[2018] UKFTT 0740 (TC)

TC06873

Appeal number: TC/2017/03580

INCOME TAX AND CAPITAL GAINS TAX – ***Post-cessation Trade Relief - whether valid trust created - whether trust can be "payment" - if there was a payment, was it a "qualifying payment" - were there "relevant tax avoidance arrangements"***

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID SINCLAIR **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MR JULIAN SIMS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 20 November 2018

The Appellant appeared in person

Dr Jeremy Schryber Officer of the Respondents, for the Respondents

DECISION

Introduction

1. Mr Sinclair appeals against a closure notice refusing his claim for Post-cessation Trade Relief (PCTR) for the year 2011-12. Mr Sinclair had claimed relief from income tax under section 96 Income Tax Act 2007 (ITA) and relief from capital gains tax under 261D Taxation of Chargeable Gains Act 1992 (TCGA) totalling £438,749. The refusal of the relief resulted in Mr Sinclair having £48,059 additional taxable income and capital gains of £387,773. The total additional tax was £117,827.64 comprised of £9,251.20 income tax and £108,576.44 capital gains tax.

2. There was a preliminary issue that Mr Sinclair had notified his appeal to the Tribunal late. It had been submitted in time but was rejected and had to be resubmitted. HMRC did not oppose the application for a late appeal and we allowed the appeal to proceed.

The law

3. The rules on PCTR are set out in sections 96-101 ITA. So far as relevant, they provide as follows.

> "**96 Post-cessation trade relief**
> (1) A person may make a claim for post-cessation trade relief if, after permanently ceasing to carry on a trade–
> (a) the person makes a qualifying payment, or
> …
> and the payment is made, or the event occurs, within 7 years of that cessation.
> (2) If the claim is made in respect of a payment, the claim is for the payment to be deducted in calculating the person's net income for the tax year in which the payment is made (see Step 2 of the calculation in section 23).
> …
> (4) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the tax year for which the deduction is to be made.
> …
> (6) This section applies to professions and vocations as it applies to trades (and sections 97 and 98 are to be read accordingly).
>
> **97 Meaning of "qualifying payment"**
> (1) For the purposes of section 96 a person makes a "qualifying payment" after permanently ceasing to carry on a trade if the person makes a payment wholly and exclusively for any of purposes A to D.
> (2) A payment is made for purpose A if it is made–
> (a) in remedying defective work done, goods supplied or services provided in the course of the trade, or
> (b) by way of damages (whether awarded or agreed) in respect of defective work done, goods supplied or services provided in the course of the trade.

(3) A payment is made for purpose B if it is made in meeting the expenses of legal or other professional services in connection with a claim (a "claim about defects") that–
(a) work done in the course of the trade was defective,
(b) goods supplied in the course of the trade were defective, or
(c) services provided in the course of the trade were defective.

98A Denial of relief for tax-generated payments or events
(1) Post-cessation trade relief is not available to a person in respect of a payment or an event which is made or occurs directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements (and, accordingly, no section 261D claim may be made in respect of the payment or event).
(2) For this purpose "relevant tax avoidance arrangements" means arrangements—
(a) to which the person is a party, and
(b) the main purpose, or one of the main purposes, of which is the obtaining of a reduction in tax liability as a result of the availability of post-cessation trade relief (whether by making a claim for that relief or a section 261D claim).

(3) In this section—
(a) "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable), and
(b) "section 261D claim" means a claim under section 261D of TCGA 1992

99 Reduction of relief for unpaid trade expenses
(1) This section applies for the purposes of post-cessation trade relief in respect of a person's trade if a deduction was made in calculating the profits of the trade for an expense not actually paid (an "unpaid expense").
(2) The amount of the person's relief for a tax year is reduced (but not below nil) by–
(a) the total amount of unpaid expenses at the end of the tax year, or
(b) if the person carried on the trade as a partner in a firm, the person's share of the total amount of unpaid expenses at the end of the tax year.
(3) But any unpaid expense which is taken into account in reducing the amount of the person's relief for a tax year is left out of account in making reductions for subsequent tax years.
(4) If the person actually pays an amount in respect of an unpaid expense taken into account in reducing the amount of the person's relief, the person is treated as making a qualifying payment for the purposes of section 96.
(5) The amount of the qualifying payment is–
(a) the amount actually paid, or
(b) if less, the amount of the reduction.
(6) This section applies to professions and vocations as it applies to trades.

