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Case No: CA-2021-001799

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Chamberlain
[2021] EWHC 1914 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2023

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ANDREWS
and
LADY JUSTICE FALK

Between:

(1) HUGH MURPHY **Claimants/**
(2) WINIFRED LINNETT **Appellants**
- and -
THE COMMISSIONERS FOR HIS MAJESTY’S **Defendants/**
REVENUE AND CUSTOMS **Respondents**

William Massey KC and Ben Elliott (instructed by Howes Percival LLP) for the Appellants
Aparna Nathan KC and Ishaani Shrivastava (instructed by The General Counsel and
Solicitor to HM Revenue and Customs) for the Respondents

Hearing date: 20 April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal raises an issue as to the construction of an extra-statutory concession, ESC B18, issued by the respondents, HM Revenue and Customs (“HMRC”). Among other things, ESC B18 can enable a UK resident beneficiary of a non-resident trust to claim credit for UK income tax which the trustees of the trust paid on income subsequently distributed to the beneficiary. The question in the present case is whether, as HMRC contend, credit can be claimed only in relation to income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment to the beneficiary was made. Chamberlain J (“the Judge”) accepted this, but the appellants, Mr Hugh Murphy and Mrs Winifred Linnett, dispute that ESC B18 imposes such a limitation.

The facts

2. The appellants are the beneficiaries of a discretionary settlement known as “the Charles Street Group Funded Unapproved Retirement Benefit Scheme” (“the Trust”). The Trust was set up in 1998 by Charles Street Buildings (Leicester) Limited, of which each appellant was a director.
3. While the appellants have at all material times been resident in the UK, the trustees of the Trust have always been resident for UK tax purposes in Guernsey, and not in the UK. The trustees received UK source income in the form of interest on which they were liable to pay, and in fact paid, UK income tax. The net amounts generated further income as overseas bank interest.
4. On 26 September 2018, Magma Chartered Accountants (“Magma”) wrote to HMRC on behalf of the appellants and the trustees of the Trust asking for confirmation that ESC B18 would apply to distributions which the trustees were considering making to the appellants. Magma sought HMRC’s agreement that the appellants would be granted credit for UK income tax which had been paid on Trust income regardless of whether the income had arisen within the previous six years or longer ago.
5. On 20 November 2018, HMRC replied that, in their view, ESC B18 claims by both UK beneficiaries of non-resident trusts and non-resident beneficiaries of UK resident trusts could be made only in respect of a payment out of income received not more than six years before the year of assessment of the payment. Magma requested reconsideration, but in the meantime the trustees of the Trust varied the deed governing it so as to allow its assets to be distributed and, on 25 January 2019, the entire trust fund was distributed to the appellants in the UK. Mr Murphy and Mrs Linnett received respectively £7,329,856.22 and £1,832,464.06.
6. The distributions constituted income in the hands of the appellants for UK income tax purposes for the tax year 2018-2019. The appellants paid income tax on the distributions, but also made claims for credit under ESC B18 for the UK income tax which the Trust had borne on the income out of which the distributions had been made. The claims related to all relevant tax years, not just the last six.
7. HMRC gave credit for UK income tax paid by the trustees on UK source Trust income arising in tax years from and including 2012-2013 and have repaid the tax so paid. However, they rejected the claims for credit in respect of earlier years. HMRC

acknowledge that, on their interpretation of ESC B18, relief was given in error in relation to the income arising in 2012-2013.

8. On 8 August 2019, the appellants issued judicial review proceedings. The claim came before the Judge, who, in a judgment dated 13 July 2021 (“the Judgment”), dismissed it. The appellants now appeal against that decision.

ESC B18 in context

The Finance Act 1973

9. As its heading indicates, section 16 of the Finance Act 1973 (“FA 1973”) imposed a “[c]harge to additional rate of certain income of discretionary trusts”. In addition to the basic rate of income tax, income arising to trustees which “[was] to be accumulated or which [was] payable at the discretion of the trustees or any other person” was subject to “the additional rate”. UK resident trustees were liable for the “additional rate” on all income, whatever its source, while non-resident trustees had to pay the “additional rate” on UK source income.
10. Section 17 of FA 1973 provided for a credit mechanism to prevent income being taxed twice: both as income received by trustees and on its distribution to beneficiaries. But for section 17, the beneficiaries would be liable for tax on the distribution even though the income distributed had already been taxed in the hands of the trustees. Section 17 addressed the issue as regards UK resident trustees. So far as material, it provided:
 - “(1) Where, in any year of assessment, trustees make a payment to any person in the exercise of a discretion exercisable by them or any person other than the trustees, then, if the sum paid is for all the purposes of the Income Tax Acts income of the person to whom it is paid (but would not be his income apart from the payment), the following provisions of this section shall apply with respect to the payment in lieu of section 52 or 53 of the Taxes Act [i.e. the Income and Corporation Taxes Act 1970].
 - (2) The payment shall be treated as a net amount corresponding to a gross amount from which tax has been deducted at a rate equal to the sum of the basic rate and the additional rate in force for the year in which the payment is made; and the sum treated as so deducted shall be treated—
 - (a) as income tax paid by the person to whom the payment is made; and
 - (b) so far as not set off under the following provisions of this section, as income tax assessable on the trustees.

