will be forgiven in one lump sum amount on the first anniversary of your Start Date unless a Repayment Event (as defined below) occurs. You will be reported as having taxable income (a) with respect to imputed interest on the unforgiven balance of the Loan for each year the loan remains outstanding and (b) with respect to the forgiveness of the Loan on the date of forgiveness. For the avoidance of doubt this Loan will not form part of your total compensation for 2009 or any other year.
>
> In the event (i) of a default in payment under the terms of the Promissory Note, for any reason whatsoever, (ii) of any material breach of any of the terms of the Promissory Note or Nomura's rules (including for the avoidance of doubt but without limitation any rule or policy set out in the Nomura Employee Handbook), (iii) that you fail to become an employee of the Company for any reason whatsoever, (iv) that you leave the employment of the Company or any subsidiary or affiliate thereof (whether voluntarily or involuntarily), before the Loan has been fully forgiven, or (v) that you are adjudicated bankrupt, makes as assignment for the benefit of creditors or files a petition for relief under the Bankruptcy Act (all of which are herein referred to as "Repayment Events"), you will be required to repay any outstanding portion of the Loan, plus interest at the prevailing HM Revenue & Customs ("HMRC") beneficial loan interest rate. The date for repayment of the Loan, plus interest, will be on or before the 7th day after the date of the Repayment Event. […] A summary detailing the current tax position in the United Kingdom in relation to Loans is attached for your information

17. At the hearing, neither Mr Clarke nor Mr Berrier drew the Tribunal's attention to the last sentence quoted above, making reference to the summary description of the tax position of the Loan. Nor was this summary description of the tax position of the Loan included in the Bundle of documentary evidence placed before the Tribunal. It only became apparent on a close reading of the Principal Statement of Employment by the Tribunal after the hearing that only some of the relevant pages of Mr Berrier's offer of

employment had been sent to HMRC with Mr Clarke's letter and had been included in the Bundle and, in particular, that the summary description of the taxation of the Loan had been omitted. In consequence the Tribunal issued directions for (amongst other things) that a complete copy of Mr Berrier's offer of employment (and all the accompanying papers) be produced. The terms of the summary description are set out in an appendix to this decision.

18. Mr Berrier signed a document titled "Promissory Note, To Nomura International plc" which was dated 14 August 2009 ("the Note"). The Note included the following terms:

> In consideration of a loan in a principal amount of £25,000 (the "Loan") from Nomura International plc ("the Company") to Francois Berrier, ("the Borrower"), the Borrower agrees to the terms and conditions set out below:
>
> 1. Forgiveness of Loan. Provided that the Borrower remains an employee of the Company and no Repayment Event (as defined below) has occurred, the Loan shall be forgiven on the first anniversary of the Borrower's date of commencement of employment.
>
> 2. Interest. The Borrower will be charged interests (compounded annually at the end of each United Kingdom tax year) on the Loan at the prevailing HM Revenue & Customs ("HMRC") beneficial loan interest rate for the period beginning on the date of execution of this Promissory Note. At the time any principal element owed by the Borrower is forgiven as set forth in paragraph 1, accrued interest owed by the Borrower relating to that principal element will also be forgiven. Upon the occurrence of a Prepayment Event (ad defined below) accrued interest will become immediately due and payable by the Borrower as set forth in Paragraph 5 below.
>
> […]
>
> 4. Default. In the event (i) of a default in payment under the terms of the Promissory Note, for any reason whatsoever, (ii) of any material breach of any of the terms of the Promissory Note or the Company's rules (including for the avoidance of doubt but without limitation any rule or policy set out in the Nomura Employee Handbook), (iii) that the Borrower fails to become an employee of the Company for any reason whatsoever, (iv) that the Borrower leaves the employment of the Company or any subsidiary or affiliate thereof (whether voluntarily or involuntarily), before the Loan has been fully forgiven, or (v) that the Borrower is adjudicated bankrupt, makes as assignment for the benefit of creditors or files a petition for relief under the Bankruptcy Act (all of which are herein referred to as "Repayment Events"), the unforgiven balance of the Loan will become immediately due and payable, together with accrued interest owing.
>
> 5. Repayment. The date for repayment of the Loan, plus interest, will be on or before the 7th day after the date of a Repayment Event. […]

[…]

> 7. Reported Income. Both the amount of the forgiven Loan and interest calculated with reference to the applicable tax regulations for loans carrying interest at below the official rate will be reported to the Borrower as income and will be subject to all applicable tax. Please note that the Borrower will need to file a tax return to ensure that all applicable taxes are calculated and paid over in accordance with UK tax legislation.

19. £25,000 was paid to Mr Berrier in September 2009 shortly after he started employment with Nomura.

20. No copy of Mr Berrier's P11D for the tax year 2009/10 was included in the Bundle, and when asked by the Tribunal in its directions of 17 March to produce a copy of the P11D, Mr Berrier said that none had been issued. Although HMRC were also unable to produce a copy of the P11D filed by Nomura with them, they were able to produce screen shots of the computerised entries corresponding to the details returned on the P11D by Nomura. These show a benefit-in-kind of a beneficial loan of amount £25,000, with a corresponding taxable benefit of £494.

