Neutral Citation Number: [2021] EWHC 2360 (Admin)

Case No: CO/3649/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 August 2021

Before :

THE HON MR JUSTICE BUTCHER

- -

Between :

The Queen (on the application of Iain Clamp and Jeremy Beck)	**Claimants**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Defendants**

- -
- -

Rory Mullan QC (instructed by **Wright Hassall LLP**) for the **Claimants**
Sadiya Choudhury (instructed by the **General Counsel and Solicitor to HMRC**) for the **Defendants**

Hearing dates: 22, 23 June 2021

- -

JUDGMENT

Mr Justice Butcher:

Introduction

1. This is an application for judicial review brought by Mr Iain Clamp ("Mr Clamp") in respect of the refusal of the Defendants ("HMRC") to consider agreeing to his request that certain loans, if reinstated, should be taxed as if they had not been repaid.

2. The Claim Form also named Mr Jeremy Beck as a Claimant. I have been informed that Mr Beck has settled his affairs with HMRC, and has stated that he wishes to withdraw his claim. As at the time of the hearing before me, no formal Notice of Discontinuance had been served. No submissions were made as to his position, and this judgment does not deal with his claim.

3. Mr Clamp's claim arises out of a charge to income tax introduced under Schedule 11 to the Finance (No. 2) Act 2017 ("the F(No.2)A 2017") in November 2017. A corresponding charge was also introduced in respect of Class 1 National Insurance Contributions ("NICs") by reference to those income tax provisions. That charge to both income tax and NICs is referred to in this judgment as the "Loan Charge".

The Loan Charge and Loan Charge Review

4. It is necessary to say something in more detail about the origin and fate of the Loan Charge. A considerable part of this history has been summarised in previous judgments of the courts, and in particular in R (oao Cartref Care Home Ltd and others) v HMRC [2019] EWHC 3382 (Admin) and Zeeman v HMRC [2020] EWHC 794 (Admin). Those accounts allow the following summary to be relatively brief.

5. Prior to 2011, there was widespread use of what HMRC term "disguised remuneration" schemes, in which users receive most or part of their remuneration in the form of loans,

with a small salary. In Zeeman, at paragraph 5 - 7, Andrews J described such schemes as follows:

> "[5] … arrangements … by which an individual receives a reward for the work he performs for another (or services he provides to another) in the form of (i) a modest salary (if employed) or fee (if self-employed) which is much lower than what he would be entitled to be paid or to charge for the work or services, plus (ii) a loan which in effect makes up the difference in terms of remuneration. To take a simple example, he carries out work for which he might have charged £50,000, in return for a £10,000 salary or fee and a loan of £40,000. He is better off than he would have been if he took a salary or a fee of £50,000 for doing the same work, because the loan is supposedly free of any liability to tax or NIC. Moreover, if the salary or fee is kept low enough, he may not have to pay income tax at a higher rate. In many [such] schemes, the loan represents by far the greater part of the financial compensation received by the individual in exchange for the work done or services rendered.
>
> [6] The loans are often made by trustees of Employee Benefit Trusts ('EBTs') rather than directly by the employer or customer, although the latter will be the source of the funds. In other cases, the loan may be made initially by the employer or customer and then assigned to the trustees of an EBT. The fact that the trustees of the EBT are, or become, the creditor, decreases the likelihood of the loan being called in, as the whole rationale of an EBT is to benefit past, present and future employees. …
>
> [7] Whilst the salary (or the net profits in the hands of the self-employed contractor) will be liable to income tax and NIC, on the face of it the loan is not income, but

rather, a transaction that gives rise to an indebtedness and a liability to repay. In balance-sheet terms the value of the 'asset' in the form of the money received under the loan, is balanced against the corresponding liability. Neither item would usually appear in the profit and loss account of a self-employed individual, though the cost of borrowing (eg from a bank) might form a deductible expense. In practice, however, the creditor does not enforce the liability for many years, if at all – and is not expected to. The individual is free to spend the money as if it were his income, and rarely makes provision for its repayment. As a matter of economic reality, the loan is part of the reward he gets in return for his work or services, often the major part."

6. The proliferation of such schemes led to legislation in the Finance Act 2011. This introduced what is now Part 7A of Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). Broadly, under Part 7A of ITEPA 2003 a charge to tax on employment income and Class 1 NICs arises where there is an arrangement between an employer, employee and a third party to provide rewards in connexion with the employment and the third party takes a "relevant step" for the benefit of the employee pursuant to that arrangement: s. 554A ITEPA 2003. A relevant step by the third party includes making a loan to the employee: ss. 554C and 554Z(7) of ITEPA 2003.

7. The introduction of Part 7A of ITEPA 2003 did not prevent the development of further variants of such schemes. Although, after its introduction, larger employers became less likely to enter into loan schemes, the use of such schemes by other employers and employees continued. In March 2016, as part of the Budget, the Government announced that it would introduce a new charge intended to shut down the use of such schemes, by means of the Loan Charge.

8. The Loan Charge was introduced by F(No.2)A 2017, Schedule 11. As originally enacted para. 1 of Schedule 11 of F(No.2)A 2017 provided that a person making a loan on or after 6 April 1999 to a "relevant person" (which included a current, former or prospective employee), which had not been repaid by 5 April 2019, was to be treated as having taken a relevant step for the purposes of Part 7A of ITEPA 2003. The outstanding amounts of loans under "disguised remuneration" schemes made over the relevant years by a third party to an employee would therefore be taxed as employment income in the 2018/19 tax year. No Loan Charge would, however, be payable in respect of loans repaid before 5 April 2019 (or a later date where an approved repayment date had been agreed by HMRC), or in respect of loans made on commercial terms.

