



Neutral Citation: [2024] UKFTT 00432 (TC)

Case Number: TC09178

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/11728

INCOME TAX – Remittance Basis of taxation - section 809L of the Income Tax Act 2007 – whether the definition of ‘brought to’ catches bank transfers from an offshore bank account to the UK bank account of a non-relevant person – whether the Appellant has any right or entitlement to property in the UK in the case of an electronic bank transfer from a non-UK bank account to the UK bank account of a non-relevant person – Foskett v McKeown and R v Preddy & Ors considered – the intention of Parliament in drafting section 809L and the meaning of “brought to” - whether a relevant person must benefit in order for there to be a taxable remittance - whether the use of an offshore credit card to make a UK purchase for a non-relevant person creates a ‘relevant debt’ - whether items such as jewellery purchased in the United Kingdom for a relevant person are exempt – discovery assessment and closure notice - Appeal allowed in part

Heard on: 10 July 2023

Judgment date: 23 May 2024

Before

**JUDGE NATSAI MANYARARA
JOHN WOODMAN**

Between

AFZAL ALIMAHOMED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Firth of Counsel instructed by Brian White Tax Resolution Limited

For the Respondents: Mr Paul Hunter, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant (Afzal Alimahomed) appeals against: (i) a discovery assessment issued by HMRC pursuant to s 29 of the Taxes Management Act 1970 ('TMA'); and (ii) a closure notice issued pursuant to s 28A TMA, as follows:

Tax Year Ended	Decision	Amount
5 April 2016	Discovery Assessment	£89,546.24
5 April 2017	Closure Notice	£133,681.90

2. The discovery assessment and the closure notice were issued because the Appellant, a non-domiciled but UK resident individual in the years in question, was considered by HMRC to have made taxable remittances to the UK, pursuant to s 809L of the Income Tax Act 2007 ('ITA 2007').

3. With the consent of the parties, the form of the hearing was V (video). The documents to which we were referred were (i) the Court Bundle consisting of 755 pages; (ii) the Legislation and Authorities Bundle consisting of 305 pages; (iii) the Appellant's Skeleton Argument ('ASA') dated 19 June 2023; and (iv) the Respondent's Skeleton Argument ('RSA') dated 19 June 2023 (incorporating the submissions made in HMRC's Statement of Case). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. There is a lengthy history to this matter. What follows is a summary of the history leading up to the discovery assessment and the closure notice, sufficient to set the scene.

BACKGROUND FACTS

5. The Appellant joined his father's packaging business in 1986 and the business was sold in 2006, with the proceeds of the sale being deposited into a bank account in Guernsey ('the Guernsey account'). The Appellant and his family (wife and children) then moved to Dubai in 2007. As the Appellant had then remained non-UK tax resident for more than five years, the proceeds of the sale of the business were, effectively, "clean capital" for remittance purposes, and it was the Appellant's intention to use those proceeds for personal use, whether in the UK or overseas; however, inadvertently, certain income from overseas sources was credited to that account, creating a "mixed fund" for the purposes of the ordering rules in s 809Q(6) ITA 2007.

6. The Appellant transferred money from the Guernsey account (which was described as a "family account") to a personal Barclays Bank account in the Isle of Man, which also consequently became a mixed fund. He made transfers from that account to his own personal bank account in Dubai to pay his living expenses, and made various other payments with the same result. He also operated a credit card based in Dubai, the bills on which were paid out of his Dubai account.

7. The business (under its new owners) went into administration in 2009 and the Appellant's family purchased the business back, in order to save jobs. Local UK management was employed to run the business, but the business continued to struggle until the Appellant returned to the UK for significant periods of time from 2014, in order to assist in the recovery of the business, for which he was not remunerated. Due to the size of the challenge, the

Appellant fell-foul of the 90-day limit and became UK resident for tax purposes during the relevant period covered by the discovery assessment and closure notice.

8. On 27 January 2017, HMRC received the Appellant's self-assessment tax return for the year ending 5 April 2016. There was no source of income declared in the tax return and the Appellant had made a claim to the remittance basis of taxation under s 809B ITA 2007, such that his foreign income for the relevant tax year would be taxed only to the extent that it had been remitted to the UK. On 11 January 2018, the Appellant's tax return for the year ending 5 April 2017 was received. No remittances were included in the tax returns for either tax year.

