Neutral Citation: [2024] UKFTT 00367 (TC)

Case Number: TC09156

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, Tribunal Hearing Centre,
London

Appeal reference: TC/2019/03915

Close company – participator – director's loan account – corporation tax reclaimed – income tax liability – whether loan written off in relevant tax year – no – whether amendment to income tax self-assessment by closure notice excessive – yes – appeal allowed

Heard on: 14 and 15 February 2024
Judgment date: 2 May 2024

Before

TRIBUNAL JUDGE RUDOLF KC
TRIBUNAL PRESIDING MEMBER NOEL BARRETT

Between

DAVID KINGSMILL PLUMPTON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jonathan Peacock KC, appearing *pro bono,* instructed by Advocate

For the Respondents: Ms Kirsty Harding and Mr Aiden Knowlson, litigators, of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant is David Kingsmill Plumpton ('Mr Plumpton'). The Respondents are the Commissioner's for His Majesty's Revenue and Customs ('HMRC').

2. On the 14 and 15 February 2024, we heard Mr Plumpton's appeal against:

   (1) HMRC's decision to issue a closure notice resulting in the amendment to his income tax self-assessment for the tax year 2013 – 2014 ('the ITSA') and a further chargeability to tax of £201,177.30 and

   (2) The penalty on a careless basis (sought by HMRC sought to be varied and reduced by us to £30,176.59.)

BACKGROUND

3. Mr Plumpton was a director, secretary and shareholder of Botleigh Grange Hotel Limited ('the company'). For many years until 2006 he ran the Botleigh Grange Hotel. From 2006 there was an agreement with a management company to run it. Thereafter he marketed it and it was introduced to potential buyers. Mr Plumpton had a director's loan account ('DLA') with the company. The company's accounting period ended ('APE') was 31 January in each tax year. In the Director's report and financial statements submitted to companies' house for the year ending 31 January 2014, signed on 18 March 2015, the sum of £783,289 showing as owing to the company by Mr Plumpton is recorded as being written off within the tax year 6 April 2013 to 5 April 2014.

4. On an HMRC form headed *Reclaim tax paid by close companies on loans to participators* the company submitted to HMRC a reclaim for the corporation tax it had paid on £639,896. That figure was recorded as having been written off by the company on 29 January 2014. £159,574 was repaid by HMRC (it seems to offset other company tax liabilities). The audited financial statements filed with companies' house in 2015 for APE 31 January 2014, recorded the writing off of the DLA in the sum of £783,289 (the difference between the reclaim write off figure and the financial statements figure being the increase in the DLA upon which corporation tax was not paid by the company as it was not required to be paid by the time the entirety of the DLA was said to have been written off).

5. In an income tax self-assessment ('the ITSA') for the tax year 6 April 2013 to 5 April 2014 signed by Mr Plumpton and dated 7 October 2017 no mention was made of income received by way of released or written off DLA. This was an amended self-assessment. The original, signed by Mr Plumpton and dated 15 July 2016, had recorded as other income the value of the written off DLA of £783,289.

6. On 10 July 2018 HMRC, through Officer Gordon Smith, opened an enquiry into the ITSA under section 9A of the Taxes Management Act 1970 ('TMA'). The enquiry was (a) seeking of confirmation that the sum of £783,289 had been owed to the company and written off in the tax year ending 5 April 2014 and (b) asking why this was omitted from the ITSA.

7. On 23 October 2018 a closure notice was issued for the tax year ending 5 April 2014 under section 28A (1B) and (2) TMA. That amended the ITSA resulting in a further chargeability to income tax of £201,177.30 on the basis that the DLA had been timeously written off. On 26 October 2018 HMRC determined that Mr Plumpton had been deliberate in the inaccuracy on his ITSA and issued a penalty of £90,529.78 under Schedule 24 of the Finance Act 2007 ('FA'). On 20 November 2018 Mr Plumpton appealed. On 26 November 2018 HMRC provided their view of the matter and on 9 May 2019 an independent officer

upheld HMRC's decision to issue the closure notice in the amount (but varied the penalty to £70,412.05 as the wrong minimum rate had been applied originally).

8. Mr Plumpton was aggrieved by these decisions and, on 3 June 2019, appealed to the First-tier Tribunal (Tax Chamber).

THE CASES AND QUESTIONS RAISED

9. Mr Plumpton's case is that the DLA was not written off in the tax year 2013-14 and, as a result, his ITSA was accurate. Therefore, there was no further chargeability to tax and no inaccuracy capable of leading to any penalty. Alternatively, if there was a chargeability to tax, the amendment to the ITSA by the closure notice is excessive as elements of the DLA were properly characterised as business expenditure. Further or alternatively, he was not careless in submitting his ITSA by not mentioning a written off DLA.

10. HMRC's case is that the closure notice was properly issued and the amendment to the ITSA correct as the company had written the DLA off in the relevant tax year. As to the penalty, they revisited their conclusion that Mr Plumpton had been deliberate in the asserted inaccuracy in his ITSA, instead substituting a view that he had been careless. That is how the appeal was defended and HMRC concede, in the event we dismiss Mr Plumpton's appeal against the amendment to the ITSA by the closure notice, that the penalty varied on review was incorrect. We are requested to further vary it from £70,412.05 to £30,176.59 or whatever 15% (as the minimum applicable penalty) of any lower amount properly chargeable to tax to Mr Plumpton is.

11. The narrow questions raised (or potentially raised) by this appeal are:

(1) Whether Mr Plumpton's DLA with BGHL was 'released' or 'written off' in the tax year 2013-14? If the answer is no, then the amendment to his ITSA would be excessive by £201,177.30 due to the change to it imposed by HMRC under the closure notice. The appeal would be allowed, and the penalty would therefore fall away. The burden is upon Mr Plumpton to show on the balance of probabilities that the amendment to his ITSA by way of closure notice is excessive.

(2) If the answer to (1) is yes, what amount of tax is owed by Mr Plumpton by reference to the amount we find 'released' or 'written off'? Again, the burden is upon Mr Plumpton to show on the balance of probabilities that the amendment to his ITSA by way of closure notice is excessive.

(3) If the answer to (1) is yes, whether Mr Plumpton was careless in filing his ITSA for the tax year 2013-14? HMRC have requested the us to vary the penalty to £30,176.59 to reflect the minimum penalty capable of imposition where carelessness is shown. If Mr Plumpton was not careless, then the penalty would fall away. The burden is upon HMRC to show on the balance of probabilities that the penalty is legally and procedurally valid and that Mr Plumpton was careless.

(4) If the answer to (3) is yes, whether any special reduction of the appropriate penalty of 15% of the tax owed should nevertheless be made? To make any special reduction we would need to be satisfied HMRC's decision was flawed (in a public law sense) before deciding whether to make such a reduction ourselves.

(5) If the answer to (4) is yes, to what extent should there be a reduction.

12. The issues raised in this appeal are intensely fact specific. The appeal raises no new principle of law. Reliance by HMRC and others upon properly prepared and filed statutory documentation such as annual reports and other materials is not called into question on any wider basis whatsoever.

13. We have considered with care the decision of the Upper Tribunal and the principles set out in *Pierhead Drinks Limited v HMRC [2019] UKUT 7 (TCC) ('Pierhead')* which we drew to the parties' attention at the start of the hearing. Both sides agreed, as do we, that those principles applied to a non-witness third-party as much as a one who was a witness in terms of ensuring procedural fairness. Here, in our judgment, as no other individual has a direct financial interest in the outcome of this appeal, there was nothing which might require them being joined as a respondent under Rule 9 (2) of the Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009. Further, we have made no findings of fact at all in relation to the wider allegations of fraud made by Mr Plumpton. Mr Peacock KC rightly disavowed any suggestion that such findings were necessary or appropriate to our decision. As will be seen we have made findings of fact which are central to our decision (or 'within the four corners' of the appeal) but whether there was dishonesty is of itself not relevant to our determination, and we have not found that as we do not need to consider it. In our judgment no procedural impropriety is occasioned by our findings. No notice to any third-party is required for us to receive representations before the issue of this Decision.