9. The Loan Charge, as originally enacted, was challenged in the courts as disproportionate and unjustified. In the two cases I have mentioned, Cartref and Zeeman, those challenges failed, and permission to appeal was refused.

10. The Loan Charge had, however, become highly controversial. This controversy led, in the autumn of 2019, to the Government's asking Sir Amyas Morse to carry out an independent review of the Loan Charge. He reported in December 2019. In the Executive Summary of his Report appear the following:

> "… The Loan Charge therefore emerged in 2016 out of a desire to shut down the use of loan schemes, for reasons of fairness to other taxpayers, as well as value for money, practicality, and to collect revenue for public services.
>
> … I support the essential purposes of the Loan Charge.
>
> However, the design of the Loan Charge has been described to me by my legal and expert advisers, and the vast majority of contributors, as being highly unusual.

Unusual is not always wrong. But it does need to be justified. In my view, elements of the Loan Charge go too far in undermining or overriding taxpayer protections. My recommendations are designed to bring it back in line.

The first point often made by contributors to the Review was how unusual the Loan Charge is in how far it can look back, bringing schemes used since 1999 into scope. Many called this aspect of the design retrospective and unfair.

The justification for looking back to 1999 appears to be that the government always said that the schemes did not work. I found that HMRC did not consistently articulate this to taxpayers before the 2011 legislation. … Even if HMRC had made their position clearer, taxpayers are entitled to rely on the law as interpreted by the courts … At the time of the 2011 legislation being enacted, the courts had not supported HMRC's views about the taxable nature of loan schemes. Indeed, the leading cases from the time had been consistently decided against HMRC's position.

For the twenty-year look-back period of the Loan Charge to be proportionate and justified, taxpayers would need to have acted in a way that was perverse in light of a clear legal position. This was not the case. **I therefore conclude that the Loan Charge should not apply to loans entered into by either individuals or employers before 9th December 2010**, being the point at which the law became clear. …" (emphasis in original)

11. Sir Amyas Morse's recommendations fell broadly into four categories: those concerning the structure of the Loan Charge; those concerning collection of the Loan Charge; those concerning how tax avoidance should be tackled; and a series of more general recommendations as to the operation of HMRC. All but one of the

recommendations were accepted by the Government. One of the most important recommendations, which was amongst those accepted, was that which I have already quoted, namely that the Loan Charge should not apply to loans entered into by either individuals or employers before 9 December 2010, being the date on which the draft Part 7A ITEPA 2003 legislation had been published.

12. The recommendations of the Loan Charge Review were implemented by sections 15-21 of Finance Act 2020 ("FA 2020"). S. 15 of FA 2020 provided that the Loan Charge should not apply to loans or quasi-loans made before 9 December 2010. S. 16 provided that taxpayers might elect to split the Loan Charge over three tax years. S. 17 provided for the Loan Charge to be reduced where the underlying liability had been disclosed. Sections 20 and 21 made provision for the repayment, or waiver, of qualifying amounts which a person had paid, or agreed to pay, under an agreement entered into with HMRC between 16 March 2016 and 11 March 2020 in respect of income tax referable to a loan or quasi-loan which was no longer within the scope of the Loan Charge following the amendments to the legislation. The repayment scheme became effective once FA 2020 received Royal Assent on 22 July 2020, and is termed by HMRC the Disguised Remuneration Repayment Scheme 2020.

The facts of Mr Clamp's case

13. Mr Clamp was an employee of UFJ International plc ("UFJ") from 2003 to 2005. On 16 February 2005 UFJ created a settlement ("the UFJ Trust") with Ogier Employee Benefit Trustee Ltd as the original trustee for the benefit of persons defined by reference to employment with UFJ.

14. On 25 February 2005 the trustee of the UFJ Trust appointed that a portion of the trust fund amounting to £3,199,250.00 ("the sub-fund") should be held on trust for a class of

beneficiaries which included Mr Clamp and persons defined by relation to him. On 23 June 2005 the trustee of the UFJ Trust agreed to provide a facility in the amount of £1,850,000 to Mr Clamp and to Kate Clamp which could be drawn down from time to time at their request. On 24 August 2009 the trustee of the UFJ Trust agreed to provide a facility in the amount of £235,000 to Mr Clamp which could be drawn down at his request. A letter from the trustee of the UFJ Trust dated 16 September 2010 records that £1,650,000 was outstanding as at 31 August 2010 under the loan agreement dated 23 June 2005, and £235,000 was outstanding under the loan agreement dated 24 August 2009.

15. After the announcement in 2016 that the Loan Charge would be introduced, and in order to avoid it, Mr Clamp made the following repayments of his loans: on 15 May 2017, a sum of £1 million; on 2 April 2019, as sum of £885,023. Mr Clamp says in his witness statement that in order to make these repayments, he mortgaged his house and sold an investment property; and that he had thought this preferable to incurring the Loan Charge.

16. Mr Clamp further says (paragraph 12):

> "Following the Loan Charge Review and the adoption of the Morse Report recommendations on 20 December 2019, it has now become clear that the Loans would not have been caught by the Loan Charge as the Loans were taken out prior to 9 December 2010."

Correspondence with HMRC

17. Mr Clamp proceeded to correspond with HMRC about the situation. This correspondence led to the decision of which complaint is made on this application.

18. Mr Clamp's initial email of 14 April 2020 described his situation, and said that his actions in repaying his loans "were purely as a result of the threat of the loan charge (which is not now applicable and judged unfair)". He said: "… I wish to cancel my repayment to the EBT in March 2019. Drawing down on this loan facility again will allow me to repay the mortgage on my family home to return our property-security to us, and provide for my retirement as intended."

