Neutral Citation: [2024] UKFTT 00462 (TC)

Case Number: TC09186

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/13616

INCOME TAX - BUSINESS INVESTMENT RELIEF - Introduction by Appellant of £1.5m foreign income to UK - ITA 2007 s 809VH(2) - 'Extraction of value' - How legislation should be interpreted - Was the provision of a Director's Loan Account (used to pay certain personal expenses) an 'extraction of value' within the proper meaning and effect of the legislation? - Yes, giving the words their natural and ordinary meaning, and in accordance with the purpose of the legislation - Was the Director\s Loan Account within the exception in ITA 2007 s 809VH(3)? - No, because not on arm's length terms - Appeal dismissed

Heard on: 13 and 14 March 2024
Judgment date: 30 May 2024

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL
TRIBUNAL MEMBER DEREK ROBERTSON

Between

MR BENOÎT D'ANGELIN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth (now, KC) of Counsel, instructed by McGrath Elliott Ltd

For the Respondents: Rebecca Murray, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

SUMMARY

1. Mr d'Angelin is a banker, financier, and entrepreneur. In 2016 he was UK resident but not UK domiciled. He introduced £1.5m of his foreign income to a UK company which he had recently founded and of which he was at that time the sole director. This investment was made, with legal advice, in the expectation that it would qualify for Business Investment Relief, and so would not be taxable.

2. The company gave Mr d'Angelin a director's loan account. As he accepts, Mr d'Angelin used that account, drawing against it to pay (amongst other things) personal expenses. The balance eventually stood at about £71,000.

3. After an enquiry, HMRC concluded that the loan account constituted an 'extraction of value', contrary to the 'Remittance Basis' provisions in Part 14 of the *Income Tax Act 2007*, and section 809VH in particular, and denied Business Investment Relief in relation to the entirety of the £1.5m which had been invested. That led to an increase in Mr d'Angelin's tax payable of about £675,000.

4. For the reasons set out more fully below, we have decided to dismiss his appeal. There was an extraction of value within the proper meaning and effect of the legislation, and the extraction of value was not within the statutory exception in ITA 2007 section 809VH(3).

INTRODUCTION

5. This is an appeal, made by way of a Notice of Appeal dated 18 November 2022, against a Closure Notice issued on 15 June 2022 (upheld at departmental review on 21 October 2022) which concluded that, in relation to the director's loan account between the Appellant and a limited company registered in England and Wales known as "d'Angelin and Co Ltd" ('**DAC**'; **'the Company'**) there had been an omission of employment benefit from the Appellant's tax return, and that additional tax was due. HMRC amended the Appellant’s tax return for 2017/18 and increased the tax payable by £675,307.35.

6. The key issue in the appeal is whether the Appellant breached the so-called "extraction of value rule" in section 809VH of the *Income Tax Act 2007* (**'ITA 2007'**).

THE FACTS

7. On the basis of the documents which we have read, and the evidence which we have heard, we make the following findings of fact. Where relevant, we shall make further findings of fact in our discussion.

8. At all relevant times the Appellant was resident in the UK (but not domiciled in any part of the UK) and was taxable on the remittance basis.

9. On 14 December 2016, DCL was incorporated, the Appellant was appointed its sole director, acquired its single issued share (a single £1 share), and it started trading. DCL's stated principal activity was as an "advisory boutique offering exclusive bespoke personal advice and high-end transaction execution services to global corporate clients at the CEO and board of directors level as well as family holdings and fast growing private companies".

10. At all relevant times, the Appellant was a director, company secretary, and the sole shareholder of DCL. The Appellant was the Company's "controlling party", meaning that the Company was under his control.

11. Until 8 May 2017, when a second director was appointed, the Appellant was the Company's sole director.

12. On 6 December 2016, the Appellant remitted £1.5 million of his foreign income to the UK.

13. On 7 December 2016, he received advice in writing from his legal advisers as to Business Investment Relief ('**BIR**','**the Relief**') and the circumstances in which the Relief could be lost.

14. On 7 December 2016, he forwarded that advice to his accountants with instructions that the £1.5m was a capital subscription and was to be treated as an equity investment in the Company (**'the Investment'**). He asked that the new shares subscribed in the Company were all to be registered in his sole name.

15. A further ordinary £1 share was issued to him.

16. For the tax year 2016/17, the Appellant claimed BIR under section 809VA of *ITA 2007* in respect of the Investment, as a "qualifying investment" in DCL (as the "target company") so that the £1.5m of foreign income was treated as not remitted to the UK, and was not taxable.

17. During the tax year 2017/18, the Appellant became increasingly indebted to DCL. As at 28 March 2018, this stood at £71,515 ('**the Indebtedness**').

18. The Indebtedness was recognised in DCL's financial statements for its accounting periods ended 31 December 2017 and 31 December 2018 as "amounts advanced" to the Appellant, and as being "interest free and repayable on demand".

19. As at 31 December 2017, the Company had total equity in excess of £5m.

20. On 13 April 2018, the Company declared an interim dividend of £825,000 per share. At that time, the Company had two issued shares, and the Appellant held both.

21. The Appellant's tax return for 2017/18 was submitted on 28 January 2019.

22. On 26 July 2019, HMRC opened an enquiry into Mr d'Angelin's self-assessment return for 2017/18.

23. On 13 August 2019, Mr d'Angelin's legal advisers told HMRC that his accountants had mistakenly not produced a P11D for Mr d'Angelin for the year ending 5 April 2018, and provided a copy to HMRC.

24. On 17 February 2022, and after complaining of much delay on HMRC's part in responding to the Appellant's representations (and especially the Opinion of Mr Firth, dated 29 October 2020, which had been sent to HMRC on 18 November 2020) the Appellant applied to the Tribunal for an order that HMRC close its enquiry. The closure application was assigned to category on 18 May 2022. On 14 June 2022, the Appellant notified the Tribunal and HMRC of the requirements for the hearing of that application.

25. On 15 June 2022, HMRC issued a Closure Notice.

26. On 21 June 2022, HMRC made a penalty assessment against Mr d'Angelin of £101,295 in relation to alleged late payment of taxes in 2018/19. However, on 4 August 2022, following correspondence, HMRC concluded that those penalties had been incorrectly charged, and cancelled them.

THE PARTIES' ARGUMENTS

27. In summary, the Appellant, in his Grounds of Appeal, advances, as his primary case:

(1) On a proper interpretation of the legislation, the extraction of value rule was not breached, because a receipt of value must mean a receipt of <u>net</u> value;

(2) There was no extraction of net value, because the provision of interest-free credit by an employer to an employee (resulting in a tax charge under ITEPA 2003 s 175 on the benefit of the cheap loan) is treated as carrying interest on loan equal to the cash equivalent (ITEPA 2003 s 184);

(3) But in any event, the DLA was provided to Mr d'Angelin in the ordinary course of business and on arm's-length terms within the proper meaning and effect of the exception in ITA s809(3) (**'the Exception'**).

