TC03103

Appeal number: TC/2010/09065 & TC/2010/09066

INCOME TAX – whether emoluments from employment – PAYE - whether employer liable – whether inspector precluded from raising Discovery Assessment - Langham v Veltema followed – whether tax avoidance – whether transfer of assets abroad

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP BOYLE **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL GORT
MIKE BELL ACA CTA

Sitting in London on 20 to 23 May 2013

Ms Sian Woods, Consultant with Accountax Consulting appeared on behalf of the Appellant.

Ms Aparna Nathan of Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs appeared on behalf of the Respondents.

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DECISION

1. This is an appeal against:

(i) a discovery assessment raised on 10 January 2008 in respect of the tax year 2001/2002 in respect of additional income in the sum of £26,922;

(ii) a closure notice issued on 25 October 2010 in respect of the tax year 2002/2003 in respect of additional income in the sum of £49,998;

(iii) a discovery assessment for the tax year 2003/2004 raised on 21 January 2008 in respect of additional income in the sum of £30,524.

2. The sums are said by the Respondents ("HMRC") to be due either as additional employment income under the Income and Corporation Taxes Act 1988 ("ICTA 1988") in the case of (i) and (ii) and, in the case of (iii), under the Income Tax Earnings and Pensions Act 2003 ("ITEPA 2003"), or in the alternative, in the case of (i), (ii) and (iii) as additional other income under section 739 of the Income & Corporation Taxes Act 1988 ("ICTA").

3. HMRC had originally issued a discovery assessment in respect of 2002/03. During the statutory review process HMRC learned that there was an open enquiry (opened on 9 December 2004), which rendered the discovery assessment void. HMRC then issued the Closure Notice on 25 October 2010 in the same amounts in respect of the year ended 5 April 2003.

4. By a notice of appeal dated 22 November 2010 the Appellant ("Mr Boyle") appealed on the ground that "the legislation does not apply" and further that "there is no additional income tax due".

5. **Legislation**

Substantive Issues: Employment Income and PAYE

Tax Years ended 5 April 2002 and 5 April 2003: ICTA

Section 19 ICTA imposed an income tax charge on "emoluments" and provides (so far as relevant):

> "(1) Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more than one of the following Cases –
>
> Case I: Any emoluments for any year of assessment in which the person holding the office or employment is ordinarily resident in the United Kingdom …
>
> And tax shall not be chargeable in respect of emoluments of an office or employment under any other paragraph of this Schedule."

Section 131 ICTA provided so far as relevant:

"(1) Tax under Case I … of Schedule E shall, except as provided to the contrary by way of provision of the Tax Acts, be chargeable on the full amount of the emoluments falling under that Case, subject to such deductions only as may be authorised by the Tax Acts, and the expression "emoluments" shall include all salaries, fees, wages, perquisites and profits whatsoever."

Section 160 ICTA provided so far as relevant:

"(1) Where in the case of a person employed in employment to which this Chapter applies there is outstanding for the whole or part of a year a loan (whether to the employee himself or a relative of his) of which the benefit is obtained by reason of his employment and –

(a) no interest is paid on the loan for that year; or

(b) the amount of interest paid on it for the year is less than interest at the official rate,

An amount equal to whatever is the cash equivalent of the benefits of the loan for that year shall, subject to the provisions of this chapter, be treated as emoluments of the employment, and accordingly chargeable to tax under Schedule "; and where that amount is so treated, the employee is to be treated as having paid interest on the loan in that year of the same amount.

…

(2) Where in the case of a person employed in employment to which this chapter applies -

(a) there is in any year released or written off the whole or part of a loan (whether to the employee himself or a relative of his, and whether or not such a loan as is mentioned in subsection (1) above), and

(b) the benefit of that loan was obtained by reason of his employment,

then there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to that which is released or written off.

…

(5) In this section, sections 161 [, 161B] and 162 and [Schedules 7 and 7A] –

(a) "loan" includes any form of credit;

(b) …

(c) References to making a loan include arranging, guaranteeing or in any way facilitating a loan (related expressions being construed accordingly); and

…

(7) Subject to section 161, this section applies to loans whether made before or after this Act is passed.]"

Paragraph 1 of Schedule 7 to ICTA provides as follows in relation to the meaning of "by reason of employment":

"1. – (1) Subject to sub-paragraph (5) below, the benefit of a loan is obtained by reason of a person's employment if, in relation to that person, it is of a class described in sub-paragraphs (2), (3) or (4\0 below.

(2) A loan make by his employer.

(3) a loan made by a company –

(a) over which his employer had control;

(b) by which his employer (being a company) was controlled; or

(c) which was controlled by a person by whom his employer (being a company) was controlled.

…

(5) Sub-paragraphs (2) and (4) above do not apply to a loan made by an individual in the normal course of his domestic, family or personal relationships."

Section 203(1) ICTA provided for the operation of PAYE by the employer, "on the making of any payment of, or on account of, any income assessable to income tax under Schedule E".

Tax Year Ended 5 April 2004: ITEPA

Schedule 1 ITEPA imposes an income tax charge on "employment income".

Section 7 ITEPA states that "employment income" means (a) earnings within Chapter 1 of Part 3 (s62 et seq), (b) any amount treated as earnings; and (c) any amount that counts as employment income.

Section 62 ITEPA defines "earnings" as:

"(1) This section explains what is mean by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means –

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is –

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7))."

Section 6(4) ITEPA provides that the person liable to tax in respect of employment income is set out in s13 ITEPA.

Section 13(2) ITEPA confirms that where the tax is on general earnings, the person liable is the person to whose employment the earnings relate. The Respondents submit that the Appellant is "the taxable person" within s13(2) ITEPA.

Section 173 ITEPA provides so far as relevant:

"(1) This Chapter applies to a loan if it is an employment-related loan.

(2) In this Chapter –

(a) "loan" includes any form of credit, and

(b) references to making a loan (and related expressions) including arranging, guaranteeing or in any way facilitating a loan.

…

Section 174 ITEPA provides so far as relevant:

"(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 controlled that close company.

(3) In this section –

"employee" includes a prospective employee, and

"employer" includes a prospective employer.

…"

Section 188(1) ITEPA provides so far as relevant:

"(1) 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."

The assessment, collection and recovery of income tax in relation to income that is PAYE income is set out at s683 et seq TEPA. "PAYE income" is defined at s683 (so far as relevant):

"(1) For the purposes of this Act and any other enactment (whenever passed) "PAYE income" for a tax year consists of –

(a) any PAYE employment income for the year,

(b) any PAYE pension income for the year, and

(c) any PAYE social security income for the year.

(2) "PAYE employment income" for a tax year means income which consists of –

(a) any taxable earnings from any employment in the year (determined in accordance with section 10(2)), and

(b) any taxable specific income from an employment for the year (determined in accordance with section 19(3)),

…"

Section 684 ITEPA requires that the Respondents must make regulations ("PAYE regulations") with respect to the assessment, charge, collection and recovery of income tax in respect of all PAYE income.

The PAYE Regulations

The PAYE regulations, as they applied to all the relevant tax years, are set out in Income Tax (Employment) Regulations 1993 ("1993 Regulations").

The requirement for an employer to operate PAYE is set out in Regulation 6 Income Tax (Employments) Regulations 1993, which states that

> "Subject to the conditions specified in Paragraph (2), every employer, on making any payment of emoluments to any employee during any year, shall deduct or repay tax in accordance with these Regulations by reference to the appropriate code"

Substantive Issue: Transfer of Assets

Section 739 ICTA provides:

> "**Prevention of avoidance of income tax**
>
> (1) Subject to section 474(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in accordance of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> (1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) apply only if –
>
> (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
>
> (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was affected.
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.
>
> (3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled outside the

United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.

(4) In subsection (3) above "capital sum" means, subject to subsection (5) below –

(a) any sum paid or payable by way of loan or repayment of a loan, and

(b) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth.

(5) For the purposes of subsection (3) above, there shall be treated as a capital sum which an individual receives or is entitled to receive any sum which a third person receives or is entitled to receive at the individual's direction or by virtue of the assignment by him of his right to receive it.

(6) Income shall not by virtue of subsection (3) above be deemed to be that of an individual for any year of assessment by reason only of his having received a sum by way of loan if that sum has been wholly repaid before the beginning of that year."

Section 742 ICTA sets out the interpretive provisions:

"**742 Interpretation of sections 739 to 741**

(1) For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.

(2) An individual shall, for the purposes of section 739, be deemed to have power to enjoy income of a person resident or domiciled outside the United Kingdom if –

(a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to enure for the benefit of the individual; or

(b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or

(c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or

(d) the individual may, in the event of the exercise or successive exercise of one or more powers, by whomsoever exercisable and

whether with or without the consent of any other person, become entitled to the beneficial enjoyment of the income; or

(e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income.

(3) In determining whether an individual has power to enjoy income within the meaning of subsection (2) above –

(a) regard shall be had to the substantial result and effect of the transfer and any associated operations, and

(b) all benefits which may at any time accrue to the individual (whether or not he has rights at law or in equity in or to those benefits) as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits.

(4) Subsection (5) below applies where a person resident or domiciled outside the United Kingdom throughout any chargeable period in which an interest period (or part of it) falls would, at the end of the interest period, have been treated under section 714(2) as receiving annual profits or gains or annual profits or gains of a greater amount if he had been resident or domiciled in the United Kingdom during a part of each such chargeable period.

(5) Sections 739 to 741 shall have effect as if the amount which the person would be treated as receiving or the additional amount (as the case may be) were income becoming payable to him; and, accordingly any reference in those sections to income of (or payable or arising to) such a person shall be read as including a reference to such an amount.

(6) Where income of a person resident or domiciled outside the United Kingdom throughout any chargeable period in which an interest period (or part of it) falls consists of interest –

(a) which falls due to the end of the interest period, and

(b) which would have been treated under section 714(5) as reduced by an allowance or an allowance of a greater amount if he had been resident or domiciled in the United Kingdom during a part of each such chargeable period,

then for the purposes of sections 739 to 741, the interest shall be treated as being reduced by the amount of the allowance or by the additional amount (as the case may be).