101 Treating excess post-cessation trade relief as CGT loss
A person who cannot deduct all of an amount under a claim for post-cessation trade relief may be able to treat the unused part as an allowable loss for capital gains tax purposes: see sections 261D and 261E of TCGA 1992."

4. Section 261D TCGA provides:

"261D Treating excess post-cessation trade or property relief as CGT loss
(1) A person may make a claim under this section if–

(a) relief is available to the person under section 96 or 125 of ITA 2007 (post-cessation trade or property relief) for a tax year in relation to an amount, and
(b) the person makes a claim under that section to deduct the amount in calculating the person's net income for the tax year.
(2) A person may also make a claim under this section if–
(a) relief is available to the person as mentioned in subsection (1)(a) for a tax year in relation to an amount, but
(b) the person's total income for the tax year is nil.
(3) A claim under this section is for treating for the purposes of capital gains tax so much of the amount as is not deducted in calculating the person's net income for the tax year ("the relevant amount") as an allowable loss accruing to the person in the year of assessment corresponding to the tax year.
(4) But so much of the relevant amount as exceeds the maximum amount (see section 261E) is not to be treated for the purposes of capital gains tax as an allowable loss.
(5) The relevant amount is no longer to be regarded as an amount available for income tax relief.
(6) A claim under this section must be made on or before the first anniversary of the normal self-assessment filing date for the tax year mentioned in subsection (1) or (2) (as the case may be).
(7) In this section "normal self-assessment filing date", "tax year" and "total income" have the same meaning as in the Income Tax Acts (see section 989 of ITA 2007)."

5. The scheme of the legislation is that a professional person whose business has ceased to operate may claim tax relief against his general income and/or capital gains if he has to make a payment for certain purposes after the cessation. Relief is available for payments made, to use a neutral expression, in connection with, defective professional services and legal costs related to a claim in respect of defective services. Income tax relief is given first and any excess payment can be set against capital gains and may create an allowable loss.

6. It is important to note that relief may only be given in the tax year in which the payment is made. There is no carry forward or carry back of relief although there is some relief against future receipts from the same ceased business.

7. Nor is relief due where the payment was made in connection with certain tax-avoidance arrangements.

8. It is common ground that, if the claimed payment was indeed a payment, it was made, and the associated claim was made, within the relevant time limits.

The facts

9. The facts are not in dispute.

10. Mr Sinclair was a partner in a firm called Sinclair Silverman. There was one other partner, a Mr Silverman. Mr Sinclair is a chartered accountant and, at Sinclair Silverman, advised on financial and tax matters. Mr Silverman indicated that he only advised on basic tax issues.

11. In the course of that business, Mr Sinclair advised a lady ("the Claimant") in connection with her financial claims against her husband in their acrimonious

divorce. The Claimant secured a settlement of several million pounds. Mr Sinclair subsequently advised the Claimant in connection with tax planning and investment matters. That advice unfortunately formed the basis of a dispute and subsequent legal claim against Mr Sinclair.

12. Sinclair Silverman ceased to practice in November 2007.

13. On 25 March 2011, the Claimant and a company owned by her, which had been established as part of Mr Sinclair's advice, commenced proceedings in the High Court claiming damages of £1.7 million.

14. We infer that there had been negotiations about the claim before the formal proceedings were issued as Mr Sinclair sold a property on 7 April 2011, intending to use the proceeds to meet the claim which he expected to settle within the tax year. This sale generated a substantial capital gain.

15. Mr Sinclair engaged lawyers to deal with the claim on his behalf and they issued various invoices in connection with the work. Mr Sinclair claimed relief under section 97(3)(c) ITA in respect of legal fees totalling £38,749. It is not entirely clear which invoices these related to, but an invoice issued on 27 July 2011 for £14,315 and two invoices dated 29 February 2012 for £9,907.58 and £14,726 respectively total £38,948.58, a very similar figure. During the tax year 2011-12 the 27 July invoice and also an invoice which had been issued on 28 February 2011 (tax year 2010-11) in the sum of £6,880.71 were paid, a total of £21,195.71. In each case, the payment was made by Sinclair UK Associates Ltd. a company wholly owned by Mr Sinclair.

