Neutral Citation: [2025] UKFTT 00750 (TC)

Case Number: TC09557

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/12387

INHERITANCE TAX – employee benefit trust – scheme entered into to pay a bonus in a way that avoided income tax and NICs – Appellant accepted that scheme ineffective and that income tax and NICs are due – whether an additional charge to inheritance tax under IHTA 1984, s 94 (charge on participators in a close company) – whether the effect of IHTA 1984, s 94(2)(a) is to prevent an apportionment – yes – appeal allowed

Heard on: 19 May 2025
Judgment date: 19 June 2025

Before

TRIBUNAL JUDGE RACHEL GAUKE
DR COLIN BOYD

Between

ANNETTE TONKIN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Laurent Sykes KC of Counsel, instructed by MHA MacIntyre Hudson

For the Respondents: Mrs Amy Cook, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant, Ms Annette Tonkin, has appealed against a notice of determination issued on 8 April 2022 imposing a charge to inheritance tax of £83,020, plus interest.

2. This case concerns a tax avoidance scheme entered into by Ms Tonkin's company, Resource (Marketing Research) Ltd ("the Company"), in 2012. The scheme was intended to allow Ms Tonkin to receive what was in effect a bonus from the Company in a manner that avoided income tax and national insurance contributions ("NICs"). Ms Tonkin has accepted that the scheme resulted in the payment of employment income and that this was subject to income tax and NICs under PAYE, and so in this sense the scheme did not work.

3. The dispute in this case is about whether, in addition to the income tax and NICs consequences, Ms Tonkin's participation in the scheme resulted in a liability to inheritance tax. Having considered the evidence and the submissions of both parties, we have decided to allow Ms Tonkin's appeal, for the reasons we give below.

HEARING AND EVIDENCE

4. We had:

   (1) a 492-page hearing bundle containing HMRC's statement of case (original and revised versions), other procedural documents relating to the appeal, two witness statements from Ms Tonkin, and other relevant documents and correspondence

   (2) a 93-page supplementary bundle containing accounts for the Company

   (3) a 266-page respondent's authorities bundle, a 593-page appellant's authorities bundle and a 22-page supplementary authorities bundle for the appellant, each of which contained relevant legislation and case law, and

   (4) both parties' skeleton arguments, plus a supplementary skeleton argument for Ms Tonkin.

5. Ms Tonkin attended the hearing and gave oral evidence. Her two witness statements stood as her evidence in chief and she was cross-examined. We found her to be a reliable and credible witness.

FINDINGS OF FACT

6. Based on the evidence before us, we make the following findings of fact.

   (1) The Company was incorporated in March 1992, and its principal activity is market research. Ms Tonkin is, and has been since October 2004, the sole director and the sole shareholder of the Company. The Company previously had two directors but the second director left in 2004. At the time of the departure of the other director, the Company's business suffered a downturn. Since then Ms Tonkin's work and efforts have built up the Company's profitability.

   (2) Until 2012, Ms Tonkin's habit was to keep funds in the Company and only pay herself what she described as "basic dividends and very low salary". When the Company was first set up, bonuses were paid every few years, but as of 2012 the last time this had happened was in 2002.

   (3) Mr Shahbaz Husain was the company secretary of the Company between 10 October 2011 and 1 January 2019. Mr Husain was also the Company's accountant. At

some time around 2012 he introduced Ms Tonkin to a Mr Martin Dore of Smart Tax Solutions Ltd. Mr Dore discussed with Ms Tonkin what she described as a "way of taking out a bonus for the work done in all these years".

(4) Ms Tonkin's understanding was that under the arrangements proposed by Mr Dore, funds would not be received by her but would instead belong to a trust of which she would be a beneficiary. As Ms Tonkin understood it, the money from the trust would be lent to her, but the loan would be left outstanding indefinitely, or at least until her death.

(5) Ms Tonkin believed that this arrangement would have inheritance tax advantages on her death. She also believed that, compared with a normal bonus, this arrangement would have the benefit of not being taxable for her.

(6) Mr Husain approved of the scheme and advised Ms Tonkin that the Company should go ahead and enter into the arrangements.

(7) Ms Tonkin knew that there were risks associated with the scheme but Mr Dore told her that the scheme was above board and that "this was how people did things". She knew there was a risk that the law might change, and/or that HMRC could challenge the scheme under the existing law. She was, however, assured that HMRC would not seek to impose income tax and NICs while also denying a corporation tax deduction.

(8) We had no evidence that inheritance tax featured in Ms Tonkin's discussions with her advisers, although as we note below Ms Tonkin signed an engagement agreement which made specific reference to the risk of an inheritance tax charge under IHTA 1984, s 94.

(9) The arrangements had been disclosed to HMRC under the rules on the disclosure of tax avoidance schemes ("DOTAS") and had been given a DOTAS reference number. Ms Tonkin was aware that the scheme had a reference number from HMRC and thought this meant that it must be legitimate.

(10) The Company entered into the scheme in November and December 2012, and the scheme transactions are summarised below. Once the scheme transactions were completed Ms Tonkin was owed a large sum of money from the Company in her director's loan account, but left all or most of this amount within the Company rather than drawing it down.