(7) In subsections (4) to (6) above "interest period" has the meaning given by section 711.

(8) For the purposes of sections 739 to 741, any body corporate incorporated outside the United Kingdom … shall be treated as if it were resident outside the United Kingdom whether it is so resident or not.

(9) For the purposes of sections 739 to 741 –

(a) a reference to an individual shall be deemed to include the wife or husband of the individual;

(b) "assets" includes property or rights of any kind and "transfer", in relation to rights, includes the creation of those rights;

(c) "benefit" includes a payment of any kind;

(d) …

(e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that income or those accumulations are or have been transferred."

Section 741 ICTA sets out an exemption to the application of ss739 and 740 ICTA and provided so far as relevant:

"Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either –

(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were affected; or

(b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

Procedural Issue: Discovery Assessment

Section 29 TMA 1970, which deals with discovery assessments in relation to individuals, provides:

"(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

…

(3) Where the taxpayer has made and delivered a return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment], he shall not be assessed under subsection (1) above -

(a) in respect of the [year of assessment] mentioned in that subsection; and

(b) … in the same capacity as that in which he made and delivered the return,

Unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board –

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment]; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if -

(a) it is contained in the taxpayer's return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment] (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant [year of assessment] by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing by the taxpayer to an officer of the Board,"

The background

6. Some time in 2002 a local office enquiry was opened into an individual taxpayer's use of a tax avoidance scheme. This enquiry was referred to a Dr Len Jacobs of the Special Compliance Office, "Special Investigations" ("SI") of HMRC in Bristol. The individual taxpayer concerned had later taken up employment with a London-based company called Sandfield Systems Limited ("SSL"), and subsequently with Sandfield Consultants Limited ("SCL"), at which time a significant fall in his income was noticed. The taxpayer's agent advised that the reason for the drop in income was that either SSL or SCL kept around two-thirds of the income generated by the taxpayer and then paid this to him by way of a loan made in a rapidly depreciating currency. The taxpayer in question was not Philip Boyle, the Appellant in this case, but these background facts are relevant, the companies involved and the arrangements made appearing to us to be the same as in Mr Boyle's case.

7. Dr Jacobs notified the taxpayer in that case and his agent that he had taken over responsibility for the ongoing investigation. On 23 January 2003 Dr Jacobs wrote to the agents for SSL to notify them of his decision to open an enquiry into the company's tax affairs. These enquiries continued in parallel with the enquiry into the individual, and also an inquiry into a UK company called Sandfield Consulting UK Limited, relating to a scheme involving partnerships. This last enquiry is not relevant to the one investigating SSL and SCL, which became an enquiry into what was known as the Sandfield Loan Scheme ("the Scheme").

8. On 26 February 2003 Dr Jacobs held a meeting with *inter alios* a Brian Garside of Garside & Co ("Garside") specialists in this type of investigation who had been brought in by SSL's agent, and a Paul Bishopp, managing director of SSL. It was learned at that meeting that SSL had a master service agreement with SCL, which was an Isle of Man company, having been transferred there on 9 August 2001. SSL received 5% of its turnover as a commission for administration and invoicing services on behalf of SCL. SSL administered the payroll and remitted the appropriate amounts to the individual employees of SCL and to the Collector of Taxes (PAYE and National Insurance). It retained the 5% commission plus VAT from the balance of funds received and remitted the remainder to SCL or its agents.

9. In the course of several meetings and much correspondence Dr Jacobs learned that in all cases SCL's employees' ratio of earnings to loans was about the same, being around one-third.

10. On 17 to 18 November 2003 Dr Jacobs visited SSL's premises in London and was given access to its business records in respect of the Scheme covering the tax

year ended 5 April 2002. Copies of SSL's invoices to SCL dated 3 October 2001 to 9 November 2001 were obtained by Dr Jacobs.

11. Paul Bishopp, the director of SSL, was also a director of a company called Consulting Overseas Limited ("COL") and of Sandfield Consulting UK Limited. COL marketed the Scheme and was the tax agent for SCL's employees. SCL had no assets in the UK.

12. All the employees of SCL used Credex International SA ("Credex"), a foreign exchange broker, when taking out the loans in question. Credex was a Bulgarian-based company registered in the British Virgin Isles. Its directors were a Mr Emil Manov and Mr James Espir who was an employee of SSL whilst the Sandfield Loan Scheme operated and had a COL e-mail account. Emil Manov and his wife were co-owners of Credex and also of a broker, Laro Inc., a Mauritius-based company. SCL is a wholly-owned subsidiary of Laro Inc.

13. Credex' business as a foreign exchange broker was web-based. Its website ceased to be accessible after the last loan payment was made by SCL on 10 February 2004. At the meeting on 17 November 2003, to demonstrate to Dr Jacobs that Credex' website worked, Garside had opened an account with Credex. An e-mail provided by Garside was found to have been automatically redirected to COL. Paul Bishopp subsequently acknowledged that Credex only dealt with Sandfield employees.

14. A number of payment orders from Credex are shown as coming from Credex Intl SA Aston International c/o Aston Corporate Services. Aston is a company registered in the Isle of Man. On its website its address is the same as SCL's registered office in the Isle of Man.

15. Brian Garside had maintained that the loans which were advanced to SCL's employees were repaid by them in full within one year and a commercial rate of interest was charged. Dr Jacobs sought, but was unable to obtain, evidence that the foreign currency involved in loans to the employees in the Sandfield Loan Scheme existed.

16. Dr Jacobs obtained a list of employees of SCL which included Mr Boyle from the P14s which had been submitted on behalf of SCL. In November 2004 a company, Chiltern Plc ("Chiltern") wrote to Dr Jacobs stating that COL had asked them to assist in handling PAYE matters on behalf of SCL and its employees.

The Issues

17. The main issues for determination by the Tribunal are as follows:

(i) Whether Mr Boyle is liable to income tax on emoluments/employment income (as appropriate to the year of assessment concerned) in respect of purported loans made by his employer, SCL.

(ii) Whether, if Mr Boyle is so liable, he is entitled to credit for income tax that ought to have been deducted by the employer (in accordance with Regulation 101(4)–(6) 1993 Regulations).

(iii) Whether in the alternative Mr Boyle is liable to income tax in respect of the arrangements by virtue of the transfer of assets provisions.

(iv) Whether the discovery assessment relating to 2003/2004 tax year is valid.

(v) Whether the quantum of the determinations was excessive.

18. **Agreed statement of facts**

(These were provided on behalf of Mr Boyle, but as can be seen from footnote 1 HMRC did not agree to the legal categorisation or that all the steps took place).

"(i) On or around 17 September 2001, the Appellant entered into a contract of employment with Sandfield Consultants Limited ("SCL"), a company registered in the Isle of Man with a UK representative office at 1 Royal Exchange Avenue, London EC3V 3LT.

(ii) SCL contracted with UK businesses to provide the services of its employees, including the Appellant.

(iii) The Appellant was paid a salary, and also participated in a soft currency loan scheme arranged by SCL, a scheme which worked as follows:[1].

(a) SCL's Rumeneration (sic) Committee would give notice to all employees that it would at approximately five-week intervals "meet … to consider and review staff loans and fringe benefits".

(b) The loans made by SCL, were in either Romanian Lei, Byelorussian Roubles or in Uzbekistani Soums.

(c) The Appellant was introduced to a company, said to be based in Bulgaria, named Credex International SA ("Credex"). Credex was incorporated in the British Virgin Islands. The loaned currency would then be credited to an account the Appellant opened with Credex.

(d) The Appellant and Credex would on the same day enter into a "physical spot trade" and a "one-year forward trade".

(e) In the "physical spot trade", Credex would arrange for a third party to buy the Lei, Roubles or Soums from the Appellant, converting it to Sterling.

(f) In the "one-year forward trade", Credex would sell the Appellant a greater number of Roubles or Soums, as the case may be with:

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[1] It should be noted that paragraph 18(iii)(a)-(h) is agreed to set out the nature of the soft-loan scheme. It should not be taken that HMRC agrees to the legal categorisation of any payments (e.g. as loans, existence of interest, etc), or that any or all of the steps took place.

a) the appellant paying the sale price on the day of the trades, and

b) delivery of the Roubles or Soums to take place after one year.

(g) The Roubles or Soums payable under the "one-year forward trades" would be paid directly by Credex to SCL to discharge the loan made to the Appellant.

(h) Appendix 1 summarises the foreign exchange transactions for which the Appellant has provided evidence. "Buy" represents the "physical spot trade"; "sell" represents the "one-year forward trade".

(iv) The Appellant's tax returns for the year from 2001/02 to 2003/04 state the following:

Year	Total income returned	Income from SCL
2000/01	49,196.00	n/a
2001/02	40,580.00	13,461.00[2]
2002/03	24,999.00	24,999.96
3003/04	29,721.00[3]	15,262.80

The returns for 2001/02 to 2003/04 attributed the above income to employment with SCL, but did not include any profit from the foreign exchange transactions, or any mention of those transactions, or the loans.

(v) The Respondents wrote to the Appellant in December 2004 advising that they believed additional income ought to be assessed for 2002/03 and 2003/04.

(vi) A section 9A TMA 1970 enquiry was opened into the 2002/03 tax year.

(vii) No enquiries under section 9A TMA 1970 were opened into either 2001/02 or 2003/04.

(viii) Discovery assessment for the years ended 5 April 2002 and 2004 were raised in January 2008. A closure notice was issued in respect of the year ended 2003."

There was an Appendix to the Agreed Statement of Facts which we set out as Appendix 1.

HMRC's Evidence re Mr Boyle's Tax Returns

[2] The balance of £27,119.00 was from previous employment with Highinspire Ltd.

[3] The balance of £14,459.00 was from employment with Actinium Management Ltd (£1,500) and company dividends of £12,959.00.

