Neutral Citation: [2023] UKFTT 00996 (TC)

Case Number: TC09007

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/11515

PAYE/NICs – whether payment made by third party to all employees taxable as income from employment – no – whether taxable under the benefits code – yes – appeal dismissed

Heard on: 7 and 8 November 2023
Judgment date: 24 November 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MS SHAMEEM AKHTAR

Between

OOCL UK BRANCH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Banham, of the Appellant

For the Respondents: Mr Asuelimen, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The issue at the heart of this appeal is to determine the nature of payments (**Payments**) made at the cost of the former majority shareholder and chairmen of Orient Overseas Container Line Limited (UK Branch) (**OOCL**) to the UK workforce and, in particular whether the Payments are chargeable to income tax and national insurance contributions (**NICs)**.

2. The decisions issued by HM Revenue & Customs (**HMRC**) under appeal are set out in the table below, they are a sample agreed between the parties:

Date	Description	Amount
26 November 2021	Notice of determination issued under Regulation 80 Income Tax (Pay as You Earn) Regulations 2003 for the period ended 5 April 2019 (**Determinations**)	£567,680
26 November 2021	Notice of decision issued under section 8 Social Security Contributions (Transfer of Functions, etc) Act 1999 for the period 6 September 2018 to 5 October 2018 (**Decisions**)	£21,349*

* this sum forms part of a total charge to NICs of £284,051.68 the larger sum representing both the employer and employee NICs.

3. There is no dispute between the parties as to the validity of the Determinations or Decisions if we determine that the nature of the payments made render them subject to a charge to income tax and NICs.

4. For the reasons set out in more detail below we refuse the appeal. We consider that the Payments were not earnings from employment. However, we find that they were made by reason of employment and as such are chargeable to both income tax and class 1 NICs.

BACKGROUND AND FINDINGS OF FACT

5. We were provided with a bundle of documents from which to make our relevant factual findings. Neither party had served witness statements, and no oral evidence was given; however, Mr Banham is an employee of OOCL within the finance department and during the course of his submissions various points of fact were asserted. Though not formal evidence the majority were not disputed by HMRC and, so far as relevant as identified below, we accept the asserted facts.

6. By their skeleton argument HMRC invited us to draw an adverse inference from the absence of a witness statement from Mr CC Tung (**Mr CC Tung**). HMRC contended, by reference to *Thomas Barnes & Sons Plc v Blackburn and Darwen Borough Council* [2022] EWHC 2598 (TCC) that he would have been a critical witness in establishing the motivation for making the Payments and how they were calculated, and his absence was a matter which should cause us to infer that his evidence would have contradicted the assertions made on behalf of OOCL. Mr Banham informed us that OOCL had not approached Mr CC Tung to give evidence or provide further clarification beyond the document available to us on the basis that he was an elderly man who lives in Hong Kong. Whilst we agree with HMRC it would have been helpful to have had evidence from Mr CC Tung, for the reasons set out below, we consider it would have made no difference to the possible outcome in this appeal. Any evidence he could have given could not, in our opinion, have broken the link between the Payment and each recipient's status as an employee of OOCL.

7. In respect of the evidence available to us, there was no real dispute between the parties as to the relevant facts in this appeal, the dispute lay in what inferences could properly be made from the primary facts and how the statutory provisions apply to the facts as found.

Chronology

8. OOCL is an international container shipping company which was founded in 1947 by Mr CY Tung. Ownership passed initially to Mr CH Tung in 1982. When Mr CH Tung was elected Chief Executive of Hong Kong Special Administrative Region in 1996 Mr CC Tung took over as chairman and majority shareholder of OOCL.

9. OOCL's principal corporate values/moto, introduced by Mr CC Tung, is "Taking it Personally". We were told and accept that Mr CC Tung was a "hands on" chairman. It was also said that he valued the workforce of OOCL. As an example of his attitude of appreciation and, it was asserted generosity, we were informed that during his tenure he introduced a policy of rewarding long service through the presentation of a Rolex watch to each employee at 25 years' service.