9. On 18 December 2018, HMRC opened an enquiry, under s 9 TMA ('the opening letter'), for the tax year ending on 5 April 2017. The enquiry was opened in order to consider the Appellant's domicile position, and to review his means. It was subsequently accepted, on the Appellant's behalf, that amounts should have been included in the Appellant's tax return for the year under enquiry, and for earlier years. The Appellant's representatives, therefore, proposed to make amendments to the tax return(s).

10. The payments made by the Appellant are considered in more detail below, but included payments made to the UK bank account of his son, Ibrahim Majid ('IM'), aged over 18, who was studying at the London School of Economics.

11. On 31 March 2020, HMRC issued a notice of assessment for the tax year ending on 5 April 2016, on the basis that there was foreign income that had been remitted to the UK that had been omitted from the Appellant's tax return. On 22 February 2022, HMRC issued a closure notice for the year ending 5 April 2017, on the same basis.

12. Following appeals against both the closure notice and the discovery assessment, HMRC issued their formal "view of the matter" letters on 22 April 2022, and their decisions were confirmed in a statutory review letter dated 14 June 2022. The Appellant submitted an appeal to the Tribunal on 30 June 2022.

THE TRANSACTIONS

13. The Appellant entered into transactions falling into the following categories:

- (1) Transfers from his offshore bank account to IM's UK bank account, for IM's personal use;
- (2) Other transfers from the Appellant's offshore bank account into the UK bank accounts of friends and family who are not relevant persons (see below), for their own use.
- (3) Direct payments of IM's university-related expenses by the Appellant using his offshore credit card, or his offshore bank account.
- (4) Payments by the Appellant using his offshore credit card for services (to IM's landlord and university).
- (5) Jewellery (gifts) for persons in the UK who are not relevant persons for their own use, paid for by the Appellant using his offshore credit card.
- (6) Jewellery purchased in the UK by the Appellant (for the Appellant and his wife's personal use) paid for using the Appellant's offshore credit card.

THE ISSUES

14. The issue(s) under appeal are whether the payments made by the Appellant were taxable remittances within the meaning of s 809L ITA 2007. This, in turn, requires consideration of: (i) whether the definition of "brought to" catches bank transfers from an offshore bank account to a UK bank account: s 809L(2)(a) ITA 2007; and (ii) whether a

relevant person must benefit in order for there to be a taxable remittance pursuant to s 809(1) (a) ITA 2007.

15. In respect of the payments, the substantive issues for consideration are whether the Appellant makes a remittance when he:

(1) makes a transfer from his non-UK bank account to the UK bank account of a non-relevant person for the non-relevant person's own use? (i.e., transfers from the Appellant's offshore bank account to IM's UK bank account for IM's personal use and payments to friends/family members who do not meet the definition of a relevant person);

(2) makes a direct payment from his non-UK bank account to a non-relevant person who provides/has provided services to a non-relevant person in the UK? (i.e., direct payments of IM's university-related expenses using the Appellant's offshore bank account);

(3) makes payment using a non-UK credit card to a UK business that provides/has provided goods or services to a non-relevant person in the UK? (i.e., payments of IM's university-related expenses using the Appellant's offshore credit card and payments for gifts to family members who do not meet the definition of a relevant person); and

(4) buys jewellery for his/his wife's own use, paid for in the UK using his non-UK credit card.

APPLICABLE LAW

16. The relevant law, so far as is material to the issues in this appeal, is as follows:

ITA 2007:

809B Claim for remittance basis to apply

(1) This section applies to an individual for a tax year if the individual—

(a) is UK resident for that year,

(b) is not domiciled in the United Kingdom in that year ..., and (c) makes a claim under this section for that year.

809L Meaning of “remitted to the United Kingdom”

(1) An individual's income is, or chargeable gains are, “remitted to the United Kingdom” if

(a) conditions A and B are met,

(b) condition C is met, or

(c) condition D is met.

(2) Condition A is that—

(a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or

(b) a service is provided in the United Kingdom to or for the benefit of a relevant person.

(3) Condition B is that—

(a) the property, service or consideration for the service is (wholly or in part) the income or chargeable gains,

(b) the property, service or consideration

(i) derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and

(ii) in the case of property or consideration, is property of or consideration given by a relevant person,

(c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or

(d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c).

...

(7) In this section “relevant debt” means a debt that relates (wholly or in part, and directly or indirectly) to

(a) property falling within subsection (2)(a),

(b) a service falling within subsection (2)(b),

...

809M Meaning of “relevant person”

(1) This section applies for the purposes of this Chapter.