19. The reaction to this within HMRC was to focus on the request for Mr Clamp to "cancel the repayment", and on the fact that, given that that was a transaction with a third party, which had actually occurred, it was not something that HMRC was in a position to agree could be "cancelled". Some consideration was also given to what should be said as to whether the Part 7A charge would be payable on a future loan from the EBT. In one draft the author proposed wording to the effect that "HMRC does not have any discretion to disapply [a Part 7A charge]". This wording was removed, however, by a Mr Green, on the basis that there needed to be "no suggestion that we have considered the application of any possible discretion in this case when we haven't e.g. C&M etc.".

20. In the event, HMRC's email to Mr Clamp of 10 July 2020 was in these terms:

> "… My understanding of the matter is that you received loans from an EBT in 2005 and 2008 which you then repaid in March 2019. You have stated that following the announcement of the Loan Charge, you considered your options and chose to make repayment of the loans to the EBT because you 'felt it preferable that instead of paying the charge and leaving the loan (to the EBT) outstanding, it was better to repay the balance to the Trust to avoid this tax charge'.
>
> As a result of the changes announced to the Loan Charge by the Government following the Loan Charge Review, had these loans been outstanding at 5 April

2019, they would have been taken out of the scope of the Loan Charge. You state that you therefore wish to cancel the repayment that you made to the EBT.

While I appreciate your comments regarding the motives behind the repayment of the loans to the EBT, we must deal with the facts, and how the statute applies to these facts. The facts are that the loans were repaid in March 2019. This is a third party transaction between yourself and the Trust which is independent of HMRC and over which we have no ability or means to influence.

Should loans subsequently be issued from the EBT this would be the taking of a relevant step for the purposes of Part 7A of the … ITEPA 2003, so that the amount of the relevant step will count as employment income and result in a charge to tax. Should this occur, HMRC can work with you to resolve the tax implications, including any inheritance tax liabilities."

21. This was challenged by a letter from Mr Clamp's solicitors, Wright Hassall LLP ("Wright Hassall") dated 18 September 2020. In that letter it was stated that HMRC's position, which resulted in a distinction between loans repaid before April 2019 and other loans taken out before 9 December 2010, was "irrational". It was said that this was an area in which HMRC had "a discretion to act fairly and judiciously". This was because it was open to HMRC to regard a transaction entered into under a mistake as if it had never happened; or on the basis that it was not clear that a new loan from the EBT would be caught by Part 7A of ITEPA 2003. The letter also stated that Mr Clamp regarded the email of 10 July as "a decision by HMRC not to permit him to retrospectively cancel repayment of his Loan", and asked whether HMRC agreed with the analysis that it was a final decision for the purposes of judicial review.

22. HMRC's Solicitor's Office responded on 25 September 2020. The letter stated that HMRC did not consider that the email of 10 July 2020 was a reviewable decision for the purposes of judicial review. It continued:

> "In essence, Mr Clamp was seeking agreement from HMRC that, should the funds be repaid to him from the EBT, he would not be subject to a tax charge. However, there is no statutory route for such an agreement. The fact that HMRC did not provide such an extra-statutory assurance is not a reviewable decision.
>
> In response to Mr Clamp's request for 'specific advice', HMRC did provide their view that further loans issued by the EBT would be a relevant step for the purposes of Part 7A ITEPA 2003. It was noted that the amount of the relevant step would count as employment income and result in a charge to tax.
>
> If Mr Clamp disagrees with the view that a further payment to him by the EBT would lead to a charge under Part 7A, then it is up to him to carry out those actions and submit a tax return accordingly. HMRC may then enquire into his return and if they conclude that there is a charge, Mr Clamp could then make any relevant arguments by way of a statutory appeal to the First-tier Tribunal against that conclusion."

The letter also enquired as to the basis on which it was suggested that any decision which HMRC had made was "irrational".

23. On 29 September 2020 Wright Hassall replied saying that the only reasonable reading of HMRC's recent letter was that they were "refusing the Claimants' request that if they reinstate their loans HMRC will agree to tax them as if they had never been repaid in the first place. That … is a decision and one which is amenable to judicial review …"

24. HMRC's response of 2 October 2020 complained that no further details of the legal basis of the claim had been forthcoming. It continued:

> "As set out in our letter, you do not explain the basis upon which you contend HMRC could properly enter into an agreement now to apply 'a compromise position' and not apply the law; you are unclear on the source of the 'discretion' that you contend HMRC have. HMRC intend to apply the law to the facts in accordance with the legislation. We do not intend to deviate from this by agreeing now to a 'compromise' on what, as we explained, appear to be hypothetical facts …"

<u>The present claim</u>

25. The Claim Form seeks judicial review of HMRC's decision of 10 July and/or 25 September 2020 "to refuse to consider agreeing to the Claimants' request that their loans if reinstated be taxed as if they had not been repaid". In the Detailed Statement of Grounds it was argued that HMRC had "refused to consider agreeing" that if the loans were reinstated they would be taxed on the basis that those loans had never been repaid; and it was said that this refusal was on two grounds (1) that there was no basis upon which HMRC could properly agree to this and (2) that it was not irrational to refuse to enter into such an agreement in any event. It was contended that there was a basis on which HMRC could agree, based on the lack of clarity in the law, and a discretion to treat as set aside for mistake the repayments of the loans which had been made. It was also argued that it was irrational for HMRC not to have taken into account the purpose of ss. 15-20 FA 2020 in considering Mr Clamp's request.