- (3) The following amounts, so far as not previously allowed, shall be set against the amount assessable (apart from this subsection) on the trustees in pursuance of subsection (2)(b) above:
- (a) the amount of any tax on income arising to the trustees and charged at the additional as well as at the basic rate in pursuance of section 16 of this Act”
11. The payment received by a beneficiary was thus treated as a net amount from which basic and additional rate tax had already been deducted. The notional deduction was deemed both to have been paid by the beneficiary as income tax and to be income tax for which the trustees were assessable. The trustees could, however, set off any income tax for which they were otherwise liable or had already paid on the trust income, with the result that, provided that they incurred such tax (i.e. that the trustees had what has been described as “tax capacity”), the income was taxed only once.
12. By reason, however, of the latter part of section 17(1) of FA 1973 (“the following provisions ... shall apply with respect to the payment *in lieu of section 52 or 53 of the Taxes Act*” – emphasis added), section 17 applied only if trustees were UK resident. Where trustees were not UK resident, they were liable to income tax on UK source income and a UK resident beneficiary to whom net income was distributed would be taxed again without any credit for the tax paid by the trustees.
13. Section 18 of FA 1973 dealt with the position where trustees received income which was eligible for relief from double taxation under a double tax treaty or the UK’s unilateral relief rules. In such a case, a beneficiary to whom income was paid on would still be treated as receiving a net amount after deduction of income tax, but, not themselves having paid UK income tax (or the full amount of UK tax), the trustees stood to be liable for the amount notionally deducted from the payment to the beneficiary. The trustees could therefore be taxed twice on non-UK source income: both in the country from which the income originated and on the payment to the beneficiary, without effective relief for the foreign tax.
14. Section 18 of FA 1973 ameliorated the position by allowing a beneficiary to claim to “look through” the trust to the source of the income. It read:
- “(1) Subsection (2) of this section shall apply if a payment made by trustees falls to be treated as a net amount in accordance with section 17(2) of this Act and the income arising under the trust includes income in respect of which the trustees are entitled to credit for overseas tax under Part XVIII of the Taxes Act (in that subsection referred to as ‘taxed overseas income’).
- (2) If the trustees certify—
- (a) that the income out of which the payment was made was or included taxed overseas income of

an amount and from a source stated in the certificate; and

- (b) that that amount arose to them not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made;

the person to whom the payment was made may claim that the payment, up to the amount so certified, shall be treated for the purposes of the said Part XVIII as income received by him from that source and so received in the year in which the payment was made.”

- 15. The effect was to relieve trustees of the liability otherwise imposed on them by section 17 of FA 1973. However, the relief was not available in respect of income which had arisen to the trustees “earlier than six years before the end of the year of assessment in which the payment [to the beneficiary] was made”. Moreover, section 18 did not apply to non-resident trustees (since it was limited to payments to which section 17(2) applied).

ESC B18 (1978 version)

- 16. ESC B18 was first published in 1978. In its original form (“ESC B18 (1978)”), it read as follows:

“B18. Payments out of a discretionary trust: entitlement to relief from United Kingdom tax under the provisions of the Income Tax Acts or of double taxation agreement.

If a payment made by Trustees falls to be treated as a net amount in accordance with Section 17(2), Finance Act 1973 and the income arising under the Trust includes income in respect of which the beneficiary would, if such income came to him directly instead of through Trustees, be entitled to relief under the provisions of the Income Tax Acts, e.g.

Section 27, Income and Corporation Taxes Act 1970 (claims for personal reliefs by non-residents);

Section 99, Income and Corporation Taxes Act 1970 (claims for exemption from tax on certain United Kingdom Government Securities held by persons not ordinarily resident in the United Kingdom);

Sections 100 and 159, Income and Corporation Taxes Act 1970 (claims for exemption from United Kingdom tax or income from overseas securities by persons not resident in the United Kingdom);

or under the terms of a double taxation agreement,

such relief will be granted to the beneficiary on a claim made by him to the extent that the payment is of income which arose to the Trustees not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made, provided that the Trustees have submitted for each year Trust Returns which are supported by the relevant income tax certificates and which detail all sources of trust income arising and payments made to beneficiaries.

A similar concession will operate where the payment made by the Discretionary Trustees is not within Section 17(2), Finance Act 1973 but constitutes income arising from a foreign possession (e.g. where non-resident Trustees exercise their discretion outside the United Kingdom) provided the Trustees:

(i) submit Trust Returns, supported by the relevant income tax certificates, which detail all sources of Trust income arising and payments made to beneficiaries; and

(ii) pay the Additional Rate Tax chargeable on the United Kingdom income of the Trust in accordance with Section 16, Finance Act 1973.”

17. The first paragraph of ESC B18 (1978) served to enlarge the ability of a beneficiary of a UK resident trust to claim to “look through” the trust. (I shall call this concession “Concession 1”.) The limitation to “income which arose to the Trustees not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made” mirrored the requirement in section 18 of FA 1973 that income “arose [to the trustees] not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made”.
18. The second paragraph of ESC B18 (1978) provided for a “similar concession” to operate in relation to payments from a non-resident discretionary trust, subject to the trustees submitting the requisite returns and paying the “additional rate” tax on UK source income.