(11) Since the implementation of the scheme Ms Tonkin has lost contact with Mr Husain and has been unable to locate him, or the files he held relating to the Company. She last heard from him in 2018. For a number of months around the end of 2018 and start of 2019 she was without representation. She engaged MHA MacIntyre Hudson to represent her some time around the beginning of 2019.

The scheme transactions

7. In simplified form, the scheme involved the following steps.

(1) A Guernsey-resident trust ("the Trust") was set up with the Company as settlor and the Company's employees as beneficiaries. The Company made an initial contribution to the Trust of £100 by way of gift.

(2) The Company transferred £740,000, and the Trust transferred £100, to a company called International Employment Services Ltd ("IES").

(3) The Company funded the £740,000 by borrowing that amount from a company called Havelet Finance Ltd ("HFL"). HFL paid the £740,000 directly to IES.

(4) IES used the £740,100 to buy gold which it held as nominee for Ms Tonkin. It immediately sold the gold and, at Ms Tonkin's direction, transferred £740,000 to HFL (thereby repaying the Company's loan), and £100 to Ms Tonkin.

(5) Ms Tonkin promised to pay £740,100 to the Trust within ten years.

(6) As a result of Ms Tonkin repaying the Company's debt to HFL, the Company owed Ms Tonkin £740,000. This amount was credited to her director's loan account and was available for her to draw down.

8. In more detail, the scheme was implemented in the following manner.

(1) The Company's Board of Directors held a meeting on 20 April 2012. The meeting was attended by Ms Tonkin, Mr Husain and Mr Dore. According to the minutes, the purpose of the meeting was to "discuss employee reward arrangements for the year ending 30 April 2012".

(2) It was resolved at the meeting to set aside £740,000 "for awards to be made to key employees in respect of their service for the year ending 30 April 2012". The minutes record that:

> "Ms A Tonkin confirmed that he [sic] has been informed of (on behalf of the company) various ways in which funds could be used to benefit employees. Ms A Tonkin mentioned that he [sic] has received guidance that it was possible through a certain structure to provide benefits to individual employees and that this could defer or in certain circumstances even eliminate income tax and NIC, yet allows value to be passed to the employee".

(3) The minutes then record a discussion about which employees and directors should be included in the employee reward arrangements for the year, after which a provisional "list" was drawn up containing just one name: Ms Tonkin. The intention of all concerned was that only Ms Tonkin would benefit from these arrangements.

(4) Three Board meetings took place on 23 November 2012: one at 2.30pm, one at 3pm and one at an unspecified time.

(5) The purpose of the meeting at 2.30pm was, according to the minutes, "to consider and, if thought fit, to:

> (a) establish a discretionary trust to be known as the Resource (Marketing Research) Ltd Trust ("the Trust"), and
>
> (b) approve the appointment of Bourse Trust Company Ltd as the sole corporate trustee of the Trust ("the Trustee")."

(6) The Company was authorised to pay an initial contribution of £100 to the Trustee by way of gift. This payment was subsequently made.

(7) The minutes of the meeting at 2.30pm also recorded that:

> (a) the purpose of the Trust was to reward and incentivise the employees and office holders of the Company
>
> (b) the Trust was intended to be controlled and managed in Guernsey, so that it would be resident outside the UK for tax purposes, and
>
> (c) one of the reasons for establishing the Trust offshore was to ensure that property held in the Trust was outside the scope of the charge to UK capital gains tax.

(8) Ms Tonkin was declared to be a discretionary beneficiary of the Trust.

(9) During the meeting at 3pm, it was resolved that a Deed of Transfer of Assets ("DOTA") would be executed on behalf of the Company. The minutes of the meeting record that the DOTA was "a suitable mechanism to reward employees for their services." The terms of the DOTA would include the following:

(a) the Company would pay £740,000 to IES

(b) the Trustee would pay £100 to IES

(c) IES would transfer gold with a market value of £740,100 to Ms Tonkin, and

(d) Ms Tonkin would promise to pay £740,100 to the Trust within ten years.

(10) The minutes of the meeting at 3pm also recorded that the Company had been advised that it should obtain a corporation tax deduction for the £740,000. It was also expected that the transfer of assets to Ms Tonkin would result in an obligation on the Company to withhold income tax and NICs under PAYE, but only in respect of the £100 paid by the Trust.

(11) The minutes of the meeting that took place at an unspecified time record the Company's intention to borrow £740,000 from HFL. The loan was to provide the Company with funds to pay for the provision of assets by IES to Ms Tonkin.

(12) Ms Tonkin explained that the reason for borrowing the money from HFL, rather than using the Company's own funds, was that from her perspective IES was an unknown third party and she did not feel comfortable transferring that amount of money to an entity with which she was not familiar. Mrs Cook suggested that this seemed unnecessarily complex when the Company already had the money, but Ms Tonkin said that it only involved her signing a couple of extra documents. We accept Ms Tonkin's evidence that the reason for the Company borrowing money from HFL was that she did not want to transfer a large sum to an unknown third party.