REPRESENTATION

14. We record our gratitude to Ms Harding who led in representing the Respondents and Mr Peacock for the Appellant for the quality of their submissions and the way they conducted their respective cases. Mr Peacock was instructed *pro bono publico* by the charitable organisation 'Advocate' (formerly the Bar Pro Bono Unit) to represent Mr Plumpton and at short notice. The work of Advocate is not as well-known as it should be. Their website is https://weareadvocate.org.uk. The work they do is a testament to them and their devoted staff as well as the many advocates prepared to take it on *pro bono*.

15. We are also grateful for the way in which the papers were presented to us. We received bundles prepared by HMRC that ran to 1567 pages. We also received from Mr Plumpton two full lever arch files of material. At our request, prior to the hearing, HMRC were good enough to provide a schedule of duplication between the two sets of papers which proved invaluable in navigating the bundles. In the event, save where there was a document that needed to be referred to in Mr Plumpton's files, all parties worked from the bundles prepared by HMRC. Equally, the skeleton arguments and concise legislation and authorities bundles supplied by both sides were also extremely helpful.

16. Finally, we are grateful to Mrs Plumpton who assisted both witnesses with the location of material when required.

THE LAW

17. As the applicable law was in largest part, by the end of the hearing, the subject of agreement between the parties it is convenient to set it out now, before our findings of fact. We will consider the law in the following order: (1) the position as it relates to (a) corporation tax and (b) income tax (2) the evidential status of board minutes (3) the proceedings before the First-tier Tribunal (4) penalties and (5) special reduction.

(1) (a) Corporation Tax

18. We will begin, as the parties did, with the position as to corporation tax to understand what have been called the 'mirror' provisions relating to income tax. That is not precisely what they are, but the term serves to understand the interplay between them.

19. There is no dispute that the company is a UK resident company and liable to corporation tax on its profits. There is also no dispute that it was a 'close' company as control vested in five or fewer 'participators' (section 439 of the Corporation Tax Act 2010 ('CTA').

A participator means a person having a share or interest in the capital of the company (section 454 CTA). There is no dispute that Mr Plumpton is a participator.

20. One important consequence is that there is a specific charge to tax, as if it were corporation tax, on the company when it made a loan to Mr Plumpton through, for example, a DLA. The loan is treated as if a dividend had been paid to the participator (section 455 CTA).

21. There is relief available to the company which has paid the charge to tax in such circumstances where the loan is repaid, released or written off. The company may reclaim the tax paid. Section 458 CTA states (in pertinent part):

Relief in case of repayment or release of loan

> ***458 Relief in case of repayment or release of loan***
>
> *(1) Subsection (2) applies if a close company has made a loan or advance which gave rise to a charge to tax on the company under section 455.*
>
> *(2) Relief is to be given from that tax, or a proportionate part of it, if—*
>
> > *(a) the loan or advance or part of it is repaid to the company, or*
> >
> > *(b) the whole or part of the debt in respect of the loan or advance is released or written off.* (emphasis added)
>
> ...

22. There is not a wealth of authority on the meanings of the terms 'released' and 'written off' as used by section 458 (2) (b) CTA. In *Collins v Addies [1991] STC 445 ('Collins')* the High Court was concerned with antecedent legislation concerning corporation and income taxes on an appeal by way of case stated. In a passage undisturbed by the Court of Appeal thereafter Millet J., (as he then was) said (at 449D-E):

> *A release is a final and conclusive act if completed according to law whereas the act of writing off by a company may not be. A debt which is written off may yet be recovered by a company if it discovers that the debtor's circumstances have changed so that it is no longer able to repay the creditor company. A release is generally a transaction involving more than one person, whereas by its very nature an act of writing off by a company is unilateral. It does not seem to me that one's attention is necessarily directed to the sum of money which leaves the company.*

23. Each case will need to be considered on its specific facts to determine whether a loan has been 'released' or 'written off'. An example of this, which was drawn to our attention, was the First-tier Tribunal's decision in *England v HMRC [2023] UKFTT 313* however this was on very different facts.

24. It was accepted by Mr Peacock that there is nothing in the legislation imposing a requirement upon a creditor to notify a debtor that a loan had been 'released' or 'written off'; although as a matter of fact this may well occur.

(1) (b) Income Tax

25. What then of the income tax position to the recipient of a 'released' or 'written off' loan? In circumstances where such a loan, made to a 'participator' by a 'close company', is no longer chargeable to tax on the close company, it becomes chargeable to tax on the participator. Hence the descriptor employed in terms of a 'mirror'. Thus, where a loan has been released or written off by the company then the borrower (in this case the shareholder participator) is treated as having received an outright receipt by way of dividend and is charged to tax as if income tax were due.

26. Sections 415 to 416 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA') state (in pertinent part):

Chapter 6

Release of loan to participator in close company

415 Charge to tax under Chapter 6

(1) Income tax is charged if—

(a) a company is or was chargeable to tax under section 455 of CTA 2010

(loans to participators in close companies etc.) in respect of a loan or advance,

and

(b) the company releases or writes off the whole or part of the debt in respect of the loan or advance.

...

416 Income charged

(1) Tax is charged under this Chapter on the gross amount of the debt released or written off in the tax year.

(2) The "gross amount" is the amount released or written off, grossed up by reference to the dividend ordinary rate for that year.

(3) For the purposes of calculating the total income of the person liable for the tax, the amount charged is treated as income. (emphasis added)

...

27. It must be appreciated that a charge to tax only arises by virtue of section 416 (1) on an amount 'released' or 'written off' *in* the relevant tax year. In this case the 'relevant tax year' is 6 April 2013 to 5 April 2014. If, as a finding of fact, there was no such release or writing off in that tax year then no charge to tax against Mr Plumpton would arise requiring it to be recorded on the ITSA in that tax year.

28. This interpretation of section 416 (1) ITTOIA was agreed by both parties as being correct.

29. Here HMRC have amended Mr Plumpton's ITSA by closure notice to reflect a chargeability to tax arising from what is said to be the writing off of his DLA by the company in the relevant tax year. We have already recorded that, in those circumstances, the burden is upon Mr Plumpton, on the balance of probabilities, to show that amendment was excessive. In practical terms that means him showing there was no writing off in the relevant tax year or, if there was, what any correct lesser amount was.

30. In terms of the burden and standard of proof, Mr Peacock submitted that it was impermissible, as Mr Plumpton was seeking to prove a negative, not to make findings in his favour due a paucity of evidence, and then find he had not discharged his burden of showing it was more likely than not that the closure notice had not been properly raised.

31. Mr Peacock accepted that it would be appropriate for us to start from the position that the financial statements for the APE 2013-14 (here 1 February 2013 to 31 January 2014) contained a writing off of Mr Plumpton's DLA. That, he accepted, was based upon a set of board minutes understood by the accountant at the auditors instructed to prepare the accounts

to reflect what was said to be a writing off of that DLA in January 2014. From there, we would need to assess all the relevant evidence in order to come to a finding of fact as to whether or not the DLA had actually been written off in 2013-14. Ms Harding did not dissent from that approach.