The Income and Corporation Taxes Act 1988

19. Sections 16-18 of FA 1973 were re-enacted without any important change in sections 686, 687 and 809 of the Income and Corporation Taxes Act 1988 (“ICTA 1988”).
20. Like section 16 of FA 1973, section 686 of ICTA 1988 provided for trustees of a discretionary trust to pay income tax at the “additional rate” as well as the basic rate. Section 687 of ICTA 1988 corresponded to section 17 of FA 1973 and stated:

“(1) Where, in any year of assessment, trustees make a payment to any person in the exercise of a discretion exercisable by them or any person other than the trustees, then, if the sum paid is for all the purposes of the Income Tax Acts income of the person to whom it

is paid (but would not be his income apart from the payment), the following provisions of this section shall apply with respect to the payment in lieu of section 348 or 349(1).

- (2) The payment shall be treated as a net amount corresponding to a gross amount from which tax has been deducted at a rate equal to the sum of the basic rate and the additional rate in force for the year in which the payment is made; and the sum treated as so deducted shall be treated—
 - (a) as income tax paid by the person to whom the payment is made; and
 - (b) so far as not set off under the following provisions of this section, as income tax assessable on the trustees.
- (3) The following amounts, so far as not previously allowed, shall be set against the amount assessable (apart from this subsection) on the trustees in pursuance of subsection (2)(b) above—
 - (a) the amount of any tax on income arising to the trustees and charged at the additional as well as at the basic rate in pursuance of section 686”

Section 809 of ICTA 1988 was in comparable terms to section 18 of FA 1973, reading:

- “(1) In any case where—
 - (a) a payment made by trustees falls to be treated as a net amount in accordance with section 687(2) and the income arising under the trust includes any taxed overseas income, and
 - (b) the trustees certify that—
 - (i) the income out of which the payment was made was or included taxed overseas income of an amount and from a source stated in the certificate, and
 - (ii) that amount arose to them not earlier than six years before the end of the year of assessment in which the payment was made;

then the person to whom the payment was made may claim that the payment, up to the amount so

certified, shall be treated for the purposes of this Part as income received by him from that source and so received in the year in which the payment was made.

- (2) In subsection (1) above “taxed overseas income”, in relation to any trust, means income in respect of which the trustees are entitled to credit for overseas tax under this Part.”

ESC B18 (1994 version)

21. A revised version of ESC B18 (“ESC B18 (1994)”) was published in 1994. This was in these terms:

“B18: Payments out of discretionary trusts

UK Resident Trusts

A beneficiary may receive from trustees a payment to which section 687(2), Income and Corporation Taxes Act (ICTA) 1988 applies. Where that payment is made out of the income of the trustees in respect of which, had he received it directly, the beneficiary would

- have been entitled to relief under sections 47, 48 or 123 ICTA 1988 ;* or
- have been entitled to relief under the terms of a double taxation agreement; or
- not have been chargeable to UK tax

the beneficiary may claim those reliefs or, where he would not have been chargeable, repayment of the tax treated as deducted from the payment (or an appropriate proportion of it).

Relief will be granted to the extent that the payment is out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made, provided that the trustees have made trust returns for each year which are supported by the relevant income tax certificates and which give details of all sources of trust income and payments made to beneficiaries.

Non-resident trusts

A similar concession will operate where a beneficiary receives a payment from discretionary trustees which is not within section 687(2), ICTA 1988 but is income arising from a foreign possession (e.g. where non-resident trustees exercise their discretion outside the UK).

Where a non-resident beneficiary receives such a payment out of income of the trustees in respect of which, had he received it directly, the beneficiary would have been liable to UK tax then he

- may claim relief under Section 278 ICTA 1988* (if entitled); and
- may be treated as if he received that payment from a UK resident trust but claim credit only for UK tax actually paid by the trustees on income out of which the payment is made.

A UK beneficiary of a non-resident trust may claim credit for UK tax actually paid by the trustees on the income out of which the payment is made as if the payment were from a UK resident trust.

This treatment will only be available where the trustees:

- make trust returns, supported by the relevant income tax certificates, giving details of all sources of trust income and payments made to beneficiaries; and
- pay tax at the rate applicable to trusts chargeable on the UK income of the trust under section 686, ICTA 1988.

No credit is given for tax treated as paid on income received by the trustees (for example foreign income dividends) which would not be available for set off under Section 687(2) if that section applied, and that tax is not repayable.

* The relevant reliefs are

- exemption from tax on certain UK Government securities held by persons not ordinarily resident in the UK (Section 47 ICTA 1988);
- exemption from UK tax on income from overseas securities held by persons not resident in the UK (Sections 48 and 123 ICTA 1988);
- personal reliefs for certain non-residents (Section 278, ICTA 1988).”

22. A press release issued at the time explained:

“The Inland Revenue have today published a revised version of extra-statutory concession B18 which applies where a beneficiary receives income from a discretionary trust. The

concession enables the beneficiary to claim certain reliefs or credits to set against his tax liability on that income.

The concession allows some beneficiaries of trusts with income taxable in the UK to claim reliefs to which they would not otherwise be entitled, by treating them as if they had received the income directly. The amendment now being made to the concession ensures that it also applies to allow UK resident beneficiaries of non-resident trusts to claim credit for UK tax paid by the trustees. The Inland Revenue have always viewed the concession as enabling credit for this tax to be claimed, and the amendment is made to correct a possible defect of the previous wording. The text has also been re-ordered and amended to take into account changes to the taxation of trusts introduced by Finance Act 1993.”