28. In summary, HMRC argues, in its succinct Statement of Case, and as its primary case:

(1) Extraction of value does not mean net extraction of value;

(2) Even a single payment by DCL to the Appellant for his personal expenses was a receipt of value by the Appellant from DCL and hence contrary to the extraction of value rule;

(3) The DLA was a receipt of value.

29. As its secondary case, HMRC argues, in its Statement of Case, that, if the concept of extraction of value is (contrary to its submissions) concerned with whether the recipient is better off overall (ie, gets net value) then Mr d'Angelin was nonetheless better off financially as a result of the Indebtedness, such that he received value in money or money's worth.

30. It is common ground that, if the extraction of value rule was breached, then the statutorily-prescribed mitigation steps were not taken within the statutorily-prescribed grace period, with the effect, in that event, that the whole of the £1.5m was to be treated as remitted to the UK and taxable accordingly: ITA 2007 s 809VG(5) and (6).

31. It is also common ground:

(1) Where an individual makes a qualifying investment in a company of which they are a director, the receipt of director's remuneration on commercial terms and taxable in the UK would not constitute an extraction of value within the meaning and effect of the legislation;

(2) The payment of dividends to shareholders by a trading company is a commercial return on an investment and is not a potentially chargeable event;

(3) The Indebtedness constituted an employment-related loan which was a taxable "cheap loan" in relation to the tax year 2017/18;

(4) The cash equivalent of the benefit of the loan was treated as earnings of the Appellant's employment under ITEPA 2003 s 175;

(5) Although the Indebtedness, on the face of it, was interest-fee, the cash equivalent of the benefit was equal to the amount of interest that would have been paid for it at the official rate of interest, which was 2.5%;

(6) ITEPA 2003 s 184(2) applied to treat the Appellant for the purposes of the Tax Acts as having paid interest on the Indebtedness in 2017/18 equal to the cash equivalent.

The evidence

32. The only witness evidence was from Mr d'Angelin. His written evidence is contained in a witness statement dated 13 October 2023. This stands as his evidence-in-chief. There were no supplementary questions in chief. He was cross-examined by Ms Murray. There was no re-examination.

33. There was no evidence from HMRC.

34. We make the following findings of relevant facts:

(1) The availability of the Relief was an important factor in Mr d'Angelin's decision to set up the Company in the UK;

(2) He knew about the Relief before committing his £1.5m;

(3) The £1.5m came from offshore, but he would have been able to invest £1.5m from his UK funds if he had chosen to;

(4) Mr d'Angelin did not use the Relief with any intention of getting around any tax rules or for any purpose of avoidance. For the sake of clarity, this is not a case which concerns Mr d'Angelin's honesty or integrity - neither are challenged by HMRC;

(5) The Company paid him an annual salary of £200,000. This was a significant reduction from his payment from employment as a banker in previous years, when he had earned over £5m a year;

(6) In 2017/18, in addition to his pay from employment with the Company, he also received dividends from foreign companies in a sum in excess of his annual salary, as well as significant (but much smaller) sums of interest from UK banks, building societies and securities etc, and dividends from UK companies;

(7) His previous employer, also in the finance industry, had made a director's loan account available to him, and he had used it, including for personal expenses, with those then being reconciled and settled;

(8) The DLA was in operation by 1 April 2017;

(9) The provision of the DLA was a facility made available to the Appellant by the Company as part of his director's 'package';

(10) His 2017/18 self-assessment return did not mention the cash equivalent of the loan benefit nor did it attach a P11D. A P11D was subsequently filed, as set out above;

(11) Sometimes the Appellant personally paid Company expenses on behalf of the Company;

(12) Sometimes, the Company paid personal expenses on behalf of the Appellant;

(13) The latter happened when the Appellant used the Company's credit card or debit card for personal expenditure, with that expenditure being then identified, at some time after the event, by the Appellant's assistant and posted to the DLA.

(14) These ranged from a £0.79 monthly subscription to ITunes, through purchases such as flowers for his wife, dry cleaning, taxis, currency for travelling, clothing, and books;

(15) By far the largest individual items debited to the DLA were for personal travel: £20,380 on private use of a jet on 15 December 2017; £15,422 flights; and £12,576 on 24 January 2018 on personal travel for him and his family to Dubai;

(16) Between 5 April 2017 and 28 March 2018, the DLA was debited by £75,758, across about 80 transactions, and credited with £4,466 across 7 payments, leaving a stated balance on 28 March 2018 of £71,515;

(17) For the period ending 31 December 2017, the Notes to the Company's Annual Report and Financial Statements, signed by Mr d'Angelin on 20 March 2018, recorded

amounts advanced to the Appellant under the DLA of £49,369; amounts repaid of £11,554; leaving a closing balance of £37,825;

(18) For the year ending 31 December 2018, the Notes to the Company's Annual Report and Financial Statements, approved by Mr d'Angelin on 26 March 2019, recorded a carried-across loan opening balance of £37,285; amounts advanced to the Appellant under the DLA of £86,734; amounts repaid of £67,256; leaving a closing balance (as at 31 December 2018) of £57,303;

(19) There is no corroborative documentary evidence that the Appellant repaid the Indebtedness in full on 13 April 2018; and this is self-evidently inconsistent with the Company's Financial Statements for the year ended 31 December 2018. On the face of it, the Appellant retained the DLA until at least 31 December 2018 (ie, for just over two full years after the Company started trading);

(20) At all times, the Appellant had more than enough money available to him, in a personal bank account held jointly with his wife, to have paid directly, without needing to borrow (i) for all the things which the Company paid for; and (ii) to have paid off the whole of the DLA; but he did not do so;

(21) The expectation always was that the Appellant would reimburse the Company. However, on the basis of the contemporary documentation before us, the loan account was not paid off in full at any time. Nor is there any identifiable pattern of repayment - whether in terms of money, or in terms of frequency: payments towards the account are sporadic and of irregular amounts;

(22) The DLA was, as actually operated, interest-free and repayable on demand;

(23) The DLA was being used as a vehicle which avoided the Appellant having to arrange reimbursement ad hoc on each and every occasion that a transaction was for personal expenses, or had a personal element;

(24) Because the DLA, although on the face of it interest-free, was treated by statute as a cheap loan, it is treated for the purposes of this appeal as bearing interest at 2.5%. Therefore, it would, looked at purely in terms of interest, have cost the Appellant less to have made payments directly from his personal bank account (on the footing that he was in credit and would have remained in credit and not overdrawn) than to have incurred them on the DLA;

(25) In the period ending 31 December 2017, the Company paid a director's bonus, but the amount and the payee(s) (ie, whether both directors, or just one of them) are not known to us;

(26) The Company could, at any time up to and including 31 December 2017, have declared a dividend to immediately clear the loan account, but did not. In that period, the Company recorded net profit after a director's bonus and taxation of £3,668m, and the Company Financial Statements recorded that it had cash balances during the year averaging over £5m. No dividends were paid in the period ending 31 December 2017;

(27) An interim dividend of £1.65m was declared on 13 April 2018.

