



TC02383

Appeal number: TC/2012/02936

*Corporation tax. Employee benefit trust. Section 43(11) Finance Act 1989.
Is a trustee an intermediary? Dextra Accessories and Sempra Metals
considered.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

B. W. MALE & SONS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GERAINT JONES Q. C.
RICHARD THOMAS ESQ**

Sitting in public at 45 Bedford Square, London WC1 on 05 November 2012.

Mr Grant of Smith & Williamson, Chartered Accountants, for the Appellant.

**Mr Griffin instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents.**

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DECISION

1. This appeal raises a short point, but one that is important to the appellant. Initially it was thought that a second point might fall for determination, that is, whether an amount appearing (and we use that word deliberately) in the appellant's accounts for its year ended 30 September 2002 is or is not properly to be seen as "an accrual".
2. When Mr Grant opened the appeal he informed us that the facts set out in paragraphs numbered 1 – 6 in the letter from the respondents dated 30 March 2011 are agreed.
3. The agreed facts are that the appellant company is a close company trading as a furniture and carpet retailer and property developer. It is agreed that on 29 October 2002 the appellant company executed a Trust Deed, whereby the "B W Male & Sons Ltd Employee Benefit Trust" was established. There are Minutes appearing in our bundle which show contributions to the Employee Benefit Trust of £15,000 on 29 October 2002 and £250,000 on 25 November 2002, a total of £265,000. It is also agreed (and can be seen from the Trust Deed) that the beneficiaries under the trust are the appellant's employees (which includes the directors), former employees, their respective spouses, dependants and personal representatives. Paragraph 6 of the letter records agreement concerning the use of some of the trust funds, the detail of which is not relevant to this Decision.
4. The monies were paid to the trustees. The monies so paid were shown as an accrual in the appellant's year end accounts to 30 September 2002. The respondents challenged the appellant's right to charge the £265,000 against profits. It opened an enquiry in June 2003. We now find ourselves, more than nine years later, having to determine whether the respondent was correct to disallow the deduction from profits and to add the sum of £265,000 back into the appellant's profits and amend the company's self-assessment accordingly.
5. The first issue that fell to be decided by us was whether the sum of £266,000 could be deducted from profits (and thus reduce the liability to corporation tax) on the basis that it was a payment (or series of payments) that fell outside section 43 Finance Act 1989. That is the legislative provision under which this appeal falls to be decided notwithstanding the change in the law introduced by the Finance Act 2003, schedule 24, which took effect from 27 November 2002. The relevant parts of section 43 are:
6. “(1) Subsection (2) below applies where—
7. (a) a calculation is made of profits or gains which are to be charged under Schedule D and are for a period of account ending after 5th April 1989,
8. (b) relevant emoluments would (apart from that subsection) be deducted in making the calculation, and

9. (c) the emoluments are not paid before the end of the period of nine months beginning with the end of that period of account.
10. (2) The emoluments—
11. (a) shall not be deducted in making the calculation mentioned in subsection 5 (1)(a) above, but
12. (b) shall be deducted in calculating profits or gains which are to be charged under Schedule D and are for the period of account in which the emoluments are paid.
13.
- 10 14. (10) For the purposes of this section "relevant emoluments" are emoluments for a period after 5th April 1989 allocated either—
15. (a) in respect of particular offices or employments (or both), or
16. (b) generally in respect of offices or employments (or both).
17. (11) This section applies in relation to potential emoluments as it applies in relation to relevant emoluments, and for this purpose—
- 15 18. (a) potential emoluments are amounts or benefits reserved in the accounts of an employer, or held by an intermediary, with a view to their becoming relevant emoluments;
19. (b) potential emoluments are paid when they become relevant emoluments which are paid."
- 20 20. In this case we are concerned only with "potential emoluments", as the parties were agreed that no actual emoluments had been paid by the trustees. And since no actual emoluments had been paid by the trustees, clearly no relevant emoluments derived from potential emoluments had been paid within nine months of the end of the period of account that ended on 30 September 2002.
- 25 21. Mr Grant argued his case for the payment(s) to fall outside the scope of section 43(11) FA 1989 on the basis that "potential emoluments" albeit caught by section 43 by reference to section 43(11), nonetheless fell outside section 43 because they were only caught by it if "held by an intermediary with a view to becoming relevant emoluments."
- 30 22. Mr Grant argued that the trustees appointed under the Trust Deed were not an intermediary for the purpose of section 43. He put his argument on the basis that the etymological meaning of the word "intermediary" requires such a person to act as an agent or go-between between two other parties. He pointed to those who would ordinarily be understood to be intermediaries, such as estate agents, mortgage brokers, 35 financial advisers and commodity brokers. He argued that the trustees of the Trust could not be intermediaries because if they were to fulfil their fiduciary duties to the

beneficiaries of the trust, they must act independently of the settlor and exercise the discretion vested in them in accordance with the terms of the Trust Deed wholly uninfluenced by external pressures. As a statement of the requirements placed upon trustees as a matter of trust law, that submission cannot be impugned.