(13) Ms Tonkin, in her capacity as director of the Company, entered into an engagement agreement with the scheme promoter on 23 November 2012 (the same day as the three Board meetings). This document includes a section headed "risks", which lists a number of challenges that HMRC may make to the "strategy". The document states that if these challenges are successful the consequence could be:

(a) the Company failing to secure a corporation tax deduction

(b) the Company making a transfer of value for inheritance tax purposes, which is apportioned to the Company's shareholders under IHTA 1984, s 94, and

(c) a charge under chapter 2 of Part 7A ITEPA 2003.

(14) The engagement agreement gave clients a number of options regarding the purchase and delivery of the gold. The option selected by Ms Tonkin was for IES to buy gold for the Employee (ie Ms Tonkin), to sell the gold at the earliest opportunity, and deliver the proceeds to Ms Tonkin.

(15) The agreement noted that the "strategy" is a notifiable arrangement for the purposes of the DOTAS rules, and so had been disclosed to HMRC, for which a DOTAS scheme reference number had been, or would be, obtained.

(16) In the same agreement, Ms Tonkin ticked a box which stated that she had "declined to receive tax advice from a tax adviser" but that she was an experienced business person familiar with tax planning issues, had read and understood the technical checklist provided by her "introducer", and fully understood the risks involved. She further agreed

to indemnify IES and the Trustee in respect of any claim resulting from any PAYE, NICs or other liability resulting from any of the transactions involved in the "strategy".

(17) Ms Tonkin's oral evidence, which we accept, is that by ticking this box she believed she was confirming that she had not received advice from an adviser connected with the scheme promoter. She had, in fact, received advice in connection with the scheme from both Mr Husain and Mr Dore.

(18) On the same day (23 November 2012), Ms Tonkin, this time in her capacity as employee, wrote to IES enclosing the executed DOTA, and giving IES authority to complete the figure for the quantity of gold bullion to be transferred, on the basis that "I fully understand that it is not possible for IES to quantify the amount of bullion to be transferred until the date of the transfer".

(19) Also on 23 November 2012, Ms Tonkin signed an "instruction to sell", addressed to IES, instructing them to sell the gold "at best" and pay £740,000 to HFL, with the balance to be transferred to her own account.

(20) On 4 December 2012, the Company entered into the loan agreement with HFL. HFL agreed to make a loan to the Company of £740,000, and to pay that amount directly to IES.

(21) Also on 4 December 2012, the Company and Trustee entered into a deed of settlement to establish the Trust, with the Company as settlor. There was a list of beneficiaries including the Company's employees, office holders, former employees and former office holders, as well as those persons' spouses, surviving spouses, children, remoter issue and dependants, and a default beneficiary (the Red Cross). However it was common ground (and we find) that the intention of all concerned was that Ms Tonkin would be the sole beneficiary of the Trust.

(22) The DOTA was also executed on 4 December 2012, by the Company, IES, the Trustee, and Ms Tonkin. The terms of the DOTA included the following:

> (a) the Company appointed IES as its agent for the purposes of purchasing the gold
>
> (b) the Company as principal instructed IES as agent to apply the full amount given to it by the Company and the Trustee to purchase the gold
>
> (c) IES declared that once it had purchased the gold it would immediately hold it as nominee for Ms Tonkin
>
> (d) the Company would pay £740,000 and the Trustee would pay £100 to IES
>
> (e) Ms Tonkin agreed to pay £740,100 to the Trustee within ten years of the date of the DOTA, and
>
> (f) if Ms Tonkin did not make the payment by that date, the Trustee at its discretion could require Ms Tonkin to pay interest on the outstanding amount

(23) Also on 4 December 2012, IES wrote to Ms Tonkin to inform her that they had implemented her instruction to sell, and that the value received net of brokerage costs was £740,100.

(24) Following the sale of the gold, IES transferred £740,000 to HFL (thereby repaying the loan it had made to the Company) and £100 to Ms Tonkin.

(25) The Company then credited Ms Tonkin's director's loan account with £740,000, which was the amount owed to her following the repayment of the loan from HFL.

9. On 8 January 2013, the Company submitted its corporation tax return for the period ending 30 April 2012. The accompanying accounts recorded an expense of £740,000 described as "employment costs", and a corresponding liability. The return was accompanied by form CT600J, disclosing the use of a tax avoidance scheme.

10. Under the terms of the DOTA that was executed on 4 December 2012, Ms Tonkin had promised to pay £740,100 to the Trust within ten years of the date of the DOTA, ie by 4 December 2022. As at the date of the hearing in this case (19 May 2025), no such payment had been made. Ms Tonkin said she had contacted the scheme promoter (which was connected with the Trustee) to explain the disputes that had arisen with HMRC. They told her that they had put the matter "on hold" and had deferred making a decision on what further action to take. Ms Tonkin was not given a date on which she might expect to hear more from them on this matter.

11. We find as a fact that Ms Tonkin's intention (and as she was the sole director, the Company's intention) in entering into the scheme was to pay Ms Tonkin a bonus in a way that avoided income tax and NICs. She also anticipated that there would be inheritance tax advantages on her death. It is, we find, clear from the evidence both that she wished the Company to pay her a bonus, and that she wished this to happen in a way that avoided the tax consequences that usually follow when an employee receives a bonus.