23. The section of ESC B18 (1994) headed “UK Resident Trusts” was expressed slightly differently from the first paragraph of ESC B18 (1978) but was to the same effect. The remainder of ESC B18 (1994) expanded on the second paragraph of ESC B18 (1978) and, as the press release indicated, made clear that relief was available where a UK resident beneficiary of a non-resident trust received income on which UK income tax had already been paid by the trustees.

ESC B18 (1999 version)

24. A third version of ESC B18 (“ESC B18 (1999)”) was published in 1999. This read:

“B18: Payments out of discretionary trusts

UK Resident Trusts A beneficiary may receive from trustees a payment to which Section 687(2) ICTA 1988 applies.

Where that payment is made out of the income of the trustees in respect of which, had it been received directly, the beneficiary would

- have been entitled to exemption in respect of FOTRA Securities issued in accordance with Section 154 FA 1996; or
- have been entitled to relief under the terms of a double taxation agreement; or
- not have been chargeable to UK tax because of their not resident and/or not ordinarily resident status

the beneficiary may claim that exemption or relief or, where the beneficiary would not have been chargeable, repayment of the tax treated as deducted from the payment (or an appropriate proportion of it). For this purpose, the payment will be treated as having been made rateably out of all sources of income arising to the trustees on a last in first out basis.

Relief or exemption, as appropriate, will be granted to the extent that the payment is out of income which arose to the trustees not earlier than six years before the end of the year of

assessment in which the payment was made, provided the trustees:

- have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required, and
- have paid all tax due, and any interest, surcharges and penalties arising, and
- keep available for inspection any relevant tax certificates.

Relief or exemption, as appropriate, will be granted to the beneficiary on a claim made within five years and ten months of the end of the year of assessment in which the beneficiary received the payment from the trustees.

Non-resident trusts

A similar concession will operate where a beneficiary receives a payment from discretionary trustees which is not within section 687(2) ICTA 1988 (i.e. where non-resident trustees exercise their discretion outside the UK).

Where a non-resident beneficiary receives such a payment out of income of the trustees in respect of which, had it been received directly, it would have been chargeable to UK tax, then the beneficiary

- may claim relief under Section 278 ICTA 1988 (personal reliefs for certain non-residents); and
- may be treated as receiving that payment from a UK resident trust but claim credit only for UK tax actually paid by the trustees on income out of which the payment is made. The beneficiary may also claim exemption from tax in respect of FOTRA Securities issued in accordance with Section 154 FA 1996 to the extent that the payment is regarded as including interest from such securities.

A UK beneficiary of a non-resident trust may claim appropriate credit for tax actually paid by the trustees on the income out of which the payment is made as if the payments out of UK income were from a UK resident trust and within Section 687(1) ICTA 1988.

This treatment will only be available where the trustees:

- have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required, and
- have paid all tax due and any interest, surcharges and penalties arising, and
- keep available for inspection any relevant tax certificates.

Relief or exemption, as appropriate, will be granted to the beneficiary on a claim made within five years and ten months of the end of the year of assessment in which the beneficiary received the payment from the trustees.

No credit will be given for UK tax treated as paid on income received by the trustees which would not be available for set off under Section 687(2) ICTA 1988 if that section applied, and that tax is not repayable (for example on dividends). However, such tax is not taken into account in calculating the gross income treated as taxable on the beneficiary under this concession.”

25. To a great extent, ESC B18 (1999) simply replicates ESC B18 (1994). So far as the section of each document under the heading “Non-resident trusts”, the distinctions include these:
- i) The paragraph breaks in ESC B18 (1994) between the first and second sentences and immediately before the sentence beginning “This treatment” have been removed in ESC B18 (1999);
 - ii) The words “out of UK income” and “and within Section 687(1) ICTA 1988” have been inserted into the sentence in ESC B18 (1999) beginning “A UK beneficiary of a non-resident trust”;
 - iii) The sentence beginning “This treatment” now speaks of “have made” and “have paid” rather than “make” and “pay” and has an extra bullet point (“keep available for inspection any relevant tax certificates”);
 - iv) The paragraph beginning “Relief or exemption” has been added both at the end of the section of ESC B18 dealing with “UK Resident Trusts” and as the penultimate paragraph in the section headed “Non-resident trusts”.
26. The section of ESC B18 (1999) with the heading “Non-resident trusts” plainly contains two concessions: one applying where “a non-resident beneficiary receives ... a payment out of income of the trustees in respect of which, had it been received directly, it would have been chargeable to UK tax” and the other allowing a “UK beneficiary of a non-resident trust” to “claim appropriate credit for tax actually paid by the trustees on the income out of which the payment [to the beneficiary] is made”. I shall call the former concession “Concession 2” and the latter “Concession 3”.

The Income Tax Act 2007

27. Sections 686, 687 and 809 of the 1988 Act were replaced by sections 493-498 of the Income Tax Act 2007. It is common ground that the change is not material for present purposes. The explanatory notes stated:

“This change does not affect the operation of ESC B18, which enables UK resident beneficiaries who receive discretionary payments to have a credit for the tax paid by non-UK resident trustees on United Kingdom source income.”