(2) Minutes of a director's meeting

32. We consider at this point sections 248 and 249 of the Companies Act 2006 ('CA') which were properly drawn to our attention by Mr Peacock. Section 248 requires, inter alia, a company to cause minutes of all proceedings at meetings of its directors to be recorded and kept for at least 10 years from the date of the meeting. Section 249 must be set out in full:

> ***249 Minutes as evidence***
>
> *(1) Minutes recorded in accordance with section 248, if purporting to be authenticated by the chairman of the meeting or by the chairman of the next directors' meeting, are evidence (in Scotland, sufficient evidence) of the proceedings at the meeting.*
>
> *(2) Where minutes have been made in accordance with that section of the proceedings of a meeting of directors, then, until the contrary is proved—*
>
> *(a) the meeting is deemed duly held and convened,*
>
> *(b) all proceedings at the meeting are deemed to have duly taken place, and*
>
> *(c) all appointments at the meeting are deemed valid.* (emphasis added)

33. It is important to understand what this provision does. Minutes of a properly held meeting of directors, if purporting to be authenticated by the chair, are evidence of the proceedings in the meeting which are deemed to have taken place. If the contrary is proven as to the recording of the minutes, then the evidential deeming is disapplied. What it does not mean, of itself, is that the acts recorded did not occur. We would then need to find, without the deeming, what the factual position was. Such fact finding will be informed, to a lesser or greater extent, by what would be at that point the proven defect in the recording of the minutes.

(3) The proceedings before the First-tier Tribunal

34. There is no dispute that by section 9A (1) and (2) of the Taxes Management 1970 ('TMA') HMRC may give notice to a taxpayer of an intention to enquire into a return provided it is given within 12 months of the date of the filing.

35. Here Mr Plumpton's 2013-14 amended ITSA was submitted to HMRC on 10 October 2017. HMRC issued an opening enquiry letter relating to that tax year on 10 July 2018 within the 12-month permitted period. Thereafter a closure notice was issued by HMRC on 23 October 2018 by section 28A (1B) and (2) TMA amending the ITSA resulting in additional tax of £201,177.30 becoming due.

36. As is agreed, our task is to decide whether the amendment to Mr Plumpton's ITSA by the closure notice is excessive or, put another way, has resulted in an overcharge and if so by how much.

(4) Penalties

37. Schedule 24 (1) FA provides for a penalty to be payable by a person where there is an inaccuracy in a relevant document leading to an understatement of a liability to tax where the inaccuracy was careless. There is no dispute that an ITSA is a relevant document for these

purposes. Schedule 24 (3) FA says a person as careless if *the inaccuracy is due to failure by P to take reasonable care*.

38. No point has been taken that the penalty was not legally and procedurally validly issued. The point that is taken is that if there was an inaccuracy in the ITSA it was not brought about because of Mr Plumpton being careless.

39. *In Malcolm v HMRC [2021] UKFTT 207* the First-tier Tribunal said:

> *80. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: Atherton v HMRC [2019] STC 575 (Fancourt J and Judge Scott), at [37]. The issue as to 'carelessness' must be considered and decided in the relevant context and the tax return must be read as a whole. The context in the present case is the delivery of a self-assessment tax return pursuant to ss 8 and 9 TMA. Under s8(2), the person making the return is required to declare that to the best of his knowledge, the return is correct and complete. 81. Carelessness can take the form of omissions, as well as positive acts. Whether acts or omissions are careless involves a factual assessment, having regard to all the relevant circumstances of the case. If the assessment to tax (as contained in the self-assessment tax return) states the wrong figure as to the tax payable and the wrong figure is stated as a result of carelessness, then the insufficiency in the assessment to tax is brought about by that carelessness.* (emphasis added)

40. We can do no better in expressing the approach to carelessness and gratefully adopt it.

(5) Special reduction

41. A special reduction was not contended for by Mr Peacock. However, HMRC considered whether to make a reduction on this basis and concluded, by paragraph 11 of Schedule 24 FA, that they would not.

42. We may make our own decision but only if it considers HMRC's was flawed (paragraph 17 (3) (d) Schedule 24 FA).

43. The test we would apply is set out in the Upper Tribunal's decision in *Barry Edwards v HMRC [2019] UKUT 131 (TCC)* (at paragraphs 72 to 74).

44. Thus, we would need to consider (a) whether HMRC's decision was 'flawed' – that is flawed in a public law sense – and (b) if so, consider whether the circumstances are sufficiently special that it is right to reduce the penalty and (c) if so, by how much.

THE FACTS

45. The facts are complicated and extend over a considerable length of time. We do not make findings on everything. We make only those findings necessary to our decision and do so with the relevant burden and standard of proof firmly in mind.

46. Having read his witness and other statements, heard Mr Plumpton and weighed up his evidence with care we accept that he was an honest witness doing his best to assist us. His evidence revealed his unwavering trust in Daniel O'Doherty ('DOD') until late 2017, something we accept explains Mr Plumpton's uncritical behaviour at the relevant times, including the signing of documents without reading them. He suggested (as he had in 2018) that several emails sent using his email address to HMRC between 9 May 2016 and 24 August 2016 were not sent by him (he marked them in the papers with a large X) believing his computer had been "hacked". We have not found it necessary to resolve that as it does not assist us in our fact finding. Mrs Plumpton did not give evidence and we have not attached

any weight to her witness statement but accept, and there was no challenge to it, the veracity of her contemporaneous diary.

47. We also heard Mr Smith, for HMRC. He was a most impressive witness. He was prepared to make concessions to Mr Peacock in cross examination and did so without qualification or argument. It was a model of giving evidence that assisted us greatly. Inevitably, his evidence did not concern events that occurred prior to his enquiry in 2018 or HMRC's involvement in the company's section 458 CTA reclaim in 2016.

48. We were not able to hear from Mr Peter Phelan ('PP') due to his inability to attend for health reasons. Ms Harding took no point about his non-attendance save to properly point out that the weight to be attached to either his own statements in email form to Mr Plumpton for the purposes of this appeal or his statements to his son, passed on in a similar way to Mr Plumpton, should be considered with care as they could not be tested. Mr Peacock did not demur from that general proposition; in our view rightly, but submitted that if the evidence from PP, even in the limited form we had it, was consistent with other evidence that was tested it should, after taking the care Ms Harding referred to, be accepted. We agree that is the proper approach to the consideration of that evidence.

49. These are our necessary findings of facts from all the documentary evidence we were provided with and the witnesses we heard.

50. Botleigh Grange Hotel was purchased in 1948 for Mr Plumpton's father. In 1974 Mr Plumpton ran the hotel with his mother. From 1990 to 2006 Mr and Mrs Plumpton built up a 58-bedroom four-star venture with conference facilities and a spa. Until 2006 it was profitable and successful. As Mr Plumpton neared retirement he wished to sell the business but retain his home and the tea rooms aspect of it (the 'Butteries'). Unfortunately, various attempts at a sale did not complete. Before the financial crash in 2008 Mr Plumpton elected to use a management company for five years. That did not go well. Toward the end of that period Mr Plumpton put the hotel back on the market.

51. At that point DOD was introduced to the company as a prospective part purchaser and Mr Plumpton agreed to that with full handover assistance. Mr Plumpton understood that DOD was an accountant and a tax specialist. There were several professional people surrounding DOD who vouched for his business experience and professionalism. Mr Plumpton had no reason to doubt this and did not do so. Mr Plumpton did not make any independent researches of DOD. As well as being a prospective purchaser Mr Plumpton relied upon DOD to look after his own position regarding DOD purchasing his majority shareholding in the company and his tax affairs. Again, Mr Plumpton trusted DOD's tax expertise without question. Mr Plumpton was aware that DOD had assisted others that he knew with tax returns. The obvious potential conflict of interest did not occur to Mr Plumpton.

52. On 9th December 2012 the company, through a resolution of the board of directors, appointed DOD as a director (until the next AGM of the company). The resolution was signed by Mr Plumpton. On 20th December 2012 Mr Plumpton, as a director of the company, signed a 'Management and Share Purchase agreement' with DOD appointing DOD and another individual to what may be described as 'new management'. This ceded control of the company to DOD and the other individual. On 3rd January 2013 at a meeting of the board PP was appointed.