12. We also find as a fact that Ms Tonkin's expectation was that if the Company had simply paid her a bonus in a straightforward manner without using a scheme, this would have been deductible for corporation tax purposes. Her intentions in entering into the scheme did not, therefore, include obtaining a corporation tax deduction that would not otherwise have been available.

HISTORY OF THE TAX DISPUTE

13. On 5 December 2013, HMRC opened an enquiry into the Company's corporation tax return for the period ending 30 April 2012, and on 9 January 2015, they opened an enquiry into the Company's corporation tax return for the period ending 30 April 2013.

14. On 30 September 2015, HMRC made and issued to the Company:

> (a) a determination under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 in the amount of £348,021.50 in respect of the tax year ending 5 April 2013 ("the Regulation 80 Determination"), and
>
> (b) a decision under section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 that the Company was liable to pay Class 1 NICs of £120,469.76 for the tax year ending 5 April 2013 ("the Section 8 Decision").

15. On 29 June 2017, HMRC issued closure notices to the Company in respect of the enquiries for the periods ending 30 April 2012 and 30 April 2013. These made amendments denying the Company a corporation tax deduction for the £740,000 it had paid to IES under the scheme. This resulted in additional corporation tax due from the Company of £166,943.54.

16. HMRC sent the Company a letter to accompany the closure notices. This set out HMRC's analysis of the Company's participation in the scheme. It explained that HMRC's view was that the scheme resulted in the payment of earnings to the employees (ie Ms Tonkin) from the employer in the form of money or money's worth, in the form of gold. In HMRC's view, the effect of the scheme was that payments of PAYE income (for income tax purposes) and earnings of an employed earner (for NICs purposes) had been made.

17. As regards corporation tax, HMRC denied the deduction for the payment of £740,000 on a number of bases, one of which was that the Company's purpose in making the payment was

not simply to reward employees, but was also to implement a pre-arranged scheme to obtain a tax deduction. As such, in HMRC's view, the payment had a dual purpose and was not incurred wholly and exclusively for the purposes of the Company's trade.

18. HMRC also took the view that the income tax due from the Company under PAYE was earnings for NICs purposes, resulting in a further liability to Class 1 NICs of £54,987.40.

19. In total, in HMRC's view, the Company's combined liability to PAYE income tax, NICs and corporation tax was £690,329.94. Interest was due in addition. The letter stated that inheritance tax charges may also apply, and that these would be set out in a separate notice of determination.

20. The Company appealed against the Regulation 80 Determination, the Section 8 Decision and the closure notices. Ms Tonkin did not know who lodged the appeals on the Company's behalf, and they have since been withdrawn. Ms Tonkin has accepted that the payment made by the Company under the scheme was a payment of employment income and was subject to PAYE.

21. Sometime in the first half of 2018, Ms Tonkin started to receive letters from a company connected with the scheme promoter about some Tribunal proceedings concerning the scheme. She attempted to contact Mr Husain and Mr Dore to find out more, but obtained little information. In August 2018 she received a large lever arch of files from HMRC in connection with the Company's appeal. She described these documents as arriving "out of the blue". She was unable to contact Mr Husain after July 2018 and did not (and still does not) have access to any of Mr Husain's files or correspondence regarding the Company's appeal. In October 2018, she received a short email from Mr Dore advising her to "settle with HMRC".

22. At some point in autumn 2018, Ms Tonkin called HMRC, spoke to an adviser and explained the situation. Ms Tonkin did not record this adviser's name but they told Ms Tonkin she was doing the right thing by speaking to them and that HMRC would get back to her with options.

23. On 21 December 2018, HMRC sent a "without prejudice" letter to Ms Tonkin. This letter referred to some settlement terms in respect of disguised remuneration schemes such as those entered into by the Company, which HMRC had published on 7 November 2017. HMRC stated that as the Company had referred their appeal to the Tribunal on 3 January 2018, these settlement terms were not available to the Company in full. The Company was offered the opportunity to proceed on "alternative terms" whereby no deduction would be available for the contribution to the scheme or the associated fees, but that "otherwise the normal disguised remuneration settlement terms would apply". The letter continued that if Ms Tonkin did not respond by 21 January 2019, HMRC would assume that she did not want to take advantage of this settlement opportunity.

24. We find as a fact that Ms Tonkin did not receive HMRC's letter of 21 December 2018. HMRC had not sent a copy to an agent for Ms Tonkin as it was not clear to HMRC at that stage whether she had set up an authority for an agent to act on her behalf.

25. On 7 March 2019, Ms Tonkin received a call from a Mr Passmore of HMRC's Counter Avoidance unit. Ms Tonkin's understanding of this call was that if she withdrew the Company's appeal, HMRC would make her a settlement offer. As a result, on 29 March 2019, Ms Tonkin sent an email to the Tribunal, asking to "formally halt any further proceedings in relation to this Tribunal". Ms Tonkin's new advisers, MHA MacIntyre Hudson, were not involved in preparing this email.