Extra-statutory concessions: legal principles

28. In *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, Lord Diplock noted at 636 that the Inland Revenue had “a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection”. In *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718, Lord Hoffmann observed in paragraph 21 that this discretion:
- “enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time”.
29. Where HMRC or their predecessors have published an extra-statutory concession on such a basis, a taxpayer may be able to hold HMRC to it. In *R v Inland Revenue Commissioners, Ex p M.F.K. Underwriting Agents Ltd* [1990] 1 WLR 1545 (“*M.F.K.*”), Bingham LJ said at 1569, “No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them”. As Sales J said in *R (Accenture Services Ltd) v Revenue and Customs Commissioners* [2009] EWHC 857 (Admin), [2009] STC 1503 (“*Accenture*”), at paragraph 8, “Where a taxpayer claims to be entitled to take advantage of an extra-statutory concession promulgated by the tax authorities, its claim is in the nature of a claim to benefit from an enforceable substantive legitimate expectation”.
30. The meaning of an extra-statutory concession falls to be determined by the Court. In *Accenture*, Sales J recognised at paragraph 33 that “[t]he proper interpretation of the concession [which was at issue] is a matter for the court”. Earlier, in *First Secretary of State v Sainsbury’s Supermarkets Ltd* [2005] EWCA Civ 520, Sedley LJ had said in paragraph 16 in a planning context that “the interpretation of policy is not a matter for the Secretary of State” and that “[w]hat a policy means is what it says”. In a similar vein, in *R (Ellis) v Secretary of State for the Home Department* [2020] UKUT 82 (IAC), the Judge expressed the view that, although “[t]here are some jurisdictions where decision-makers subject to administrative law are permitted to interpret for themselves the norms that govern their action, subject to review on a reasonableness or rationality standard”, “[t]he UK courts have never adopted this approach to the interpretation of a statute” and, likewise, “[i]t would be inimical to legal certainty if the Secretary of State were permitted (even subject to rationality review) to interpret [an extra-statutory immigration policy] other than in accordance with the objective meaning that a reasonable and literate person would ascribe to it”: see paragraphs 34 and 35.
31. The meaning of an extra-statutory concession published by HMRC is to be assessed by reference to how it would “reasonably have been understood by those to whom it was directed” (to borrow from *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, at paragraph 56, per Dyson LJ, giving the judgment of the Court; see also *Paponette v*

Attorney General of Trinidad and Tobago [2010] UKPC 32, [2012] 1 AC 1, at paragraph 30). The “ordinarily sophisticated taxpayer” can be taken to be representative of those to whom an extra-statutory concession is directed: *M.F.K.*, at 1569, and *R (Davies) Revenue and Customs Commissioners* [2011] UKSC 47, [2011] 1 WLR 2625 (“*Davies*”), at paragraph 29 (“the hypothetical representee is the ‘ordinarily sophisticated taxpayer’ irrespective of whether he is in receipt of professional advice”, per Lord Wilson, with whom Lords Hope, Walker and Clarke expressed agreement, in the context of a booklet published by the Inland Revenue).

32. An extra-statutory concession should not be construed as if it were a statute (*R (Greenwich Property Ltd) v Customs and Excise Commissioners* [2001] EWHC Admin 230, [2001] STC 618). Further, for HMRC to be bound by a statement it should have been “clear, unambiguous and devoid of relevant qualification”: *M.F.K.*, at 1569, per Bingham LJ. In *Davies*, Lord Wilson said in paragraph 29 that the right course was to:

“proceed on the basis that the representations in the booklet for which the appellants contend must have been clear; that the judgment about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part upon the identity of the person to whom it is made, the hypothetical representee is the ‘ordinarily sophisticated taxpayer’ irrespective of whether he is in receipt of professional advice”.

The Judgment

33. The Judge considered there to be some support for the appellants’ interpretation of ESC B18 (1999) “[l]ooking simply at the language”: paragraph 63 of the Judgment. He took the view, however, that the concession was also susceptible to another interpretation (paragraph 66) and that, to decide between them, “it is necessary to go beyond the language of ESC B18 in its current form and consider the statutory scheme and the 1978 and 1994 versions of the concession” (paragraph 67). In ESC B18 (1978), the words “A similar concession will operate” will have imported into the paragraph dealing with non-resident trusts the six-year income limit specified in the previous paragraph; and, similarly, the six-year income limit will have applied to the totality of what featured in the section of ESC B18 (1994) headed “Non-UK resident trusts”: paragraph 72. While Concession 3 may have extended the credit mechanism in section 17 of FA 1973 (which was not subject to the six-year income limit) rather than the look-through relief in section 18 (which was), it did not follow that the extension must be unrestricted in its extent and, taken in conjunction with “the fact that the draftsman regarded [Concession 3] as simply a second limb of [Concession 2]”, “it would be anomalous if [Concession 2] provided relief to a greater extent (i.e. not subject to the six-year income limit) than either section 18 or [Concession 1 or Concession 2]”: paragraph 73. That conclusion was, moreover, supported by the fact that Concession 3 grants a relief which must be claimed and “[i]t is understandable that HMRC would wish to limit the number of years of records it has to check when deciding whether to grant such a relief”: paragraph 74. Nor was the appellants’ case advanced by resort to principles of European Union law.

34. The Judge therefore concluded that the “better interpretation” of Concession 3 is that relief is granted “to the extent that the payment is out of income which arose to the trustees not earlier than 6 years before the end of the year of assessment in which the payment was made”: paragraph 75. The Judge went on in paragraph 76:

“Thus, even without applying the principle [that ‘any ambiguity should in general be resolved against the taxpayer’], I would have rejected the Claimants’ case on the proper interpretation of ESC B18. But if, contrary to my view, ESC B18 is ambiguous between HMRC’s and the Claimants’ interpretations, that principle would resolve this claim in HMRC’s favour: on no view can it be said that the Claimants’ case *clearly* falls within ESC B18. The concession was not ‘clear, unambiguous and devoid of relevant qualification’ on this point. That being so, the precondition for the invocation of a substantive legitimate expectation is not satisfied.”