10. In July 2017 OOCL received a significant takeover offer for the business from COSCO Shipping Co., Ltd. The offer required regulatory clearance in a number of jurisdictions, the majority of which were obtained by July 2018 and, on 24 July 2018, Mr CC Tung's interest in the company was sold. On 3 August 2018 he resigned as a director of OOCL.

11. On 2 August 2018 from his OOCL corporate email account, Mr CC Tung sent an email (**Email**) to all (circa 10,300) global employees as follows:

> "**SUBJECT: A letter from OOIL Charman Mr C.C.Tung**
>
> Dear Colleagues,
>
> On July 24, we announced that OOIL's majority shareholder has changed to COSCO SHIPPING Holdings, a significant milestone as we approach the end of the transaction process.
>
> This is an exciting time for OOIL as we look to the future. We remain convinced that this transaction is an essential step to ensure the long-term viability and competitiveness of the company in a rapidly changing industry. And we are confident that COSCO SHIPPING is the right platform for this next step in the company's journey.
>
> As we move toward the close and I will step down from my role as Chairman after 22 years, the Tung family wishes to express its appreciation for the long corporate journey we have had together by making a special discretionary payment to colleagues directly employed by OOIL and its subsidiaries, according to certain terms and conditions. Whether through good or challenging times, it is you, our people, united as a team under the OOIL banner and the "Take it Personally" spirit, who have continued to deliver. This special discretionary payment will be funded by the Tung family, and distributed through OOIL, as payment agent, as a bonus. Details of this special discretionary payment by the Tung family will be further communicated through CADM.
>
> As OOIL embarks on our next steps with a strong and supportive shareholder as well as unprecedented opportunities to leverage economies of scale, I am confident that OOIL will continue to go from strength to strength.
>
> With warmest regards,
>
> CC Tung
>
> OOIL Chairman"

12. In accordance with the Email, Mr CC Tung, acting through the corporate administration department (referred to in the email as CADM), determined the amount that he wished to be paid to each individual. On 20 September 2018, 99 UK employees were notified by the administration department of the gross sums which were to be paid to them in the September 2018 pay run. Local payroll managers were instructed to make the Payments at the next most convenient time. In the UK that was 27 September 2018. OOCL instructed its third-party payroll provider to make the Payments as part of the September 2018 payroll.

13. The payslips provided to the individual employees showed the gross sum of the Payments as "Bonus". PAYE income tax and NICs were deducted from the gross sums and the net amount of the Payments were made together with the usual salary entitlement.

14. In accordance with his intention to bear the full cost of the Payments, Mr CC Tung paid OOCL the full gross value of the Payments and the employer's NICs.

15. Sometime shortly after the payments were made the OOCL finance team reviewed the tax and NICs treatment of them. It was considered that the payments were not emoluments "from" employment and were not "paid by reason of" employment such that they should not have been subject to a charge to PAYE or NICs. They raised their view at a meeting with HMRC on 6 November 2018.

16. Earlier year updates were submitted between August and September 2020 for the September 2018 pay period pursuant to which OOCL sought repayment of the £587,680 income tax and £284,051 NICs that had been remitted to HMRC in respect of the Payments.

17. After correspondence spanning three years HMRC issued the Decisions and Determinations on 26 November 2021.

Factual findings

18. We note that the Email, whilst signed by Mr CC Tung, is drafted by reference to a plural pronoun. We have considered whether, in doing so, the Email was prepared in his capacity as chairman of the company (as asserted by HMRC) and the "we" was a reference to the company (as employer). Conscious that we should not treat the interpretation of the Email as if it were a statute, we nevertheless consider that the use of "we" is a reference to the Tung family and the Email was drafted in a personal capacity/as shareholder and not on behalf of OOCL. We do so by reference to the tenor of the communication, the clear context of the share sale which benefited Mr CC Tung and his family and its references to the Tung family.