35. The debt stated on the DLA:

(1) Was £223.24 on 1 April 2017;

(2) Was £37,825 (being £49,339 advanced, minus £11,544 repaid) on 31 December 2017;

(3) Was £71,515 as at 28 March 2018;

(4) Was £57,303 (being £86,734 advanced, minus £67,256, against a carried-across opening balance of £37,825) on 31 December 2018.

36. We also find:

(1) Before introducing the capital, Mr d'Angelin asked his solicitors about the use of BIR;

(2) He wanted to know if BIR was open to him to subscribe for shares in the company;

(3) He received such advice in writing on 7 December 2016 (ie, the day after he made the Investment);

(4) That advice contained the following passage:

> "Any salary, bonus, dividends received by you (or any person connected to you) from the company must be in accordance with the normal commercial practices in order to avoid being treated as a benefit which could endanger the relief. Excessive remuneration or use of company's assets personally would be treated as an extraction of value and would breach the conditions of the relief." (the underlining is emphasis added by us).

37. We also find (to the extent that these are in dispute):

(1) Mr d'Angelin was a 'relevant person' (section 809M); and

(2) DCL was an "involved company" (section 809VH(4)).

THE LEGISLATION

38. The key provisions are these:

Business Investment Relief

809VA Money or other property used to make investments

(1) Subsection 2 applies if-

(a) a relevant event occurs,

(b) but for subsection (2), income or chargeable gains of an individual would be regarded as remitted to the United Kingdom by virtue of that event, and

(c) the individual makes a claim for relief under this section.

(2) The income or gains are to be treated as not remitted to the United Kingdom.

[...]

809VG Income or gains treated as remitted following certain events

(1) Subsection (2) applies if-

(a) income or chargeable gains are treated under section 809VA(2) as not remitted to the United Kingdom as a result of a qualifying investment,

(b) a potentially chargeable event occurs after the investment is made, and

(c) the appropriate mitigation steps are not taken within the grace period allowed for each step.

809VH Meaning of 'potentially chargeable event'

(1) For the purposes of section 809VG, a 'potentially chargeable event' occurs if-
[...]
(b) the relevant person who made the investment ('P') disposes of all or part of the holding,
(c) the extraction of value rule is breached [or]
[...]

(2) The extraction of value rule is breached if-
(a) value (in money or money's worth) is received by or for the benefit of P or another relevant person,

(b) the value is received-
(i) from an involved company, or
(ii) from anyone else but in circumstances that are directly or indirectly attributable to the investment or to any other investment made by a relevant person in an involved company, and
(c) the value is received other than by virtue of a disposal that is itself a potentially chargeable event.

(3) But the extraction of value rule is not breached merely because a relevant person receives value that-
(a) is treated for income tax or corporation tax purposes as the receipt of income or would be so treated if that person were liable to such tax, and
(b) is paid or provided to the person in the ordinary course of business and on arm's length terms.

"Involved company"

(4) Each of the following is an 'involved company'-
(a) the target company,
(b) if the target company is an eligible stakeholder company, any eligible trading company in which it has made or intends to make an investment
(c) if the target company is an eligible holding company, any eligible trading company that is a 51% subsidiary of it
(d) any company that is connected with a company within paragraph (a), (b), or (c)."

39. This is all within Part 14 ("Income Tax Liability: Miscellaneous Rules") Chapter A1 ("Remittance Basis").

"Relevant person"

40. Relevantly, for the purposes of the Chapter, a 'relevant person' (s 809M(2) is-

"(a) the individual,
(b) the individual's husband or wife,
(c) the individual's civil partner,

(d) a child or grandchild of a person falling within any of paragraphs (a) to (c), if the child or grandchild has not reached the age of 18,
(e) a close company in which a person falling within any other paragraph of this subsection is a participator, or a company which is a 51% subsidiary of such a close company,
(f) a company in which a person falling within any other paragraph of this subsection is a participator, and which would be a close company if it were resident in the United Kingdom or a company which is a 51% subsidiary of such a company,
(g) the trustees of a settlement of which a person falling within any other paragraph of this subsection is a beneficiary, or
(h) a body connected with such a settlement.

41. Section 809M(3) provides, by way of amplification:

"For that purpose-
(a) a man and woman living together as husband and wife are treated as if they were husband and wife,
(b) two people of the same sex living together as if they were civil partners of each other are treated as if they were civil partners of each other,
(c) 'close company' is to be read in accordance with Chapter 2 of Part 10 of CTA 2010 (see in particular section 439 of that Act)
(ca) 'participator' in relation to a close company, means a person who is a participator in relation to the company for the purposes of section 455 of CTA 2010 (see sections 454 and 455(5) of that Act) and, in relation to a company that would be a close company if it were resident in the United Kingdom, means a person who would be such a participator if it were a close company,
(cb) 51% subsidiary has the same meaning as in the Corporation Tax Acts (see Chapter 3 of Part 24 of CTA 2010);
(d) 'settlement' and 'settlor' have the same meaning as in Chapter 2 of Part 9,
(e) 'beneficiary', in relation to a settlement, means any person who receives, or may receive, any benefit under or by virtue of the settlement,
(f) 'trustee' has the same meaning as in section 993 (see, in particular, section 994(3)), and
(g) a body is 'connected with' a settlement if the body falls within section 993(3) (c), (d), (e) or (f) as regards the settlement."

42. For the avoidance of doubt, we add that we are aware that Parliament, by *Finance (No. 2) Act 2017* s 15(5)(c), amended (and, on the face of it, narrowed) section 809VH(2)(b) and the definition of "potentially chargeable event" by requiring that "the value is received from any person in circumstances that are directly or indirectly attributable to the investment" (ie, deleting "or to any other investment made by a relevant person in an involved company") but this amendment applies only to investments made on or after 6 April 2017. This investment was made in December 2016.

DISCUSSION

INTERPRETATION

43. In his Skeleton Argument/Outline of the Case, the Appellant raised a far-reaching interpretation argument in relation to the legislation. The first major limb of this was that 'value' must mean *'net* value'. This was in support of a submission that the existence and operation of the loan account was not something of "value" to the Appellant, because it was not of "net" value. Another major limb of the argument was that the legislation led to (on the

Appellant's case) ostensibly absurd outcomes, which meant that the language had gone wrong.

44. Our starting point is the basic principle that the words of the statute should be interpreted "in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation".

45. There is a mass of guidance emanating from superior courts of record concerning the interpretative approach to be taken by courts at first instance. We take our starting point - set out above in quotation marks - from the approach taken in the Divisional Court (Leggatt LJ, as he then was, and Green J) in *R (oao The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin) at Para [33]. Although, in that case, the Divisional Court's conclusion as to the interpretation of the meaning of 'referendum expenses' was successfully challenged on appeal, this succinct description of the correct overall approach to interpretation was not: see [2019] EWCA Civ 1567 (Burnett, Lord Chief Justice; Singh and Nicola Davies LJJ) at Para [60]. Although the appeal was allowed, that was on the footing that the Divisional Court had not given sufficient weight, in its interpretative exercise, to certain factors: see Paras [78] et seq.