5 23. In *Dextra Accessories Ltd v Macdonald* [2002] STC 413 Leading Counsel had conceded and accepted that the trustees of the relevant settlement were properly to be regarded as intermediaries. Thus, argued Mr Grant, it gives little assistance because it is trite law that a concession acted upon by a court does not establish any legal principle and has little or no value in precedent.

10 24. Mr Grant also argued that the decision of this Tribunal in *Sempra Metals Ltd v HMRC* [2008], where the Tribunal, at paragraphs 102 – 108 of its Decision decided that trustees (in factual circumstances directly analogous to this case) were intermediaries for the purpose of section 43, was wrongly decided and should not be followed. It is for that reason that we took particular note of the reasoning of the
15 Tribunal in paragraphs 102 – 108 of its Decision. It is perhaps worthy of note that Leading Counsel, Mr Thornhill Q.C. appeared for the appellant in that appeal and certainly did not make the same concession as had previously been made in the *Dextra* case.

20 25. Mr Griffin responded that although the decision in *Dextra* did not create a precedent that had to be followed by an inferior Tribunal, it was still significant because that case went on appeal and, in paragraph 17 of his judgement, Mr Justice Neuberger at [2003] EWHC 872 commented that he thought that the concession made by Mr Thornhill Q.C. has been rightly made. To like effect is the comment of Lord Justice Parker when the same case reached the Court of Appeal where at paragraph 62
25 of his judgement he also commented that he thought the earlier concession had been correctly made.

26. It is correct for Mr Grant to submit that those references amount to obiter dicta and are not binding. We have that point very much in mind.

30 27. So far as the decision in *Sempra* is concerned Mr Grant submitted that it is a decision of a Tribunal of co-ordinate jurisdiction and so whilst it might be persuasive, it is not binding upon us if we do not consider that it was rightly decided. We accept that proposition of law.

35 28. We return to the fundamental issue in this case which is whether the trustees, in Jersey, were or were not an intermediary within the meaning of section 43(11) of the 1989 Act. Whilst we accept that the word "intermediary" normally carries with it a connotation of some form of agency or putting parties into a relationship with one another which otherwise might not exist, that does not necessarily exclude trustees simply because in the exercise of their fiduciary duty as trustees they must act impartially in accordance with those duties. It seems to us that there are two kinds of
40 intermediary. The first is an intermediary in the most usual sense, that is, somebody who acts as an agent (often for remuneration – but not necessarily so). The second is an intermediary in the sense that he or it acts as a conduit for the transfer of, in this

case, money or benefits in kind representing money, to a group of potential recipients whose receipt of such benefits is dependent upon the trustees exercising a power of appointment (discretion) in their favour.

5 29. We feel unable to accept the underlying proposition advanced by Mr Grant that
where a fiduciary must act independently in accordance with the duties assumed by a
fiduciary, that automatically means that such a trustee cannot be an intermediary. That
is to proceed on the basis that such a fiduciary has only one function whereas, in
10 reality, a trustee may have several functions to perform, some of a fiduciary nature
and others that are not of a fiduciary nature. The first function is to decide who, from
the potential pool of beneficiaries, is to receive what and when. That is where the
fiduciary duty is in play. The second function is to distribute funds to the person or
persons in whose favour the trustees have exercised their discretion, then acting as a
mere functionary to distribute funds which have been paid to them for distribution
15 once they have exercised that powers of appointment under the Trust Deed. That
second function does not involve any kind of fiduciary duty. It is merely a mechanical
function of distributing funds made available by the settlor to those who are, by that
time, entitled to receive same. In our judgement such a person is acting as an
intermediary where, for example, trustees act as a functionary only subsequent to the
exercise by them of the power of appointment vested in them under the Trust Deed.

20 30. Accordingly, we are of the view that we should follow the decision of this
Tribunal in *Sempra* for the reason that we have set out above.

31. It was common ground between us that if the appellant failed on this first point,
that is, the "intermediary" point, this appeal must fail.

25 32. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
which accompanies and forms part of this decision notice.

33. Decision.

34. Appeal dismissed.

GERAINT JONES Q. C.

35

TRIBUNAL JUDGE

RELEASE DATE: 26 November 2012