21. Mr Berrier filed his tax return for 2009/10 on time. In the section of the Return dealing with "Other UK income – life insurance gains", he entered "£25000" in the box labelled "Non-qualifying distributions and close company loans written off or released". Mr Berrier told us that he had entered the £25,000 in this box as he wanted to declare the loan as income, and this was the only box on his tax return that referred to loans being written off.

22. HMRC treated this amount as taxable under Chapter 6 of Part 4, Income Tax (Trading and Other Income) Act 2005. There are complex provisions which address loans made by close companies to participators. If such a loan is written-off, the "gross amount" of the loan is taxable as income in the hands of the participator, but the participator is treated as if he or she had already paid tax at the "dividend ordinary rate" on that "gross amount". The net effect, for a taxpayer who is only liable to tax at the basic rate, is that no further tax is payable in respect of the write-off. That is what happened in Mr Berrier's case, and he paid no tax in 2009/10 in respect of the loan.

23. On 25 February 2011 Nomura issued Mr Berrier with a payslip. On the payslip it states "Forgivable Loan w/o £25000.00"

24. A copy of Mr Berrier's P11D for 2010/11 was included in the Bundle. At the top it says the following:

> Note to employee. Your employer has filled in this form, keep it in a safe place. You will need it to complete your 2012-11 Tax Return if you get one. The box numberings on the P11D are the same as on the Employment Page of the Tax Return …

25. Section H of the P11D deals with "Interest free and low interest loans". It states that as at 5 April 2011 (or date loan was discharged if earlier) there was a loan outstanding of 25000.00 and that the loan was discharged on 25/02/2011. In box 15 in section H it states that that the cash equivalent of the loan was 833.00. In section M of the P11D (Other items) it gives as a description of the item "Loan Write Off", and the amount in box 15 in section M is given as 25000.00.

26. Mr Berrier filed his tax return for 2010/11 by the due date. No entries were included in the tax return in respect of the loan.

27. On 25 October 2012 HMRC opened an enquiry into Mr Berrier's tax return for 2010/11 in respect only of benefits in kind and his residence status.

28. By a letter dated 5 August 2013, HMRC wrote to Mr Clarke (with a copy to Mr Berrier) setting out their preliminary conclusions from the enquiry, and stating that they considered that Mr Berrier had been careless in completing his tax return, such that penalties should be charged. Factsheet FS10 relating to suspension of penalties was enclosed with the letter. The enquiry was concluded by the issue of a closure notice on 12 September 2013 which amended Mr Berrier's tax return by adding £25,000 principal and £833 benefit in respect of interest. By a notice dated 11 September 2013, penalties for carelessness of £1893.30 were assessed pursuant to Schedule 24, Finance Act 2007.

29. The penalties were calculated on the following basis.

(1) Potential lost revenue (PLR): £12,622.00

(2) Quality of disclosure: 100% (telling 30%, helping 40% and giving access 30%)

30. The penalty calculation was therefore as follows:

Quality of disclosure	100%	(a)
Maximum disclosure reduction		
Maximum penalty percentage	30%	(b)
Less		
Minimum penalty percentage	15%	(c)
Equals		
Maximum disclosure reduction	15%	(d)
Reduction for disclosure percentage	15%	(e)

(d)x(a)		
Penalty to be charged (b)-(e)	15%	(f)
Penalty chargeable PLR x (f)	£1893.30	

31. No review of HMRC's decision was sought. Appeals against both the assessment and penalty were filed with the Tribunal.

Contentions of the parties

32. HMRC submitted that Mr Berrier borrowed £25,000 from Nomura when his employment started, and that this loan was waived in February 2011. As no interest was charged on the loan, Mr Berrier was liable to tax on the cash equivalent of the loan under the benefit in kind charge in s175 ITEPA, and was liable to tax on the amount waived under s 62 ITEPA in the tax year in which the waiver took place (2011/12).

33. We note that these submissions are entirely consistent with the summary description of the tax consequences of the Loan given to Mr Berrier by Nomura.

34. In support of his contentions, Mr Mason referred us to the terms of Mr Berrier's statement of terms, and the terms of the Note. He also referred us to Mr Berrier's payslip for February 2011 and the P11D that Nomura had issued to Mr Berrier and had filed with HMRC. Finally we were referred to correspondence between HMRC and Nomura which occurred during the course of the enquiry, and in which Nomura confirmed that Mr Berrier had been lent £25,000 and that this loan had been written off in February 2011.

35. Mr Mason also submitted that Mr Berrier had been careless in the completion of his tax return for 2011/12 in not declaring the waiver of the loan and the interest benefit. These had been set out in his P11D and the P11D form expressly stated into which boxes on the tax return these amounts had to be copied. Mr Berrier had acted carelessly in not declaring this income. However Mr Mason recognized that Mr Berrier had co-operated with the enquiry and had provided all information requested, and it was for this reason that HMRC gave the maximum abatement to the carelessness penalty. HMRC had given consideration to suspension of the penalty, but did not consider suspension was appropriate in this case - and no representations as to suspension had been made on behalf of Mr Berrier.