46. We must therefore focus on the meaning of 'extraction of value', and in particular the meaning of 'value'.

"Ordinary and natural meaning"

HMRC's position

47. HMRC's argument is simple. It says that the concept of receipt of value is not concerned with whether the recipient has given consideration for the receipt, or whether they are better off overall, because:

> "One would not say as a matter of the ordinary meaning of the word 'value', that the value of an asset received is nil because the recipient gives consideration of equivalent value. On the contrary, the consideration given in exchange is ignored".

48. In terms of the natural and ordinary meaning, we can have recourse to dictionaries. The word 'value' (which, according to the OED, entered English in the 1300s from the Anglo-French 'valoir') does not have a single hard-and-fast dictionary meaning in our current language. OED has a number of senses of the noun 'value'. In general terms, these capture the notions of value being something which is not necessarily measured in money, but which is considered to be an equivalent for something else, and thereby representing a fair or satisfactory equivalent or return. Cognate expressions such as "of value" can mean something of material worth; "important, useful, or valuable". "To add value to" can mean to enhance or improve so as to increase the value, or add value - including in the sense of usefulness.

The Appellant's position

49. The core of the Apepllant's argument is that the legislation must mean net 'extraction of value' because (i) this is the fair reading of its purpose; (ii) if it is not read in this way, then absurd consequences ensue. Although this perhaps bleeds across into a purposive analysis, it is convenient to consider this argument at this stage.

The 'scenarios'

50. Mr Firth contended that the legislation, if read literally, leads to absurdity (which he argued should be given a wide meaning so as to include "inconvenient, pointless, artificial, or disproportionate": see *Bennion and others on Statutory Interpretation* [24](1)). The opinion of the learned editors of Bennion is that the Tribunal should strive to avoid a construction which produces an absurd result, except in rare cases where there are overriding reasons for

applying a construction which produces an absurd result - for example, where it appears that Parliament really intended it, or the literal meaning is "too strong": ibid. [24](2). In *R (on the application of Edison First Power Ltd) v Central Valuation Office* [2003] UKHL 20, Lord Millett (at Paras 116 and 177) remarked that judicial decision-makers should presume that Parliament did not intend a statute to have consequences "which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless". But Lord Millett went on to observe that "the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it...".

51. Mr Firth put forward a series of scenarios, each of which ostensibly involving an extraction of value, but not an extraction of net value, namely (with some of the numbering adjusted by us):

A: "Intra-group transactions of the company invested in

(1) Scenario 1: T establishes X Ltd (and claims BIR), X Ltd establishes Y Ltd as its subsidiary and invests £100 as share capital. X Ltd is an involved company. Y Ltd is a relevant person. Y Ltd received value (£100) from X Ltd. The extraction of value is breached;

(2) Scenario 2a: As in scenario 1 but X Ltd lends Y Ltd £100 instead. The same result applies, according to HMRC;

(3) Scenario 2b. The same result also applies in the reverse scenario, if Y Ltd (the subsidiary) lends £100 to X Ltd (parent) (Y Ltd is an involved company and X Ltd is a relevant person);

(4) Scenario 2c: The same result also applies if this transactions was undertaken between subsidiaries of X Ltd;

(5) Scenario 3a: As in Scenario 1, but X Ltd sells an asset worth £100 to Y Ltd for £100. The same result applies, according to HMRC;

(6) Scenario 3b: The same result also applies in the reverse scenario, if Y Ltd (the subsidiary) sells an asset worth £100 to X Ltd. In other words, on HMRC's case, the sale of an asset by a subsidiary to the company invested in breaches the extraction of rule;

(7) Scenario 3c: The same result also applies if this transactions was undertaken between subsidiaries of X Ltd.

B: "Intra-group transactions of an entirely separate group owned by the investor"

(8) Scenario 4: T establishes X Ltd (and claims BIR). Separately, T already has a company in the UK, which he controls, P Ltd. P Ltd has a subsidiary, Q Ltd. The P Ltd group carries on an entirely separate business to X Ltd. Each of the variations in Scenarios 1 – 3 are carried out between P Ltd and Q Ltd:

(a) P Ltd invests £100 as share capital in Q Ltd.

(b) P Ltd lends £100 to Q Ltd (or vice versa).

(c) P Ltd buys an asset from Q Ltd for £100 (or vice versa).

C: "Intra-group transactions of an entirely separate group owned by the investor's wife"

(9) Scenario 5: as in Scenario 4, but P Ltd is owned and run entirely independently by T's wife. In each variation, the extraction of value rule is breached. P Ltd and Q Ltd are both, still, relevant persons and involved companies.

D: "Investor's wife engages in independent transaction with group owned by her"

(10) Scenario 6: T's wife owns and runs R Ltd. R Ltd:

(a) Lends £100 to T's wife;

(b) (b) Buys an asset worth £100 from T's wife for £100

(together, **'the Scenarios'**).

52. The Scenarios are, in essence, permutations on the statutory definitions of 'relevant person' and 'involved company'. The Appellant argues that if the Scenarios are extractions of value within the proper meaning and effect of the legislation, then:

> "It is difficult to overstate how absurd these results are. In essence, almost any sort of intra-group transaction between companies controlled by the investor or his spouse becomes impossible (without breaching the extraction of value rule)"
>
> [...]
>
> "The consequences are so serious and widespread that they go a long way to nullifying the relief/making is so unattractive and restricted that nobody who properly understood it would use it."

53. HMRC has not contended that any of the Scenarios is one which is not capable of being encountered in the real world. Nor has HMRC contended that any of the Scenarios (which deliberately, but not improperly, exploit the width of the definitions of 'relevant person' and 'involved company') should be disregarded as artificial or contrived.

54. HMRC's position is that the Scenarios each involve an extraction of value within the literal meaning and effect of the legislation because money or other value is being extracted.

55. Mr Firth attacks HMRC's position:

> "How can HMRC submit to the Tribunal that the legislative policy included prohibiting (on pain of withdrawal of relief) a target holding company investing in its subsidiary? ... What legislative policy does that serve?"

56. Mr Firth submits that there is an interpretation which brings the Scenarios within the legislation, but this is (as he accepts) a strained interpretation, and involves reading the proviso at the end of s 809VH(2)(b)(ii) ("but in circumstances that are directly attributable to the investment or to any other investment made by a relevant person in an involved company") as also applying to (b)(i) ("from an involved company").

57. We decline to adopt this interpretation:

(1) It ignores the comma and the word "or" at the end of b(i);

(2) It is doing violence to the statutory language, in circumstances where it is not "plain that there has been a drafting mistake" (see the authorities cited in *Shahid v Scottish Ministers* [2015] UKSC 58 at Para [21]);

(3) The interpretative exercise should not become one of judicial legislation. As a further reason, and overall, it goes too far as a species of (permissible) interpretation and, in our view, becomes a species of (impermissible) judicial legislation.