19. HMRC invited us to draw an inference that the Payments were from employment because they were referred to as bonuses in the Email. We consider that this is a relevant factor to bear in mind whilst also recognising that bonus has a range of potential meanings and is not a word limited only to an additional salary payment in an employment situation. We also consider it relevant that whatever the language in which this Email was originally drafted (accepting that may well have been English) it was an email that would, in all probability have been translated into multiple languages as it was received by all circa 10,300 global employees. Accordingly, we have taken into account the choice of the word but do not consider that it can be determinative of the nature of the Payments for UK tax purposes.

20. We find that neither Mr CC Tung nor CADM have ever explained or provided the basis on which individual payments were determined. HMRC have undertaken an analysis which demonstrates some, but certainly not perfect, correlation between salary and bonus and length of service and bonus. We find that the UK finance team were not informed and does not know the basis on which the payments were made. We infer from the information made available to us that the calculation of appreciation was, entirely unsurprisingly, determined by reference to both to annual salary and length of service, but not in a defined formulaic way.

21. We infer as a matter of common sense that the use of OOCL's payroll was an administrative convenience to facilitate the making of circa 10,300 payments.

22. The payments were multiples of monthly salary and a proportion less than 100% of annual salary, on average the Payments were 50% of the individual's annual salary. Mr Banham stated that the Payments were significantly larger than those paid under the bonus scheme operated by OOCL to encourage outstanding performance. We accept what we were told that the bonus scheme requires that organisational profit targets be met before there is payment of any bonus at all. The amount paid to each employee is then determined by their own personal performance. Bonuses range from 0% to a maximum of 10% and often are of the order of 6%. Accordingly, we find that the Payments were sums which significantly exceeded bonus payments made by OOCL and cannot therefore be equated with a conventional bonus paid from time to time by OOCL.

23. We find no practical significance in the use of the term "Bonus" on the payslip. OOCL used a third-party payroll provider. The instruction to make the payment was made on 20 September 2018 for a payroll run 7 days later. It would have been highly surprising if the payroll package had a convenient data field for the Payments. It was not, in our view, unreasonable for them to use bonus and for tax and NICs to have been paid even if it were ultimately to be determined that the Payments were not taxable.

24. We do not consider it relevant to the decision we have to take that Mr CC Tung met the cost of the employer NICs. He had been clear that the cost of the Payments was to be borne by him/the Tung family. We were told and accept that Mr CC Tung did not take advice from the UK finance team as to whether the payments were chargeable to either income tax or NICs prior to making the payments. We do not consider that meeting the full cost without enquiry is indicative that he considered the payments to be either "from" employment or "by reason of employment". Although we cannot make a formal finding as to Mr CC Tung's state of mind as we had no evidence from him, we infer that he simply made the Payments on the basis that he would bear the full cost of them and ignorant of, and somewhat agnostic to, the tax status of the payments in any particular jurisdiction.

25. It is agreed between the parties, and we therefore find, that the Payments were:

(1) made voluntarily,

(2) not expected by the recipients,

(3) not customary,

(4) not paid in order to make good a below market salary otherwise paid to the employees but

(5) only made to those who were employees on 27 September 2018.

26. HMRC seemed to infer (as part of a composite submission with the inference we were asked to draw from the fact that Mr CC Tung paid the employer's NICs) that the short delay before the contention was raised and the fact that it was raised by the OCCL finance team indicated that the Payments were properly chargeable to income tax an NICs. We do not consider that a reasonable inference to draw. The Payments were announced, over a month later the amounts had been calculated and communicated and 7 days later they were paid without consultation with the UK finance team. We find the tax was paid because of the normal operation of a payroll system and not because there had been any consideration of their taxability.

27. We infer from the corporate moto "Taking it Personally" (introduced during Mr CC Tung's period of leadership), the introduction of Rolex long service awards, and the tone and

content of the Email that Mr CC Tung wanted to share the benefit he had derived from the share sale and wanted to recognise that the share value was a measure of the company and all that is in it, including the staff.