26. We find as a fact that although Ms Tonkin was aware that the appeal concerned the effectiveness of the scheme, she was not aware that it was specifically concerned with whether

the Company could obtain a corporation tax deduction. She withdrew the appeal because she did not want to challenge the charges to income tax and NICs. She was unable to speak to Mr Husain to obtain better information on the nature of the appeal.

27. On 12 February 2020, HMRC wrote to the Company in its capacity as settlor of the Trust. The letter stated that the transfer of assets worth £740,100 into the Trust on 4 December 2012 had given rise to a charge to inheritance tax of £83,020. At that stage HMRC were also seeking an additional amount of inheritance tax in the form of an exit charge, but this potential additional charge was not raised as an issue in this appeal.

28. On 8 April 2022, HMRC issued a notice of determination to Ms Tonkin on the basis that she was liable to inheritance tax under section 94 of the Inheritance Tax Act 1984. The charge was for £83,020 plus interest.

29. Ms Tonkin appealed against the notice of determination on 25 April 2022, and requested that HMRC conduct a statutory review. On 9 May 2022, HMRC informed Ms Tonkin of their view of the matter, and on 22 June 2022 issued the conclusion of their review, in both cases upholding their view that the notice of determination was correct.

30. Ms Tonkin notified her appeal to the Tribunal on 21 July 2022.

RELEVANT LAW

31. The Inheritance Tax Act 1984 (IHTA 1984) provides that inheritance tax is chargeable on transfers of value, other than exempt transfers. Transfers of value are defined in IHTA 1984, s 3(1) as follows:

> "(1) Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer."

32. IHTA 1984, s 3(4) provides:

> "(4) Except as otherwise provided, references in this Act to a transfer of value made, or made by any person, include references to events on the happening of which tax is chargeable as if a transfer of value had been made, or, as the case may be, had been made by that person; and "transferor" shall be construed accordingly."

33. IHTA 1984, s 3A(6) provides:

> "(6) Where, under any provision of this Act, tax is in any circumstances to be charged as if a transfer of value had been made, that transfer shall be taken to be a transfer which is not a potentially exempt transfer."

34. IHTA 1984, s 94 makes provision for inheritance tax to be charged on participators in respect of transfers of value by close companies. It is common ground in this case that the Company is a close company for these purposes, and that Ms Tonkin, as its sole shareholder, is a participator in that close company. The relevant provisions of s 94 are as follows:

> "(1) Subject to the following provisions of this Part of this Act, where a close company makes a transfer of value, tax shall be charged as if each individual to whom an amount is apportioned under this section had made a transfer of value of such amount as after deduction of tax (if any) would be equal to the amount so apportioned, less the amount (if any) by which the value of his estate is more than it would be but for the company's transfer; but for this

purpose his estate shall be treated as not including any rights or interests in the company.

(2) For the purposes of subsection (1) above the value transferred by the company's transfer of value shall be apportioned among the participators according to their respective rights and interests in the company immediately before the transfer, and any amount so apportioned to a close company shall be further apportioned among its participators, and so on; but—

(a) so much of that value as is attributable to any payment or transfer of assets to any person which falls to be taken into account in computing that person's profits or gains or losses for the purposes of income tax or corporation tax (or would fall to be so taken into account but for section 1285 of the Corporation Tax Act 2009 (exemption for UK company distributions)) shall not be apportioned…"

35. The combined effect of these two provisions (IHTA 1984 ss 3A(6) and 94) is that where inheritance tax is charged on a participator under s 94, this is not a potentially exempt transfer (because the charge under s 94 is to be imposed "as if" each relevant individual had made a transfer of value). A charge under s 94 does not, therefore, benefit from the effect of IHTA 1984, s 3A(4) concerning potentially exempt transfers.

36. IHTA 1984, s 12 is entitled "dispositions allowable for income tax or conferring benefits under pension scheme". S 12(1) provides:

"(1) A disposition made by any person is not a transfer of value if it is allowable in computing that person's profits or gains for the purposes of income tax or corporation tax or would be so allowable if those profits or gains were sufficient and fell to be so computed."

37. Section 54 of the Corporation Tax Act 2009 ("CTA 2009") provides that in calculating the profits of a company's trade, no deduction is allowed for expenses not incurred wholly and exclusively for the purposes of the trade.

38. CTA 2009, s 1288 is entitled "unpaid remuneration" and includes the following provisions:

"(1) This section applies if—

(a) an amount is charged in respect of employees' remuneration in a company's accounts for a period,

(b) the amount would, apart from this section, be deductible in calculating income from any source for corporation tax purposes, and

(c) the remuneration is not paid before the end of the period of 9 months immediately following the end of the period of account.

(2) If the remuneration is paid after the end of that period of 9 months, the deduction for it is allowed for the period of account in which it is paid.

(3) No deduction is allowed for the remuneration if it is not paid."

39. CTA 2009, s 1290 concerns corporation tax deductions in respect of employee benefit contributions, and relevantly provides as follows:

"(1) This section applies if, in calculating for corporation tax purposes the profits of a company ("the employer") of a period of account, a deduction would otherwise be allowable for the period in respect of employee benefit contributions made or to be made (but see subsection (4)).