58. Despite Mr Firth's submissions, we do not agree that extraction of value must mean, and can only mean, extraction of net value. It does not seem to us that there is any obvious reason why, as a matter of natural and ordinary language, extraction of value must mean net extraction of value.

59. We agree with HMRC. We agree that the natural and ordinary meaning of the word 'value' does not give rise to any need for the relevant person to have ended up better-off.

60. However, the analysis does not end there. We need to test to see if it accords with the purpose of the legislation.

THE PURPOSE

61. HMRC contends that:

> "The purpose of the extraction of value rule is to 'ring fence' the foreign income or gains, so that they are used by the target company for the purposes of its business, and are not extracted from the company by the taxpayer, except by way of taxable remuneration or taxable dividends paid in the ordinary course of the company's business and on arm's-length terms. By enacting business investment relief, Parliament cannot have intended to permit taxpayers to remit foreign income tax-free by investing it in a target company but then extracting it from the company by borrowing it for the taxpayer's private use in the UK."

Parliamentary materials

62. Sections 809VA-809VO and the cross-heading of 'Business Investment Relief' were introduced into the ITA 2007 by FA 2012 with effect from 17 July 2012.

63. The Treasury and HMRC's joint consultation document ("Reform of the taxation of non-domiciled individuals) that preceded the legislation, dated June 2011, reads (as part of its section on anti-avoidance):

> "[2.52] [...] the Government proposes to introduce a provision to prevent the value of the investment leaking out to the individual either directly through payments or loans which are not arms-length or through transactions designed to pass value to the individual. For example, it would not be permitted for the company to use the funds invested to guarantee loans made to the individual; nor would it be possible to make payments to a third party which are linked to payments made to the individual. This would not prevent an individual or a connected person enjoying commercial levels of remuneration from the company in which they invest or receiving dividends or interest out of profits made by the business after the investment has occurred."

64. In the summary of reponses to that consultation (December 2011) the Government said:

> "[2.73] The Government reiterates that it is critical to ensure that the policy is not used for tax avoidance or to provide a personal benefit for the investor. The legislation will include two rules to prevent the value of an investment leaking from a company to an investor either directly or indirectly. These will apply if:

the invested company provides a personal benefit to the investor or a relevant person on terms which are not arms length or commercial. This rule will apply if any portion of the business, however small, provides such a benefit; or

the investment is made as part of a scheme or arrangement where the purpose, or one of the main purposes, is the avoidance of tax.

[2.74] An investor who breaches either of these rules will be required to take the full amount of overseas income and gains invested, and any proceeds, out of the UK or to reinvest them in a qualifying company.

[2.75] The Government confirms that this will not prevent an individual or relevant person from receiving a commercial salary, other commercial remuneration, dividends, interest or other income in respect of their rights as a shareholder or lender, provided UK tax is paid on such payments. The Government does not intend to prevent the provision of benefits on arm's length or commercial terms."

65. The Explanatory Notes to FA 2012 say:

"[249] Under the existing rules, remittance basis taxpayers are liable to UK tax on any foreign income or capital gains which they remit to the UK, irrespective of the purpose for which those income and gains are used. This can discourage such individuals from making commercial investments in the UK. Part 2 of the Schedule seeks to remove this disincentive by allowing remittance basis taxpayers to bring their overseas income and gains to the UK without becoming liable to tax provided they are brought to the UK for the purpose of making a commercial investment in a qualifying company.

[250] To prevent abuse, there are a number of conditions to prevent an investor from using the relief as a means of enjoying their overseas income and gains in the UK tax-free."

66. There are well-known constraints on the Tribunal's ability to use government papers and Explanatory Notes as an aid to interpretation. In *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [5] Lord Steyn (obiter) supported the use of Explanatory Notes as an aid to interpretation, even in the absence of ambiguity (and hence falling outside the scope of *Pepper v Hart*) where these cast light on 'the objective' or 'contextual sense'. That approach was supported by Sales J (as he then was) in *Eclipse Film Partners (Nr 35) LLP v HMRC* [2013] UKUT 639 (TCC) who nonetheless remarked that Lord Steyn's observations should be approached "*with a little caution, since none of the other members of the Appellate Committee referred to them or endorsed them*." We bear those observations in mind.

67. In *Big Bad Wolff Ltd v HMRC* [2019] UKUT 121 (TCC) (Henry Carr J and UTJ Jonathan Richards (as he then was) said, at Paras [23] et seq:

"23. Lord Steyn's speech in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 establishes that Explanatory Notes to Finance Bills can in principle be relied on as an aid to construction as they may:

'...cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed...'

Moreover, the statute does not have to be ambiguous before a court or tribunal can have regard to evidence of the contextual scene set out in the Explanatory Notes.

24. However, the relevance of Explanatory Notes should not be overstated. It is important to bear in mind that Explanatory Notes might simply reflect the views of the Government (as distinct from Parliament) and, moreover, that Explanatory Notes will often include summaries of statutory provisions prepared by people who are unskilled in statute law.

25. Thus, in *R (Westminster City Council) v National Asylum Support Service Lord Steyn* said at [6] of his speech:

'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'

26. The 7th edition of *Bennion on Statutory Interpretation* summarises the position as follows at [24.14]:

'Although explanatory notes may therefore be useful as an aid construction, the courts will resist attempts to elevate the notes to a status where they supplant the language of the legislation itself. There is also always a risk that the notes will be wrong or misleading.' "

68. This guidance has recently been adopted and endorsed by the Upper Tribunal in *HMRC v Marlborough DP Ltd* [2024] UKUT 00103 (TCC) (Edwin Johnson J and UTJ Brannan).

69. The consultation document, the Government's response to submissions, and the Explanatory Notes are of some use in this appeal. The consultation document is clear that the overall aim of the legislation was to prevent remitted offshore money, or the benefit of it, 'leaking out', tax-free. We are struck by that (colloquial and non-statutory) expression. The consultation document is also tolerably clear that the prohibition of 'leaking out' is intended to have a wide reach. For example (and to adopt one of the illustrations used in the consultation paper) the use of invested funds to guarantee loans made to the taxpayer is to be treated as taxable. But there, the invested funds are not actually even spent, but are simply staked.

70. Consistently with this, the overall thrust of the Explanatory Notes is that the regime was intended to remove disincentives to remittance taxpayers making commercial investments in the UK. But (i) it is obvious that the Government must have formed the view that the previous regime was operating as a disincentive; (ii) the new regime obviously sought to ameliorate that position; (iii) there is no suggestion that the new regime was to give taxpayers who previously would have been taxed *carte blanche* in terms of extraction of value; (iv) there would still be restraints against money 'leaking out'; and (v) on the facts of this case, Mr d'Angelin was not discouraged from bringing over a million pounds of his foreign income to the UK.

71. There is therefore an admissible interpretative background pointing to the legislation being meant to have a wide reach.