(2) A “relevant person” is—

(a) the individual,

(b) the individual's husband or wife,

(c) the individual's civil partner,

(d) a child or grandchild of a person falling within any of paragraphs (a) to (c), if the child or grandchild has not reached the age of 18,

(e) a close company in which a person falling within any other paragraph of this subsection is a participator or a company which is a 51% subsidiary of such a close company,

(f) a company in which a person falling within any other paragraph of this subsection is a participator, and which would be a close company if it were resident in the United Kingdom, or a company which is a 51% subsidiary of such a company,

(g) the trustees of a settlement of which a person falling within any other paragraph of this subsection is a beneficiary, or

(h) a body connected with such a settlement.

THE APPEAL HEARING

17. At the commencement of the hearing, both representatives confirmed that the hearing would largely proceed by way of submissions. We also heard brief oral evidence from the Appellant and Officer Matthew Clough.

18. During his oral evidence, the Appellant adopted the contents of his witness statement, dated 14 April 2023, as being true and accurate. He was not asked any further questions in examination-in-chief by Mr Firth. Under cross-examination by Mr Hunter, the Appellant accepted that he had initiated the movement of money to the UK when he made transfers from his offshore accounts to the UK bank accounts of IM and persons who had provided services to IM (such as IM's university and landlord). He added that he had already paid tax on the money that was for his personal benefit.

19. Officer Matthew Clough also adopted the contents of his witness statement, dated 22 December 2022, as being true and accurate. In response to brief questions in examination-in-chief from Mr Hunter, he stated that he had discovered a loss of tax in respect of the Appellant. He added that he did not assess the Appellant for the 2014-15 tax year because such an assessment would have been outside of the normal time-limit of four years. Under cross-examination by Mr Firth, Officer Clough stated that HMRC did not conclude that the Appellant's behaviour was deliberate. When referred to the schedule of transactions appended to the Appellant's witness statement by Mr Firth, Officer Clough accepted that HMRC had not cross-referenced the transactions identified by the Appellant in his schedule to those forming part of the assessment. He explained that this was because a full breakdown of the transactions in question had been sent to the Appellant previously.

20. We then heard submissions from both representatives. There were no applications to amend the Grounds of Appeal or the Statement of Case ('the pleadings') by either representative. I shall refer to the pleadings later to shed light on the relevance of those unamended pleadings to our findings.

21. Mr Firth's submissions (as contained in the ASA) can be summarised as follows:

(1) HMRC have sought to justify the discovery assessment for 2015-16 on the basis of an allegation of deliberate behaviour - in reliance on s 29(4) TMA - but have failed to provide any evidence to support such a serious allegation. HMRC have, further, failed to identify the conditions specified in s 29(3) TMA.

(2) In order for there to be a remittance, the Appellant must receive or obtain property in the UK. In respect of s 809M ITA 2007, the key part is that Parliament is interested in a "relevant person". The only relevant person in this appeal is the Appellant.

(3) The purpose of s 809L ITA 2007 is to identify situations where remittance basis income is genuinely enjoyed in the UK by a relevant person. The issue is whether property has been "brought to" or "used" in the United Kingdom. *Thomson v Moyse* [1960] 39 TC 291; [1961] AC 967 (*Thomson v Moyse*), upon which HMRC place reliance, is not a permissible aide to the interpretation of s 809L because it concerned a different statutory regime. The reason why Mr Moyse was taxed was because he received Sterling in the UK. The outcome in *Thomson v Moyse* would have been the same today, and the case says the opposite of what HMRC submit.

(4) In relation to bank transfers, the correct position is described by the House of Lords in *Foskett v McKeown* [2001] 1 AC 102 (*Foskett v McKeown*); namely that a

bank account consists of a debt owed by the bank. In *R v. Preddy & Ors* [1996] AC 915 (*Preddy*), the court confirmed that a person whose account is credited in a bank transfer does not receive property from the person whose account is debited, but what they receive is new property that never belonged to anyone else, with the original *chose in action* being extinguished. No money therefore passes when there is an electronic bank transfer. The taxpayer never has any right, or entitlement, to property in the UK. This position was re-affirmed by the Court of Appeal in *First City Monument Bank plc v Zumas Nigeria Ltd.* [2019] EWCA Civ 294 (*Zumas*).

(5) In respect of whether property was “brought to” the UK, as a matter of ordinary language, to “bring” means to “take or go with (someone or something) to a place”. The concept involves the person accompanying the thing that is being moved/being part of the movement (i.e., “with”). There is a difference between “bringing” and “sending”. The ordinary meaning of “send” is to “cause to go or be taken to a particular destination”. There is no concept of the person accompanying the thing that is moving.