The parties’ cases in outline

35. Mr William Massey KC, who appeared for the appellants with Mr Ben Elliott, argued that the latter part of ESC B18 (1999), from the paragraph beginning “A UK beneficiary of a non-resident trust may claim appropriate credit”, creates a freestanding concession the conditions applicable to which are stated exhaustively in what follows. The requirements listed in the sentence starting “This treatment will only be available” must all, therefore, be met, but they do not limit the availability of the concession by reference to when the income arose to the trustees. The section of ESC B18 (1999) dealing with “UK Resident Trusts” specifically makes relief conditional on payment being “out of income which arose to the trustees not earlier than six years before the end of the year of assessment”, and the first of the concessions under the heading “Non-resident trusts” (i.e. Concession 2) will, as a “similar concession”, also be subject to that limitation, but HMRC have not chosen to confine in that way the concession that matters in this case (i.e. Concession 3). That there is no mention of a six-year income limit in relation to Concession 3 is particularly significant when the other conditions set out in the “UK Resident Trusts” section have been replicated. Nor would a six-year income limit be expected. Concession 3 provides for credit to be given “as if the payments ... were from a UK resident trust and within Section 687(1) ICTA 1988” and, unlike section 809 of ICTA 1988, section 687 did not impose a six-year income limit. EU law considerations would also indicate to the “ordinarily sophisticated taxpayer” that no such restriction was intended, as would the fact that the words “and within Section 687(1) ICTA 1988” were inserted into ESC B18 when it was revised in 1999. In all the circumstances, Mr Massey submitted, any reader would understand that Concession 3 is not subject to the six-year income limit.
36. In contrast, Ms Aparna Nathan KC, who appeared for HMRC with Ms Ishaani Shrivastava, supported the Judge’s decision. It is evident that the conditions specified in the “UK Resident Trusts” section of ESC B18 (1999) are intended to apply to the first of the “Non-resident trusts” concessions as well as to Concession 1. ESC B18 (1999) makes that clear by stating at the beginning of the “Non-resident trusts” section that a “similar concession” will operate, and that sentence should be seen to be applicable not only to the first concession under that heading (i.e. Concession 2) but

to both of them. There is to be a “similar concession” where a “beneficiary” receives a payment from discretionary trustees, and what follows addresses in turn the types of beneficiary: non-resident and UK-resident. The conditions set out earlier, including the six-year income limit, must be in point in either case. Considerations of practicality confirm that that construction will have been what was intended, and the history of ESC B18 (1999) points in the same direction. The fact that this interpretation of ESC B18 (1999) might render some of the text redundant does not matter given that an extra-statutory concession is not to be construed as if it were a statute, and neither does EU law dictate a different result. Further, since an extra-statutory concession has to be “clear, unambiguous and devoid of relevant qualification”, any ambiguity in ESC B18 (1999) must, Ms Nathan submitted, be resolved in HMRC’s favour.

37. Ms Nathan did not suggest that, supposing Mr Massey’s construction of ESC B18 (1999) to be correct, it would be fair for HMRC to depart from it in this case.

Discussion

38. I find it convenient to consider, first, the text of ESC B18 (1999); secondly, the significance (if any) of EU law; and, thirdly, the significance (if any) of ESC B18’s genesis.

ESC B18 (1999)

39. It seems to me that, read naturally, the text of ESC B18 (1999) strongly supports the appellants’ case.
40. There is very good reason to take the conditions specified in relation to Concession 1 as applicable also to Concession 2. The reference to a “similar concession” can readily be understood to have that effect, and it makes obvious sense that Concession 2 should, like Concession 1, be subject to the six-year income limit. The requirement for a payment to be “out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made” precisely reflects section 809 of ICTA 1988, subsection (1)(b) of which stipulates that trustees must certify that the income out of which a payment has been made “arose to them not earlier than six years before the end of the year of assessment in which the payment was made”. Both Concession 1 and Concession 2 supplement section 809 by allowing a beneficiary to claim to “look through” the trust to the source of income which he has received. That being so, it is to be expected that Concessions 1 and 2 should alike be restricted in the same way as section 809.
41. The position is different as regards Concession 3. In the *first* place, the way in which ESC B18 (1999) is laid out tends to suggest that the sentence referring to a “similar concession” relates only to Concession 2, not Concession 3. The sentence in question forms part of a block of text in which Concession 2 is explained. Concession 3 is to be found in a separate paragraph. *Secondly*, the next block of text, dealing with Concession 3, states that the treatment is dependent on the trustees taking the steps which are specified. There would have been no need to spell out these conditions if those set out in relation to Concession 1 had been meant to apply to Concession 3 too, and the next paragraph of ESC B18 (1999) (beginning “Relief or exemption, as appropriate, will be granted”) would also have been unnecessary. *Thirdly*, while the