53. There was an agreement at this stage which was not written down to effect the sale of hotel business formed on 13 February 2013 ('the 2013 agreement'). The agreement was, so far as is relevant, a sale of Mr Plumpton's 58% of the company for £1 million, a demerger of the company so that a property ('a farm') and part of the business ('the Butteries') would be

transferred out into a separate company and continued to be owned by Mr Plumpton and for all of this to be completed within one year. There would be no writing off of the DLA until the £1 million was paid so that Mr Plumpton would have the funds to pay the tax he would then owe. It was an all-encompassing deal. Additionally, Mr Plumpton's tax affairs would be sorted out by DOD.

54. Also, on 13 February 2013 several letters were given by DOD for the company to Mr Plumpton in furtherance of the 2013 agreement. Mr Plumpton and DOD did not go through them, but Mr Plumpton was assured they were in his best interests. Mr Plumpton did not read them and simply put them in his safe. These included a suggested approach for the purposes of buying Mr Plumpton's shares in the company, an agreement to sell the farm to Mr Plumpton (by the provision of a three year option to buy for £1 consideration which was acknowledged), an agreement to sell the Butteries (by the provision of a three year option to buy for £1 consideration which was acknowledged) and an approach to Mr Plumpton's DLA. That stated:

> *Dear David*
>
> *Your director's debtor's loan account to the company is a very complex situation, created over many years, but compounded by the … Management Agreement of 2008, whereby you were not permitted to draw a normal salary. Significant section 419 and 455 taxation liabilities on the company and benefit in kind liabilities on you have arisen. These unnecessary liabilities will be part of the company's claim … but the quantum of recovery at this time is obvious [sic] uncertain.*
>
> *In order to preserve the balance sheet values this loan account must be seen to be repaid. Time is required to resolve this matter. A contract has been structured re the 2012 audited accounts to ensure your own position and that of the company is protected. We will discuss this in greater detail over the next few months and I confirm that directors will not require any repayments during the 12 months to 31st January 2014, whilst the restructuring of the company takes place.*

55. This does not refer to any release or writing off of the DLA. Rather it contemplates for accounting purposes only being seen as by way of repayment of the DLA by Mr Plumpton but excluding any requirement for any actual repayments up until 31st January 2014. Self-evidently a writing off of the DLA would not be, or be seen as, repayment. There is no inconsistency with the 2013 agreement and how the DLA would finally be dealt with. Further, repayment of the DLA would have had not caused a charge to income tax for Mr Plumpton, nor would it have enabled the company to claim the return of any corporation tax previously paid by it on the DLA.

56. There was a later meeting in early 2013 where Mr Plumpton signed a document saying he owed £701,000 in his DLA and would repay it over 10 years. DOD said this was for accounting purposes so the auditors could show HMRC. It was a document Mr Plumpton signed without agreeing to it or knowing what its full content was as he still trusted DOD. Mr Plumpton also signed a blank stock transfer form *in case he went under a bus*.

57. The lack of an overall written agreement is confirmed by an email exchange between Mr Plumpton and DOD in late 2016. Mr Plumpton wrote on 12 October 2016:

> *Thank you for trying to explain the current companies, directors, shareholders and assets position and future strategy. I am sorry I did not fully understand but I do look forward to your proposal that you will get a professional … to provide all the information.*

58. He wrote further on 23 October 2016:

To produce the agreement that reflects our 2013 deal, you mentioned … we would be happy for the same firm to act on our behalf.

59. DOD replied on 26 October 2016: *… it will probably take them into Friday to draw up the appropriate documents.*

60. In the event no documents were ever drawn up.

61. On 28 March 2013 DOD started to do Mr Plumpton's accounts.

62. On 15 January 2014 DOD signed the director's report containing the financial statements for the company for the APE 31 January 2013 on behalf of the board. These were filed with companies' house on 16 January 2014. DOD, PP and Mr Plumpton are recorded as the directors and Mr Plumpton the secretary. The independent auditors' report states:

> ***Respective responsibilities of directors and auditors***
>
> *As explained more fully in the Directors' Responsibilities Statement set out on pages 1-4, the directors are responsible for the preparation of the financial statements and for being satisfied that they give a true and fair view. Our responsibility is to audit and express an opinion on the financial statements in accordance with applicable law and International Standards on Auditing (UK and Ireland) …*

63. A qualified opinion on the financial statements was given because (a) the management of the company was fully replaced by new management one prior to the end of the financial period so full information was not able to be obtained and (b) the auditors were not appointed until after the year end. Although Mr Plumpton remained a director and secretary at this point his involvement in the company's management ended, as the auditors made clear, in December 2012 upon the appointments of DOD and PP.

64. In the Notes to the financial statements under the heading ***26 Related party relationships and transactions*** there appears a sub-heading ***Loans to directors***. Under Mr Plumpton's details appear (all figures in £):

Description	***Opening Balance***	***Amounts Advanced ...***	***Closing Balance***
DK Plumpton	*571,077*	*68,819*	*639,896*

65. There then appears the following statement:

> *At 31 January 2013 Mr D K Plumpton, the director, owed the company £639,896. The loan is unsecured, interest free and with no set date for repayment.*

66. Mr Plumpton asserted that some 25% of the total of his DLA should not, in any event, be considered when calculating any chargeability to tax. This figure was very vague indeed. Mr Smith in his evidence demonstrated why the latest figures were not inconsistent with previous iterations of the value of the DLA taken from documents Mr Plumpton had himself signed.

67. There are no documents created within the tax year 6 April 2013 to 5 April 2014 that show the DLA being written off.

68. The corporation tax paid by the company at some point previously on the DLA of *£639,986* [sic] was a partial £137,562, as set out by the company auditors in a note which HMRC received.

69. HMRC have not produced any of the materials from the reclaim the company made of the tax it had paid on the DLA to the participator shareholder Mr Plumpton. However, in his letter dated 24 August 2023 Mr Smith records under the heading *CTA 2010, S458 Relief claim documents:*

You showed me documents related to BGHL's S458, CTA 2010 Relief claim which had a figure of £639,896, which resulted in a tax repayment to BGHL of £159,974. At the point of the claim, made in January 2015, the amount of S455 tax paid by BGHL was £159,974 and so this was the maximum available to repaid [sic] by HMRC.

70. The documents referred to are the undated two-page form headed *Reclaim tax paid by close companies on loans to participators* was submitted to HMRC by DOD on behalf of the company. It is a form provided for taxpayers by HMRC for the purpose for which it is headed. As with HMRC in the enquiry, the copy we have was produced by Mr Plumpton in his files for us. It was provided to Mr Plumpton originally by the administrators of the company.

71. It is upon the submission of this form in January 2015, that HMRC eventually accepted the reclaim in January 2016, and made a repayment. The form sets out the name of the company and the corporation tax reference. In the boxes headed *About the loan – Accounting period in which loan made* it recites 'From' 01 02 2008 'To' 31 01 2009 and asserts the 'Date loan made' as 11 07 2008. In the boxes headed *Accounting period in which loan / part loan repaid, released or written off* it recites 'From' 01 02 2013 'To' 31 01 2014 and asserts the 'Date loan / part loan repaid, released or written off' as 29 01 2014. The *Value of loan/part loan repaid, released or written off* is asserted as £639,896 and the *Date relief due for loan / part loan repaid, released or written off* is said to be 01 11 2014 (that is nine months after the end of the APE). The declaration is in the name DOD, a contact number is provided, and the box ticked confirming the information given is correct. It is not signed or dated.

72. The 'date loan made' is, at best, an inelegant shorthand. On any view the DLA was increasing year upon year. By way of example the opening balance of the DLA on 1 February 2012 was £571,077 and increased to £639,896 at APE 31 January 2013.