19. Mr Boyle's declared salary for the relevant years is set out at paragraph 18 above. His tax return for the year ended 5 April 2002 was received by HMRC on 16 December 2002. His tax return for the year ended 5 April 2003 was received on 25 March 2004. HMRC opened a Section 9A enquiry into the tax return for the year ended 5 April 2003 on 9 December 2004. As a result of the enquiry, a notice of assessment for the year ended 5 April 2002 was issued on 10 January 2008; Mr Boyle's tax return for the year ended 5 April 2004 was received by HMRC on 27 April 2005. Notices of further assessments for years ending 5 April 2003 and 5 April 2004 were issued on 21 January 2008. Mr Boyle appealed these notices of assessment on 10 November 2008. He requested a review by letter dated 21 July 2010. In accordance with the provisions of section 49B Taxes Management Act 1970, HMRC's updated view of the matter in question was notified to Mr Boyle in a letter dated 10 September 2010. By a letter dated 19 October 2010 the reviewing officer upheld the discovery assessments in relation to 2001/2002 and 2003/2004 but held that procedurally the discovery assessment for 2002/2003 should be withdrawn and replaced by a closure notice in the same amount. Mr Boyle notified his appeal to the Tribunal by notice of appeal dated 22 November 2010.

20. The amounts available to Mr Boyle for loans and received by him as shown in his bank account are set out the following table.

Date	Available for loans	Anticipated Date of Receipt into the Appellant's bank Account	Amounts received
31/10/2001	£3,633.23	05/11/2001	£2,848.38
12/12/2001	£6,901.94	17/12/2001	£5,276.98
23/01/2002	£3,386.01	28/01/2002	£2,639.93
28/02/2002	£2,925.84	05/03/2002	£2,295.72
	£16,877.02		**£13,061.01**

21. This record is incomplete, Mr Boyle having supplied no documentation in relation to the years 2002/2003 and 2003/2004. Also agreed and set out in Appendix 1 to the agreed statement of facts was a table setting out the rate at which Mr Boyle bought and sold the foreign currency. On each occasion it shows that the foreign currency was bought at a price considerably less than the price at which it was sold.

22. We were subsequently supplied with the following figures for determining the assessments which differ from the estimated figures in the assessments:-

Emoluments/Earnings

	Additional Income	Additional Income Tax Due
2001/02	£13,061.00	£5,224.40
2002/03	£39,505.00	£14,089.12
2003/04	£21,944.00	£8,389.84

Transfer of Assets Abroad

	Additional Income	Additional Income Tax Due
2001/02	£16,877.00	£6,750.80
2002/03	£51,142.00	£18,743.92
2003/04	£28,546.00	£11,030.00

The Sandfield Loan Scheme – other evidence

23. The scheme operated between May 2000 and February 2004. On 9 August 2001 (before the time at which Mr Boyle had joined SCL) COL had written to the employees of SSL informing them that their employment contracts were being changed and were now in the name of SCL, not SSL.

24. As stated above, as from 9 August 2001 SCL was registered in the Isle of Man and had no employees in the United Kingdom.

25. The following is for the most part taken from the largely uncontested evidence of Mr Kerry Rowe, as set out in his decision letter of 10 September 2010, and is evidence which we accept.

26. The Scheme was marketed by COL, and was designed and marketed as a remuneration package that could achieve substantial income tax and national insurance contributions ("NIC") savings.

27. At an initial meeting each prospective user of the Scheme was provided with an overview of how the Scheme was said to operate and an Employee Benefit Tax Calculator ("the EBTC"), based on that individual's potential annual earnings, to demonstrate the income tax and NIC savings that could be made by them in using the Scheme. A copy of the EBTC was with the documents produced by Mr Rowe. After the initial meeting COL would send the prospective user of the Scheme a package of documents by e-mail. The documents as well as the EBTC included an introduction to the services being offered, details of how the Scheme was said to operate, a specimen of a Sandfield employment contract (which stated that the Company's address was in the Isle of Man), specimen examples of Notification of Loan letters and drafts of letters to be sent to SCL and Credex. Also included with the documents sent by SSL was a list of 21 currency brokers and a letter which stated *inter alia*:

"While there are many brokers that deal with major currencies, only a few handle some of the minor currencies. You are of course under no obligation to open such an account.

"For some of the minor currencies used on occasion by Sandfield we have found the following to be a broker willing to deal in such currencies:

Credex International SA
Topli Dol 3 # 9
1680 Sofia
Bulgaria

and

Goretskogo Strasse 63
Minsk 220022
Republic of Belarus

See their website www.credexinternational.com for further information and account opening procedures."

28. After an individual agreed to join the Scheme, COL would arrange for that individual to be employed by SCL, with the individual signing a contract of employment with SCL. SCL would provide the services of the employee to third parties, either directly or via separate agreements with unrelated employment agencies.

29. SCL stated at the foot of its correspondence with employees that it had a UK representative office at 1 Royal Exchange Avenue, London EC3V 3LT. Its registered office was shown as being in the Isle of Man.

30. The employee, having been provided with all the necessary details in the package of documents provided to them by COL, would log on to Credex' website to register their details and open their foreign exchange brokerage account. The employee would send Credex, via COL, the letter contained in the package of documents supplied to them by COL.

31. Once the initial paperwork was put in place the employee did not have to do anything else. SCL would continue to provide the services of the employee to the end-user, raising invoices and receiving payment in respect of these.

32. SCL would pay the employee a monthly salary, set at a level agreed with them, to which PAYE was applied. The salary was set considerably below the actual amount of income each employee would generate for SCL. The difference between what was invoiced by SCL on behalf of the employee and the amounts paid out as salary and employer's NIC would then be "available for loans". The employee would be provided with summary sheets, typically monthly, detailing this. Attached to this summary sheet the employee received a Notification of Loan letter specifying the

amount of foreign currency they had apparently been loaned, together with a Loan Repayment Letter.

33. The employee received e-mails from Credex containing Excel Spreadsheets that constituted their statement in respect of their foreign exchange brokerage account. These statements would show that their account had received the amount of foreign currency expressed in the Notification of Loan letter from SCL and would show it being immediately sold and converted to sterling. The statement also showed an open position to purchase the same currency, plus an additional amount equal to the official rate of interest, in one year's time and the cost of that position. The difference between the two was then paid into the employee's bank account.

34. The Credex statements ceased to be issued after the employee had received their last loan, irrespective of whether the employee continued to have open positions in respect of loans due to be repaid over the next year. No other transactions, apart from the loans from SCL, were conducted by the employees through their Credex account. The forward rate used by Credex did not correspond with any historical data available to HMRC regarding the date of depreciation of the relevant foreign currency against sterling. Irrespective of market conditions and the actual changes in the currency selected, the forward rate used by Credex always resulted in the employee receiving between 76 to 78% of the amount "available for loans". This essentially matched the amount the employee was quoted by COL as the "loan retention rate", via their EBTC when they joined the Scheme.

35. The formula used by Credex to arrive at the forward rate did not change once Credex had historical data of its own to use. Mr Rowe gave an example of this as follows: When the employees received their first loan in Uzbekistan Soums (UZS) on 4 October 2002, according to their Credex statements, they were able immediately to convert the UZS they received into sterling at an exchange rate of 1,270 UZS to the pound. The forward rate used in the corresponding forward contract was 5,890 UZS to the pound. The forward contract therefore assumed that the UZS would depreciate against the sterling, with a value of only 22% of where it had been one year before. A little over a year later when SCL made another UZS loan to employees on 12 November 2003, the employee was able immediately to convert the UZS they received into sterling at an exchange rate of 1,620 UZS to the pound. Based on Credex exchange rates, the UZS had depreciated against the sterling over the year, but at nothing like the rate it had predicted in respect of the 4 October 2002 forward contract, on which Credex stood to make a substantial loss. Despite this, the employees were able to secure from Credex another forward contract to buy UZS in one year's time at a rate of 7,305 UZS to the pound. The forward contract therefore assumed that the UZS would depreciate against sterling, retaining a value of only 22% of where it had been one year before.

36. HMRC had been unable to obtain full information about Credex or Emevex, a Bulgarian Currency Company, or any information on any other Forex Exchange Company with which employees of SCL had taken loans. Equally they had been unable to establish the origin of the money used by SCL to fund the loans.

HMRC's investigation into SCL's employees

37. Further to Chiltern's involvement on behalf of various SCL employees in November 2004, over a period of time some of those employees had reached a settlement with HMRC subject to a repayment clause. That clause provided that, should the Scheme be successfully defended before the Commissioners or the Courts, they would be entitled to a repayment. Mr Boyle was not represented by Chiltern at this stage, but had been the recipient of a letter dated 9 December 2004 sent by Dr Jacobs to all those who were known to have been employed by SCL and who had possibly taken part in the Scheme. The opening paragraphs of that letter state:

> "I understand that you are or have been employed by Sandfield and that you may have taken advantage of a marketed tax avoidance scheme.
>
> "I am writing to tell you that it is the view of the Inland Revenue that the tax avoidance scheme does not work and that you are liable to pay income tax and interest on all the payments received from Sandfield."

38. After setting out the Inland Revenue's view of the Scheme the letter then continued:

> "If you were employed by Sandfield Consultants in the tax year 2002-2003 and/or 2003-2004 and you have made Tax Returns, this letter is notification that I am opening an enquiry under s.9A TMA 1970 into those Returns. Formal notification of these enquiries are attached."

39. An undated letter was sent by Mr Boyle to Dr Jacobs providing him with a signed Form 64-8 authorising Chiltern to act as his agent in respect of the s.9A TMA 1970 enquiries. The 64-8 Form is signed by Mr Boyle and dated 3 March 2005. On 9 April 2005 Mr Boyle sent a letter by fax to Dr Jacobs regarding the recent letters he had received in respect of SCL that had been forwarded to him at his new address which was in New Zealand. On 14 April 2005 Dr Jacobs wrote to Mr Boyle in New Zealand confirming that he was prepared to extend the deadline for him to reach a settlement with HMRC. Mr Boyle's Tax Return for the year ended 5 April 2004 was received by HMRC on 27 April 2005.