28. Having considered all the evidence we find that Mr CC Tung made the payments as a mark of appreciation to the UK workforce (as part of a gesture to of similar appreciation to the global workforce) following the successful sale of the business and in consequence of his long tenure as both chairman and majority shareholder of the OOCL. He did so as a personal gesture of thanks from the proceeds of sale.

29. However, we also find that the Payments were received by virtue of the recipients' status as employees.

LEGISLATION

30. The legislation we are required to interpret and apply in this appeal is contained in Income Tax (Earnings and Pensions) Act 2003 (**ITEPA**) sections 9, 62, 201 and 209 and Social Security Contributions and Benefits Act 1992 (**SSCA**) section 3.

31. So are as relevant these provide:

(1) ITEPA Section 9:

> "(1) The amount of employment income which is charged to tax under this Part for any particular tax year is as follows.
>
> (2) In the case of general earnings, the amount charged is the net taxable earning from and employment in that year.
>
> …"

(2) ITEPA Section 62:

> "**Earnings**
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment means:
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by an employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment.
>
> …"

(3) ITEPA Section 201:

> "**Employment-related benefits**
>
> (1) This Chapter applies to employment-related benefits.
>
> (2) In this Chapter:
>
> "benefit" means a benefit or facility of any kind;
>
> "employment-related benefit" means a benefit, other than an excluded benefit, which is provided in a tax year (a) for an employee … by reason of employment …
>
> (3) A benefit provided by an employer is to be regarded as provided by reason of employment unless [provisions not applicable]"

(4) ITEPA Section 209:

"**Meaning of '*persons providing benefit*"**

For the purposes of this Chapter the persons providing a benefit are the person or persons at whose cost the benefit is provided."

(5) SSCA Section 3

"'**Earnings' and 'earner'**

(1) … (a) "earnings" includes any remuneration or profit derived from an employment …

OUTLINE OF PARTIES' SUBMISSIONS

OOCL's submissions

Income from employment

32. OOCL contends that the Payments do not represent either income "from" employment or a cash benefit paid "by reason of" employment. Rather they contend that the Payments were a simple act of generosity by Mr CC Tung.

33. Mr Banham carefully drew a detailed parallel between the nature of the payment and the terms of the Email and what he considered to be a similar payment made by Mrs DeHaan to Mr Collins in which the Tribunal determined that the payment in question was not "from" employment (*Collins v HMRC* [2012] UKFTT 411 (TC) (***Collins***)).

34. The judgment in *Collins* (at paragraph [70]) had adopted the relevant points of principle in determining whether a payment was "from" employment from the summary of relevant jurisprudence as set out in the earlier Tribunal judgment in *KA Rogers v HMRC* [2011] UKFTT 167 (TC) (***Rogers***).

35. OOCL contended that the relevant jurisprudence established that the issue of whether a payment was from employment was essentially one of fact to be determined by reference to the circumstances; however, a number of factors were particularly relevant where, as here, there was no contractual entitlement to the payment:

(1) In order to be income from employment the payment in question must be in return for past or present services of employment;

(2) Employment must be a "causa causans" and not the "causa sine qua non" for the payment such that the fact that a payment might only have been made because the recipient was an employee was insufficient to justify a conclusion that it was income from employment (and for NICs purposes thereby general earnings).

(3) Case law has indicated that there are six factors which point to a conclusion that a payment does not represent income from employment:

(a) The receipt of the payment was non-contractual voluntary and unexpected.

(b) The payment was disproportionate to the recipient's past salary (the greater the disproportion the less likely it is to be salary).

(c) The payments were not made regularly.

(d) It is not a customary gratuity paid in the industry and was not an amount paid to make up salary to an acceptable level.

(e) The payment was not at the cost of the employer and could not have been made by the employer as the funding for the payment did not accrue to the employer.

(f) The payment was not made to an employee and/or in connection with termination of employment.