73. There was purported to be a board meeting of the directors on 29 January 2015. The minutes ('the minutes') must be set out:

Botleigh Grange Hotel Limited

Meeting of the Directors

Held at Botleigh Grange Hotel

On Thursday 29th January 2015 at 3.00pm

Present: ***D O'Doherty (Chairman)***

DK Plumpton

P Phelan

D O'Doherty opened the meeting by explaining in order to finally obtain the most appropriate refinance package to redeem the charges held by National Westminster Bank and repay their borrowings (in the region of £2.1m) and to provide working capital for essential refurbishment and repainting exterior of hotel, upgrading main building bedrooms etc it has been necessary to critically review the balance sheet as at 31 January 2014.

Professional valuations have been obtained of the company's properties, and it has been discussed at previous Directors' meetings the separation of the Butteries operation from the company and a similar exercise with the Spa. David Plumpton's Debtor Loan Account has also been dealt with, with the benefit to the company of seeking repayment of outstanding s455 corporation tax which is now due to company

from HMRC and will part of the resolution of the current dispute with HMRC re taxation arrears inherited from the Legacy era.

The following resolutions were passed:

1. *To accept offer of finance … at an amount of £2.5m to take out National Westminster Bank*
2. *To write of DK Plumpton's Directors Loan Account (Debtor) at the sum of £783,289 in the 31st January 2014 balance sheet*
3. *To approve Draft Financial Statements for the year to 31st January 2014 subject to any minor adjustments made by the auditors*

Resolutions 1 & 3 were passed unanimously.

Resolution 2 David Plumpton abstained from voting, D O'Doherty and P Phelan voted in favour

There being no other business the meeting was declared closed.

74. They are signed at the end by DOD as Chairman. Mr Plumpton was not at, nor was he aware of, any such meeting. He was consistent and clear about this and, in fairness to Ms Harding, he was not pressed heavily about being wrong on that. Mrs Plumpton's contemporaneous diary records no meeting on 29 January 2015 that Mr Plumpton was at. Mr Plumpton was not aware of any 'writing off' of his DLA on 29 January 2014.

75. The auditor confirmed to Mr Plumpton in a letter in 2020, in relation to the content of the financial statements for APE 31 January 2014, that the DLA write off solely came from the content of the minutes and provided a copy of the same to Mr Plumpton. That was in reply to Mr Plumpton writing to him on 6 September 2020 asking for confirmation that the auditor and Mr Plumpton had never discussed the writing off of his DLA. It was the first time Mr Plumpton was aware of the minutes. Until that point his dispute with HMRC was on the amount of the write-off, not that it had not occurred at all (and explains why his grounds of appeal changed).

76. In 2021 PP's son provided an email to Mr Plumpton from DOD to PP showing a meeting was to take place on 2 February 2015 at the hotel and booking him a room for that night. PP's son told Mr Plumpton his father had no information on any meeting said to have occurred on 29 January 2015. Mrs Plumpton's diary does record a meeting of 2 February 2015.

77. On 4 February 2015 DOD sent the auditor an email head 'Accounts' with importance being High. The accounts in question are the APE 31 January 2014. The auditor replied on 6 February 2015 in blue (of which the last four lines are the most important). We set out that email and the relevant questions and replies:

I have sent you the revised Director's Report. I attach the revised accounts.

…

Your view please on the Board minute required regarding the write-off of D Plumpton's loan account. We need a board minute confirming that the overdrawn directors loan of David Plumpton has been written off and confirmation that David will report the fact on his own personal tax return that he will be liable for the tax consequences of the write off.

78. In between those dates on 5 February 2015 PP emailed DOD asking *Let me know when the Botleigh annual account to Jan 2014 has been completed … and ready for signature*.

79. On 12 February 2015 the auditor sent the latest copy of the draft accounts to DOD and on 13th March 2015 a further communication to DOD from the auditor stated *We need copy of minutes approving the DCA write off*. Mr Smith in his evidence agreed that the content of the emails between DOD and the auditor on 4 and 6 February 2015 gave him *pause for thought*. Mr Smith had a lot of information *that does not correlate with each other, this being one.* In coming to his conclusion to issue a closure notice *Ultimately, I decided what I could rely upon was the company accounts.*

80. On 18 March 2015 DOD signed the director's report containing the financial statements for the company for the APE 31 January 2014 on behalf of the board. These were filed with companies' house on 20 March 2015. DOD, PP and Mr Plumpton are again recorded as the directors and Mr Plumpton the secretary. Within the strategic report the following appears the following, again signed by DOD stated to be for the board:

> *In order to achieve the separation of the Butteries from the Company the Directors agreed to write-off DK Plumpton's loan account as part of the re-financing of the bank debt.*

81. The auditors once again gave a qualified opinion on the financial statements, this time on the basis that the new management had only begun updating the systems so that full information was not available. The 'profit and loss' contains the 'writing off' of the DLA in the sum of (£783,289) as an 'exceptional item'. Note 4 states:

> ***4 Exceptional items***
>
> *The exceptional item for the year ended 31 January 2014 is a write off of the overdrawn directors loan balances. The January 2013 amount includes the balances taken over by the new management in December 2012. These balances were considered to be not payable and not receivable by the directors and had consequently been written off.*

82. The 'balance sheet' includes the profit and loss account of £1,810,510. That, according to note 15, is comprised of:

Balance at 1 February 2013	*£2,390,938*
Loss for the year	*(£580,428)*
Balance at 31 January 2014	*£1,810,510*

83. The loss includes the 'written-off' DLA of (£783,289).

84. Finally, under the heading ***25 Related party relationships and transactions*** there again appears a sub-heading ***Loans to directors***. Under Mr Plumpton's details appear (all figures in £) on this occasion:

Description	***Opening Balance***	***Amounts Advanced ...***	***Amounts written off***
DK Plumpton	*639,896*	*143,393*	*(783,289)*

85. There then appears the following recorded:

> *At 31 January 2014 the amount of £783,289 owed to the company by the director, Mr D K Plumpton, has been written off.*

86. No criticism at all is made of the auditor. Not only did they give a qualified opinion, but the financial statements were also based upon the minutes supplied to them.

87. Neither Mr Plumpton nor PP saw those financial statements. PP wrote to DOD on 8th April 2015 (some three weeks after they had been filed at companies' house) stating:

I understand the pressure to complete and submit the outstanding accounts as soon as possible. I look forward to seeing and discussing them, as well as this year's draft accounts …

88. The reference to draft accounts was for APE 31 January 2015. The outstanding accounts was, to PP's mind, those for APE 31 January 2014 which had already been filed.

89. On 15 July 2015 Mr Plumpton wrote to DOD asking whether Mr Plumpton should contact the auditor as *HMRC are getting increasingly irritable.* DOD replied on the same day saying *Under no circumstances* and that *[he] would deal with it.* That did not occur. On 31 July 2015 Mr Plumpton wrote to DOD saying *HMRC called me yesterday and said if they do not hear anything that they will 'apply for an assessment' for the year ending 2013. Last week you said you would write to them … I hope your correspondence with them has curtailed the ongoing penalty costs.* DOD did not write to HMRC.

90. On 7 January 2016 DOD signed the annual report for the company for the APE 31 January 2015 on behalf of the board. These were filed with companies' house on 7 January 2016. DOD, PP and Mr Plumpton are again recorded as the directors, together with a new director appointed on 9 July 2015 and Mr Plumpton the secretary. The only reference to Mr Plumpton's DLA appeared in the strategic report where DOD, signing on behalf of the board, again inaccurately said:

In order to achieve the separation of the Butteries from the Company the Directors agreed to write-off DK Plumpton's loan account as part of the re-financing of the bank debt.

91. The auditors again provided a qualified opinion on the financial statements for the same reasons as APE 31 January 2014.