(6) This interpretation of “brought” makes sense alongside “received”. If a person has property abroad and brings it with him to the UK, he cannot be said to have “received” it in the UK because he always had it with him. Accordingly, the “brought” limb covers the alternative situation by which a person may come to have property in the UK without receiving it in the UK (where he himself brought it to the UK). If the taxpayer does not receive the property in the UK and does not, himself, bring it to the UK, there will be no time at which the taxpayer has any access to the property whilst it is in the UK. The Appellant in this appeal did not have any access to, use or enjoyment of property, and the bank transfers cannot be treated as remittances.

(7) In respect of a transfer to a non-relevant person who has provided a service to a non-relevant person in the UK, the thing that is enjoyed in the UK is the service by the non-relevant person and it is clear that the legislation does not treat the enjoyment of a service by a non-relevant person in the UK as a remittance. There is a difference if the service is provided to a relevant person.

(8) In respect of payment for good/services received by a non-relevant person in the UK using the Appellant’s non-UK credit card, the debt is not a relevant debt.

(9) In respect of jewellery, the jewellery in question was for the Appellant and his wife’s personal use and was, accordingly, exempt property.

(10) In relation to the closure notice and the issue of quantum, HMRC have failed to identify which transactions give rise to a remittance in order to allow the quantum to be tested. The Appellant has identified which transactions are in issue and HMRC have not identified any amounts going beyond that. Accordingly, even if HMRC were found to be correct as to the law, the quantum should be adjusted to the figure shown in the Appellant’s written evidence.

22. Mr Hunter’s submissions can be summarised as follows:

(1) There was a valid discovery.

(2) For the purposes of the remittance basis of taxation, the relevant person is either the individual, their spouse or civil partner, or child/grandchild under the age of 18. It is agreed that the Appellant is the relevant person in this appeal. The key provision provides that Condition A and Condition B are satisfied where any money or other property is brought to, received, or used in the UK by or for the benefit of a relevant person. If a relevant person brings money or property to the UK, this satisfies the

provisions of s 809L(2), even if they do not themselves benefit. Guidance is a useful aid to interpreting the legislation. The key words are “brought to”.

(3) With regard to the meaning of “brought to”, the courts would approach the application of remittance rules to electronic banking transfers in a “real world and commercial manner”. HMRC’s view is consistent with the courts’ established attitude to banking methodologies in the remittance basis context, as demonstrated in the House of Lords case of *Thomson v Moyses*. Conditions A and B are satisfied in the circumstances of this appeal. The Appellant was the account-holder and he brought money to the UK, whether or not he benefitted from those bank transfers. The fact remains that the Appellant initiated the transactions.

(4) Any repayment of an offshore credit card in respect of services received, or goods purchased, in the UK constitutes a remittance, regardless of whether those services or goods were for the benefit of a relevant person. The definition of a “relevant debt” is set out at s 809L(7) ITA 2007. The Appellant was authorising the credit card companies to make a payment. The purchase, via a credit card, is treated as being equivalent to the cardholder authorising the credit card company to pay the bill for the goods or services on their behalf. This creates a relevant debt, the definition of which encompasses a debt that relates to property within s 809L(2)(a) and s 809L(7). As the account-holder of offshore credit cards, the Appellant brought money to the United Kingdom.

(5) HMRC have supplied a breakdown of the quantum. This breakdown is also attached to Office Clough’s witness statement, at Appendix MAC21. What is omitted is the level of detail provided by the Appellant.

23. At the conclusion of the appeal hearing, we reserved our decision which we now give with reasons.

FINDINGS OF FACT

24. The facts of this appeal are largely undisputed, save that the parties differ in view as to the conclusions that we should reach as a result of those facts. The following facts were admitted or proved:

(1) The Appellant’s family sold their family business and the funds from that sale were placed into the Guernsey account.

(2) The Appellant left the UK during the tax year ending on 5 April 2007 and he was non-UK resident for all tax years up to, and including, the tax year ending on 5 April 2013. The Appellant returned to the United Kingdom in 2014 when his family had purchased the business back after it went into administration. From the tax year ending on 5 April 2014, the Appellant was UK resident, but non-UK domiciled, and the remittance basis of taxation applied to him.

(3) Certain income arising after 5 April 2014 had been credited into the Guernsey account and it became a “mixed fund” account, for the purposes of the ordering rules in s 809Q(6) ITA 2007. The Appellant has a personal Barclays bank account on the Isle of Man and transfers were made into that account from the Guernsey account. The Barclays bank account, therefore, also became a mixed fund account.