40. There was a considerable amount of correspondence between Dr Jacobs and Chiltern between 24 March 2005 and 12 January 2007 in which no mention was made of Mr Boyle. There are some 40 letters or notes of meeting or telephone calls in the papers before us in that period. These documents included a letter which Dr Jacobs had written to Chiltern in respect of the remaining employees of SCL who had chosen not to settle with HMRC, and with which he enclosed a draft copy of a letter he proposed sending to those remaining employees. In January 2007 Mr Rowe had taken over from Dr Jacobs as investigator with responsibility for the Scheme. Much correspondence followed in which, as before, there was no mention of Mr Boyle. Similarly there was no mention of Mr Boyle in the telephone conversations and email correspondence that followed, nor at a meeting with SCL's counsel in June, until, on 3 July 2007, Mr Rowe received an e-mail from John Hood of Chiltern attached to

which was a list of Chiltern's clients, this list included Mr Boyle's name. No agreement had been reached at the meeting with Counsel in June.

41. After taking over from Dr Jacobs Mr Rowe had, after February 2007 and prior to the meeting with the Tax Counsel in June 2007, had all the letters, notes of meeting and notes of telephone conversations that had taken place. On 8 June 2007 he wrote an internal memo to his then manager stating:

> "As a way forward, I believe we will now have to start the process of raising assessments and waiting for the appeal. I would suggest that all assessments are raised together, to protect our position, rather than just raise assessments in one or two cases (as they might suggest)."

42. Following the failure to reach an agreement at the June meeting with Chiltern and Tax Counsel, Mr Rowe started preparations for issuing assessments.

43. Mr Rowe was aware that in respect of the tax year ended 5 April 2001 the normal time limit for raising a discovery assessment had passed and he therefore decided not to issue assessments in respect of that tax year. He was also aware that the normal time limit in respect of tax year ended 5 April 2002 was shortly due to expire, he therefore prepared a schedule of those employees who had not reached a settlement but were in receipt of a salary from SCL during tax year ended 5 April 2002. He also included employees whether or not they were also in receipt of salary income from SCL in any later years.

44. Having reviewed the SI investigation papers Mr Rowe had formed the view that previous assessments to tax made in respect of those SCL's employees who had not reached settlement with HMRC were or may have become insufficient. He therefore decided to write directly to them and notify them of his view and explain to them, including Mr Boyle, that he would be shortly arranging for assessments to be issued to them. The same letter was issued to all of them, and Mr Boyle's letter was sent to him on 8 January 2008.

45. Mr Rowe's letter of 8 January 2008 and the assessments issued to Mr Boyle on 10 January 2008 and 21 January 2008 were returned on 26 March 2008 and on 6 April 2008 respectively to HMRC Bristol marked "no longer at this address". In fact Mr Boyle's change of address had previously been noted on his self-assessment record, and when this was discovered the documents were re-issued on 20 August 2008 to his new address.

46. At the hearing Mr Rowe gave evidence that at the time HMRC (or the Inland Revenue as it then was) did not have the ability to flag up an active s.9A enquiry. Although it would be general practice to note an SI interest in a case, the returns would not automatically be brought to the attention of the inspector dealing with the SI. At the time Mr Boyle was sent the letter of 9 December 2004 he had not submitted his 2003-2004 return. When the return was submitted, on 27 April 2005, there was no information on it beyond the fact that Mr Boyle was employed by SCL. Given this limited information, there was no reason on the basis of that return to flag it up for enquiry.

47. Dr Jacobs gave evidence that he would not have had all the tax returns when he sent out the letter of 9 December 2004, and at that stage the enquiry was still active. He was the only person at the Inland Revenue as it then was who knew how the Scheme worked and he did not seek out the officer who dealt with the returns. At the time of his enquiry there was no system in place to deal with 397 people, and there was no active ongoing enquiry into Mr Boyle. Between December 2004 and January 2008 when the assessment was issued, there was no further information specifically about Mr Boyle available. Dr Jacobs' own job had been to find ways to settle the Scheme and to get information from SCL/SSL.

Mr Boyle's evidence

48. Mr Boyle gave the following account of his employment history prior to joining SCL, of how he came to be employed by SCL, and his understanding of that employment.

49. Mr Boyle had initially worked as an employed IT consultant but had then set up his own limited company, taking advantage of the tax system as it was at the time by paying himself dividends. He worked exclusively on a contract with Sony Ericsson ("Ericsson") which earned his company around £70,000 per annum from which Mr Boyle would take part as earnings (salary) and part as a dividend from the company.

50. In 2000 Mr Boyle became concerned as to whether his company was IR35 compliant, and his accountant was unable to advise him as to that. He learned from a friend about COL, contacted them and met Paul Bishopp at SSL's address in London.

51. Mr Boyle's claimed understanding following that meeting was that he would be employed by a UK company, he would be paid a monthly salary and loans, which he took to be equivalent to the dividends he had been receiving from his own limited company, and which would be taxable. All correspondence with him had been by telephone or email.

52. Mr Boyle saw not having to be involved in administration, as he had been previously, as being a great advantage to him, and in his initial evidence to us he stated that he also considered that he would be about £5,000 per annum better off if he worked for SCL. However, during the hearing it became necessary to recall him to give further evidence, and in the course of that later evidence he stated that he believed that "from an overall point of view" he would be neither better nor worse off with Sandfield than he had been previously. When asked why he had taken out loans which, he accepted, he did not need, his reply was:

> "Because from a holistic point of view I would be happy they would look after me as an employee. I did not know how the company worked."

53. Mr Boyle accepted that during his encounter with Mr Bishopp there may have been a discussion about the tax position of the loan, but he did not recall it. In his phrase he was "blinded by not having to do the administration work". That administration work had involved him in such matters as preparing a timesheet at the end of the day, preparing invoices for Ericsson, purchasing equipment, dealing with

invoices for the company, dealing with correspondence and going on training courses. He stated that he did not know that he was not paying tax.

54. Mr Boyle was clear that he had not asked for the loans, but he had been told by Paul Bishopp that Credex would provide a loan in foreign currency. He had had no involvement with Credex beyond doing initially what he was told to do in order to open the account and then receiving from them the monthly Excel statements about which foreign currency the loan had been converted to. All the monies paid into his bank account were paid in sterling. Mr Boyle was not aware of the circumstances in which he would have to repay the loan, this not being a matter discussed with Paul Bishopp other than that he understood that the loans would be guaranteed and would be payable on request.

55. Whilst Mr Boyle had opened a Credex account, he was not aware that he had access to it. In his witness statement he had said:

> "I did not have to instruct Credex to do anything, it was done automatically".

56. It was Mr Boyle's belief that he was employed by SCL who then contracted him out to Ericsson. He had believed that, as an employee, he would be paid whether or not he was working. It had come as a shock to him when in about September 2003, a time at which the contract with Ericsson ended, his salary and the loan payments had stopped and did not restart until there was a new contract with IBM in November 2003. He said in evidence that he believed that as an employee of SCL everything he earned would be taxable and that SCL would deal with the relevant tax, although he "did wonder" at what point he would be paying PAYE, but he made no enquiries of the Inland Revenue, HMRC or SCL about this.

57. Mr Boyle recalled seeing some of the documents referred to by Mr Rowe, but, having moved to New Zealand some time in 2004, he had misplaced a large amount of his paperwork. He did not recollect ever seeing the EBTC. Mr Boyle's tax returns had been completed by SSL and sent to him for signing. At the time he signed them he believed that the correct amount of tax had been paid on everything and claimed that he was later shocked to discover that this was not the case.

58. Mr Boyle's employment with SCL had started on 17 September 2001 (that is, after SCL had moved to the Isle of Man) and temporarily ceased on 5 September 2003, the period when his initial contract with Ericsson had ended, then he was re-employed between 24 November 2003 and 29 February 2004.

The Respondents' Case

59. HMRC described their understanding of Mr Boyle's involvement in the Scheme as follows:

(a) Mr Boyle purported to forgo broadly two-thirds of his salary in return for a loan in either Romanian Leu, Belarusian Roubles, or Uzbekistan Soums.

(b) In three consecutive years, SCL purported to be able to find for Mr Boyle an arbitrage opportunity provided by two trades with the same company in

Leu, Roubles or Soums which generated an immediate profit equal to 78% of the loan made;

(c) The arbitrage opportunity involved Credex International SA ("Credex") or Emevex Limited ("Emevex") which were purported to be Bulgarian foreign currency brokers;

(d) The websites of both Credex and Emevex ceased at the time the Scheme ceased, i.e. early 2004; and

(e) The documentation held for Credex and Emevex are striking similar (and often identical) in form – from which HMRC infer that they were essentially *alter egos*.

60. HMRC did not accept the existence of the arbitrage opportunity, and in particular that such opportunities would arrive year after year. It was not accepted that any company would on a regular basis enter into a forward contract to sell Leu, Roubles or Soums at 22% of their current market value expecting a catastrophic decline, the relevant Bulgarian Currency Company (either Credex or Emevex) would obviously sell at the rate available on the relevant date. It was HMRC's case that the loan arrangements were structured in such a way that Mr Boyle knew from the outset that part of the loan would not be repayable. The subsequent waiver or writing off of the repayment of part of the loan was a clear financial benefit to Mr Boyle. That benefit constituted emoluments from employment/earnings or an amount treated as emoluments from employment/earnings.

Issue (i) Whether Mr Boyle liable to income tax on loans

61. It was HMRC's primary case that Mr Boyle was personally liable under the employment income code for the tax that should have been charged on the full remuneration he received for his work for the UK businesses by way of the Scheme, and should have been subject to PAYE and National Insurance.

62. The following matters were put forward by Ms Nathan in support of HMRC's case that the purported loan should be disregarded:

(a) All the documents were sent to the scheme user as a package, the steps in this arrangement were intended to operate as a whole, and the intention was to ensure that the scheme user (Mr Boyle) received approximately two-thirds of his earnings in a supposedly non-taxable way.

(b) The e-mail documents sent to each scheme user (see above) showed that the loan was intended to be non-taxable because it was apparently made in a foreign currency and the recipient was apparently under an obligation to repay that amount of foreign currency plus interest in a year's time. Under the scheme the employee immediately converted the amounts apparently lent into sterling and at the same time acquired a forward contract to purchase the foreign currency in question in a year's time at a predicted exchange rate that was significantly in sterling's favour, which meant that the scheme user was entitled, within a few days of receipt of the purported loan, to the sterling

amount received from SCL net of the amount used to acquire the forward contract.