HMRC Guidance

72. These materials are also consistent with HMRC's guidance (albeit not law, and not expressed as having the force of law). This guidance is relevant in our overall interpretative exercise, because it is the guidance given by HMRC (the department tasked with the operation of these provisions) to its own officers and also to the public (now that Manuals are, to some extent, made publicly available).

73. This is to be found in the *Residence, Domicile and Remittance Basis Manual* (RDRM) §33420.

74. Not all the 'Examples' in that section are relevant. We disregard those which relate exclusively to a post-6 April 2017 scenario. Examples 2 and 4 are both relevant.

"Example 2"

75. Example 2 reads as follows:

> "Nelka sets up a trading company, Nelka Fashions Ltd, and asks Luther to invest in it. Luther invests £1m of his foreign income in the company which is an unlisted private company for which he receives newly issued shares.
>
> Nelka Fashions Ltd trades successfully and pays dividends to its shareholders, which Nelka and Luther declare on their respective tax returns. This is a commercial return on the investment and is not a potentially chargeable event.
>
> Subsequently, Nelka Fashions Ltd acquires an interest in a flat in Wimbledon together with tickets for Centre Court for each day of the tennis tournament with the intention to use these for marketing and publicity purposes. Instead, Luther and his family stay in the flat and use the tickets.
>
> Unless Luther takes the appropriate mitigation steps, he will be treated as having made a taxable remittance of £1m, as the use of the flat and the tickets have not been provided on arm's length terms.
>
> If Luther pays the commercial rate to Nelka Fashions Ltd for the use of the flat and tickets, there has not been an extraction of value by Luther and he does not have to take any mitigation steps."

"Example 4"

76. Example 4 reads as follows:

> "Avril owns a company which operates a mountain bike hire shop in Spain. As she lives in the UK, she asks her brother Zain to run the business as its sole director.
>
> In May 2017 Avril invests £2m in her UK company, which operates a clothing retail business, and the investment qualifies for BIR.
>
> This company is connected through common ownership to the one which operates the bike retail shop in Spain.

> In September 2017, Avril is given a spare mountain bike from the hire shop, free of charge. Because Avril is neither an employee nor a director of the company, she is not liable to income tax on the gifted mountain bike.
>
> Because the gift of the mountain bike is not directly attributable to the BIR qualifying investment, the extraction of value rule is not breached. Had the investment been made prior to 6 April 2017, it would have been, as both companies are connected and the full £2m would be treated as taxable remittance to the UK, if the appropriate mitigation steps had not been taken.
>
> The fact that the value received was only the free mountain bike is irrelevant."

77. Our reading of the purpose and its width is reflected in the so-styled "Examples" in HMRC's own guidance.

78. The purpose is not violated by trivial extractions of value. This is a bright-line approach, and is consistent with Example 4 in its Guidance, set out above, where (in relation to investments made before 6 April 2017) BIR on £2m is lost because of the value of a gifted mountain bike.

79. It is not clear to us why the Scenarios which the Appellant criticises, if the consequence of the natural and ordinary meaning, should be treated as "wholly unreasonable" and/or outwith the statutory purpose. Parliament was obviously aware of the potential for remitted income to "leak out" - that is to say, for the value to be extracted in ways which were indirect or ingenious.

Other provisions of the legislation

80. The expression 'extraction of value' should not be looked at entirely in isolation. It is part of a wider, self-contained scheme, set out in this Part of the Act. Wherever possible, a subsection should be read in the context of the section, and the section alongside the other sections in the Part, on the footing that the whole is intended to be harmonious.

81. It is striking that the definitions of 'relevant persons', and 'involved company' set out extensively above, are each compendiously drawn. Deployed in permutation, the width of their reach and capture is even greater. Parliament clearly had in mind that there was (at least, potentially) a very wide range of transactions, not vitiated by the anti-avoidance provisions, where nonetheless value could be extracted. In casting the nets of relevant person and involved company as widely as they did, Parliament did not want those transactions to benefit from the Relief.

82. In this regard, it is also relevant that the legislation provides for anti-avoidance, with the denial of the Relief otherwise available under s 809VA if 'the relevant event occurs, or the investment is made, as part of or as a result of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax': s 809VA(7). With the possible exception of the qualification of 'purpose/s' with 'main', this is a widely-drawn anti-avoidance clause.

83. It is also common ground that, at the relevant time, there were statutory mitigation measures available to the taxpayer in the event that value was extracted so as to preserve the relief. If a potentially chargeable event took place, then the "appropriate mitigation steps" were (in essence) that the taxpayer, with a 90-day 'grace period', should take the whole of the disposal proceeds offshore or re-invest: sections 809VI(1) and (2); 809VJ. Proceeds were "re-invested" if "a relevant person uses them to make another qualifying investment (or the

proceeds are themselves a qualifying investment) whether in the same or a different company": section 809VI(7).

84. An outcome where the whole of a £1m capital investment loses the relief because of a £1 (one pound) extraction of value might look surprising (and harsh) but (i) if the £1 is an extraction of value, then denial of the relief to the entirety of the investment is the ordinary effect of section 809VG(6); (ii) there is no de minimis or threshold or materiality condition in the legislation; (iii) there is no pro rata taxation in relation to extraction of value.

85. Overall, then, we agree with HMRC that the purpose of the extraction of value rule was to 'ring-fence' the foreign income, with only limited and tightly-constrained circumstances in which value could be extracted without losing the Relief.

86. It seems to us that Parliament did intend to legislate so that the value was held in ways which were (to pursue the expression) not "leaky", and where extraction of that value, where it happened, would be easy to identify so that the circumstances of the operation of the Relief were to be comprehensible not only to HMRC but also to taxpayers.

87. In our view, the advice given to Mr d'Angelin by his lawyers - "use of company's assets personally would be treated as an extraction of value and would breach the conditions of the relief" - was (albeit very brief) a fair and accurate summary of how the legislation was intended to operate.

Does the ordinary and natural meaning accord with the purpose of the legislation?

88. For the reasons set out above, we think that the ordinary and natural meaning does accord with the purpose of the legislation.

89. We are not persuaded that the scenarios identified by Mr Firth are in fact absurd so as to compel some different outcome. But, even if (contrary to our view) those were shown to be absurd, and that Parliament intended absurd outcomes, we are nonetheless of the view that the language is too "strong" to justify a departure from the interpretation which we have endorsed.

A1P1

90. A final test is whether this interpretation offends A1P1.

91. We are bound to read and give effect to the legislation in a manner compatible with human rights, "as far as it is possible to do so". In this instance, this means A1P1. We are reminded that, although this Tribunal is not a superior court of record, and does not have the power (for example) to make declarations, we should nonetheless not hesitate to grasp the nettle if the circumstances call for it.

92. On the footing that "the Appellant's right not to be deprived of the money that he will have to pay by way of tax if BIR is withdrawn" is a Convention right (noting that a similar point was said to have been 'common ground' in *Reeves v HMRC* [2018] UKUT 293 (TCC) at Para [101]) and even if it were prima facie infringed, A1P1 still provides that the existence of the right "shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes ...".