36. It was submitted on behalf of Mr Berrier that the reason Nomura described the £25,000 paid to Mr Berrier as a "forgivable loan" was to enable the department hiring Mr Berrier to get around Nomura's policy of not paying a joining salary in excess of £58,000. This was an artificial device to address Nomura's internal restrictions. Although the £25,000 was described in Mr Berrier's Principal Statement of Employment and in the promissory note as a "loan", Mr Berrier's evidence was that it was no such thing. Mr Clarke, on behalf of Mr Berrier, submitted that the statement of terms and the

promissory note were a sham – that is to say, no loan was ever made to Mr Berrier, rather the £25,000 paid to Mr Berrier was a "golden hello" or welcome bonus taxable on receipt, but that Mr Berrier was under a separate obligation to pay £25,000 back to Nomura in the event that (amongst other things) he ceased to be employed by them.

37. Alternatively, Mr Clarke submitted that the £25,000 was a loan, but one that was waived immediately it was paid.

38. Mr Clarke argued that the fact that Mr Berrier had been asked to sign a promissory note supported his contention. If the £25,000 was truly a loan (albeit one that would be waived in a year – subject to Mr Berrier's continued employment), then, submitted Mr Clarke, a promissory note was unnecessary. Mr Clarke submitted that lender could enforce an "on demand" loan as a matter of English common law without the need for a promissory note - the only reason that there was a need for a promissory note was to support the obligation to pay the £25,000 back to Nomura in the event that Mr Berrier ceased to be an employee.

39. .Included in the Bundle was correspondence between HMRC and Nomura, in which Nomura described the arrangements as a loan – Mr Clarke's comment on this was "they would say that wouldn't they"? He submitted that statements from Nomura should not be trusted as, in common with many other banks, they had engaged in the misselling of PPI, fixing LIBOR and many other misfeasances.

40. As regards penalties, Mr Clarke submitted that Mr Berrier took reasonable care completing his tax returns. He declared the £25,000 on his 2009/10 tax return in the only box that he could see that dealt with loans being written off. On Mr Clarke's analysis, the tax payable in respect of the £25,000 was payable in the 2009/10 tax year, when the payment was made. No tax was payable in 2010/11. As no tax was payable in 2010/11, the potential lost revenue for that year was zero, and therefore no penalties could be charged.

Tribunal's analysis - £25,000 payment

41. We have no hesitation in finding that Nomura made a loan of £25,000 to Mr Berrier in September 2009, and that this loan (and any interest payable in respect of the loan) was waived in February 2011. Our reasons are as follows.

42. First, the arrangements were documented as being a loan. Both Mr Berrier's statement of terms and the terms of the Note clearly state that the payment is a loan.

43. Second, the summary description of the tax position of the Loan clearly sets out the tax result for which HMRC contend in this appeal. If Nomura did not consider that these arrangements were in substance a forgivable loan, then we consider that they would not have included a description of tax effects consistent only with the Loan being made and then released following one year's employment.

44. Third, in the correspondence between HMRC and Nomura, Nomura describe the arrangements as a loan.

45. Fourth, the actions of Nomura were entirely consistent with the payment being a loan that was subsequently forgiven. Mr Berrier's payslip for February 2011 has as a line item, £25,000 loan w/o (written off).

46. Although no copy of the P11D document for 2009/10 was produced to the Tribunal, we find that Nomura must have sent such a document to HMRC, given the entries in HMRC's computerised records. As the document would have been sent to HMRC, we find that it is more likely than not that the document would also have been sent to Mr Berrier.

47. The P11D entries for 2009/10 show the amount of the loan and the interest equivalent charged to tax. The P11D issued to Mr Berrier and filed with HMRC for 2010/11 state the cash equivalent of the interest benefit from the loan and the fact that the loan was written off.

48. We find Mr Clarke's submissions unconvincing. The only evidence before us which suggests that the arrangements were not a forgivable loan is Mr Berrier's oral evidence. We consider that Mr Berrier's evidence that the payment was described by Nomura to him as being a "golden hello" or a "welcome bonus" cannot override the clear weight of the documentary and other evidence.

49. We prefer the documentary evidence to the oral evidence of Mr Berrier.. For us to ignore the express and clear terms of the Principal Statement of Employment and the Note, the documents must be a sham (in the true legal sense). The classic statement of what is meant by a sham is a document executed by the parties which is intended by them to give to third parties the appearance of creating legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create. There is a very strong presumption indeed that parties intend to be bound by the provisions of agreements into which they enter, and, even more, intend the agreements they enter into to take effect. Because a degree of dishonesty is involved in a sham, it follows that there is a strong and natural presumption against holding a provision or a document a sham.

50. Although Mr Clarke made submissions about the dishonesty of banks (including Nomura) in general, he produced no evidence that there was any dishonesty on the part of Nomura in this particular case.