92. On or about 15th January 2016 Mr Plumpton signed the letter to the Directors of the company as set out in part below:

15th January 2016

Dear Sirs,

RE: TAXATION

1. *I confirm to the best of my knowledge and belief that despite various correspondence with HMRC in 2000 and 2001 no formal option to elect VAT was ever entered into by the Company.*
2. *I also confirm that £639,896 of my loan account from the Company was written off by agreement with the other Directors in the year to 31.01.2014 and that the Company's accountants … have submitted a repayment claim for the s455 Corporation Tax relating thereto. I am currently in the process of dealing with my personal taxation issues relating to this write off.*

Yours sincerely

93. Mr Plumpton did not draft this letter. The home address at the top of the letter, which is not necessary to set out, was spelt wrongly. Mr Plumpton signed it at the request of DOD as he still placed full trust in him at this stage and without reading it again being told it would be beneficial to do so. It is not accurate as Mr Plumpton could not confirm any writing off of the DLA which had not been subject of an *agreement with the other directors*.

94. The auditor provided a note which HMRC received it seems copied on to the back of the above letter. This section comes from a wider letter dated 14 January 2016. Given we accept what Mr Plumpton has said about the letter, the note does not assist us in its assertion

that the DLA was in fact written off in the relevant tax year. By this time the auditor had the minutes as they were said to relate to writing off of the DLA. That note and the letter dated 16 January 2016 set out above were provided to HMRC in late January 2016 before HMRC eventually did accept the section 458 TCA reclaim by the company on 28 January 2016. That sum was offset against outstanding corporation tax arrears of the company.

95. The HMRC officer originally dealing with Mr Plumpton then wrote several letters. Mr Plumpton replied by email on 9 May 2016. He said:

> *My apologies for apparently not filling in a return for 2014. I have been unwell for some time culminating in [a serious illness] last year which resulted in major … surgery … on 17th May 2015. Although I am recovering it has been a very difficult and traumatic period in my business and personal life and I am only now able to start dealing with a backlog of business matters including my tax affairs.*

96. That was the culmination of a serious accident on 10 January 2015, before the date for filing his ITSA. Mr Plumpton was in hospital on the day DOD signed the company's financial statements for APE 31 January 2014 on 18 March 2015.

97. On 27 April 2016 Mr Plumpton emailed DOD. He said:

> *HMRC have just called me about my tax return on my loan account write off. I have 21 days from yesterday to make a return or get an accountant to issue a 64-8 form. Please advise what I should do.*

98. A 64-8 form is an authority for HMRC to communicate with a representative of the taxpayer. Without such HMRC will not do so. That was the first time Mr Plumpton was aware of anything to do with the writing off of his DLA. Again, DOD provided comfort that he was taking care of matters and dealing with HMRC.

99. On 18 July 2016 HMRC received an income tax self-assessment for the tax year 6 April 2013 to 5 April 2014 signed by Mr Plumpton. This was dated 15 July 2016, and its contents are handwritten. In the *Additional Information* section under the heading *Other UK income* and sub-heading *Stock dividends, non-qualifying distributions and loans written off* is box 13. That has a further sub-heading including *close company loans written off or released – read the notes*. In the box was inserted [£] *783289*.

100. Mr Plumpton was told by DOD what to put in the various boxes. Mr Plumpton wrote to DOD on 27 July 2016 having looked at his online HMRC account. Mr Plumpton wrote (in part):

> *It was nothing like what I filled in with your help the other day for the year 2013/14 and I am concerned that with my inability to understand it all and with the information you are going to give me for years 2012/13; 2014/15, I will be unable to file any returns without 'basic help' and more – sorry to be so helpless but I am!*

101. Mr Plumpton's trust in DOD still did not waver at this point. He trusted him fully regarding his tax affairs. That was so regarding the various penalties that had accrued by this point against Mr Plumpton. DOD told Mr Plumpton he was dealing with them as they were incorrect, which Mr Plumpton accepted. Mr Plumpton had not received the £1 million for his shares which was a precondition in the 2013 agreement of the writing off of his DLA and when Mr Plumpton asked DOD was telling him things were imminent and all would be well but in any event it could be written back in. Mr Plumpton filled in the form and signed it dating it 15 July 2016. It was sent to HMRC.

102. On 16 August 2016 Mr Plumpton asked DOD's advice for dealing with HMRC. The following day DOD responded suggesting a form of words for him.

103. On 25 August 2016 PP's position as a director was terminated by the company. On 30 August 2016 Mr Plumpton's position as a director and secretary of the company was terminated by the company under the signature of DOD. Mr Plumpton did not know this and accepted an explanation in due course that it had been an error.

104. On 8 September 2016 Mr Plumpton, in reliance upon DOD for assistance with his tax affairs, wrote:

> *... I can come to suit you but I suspect as early as possible is best as there is a lot to 'catch up' on not least my 3 years tax returns to complete before the HMRC 'pay me a visit'!*

105. On 23 September 2016 Mr Plumpton emailed HMRC to say that 3 years tax returns outstanding were completed to the best of his ability and were being posted that day. Mr Plumpton forwarded that email to DOD saying *Don't forget to get proof of posting just in case and keep copies*.

106. On 17 October 2016 in an email to Mr Plumpton, from a solicitor retained by him at this stage, the following is recorded:

> *I am concerned that the loan account is increasing and I am not at all comfortable with the explanation that the debt you owe the company based on the loan account has been 'written off' ...*

107. Mr Plumpton believed at this point that his DLA had been written off at some stage because that was what he had been told by DOD. Mr Plumpton did not know this before some date in 2016.

108. On 24 October 2016 HMRC wrote to Mr Plumpton indicating they had not received the tax returns. By 7 November 2016 Mr Plumpton still relied upon DOD. He wrote in an email to him headed 'Tax etc':

> *I know you have a very busy week but you did say that on Tuesday, you will have my tax file that contains the information ...*

109. That was because, in that email, Mr Plumpton included text from HMRC from 24 October 2016 which included *I have not received the SA returns. I shall need to attempt to trace them...*

110. On 15 November 2016 HMRC emailed Mr Plumpton saying they had located the income tax self-assessment for 2013-14. That was the document received by HMRC on 18 July 2016. HMRC told Mr Plumpton that it was incomplete as the boxes were checked indicating foreign earnings and employment income, but no detail provided and so HMRC could not accept it. Throughout late 2016 and 2017 Mr Plumpton still trusted and relied upon DOD to deal with several matters on his behalf including how to deal with an attempt by HMRC to take payment of more than £500,000 or list Mr Plumpton's possessions for sale at auction. Mr Plumpton was aware of share transfer to a different company in October 2016 of which he had been made a director, but still trusted DOD. He was not aware of anything more than that until 2018.