26. Permission to apply for judicial review was granted by Swift J on 17 February 2021.

27. In opposition to Mr Clamp's application, HMRC served witness evidence, including from Mr Martin Durnin. Mr Durnin is HMRC's departmental technical lead for the application of the main provisions of Part 7A ITEPA 2003. Mr Durnin says in paragraphs 4 and 7 of his witness statement that HMRC "did not and still do not" consider that they can agree that the "cancellation" of any loan repayments will not give rise to a tax charge, and did and do not consider that it is relevant that Mr Clamp would be in a different situation to that he would have been in if he had opted to pay the Loan Charge or to settle the underlying tax with HMRC. At paragraph 8 Mr Durnin says:

> "Finally, it was not clear to me from the letter on what basis the claimants were suggesting that HMRC could agree not to apply the law to the proposed transactions if they were undertaken. The claim states that HMRC has a discretion under s. 5 of the Commissioners for Revenue and Customs Act 2005 to make concessions which may result in tax lawfully due not being collected. The application and scope of this section is a matter for legal submissions. Nevertheless, I can confirm that it is very clear that the effect of Part 7A is that any further loans (even if described as 'cancelling a repayment') would be caught by Part 7A and that, contrary to what the claimants assert, any other interpretation of the provision would be out of line with the policy objective of the legislation. Where the law is clear, HMRC must apply it correctly."

<u>Overview of the arguments</u>

28. At the hearing before me, Mr Rory Mullan QC appeared on behalf of Mr Clamp. His argument was to the following effect.

(1) HMRC had refused to entertain Mr Clamp's request that if his loans were reinstated, that would not result in a charge to tax under Part 7A ITEPA 2003, because they considered that they had no discretion in the matter.

(2) The central issue on the claim was therefore a very narrow one, namely whether HMRC have the power lawfully to agree to what Mr Clamp proposes. Mr Mullan contended that there was no issue on this claim as to whether HMRC had rationally refused to exercise a discretion, because they considered that they did not have one. Equally, he argued, it was not in issue on this hearing as to whether this was a case where there should be extra statutory clearance, because HMRC have not sought to apply their policy on extra statutory clearance.

(3) HMRC do have power to agree what is being requested. HMRC have a wide managerial discretion, which they can exercise to ensure the effective operation of the tax system, to maintain confidence in its operation, and to ensure that tax is collected in line with the policies underlying relevant legislation. As part of their management powers and duties they may interpret legislation consistently with its purpose. This may mean HMRC deliberately collecting less tax. HMRC may make concessions which may result in tax lawfully due not being collected. This is exemplified in <u>Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd</u> [1982] AC 617. They can give pre-clearances to specific transactions which are in contemplation. And they can give a purposive construction to legislation.

(4) In the present case, HMRC can properly agree to what is proposed on at least two bases. In the first place, because it is unclear whether the arrangements which would be put in place would be within the scope of Part 7A ITEPA 2003. The

argument is that the decision in RFC 2012 plc (in liquidation) v Advocate General for Scotland [2017] 1 WLR 2767 means that sums paid into a relevant trust, when paid on behalf of an employee, were the income of that employee, and that, in light of the presumption against double taxation, that meant that it was questionable that Part 7A ITEPA 2003 had any application. Alternatively, the arrangement identified in s. 554A ITEPA 2003 was completed when the loans were originally made; when Mr Clamp repaid the loans he provided all the value; and the reinstatement of the loans would not be a means of providing or otherwise be concerned with the provision of rewards in connexion with his employment which had ended many years earlier. Given the existence of these arguments, agreeing that the reinstatement of the loans on terms that, though that does not result in a charge, Part 7A ITEPA 2003 will apply in the future, would create certainty for taxpayers, and promotes trust in the fairness and integrity of the tax system. Secondly, the repayment of the loans was made under a mistake as to the consequences of not repaying. It is open to HMRC in such circumstances to agree to the reinstatement of the loans without a charge to tax, because it is a tenable purposive construction of Part 7A ITEPA 2003 (especially when regard is had to the legislative amendments in s. 15 FA 2020) that reinstatement of loans repaid under a mistake is not the type of transaction which answers to the statutory description of a relevant step.

(5) Accordingly, HMRC's decision that they could not agree with Mr Clamp's proposal on the basis of a lack of a discretion was wrong, should be quashed, and the matter remitted to HMRC to reconsider Mr Clamp's request. In that reconsideration, HMRC should have proper regard to the scope of their powers and all relevant considerations, which include the reasoning of the Loan Charge Review and the

purpose of the FA 2020 amendments. What the Loan Charge Review and the FA 2020 amendments recognise is that it was fundamentally unfair for the Loan Charge to apply to loans made before 9 December 2010. The Court should declare that "the acknowledged error in applying the Loan Charge to [Mr Clamp's] situation is a matter to be taken into account by HMRC in any reconsideration."

29. For HMRC Ms Choudhury contended that Mr Clamp's claim failed on straightforward grounds which did not involve any detailed consideration of the extent of HMRC's powers; but that in any event HMRC had lacked the power to agree to what was proposed. Her argument was as follows:

(1) That the decision of HMRC which is challenged was a refusal to agree to Mr Clamp's proposed tax treatment if the loans were reinstated.

(2) While Mr Clamp now sought to suggest that the only issue was whether HMRC had the power to agree to that tax treatment, that would not be sufficient to lead to the quashing of the decision. The reason was that even if HMRC had the power lawfully to *agree* to the proposed tax treatment, they undoubtedly also had the power to *refuse* to agree it. So even if they had wrongly thought that they had no power lawfully to agree the proposed treatment that would be immaterial, unless the refusal was unlawful. There was no basis for saying that the refusal was unlawful. HMRC had set out in paragraphs 54-56 of their Detailed Grounds of Defence their case that, even if they had the power to agree, their refusal had not been irrational.

(3) Ms Choudhury suggested that Mr Clamp had, for the purposes of this hearing, sought to discard that part of his case in his Detailed Statement of Grounds in which he had contended that HMRC's decision was irrational in order to try to present the

case as one which involved a narrow issue as to HMRC's vires. She submitted that the consequence of this position was that his challenge must fail. In the absence of any irrationality challenge, there was no public law ground on which HMRC's refusal to agree the proposed treatment could be impugned, even if it had been within their powers to have agreed it.