51. It may well be that the forgivable loan was used as a device by Nomura to circumvent their internal policy about maximum starting salaries. But the mere fact that it was such a device does not prevent it from being a loan – and as we have stated above, Nomura's conduct was entirely consistent with the payment being a loan.

52. For these reasons, we find that the Principal Statement of Employment of Mr Berrier's employment and the Note were not shams.

53. Nor does the fact that Nomura used a document entitled a promissory note to evidence the arrangements, indicate that the payment was not a loan. As we discussed with Mr Clarke at the hearing, the experience of Judge Aleksander is that international investment banks (such as Nomura) regularly use instruments purporting to be promissory notes to evidence loans, even though such a note may not strictly be necessary as a matter of English law.

54. Mr Clarke argued that the only reason there can be for a promissory note is to evidence a contingent obligation to repay the "golden hello" in the event, for example, that Mr Berrier left Nomura's employment within a year. This argument is wholly without merit, as a contingent obligation of this nature could never be evidenced by a promissory note. A promissory note has to be an unconditional promise in respect of a sum certain payable on a fixed or determinable date. A contingent obligation of the kind described by Mr Clarke cannot meet this test.

55. We consider that the Note in this case is probably not a "promissory note" within the meaning of the Bills of Exchange Act 1882, as it appears not to comply with the formalities required of promissory notes under the Act. Even though the Note ought properly not to be described as a promissory note, of course that does not prevent it from having legal effect as setting out the terms of a forgivable loan.

56. For these reasons, we find that Nomura paid £25,000 to Mr Berrier in September 2009 as a loan, and that loan (and any accrued interest) was written off in February 2011.

57. Given these findings, the tax analysis is straightforward. We find that the loan is an employment related loan for the purposes of section 174 ITEPA, as it was a loan made to Mr Berrier by his employer.

58. Mr Berrier is liable to income tax on £25,000, being the amount of the loan written off under section 62 ITEPA, and is liable to income tax on the cash equivalent of the loan (in essence the interest forgone) under section 175 ITEPA. In an amount of £833. These charges arise in the tax year in which the loan was written off, namely 2010/11.

Tribunal's Analysis - Penalties

59. Our analysis of the penalty issues in this appeal falls logically into a number of stages.

60. First, were Mr Berrier's actions within the scope of the penalty regime in Schedule 24?

61. Second, had Mr Berrier disclosed the inaccuracy to HMRC, as disclosure operates to reduce the amount of the penalty otherwise payable? The amount of the reduction depends on (a) whether the disclosure was unprompted; and (b) the "quality" of the disclosure (paragraph 9, Schedule 24).

62. Third, were there any special circumstances justifying a reduction in the amount of the penalty? (paragraph 11, Schedule 24)

63. Finally, are there any reasons to justify suspension of all or part of the penalty? (paragraph 14, Schedule 24)

Inaccurate Document

64. A penalty is payable if:

(1) a person gives HMRC a document of a kind listed in the table in paragraph 1 (paragraph 1(1)(a),Schedule 24),

(2) which contains an inaccuracy which leads to an understatement of P's liability to tax (paragraph 1(2), Schedule 24), and

(3) the inaccuracy is careless or deliberate (paragraph 1(3)) , Schedule 24

65. It is not in dispute that Mr Berrier gave HMRC a tax return for 2010/11 under s8 Taxes Management Act 1970. Tax returns are listed in the table in paragraph 1. Nor is it disputed that the return did not include as income either the write-off of the £25000 loan, nor the cash equivalent of the interest on the loan. Given our decision as to the taxablility of those items, it follows that the tax return for 2010/11 was inaccurate, and that as a result of those omissions, the self-assessment understated Mr Berrier's liability to income tax.

66. HMRC content that Mr Berrier was careless in the preparation of his tax return. Paragraph 3, Schedule 24 defines an inaccuracy as being "careless" if it is due to a failure by the taxpayer to take reasonable care. HMRC in their submissions referred us to the case of *Blythe v Birmingham Waterworks* (1856) 11 Exch 781. In that case the issue was whether damage sustained was by reason of the negligence of the waterworks company in not keeping their water pipes and equipment in proper order. The *Blythe* case is neither relevant nor binding on us as it concerns a different legal issue (negligence) and wholly different factual circumstances. We consider that reference to 19th century cases relating to negligence is misplaced in the context of the interpretation of “careless” in a statutory provision for tax penalties enacted by the Finance Act 2007. It is clear that in enacting the Finance Act 2007, Parliament deliberately chose not to set the standard required in the preparation of documents by reference to "neglect" or "negligence" (the terms used previously in tax legislation), but instead by reference to carelessness.

67. The approach to penalty appeals under Schedule 24 can be derived from more relevant and recent case law, such *Ashton v HMRC* [2013] UKFTT 140 (TC), which quoted with approval from the decision of the tribunal in *David Collis v HMRC* [2011] UKFTT 588 (TC), where the tribunal found that the standard by which reasonable care fell to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question. The test is therefore an objective one; an error may be innocent, but nevertheless careless. Furthermore, the tribunal in that case went on to say that it is of the essence of the reasonable care test that in normal circumstances this should avoid simple errors of omission, or mere oversights.