16. On 30 March 2012, just before the end of the tax year, Mr Sinclair sent an email to himself, which he signed and dated. The email read:

> "Please note that the monies in [specified bank and building society accounts in Mr Sinclair's name totalling £400,000] are now held irrevocably in trust for the Sinclair Associates client account as the first part of the settlement payment to [the Claimant/ her company] and are accordingly paid on behalf of Sinclair Silverman today as part of the settlement and as a post cessation payment of the practice."

17. Mr Sinclair did not inform the Claimant of the alleged trust and did not seek her instructions in relation to dealing with or investing the funds which he asserted were held on bare trust for her. Indeed, he invested the funds in a way which he knew the Claimant would not approve of. Initially, the funds remained in the bank and building societies in Mr Sinclair's name. Mr Sinclair was concerned that the litigation was not progressing quickly. He recognised that he was going to have to pay a substantial amount and that the Claimant would be entitled to 8% statutory interest on any damages awarded. He therefore sought to match that return by making short term, high interest loans to third parties which were the very same type of investments which he had made on behalf of the Claimant, the £600,000 losses on which formed part of the claim against him. The investments he made on his own behalf proved equally disastrous and little or nothing is left of the £400,000 originally referred to in the 30 March 2012 email.

18. Although Mr Sinclair had professional indemnity insurance, one insurer resisted his claim because of late notification and a second insurer asserted that the claim pre-dated its cover. He also sought a contribution from his partner Mr Silverman and a Mr Kenton. Although he did ultimately obtain contributions from them, they resisted strongly and at the end of the 2011-12 tax year it was uncertain how much, if anything, they would pay.

19. Mr Sinclair asserted that it was "inconceivable" that as at March 2012 the amount he would ultimately have to pay in damages would be less than £400,000 and so there was no need to provide, in the email, for the situation where his liability was less than the amount he was holding on trust. He also assumed that the claim would succeed and that he would have a liability although proceedings had been issued less than a week earlier and there was no certainty as to whether the claim would succeed. Mr Sinclair's lawyers were more circumspect. They wrote a letter to him on 24 December 2014 in which they stated:

> "I write to confirm that as at March 2012, in my view, given the substantial claim being advanced by the Claimants, your liability as a former partner in the former partnership of Sinclair Silverman, to [the Claimant and her company] was likely to have been in excess of £400,000."

20. The claim was submitted to mediation in February 2013 and the Claimant and her company agreed to accept £850,000 in settlement of the claim. As part of the mediation process, Mr Sinclair was required to disclose his financial position. He did not declare the investments made with the £400,000 which is consistent with them being held on bare trust; the funds would belong in law to the beneficiary of the trust. Mr Sinclair asserted in his letter to HMRC of 28 January 2015 that the movement of the monies and the making of the loans were with a view to enhancing interest rate returns "with all the monies and loans continuing to be irrevocably held for Sinclair Associates' client account".

21. Two other letters were written by Mr Sinclair to HMRC which suggest that he was not entirely clear as to the status of the monies representing the initial £400,000. In his letter of 14 March 2015, he stated:

> "…these were [loans] to third party companies where I was able to exclude them from my asset position in my asset disclosure, as the values were arguably individually less than £10,000. At all times, however, they were part of the money held for client account."

22. HMRC commented in their response:

> "The fact that you took steps to exclude such funds from your disclosure, in my view, makes it abundantly clear that they were <u>your</u> funds…"

23. Mr Sinclair replied on 27 July 2015.

> "They [the loans] all turned into disasters, which is why, when it came to the mediation in February 2013, I was justified in writing down their value to below the £10,000 disclosable threshold, asked by the Claimant, in the mediation…"

24. The claim in the High Court was formally settled on 20 February 2013 by way of a Tomlin Order.

25. In the light of the Appellant's financial position, the quantum of the settlement was agreed at £850,000. Mr Sinclair also managed to negotiate some contribution from Mr Silverman and Mr Kenton. His share of the damages was £550,000 which he paid in two tranches:

- £275,000 (plus interest) on 14 August 2013
- £275,000 (plus interest) on 13 February 2014.