(4) It was not the case that the question of irrationality or otherwise was rendered irrelevant on the present application as a matter of procedure. On the contrary, Ms Choudhury submitted, the issue of irrationality had been raised in correspondence, in the Detailed Statement of Grounds, and in the Detailed Grounds of Defence. Any suggestion on behalf of Mr Clamp that HMRC were procedurally barred from arguing that, because there was no irrationality in their refusal, his claim failed was one which could not be taken for the first time at this stage.

(5) In any event, HMRC could not be procedurally barred from an argument that even if they had wrongly directed themselves as to the scope of their powers it would have made no difference because the answer would still have been not to agree to Mr Clamp's request. This was because of the terms of s. 31(2A) Senior Courts Act 1981. That provision was applicable in the present case. The mandatory wording of s. 31(2A)(a) ("must") meant that the court was obliged to consider the issue set out in s. 31(2A). Furthermore, it was indeed highly likely that the outcome would not have been substantially different. HMRC would have refused to agree to the suggested tax treatment even if they had considered that they could have legally done so, and that this is so is apparent from the witness statement of Martin Durnin.

(6) To the extent that it is necessary to consider whether HMRC had power lawfully to agree to what Mr Clamp was proposing, they did not. HMRC were being asked to

agree in advance that no liability to tax should arise. That was not something that they could do. Equally, Mr Clamp was seeking a forward tax agreement, which was something HMRC could not agree to. Furthermore, HMRC could not exercise collection and management powers to "untax" a transaction in respect of which they had formed a settled view that it ought to be taxed.

(7) As to the first of the two specific bases on which Mr Clamp contended that HMRC could agree to what he suggested, HMRC consider that the law is clear, and that there is no lack of clarity in Part 7A ITEPA 2003. The fact that sums from which loans were made were taxable as employment income did not prevent further transactions in respect of those sums from being relevant steps within Part 7A ITEPA 2003, as was made clear by the double taxation provisions introduced by F(No.2)A 2017, in particular s. 554Z5. Equally the argument that the relevant arrangement was completed when the loans were originally made was also wrong. That would suggest that funds could be loaned by an EBT, repaid, and then appointed to the employee beneficiary without any tax charges arising on that appointment. The simple act of repayment is not sufficient to break the connexion with the original arrangement. As to the second, HMRC do not consider that Mr Clamp repaid the loans under a "mistake". In any event, Mr Clamp has not set aside the repayments, and HMRC cannot agree to what his tax position would be on the basis of a hypothesis that he does so.

Analysis

The decision made

30. The starting point is the decision which was made. This is said in the Claim Form to have been a decision made on 10 July and/or 25 September 2020. As permission to

bring judicial review proceedings has been granted, HMRC no longer dispute that a decision was made. Looking at the two communications of 10 July and 25 September 2020, the decision must, in my view, be characterised as one to decline to agree Mr Clamp's proposal that, should the loans be reinstated, HMRC would tax them as if they had never been repaid. It is not adequately described simply as a decision not to consider his proposal. It was rather a decision not to agree it, which was taken on the basis that there was no statutory route by which HMRC could enter such an agreement, and no extra-statutory assurance was being provided.

Did HMRC have power to agree to Mr Clamp's proposal?

31. While Ms Choudhury argued that the issues should be approached in a different order, I consider that this is the next issue which falls for consideration. In this regard, as I have said, HMRC contend that they had no power to enter into the arrangements proposed. It appeared to me that the arguments in relation to this fell into two groups. The first was as to whether HMRC had the power to enter into the type of arrangement proposed by Mr Clamp, or whether they had no power to do so because what was being proposed was an agreement that there should be no *liability* for tax and/or was a "forward tax agreement". The second was as to whether, assuming that HMRC could enter into agreements or arrangements of the broad type proposed, they had the power to enter into such an agreement in the present case in accordance with what has been referred to as the rule, or principle, in R (Wilkinson) v Inland Revenue Commissioners. I will consider these two groups of points in turn.

Did HMRC lack a relevant power and discretion by reason of the nature of the proposed arrangement?

32. It was not in dispute that HMRC have, pursuant to s. 5 Commissioners for Revenue and Customs Act 2005, very wide powers of collection and management of revenue.

Inherent in those powers of collection and management is a discretion. This was described in R (oao Davies) v Revenue and Customs Commissioners [2011] 1 WLR 2625 by Lord Wilson JSC at [26] in these terms:

> "The primary duty of the revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: section 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (R (Wilkinson) v Inland Revenue Comrs [2005] 1 WLR 1718, para. 21 per Lord Hoffmann), it is lawful for the revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 636, per Lord Diplock. In particular the revenue is entitled to apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute."

33. As referred to in that paragraph of Davies, HMRC may agree not to collect tax lawfully due. The lawfulness of such an arrangement was confirmed by the House of Lords in the National Federation of Self-Employed and Small Businesses Ltd case, where it was held that the revenue might offer what was in effect an amnesty, such that if an arrangement for the payment of some tax was agreed there would not be an investigation into tax lost in certain previous years. It is also clearly the case that

HMRC can enter into certain binding contracts under which taxpayers' liabilities are fixed: IRC v Nuttall [1990] 1 WLR 631; HMRC v Southern Cross Employment Agency Ltd [2015] UKUT 122 (TCC).

34. HMRC however argued that it was not within their powers to agree the arrangement proposed here because the nature of those arrangements was an agreement in advance that there should be no liability to tax. They further submitted that it would amount to a "forward tax agreement" because Mr Clamp was suggesting that they should agree that if he carries out a transaction in the future reinstating his loans, his liability would be fixed at nil. That, they submitted, was not something which they had the power to agree, as shown in Al Fayed v Advocate General for Scotland (representing the Inland Revenue Commissioners) [2004] STC 1703.