(c) There was no evidence that any foreign currency was ever acquired by SCL in order to make the loan in a foreign currency to the scheme user, nor by the scheme user.

(d) There was no commercial rationale for the acquisition by the scheme user of a loan in Uzbeki Soums or other foreign currencies. There was no link between Mr Boyle and those countries.

(e) There was no commercial rationale for Mr Boyle giving up approximately two-thirds of his potential earnings in return for the hope and expectation that he would receive a loan, or a series of loans in volatile currencies.

(f) The scheme user received the sterling which represented his emoluments/earnings.

Alternatively, as set out under Issue (iii) below, it was HMRC's case that Mr Boyle was chargeable to income tax on an amount treated as his income under the transfer of assets provisions in section 739 ICTA.

Issue (ii) PAYE

63. Following directions issued by the Tribunal on 22 June 2012 HMRC had submitted a supplementary statement of case to deal with an argument submitted late on behalf of Mr Boyle to the effect that if the arrangements did constitute employment income of Mr Boyle, then he was entitled to credit for the income tax which ought to have been deducted as PAYE by SCL, but which SCL had failed to deduct under Regulation 185 of the Income Tax (Pay As You Earn) Regulations 2003. Ms Nathan pointed out that the years to which this appeal relates being 2001/2002, 2002/2003 and 2003/2004, the PAYE Regulations applicable are Income Tax (Employment) Regulations 1993 and not the Income Tax (Pay As You Earn) Regulations 2003 which only came into force with effect from 6 April 2004. Mr Boyle was only entitled to credit if he could demonstrate that SCL was a UK employer which had a tax presence within the UK. HMRC's case was that SCL had no UK tax presence was not therefore required to deduct PAYE. Consequently Mr Boyle was not due any credit.

64. Furthermore it was submitted by Ms Nathan that whether the employer was liable to deduct Income Tax in respect of the arrangements it entered into with Mr Boyle depended on whether there was a "payment" of emoluments (section 203 ICTA) and Regulation 6 of the 1993 Regulations for years to 5 April 2003/payment of PAYE income (section 684) ITEPA 2003 and Regulation 6 1993 Regulations for year to 5 April 2005. In order for there to be an obligation to operate PAYE, there must be a "payment".

65. It was HMRC's case that there was no obligation on SCL to operate PAYE because there was no "payment" for the purposes of section 203 ICTA, or section 684 ITEPA and Regulation 6 of the 1993 Regulations.

66. Ms Nathan submitted that the arrangement was structured as a loan and that the subsequent release/waiver of the repayment of part of the amount lent, albeit a clear financial benefit to Mr Boyle, was not a "payment" for the purposes of section 203 ICTA, section 684 ITEPA and Regulation 6 of the 1993 Regulations. The arrangements were such that whilst the so called loans may have been either expressed or denominated in a currency other than sterling, the actual payments made were in sterling so that the correct comparison was between the amounts of sterling expressed in foreign currency at the time the purported loan was made and the amount of sterling effectively repaid.

67. Alternatively, as stated above, the arrangements were such that Mr Boyle received a pre-set profit from each loan advanced and that pre-set profit, described as a foreign exchange gain by SCL was provided to Mr Boyle by his employer as part of his remuneration package. As such whilst the amounts fell within the definition of employment income, there was no "payment" within the meaning of section 203 ICTA, section 684 ITEPA or Regulation 6 of the 1993 Regulations, there was simply a profit in Mr Boyle's hands. In other words, Mr Boyle was better off because he did not have to repay the full amount of sterling that was converted into foreign currency, but his being better off did not result from any "payment".

Issue (iii) Transfer of Assets

68. In respect of the third issue for determination of the Tribunal, whether Mr Boyle was liable to income tax in respect of the arrangements by virtue of the transfer of assets provisions, it was HMRC's alternative case in the light of *IRC v Brackett; Brackett v Chater (Inspector of Taxes); Chater (Inspector of Taxes) v Brackett* 60 TC 134 that the entry into the employment contract with SCL constituted a transfer of assets by Mr Boyle to SCL. SCL, being a company registered and resident in the Isle of Man, was a person resident or domiciled outside the United Kingdom and a "person abroad" (see s743(5)). The Tribunal was referred to the case *IRC v Willoughby* 70 TC 57 (page 59) where the Special Commissioners rejected the argument that it was an essential requirement for the application of s739 that UK situate assets must have been transferred abroad.

69. By virtue of entering into the employment contract with SCL, and as a result of SCL contracting his services to independent third parties, income in the form of fees for Mr Boyle's services became payable to SCL.

70. Secondly Mr Boyle had "power to enjoy" the income of the SCL as under s742(2)(3) ICTA for the following reasons:

(a) The income was dealt with and calculated so as to enure for Mr Boyle's benefit (s742(2)(a) ICTA); and

(b) Mr Boyle received benefit, in particular the loan, out of the income or money available as a result of actions in respect of any assets directly or indirectly representing that income (s742(2)(c) ICTA); and

(c) Exercising its discretion to award loans, SCL entitled Mr Boyle to the beneficial enjoyment of the income (s742(2)(d) ICTA).

71. Further or alternatively, it was submitted by Ms Nathan that Mr Boyle received a capital sum within s739(3) ICTA as a result of which he was liable to tax in respect of the income from SCL arising as a result of his transfer of assets. Ms Nathan submitted that there was no basis under section 743 ICTA 1988 for allowing a credit for tax which ought to have been deducted by the employer, SCL. Whilst it was not accepted by HMRC that that was the case, assuming it to be so, s.743(1) ICTA clearly states that income tax is not to be charged under s.739 ICTA at the basic rate, lower rate or Schedule F ordinary rate in respect of "any income to the extent that it has borne tax at that rate". In the present case no tax at all had been borne in respect of the income tax sought to be brought into charge under s.739 ICTA 1988, therefore the full amount of such income was chargeable in Mr Boyle's hands.

Issue (iv) Whether the discovery assessment is valid

72. Ms Nathan submitted that no information falling within s29(6) was made available which made the hypothetical officer of HMRC aware that the situation in s29(1) existed. In particular, there was no DOTAS notification (as the Scheme predated the reporting requirements of the DOTAS provisions) and there was no information in the "white space" on the tax return. HMRC relied on the evidence of Mr Rowe in support of their submission that no information falling within s29(6) was made available by or on behalf of Mr Boyle which made the hypothetical officer of HMRC aware that the situation in s29(1) existed.

Issue (v) Quantum of the assessments

73. HMRC relied on the figures set out at paragraph 22 to determine the assessments rather than the estimates which had been included in the assessments and the closure notice.

The Appellant's Case

74. Mr Boyle's appeal at the hearing was based on five grounds:

(1) The discovery assessment for the tax year 2003/04 was invalid.

(2) Mr Boyle was entitled to credit for the income tax which ought to have been deducted by SCL.

(3) Mr Boyle made a foreign exchange gain that is not subject to income tax.

(4) Section 739 ICTA 1988 does not apply.

(5) The quantum of the determinations was excessive.

Ground (1) (Issue (iv))

75. In respect of Ground 1 it was submitted by Ms Woods that the Commissioners were aware in 2004 at the latest of the alleged insufficiency, as evidenced by the letter from Dr Jacobs written to Mr Boyle on 9 December 2004, and in particular the paragraph which reads:

> "If you were employed by Sandfield Consultants in the tax year 2002-03 and/or 2003-2004 and you have made Tax Returns, this letter is notification that I am opening an enquiry under s9A TMA 1970 into those Returns. Formal notification of these enquiries are attached."

76. By 31 January 2006 HMRC had all the information needed to make the assessment for 2003/2004, the opinions of Dr Jacobs and of Mr Rowe about the Scheme had not changed between December 2004 and 2008 when the assessments were made, therefore HMRC were not entitled to open an enquiry under s9A of the TMA.

77. Ms Woods referred to the case of *Charlton* [2012] UKFTT 770 (TCC) for the proposition that it was not necessary for the hypothetical officer to understand precisely how a scheme worked, or how any claimed tax treatment was said to arise, all that was needed was that from the information made available, he could reasonably be expected to be aware of the insufficiency of tax such as to justify an assessment. She pointed to various items of correspondence between Chiltern and Dr Jacobs, in particular a letter of 24 March 2005 in which Chiltern stated that it was acting on behalf of various employees of SCL, a telephone call of 14 March 2005 in which John Hood of Chiltern referred to clients who wished to settle and she referred us also to a considerable amount of further correspondence all of which preceded Mr Boyle informing HMRC that Chiltern were acting for him. She submitted that there had been no change of view by the officer concerned, nor a different view taken by the officer who later took over the case. All relevant information had been made available to the inspectors by Mr Boyle's advisers within the period of the enquiry window and therefore by the time that Mr Boyle gave notice of Chiltern acting for him it could reasonably be expected that HMRC would be aware of the insufficiency.

78. It was accepted by Ms Woods that there was no information contained on Mr Boyle's tax returns, but at that time, which, she submitted, was before the case of *Langham v Veltema* [2004] STC 544 there was no requirement for Mr Boyle to indicate the situation on his returns. [This submission was made on a mistaken basis of fact, given that the judgment in *Veltema* was released on 26 February 2004 and Mr Boyle's tax return for the year ended 5 April 2004 was not received until 27 April 2005.]

79. In respect of s29(7)(b) TMA Chiltern was acting on Mr Boyle's behalf and had informed Dr Jacobs on 10 February 2005 that they were acting for SCL and for "a number of employees". The officer should have been aware of the facts from Chiltern's letter and from later correspondence. Mr Boyle had submitted his 64-8 on 3 March 2005 and plenty of further evidence was submitted after that date which could have enabled the officer to raise an assessment within the required window.

Ground (2) Issue (ii)

80. Mr Boyle was entitled to credit for the income tax which ought to have been deducted by SCL. Whilst it was Mr Boyle's primary case that the loans were not subject to income tax, in the event that we found that they were, Ms Woods submitted that PAYE should have been operated by SCL, SCL's letterhead gave its UK representative's London address, and this alone was sufficient to denote a UK presence and thus to render it liable to operate PAYE. Furthermore PAYE had been deducted in respect of Mr Boyle's salary, HMRC having issued tax codes under the PAYE system in accordance with Regulation 6 of the 1993 Regulations.