68. We consider that the omission by Mr Berrier of the forgiven loan and the cash equivalent of the interest from his tax return was careless. These amounts were set out in Mr Berrier's P11D for 2010/11 that was provided to him by Nomura, and the form states on its face that the amounts included on the form need to be included in the tax return – and give the box numbers on the tax return relevant for each item. In addition, Nomura had provided Mr Berrier with the summary description of the taxation of the Loan, and therefore Mr Berrier should have been aware of the basis on which the Loan was taxed, and the tax years in which the tax charge would fall.

69. When giving evidence, Mr Berrier told us that at the time he prepared his tax return, he was unaware of the P11D as these had been filed away by his wife. He only became aware of them during the course of the enquiry into his tax return, when he was asked about the P11D and his wife found the form in her files. However this does not excuse his action. Indeed, if anything, it does rather the opposite, as a prudent and reasonable taxpayer would gather together all relevant papers from his files before starting to prepare his tax return.

70. Mr Berrier also stated that he did not think he had anything to return in respect of the loan as he had declared it on his 2009/10 return. Entering the amount of the loan into the box dealing with non-qualifying distributions and close company loans written off was wrong – but given the complexities of the tax system we can understand why even a reasonable and prudent taxpayer might be confused by this technical terminology, and enter the loan in this box. However the P11D presented to Mr Berrier for 2010/11 clearly shows both the loan and the cash equivalent of the interest, and the box numbers into which they should be entered on the 2010/11 tax return. At the very least this should have alerted Mr Berrier to the possibility that he may have made an innocent mistake in completing his 2009/10 tax return, and ought to seek advice either from HMRC or from a tax advisor.

71. Given all the circumstances, we find that Mr Berrier was careless in the completion of his 2010/11 tax return.

Disclosure

72. The standard percentage penalty for careless inaccuracies is 30% of the potential lost revenue. If the taxpayer has disclosed the inaccuracy to HMRC, paragraph 10, Schedule 24 requires that HMRC must reduce the standard percentage to one that reflects the quality of the disclosure. However the penalty cannot be reduced below a specified minimum depending upon whether the disclosure is prompted or unprompted.

73. HMRC acknowledge that Mr Berrier disclosed the loan following the opening of the enquiry into his tax return (although he disagreed with the tax treatment). The HMRC letter informing Mr Berrier of the enquiry referred to the loan. So Mr Berrier's disclosure was "prompted", as it was made at a time when Mr Berrier was aware that HMRC had discovered the inaccuracy. HMRC therefore have no discretion to reduce the penalty below 15% (paragraph 10(2), Schedule 24). In fact HMRC reduced the penalty to 15% - the maximum reduction allowed.

74. We note that Mr Clarke did not send to HMRC all the relevant pages from Mr Berrier's offer of employment, as he omitted the summary description of the tax consequences of the loan. To this extent, he did not fully co-operate with HMRC. But he did confirm the details of the loan promptly and fully, and for this reason, we are not minded to depart from the maximum reduction given by HMRC.

75. We have reviewed HMRC's calculation of the penalty and (subject to the comments below as to special circumstances) we find it to be correct.

Special circumstances

76. A crucial feature of Schedule 24 is that it does not include a defence of a "reasonable excuse". So although penalties for late filing of returns or late payment of tax are subject to such a defence, there is no such concept in the case of penalties for inaccuracies. That said, it may be that the particular circumstances of the case are such that the actions of the taxpayer are not careless, or they might constitute "special circumstances" justifying a reduction in the amount of the penalty.

77. Paragraph 11, Schedule 24 gives HMRC discretion to reduce the amount of a penalty because of special circumstances. The issue in this case is whether the fact that Mr Berrier sought to declare the loan in his 2009/10 tax return amounts to special circumstances.

78. Special circumstances do not include the (in-)ability of the taxpayer to pay the penalty itself (paragraph 11(2)(a) , Schedule 24), or the fact that the loss of revenue from one taxpayer is balanced by an overpayment by another (paragraph 11(2)(b) , Schedule 24. Neither of these circumstances is in point in this case.

79. The jurisdiction of the Tribunal in relation to special circumstances is limited. We can only apply a reduction on account of special circumstances (to a different extent than that applied by HMRC) if we consider that HMRC's decision is "flawed" when considered in the light of principles applicable to proceedings for judicial review (paragraph 17(3)(b), Schedule 24). HMRC applied no reduction on account of special circumstances. We need to consider whether HMRC, in exercising their discretion not to make any reduction, acted in a manner that no reasonable body of Revenue commissioners could have acted. Did the HMRC take into account any irrelevant factors, or fail to take into account relevant factors, in reaching their decision?