35. I was not persuaded that what Mr Clamp was proposing was an agreement of a type to which HMRC had no power to accede in any circumstances. Even if it were correct that HMRC cannot agree in advance that there will be no *liability* in respect of a tax, this would not preclude them from agreeing that they would make no *assessment* to tax, as Mr Mullan submitted. As to the suggestion that they could not enter into the arrangement proposed because it was a "forward tax agreement", I accept that there are limitations on what agreements HMRC can lawfully enter into in respect of taxes which will become payable as a result of future transactions, as is shown by Al Fayed. The arrangement considered in that case was, however, significantly different from that contemplated here. In that case the forward tax agreement involved the Inland Revenue accepting a fixed sum by way of tax in respect of the period of the agreement, in circumstances where what might happen during that period, and what might otherwise have been the amount of tax payable, were not known (see paragraphs 110-128). This

feature meant that the Inland Revenue had no power to agree it. That is different from the current proposal. If it were agreed that the reinstatement of Mr Clamp's loans should not result in a charge to tax under Part 7A ITEPA 2003, that would be an agreement in relation to a situation with defined parameters, where the amount of tax which would otherwise have been payable would be known. The other aspect of the agreement proposed by Mr Clamp is that he would then accept that the loans would be taxable in accordance with Part 7A ITEPA 2003 in the future. That would not disable HMRC from investigating actual tax liabilities, as they might arise hereafter.

36. I do not, however, need to, and do not, decide that HMRC had the power to enter into a binding contractual agreement of this type because, as Mr Mullan submitted, what Mr Clamp is seeking would not necessarily require such a binding contract. It is something that could be achieved by HMRC giving a clearance or advance assurance in respect of the proposed transaction. There is no doubt that HMRC have the power, in appropriate circumstances, to give clearances in respect of future transactions. This is in accordance with what was said by Lord Browne-Wilkinson in <u>R v Inland Revenue Commissioners Ex p. Matrix Securities Ltd</u> [1994] 1 WLR 334 at 356:

> "It is the statutory function of the revenue to collect the taxes which Parliament has legislated are to be payable. The tax liability which any given transaction attracts can only be determined by the courts after the transaction has been carried through. But the financial viability of many transactions depends upon its tax repercussions. Therefore taxpayers frequently need to know the tax consequences of a transaction before carrying it through. To meet this need, the revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with

> confidence. This practice is of the greatest benefit to taxpayers and it would not be in the public interest to discontinue it."

It was consistently with this, as Mr Mullan submitted, that HMRC have a non-statutory clearance procedure and service.

37. Ms Choudhury for HMRC said that HMRC's non-statutory clearance procedure was not relevant here, because Mr Clamp had not stated in his initial email of 14 April 2020 that he was seeking clearance. I did not, however, understand her to be saying that the mere fact that the request was not labelled a request for clearance of itself meant that it could not be granted; and Ms Choudhury also submitted that had it been labelled as such a request there were various reasons why it would not have been granted.

38. Mr Mullan submitted that, as HMRC had never addressed the matter as a request for a clearance, their reasons why it would not fall within the clearance policy did not arise, but also disagreed that Mr Clamp's request would not have fallen within the parameters of the policy. Given that HMRC did not deal with the matter on the basis of their clearance policy – as opposed to more general considerations as to what they considered to be their powers – the latter question does not directly arise for decision. The significant point for present purposes appears to me to be that it is not right to say that HMRC have no power to give advance assurances in respect of contemplated future transactions, and that to do so does not necessarily involve an impermissible "advance tax agreement".

Do HMRC lack the relevant power and discretion by reason of the "Wilkinson principle"?

39. I turn to the second aspect of the dispute as to the ambit of HMRC's powers.

40. The discretion which HMRC have, as part of their collection and management powers, to enter both into back tax arrangements and advance assurances must be exercised in furtherance of the primary duty of HMRC to collect taxes which are properly payable in accordance with the taxation legislation. The most obvious case of where such arrangements or assurances will further the HMRC's primary objective are where a cost-benefit analysis commends them. It is also doubtless the case that HMRC can take into account that cooperation with the public facilitates the collection of tax, and that cooperation requires fair dealing by HMRC (see the in the decision of the Court of Appeal in R (oao Davies) v Commissioners for HM's Revenue and Customs [2010] EWCA Civ 83 at [12] per Moses LJ).

41. HMRC cannot properly, however, make concessions that tax should not be payable, where this is done not to facilitate the overall task of tax collection, but because they consider that a tax which Parliament has clearly imposed should not as a matter of principle or policy, or by reasons of considerations of equity, be payable. In R (Wilkinson) v Inland Revenue Commissioners [2003] 1 WLR 2683, in the decision of the Court of Appeal in that case, Lord Phillips MR said this (at [46]):

> "No doubt, when interpreting tax legislation, it is open to the commissioners to be as purposive as the most proactive judge in attempting to ensure that effect is given to the intention of Parliament and that anomalies and injustices are avoided. But in the light of the authorities we have cited above and of fundamental constitutional principle we do not see how section 1 of the 1970 Act can authorise the commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid, not because this will facilitate the overall task of collecting taxes, but

because the commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question."

42. In his speech in the House of Lords in the same case, in which the decision of the Court of Appeal was affirmed, Lord Hoffmann said this ([2005] 1 WLR 1718, at [21]):

> "This [managerial] discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margin or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under section 1 of TMA. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women."