The Appellant's submissions

26. The legal fees claimed were paid in the relevant tax year.

27. The Appellant submits that the email of 30 March 2012 constituted a valid bare trust in favour of the Claimant and her company. In the context, this was equivalent to him holding the funds as nominee.

28. In turn this constituted a "payment" which satisfied the conditions in sections 96 and 97 ITA so that it was a "qualifying payment" eligible for PCTR. He contends that it was a qualifying payment within purpose A of section 97(2) ITA in that it was made in remedying defective services provided in the course of the ceased profession.

29. The payment was not made in connection with any relevant tax-avoidance arrangements and so relief was not disallowed by section 98A ITA.

The Respondent's submissions

30. With regard to the claim for PCTR in relation to legal fees, HMRC contend that Mr Sinclair has failed to provide evidence that he paid the legal fees within the tax year 2011-12.

31. To the extent that any legal fees were paid in the relevant tax year they were paid, not by Mr Sinclair, but by his companies, and are not therefore eligible for relief.

32. Dr Schryber made the following submissions in relation to the claim for relief in respect of the payment of the £400,000.

33. The email of 30 March 2012 was not a valid declaration of trust.

34. If it was, it did not constitute a "payment".

35. If it constituted a payment, it was not a "qualifying payment".

36. If it was a qualifying payment, it was connected with tax-avoidance arrangements so that relief is denied by section 98A ITA.

Burden of proof

37. The Appellant must prove that PCTR is due to the normal civil standard of the balance of probabilities.

Discussion

The legal fees

38. As noted in paragraph 15, Mr Sinclair's lawyers issued a number of invoices in the course of 2011-12. As also noted in that paragraph, Mr Sinclair actually paid a total of £21,195.71 to his lawyers in that period.

39. Dr Schryber argued that there was no evidence that the fees had been paid.

40. The evidence provided by Mr Sinclair was a copy of his lawyers' cash statement in relation to the claim which showed the dates and amounts of the various invoices and the dates, amounts and payers of the various payments which were made. We accept that this shows, on the balance of probabilities that those invoices were issued and those payments were made.

41. Mr Sinclair submitted that "payment" has a wide meaning and that the dictionary definition includes the process of paying. He suggested that that process begins when an invoice is received and the amount is due. The total invoices issued in the year amounted to £41,206 although Mr Sinclair only claimed £38,749. He sought to persuade us that the claim should be allowed in full in that the issue of an invoice which is accepted as creating a liability starts the process of payment and is capable of constituting payment even if the funds have not yet been transferred to the issuer of the invoice.

42. We are unable to accept that argument. There is a clear distinction between the creation of a liability and the discharge of it and it is the discharge of the liability which constitutes payment.

43. To the extent that actual payment was made, Dr Schryber contended that no relief was due as the payments had been made by one of Mr Sinclair's companies and not by Mr Sinclair himself. Mr Sinclair explained that the company had the cash. It could have lent him the money to enable him to pay and debited that amount to Mr Sinclair's director's loan account. To streamline the process, the company had paid the invoices direct, but had, at the same time, debited the amount paid to Mr Sinclair's loan account.

44. On this basis, we are satisfied that the company paid the invoices on behalf of Mr Sinclair and that he bore the cost of it personally. We therefore find that Mr Sinclair paid £21,195.71 in legal fees in connection with a claim that services provided in the course of his profession at Sinclair Silverman were defective. These payments fall within purpose B in section 97(3) ITA and are eligible for PCTR.

45. Relief should be granted in relation to this element of the claim.

The "trust" of £400,000

46. The larger part of the claim turns on whether the email of 30 March 2012 constituted a qualifying payment within purpose A of section 97(2) ITA.