conditions listed in respect of Concession 3 largely replicate those given for Concession 1, the draftsman has not thought it appropriate to repeat the requirement for a payment to be “out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made”. The obvious inference is that Concession 3 was not intended to be subject to that limitation. *Fourthly*, the absence of any paragraph break before “This treatment”, the repetition of the paragraph beginning “Relief or exemption” and the inclusion of the paragraph starting “No credit” provide additional reasons for thinking that the conditions applicable to Concession 3 are being stated comprehensively: in other words, that the relevant conditions are those, and only those, specified in the section of ESC B18 (1999) which starts “A UK beneficiary of a non-resident trust”. *Fifthly*, Concession 3 does not enable a beneficiary to “look through” the trust to the source of income in the same way as section 809 of ICTA 1988 and Concessions 1 and 2, but rather states that a beneficiary may claim credit for tax paid by the trustees “as if the payments out of UK income were from a UK resident trust and within Section 687(1) ICTA 1988”. Concession 3 thus extends the credit mechanism for which section 687 of ICTA provides, and, unlike section 809, section 687 does not have any six-year income limit. It is true that Concession 3 does not work in quite the same way as section 687 since there is no question of a claim pursuant to Concession 3 rendering the trustees liable for additional tax; Concession 3 instead caps the credit which a beneficiary may claim to the amount of tax “actually paid by the trustees”. It remains, however, highly significant that Concession 3 specifically invokes section 687, which differs from section 809 in its omission of the six-year income limit. The link with section 687 is reinforced by the reference to it in the final paragraph of ESC B18 (1999).

42. The Judge observed that it is “understandable that HMRC would wish to limit the number of years of records it has to check when deciding whether to grant [relief pursuant to Concession 3]”. For my own part, I can see that HMRC might have chosen to impose a six-year income limit on Concession 3 for such reasons. I do not think, however, that any issues of practicality for HMRC would lead an “ordinarily sophisticated taxpayer” to infer that there is a six-year income limit if ESC B18 (1999) does not otherwise so indicate. That is especially the case given the stringency of the conditions specified in the sentence beginning “This treatment”. For credit to be claimed pursuant to Concession 3, the trustees must, among other things, “have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required” and “keep available for inspection any relevant tax certificates”.

The significance (if any) of EU law

43. There can be no doubt that the interpretation of ESC B18 (1999) which HMRC put forward could mean that a UK beneficiary of a non-resident trust would be denied a credit when one would have been available to a UK beneficiary of a UK trust. Where a UK beneficiary receives a payment derived from income on which the trustees have already paid UK tax, the beneficiary can make a claim under section 687 of ICTA 1988 regardless of when the income arose to the trustees, but if ESC B18 (1999) applied (because, say, the trust was resident in Ireland) the beneficiary could make a claim only if and so far as the income had arisen to the trustees within six years.

44. Mr Elliott, who presented this part of the appellants' case, argued that this difference in treatment could infringe EU law. EU law guarantees freedoms of goods, persons, services and capital. A measure may potentially be held to infringe such a freedom on the basis that it discriminates directly or indirectly by reference to nationality or is capable of hindering or rendering less attractive exercise of the freedom. Which freedom would be relevant to the taxation of a particular beneficiary of a particular non-resident trust might vary, but, depending on the specific facts, freedoms of movement of workers, establishment and capital could be in point.
45. The Judge considered there to be a "short answer" to the appellants' EU law contentions: that, the appellants having "expressly disavowed the argument that their own EU rights are infringed by the challenged decision, there is no reason to 'read down' ESC B18 in this case" (see paragraph 80 of the Judgment). Mr Elliott said, however, that it had never been the appellants' contention that a conforming construction should be applied to ESC B18. Their argument, Mr Elliott explained, is that EU law considerations are relevant to how ESC B18 (1999) would be understood by an "ordinarily sophisticated taxpayer". Such a reader, Mr Elliott submitted, would assume that ESC B18 (1999) should be read in a way that would avoid discrimination and be consistent with EU law principles. EU law is thus relevant, Mr Elliott maintained, not because there is any question of "reading down" ESC B18 (1999), but because it forms part of the context by reference to which an "ordinarily sophisticated taxpayer" would interpret ESC B18 (1999).
46. Ms Nathan denied that EU law is of relevance to the construction of ESC B18 (1999). Pointing out the complexities of the material EU law and also that which, if any, freedom will be in point in any specific case will vary, Ms Nathan argued that the application of EU law in the context of ESC B18 (1999) is not amenable to a hypothetical thought process and that an "ordinarily sophisticated taxpayer" would not take EU law into account when considering the meaning of ESC B18 (1999).
47. In my view, however, EU law is of significance. The hypothetical "ordinarily sophisticated taxpayer" can, I think, be expected to appreciate that, read in the way favoured by HMRC, ESC B18 (1999) could favour UK trusts over non-resident ones and so, potentially, run counter to EU law principles. That, I think, would tend to confirm to an "ordinarily sophisticated taxpayer" that, contrary to HMRC's case, Concession 3 is not subject to a six-year income limit.

The significance (if any) of ESC B18 (1999)'s genesis

48. As I have already indicated, the Judge thought it important to consider the 1978 and 1994 versions of ESC B18. He considered that, in the 1978 version, the words "A similar concession will operate" imported the six-year income limit into the second part of ESC B18 and that there was no reason for the words to mean anything different in the 1994 version.
49. Ms Nathan likewise attached significance to the terms of ESC B18 (1978) and ESC B18 (1994) in her submissions. Among other things, she pointed out that the second part of ESC B18 (1978) was not stated to be limited to non-resident beneficiaries. That being so, the words "A similar concession" were being used in relation to UK beneficiaries of non-resident trusts as well as non-resident beneficiaries: in other words, in the context of situations now covered by Concession 3. Ms Nathan argued

that, in the circumstances, ESC B18 was not extended in any fundamental way by the later iterations. It is noteworthy here that the press release issued in connection with ESC B18 (1994) explained that the Inland Revenue had always viewed ESC B18 as allowing UK resident beneficiaries of non-resident trusts to claim credit for UK tax paid by the trustees.