80. We find that HMRC's decision to apply no reduction was flawed.

81. We can find no reference in any of HMRC's letters to their discretion to reduce penalties to take account of special circumstances, and there is no statement that they had reached a decision that no such circumstances existed. Nor can the correspondence be read in any way that might suggest that, although no express reference is made in the correspondence to special circumstances, HMRC had in fact applied their mind to the issue and had reached the conclusion that there were none.

82. We therefore find that HMRC had not given proper consideration to the potential for there to have been special circumstances, and we find that HMRC's failure to turn their mind to this issue amounts to a "flaw".

83. As we have decided that HMRC's decision was flawed, under paragraph 17(3)(b), Schedule 24 we have discretion to rely upon paragraph 11 to a different extent to that applied by HMRC. We consider that it is right for some reduction to be made for special circumstances. We consider that the penalty attributable to the omission of the write off of the loan should be reduced by 25% to take account of special circumstances. Mr Berrier did make a genuine attempt to declare the £25,000 as income to HMRC. He found a box in his 2009/10 return that referred to writing off of loans, and he entered the full amount of the loan in this box. We recognise of course that Mr Berrier declared this loan in the wrong box and in the wrong tax year - one year too early. But having made that declaration, we have a degree of sympathy with him not then declaring the loan again in the following year (2010/11). Of course Mr Berrier should have been aware of the correct basis to return the Loan in the light of the summary description that we mentioned above. But for the fact that he had been sent the summary description, we would have been minded to reduce the amount of the penalty by a greater percentage. But given that he had been sent the summary description, we consider that a reduction of 25% is in our opinion appropriate.

Suspension

84. As regards suspension of the penalty we can only overturn HMRC's decision on suspension if we consider it to be "flawed" (paragraph 17(4), Schedule 24).

85. It is clear that in this case HMRC did consider suspending penalties, and sent Mr Berrier a leaflet about suspension. Neither Mr Berrier nor his representative made any representations to HMRC at the time about suspension, nor did they raise suspension at the hearing. We find that HMRC's decision not to suspend penalties was not flawed, and we cannot therefore re-open their decision not to suspend.

Costs

86. The jurisdiction of the Tax Chamber of the First Tier Tribunal to award costs is set out in Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (SI 2009/273) ("the Tribunal Rules"). Other than in appeals categorised as "complex", the Tribunal can only make an order in respect of costs either under s29(4), Tribunals, Courts and Enforcement Act 2007 (wasted costs), or where a party (or their representative) has acted unreasonably in bringing, defending or conducting the proceedings (Rule 10(1)(b) of the Tribunal Rules)

87. Section 29 Tribunals, Courts and Enforcement Act 2007 is as follows:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

88. We consider that there is a case (a) for Mr Clarke to answer as to whether he acted improperly, unreasonably or negligently in relation to this appeal for the purposes of section 29; and (b) for Mr Clarke (as representative) and Mr Berrier (as appellant) to answer as to whether they acted unreasonably in bringing or conducting the proceedings for the purposes of Rule 10 in respect of the matters set out below.

89. First, the Notice of Appeal was not signed by Mr Berrier. Instead, Mr Clarke signed the Notice of Appeal as "legal representative" of Mr Berrier. Rule 11(7) defines a "legal representative" as being a person authorised to conduct litigation under the Legal Services Act 2007 (eg a solicitor). Mr Clarke is not a solicitor, and does not appear to be otherwise authorised to conduct litigation. We note that it is an offence under section 21, Solicitors Act 1974 for an unqualified person to hold himself out as qualified to act as a solicitor, and that there are equivalent offences under other statutes for unqualified persons holding themselves out as other kinds of legal professional.

90. The distinction between a "representative" and a "legal representative" is important. Anything required to be done by a party under the Tribunal Rules may be done by that party's representative (legal or not), other than signing witness statements. This would include the signing of the Notice of Appeal, and the conduct of the appeal itself. Notice of the appointment of a representative must be given to the Tribunal and the other parties (Rule 11(2), Tribunal Rules). In the case of a legal representative, the legal representative may give that notice himself. However, in the case of other representatives, the notice of appointment must be given by the party.

91. As Mr Clarke is not a legal representative, he could not sign the Notice of Appeal, nor conduct the appeal itself without notice of his appointment as Mr Berrier's representative having been given to the Tribunal and HMRC by Mr Berrier. No such notice of appointment was ever given.

92. There was nothing apparent on the face of the Notice of Appeal that would suggest that Mr Clarke was not a solicitor (or otherwise qualified as a legal representative), and the fact that he was not a solicitor only became apparent on the Tribunal panel reviewing the case papers shortly before the hearing. A request was then made by the Tribunal that Mr Berrier should give notice of appointment under Rule 11(2) in the short period of time before the actual hearing itself. Although no notice of appointment was ever given, we allowed Mr Clarke to act as representative of Mr Berrier at the hearing pursuant to Rule 11(5), which allows for the Tribunal to give permission to a person accompanying a party to act as their representative at a hearing. Where such permission is given, the requirements for notice to be given of the appointment do not apply (Rule 11(6)).