93. The decision of the Upper Tribunal (Proudman J) in *Joost Lobler v HMRC* [2015] UKUT 152 (TCC) is instructive. There, the FtT had identified what it described as 'an outrageously unfair result' arising as a result of certain provisions of the *Income Tax (Trading and Other Income) Act 2005* which deemed a person making a partial surrender of insurance policies as having realised taxable income, notwithstanding that person may have made no actual profit or gain on the policy. In Mr Lobler's case, he was taxed at an effective tax rate of

779% on actual income generated by the policy which he surrendered. In the Upper Tribunal, he argued that there had been a breach of his human rights. Proudman J dealt with this in a section of her decision which was (as she recognised) obiter.

94. Like Proudman J, we consider the three tests set out by the European Court of Human Rights in *NKM v Hungary* [2013] STC 1104.

95. We consider that the legislation is sufficiently accessible, precise and foreseeable in its application. The legislation does not allow for arbitrary interferences as the legislation is prescriptive as to when the relief is available and when it is not. The legislation, and its effects, were clearly known to the Appellant and his advisers: see the letter of 7 December 2016 referred to above.

96. We consider that the legislation pursues a legitimate aim in the public interest.

97. We consider that the interference with the right to peaceful enjoyment is proportionate, in the sense that it strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of (here, Mr d'Angelin's) fundamental rights.

98. At Paragraph [90] of *Lobler*, Proudman J said:

> "The means employed to achieve the public interest in this case amount to depriving Mr Lobler and his family of all their personal finances and leaving him in a state of possible bankruptcy. Each case must be considered individually on its own merits. Is it possible to conclude that the legislation in question is generally "devoid of reasonable foundation"? In my view the scales tip, only just, in favour of reasonable foundation because the law is not irrational or arbitrary. While it would be fairer if the gain on partial surrenders was calculated using a different and more proportionate method, the fact that it is not does not make the current method of calculating tax on partial surrenders devoid of reasonable foundation. Again, while it would be fairer if the law was simpler, the fact that it is not does not mean that there is a breach of human rights."

99. The "devoid of reasonable foundation" test recognises the width of the margin of appreciation enjoyed by Member States in framing tax legislation: see *Gasus Dosier and Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403 and *National and Provincial BS v UK* (1998) 25 EHRR 127; [1997] 69 TC 540 esp at [80].

100. We do not consider that it is possible to conclude that the legislation here is generally 'devoid of reasonable foundation'. To adopt Mrs Justice Proudman's expression, "the scales tip in favour of reasonable foundation". The legislation is not irrational or arbitrary. As in *Lobler*, there might have been fairer ways of accomplishing the same taxation objective - for instance taxing only the value extracted pro tanto, and not the entirety. But the provision that an extraction of value should lead to taxation of the whole is not disproportionate. The fact that the law might in certain circumstances be fairer does not mean that there is a breach of human rights.

101. Accordingly, the challenges as to interpretation and want of conformity with A1P1 fail.

THE VALUE ARGUMENT

102. We now turn to consider whether Mr d'Angelin extracted 'value'.

103. For the following reasons, we consider that he did extract value.

104. We do not agree with his argument that what he sought to describe as 'the temporary posting of the expenditure to the interest free DLA' was not 'value attributable to the

investment (directly or indirectly)'. 'Temporary' is simply inapposite to describe expenditure which sat on the DLA from 1 April 2017 - the earliest date we have seen - even to 28 March 2018 (the last date on the ledger which we have been shown), let alone to 31 December 2018 (in accordance with the 2017/18 Financial Statement).

105. The DLA was a facility which was in use, to the tune of tens of thousands of pounds, for a significant period of time.

106. We do not agree that it is relevant that the Company could very easily have declared dividends to extinguish the debt. Very simply, this is not a relevant consideration because it did not happen. The Company did not declare any interim dividend until April 2018, by which point the DLA had been in operation for anything between just over 12 months (if instituted on or shortly before 1 April 2017) and up to 16 months (if instituted on or shortly after 14 November 2016). We do not know the reasons why the Company did not declare any dividend before 13 April 2018, despite apparently having money to do so. But the hard and ineradicable fact is that it did not.

107. The parties have focussed much attention on the absence of interest, but this is only one factor. In our view, the existence and subsequent use of the DLA had value to the Appellant, in money or money's worth, over-and-above the absence of interest.

108. The DLA was completely informal. There was no loan instrument or note; nor any Company resolution or Board minute. None of Mr d'Angelin's extremely valuable (and, we imagine, scarce) managerial or executive time needed to be spent in negotiating it or setting it up. The only explanation is that it was simply brought into being because he wished it to be so.

109. It was a facility which did not need to exist in order for the Company to function: it was a 'nice-to-have'; not a 'must-have'. But it cannot have come into being inadvertently. Mr d'Angelin was the one and only person who could have authorised it. He must have wanted it, seen some purpose in having it, and seen something of value in having it.

110. Once in existence, its operation was entirely under his control and at his discretion: see (for example) our findings as to the absence of any identifiable pattern of repayment. We have no doubt that, as at least part of the reason for its coming into being, it was regarded as providing some benefit or convenience by Mr d'Angelin - and that, in operation, it did provide such benefit or convenience.

111. In our view, the Appellant's deployment of ITEPA, in effect, to supply a statutory rate of interest into an otherwise interest-free loan, where the employee is to be treated as having paid interest in that year equal to the cash equivalent, does not answer the issue, because, in the circumstances of this case, it is a form of legal fiction. We take account of the consolidated guidance to deeming provisions recently given by the *Supreme Court in Fowler v HMRC* [2020] UKSC 22 at Para [27]. In our view, the deeming provision here, if applied to keep the Investment within the Relief, is being applied in a way (i) which is not contemplated in ITEPA (although we accept that the ITA 2007 is a 'Tax Act' for the purposes of ITEPA); (ii) which would stretch the limits of the assumption which the deeming provisions require; (iii) which produces an anomalous result; (iv) as a deeming provision, sits uneasily on the fact that there is no evidence that the Company in making available, and in using, this interest-free loan, ever had a mind that it was to be anything other than interest-free.

112. We agree with the Appellant that the state of the taxpayer's knowledge as to whether what he is doing is or is not an extraction of value is not relevant in assessing whether there has, in fact, been an extraction of value (i) because it makes HMRC's task in administering the Relief more difficult, because it then needs to inquire into motive or intent; and/or (ii)

there is a risk of treating the well-informed taxpayer (which, in this regard, Mr d'Angelin can be said to be) differently (and more harshly) than the ill-informed.

113. For the sake of completeness, we do not consider that any argument that "value" should be assessed with reference to the personal circumstances of the taxpayer is viable. One difficulty is identification of the relevant attributes. If "other wealth" is relevant (ie, the taxpayer, because of their other financial resources did not actually need, from the company, the value being extracted from it) then (i) the wealthy taxpayer ends up being treated differently to the indigent; and (ii) the Relief becomes more difficult - or even impossible - for HMRC to apply.