[…]

> (2) No deduction is allowed for the contributions for the period except so far as—
>
> > (a) qualifying benefits are provided, or qualifying expenses are paid, out of the contributions during the period or within 9 months from the end of it, or
> >
> > (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made during the period or within 9 months from the end of it."

40. CTA 2009, s 1291 has the effect that the circumstances in which an employee benefit contribution is made include where, as a result of any act or omission, there is an increase in the total value of property held in a trust, scheme or other arrangement for the benefit of employees.

DISCUSSION

41. A number of grounds of appeal were raised, but by the time of the hearing Ms Tonkin wished to rely on just two, as follows:

(1) that IHTA 1984, s 94(2)(a) applies, so that no apportionment falls to be made, and

(2) that IHTA 1984, s 12 prevents there being a transfer of value.

42. The burden of proof is on Ms Tonkin to show that the notice of determination is incorrect. The standard of proof is the usual civil standard, being the balance of probabilities.

43. We have carefully considered the submissions and evidence of both parties, but have not found it necessary to refer to every argument and authority that was put to us, nor to describe every part of the evidence.

44. So far as is relevant to this case, the effect of IHTA 1984, s 94 is that where a close company makes a transfer of value, inheritance tax is charged as if that transfer of value were made by the participators in that close company. For these purposes the value transferred is apportioned between the participators according to their respective rights and interests in the company. As a result of IHTA 1984, s 3A(6), this deemed transfer of value is not a potentially exempt transfer, but gives rise to an immediate charge to inheritance tax.

45. In this case, the Company is a close company, and Ms Tonkin is its sole participator. This means that if any apportionment falls to be made, the share of the transfer of value apportioned to her would be 100%.

46. S 94(2)(a) provides for an exception to this rule, in that no apportionment falls to be made in respect of so much of a transfer of value:

> "as is attributable to any payment or transfer of assets to any person which falls to be taken into account in computing that person's profits or gains or losses for the purposes of income tax or corporation tax"

47. We must therefore decide whether, assuming the Company made a transfer of value, this is attributable to a payment or transfer of assets which falls within the wording of s 94(2)(a).

The parties' submissions on the meaning of profits or gains

48. Mr Sykes, for Ms Tonkin, submitted that the reference in s 94(2)(a) to "profits or gains or losses" includes profits from an employment. He made the following points.

(1) At the time IHTA 1984 was enacted, the Income and Corporation Taxes Act 1970 ("ICTA 1970") contained and represented the basic statutory code for levying income tax and corporation tax. Section 1 of that Act was as follows (emphasis added):

> **"The charge**
>
> Where any Act enacts that income tax shall be charged for any year at any rates, then, subject to the provisions of the Income Tax Acts, the tax at those rates shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the following sections of this Act—
>
> Schedule A—Section 67(1),
>
> Schedule B—Section 91,
>
> Schedule C—Section 93,
>
> Schedule D—Section 108,
>
> Schedule E—Section 181(1), and
>
> Schedule F—Section 232(1),
>
> and in accordance with the provisions of the Income Tax Acts respectively applicable to those Schedules."

(2) It is clear that "profits or gains" include the amounts taxed under Schedule E (the schedule dealing with employment income).

(3) ICTA 1970, s 181 charged "emoluments" from the employment. "Emoluments" were defined under s 183(1) as including "all salaries, fees, wages, perquisites and profits whatsoever".

(4) There can be little doubt that until the introduction of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), IHTA 1984, s 94(2)(a) provided an exemption from apportionment to the extent that a transfer of value was attributable to a payment or transfer of assets which fell to be taken into account in computing a person's income for income tax purposes, and that this included employment income.

(5) The "profits or gains" wording is not replicated in ITEPA 2003. However, ITEPA 2003, s 62(2) still defines earnings as including "any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth".

(6) It would be astonishing if the effect of enacting ITEPA 2003 was to narrow the scope of IHTA 1984, s 94(2)(a) and this cannot have been the intent in the absence of clear words. In this context Mr Sykes cited *Ye Olde Cheshire Cheese Ltd v Daily Telegraph plc* [1988] 1 WLR 1173 and *R v OB* [2012] 1 WLR 3188.

(7) The term "profits or gains" in s 94(2)(a) is not limited to trading profits or chargeable gains since this is not what the legislation states. Exempt dividend income is specifically included within s 94(2)(a), clearly indicating that "profits or gains" means income taxable under the income tax code or corporation tax code.

(8) The ordinary meaning of "profit or gains" is apt to include even a single receipt.

49. HMRC made no submissions on the meaning of the term "profits or gains or losses" in s 94(2)(a).

Our view on the meaning of profits or gains

50. We agree with Mr Sykes that "profits or gains", as used in s 94(2)(a), includes a payment of employment income. This is essentially for the reasons given in his submissions and summarised above.

51. We agree that at the time that s 94(2)(a) was enacted, it was clear that the expression "profits or gains" included emoluments taxed under what was then Schedule E, and also agree that Parliament would not, without specific words, have intended to change this by the enactment of ITEPA 2003. We note, moreover, that ITEPA 2003, s 6(1) states that the charge to tax on employment income is a charge to tax on (inter alia) "general earnings", and that the definition of "earnings" in ITEPA 2003, s 62(2) includes a reference to "profit". This indicates that the term "profit" remains apt to describe a payment that is taxable as employment income.