43. Further helpful guidance on the ambit of HMRC's collection and management powers, in the light of Wilkinson was given by the Divisional Court in Heathrow Airport Ltd and Others v Her Majesty's Treasury [2021] EWCA Civ 783. At [68], having quoted paragraph [21] of Lord Hoffmann's speech in Wilkinson, Green LJ, said:

> "[68] The phrase 'could have granted but did not grant' expresses the underlying constitutional premise that when Parliament decides to impose a tax it

necessarily delineates the category or class of taxable person and differentiates them from those who are not subject to the tax. It is not open to the Commissioners to depart from that legislative intent and by means of an ESC which forgives the obligation to pay. The citation from Wilkinson also explains that the power does not enable the Commissioners to grant an ESC because, for instance, they adopt a different view of *policy* to that of Parliament. This was at the heart of the issue in Wilkinson where it had been argued that the Commissioners should have used their C&M powers to formulate a tax rule (in accordance with other binding legislative obligations '*on grounds not of pragmatism in the collection of tax but of general equity between men and women*'. That was not a policy choice that Parliament had made, and a policy of fiscal equality between men and women was not therefore one that Commissioners could introduce *via* an extra-statutory concession."

44. At [90]-[92] in giving reasons as to why the retention or extension of the ESC there under consideration was not within the Commissioners' powers, Green LJ said this:

"[90] … The House of Lords in Wilkinson made clear that the Commissioners had a broad discretion as to the use of their powers of management but that this did not extend to untaxing the taxable by an ESC: see the citation at paragraph [67] above which sets this out as an outer limit of the exercise of the C&M power. It follows that once the Commissioners were of the settled view that airside sales should have been taxed then there was no residual power to untax.

[91] Secondly, the Claimants' argument about the modalities of removal is inconsistent with the statutory language …

> [92] Thirdly, it follows from the first point that it is not within the C&M powers of the Commissioners to take a different view of *policy* to that of Parliament. Even if the Commissioners were of the view that retaining or extending the concession would increase the net revenue to the Exchequer (which they were not), that would still not entitle them to adopt an ESC if it were contrary to the express will of Parliament. Parliament has decided that the tax should be paid on all transactions and this conclusion cannot be gainsaid by a judgment of the Commissioners that Parliament got it wrong, and the exemption should be broadened. The reference to '*obtaining the highest net return*' in Fleet Street Casuals … is a reference to increasing net revenue within the parameters *set by Parliament*. It is not a consideration that operates at large." (emphasis in original)

45. How do these principles apply in the present case? The parties disagree as to whether the legislation is clear. Mr Clamp contends that it is not, and that it is "equivocal". He submits that it is arguable that Part 7A ITEPA 2003 does not apply in his situation at all. By contrast, HMRC do not accept that there is any uncertainty in the legislation. Their position is that there is no doubt that Part 7A ITEPA 2003 is applicable. I have set out the competing arguments in paragraphs 28(4) and 29(7) above.

46. These are not points which have previously been resolved by the courts. Equally, it was the position of both parties, correctly in my view, that, on this application, the court is not required and should not seek to resolve the issue of the proper construction of Part 7A ITEPA 2003 or how it would apply to the reinstatement of the loans or to any future arrangements in respect of them. In circumstances where the proper construction of the legislation has not, therefore, been decided by the courts the question arises

whether the existence of an arguable case that the legislation does not impose a charge to tax in the present case means that HMRC have the power to agree not to seek to collect tax, or give assurances that they will not collect tax, notwithstanding that they consider that argument to be wrong and the legislation to be clear.

47. In my judgment, at least in a case where HMRC have formed a "settled view" that tax is payable under the legislation, and that view cannot be seen to be irrational or formed for improper purposes, they do not have that power. I consider that this is in keeping with paragraph [90] of Heathrow Airport. I also consider that it is in keeping with the proper limits of the collection and management discretion in this area. That discretion is, as Lord Hoffmann put it in Wilkinson in the passage I have quoted, one which enables HMRC to formulate policy in the interstices of the tax legislation and to deal with minor or transitory anomalies. It is not one which allows them to "untax" matters which they consider are unequivocally taxed on the basis that another view of the legislation is arguable – a situation which, of course, might arise in relation to numerous taxation provisions.

48. It also appears to me that a recognition of this limitation on HMRC's collection and management powers is consonant with the statutory regime by which tax assessments may be challenged. If a taxpayer in cases such as the present disputes HMRC's view of the effect of the tax legislation, it is open to her to proceed with the proposed transaction, and to appeal to the tax tribunal against any assessment to tax which might be made. The tax tribunal is ordinarily the exclusive, and appropriate, forum for challenging HMRC's view of the law, as emphasised in Autologic Holdings Plc v IRC [2006] 1 AC 118. In any such appeal in the tax tribunal it is open to the taxpayer to

argue, for example, that the relevant legislation should be accorded a purposive construction under which no tax is payable.

49. An acceptance of Mr Clamp's argument as to the subsistence and width of a managerial discretion on the part of HMRC not to seek to levy tax, even when they have formed the view that the legislation imposes a charge, would be likely to mean more challenges by way of judicial review to HMRC decisions refusing to agree proposals whereby no tax is to be levied, disrupting the ordinary process of appeals to the tax tribunal against assessments made. In this context what Sales LJ said in <u>R (oao Glencore Energy UK Ltd) v Revenue and Customs Commissioners</u> [2017] EWCA Civ 1716 at paragraph 57 (cited in the context of challenges to the Loan Charge in <u>Finucane v Commissioners for HMRC</u> [2021] CSOH 38) is significant:

> "… The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach

> adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that problem will be by way of appeal."

50. I recognise, of course, that the possibility of judicial review is not of itself a reason for confining the managerial discretion of HMRC. It is, however, of importance, as emphasised in what Sales LJ said in Glencore, that the taxpayer's interests are ordinarily and appropriately protected by the regime of an appeal against an assessment to tax. There is no need, in order to provide proper protection to the taxpayer, to recognise a managerial discretion on the part of HMRC to agree not to seek to collect tax as subsisting even when they have formed the clear view that tax is or will be payable. Such proper protections are, instead, provided by way of the statutory appeal process.