47. The first question is whether there was a trust. Dr Schryber acknowledged that no formalities are needed to create a trust over personal property such as bank accounts. However, he submits that two of the "three certainties" are missing. It is trite law that there cannot be a valid trust unless the subject matter of the trust and the objects of it (the beneficiaries) are certain and the settlor must have the intention to create a trust. HMRC accept that the subject matter-the money in the bank accounts-is certain but submit that there is no certainty of objects or intention. The email was ambiguous as to whether the object was the client account or the Claimant. Dr Schryber further submits that the surrounding circumstances show that Mr Sinclair did not intend to create a trust. Mr Sinclair did not tell the Claimant that the trust existed. Nor did he seek instructions from the Claimant before making investments which one would expect a bare trustee to do. Indeed, Mr Sinclair made investments which he knew the Claimant would definitely object to. The signature on the email was not witnessed. He made high risk investments which were not in accordance with the fiduciary duties of a trustee and the ultimate payments following the Tomlin order were made from other sources.

48. Mr Sinclair acknowledged that there was no need to interpose the client account; he had used that in order to give legitimacy to the declaration. He contended that he was nominee for the Claimant and the object of the trust was accordingly certain. He also asserted that he intended to create a trust. He did not tell the Claimant about it because he was negotiating in the litigation and it would have weakened his position in the negotiations if the Claimant knew that he had set aside money to pay her. There is no need for a trust to be witnessed. There was no need to specify what would happen to the money if the claim turned out to be less than £400,000 as the claim was for a much larger amount and it was inevitable he was going to have to pay at least that sum. As to the investments, with hindsight he should not have invested in them, but that does not affect the validity of the arrangements.

49. We agree that no formalities are needed to create this trust and that, if it is in writing and signed, there is no need for a witness. We also agree that a trust can be valid even if the beneficiary is unaware of its existence. Investing in assets of which the beneficiary would disapprove might be a breach of fiduciary duty, but it does not, of itself, mean there is not a trust. The email was *capable* of constituting a trust.

50. However, we have two difficulties with this. First, there were two claimants: the individual and the company which she had set up on Mr Sinclair's advice. Both had made claims and for different amounts. The email said that the funds were

held as "the first part of the settlement payment to Mrs D/M [the company] …". It does not state how much was held for each. If the trust were valid, there would be two bare trusts, one for each of the claimants and the amount held on each trust is uncertain. Accordingly there is no certainty of subject matter.

51. Secondly, the "trust" is not absolute but conditional. It constitutes "the first part of the settlement payment" and states it is "paid…as part of the settlement". At that time there was no settlement agreed. It was uncertain what the Appellant's personal liability would be. His lawyers, more than two years after the event, said that Mr Sinclair's liability in March 2012 was "likely" to have been in excess of £400,000. But the claimants might not have pursued the claims or might have lost them, or the insurers might have paid up after all or Mr Sinclair's former partners might have made greater contributions. Whilst these events may have been unlikely, it cannot be said that in March 2012 Mr Sinclair owed the Claimants £400,000 and if it had turned out that he owed less we doubt that the Appellant would have handed over the full amount (if it had still been available). If Mr Sinclair had intended to create a valid trust, that meant that the money belonged to the claimants from that point. The wording of the email and Mr Sinclair's subsequent actions indicate to us that there was a conditionality about the alleged declaration of trust. We accept that Mr Sinclair intended to ring-fence the money so it would be available for what he saw as the inevitable liability he would ultimately have to pay but we do not accept that he intended it to become the Claimants' money on 30 March 2012.

52. This is reinforced by the correspondence referred to in paragraphs 20 to 23 above which indicate a certain ambiguity in Mr Sinclair's view of the ownership of the funds.

53. We conclude that the email of 30 March 2012 did not create a valid trust.

54. In principle, that disposes of the matter, but we heard full argument on the other points and we consider them below.

55. Dr Schryber argued that even if the email constituted a trust it could not constitute a "payment" for the purposes of PCTR. He submitted that that it did not discharge any existing liability of the Appellant and that the Claimants did not have access to the funds as they did not know about them. HMRC submit that there were no payments until the the instalments under the Tomlin order were paid and as those payments were in a tax year later than the income and capital gains tax liabilities (2012-13) no relief was due.

56. The Appellant submits that the declaration was a payment. They were very specifically designated only for the Claimant and were part of the discharge of a liability. Nor, he suggested, is it necessary for a payee to know about the payment in order to be entitled to it.