36. OOCL contended that the Payments were clearly not made in respect of future services of employment. The payments could be distinguished from payments like that made to Mr Peter Shilton by Nottingham Forest Football Club when transferred to Southampton and determined by the House of Lords in *Shilton v Wilmshurst* [1991] BTC 66 (***Shilton***) to be a payment made by a previous employer for services to be rendered to the new employer so as to justify the payment of the transfer fee by which Nottingham Forest would benefit. It was contended that the words of hope for the continued prosperity of the OOCL business in the Email were insufficient to establish a relationship between future services by the UK employees and the payment.

37. It was further contended that the causa causans (or real reason) for the payment was that Mr CC Tung and his family had, after a long period of ownership, made a significant financial gain which they wanted to share as an act of generosity. The status of the recipients as employees of OOCL was simply the causa sine qua none or a condition that had to be met for the payment to be made.

38. As regards the factors derived from years of jurisprudence it was plain, and HMRC accepted, that only the factors as to disproportionality and that the payment was made through OOCL could indicate that the Payments were from employment. It was highlighted that in *Collins* the judge had strongly inferred that meeting all six factors compelled the judge to a conclusion that the payment in question was not from employment but that any one of the factors on its own would have been sufficient. Here, it was submitted, the fact that the payments were funded by Mr CC Tung from the unusual event of the share sale, were voluntary, a one off, unexpected and made to recipients whose salaries were at market rate and not in a sector accustomed to payment of gratuities all compellingly justified a conclusion, on their own and together, that the Payments were not income from employment.

39. Properly considered, it was contended, that the Payments were gifts both in an ordinary language sense and by reference to the examples given in HMRC's guidance. OOCL strongly resisted HMRC's contention that in order to be a gift there needed to be an event or justification unique to the recipient or arise from a personal relationship between the donor and the donee. OOCL contended that there only needed to be a personal reason for the donor to have made the gift and here that reason was the significant financial benefit derived from the share sale.

40. It was contended that when all of the circumstances were taken together it could not be said that the Payments were made in order as a reward for past or present services and should not therefore be subject to income tax and NICs.

By reason of employment

41. In essence the OOCL replicated its submission on "from" employment assimilating an argument that a payment is not a benefit of employment simply because it is paid because the recipient is an employee it must be by reason of employment which required a stronger causal connection between the services of employment and the making of the Payments.

HMRC's submissions

From employment

42. HMRC contended that the Payments were made as a consequence of the recipients being employees and having contributed to the success of the business justifying the significant premium on share value which benefited Mr CC Tung. They placed significant reliance on the correlation between length of service and salary on the one hand and the amount of each payment on the other, together with the language used in the Email reflecting that the Payments

were paid in recognition of past service and the anticipated expectation of continued contribution to the success of OOCL in new hands and under new senior management/leadership.

43. Whilst HMRC accepted that the Email indicated that the Payments were made as a mark of appreciation it was appreciation for the services of each individual as an employee. They disputed that the Payments could be gifts on the basis that the Payments were made ubiquitously to all employees and that Mr CC Tung could not have had a personal relationship with each employee. They contended that there was no evidence of general generosity by Mr CC Tung personally which may have justified the making of the Payments (as was the case in *Collins* in which Mrs DeHaan had made a very significant one-off payment to a few members of the company she had formerly led). They relied heavily on the exhortation of the Court of Appeal in *Moorhouse v Dooland* (1955) 36 TC 1 that it was the perspective of the recipient which was relevant in determining the nature of a gift. Here it was asserted that if asked the UK employees would have said that the payment was because they were employees particularly as it could not be said that each had a personal reason which might justify OOCL making the Payments (i.e. wedding, house move, retirement etc).

44. HMRC denied that the funding of the payment had any material relevance in determining its nature as it was plain from cases including *Shilton* that income from employment could be paid by someone other than the employer.

By reason of employment

45. The benefits code applies to payments or other financial benefits which are not taxable as earnings. HMRC contended that the deeming provisions in section 201(3) made it clear that the charge under section 201(1) was not limited to payments made by an employer but also to payments made or funded by third parties. However, where payments were made by persons other than the employer the reason for the payment would need to be established rather than deemed and otherwise outside the statutory exemptions.