111. In January 2017 DOD arranged for Mr Plumpton to see a taxation chartered accountant ('the accountant') and on 23 February 2017 Mr Plumpton reported to DOD his satisfaction with the accountant introduced by DOD to him to complete his ITSA. Mr Plumpton wrote:

> *He called the HMRC whilst I was there and agreed to give them a weekly report whilst he completes my returns. He said he will be sending me a list of the information that he will require from me.*

112. Mr Plumpton attended the hotel on 27 February 2017. DOD emailed the following day and wrote:

> *I am not avoiding you … I would be grateful if you didn't just turn up at Botleigh and wander through the offices. You have been introduced to a very competent tax accountant … and this will result in your tax affairs being properly regularised.*

113. On 6 March 2017 Mr Plumpton was unaware of the details of how his DLA was said to have been dealt with beyond the mere fact he believed it had been written off. He said in an email:

> *I am busy supplying … with the information that I am able to provide, however I will need information from yourself in the near future regarding the movements and benefits etc from my directors loan account for the tax years 2013 onward.*

114. On 23 March 2017 Mr Plumpton sent DOD a list of materials that the accountant had requested including *detailed breakdown of the directors loan* for 2012/13, 2013/14, 2014/15 and 2015/16. On 13 April 2017 Mr Plumpton emailed his accountant. He said: *I am obviously very anxious to get it sorted and complete the deal I have with [DOD] …*

115. The accountant replied on the same day: *… he confirmed the same to me, so I too hope we can finalise your tax returns next week*

116. On 28 March 2017 the accountant wrote to DOD – not Mr Plumpton. He said:

> *I have detailed below confirmation of the services we will provided for David [Plumpton]. … I would be grateful if you would confirm your agreement by signing below and returning the proposal to me.*

117. The fee was £2500 +VAT 50% payable then. However, from April 2017 for several months DOD did not provide the accountant with the material he needed to complete Mr Plumpton's ITSA. On 23 May 2017 HMRC presented a bankruptcy petition against Mr Plumpton. Mr Plumpton relied upon DOD to assist him with that.

118. On 28 June 2017 DOD sent the accountant a letter headed *David Plumpton* and enclosing various paperwork. This enclosed the letter dated 13 February 2013 as *treatment of David Plumpton's Directors debtors loan account* which we have set out above.

119. On 20 September 2017 DOD emailed the accountant copying in Mr Plumpton. He wrote:

> *Can you please send a copy of where you have got to in relation to David's tax returns and I can then talk to you regarding the tax computation? I will ensure £2500.00 i sent to you on Friday.*

120. On 28 September 2017 DOD emailed Mr Plumpton. He wrote in relation to the accountant:

> *… he will be sending you the completed returns for the various years with a covering letter. He will require you to sign the letter to confirm you have full read the returns and then return them to him for submission to HMC [sic]*

121. The accountant duly provided the ITSA for Mr Plumpton to sign on 3 October 2017. On 4 October 2017 Mr Plumpton emailed DOD. He wrote:

> *I have received the tax returns and gone through them briefly. As I can't understand them fully I do have some questions to ask you before I sign them.*

122. Mr Plumpton signed them on 7 October 2017. The ITSA did not know include any reference to other income reflecting a close company loan released or written off (which was

consistent with the terms of the 13 February 2013 letter provided by DOD to the accountant on 28 June 2017), however Mr Plumpton did not return them to his accountant as he still wished to discuss them with DOD. Mr Plumpton's understanding of things was deficient and he could not understand much of the 80 or so pages of material. The email traffic demonstrates a number of efforts by Mr Plumpton to speak to DOD but it never happened and the ITSA was delivered to HMRC.

123. On 17th October 2017 Mr Plumpton's solicitor wrote to him, as Mr Plumpton was still under the impression the DLA had been written off. His solicitor opined:

> *I am concerned the loan account is increasing and I am not at all comfortable with the explanation that the debt you owe the company based on the loan account has been 'written off' ...*

124. Mr Smith, in his evidence, accepted the solicitor was saying he was not sure it had been written off and was uncomfortable with the explanation.

125. On 26 November 2017 Mr Plumpton received an email from his accountant and realised that the tax set out as owing from his 2014-2015 ITSA related to the £1 million he was to receive for his shares. He replied:

> *My big worry now is that HMRC might assume that I have already received the £1 million that is shown in the 2014/15 tax returns and they will start calling here as before for their money. Should I write ... and explain this so he can arrange with HMRC to 'hold off' a little longer whilst our transaction completes?*

126. Mr Plumpton's hopes about the completion of the 2013 agreement began to crumble. He realised that if he not been paid the £1 million for the shares then the DLA may not have been written off. On 18 December 2017 DOD emailed Mr Plumpton under the heading 'Update' saying *I have spoken to the insolvency practitioner first thing this morning ... he is confident we can resolve this matter so please do not concern yourself.* On 8 March 2018 a meeting was arranged between Mr Plumpton, the accountant and DOD at DOD's suggestion for 14 March 2018. Mr Plumpton wrote: *He did ask why we wanted to meet him so I said you would explain everything and I only mentioned that it concerns my tax returns and HMRC.* However, this was cancelled by DOD on 13 March 2018.

127. It was in April 2018 that Mr Plumpton instructed fresh solicitors regarding the dispute that had arisen with DOD at this stage over the transfer of Mr Plumpton's shares. At this point the scales had fallen from Mr Plumpton's eyes regarding his tax affairs being looked after by DOD.

128. On 6 June 2018 Mr Smith spoke to a colleague who had been involved in compliance activity in 2016 relating to the company. HMRC agreed to give the company the relief it sought on the assurance Mr Plumpton would declare the writing-off of the DLA in his ITSA. On 21 June 2018 Mr Smith spoke further to his colleague who told him he had been trying to get Mr Plumpton to file his 2014 ITSA to declare the DLA write-off. Mr Smith accepted in cross-examination that he had not seen a document (which would include correspondence) to that effect. Those conversational snippets aside, HMRC have produced no material nor called any witness in relation to the reclaim by the company of the corporation tax paid by it due to the loan made to Mr Plumpton.

129. Mr Smith was not involved in the original section 458 CTA reclaim by the company. He did not see the reclaim document sent by the company and signed by DOD until shown it by Mr Plumpton. Mr Smith agreed with Mr Peacock that the form aside, he was not aware of anything else that justified a conclusion that the DLA was written off on 29th January 2014.

130. On 5 July 2018 Mr Smith noted a conversation with Mr Plumpton. In it Mr Plumpton said: *... the directors have "chucked him out" and written off the loan account without his knowledge.* On 10 July 2018 Mr Smith opened the enquiry under s9A TMA into the ITSA and sent notification to Mr Plumpton and his then accountants. Four days later Mr Plumpton provided Mr Smith with two files including letters, documents and Mrs Plumpton's diary. In the covering letter Mr Plumpton wrote:

> *As regards my Directors Loan Account-As part of my deal with Mr O'Doherty it had been agreed that my DLA would be written off at the time our deal was completed [when I would also have been paid for my shares] and I was in a position to pay the tax due on them. As the deal did not progress, the DLA should not have been written off and 1 had no knowledge that it had been. I was the major shareholder and director at the time and Mr O'Doherty had no authority to write it off when he did.*

131. On 17 October 2018 Mr and Mrs Plumpton attended a meeting with Mr Smith and colleagues from HMRC. Shortly after, on 23 October 2018 Mr Smith issued a closure notice amending the ITSA to reflect additional chargeability to tax of £201,177.30 on the basis that the DLA of £783,289 was written off in the tax year ending 5 April 2014. HMRC accepted that Mr Plumpton had not received the £1 million that was disclosed in the 2014-15 ITSA and amended that ITSA accordingly, in Mr Plumpton's favour. £1 million was never paid for the share transfer away from Mr Plumpton. Mr Smith principally relied upon the content of the financial statements APE 31 January 2014 in concluding that there was a chargeability to income tax to Mr Plumpton by reference to the writing off of the DLA.

132. On 6 December 2018 the accountant replied to Mr Plumpton who had written to him. Mr Plumpton had asked: *Why was my DLA write off omitted from my Tax Returns?* The accountant replied *we did not include the write off of your DLA on your tax return because this was not what was intended or ever discussed*. The accountant then explained that he understood that the payment which should have been made for £1 million for Mr Plumpton's shares would be set off against the DLA and clear what was owed and it was for the company to notify HMRC of that. That was an incorrect understanding of the 2013 agreement, but it explained why the 2014-15 income tax self-assessment included a capital gain; albeit one which was reversed by HMRC because Mr Plumpton did not in fact get the benefit of the £1 million. It is also consistent with the letter regarding the DLA dated 13 February 2013 that DOD had provided the accountant with.