The parties' submissions on who received the transfer of value

52. Mrs Cook's submissions for HMRC focused on a different aspect of s 94(2)(a), namely, whether the transfer of value was attributable to a payment or transfer of assets to a person which fell to be taken into account in computing that person's liability to income tax or corporation tax (emphasis added).

53. Mrs Cook submitted that the scheme transactions need to be viewed realistically, and that on this view, the transfer of value was from the Company to the Trustee. The value received by the Trustee was the £100 transferred to it by the Company, and the right to be paid £740,100 by Ms Tonkin in ten years' time. These amounts do not fall to be taken into account in computing any profit or gains of the Trustee. As such, according to Mrs Cook, it is not Ms Tonkin's computation of any profit or gains that needs to be considered in the context of section 94(2)(a). Instead, the relevant consideration is that neither the £100 nor the promise to pay £740,100 were taken into account in computing the Trustee's profits or gains for the purposes of income tax or corporation tax.

54. Mrs Cook also pointed out that Ms Tonkin believed the money belonged to the Trust, and that she (Ms Tonkin) could borrow money from the Trust. Mrs Cook accepted that Ms Tonkin was liable to income tax on that money, but submitted that this was not determinative of the issue. According to Mrs Cook, Ms Tonkin did not simply take the income but set up a structure that included the Trust, and so the Tribunal should look at the transactions as a whole.

55. Mr Sykes, in response to these submissions, argued that inheritance tax is not generally concerned with identifying the recipient of a transfer of value, but instead operates as a charge where there is a loss to an estate. In this case the loss to the Company's estate was the gold (or its monetary value), and this amount had been subject to income tax in the hands of Ms Tonkin. This, submitted Mr Sykes, was consistent with HMRC's case in relation to PAYE: he made reference in this context to HMRC's letter of 29 June 2017, in which HMRC expressed the view that the scheme resulted in the payment of earnings to the employees (ie Ms Tonkin) from the employer in the form of money or money's worth, in the form of gold.

Our view on who received the transfer of value

56. On the question of whether the transfer of value by the Company was attributable to a payment or transfer of assets to Ms Tonkin which fell to be taken into account in computing Ms Tonkin's profits or gains for the purposes of income tax, we again prefer the submissions of Mr Sykes.

57. It was HMRC's case that the Company had made a transfer of value, for inheritance tax purposes, of £740,100. We note that Ms Tonkin did not accept that there was a transfer of value, and her grounds of appeal and skeleton argument make a number of submissions in support of this position. However, by the time of the hearing Ms Tonkin no longer wished to pursue the argument that there was no transfer of value. As the burden is on Ms Tonkin to show that HMRC's notice of determination is incorrect, we therefore accept that the Company made a transfer of value of £740,100.

58. Under the scheme, the Company transferred £740,000 to IES as its agent. It also transferred £100 to the Trust, which in turn transferred the £100 to IES. IES used the £740,100 to buy gold, which it held as nominee for Ms Tonkin. It immediately sold the gold and then held the cash proceeds, again as nominee for Ms Tonkin. It is, to our minds, clear that this means that there was a "payment or transfer of assets" to Ms Tonkin, and that the transfer of value by the Company was "attributable" to that payment or transfer.

59. We accept that the Trust also received value as a result of the scheme transactions. It received £100 from the Company (albeit that it immediately paid this amount to IES), and it received Ms Tonkin's promise to pay £740,100 in ten years' time. We do not, however, consider that it follows from this that the transfer of value cannot be viewed as attributable to the payment to Ms Tonkin. The payment to Ms Tonkin was one step in a scheme that involved a number of transactions, but the transfer by the Company was very directly connected to the payment to Ms Tolkin. The brief involvement of IES as agent and nominee, and the purchase and immediate sale of the gold, were the only intermediate steps between the money leaving the Company and becoming beneficially owned by Ms Tonkin.

60. We have considered why the Company's transfer of value should be regarded as attributable to the payment to Ms Tonkin and not, as HMRC argue, to what was received by the Trust. We think there are two answers to this. The first is that these positions are not mutually exclusive: we see nothing in the wording of the statute to indicate that the transfer by the Company could not be regarded as attributable both to the payment to Ms Tonkin, and to what was received by the Trust.

61. The second answer follows from HMRC's submission, which we accept, that we should view the transactions realistically. We find from the evidence, including the minutes of the meeting on 20 April 2012, the minutes of the meeting at 2.30pm on 23 November 2012, and Ms Tonkin's witness statement and oral evidence, that the Company's intention in implementing the scheme was to provide Ms Tonkin with a bonus. The transfer to Ms Tonkin had real and lasting consequences for her, in that once the transactions had been implemented, the Company owed her £740,000, which was credited to her director's loan account.