93. As HMRC had not been prejudiced by Mr Clarke signing the Notice of Appeal as a "legal representative", and given all the circumstances of the case, we consider that it is in the interests of justice that the appeal should proceed notwithstanding the irregularity in the signing of the Notice of Appeal. Pursuant to Rule 7 of the Tribunal Rules, we therefore waive the irregularity.

94. Notwithstanding this waiver, Mr Clarke misrepresented his status to the Tribunal, and put the Tribunal to significant inconvenience in seeking to address the consequences of his actions.

95. Notice was given by e-mail from Mr Berrier to the Tribunal (but not HMRC) dated 20 March 2014 that all correspondence relating to the appeal should be sent directly to him. Mr Clarke gave notice to HMRC (but not the Tribunal) on 20 March 2014 that he was no longer acting for Mr Berrier. Despite the imperfections in these notices, we find that Mr Clarke ceased to act as Mr Berrier's representative with effect from 20 March 2014.

96. But Mr Clarke was Mr Berrier's representative at the hearing, and the Tribunal views most seriously the omission of the summary description of the tax consequences of the Loan from the Bundle of evidence placed before it at the hearing. This description was a key element of the evidence showing that Nomura's intention was to make a forgivable loan to Mr Berrier, and that Mr Berrier was (or reasonably ought) to have been aware as to how the Loan was taxed. The overriding objective of the Tribunal is to deal with cases fairly and justly, and under the Tribunal Rules, the parties (and by implication, their representatives) are required to help the Tribunal to further the overriding objective. The effect of omitting this part of Mr Berrier's offer of employment by Nomura from the Bundle (and failing to draw its existence to the Tribunal's attention), was to mislead the Tribunal and to hinder the Tribunal in dealing with this appeal fairly and justly.

97. We have not heard Mr Clarke as to why he described himself as a "legal representative" on the Notice of Appeal, nor have we heard from either Mr Berrier or Mr Clarke as to why the summary description of the tax consequences of the Loan were omitted from the evidence bundle (and why the omission was not drawn to the Tribunal's attention). It would be unfair of the Tribunal to make any order as to costs under Rule 10

without first having given Mr Clarke and Mr Berrier an opportunity to make representations as to their conduct, and Rule 10(5) of the Tribunal Rules requires in any event that a "paying person" must have the opportunity to make representations, and where the paying party is an individual, the Tribunal must consider that person's financial means.

98. The Tribunal therefore gives directions below as to any application for costs.

Conclusions

99. We have found that Mr Berrier failed to declare on his 2010/11 tax return income of £25,000 in respect of a loan being written off, and £833 in respect of the cash equivalent, representing the interest benefit of the loan.

100. We have found that Mr Berrier had given HMRC a tax return under s8 Taxes Management Act 1970 which contained inaccuracies.

101. We have found that Mr Berrier was careless in failing to include the loan write-off and cash equivalent in his tax return. We agree with HMRC that Mr Berrier gave prompted disclosure of these inaccuracies. We also agree with HMRC that he should be given the maximum reduction for the quality of his disclosure.

102. We have found that HMRC's decision not to give a reduction for special circumstances was flawed. We have found that there were special circumstances which resulted in the failure of Mr Berrier to include these amounts in his tax return, and that it would be appropriate to give a further 25% reduction in the amount of the penalty relating to this.

103. We have found that HMRC's decision not to suspend the penalties was not flawed.

104. We leave it to the parties to agree the amount of tax and penalties payable in accordance with this decision. If they are unable to reach agreement, we give leave for them to apply to this Tribunal (acting by a single Judge sitting alone) to determine the amounts payable.

Directions in respect of costs

105. As regards costs, we consider that there is a case to answer that:

(1) Mr Clarke, as representative of the appellant, acted improperly, unreasonably or negligently in the conduct of the appeal for the purposes of Section 29, Tribunals, Courts and Enforcement Act 2007; and

(2) Mr Berrier or Mr Clarke acted unreasonably in bringing or conducting the proceedings for the purposes of Rule 10(1)(b) of the Tribunal Rules,

such that an order for costs ought to be made against either Mr Clarke (as representative) or Mr Berrier (as appellant) under Rule 10 of the Tribunal Rules.

106. We therefore give leave to HMRC to make an application for costs pursuant to Rule 10. Any such application must be made not later than 56 days after the decision is sent to the parties. The application must be accompanied by a schedule of the costs claimed in sufficient detail to enable the Tribunal to undertake a summary assessment of such costs if it decides to do so. The application and the schedule shall be sent both to Mr Clarke and to Mr Berrier at the same time as it is sent to the Tribunal.

107. In the event that HMRC make such an application, Mr Berrier and Mr Clarke shall send to the Tribunal a written statement setting out their reasons as to why their conduct was neither improper, unreasonable, or negligent (for the purposes of section 29) nor unreasonable (for the purposes of Rule 10(1)(b)). Such statement must be sent to the Tribunal within 56 days of the date of HMRC's application, and shall be accompanied by a statement setting out in reasonable detail their financial means, including their annual income and expenses, and their assets and liabilities. Such statements shall be sent to HMRC at the same time as they are sent to the Tribunal. Following receipt of such statements, the Tribunal shall arrange a hearing (to be heard by a Judge acting alone) in respect of costs. The provisions of Rule 10(3) and (4) of the Tribunal Rules shall not apply.