133. On 29 January 2019 administrators of the company were formally appointed as the company had ceased trading.

134. After a view of the matter was provided, on 9 May 2109 the statutory review undertaken upheld the amendment to the ITSA, but reduced the penalty to £70,412.05, Mr Plumpton appealed to the First-tier Tribunal and applied for alternate dispute resolution (which did not resolve matters). Just before launching that appeal Mr Plumpton wrote back to Mr Smith providing a letter from the administrators of the company. They had told Mr Plumpton on 15th May 2019:

> *I note that a director's loan account you had with the Company was written off in the accounts in 2014. I would advise that we do not hold any information in relation to this loan account at present but our enquiries are going to establish the position with this. We shall revert when we have further information.*

135. That did not appear to occur.

136. The administration of the company was ended on 15 July 2022.

DISCUSSION AND ANALYSIS

Question (1): Whether Mr Plumpton's DLA was released or written off in the tax year 2013-14?

137. We mean no disrespect at all to the detailed submissions we heard on the second day of the appeal, and we have taken everything we heard and read into account. However, we can summarise them shortly.

138. Mr Peacock submitted that the evidence taken together showed that the DLA was not written off in the tax year 2013-14 as it needed to be for there to be a chargeability to tax. He said that once the minutes were discounted as being unreliable there was no document at all that showed the DLA being written off within that tax year. The financial statements were based upon the minutes and were therefore similarly infected. It was very much in the company's interests for the DLA to be seen to be written off in that year as it would permit an accelerated section 458 CTA reclaim (which is what occurred). As a result, the amended ITSA by the closure notice was excessive. The appeal should be allowed.

139. Ms Harding submitted that the evidence taken together showed that the DLA was written off in the tax year 2013-14 as it needed to be for there to be a chargeability to tax. Leaving aside the minutes themselves the evidence all pointed toward the writing off which was a unilateral act of the company. Other important matters e.g. the transfer of the Butteries were informal. It was consistent with the documentation that Mr Plumpton signed which spelt out precisely that as well as his own belief as time had gone on. Even if Mr Plumpton had not have been made aware of it at the time that was nothing to the point regarding the question of his own chargeability to tax. As was accepted there was no statutory requirement to be so informed. There was no reason to go behind the statutory documentation as Mr Smith had accepted it as accurate. Mr Plumpton had failed to show closure notice had resulted in an excessive amendment to his ITSA. As a result, the amended ITSA by the closure notice was, subject to the detail of the amount, correct and the appeal should be substantively dismissed.

140. As we have set out, if there was no writing off of the DLA in the relevant tax year then, as both sides agree, the effect of the governing legislation would be that Mr Plumpton would not have any chargeability to tax in relation to his ITSA. We accept, and no point was taken, that the closure notice was valid in terms of its legal basis and procedural issue.

141. We have set out our necessary findings of fact in some detail. In our judgment Mr Plumpton has shown that it is more likely that not that there was no writing off of his DLA on 29th January 2014 or at any point within the relevant tax year of 6 April 2013 to 5 April 2014. We find this for the following reasons.

142. First, there are no documents at all from that tax year showing the DLA being written off at that point. The new management had been in place for over a year by that point. Had there been a meeting of the board or other effective decision to write the DLA off by APE 31 January 2014 we would expect some form of company document saying so from the time (or some confirmation from the administrators beyond the minutes and financial statements themselves). Even allowing for the fact that certain things may have been done informally, there is not even the hint of a reference. Unlike the transfer of the Butteries to Mr Plumpton, the 2013 agreement did not contemplate the DLA being written off before Mr Plumpton was paid £1 million for his shares in the company which did not happen in the relevant tax year as it should have (or at all). Although the company could have decided to unilaterally write off the DLA, the terms of the 2013 agreement and the fact that it was not communicated to Mr Plumpton at that point support, in this case, the finding that this was because that did not occur.

143. Secondly, we can place no reliance at all upon the minutes (dated 29 January 2015) as reflecting a writing off of the DLA on 29 January 2014. Contrary to HMRC's submission they do not reflect a meeting of the board. There is compelling evidence that this meeting did not occur. We accept Mr Plumpton's evidence that he was not at it and, having accepted his account, we find support from PP's limited email evidence on the matter that he was not either. The resolutions cannot have been passed as suggested. That being so we accept that the contrary has been proven to disapply the deeming of the proceedings otherwise required by section 249 CA. In any event, the plain wording of resolution 2 suggests an act – namely the writing off of the DLA – being purportedly undertaken at the time of the meeting, rather than recording an act that had previously taken place. That is no surprise given the terms in which the auditor made his request noted in blue in the email we have set out (of which we make no criticism). That request was the only reason for the creation of the minutes in the first place. The reference to the 'balance sheet' includes the profit and loss account which the directors' report and financial statements for APE 31 January 2014 eventually showed the 'writing off' of the DLA in. The financial statements had not been signed by that point.

144. Thirdly, the conclusion from the evidence is that the financial statements for APE 31st January 2014 prepared by the auditor, and signed by DOD in 2015, were based, insofar as the writing off of the DLA being recorded is concerned, upon the minutes. Mr Smith in his enquiry at HMRC then based his conclusion upon the financial statements. We accept the minutes do not reflect the reality. The financial statements based solely upon the minutes do not therefore reflect the reality. This is supported by PP's request to see the financial statements which he had not been told had already been signed and filed with companies' house. HMRC also accepted in closing submission that there was inconsistency between, for example, the strategic report and note 4 in the financial statements for APE 31 January 2014 in relation to the DLA. This sensible acceptance provides further support that the financial statements did not reflect the reality that there was no writing off of the DLA in the relevant tax year.

145. Fourthly, we know from Mr Smith's letter of 24 August 2023 that the section 458 CTA reclaim to HMRC by the company was dated in January 2015 (explaining, if it were needed, the terms of the second paragraph in the minutes and the reference to *David Plumpton's Debtor Loan Account has also been dealt with …*). That was prior to the minutes created after the auditor replied to DOD on 6 February 2015. The reclaim was eventually supported by a letter signed by Mr Plumpton and dated in January 2016, which he did not read, but was told was beneficial. It was also inaccurate. What is described in the second paragraph of that letter did not occur.

146. Nothing that followed alters that principal finding that there was no writing off of the DLA in the relevant tax year. Instead, what occurred afterward reinforces it.

147. Fifthly, the DLA appeared in the original ITSA signed by Mr Plumpton in July 2016 from figures and information provided by DOD, only months after HMRC had allowed the company's section 458 CTA reclaim.

148. Sixthly, that it then did not appear in the ITSA signed by Mr Plumpton on 7 October 2017 prepared by the accountant is consistent with what the accountant had been told in his instructions and the documents he had been provided with and the answer he gave to Mr Plumpton in the email of 6 December 2018.

149. Seventhly, DOD told the accountant that the 2013 agreement had not been completed. The accountant informed Mr Plumpton of that on 13 April 2017 as the 2013 agreement was that the writing off of the DLA was contingent of the payment of £1 million to Mr Plumpton for his shares.

150. Eighthly, Mr Plumpton's then solicitor wrote to him in October 2017 expressing disquiet about the 'writing off' of the DLA. Mr Smith's acceptance that this was a solicitor expressing doubt that the writing off had occurred at all was well made.

Questions (2) to (5)

151. Considering our answer to question 1 the appeal will be allowed. In those circumstances, given our findings of fact on that issue, no purpose would be served by us answering questions (2) to (5) and we do not do so.

CONCLUSION

152. For the reasons given the appeal is allowed. The amendment made to the ITSA by the closure notice is reduced to £0. The penalty falls away because of the successful appeal on the amendment to the ITSA.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

153. 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.

NATHANIEL RUDOLF KC
TRIBUNAL JUDGE

Release date: 02nd MAY 2024