81. Additionally it was submitted that the purported loans were monies placed unreservedly at Mr Boyle's disposal once they were received in his bank account, and they were received in UK pounds, Mr Boyle having no involvement in the currency transactions. If the Tribunal found the loan arrangements not to be genuine, then the payment to Philip Boyle came from his employer and in the normal course the employer was liable, therefore the employer should be liable for any tax which had not been deducted. Mr Boyle was entitled to credit for the income tax which ought to have been deducted by SCL, but which SCL failed to deduct under Regulation 185 of the Income Tax (Pay As You Earn) Regulations 2003.

82. SCL had a UK presence in the form of SSL who acted as its representatives in London and who had operated PAYE on Mr Boyle's salary. It was submitted on behalf of Mr Boyle that they should have done so with regard to any monies which were found to arise from his employment, in circumstances where the loan arrangements were not found to be genuine, and HMRC ought to have collected the tax from SCL by enforcing on its UK representative's address.

Ground (3) Issue (i)

83. It was Mr Boyle's case that he had made a foreign exchange gain that is not subject to income tax. He was an employee of SCL, and as an employee he was offered a loan by SCL. He was not required to forgo salary; he was paid the salary set out in his employment contract. The loans were made at SCL's discretion in a foreign currency. The loan was repaid by Mr Boyle, plus interest at the official rate. On repayment of the loan the value of the foreign currency had decreased. The foreign currency broker made a loan and this amount, plus interest, was repaid to it, there was therefore no loss to the broker. The broker, Credex, had been suggested by SCL, but the employees were all free to source their own broker.

84. Mr Boyle had made a profit on the repayment of the loan due to the fluctuation of the currency exchange rate. It was not funded from any source and bore no relation to the amounts paid by UK businesses to SCL in consideration of Mr Boyle's services.

85. It was Mr Boyle's case that the transactions were genuine, commercial and were instigated by genuine commercial entities.

86. Under the provisions of s160 ICTA 1988, the relevant section at the material time, Mr Boyle was only liable to tax on the difference between the official interest rate and the interest actually paid on the loan, at the sterling equivalent.

Ground (4) Issue (iii)

87. Section 739 ICTA 1988 does not apply because Mr Boyle was an employee of a UK company which then moved overseas. It was argued that because Mr Boyle was not involved in the process of the transfer to the Isle of Man he himself did not therefore transfer an asset overseas. Mr Boyle continued to receive his salary in the UK. The income generated by SCL was not the result of the transfer, but arose from the UK businesses with which SCL contracted to provide Mr Boyle's services. [These submissions were made on a mistaken basis of fact: as set out above, SCL's move to the Isle of Man had taken place by 9 August 2001, whereas Mr Boyle commenced his employment with SCL on 17 September 2001.]

88. Mr Boyle did not have the "power to enjoy" the income of SCL. He received a salary from his employer and SCL exercised their discretion and provided him with a loan. Mr Boyle had no contractual entitlement to a loan.

89. Section 739 does not apply where a transfer of assets is not made to avoid tax or the transaction is a genuine commercial transaction not designed to avoid tax. Mr Boyle relied on the fact that he did not know that SCL was an overseas entity. He had thought that he was employed by a UK company. He had joined SCL as an alternative to running his own company and using an accountant and was unaware the impact that this would have on his affairs. It had never been Mr Boyle's intention to avoid taxation.

Ground (5) Issue (v)

90. The quantum of the determinations was excessive. The only submission made in respect of this is in the skeleton argument where it is stated that "the amount shown on the assessments and disclosure notice are estimated and excessive". There were no submissions at the hearing with regard to this, nor any suggestion as to what an appropriate amount would be nor what the officers had taken into account which they ought not to have done, nor what they had failed to take into account.

Discussion

91. Before deciding the specific issues of law we consider it necessary to consider Mr Boyle's situation with regard to the scheme and his credibility.

92. Mr Boyle was a professional man, earning some £70,000 per annum prior to joining SCL. He was understandably keen to pay only the minimum amount of tax required, as evidenced by his having set up a company and taking part of his income as dividends prior to joining SCL. Whilst we take account of the fact of the long lapse of time between the circumstances of his joining SCL and the hearing, his memory of the circumstances was nonetheless extremely vague, and he provided no documentation relating to his appointment.

93. We do not accept his evidence that he did not consider the tax implications of his taking employment with SCL and taking out the loans. We find that he did receive the documents outlined at paragraph 27 above, including the Employee Benefit Tax Calculator from which he would have been able to see the artificiality of the 'loan'.

94. Mr Boyle had claimed that he believed that he was employed by a UK company on the basis of the fact that his interview was held in London and he dealt with SSL which was based in London. Given that he is an intelligent man with experience of running his own company and some awareness of the tax implications of so doing, it is to be expected that he would have been concerned to read carefully the documents provided to him, and would have been aware that SCL was based in the Isle of Man and that it, not SSL, was his actual employer. The documents referred at their head to SCL's UK representative's address being the London one which Mr Boyle had attended, and its registered office being in the Isle of Man. He claimed that his dealings with SSL were by telephone and email, implying that he would have been unaware of the Isle of Man address, and also, because he had met Mr Bishopp in London, he believed that he was working for a UK company. We do not accept that he was unaware that SCL was based in the Isle of Man, several documents including letters which gave the address of the registered office as the Isle of Man were sent to him by email as attachments. Furthermore his contract of employment with SCL specifically states at paragraph 3.1 that: "Our address is Aston House, Peel Road, Douglas, Isle of Man IM1 4LS."

95. Mr Boyle's evidence about whether or not he believed he would be better off if he worked for SCL was contradictory. Taking that evidence at its most favourable, he was aware that there would be a tax benefit to him comparable to that obtained by him previously when he took part of his earnings as dividends rather than as income at the time when he owned his own company. However, he had also said that he believed he would be £5,000 better off each year, a situation which would only arise if he were not liable to pay tax.

96. We did not find Mr Boyle a straightforward witness, in particular when giving his evidence about whether or not he believed he would have to repay the loans he received. He said he had not discussed with Paul Bishopp the issue of whether, when or how such repayment would be made, which we do not find to be credible. He claimed he did believe that he would have to repay the loans, but did not know how or when, despite the fact that the documents show that the loans were expressed to be fully repayable at the end of one year. Despite this professed belief he made no effort in all the intervening years to make any enquiries as to whether any monies were outstanding nor as to his liability to make repayment, nor as to how to do so regardless of the fact that sums (apparently) representing the amount of the repayment were shown on his Credex account.

97. Mr Boyle was apparently completely incurious as to why it was suggested by Mr Bishopp that he should take out a loan for which he had no need. He was not required to make a decision as to which of the 20 names shown to him as potential foreign exchange brokers was to act in respect of the loan he did take out, Credex having been the name of the provider given him by Paul Bishopp and suggested in the

documents he received. We find he did not as a matter of fact have any genuine or free say in the choice of provider. We do not accept his evidence that he believed that SCL was responsible for dealing with his tax affairs in the way he stated. In the circumstances we find that Mr Boyle was fully aware that there would be a tax advantage to him in taking out the loans, that he did not believe he would have to repay the full value of the loan, and that he turned a blind eye to the reality of the situation.

98. We accept HMRC's understanding of Mr Boyle's involvement in the Scheme as set out at paragraph 59 (a)-(e) above.

Issue (i) - Whether Mr Boyle is liable to income tax in respect of the proposed loans

99. With regard to the first issue before the Tribunal, we accept Ms Nathan's submission that the Tribunal had to take a realistic view of the facts when determining whether or not the purported loans were in fact emolument/earnings. In the case of *Fidex v HMRC* [2013] UKFTT 212 (TCC) at paragraph 2751 it was stated:

> "We approach this issue as one in respect of which we must apply orthodox methods of statutory construction to a realistic view of the facts. By this we mean that we must discern and apply to the facts of this case, viewed realistically, Parliament's purpose in enacting paragraph 13. We note that such was the approach adopted by Ribeiro PJ in the 2003 Hong Kong case of *Collector of Stamp Revenues v Arrowtown Assets Limited* [2003] HKFCA 46 and approved by the House of Lords in *Barclays Mercantile Business finance Limited v Mawson* [2005] STC 1 at [36], in relation to the application of the *Ramsay* principle and, although the *Ramsay* principle has not been invoked in this appeal, in our view the general guidance given in those cases is relevant and binding on us."

100. Ms Woods on behalf of Mr Boyle put two arguments in respect of the first issue, namely that the loans were genuine and therefore the gains made by Mr Boyle were not subject to income tax, or in the alternative if we found the loans not to be genuine, then SCL was liable as Mr Boyle's employer and Mr Boyle was entitled to credit for such income tax as ought to have been deducted.

101. With regard to the question of whether the loans were genuine, we do not find this to be the case. As set out in paragraphs 12-14 above, SCL and SSL were connected to Credex via Laro Inc, Credex only dealt with Sandfield employees and was not independent. There was evidence that the payments made from Credex went via a company registered in the Isle of Man to the same address as SCL. The documents stated that the loans were fully repayable, but the repayment did not relate to the full value of the purported loans which were made at an exchange rate which was manipulated. No evidence has been provided at any stage during HMRC's lengthy investigation of the Scheme, despite many requests for such evidence, to show that the foreign currency ever existed, or that Credex was a genuine dealer independent of SCL. The documents stated that the loans were fully repayable, but the exchange rates used to calculate the amounts to be paid were unrealistic and clearly

artificial. No foreign currencies were ever shown to be supplied or exchanged. We also accept the matters relied on by HMRC as set out above at paragraph 62 in support of their argument that the loans were not genuine.

102. Whilst we do not accept that the monies which went into Mr Boyle's account represent a genuine loan, we will continue to refer to a 'loan' for the purposes of this Decision. The arrangements for the loan were such that whilst they were expressed or denominated in a currency other than sterling, the actual payments to the participants were in sterling. We accept Ms Nathan's submission that to determine the benefit to Mr Boyle the correct comparison is between the sterling equivalent to the amounts expressed in foreign currency at the time the purported loan was made, and the amount of sterling repaid by him.