51. In the present case, on the evidence and material before me I consider it to be clear that HMRC are of a settled view as to the construction of Part 7A ITEPA 2003, namely that tax would be payable on the reinstatement of Mr Clamp's loans. This is apparent from Mr Durnin's witness statement, to which I have referred and from which I have quoted above, and from the stance of HMRC throughout this application. Furthermore, no case has been made on this application that the view formed by HMRC is irrational or improperly motivated. Any such suggestion would, I consider, be very unlikely to succeed.

52. Mr Mullan criticised the notion of a "settled view" on the part of HMRC or that it could have the significance which "taken literally" the statement in Heathrow Airport

appeared to attach to such a view. He cited R (oao Aozora GMAC Investment Ltd) v HMRC [2019] EWCA Civ 1643, especially at paragraph 36, and the case referred to by Rose LJ in that paragraph, R (Hely-Hutchinson) v HMRC [2017] EWCA Civ 1075, to make the point that HMRC have the power to change their minds notwithstanding that they have previously reached a settled view. In my judgment, however, those cases, which are concerned with substantive legitimate expectations, do not throw doubt on the meaningfulness of the concept of HMRC having a "settled view", nor on the relevance of such a view as is contemplated in Heathrow Airport. Furthermore, the fact that HMRC can in certain circumstances – in particular in the event of mistake or misapprehension – change their view does not assist Mr Clamp in this case. The evidence and arguments of HMRC showed that they have not changed their view in this case. No challenge has been made in this case that it is irrational for HMRC to hold, and continue to hold, that view.

53. Given that HMRC have formed and hold such a "settled view" that a charge to tax is imposed, they do not, in my judgment, have a discretion to agree that there should be no charge to tax on the basis that another view of the legislation is possible or on the basis that it would be more equitable for there not to be such a charge. If Mr Clamp continues to disagree with HMRC's view, it is open to him to enter into the transaction and to appeal any assessment.

54. A similar conclusion applies to the other way in which Mr Clamp contends that HMRC have power to agree his request, which is that his repayment of the loans was made as a result of a mistake as to the consequence of leaving them outstanding; that he has a case to set the repayments aside; and that were they to be set aside HMRC would be bound to treat the loans as reinstated. The position here is that HMRC do not consider

that Mr Clamp made a mistake because at the time he repaid his loans, the law was clear that if he did not do so before a certain date, he would be liable to pay the Loan Charge in respect of it; and that what occurred was a misprediction. In any event, HMRC's position is that they will proceed on the basis of the facts, and that unless the repayments of the loans are set aside, the possibility that they might be set aside does not mean that they have a managerial discretion to treat them as if they had been.

55. In my judgment, given that at present the loans have been repaid, and HMRC have a settled view that a reinstatement of the loans would give rise to a charge to tax, they have no power to agree now that there should not be a charge to tax on the basis that it might, but might not, be found in the future that the repayment of the loans was set aside.

Conclusion as to whether HMRC had the power to agree Mr Clamp's proposal

56. For these reasons, I conclude that HMRC did not have power to agree to what was proposed by Mr Clamp. To the extent that HMRC's view that they did not have such power was because they considered that the arrangements being proposed were "forward tax agreements" and that they had no power to enter into any arrangements of the kind proposed by Mr Clamp, I consider that that was wrong. Any such error, however, was immaterial, because HMRC did lack such power in relation to the specific proposals in the present case for the reasons I have given, which relate to what has been called, by way of shorthand, the "Wilkinson principle".

57. This is sufficient to determine that the application for judicial review must fail. Given that I have held that HMRC had no power to agree that the proposed arrangements did not give rise to a charge to tax, a fortiori their decision not to agree to that was not illegal.

Section 31(2A) Senior Courts Act

58. As I have set out, HMRC contended that, even if they had wrongly directed themselves on the scope of their powers, they would, on a correct self-direction as to the extent of their powers, still not have agreed Mr Clamp's request, and that s. 31(2A) Senior Courts Act 1981, in the circumstances, required the court to refuse to grant any relief on this application.

59. That section provides:

> "(2A) The High Court-
>
> a) must refuse to grant relief on an application for judicial review, and
>
> b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

60. The mandatory terms of this section mean that it is one which I should consider. In any event, I do not consider that there is any unfairness to Mr Clamp in doing so given the nature of the evidence and arguments before me.

61. While it may, in many situations, be difficult for the court to be satisfied that it is highly likely that the outcome would not have been substantially different if the decision maker approached the matter in a way different from that in which it did, in my judgment it is established here.

62. The conduct complained of must be that HMRC considered that they had no power to agree to Mr Clamp's suggestion. It appears clear, however, that even if HMRC had considered that they had a discretion which could be exercised in the present case, they would not have agreed to Mr Clamp's request. That is because, even if they had approached the matter on the basis that the legislation was not unequivocal, or that there might be an argument that Mr Clamp had repaid the loans under a mistake, and that this gave them a discretion to agree to an arrangement such as that proposed by Mr Clamp, they would not have agreed it. This is because **their** view was (and remains) that it would not be in accordance with the correct construction of the legislation or the policy underlying it to accept that there will be no charge to tax on the reinstatement of the loans, that Parliament has not provided for that result when it could have done, and also that they must apply the law to the facts as they stand. That is apparent from Mr Durnin's witness statement, and from HMRC's stance on this application. As HMRC point out, no attempt is made to suggest that such a decision would be irrational. In those circumstances, it does appear to me highly likely that the outcome for Mr Clamp would not have been substantially different if the conduct of which he complains had not occurred.

Overall conclusion

63. For these reasons the relief sought is refused and this application for judicial review is dismissed.