57. In our view, if there had been a valid bare trust, the consequence would be that the money belonged to the claimants. A payment need not be made in discharge

of a liability. A payment by way of gift, or in anticipation of a future liability, is still a payment. Nor does the payee have to know about the payment. If money had been deposited in the Claimant's bank account without her knowledge, she would have received the payment.

58. We do not consider that there has to be a movement of funds to constitute a payment. If the beneficial interest in the funds had passed unconditionally to then Claimant, it would have been her money and she would have received a payment.

59. We have, however, found that there was no valid bare trust, so there cannot have been a payment.

60. If there had been a valid trust which constituted a payment, we would have to decide if it was a "qualifying payment" for the purposes of section 97 ITA.

61. The relevant "purpose" is Purpose A, which has two options and is set out in section 97(2):

> "(2) A payment is made for purpose A if it is made–
> (a) in remedying defective work done, goods supplied or services provided in the course of the trade, or
> (b) by way of damages (whether awarded or agreed) in respect of defective work done, goods supplied or services provided in the course of the trade."

62. Mr Sinclair did not consider the distinction between (a) and (b) relevant. He submitted that the payment was made "in remedying defective services provided in the course of the [profession]" within (a). Alternatively, he contended that he had unilaterally "agreed" to pay damages in respect of defective services in accordance with (b). He argues that he agreed to make part payment of his ultimate liability and the claimants' agreement can be assumed.

63. Dr Schryber submits that the payment (if it was one) cannot fall within (a) and that there was no agreement about damages until the Tomlin order was made in February 2013.

64. The purported payment made by the Appellant was, as a matter of fact, clearly not made in remedying defective services. He had given bad investment and tax advice and the Claimant had lost money as a result and sued him. The payment was not made to put right the bad advice. Indeed, the defective services could not be remedied. This head of Purpose A might, for example, apply to a situation where a lawyer had prepared a will which did not give effect to the testator's intentions. After the business has ceased, the testator discovers this and the lawyer has to pay for another firm to prepare a correct will.

65. The payment in the present case could only fall within head (b) of Purpose A: a payment made by way of damages to compensate for the loss caused by the defective services. The Appellant's difficulty here is that no damages had been awarded or agreed in the tax year 2011-12. He might have been prepared to pay £400,000, but it is simply not the case that damages were agreed at that time. The Appellant cannot unilaterally "agree" to pay a sum of money. There must be an

agreement between claimant and defendant that damages of a particular amount are to be paid. We agree with Dr Schryber that there was no agreement to pay damages until the Tomlin order was made in February 2013.

66. We therefore find that even if there had been a "payment", there was no qualifying payment within section 97 ITA.

67. HMRC's final submission is that even if the Appellant had succeeded on all the previous points, relief should be denied by section 98A ITA because the payment was "tax generated". The wording of section 98A is important:

> **"98A Denial of relief for tax-generated payments or events**
> (1) Post-cessation trade relief is not available to a person in respect of a payment or an event which is made or occurs directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements (and, accordingly, no section 261D claim may be made in respect of the payment or event).
> (2) For this purpose "relevant tax avoidance arrangements" means arrangements—
> (a) to which the person is a party, and
> (b) the main purpose, or one of the main purposes, of which is the obtaining of a reduction in tax liability as a result of the availability of post-cessation trade relief (whether by making a claim for that relief or a section 261D claim)."

68. Dr Schryber argued that the declaration of trust constituted "relevant tax avoidance arrangements". On the authority of the Hong Kong case, *The Collector of Stamp Revenue v Arrowtown Assets Limited* FACV No 4 of 2003, "arrangements" is to be given a wide meaning. He submits that the declaration of trust was an arrangement to which the Appellant was a party. He further submits that the main purpose or one of the main purposes of the arrangement was to reduce the Appellant's tax liability as a result of a claim to PCTR. This is to be inferred from the wording of the email which expressly refers to the payment being "a post cessation payment of the practice.". Further, the timing of the declaration, a few days before the end of the tax year, reinforces the tax driven nature of it. It was advantageous for the Appellant to claim PCTR in 2011-12 as he had realised a large gain in that year (in order to meet his anticipated liability under the claim for damages) and the claim for PCTR had to be made in the same tax year as that in which the tax liability arose if he was to take advantage of it. These factors indicate that the purpose of the declaration was to reduce the Appellant's tax liability for 2011-12 as a result of the availability of PCTR.