50. It is fair to say, too, that some of the arguments which the appellants advance in support of their interpretation of ESC B18 would not be available if ESC B18 were still in the form of its 1994 version. Among other things, ESC B18 (1994) did not refer to a UK beneficiary of a non-resident trust being able to claim credit as if a payment were “within Section 687(1) ICTA 1988”. Further, in ESC B18 (1994), there was a paragraph break after the sentence beginning “A similar concession”, making it easier to contend that the sentence applied to all of what followed, including Concession 3.
51. However, it seems to me that, if anything, these changes assist the appellants. They will presumably have been made in order to make what was intended clearer. It would seem, therefore, to have been thought that ESC B18 would more accurately indicate what was meant if (a) ESC B18 specifically stated that Concession 3 involved payments to beneficiaries being treated as if section 687 of ICTA 1988 were applicable and (b) the sentence starting “A similar concession” were tied to the text relating to Concession 2.
52. I doubt myself whether it is in fact right to have regard to ESC B18 (1978) or ESC B18 (1994) when interpreting ESC B18 (1999). An “ordinarily sophisticated taxpayer” would not expect to have to research earlier versions of ESC B18 in order to understand ESC B18 (1999), especially when ESC B18 (1978) and ESC B18 (1994) are not readily available. Perhaps one or both could be found in old books, but an “ordinarily sophisticated taxpayer” should not be assumed to have looked at, or even to have had access to, these, and neither of the earlier versions of ESC B18 is readily to be found on the internet. If, however, it is appropriate to consider ESC B18 (1978) and ESC B18 (1994), it seems to me that, on balance, the prior history tends to support the appellants’ case. The ways in which ESC B18 was altered between its 1994 and 1999 versions are much more telling than whatever might be said about what “A similar concession” meant in the 1978 version.

Conclusion

53. I respectfully differ from the Judge. In my view, it is clear from ESC B18 (1999) that Concession 3 is not subject to a six-year income limit, and there is in this respect no ambiguity or relevant qualification. It follows that the appeal should, as it seems to me, be allowed.

The significance of practice, manuals and commentaries

54. HMRC raised by way of respondent’s notice an issue as to whether the Judge had understated the potential significance of HMRC manuals, guidance published by HMRC and commentary in practitioner texts. In the course of the hearing, it became clear that HMRC were not suggesting that such materials mattered in the present appeal. HMRC were concerned, however, that the Judge’s remarks might create

difficulties for them in future cases. In the circumstances, I think it appropriate to comment briefly on the topic.

55. The Judge said in paragraph 52 of the Judgment that the context to be taken into account when considering what the “ordinarily sophisticated taxpayer” would understand an extra-statutory concession to mean would include “previous iterations of the concession, read against the statutory provisions in force when they were issued, any other relevant statements by HMRC made at or before that time, provided that the notional taxpayer could be expected to be aware of them”. Noting that “[t]his last proviso is important”, the Judge commented in paragraph 53 that “[t]he notional taxpayer could not be expected to be aware of memoranda or discussions internal to HMRC”. The Judge went on to say in paragraphs 61 and 62:

“61 HMRC’s dealings with individual taxpayers are private. Its evidence in these proceedings is that it has consistently applied the 6-year income limit to UK resident beneficiaries of non-UK resident trusts; and that other than the Claimants’ there has only been one query about this practice. But an ordinarily sophisticated taxpayer would not necessarily have any means of knowing this. The Claimants did not, and nor did their accountants, at least until HMRC responded to their query in 2018. In my judgment it would be incompatible with the objective approach to interpretation of policy to attach weight to the existence of a long-standing practice if the practice is visible only to HMRC.

62 I therefore attach no weight to the fact that, according to their evidence, HMRC has always interpreted ESC B18 in the manner for which they now contend.”

56. I have queried above whether regard can properly be had to the “previous iterations” of ESC B18. However, the Judge was, in my view, plainly correct that no account should be taken of materials of which the “ordinarily sophisticated taxpayer” could not have been expected to be aware. If, therefore, the “ordinarily sophisticated taxpayer” would have had no means of knowing of an HMRC practice in relation to an extra-statutory concession, it must be right to disregard it. On the other hand, there may be cases in which the “ordinarily sophisticated taxpayer” would have been alerted to a settled practice of HMRC through, say, HMRC manuals, guidance published by HMRC or commentaries in practitioner texts. In such a situation, HMRC practice may be of relevance. In a sense, that might be said to result in the meaning attributed to an extra-statutory concession changing over time despite its wording remaining the same. As, however, Sales J explained in *Accenture*, a claim by a taxpayer to take advantage of an extra-statutory concession is “in the nature of a claim to benefit from an enforceable substantive legitimate expectation”. Materials revealing a settled practice on the part of HMRC may bear on whether a taxpayer had such an expectation.

Conclusion

57. I would allow the appeal.

Lady Justice Andrews:

58. I agree.

Lady Justice Falk:

59. I also agree.