46. HMRC relied on the Court of Appeal judgment of Denning MR in *Wicks v Firth* [1982] 1 Ch 255 (***Firth***) as to the meaning of "by reason of employment":

> "It seems to me that the words "by reason of" are far wider than the word "therefrom" in the 1970 Act. They are deliberately designed to close the gap in taxability which was left by the House of Lords in *Hochstrasser v Mayes*. The words cover cases where the fact of employment is the *causa sine qua non* of the fringe benefits, that is, where the employee would not have received the fringe benefits unless he had been an employee. The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause – in the sense that it was a condition of the benefit being granted. …"

47. Rightly, HMRC acknowledged that Lord Oliver (as preferred by the House of Lords in *Mairs v Haughey* [1993] UKHL 66) had marked a note of caution that Lord Denning's test may scope in too broad a range of payments or benefits.

48. Further, HMRC contended that although the premise on which the decision of the Court of Appeal had been made was reversed by the House of Lords ([1983] 2 AC 214) the analysis as to the meaning of "by reason of employment" had not and that the House of Lords had clearly confirmed that a payment made by a third party was capable of representing a benefit chargeable under the benefits code Lord Templeman having confirmed (albeit obiter):

> "Whether a benefit provided at the cost of a third party is provided by reason of employment must depend on a variety of circumstances including the

source of the benefit, the relationship, right and expectations of the employer, the employee and the third party respectively."

49. We were invited to conclude that as the Payments had, as a cause for payment, that the recipients were employees of OOCL the Payments were necessarily the subject of a charge to income tax under section 201 ITEPA with the necessary consequence that they were also subject to NICs by virtue of section 3 SSCA.

DISCUSSION

50. We are grateful to the parties for their skeleton arguments, comprehensive oral submissions and responses to the questions raised during the hearing. In reaching our decision on this appeal we have considered everything drawn to our attention by way of submission/argument. It is, however, inevitable, given the detail of the arguments and the quantity of material before us, that not everything in the appeal is given specific mention in this judgment.

Earnings from employment – sections 9 and 62 ITEPA

51. We have carefully considered the terms of the Email, and all the surrounding facts and circumstances of the payment. As set out in paragraph 28 we have determined that the payments were made as an act of appreciation and as a mark of generosity by Mr CC Tung.

52. Considering the case law which is binding on us and the factors and indicia which we must apply (summarised above at paragraph 35):

(1) we are not satisfied that the Payments were made for the past services rendered as employees by the recipients and we do not consider that the language of the Email is capable of being construed as linking the Payments to the future provision of services by employees.

(2) In our view it cannot be said that employment was the causa causans of the Payments.

(3) The Payments were:

(a) non-contractual, voluntary and were not expected by the recipients;

(b) at 50% on average of annual salary and exceeding 5x the usual maximum performance related bonus they were disproportionate though not significantly so;

(c) not part of a regular pattern of payment and would not be repeated;

(d) each employee was paid a market rate salary and performance related bonus without reference to the Payments; the Payments were not "gratuities" in the sense of tips paid in the retail service industry;

(e) the full cost of the Payments was borne by Mr CC Tung and were stated to have been funded from the sums he received from the share sale, as such they could not have been made on that same basis by OOCL;

(f) However, the Payments were made through OOCL's payroll and thereby to an employee by the employer albeit as an administrative convenience to Mr CC Tung.

53. Taking these factors in the round we consider that it is entirely reasonable to conclude that the Payments are not income "from" employment and are not therefore taxable under section 62 ITEPA.

By reason of employment – section 201 ITEPA

54. During the hearing we indicated that we were concerned at HMRC's reliance on the Court of Appeal analysis in *Firth* in circumstances in which the decision had been overturned by the House of Lords, albeit on alternative grounds, and in light of the apparent conflict between the conclusion of Lord Denning that a payment funded by a third party would never be a benefit taxed within the benefits code.