62. HMRC's position is that viewed realistically, the transfer of value was from the Company to the Trustee. We note that what the Trustee received under the transactions was a promise by Ms Tonkin to pay £740,100 in ten years' time, and that more than 12 years later this payment has not been made, nor has the Trustee taken any steps to recover this debt. On this basis we do not accept that it is more realistic to view the transfer of value from the Company as having been made to the Trustee rather than to Ms Tonkin.

63. HMRC are also in the uncomfortable position of taking a different position in relation to inheritance tax from that which they took for income tax, as set out in their letter of 29 June 2017. This states that "HMRC's primary position is that the Scheme results in payment of earnings to the employees from the employer in the form of either money or money's worth, in the form of gold".

64. We accept that the income tax code is different from the inheritance tax code. However, HMRC are not submitting that the detailed statutory provisions for each tax result in different

outcomes. As we understand HMRC's submissions (as articulated in this appeal in relation to inheritance tax, and in their letter of 29 June 2017 in relation to income tax), their position appears to be that there are different realistic views of the transactions depending on which tax is in point. We see no basis for this position, and consider that the realistic view applied by HMRC for the purposes of income tax also applies for the purposes of inheritance tax.

Whether the transfer falls to be taken into account for the purposes of income tax

65. The remaining element of s 94(2)(a) that we must consider is whether the payment to Ms Tonkin "falls to be taken into account" in computing her profits or gains "for the purposes of income tax". It is common ground between the parties that Ms Tonkin was liable to income tax on the £740,100 she received under the scheme. We did not understand HMRC to dispute that this amount fell to be taken into account in computing Ms Tonkin's income tax liability, and indeed they could hardly have done so while continuing to impose the charge to income tax on that amount. Given that neither party sought to persuade us that the charge to income tax had been imposed incorrectly, we find this element of s 94(2)(a) to have been met.

The intention of Parliament and conclusion on s 94(2)(a)

66. Mr Sykes submitted that the legislation evinces a consistent intention to avoid imposing inheritance tax where the amount in question would also be subject to income tax. He referred us to a number of provisions including IHTA 1984 ss 65(5)(b) and 70(3)(b), which provide that no inheritance tax is charged under those sections in respect of a payment which is income of any person for the purposes of income tax. He also referred us to various extracts from *McCutcheon on Inheritance Tax*, including paragraph 2.73 which describes statutory amendments having been made to s 94 to remedy "deficiencies", including an additional inheritance tax charge on gifts that were already dealt with under the existing income tax and corporation tax legislation.

67. Mr Sykes also drew attention to HMRC's published guidance in the Shares and Assets Valuation Manual at SVM108270, which is headed "Inheritance Tax: Close Companies – Transfers of Value by Close Companies ss 94 – 97 IHTA 1984". The text under this heading includes the following:

> "In the majority of cases involving close companies payment or the asset transferred is liable to Income Tax or Corporation Tax in the hands of the recipient. Where this is the case, there is no claim to IHT under s 94(2)(a) IHTA 1984."

68. Mrs Cook submitted that the "recipient" referred to in the extract quoted above is, in this case, the Trustee and not Ms Tonkin. She also argued that this is only guidance and has no statutory basis before the Tribunal.

69. We agree with Mr Sykes' submission that Parliament's intention in enacting s 94(2)(a) was to avoid the same amount being charged both to inheritance tax and to either income tax or corporation tax. We consider this to be clear from the statutory wording, and it is acknowledged in the passages from *McCutcheon* and HMRC's own guidance at SVM108720 referred to above, albeit that we accept neither reference has the force of statute. Mrs Cook did not suggest that s 94(2)(a) had a different purpose.

70. Having rejected HMRC's submission that we should not regard Ms Tonkin as the recipient of the transfer of value by the Company, we consider that it is in accordance with the intention of Parliament for us to interpret s 94(2)(a) in a way that prevents Ms Tonkin being subject to both income tax and inheritance tax on the same amount.

71. In conclusion on this point, we find that s 94(2)(a) applies to prevent an apportionment being made to Ms Tonkin under s 94(1). This finding disposes of the appeal.

IHTA 1984, s 12

72. We also heard detailed submissions on Ms Tonkin's second ground of appeal, concerning IHTA 1984, s 12. This provides that a disposition made by any person is not a transfer of value if it is allowable in computing that person's profits or gains for the purposes of income tax or corporation tax (or would be so allowable if those profits or gains were sufficient and fell to be so computed).

73. For the purposes of this case therefore, the question that arises is whether the transfer of value by the Company (the payment of £740,100) gave rise to an allowable deduction for corporation tax purposes. This in turns leads to the question of whether this expense was incurred wholly and exclusively for the purposes of the Company's trade. There is also an issue as to whether CTA 2009, ss 1288 and 1290 restrict the availability of any deduction, and what impact this has on the application of IHTA 1984, s 12.

74. Our finding on s 94(2)(a) means that we do not need to decide this question. We have, however, made relevant findings of fact above so that this issue can be considered should this case proceed further on appeal.

DISPOSITION

75. For the reasons we have given, we find that IHTA 1984, s 94(2)(a) applies to prevent an apportionment being made to Ms Tonkin under s 94(1). The appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

76. 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.

Release date: 19th JUNE 2025