114. We do not consider that the doctrine of subjective devaluation in the law of unjust enrichment (namely, if a benefit is not worth its market value to a particular person, it may be unjust to treat that person as having received a benefit possessing the value that benefit has to others) has any material part to play in this appeal. This is for the following reasons:

(1) The reasons already set out in relation to our finding as the natural and ordinary meaning of the word 'value'. The natural and ordinary meaning of 'value' is wider than that of 'market value' (which is a term of art);

(2) Moreover, the notion of subjective devaluation, if introduced into the legislation, makes the operation of the Relief almost impossible.

THE EXEMPTION ARGUMENT

115. The only remaining argument is whether what has happened is within the exemption in section 809VH(3). If it is, then there was no breach of the 'extraction of value' 'rule'.

116. The burden of establishing that he falls within the proper scope of the exemption lies on the Appellant. Insofar as material to disputed facts, the standard of proof is the ordinary civil standard.

117. The wording of the Exemption is important. There are several elements, all of which must be satisfied. In order to bring himself within the Exemption, the Appellant must:

(1) Have 'received value';

(2) Which has been 'paid or provided to him';

(3) 'in the ordinary course of business'; and

(4) 'on arm's-length terms'.

118. For the reasons already set out, we consider that the Appellant has 'received value' (limb i); and that this has been provided or paid to him (limb ii).

119. We therefore need only to assess limbs (iii) and (iv).

'In the ordinary course of business'

120. The legislation does not specify the meaning of this expression. We have taken it as an ordinary English expression, with an ordinary meaning. As an expert Tribunal (including an experienced businessman sitting as a member of the Tribunal in the composition of this panel) we apply our own knowledge and experience of what 'in the ordinary course of business' means.

121. Mr d'Angelin's oral evidence was that he had had a loan account with his previous employer, and had used it for personal expenses, subject to reconciliation and repayment, and that, to the best of his knowledge, such an arrangement was common in small and medium enterprises in his industry.

122. We accept this evidence.

123. It is consistent with our view that the making available by a company to one or more of its directors of a director's loan account is, at least in principle, a thing which is widely encountered in business, including in small and medium enterprises such as this one, and so is in 'the ordinary course of business'.

124. Albeit with some hesitation, we accept Mr d'Angelin's evidence that a loan account was not a unique facility to him, but was extended to both directors. We accept his explanation that the reason his co-director did not not avail himself of the facility was that he did not ask for it. That is consistent with the fact that the only loan account mentioned in the Financial Statements is that to Mr d'Angelin.

'On arm's-length terms'

125. Again, the legislation does not specify the meaning of this expression, but it is obviously intended to be something different from 'in the ordinary course of business' because, on the face of it, one could encounter something which could be in the ordinary course of business, but still not 'on arm's-length terms', and hence not within the Exemption.

126. The first point, self-evident, but not fatal to the exception (which deals with the *terms*, and not the *parties*) is that the DLA was not in fact negotiated at arms'-length. It could not have been. It would have been impossible for this to have been done when Mr d'Angelin was the sole director. The DLA was, in effect, implemented by Mr d'Angelin, then the sole director, on behalf of the Company (as lender) for himself (as borrower).

127. The DLA, as created, entirely informally, was interest-free, unsecured, and repayable on demand.

128. In our view, these are all departures from the norm as to the terms of a loan negotiated at arm's-length - that is to say, a loan as the end-product of a process where the prospective lender and the prospective borrower, each knowing their own business best, and each acting to preserve and advance their own commercial interests, including at the expense of the other party, each seek the best bargain.

129. The absence of interest, security, and term all happen to chime with Mr d'Angelin's evidence that the Loan was, in reality, being used as an administrative tool relating to his personal expenditure.

130. In terms of its operation: the timing and the extent of the payments made against it were entirely at Mr d'Angelin's discretion.

131. There is no evidence of any limit in terms of amount which could be borrowed; nor of any constraint in relation to the kind of personal expenses which could be charged to it.

132. Although there is evidence of some repayments (for example,the £11,544 recorded as repaid in the year ended 31 December 2017) there is no evidence of any demand for repayment (and indeed, up to and including 7 May 2017, the only person who could have given instructions to demand repayment from Mr d'Angelin would have been Mr d'Angelin himself). There is no evidence placed before us of any Company resolution or board minute as to the loan; its institution, use, or continuance. We have already observed that, as far as we can tell from the Financial Statements, the loan account was still extant and with monies outstanding on 31 December 2018.

133. Mr d'Angelin gave evidence that he could have asked his personal bank manager to have made a loan available to him, and that such a loan would certainly have been forthcoming, and, given Mr d'Angelin's finances, would have been at no- to low-interest. Although this evidence is not implausible, it encounters difficulties: (i) it is simply not what

actually happened - that is to say, it is an entirely counter-factual or hypothetical scenario; (ii) it is no more than Mr d'Angelin's ipse dixit; and (iii) it does not have (even for the purposes of the appeal) any corroborative evidence from the bank or bank manager.

134. In our view, for those reasons, the evidence falls short of discharging the burden placed on Mr d'Angelin, and limb (iv) is therefore not met.

Some concluding remarks

135. In Mr d'Angelin's circumstances, the regime could perhaps be seen as having operated in a way which is harsh. But that is the result simply of the provision that extraction of the value of any part of the remitted income renders the entirety (and not simply the extracted part) taxable. In that sense, the Relief is fragile, and easily lost.

136. In our view, the circumstances of this appeal - Mr d'Angelin making an investment, claiming BIR on that investment, but using money from the Company (repeatedly, and over a significant period of time) for personal expenditure - are, in our view, the very mischief at which the extraction of value rule is aimed. The consequence is that the Relief is lost.

137. It seems to us that the irreducible fact is that the Appellant, through his own actions (it makes no difference whether these were deliberate, or careless, or done in the face of advice to the contrary) took the £1.5m out of the Relief and into charge.

138. In its 'View of the Matter' letter, HMRC made it clear that they were not saying that there had been a deliberate attempt to extract value from DCL, and no such allegation was made before us. But HMRC said that "there has been a failure to adhere to the requirements of the legislation and as a result a potentially chargeable event has occurred". We agree.

139. In reaching our conclusion, the fact that the Appellant was expressly (and, in our view, clearly) told by his legal advisers, before making the investment, that 'use of the company's assets personally' would be treated as an extraction of value, leading to denial of the Relief is a neutral factor. The receipt of advice does not tell against the Appellant because there is no knowledge or culpability element in the availability or denial of the Relief. The Relief is either available, or it is not. Here, it is not.

CONCLUSION

140. Therefore, there was an extraction of value within the proper meaning and effect of the legislation, which was not within the Exemption.

141. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

142. 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.

TRIBUNAL JUDGE

DR CHRISTOPHER MCNALL

Release date: 30th MAY 2024