103. SCL was aware, and intended from the outset, that the amount of the effective repayments in sterling would be considerably less than the amount of sterling advanced to the scheme users (and in this case to Mr Boyle) and therefore the difference was effectively waived or written off from the outset. The subsequent waiver (or writing off) of the repayment part of the amount lent was a clear financial benefit to Mr Boyle. We consider that the financial benefit constituted emolument from employment/earnings or an amount that was treated as an emolument from employment/earnings.

104. We conclude from the way the loans were discussed at the outset of Mr Boyle's employment with SCL, and the fact that by taking them Mr Boyle received an amount approximately equivalent to the income he had previously received when working on his own account for Ericsson, that the loans were directly connected to his working for SCL and were only available to him whilst he was an employee. As such they are properly to be considered as an emolument of his employment under s.173 ITEPA which provides at subsection (1) that:

> "It applies to a loan if it is an employment-related loan and (2)(a) that "loan" includes any form of credit, and references to making a loan (and related expressions) include arranging, guaranteeing or in any way facilitating a loan"

105. If we are wrong as to our conclusion above that the loans were an emolument of Mr Boyle's employment, then further question arises as to whether Mr Boyle is liable to income tax in respect of the amounts received by him as purported loans. Given there was never any evidence that Mr Boyle's loans were repaid, and no attempt was ever made to repay them, we conclude that they were written off in the tax years in question and therefore s.188(1)(b) applies and the amount written off is to be treated as earnings from the employment for that year.

106. On the basis of all the above conclusions we find that Mr Boyle did not make a foreign exchange gain, and the fact that he had no contractual entitlement to a loan is irrelevant. For all the above reasons we reject Ms Wood' arguments on Issue (i).

Issue (ii)

107. With regard to Ms Wood's argument that SCL did have a presence in the United Kingdom, it is not soundly based. We find that SCL had no assets in the UK which would bring it within the charge of tax. It had no employees or property in the UK, SSL only operated from rented premises in London, and only received 5% from SCL in respect of its administrative services in relation to SCL's scheme users. Whilst SCL had arranged for PAYE to be deducted by SSL on its behalf, and we could speculate as to why in the circumstances it might be advantageous to SCL to do this, no claim against SCL would be enforceable by HMRC and there was no liability on SCL to render PAYE in respect of Mr Boyle.

108. In the event that we are wrong as to this, we also have regard to the question of whether or not the "loans" were payment for the purposes of s.203 ICTA, s.684 ITEPA and Regulation 6 1993 Regulations.

109. We were referred by Ms Nathan to the case of *Garforth v Newssmith Stainless Ltd* [1979] STC 129 where "payment" was considered in respect of s.204(1) of ICTA 1970, the predecessor of the present Act, and Walton J held:

> "I therefore come back to the question whether, on the facts of the present case, there was 'payment' to the directors. The argument really is, on the one hand, that all that happened was that the balances in the directors' loan accounts with the company were increased without them getting anything out of it unless and until they withdrew their money from the company, and, on the other hand, that the money was placed unreservedly at their disposal, they could have had it at any moment the chose, and that amounts to payment. As between those two contrasting views, I have no hesitation at all in saying that, in my judgement, when money is placed unreservedly at the disposal of directors by a company that is equivalent to payment; and I think I am entitled to derive support for that view from the judgment of the same Rowlatt J in *Inland Revenue Comrs v Doncaster*.
>
> Having accepted that the words 'I can conceive nothing more complete in the way of payment' were strictly obiter, Walton J continued: they are an obiter of a very great revenue judge, Rowlatt J, who more perhaps than any other revenue judge knew the Income Tax Act backwards. But it seems to me that it accords with the realities of the situation. If moneys are placed by one person unreservedly (and I think that for present purposes I do not have to go very deeply into that qualification, for the simple reason that, as has already been noted, it was found as a fact by the Special Commissioners that payment of the sums standing to the credit of the current accounts would have been made had the directors demanded payment from the company, so there is no question here of any fetter whatsoever) at the disposal of any other person, that, I think, must be equivalent to payment."

110. We were also referred to *Paul Dunstall Organisation Ltd v Hedges, Dunstall v Hedges* [1999] STC(SCD) 26, where the Special Commissioners held at paragraphs 45 -:

"45. The question then arises as to whether there can be a 'payment' of a perquisite or profit. The word payment is not defined and so should be given its ordinary meaning. There is nothing in s 203, or in regs 6 and 13, which restricts the obligation to deduct to payment in money. Indeed, the fact that the obligation to deduct arises 'on the occasion of any payment of emoluments' assumes that there could be payments if the emoluments take the form of perquisites or profits; otherwise the provision would have been restricted to the payment of emoluments in money.

46. In this connection we have been assisted by the decision in *Garforth (Inspector of Taxes) v Newssmith Stainless Ltd* [1979] STC 129, [1979] 1 WLR 409, where two directors were voted bonuses of £31,000 each. They were paid £7,500 each and the balances were credited to their accounts in the books of the company. The issue was whether the crediting of the bonuses amounted to 'payment' for the purposes of s.204 of the Income and Corporation Taxes Act 1970 (the 1970 Act) which was the predecessor of s.203 of the 1988 Act. Walton J said [1979] STC 129 at 130, [1979] 1 WLR 409 at 410) that it was not necessary, or perhaps even possible, to give an exhaustive definition of the word 'payment' and the real question in that case was whether the circumstances disclosed fell within the word. He said ([1979] STC 129 at 132, [1979] 1 WLR 409 as 412):

> "Now there can be no doubt at all, I think … that the word "payment" is a word which has no one settled meaning but which takes its colour very much from the context in which it is found.'

47. And later ([1979] STC 129 at 133, [1979] 1 WLR 409 at 414) -

> '… I have no hesitation at all in saying that, in my judgement, when money is placed unreservedly at the disposal of directors by a company that is equivalent to payment …'

48. Walton J held that the sums credited to the directors' account had been placed unreservedly at the disposal of the directors and that there had accordingly been a payment for the purposes of s.204.

49. *Garforth* is, therefore, authority for the view that the word 'payment' has no settled meaning. That means that it is not therefore, necessarily, restricted to payments of money. The work takes it colour very much from the context in which it is found. In the context of s.203, and regs 6 and 13, the reference is to the payment of emoluments, which include perquisites and profits. It must therefore be assumed that there could be payment of perquisites or profits. If placing money unreservedly at the disposal of a recipient is equivalent to payment then it follows that if a perquisite or profit is placed unreservedly at the disposal of an employee that is equivalent to payment.

50. Applying those principles to the facts of the present appeal we find that Mr Dunstall received from the company a beneficial interest in an undivided share of the land at Sutton. That could be, and was, turned into money. It was, therefore, a perquisite or profit and so was an emolument (and both the company and Mr Dunstall accepted that he

had received an emolument). The perquisite or profit was placed by the company unreservedly at the disposal of Mr Dunstall by means of the contract of 22 June 1988. Accordingly, in our view, there was a payment."

111. In *Black v Inspector of Taxes* [2000] STC (SCD) 540 the Special Commissioner set out the points of law on which the parties agreed:

"63. There was a substantial amount of agreement by the parties on the law.

64. First it was agreed that, in s.203 of the 1988 Act, the words 'payment of, or on account of, any income' were not limited to payments of cash. The words could include other transfers of valuable consideration, for example, payments by cheque, or by credit to a bank account, or by transfer of some other chose in action. *Garforth (Inspector of Taxes) v Newssmith Stainless Ltd* [1979] STC 129, [1979] 1 WLR 409 was an example of the broader meaning of the word 'payment'.

65. Secondly, it was agreed that reg 2 of the 1973 regulations defined the word 'emoluments' as meaning the full amount of any income to be taken into account in assessing liability under Sch E. Thus, the term 'emoluments' encompassed the cash equivalent of benefits in kind. However, not every provision of a benefit in kind attracted the operation of s.203 because s.203 was not applicable to benefits in kind not involving 'payments' by an employer. For example, the making of a company car available to an employee was not a 'payment' and, although the cash equivalent was taxed, the cash equivalent was not 'paid'. Thus the provision of some benefits taxable under Sch E as emoluments did not amount to the 'payment' of those emoluments.

66. Thirdly, it was agreed that, for the purposes of s.203 and of the 1973 regulations, 'payment' was the transfer of money or of money's worth where quantified in money (e.g. cheque or bank credit). It was therefore critical to identify when, if at all, the recipient's entitlement to the payment of money arose. If, prior to the transfer of assets (such as units in unit trusts) the recipient had no legal entitlement to payment of money, the transfer of the assets would amount to the provision of a benefit in kind and the relevant cash equivalent would be a deemed emolument, for example under s.154 of the 1988 Act. However, such a transfer could not amount to the 'payment' of that emolument. It was only if there were a pre-existing legal entitlement of money (or money's worth quantified in an amount of money) that satisfaction of that entitlement constituted 'payment' for the purposes of s.203. In the absence of legal entitlement, taxable arose on the receipt of the asset following *Wilkins (Inspector of Taxes) v Rogerson* [1961] Ch 133 at 143 and 146-147, 39 TC 344 at 352 and 354.

67. Fourthly, it was agreed that an employer could only be required to comply with s.203 and deduct income tax from payments of emoluments where it could be demonstrated that a legal entitlement arose in the hands of the employee to actual payment of a monetary

> amount. It was not enough to show that the employee wanted cash; preferred cash; expected to receive cash; or that an award was discussed in terms of cash prior to it being made formally by way of some other benefit.
>
> 68. Finally, it was also agreed that the four taxpayers were not directly of Group or Plc at any material time. That was significant because the voting of bonuses by the board of Plc, whenever it occurred, did not result in any binding legal obligation to pay such bonuses. Accordingly, the taxpayers had to establish, in respect of each bonus, that the award of units in a unit trust was made in satisfaction of a legally binding entitlement to money or money's worth quantified in money. The taxpayers had to show a binding contractual promise to pay an amount of money, supported by consideration moving from the promise, and entered into by someone on behalf of the company who had authority unconditionally to bind the company to such a contractual promise. Mere discussion, hope or expectation that the company would make a payment in due course was insufficient. In order for s.203 to apply each recipient must have been entitled to sue for an ascertained amount of money and to have had his entitlement to that amount discharged by the transfer of an asset the value of which was quantified as that amount."