Permission to Appeal

108. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 13 May 2014

APPENDIX 1
Schedule 24, Finance Act 2007

1(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of P's liability to tax,

(b) a false or inflated statement of a loss by P, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

[…]

Tax	Document
[…]	
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
[…]	

[…]

3(1) Inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

[…]

4(1) The penalty payable under paragraph 1 is—

(a) for careless action, 30% of the potential lost revenue,

[…]

5(1) “The potential lost revenue” in respect of an inaccuracy in a document or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

[…]

9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

(2) Disclosure—

(a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and

(b) otherwise, is “prompted”.

(3) In relation to disclosure “quality” includes timing, nature and extent.

10(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

[…]

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1 or 2.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

[…]

13(1) Where P becomes liable for a penalty under paragraph 1 or 2 HMRC shall—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice a tax period in respect of which the penalty is assessed.

[…]

(3) An assessment of a penalty under paragraph 1 must be made within the period of 12 months beginning with—

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment within paragraph (a), the date on which the inaccuracy is corrected.

[…]

14(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify—

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(a) action to be taken, and

(b) a period within which it must be taken.

15(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

(3) P may appeal against a decision of HMRC not to suspend a penalty payable by P.

(4) P may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by P.

16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply in respect of a matter expressly provided for by this Act

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)—

(a) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the tribunal orders HMRC to suspend the penalty—

(i) P may appeal against a provision of the notice of suspension, and

(ii) the tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the tribunal—

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.

APPENDIX 2
"Summary of the United Kingdom Tax Position of Forgivable Loans

Under current UK tax rules Forgivable Loans are taxed in two ways:

1) Annual beneficial loan interest charge

A loan interest benefit will be computed on the loan balance and reported for each UK tax year (running from 6th April in one year to the 5th April in the next year) that the loan remains outstanding.

The interest benefit will be based on the HM Revenue and Custom's ("HMRC") official loan interest rate (currently 6.25% per annum as at April 2008). The loan benefit will be reported to HMRC and yourself alongside other taxable benefits on form P11D. Nomura International plc will provide this to you by no later than 6th July after the end of the relevant tax year.

You will need to report the loan benefit on your UK tax return for the relevant tax year and file this with HMRC by the normal filing deadline. The deadline for filing UK tax returns for the tax year to 5th April 2008 will be 31st October following the tax year unless you file online when the deadline is extended to 31st January following the tax year.

You will be required to pay Income tax up to the top marginal tax rate, currently 40%, on this benefit. Currently you will not be required to pay National Insurance (social security) contributions on this benefit.

You will need to pay the outstanding income tax due on the loan interest benefit **directly to HMRC** by no later than, currently, 31th January following the end of the tax year. The payment deadline is currently under review and may change in the future.

2) Loan write off

In the event that you remain in employment with Nomura International plc until the date that the loan is forgiven, the loan will be "written off".

You will be taxed on the amount which has been "written off" at this time the loan is forgiven. The amount is then reported to you on form Pl1D.

You will need to report the loan on your tax return and pay the outstanding income tax due in a similar manner to the income tax due on the beneficial loan interest. Please one section 1) above for more details.

In addition you will be liable to pay an immediate National Insurance liability on the value of the loan (currently 1%). This amount will be advised to you in the month

following the loan forgiveness and collected from you in the next available payroll following forgiveness.

You should be aware that you may be required to make Payments on Account of your income tax liability in respect of the year in which the loan is written off. If your tax computation for the tax year prior to the reporting of the loan write off indicates that you should make Payments on Account you will need to make Payments on Account of the income tax due. HMRC will send you a calculation of the Payments on Account that you should expect to make. It is therefore important that you file your tax returns on a timely basis to ensure that you are aware of any Payments on Account being required. If you are in any doubt whether this applies to you, you should contact your personal tax advisor.

Forgivable Loan and MBA Fees

As you may be aware, there is a certain tax deduction in the United Kingdom for employees who utilise earnings from their employer to offset their MBA training costs.

Following changes to UK tax legislation three years ago the tax deduction is now limited to a very narrow set of circumstances. Nomura International plc has fully investigated this tax exemption with its advisors, Ernst and Young who have confirmed that the tax exemption is no longer available for employees in your circumstance.

You should therefore anticipate that the loan will remain taxable and subject to National Insurance in the United Kingdom in accordance with the summary above.

Nomura International has produced this summary for general guidance purposes only. This letter is based on general principles and current understanding of both applicable UK legislation and practice. As you will be aware, both tax law and practice can change. Further, Nomura International plc does not provide tax advice to its employees and as such this summary is not intended to be and should not be used by individuals as specific tax advice. If you are in any doubt as to your personal circumstances you are advised to seek advice from an independent tax advisor.

August 2009"