69. HMRC submit that the payment was made "directly or indirectly in consequence of, or otherwise in connection with" the relevant tax avoidance arrangements [the declaration of trust]. Accordingly, PCTR was not available, nor was a claim under section 216D TCGA.

70. The Appellant submits that there was no tax avoidance arrangement or scheme and that if the payment had been made in the ordinary way rather than by way of a declaration of trust, section 98A would never have been argued. He drew our attention to the comments in HMRC's Business Income Manual on section 98A. The Manual states:

> "In response to a contrived and aggressive avoidance scheme that sought to generate post-cessation expenses that would then be relieved against total income or capital gains, a targeted anti-avoidance rule was introduced with effect from 12 January 2012 to block such schemes."

71. Mr Sinclair contends that payment by way of declaration of trust is not a "contrived and aggressive avoidance scheme".

72. Mr Sinclair sold a property in April 2011 realising a significant gain. The sale was intended to fund his liability to the Claimant and he expected the case to settle formally within the tax year. It did not.

73. We have no doubt that Mr Sinclair attempted to make the payment when he did in order to make PCTR available in the same tax year as the gain. As the litigation was ongoing, and he did not want to show weakness in the negotiations by offering an overt actual payment, he sought to create a payment by way of declaration of trust. Although the Manual makes clear that section 98A was introduced to combat a specific aggressive scheme, the Manual represents HMRC's guidance to its staff and cannot take the place of the legislation. We must therefore construe the words of section 98A itself to determine whether the declaration of trust falls within it.

74. Section 98A(1) requires that

- A payment is made
- in consequence of, or in connection with, arrangements
- to which the payer is a party
- the main purpose of which is to obtain a tax reduction by a claim for PCTR.

75. The important point is that the payment must be made in connection with the arrangements. That is, the payment and the arrangements are not the same thing. The payment may be part of the arrangements, but there must be something more than the payment itself.

76. Dr Schryber argues that the declaration of trust was an "arrangement".

77. In our view, the declaration of trust, had it been valid, was the payment itself. It was not part of, or connected with, any wider transactions which could constitute "relevant tax avoidance arrangements".

78. As Mr Sinclair pointed out, had he simply handed over money to the Claimant HMRC would never have argued that the anti-avoidance provisions were relevant. Reliefs exist so that eligible taxpayers can take advantage of them. Where the legislation permits, a taxpayer is entitled to trigger the claim for relief at a time which is most advantageous for him. It was advantageous for Mr Sinclair to trigger a claim for PCTR in the 2011-12 tax year and it was entirely proper for

him to seek to make a "qualifying payment" under section 97 within the tax year. He was not obliged to wait until the next tax year to make a payment. The fact that the attempted payment was ineffective is a reason for denying the relief. The fact that he sought to make a payment at a time when he would derive most benefit from it is not. To take Dr Schryber's argument to its logical conclusion, any taxpayer who makes a qualifying payment in order to claim PCTR, intending to take advantage of it to reduce his tax liability must be denied the relief! That clearly cannot be the effect of the section.

79. We conclude that the declaration of trust, if effective, did not constitute relevant tax avoidance arrangements. Had the declaration constituted a qualifying payment, section 98A would not operate to deny PCTR to the Appellant.

Decision

80. For the reasons set out above we have decided that the Appellant is entitled to PCTR for the tax year 2011-12 in respect of £21,195.71 in legal fees paid to his lawyers in respect of the litigation. To that extent the appeal is allowed.

81. For the reasons set out above we have further decided that the email of 30 March 2012 did not constitute a valid declaration of trust and accordingly it did not constitute a valid payment. Even if it did amount to a payment, it was not a "qualifying payment" within section 97 ITA and so PCTR was not due. Accordingly, we dismiss the remainder of the appeal.

82. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 17 DECEMBER 2018