55. The parties did not appear able to help us with our concerns. However, independent research led us to the Upper Tribunal (**UT**) judgment in *HMRC v Vermilion Holdings Limited* [2020] UKUT 162 (TCC). That judgment is, of course, binding on us (the case proceeded to the Supreme Court which issued its judgment on 25 October 2023 determining the case on the equivalent provision to section 201(3) and as such not relevant to this appeal; the judgment does not impugn reliance on the UT).

56. The case concerns a share option granted to an advisor in place of fees. The relevant statutory provision was section 471 ITEPA which taxes share options granted "by reason of employment". The UT notes the relevant judgments of Lord Denning and Lord Oliver in the Court of Appeal and Lord Templeman in the House of Lords it then states:

> "71. What we take from Wicks v Firth is that the phrase "by reason of employment" is to be given its ordinary meaning and must be considered in the circumstances of the particular case. We note also that the employment need not be the sole reason: it is enough that the employment was a condition of a benefit being granted.
>
> 72. The question which has to be decided in this case is whether the requirements of section 471(1) are satisfied in the circumstances of this case. In other words, whether on the facts of the case, the opportunity to acquire the 2007 Option was available by reason of the employment of Mr Noble."

57. When considering the approach adopted by the Tribunal in that appeal (and reversing its decision) the UT notes:

> "78. … in our opinion the FTT has erred in law. It has failed to properly apply the guidance given in *Wicks v Firth*. In particular it has not applied the guidance in respect of how to approach matters where there is more than one cause. It has not properly applied the guidance of Denning MR that the fact of employment need not be the sole cause or even dominant cause, and that it is sufficient that the employment was a condition of the benefit granted."

58. The UT went on to consider whether the subsequent employment of the advisor was an operative cause of the granting of the share option. On the facts it was, and the share option fell within the provisions of section 471.

59. Subsequent to *Vermilion* the Court of Appeal in *John Charman v HMRC* [2021] EWCA Civ 1804 the Court confirmed that the correct test to be applied to determine whether a sum is received "by reason of" employment does not require that the sum be received only by reason of employment but rather, as per Oliver LJ in *Wicks* that by asking what enables the person to enjoy the benefit, i.e. what is the operative reason.

60. As HMRC submitted, the deeming provision in section 201(3) ITEPA must carry the consequence that section 201(1) ITEPA applies to benefits funded by third parties but in the case of the giving or payment of such a benefit it will be necessary to establish whether one of the operative causes or reasons for payment is employment (the operative cause as employment being deemed where paid by an employer). Establishing whether employment is one of the reasons will be an exercise of evaluating the evidence available and will "depend on a variety

of circumstances including the source of the benefit, the relationship, right and expectations of the employer, the employee and the third party respectively."

61. In the present case it was not contested that in order to receive their respective Payment each recipient had to be an employee. We have found as a fact that the Payments were calculated by reference to length of service and salary albeit that we do not know precisely how the calculations were undertaken. The only relationship of substance or relevance between Mr CC Tung and the recipients collectively was that he was the chairman and majority shareholder of their employer. These factors are conclusive that employment was a cause of the payments being made.

62. The fact that we have found that the Payments represented a mark of appreciation and were entirely funded by Mr CC Tung does not preclude a conclusion that the Payments were made by reason of employment the nature of the payment is simply an additional reason for it being made.

63. We therefore conclude, on the evidence, that the Payments were made by reason of employment.

NICs

64. Section 3 SSCA charges NICs on earnings "derived from employment". The Appellant rightly accepted that if we were to find either that the Payments were income from employment or benefits paid by reason of employment NICs would be due on them.

65. In light of our finding at paragraph 61 above NICs are therefore due.

DISPOSITION

66. For the reasons stated the earlier year updates were unjustified and HMRC were correct to issue the Decisions and Determinations.

67. We dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 24th NOVEMBER 2023