112. Whilst therefore, following *Garforth*, it might be possible to say that the "loans" represented "payment", being moneys unreservedly placed at Mr Boyle's disposal, the reality here was that the moneys at Mr Boyle's apparent disposal were not 'unreservedly' so because he was under an obligation to repay the monies within a year. The benefit to Mr Boyle was the subsequent release or waiver of repayment of a large part of the amount lent, which, whilst expressed in a currency other than sterling, was actually made in sterling. We do not consider that he had a legal entitlement to that release or waiver and therefore for the purposes of the legislation there was no payment.

113. In the event that we are wrong in our finding that Mr Boyle had no legal entitlement to a release or waiver of the remainder of the "loan", we accept HMRC's alternative argument that there was a pre-set profit from each loan in Mr Boyle's hands which is not a payment, he received this pre-set profit as part of his remuneration package, and this pre-set profit is not a payment.

Issue (iii) - Whether Mr Boyle is liable to income tax in respect of the transfer of assets provisions

114. We accept Ms Nathan's alternative argument based on the case of *Brackett* set out above that Mr Boyle's entering an employment contract with SCL constituted a transfer of his assets, the asset in particular being his work as an IT consultant for which SCL received monies from Ericsson and others. SCL was a "person abroad" for the purposes of s.743(5) being a company registered and resident outside the UK. We also accept her further arguments with regard to s.742(2) and (3) ICTA as set out above.

115. With regard to s.739 of ICTA, whilst we consider that the monies received by Mr Boyle as purported loans are in fact employment income, in the event that we are wrong and the sums should properly be considered to be capital, then we find that by reason of s.739(3) they should be deemed to be Mr Boyle's income for all purposes of the Income Tax Acts.

116. For Mr Boyle to rely on the defence provided by s741 ICTA the burden of proof was on him to establish that he came within s741(a) or 741(b). The evidence shows that Mr Boyle had been concerned about the tax implications of IR35 at the outset, and consequently his liability to taxation was a concern and therefore he cannot rely on s.741(a). Also we do not find that the transfer (insofar as there was one) and the associated operations were bona fide commercial transactions, and do find that they were designed for the purpose of avoiding liability to taxation. We therefore find that he is similarly unable to rely on s.741(b) and is liable under s.739 ICTA.

Issue (iv) – Whether the discovery assessment for the 2003/04 tax year is valid

117. In the case of *Langham v Veltema* [2004] STC 544 in the Court of Appeal Auld LJ at para.33 stated:

> "… It is plain from the wording of the statutory test in s.29(5) that it is concerned, not with what an inspector could reasonably have been expected to do, but what he could reasonably have been expected to be aware of. It speaks of an inspector's objective awareness, from the information made available to him by the taxpayer, of 'the situation' mentioned in s.29(1), namely an actual insufficiency heck whether there is such an insufficiency …"

At para.36 he stated:

> "It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a s.9A enquiry, having clearly alerted him to the insufficiency of the assessment, not where the inspector may have some other information, not normally part of his checks, that may put the insufficiency of the assessment in question."

118. Information provided by the taxpayer or on his behalf is within s29(6) only if it is provided for the purposes of any enquiry into the return and not if provided for other purposes (see *IA While v HMRC* [2012] UKFTT 58 (TC) at para 53). Whilst where a DOTAS number or SRN number is included in the tax return of a taxpayer, the information which the registered promoter of the scheme had provided to HMRC under that number is information available to the hypothetical officer (see *Charlton v HMRC* [2012] UKFTT 770), the Scheme in question here predates the reporting requirements of DOTAS, and in fact there was no DOTAS notification by SCL and no such information on the tax return. Dr Jacobs had no dealings with Mr Boyle's returns and at the time there was no system in place to flag up a s9A enquiry such as might notify any officer who was subsequently dealing with any relevant returns. There was no obligation on any hypothetical officer dealing with a taxpayer's returns to make enquiries of a previous officer in the present circumstances. Mr Rowe was given no direct evidence that Mr Boyle was involved in the Scheme until he received

the email of 3 July 2007 from Chiltern. From the evidence it is clear that Mr Boyle did not provide HMRC with any information about the loans on his return, and as any inferences which the hypothetical officer is to be expected to draw are only to be drawn from information that is within s.29(6)(a)-(c), i.e. information provided by the taxpayer, we find that the discovery assessments are valid, it not being required of Mr Rowe that he should search for information which Dr Jacobs may have come across relating to the loans to Mr Boyle which had not specifically been referred to HMRC.

Issue (v) – Whether the quantum of the determination was excessive

119. As stated above, we were provided with no evidence or argument at the hearing as to this, and, the burden of proof being on Mr Boyle, we do not uphold this submission.

Reasons for Decision

120. In reaching the above conclusions and deciding this appeal we have borne in mind Parliament's intention which is to render liable to tax income which in substance and reality is employment income. We find that the monies which were ostensibly paid over to Mr Boyle as loans were in substance and reality income from his employment, bearing in mind in particular that Mr Boyle had no need for a loan, there was an entirely artificial exchange rate; the reality is that there was no borrowing by Mr Boyle and he never believed that the 'loans' were other than a means of receiving his income without suffering tax on that income.

121. For all of the reasons set out above we uphold HMRC's finding that Mr Boyle is liable to income tax for the years 2001/2002, 2002/2003 and 2003/2004 in respect of monies he received as employment income in the amounts set out at paragraph 21 above. However, as stated above, if we are wrong to conclude that the monies received by Mr Boyle were emoluments of his employment, then we find that he is liable to tax under the transfer of assets provisions and we dismiss all the various grounds of appeal.

122. 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.

JUDGE J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 29 November 2013

Appendix 1

Date of Trade	Value Date	Buy/ Sell[4]	Value of Foreign Currency (ROL, BYR or UZS)	Value UK Currency £	Exchange rate (ROL/£ BYR/£ UZS/£)
31.10.01	02.11.01	Sell	163,300 ROL	9,058.56	44,60 ROL/£
31.10.01	04.11.02	Buy	173,506 ROL	813.05	312,40 ROL/£
12.12.01	14.12.01	Sell	12,730,000 BYR	6,899.73	1,845 BYR/£
12.12.01	14.12.02	Buy	13,525,625 BYR	1,622.75	8,335 BYR/£
24.01.02	28.01.02	Sell	7,920,000 BYR	3,384.62	2,340 BYR/£
24.01.02	28.01.03	Buy	8,415,000 BYR	744.69	11,300 BYR/£
01.03.02	05.03.02	Sell	6,960,000 BYR	2,924.37	2,380 BYR/£
01.03.02	05.03.03	Buy	7,308,000 BYR	628.65	11,625 BYR/£
10.04.02	12.04.02	Sell	18,900,000 BYR	7,560.00	2,500 BYR/£
10.04.02	13.04.03	Buy	19,845,000 BYR	1,721.91	11,525 BYR/£
14.05.02	16.05.02	Sell	8,440,000 BYR	3,290.45	2,565 BYR/£
14.05.02	16.05.03	Buy	8,862,000 BYR	717.57	12,350 BYR/£
25.06.02	27.06.02	Sell	19,010,000 BYR	7,027.73	2,705 BYR/£
25.06.02	27.06.03	Buy	19,960,500 BYR	1,661.30	12,015 BYR/£
29.07.02	31.07.02	Sell	13,670,000 BYR	4,746.53	2,880 BYR/£
29.07.02	31.07.03	Buy	14,353,500 BYR	1,082.88	13,255 BYR/£
03.09.02	05.09.02	Sell	9,630,000 BYR	3,337.95	2,885 BYR/£
03.09.02	05.09.03	Buy	10,111,500 BYR	721.73	14,010 BYR/£
04.10.02	08.10.02	Sell	6,770,000 UZS	5,330.71	1,270 UZS/£
04.10.02	08.10.03	Buy	7,108,500 UZS	1.206.88	5,890 UZS/£
06.11.02	08.11.02	Sell	5,570,000 UZS	4,065.69	1,370 UZS/£
06.11.02	10.11.03	Buy	5,848,500 UZS	943.30	6,200 UZS/£
11.12.02	13.12.02	Sell	8,130,000 UZS	5,587.63	1,455 UZS/£

[4] Buy means the Appellant buys the foreign currency; sell means the Appellant sells the foreign currency.

11.02.02	15.12.03	Buy	8,536,500 UZS	1,308.28	6,525 UZS/£
15.01.03	17.01.03	Sell	7,530,000 UZS	4,842.44	1,555 UZS/£
15.01.03	19.01.04	Buy	7,906.500 UZS	1,061.27	7,450 UZS/£
18.02.03	20.02.03	Sell	8,190,000 UZS	5,352.94	1,530 UZS/£
18.02.03	20.02.04	Buy	8,599,500 UZS	1,211.20	7,100 UZS/£
08.04.03	10.04.03	Sell	10,260,000 UZS	6,840.00	1,500 UZS/£
08.04.03	10.04.04	Buy	10,773,000 UZS	1,559.04	6,910 UZS/£
14.05.03	16.05.03	Sell	4,940,000 UZS	3,176.85	1,555 UZS/£
14.05.03	18.05.04	Buy	5,187,000 UZS	737.31	7,035 UZS/£
17.07.03	21.07.03	Sell	16,780,000 UZS	10,896.00	1,540 UZS/£
17.07.03	21.07.04	Buy	17,619,000 UZS	2,547.94	6,915 UZS/£
20.08.03	22.08.03	Sell	9,140,000 UZS	5,915.86	1,545 UZS/£
20.08.03	24.08.04	Buy	9,597,000 UZS	1,359.35	7,060 UZS/£
23.09.03	25.09.03	Sell	2,740,000 UZS	1,717.87	1,595 UZS/£
23.09.03	27.09.04	Buy	2,877,000 UZS	389.75	7,215 UZS/£