(4) The Appellant was a remittance basis taxpayer during the 2015-16 and 2016-17 tax years. He did not hold a UK bank account and used his offshore debit/credit cards for his general expenses whilst in the UK.

(5) During the period under review, IM was studying and living in the UK. IM is a non-relevant person as he was over the age of 18 at all relevant times. The Appellant

made transfers from his offshore Barclays bank account into IM's UK bank account. Payments into the UK account were for IM's university allowances and expenses. Payments were also made by the Appellant to the UK bank accounts of non-relevant persons who provided services to IM from the Appellant's offshore bank account(s), as well as family members and friends who were non-relevant persons.

(6) The Appellant purchased jewellery, gifts and flights in the UK using his offshore credit card, in respect of non-relevant persons. The Appellant also purchased jewellery in the UK using his offshore credit card.

(7) The Appellant has paid tax on some remittances which do not form part of the decision under appeal.

(8) On 27 January 2017, HMRC received the Appellant's tax return for the year ending 5 April 2016. The Appellant made a claim to the remittance basis of taxation but no remittances were included in his tax return.

(9) On 11 January 2018, HMRC received the Appellant's tax return for the year ending on 5 April 2017 and no remittances were included in the tax return.

DISCUSSION

25. The Appellant appeals against HMRC's decision to: (i) issue a discovery assessment, pursuant to s 29 TMA (in the sum of £89,546.24) in respect of 2015-16 tax year; and (ii) a closure notice issued pursuant to s 28A TMA (in the sum of £133,681.90) in respect of the 2016-17 tax year. The discovery assessment and closure notice were issued on the basis that the Appellant had made taxable remittances to the UK, pursuant to s 809L ITA 2007.

26. The remittance basis is a system of taxation for UK resident, but non-UK domiciled, individuals. This means that it cannot be used by a person with a domicile of origin or domicile of choice in the UK, or anyone who is deemed to be domiciled in the UK. The remittance basis allows for an individual's non-UK source income and gains to go untaxed in the UK if that income and those gains are not remitted to the UK. Ordinarily, a UK resident individual's worldwide income and gains are taxed on an arising basis in the UK. Claiming the remittance basis means only UK source income and gains are taxed on an arising basis—foreign income and gains arising in a tax year of UK residence are sheltered from UK tax unless brought to the UK, or used and enjoyed in the UK.

27. The statutory definition of a remittance covers a range of situations in which a remittance may occur whenever non-UK income and gains are 'used' in the UK, even if they are not physically brought to the UK. Generally, assets brought to the UK which derive from foreign income or gains are treated as remittances.

28. In order to determine whether a remittance has occurred, it is necessary to consider the conditions set out in s 809L ITA 2007. There are four condition clauses in s 809L, referred to as Conditions A to D. Section 809L(7) defines a 'relevant debt'. A relevant debt includes a debt on a credit card issued by a non-UK bank used to purchase assets or pay for services in the UK.

THE DISCOVERY ASSESSMENT

29. The discovery assessment in this appeal relates, solely, to the 2015-16 tax year. This is because the 2016-17 tax year was dealt with by the issue of a closure notice. If HMRC discover income which ought to be, but has not been, assessed for income or corporation tax, they may make an assessment in that amount to make good the loss of tax. Section 29(1) TMA focuses on the state of mind of the individual officer of HMRC who makes the assessment. What must be 'discovered' is that:

- (1) any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, has not been assessed; or
- (2) that an assessment to tax is, or has become, insufficient; or
- (3) that any relief which has been given is, or has become, excessive.

30. The above elements are commonly abbreviated as “a loss of tax”. What has been discovered must fall within at least one of those descriptions.

31. The burden of proof is on HMRC to show that the discovery assessment was validly issued. The standard of proof is the civil standard; that of a balance of probabilities. The Upper Tribunal said this in *Burgess & Brimheath v HMRC* [2015] UKUT 578, at [38], (in relation to the parallel statutory provisions relating to corporation tax):

“...it seems to me that the burden of establishing that paras 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (para 43), or of material to satisfy the test of objective non-awareness (para 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made.”

32. Section 50(6) TMA provides that if, on an appeal, it appears to the tribunal that an appellant is overcharged by an assessment, the assessment shall be reduced accordingly but ‘otherwise the assessment...shall stand good.’ The Appellant, therefore, has the legal burden of demonstrating that he is overcharged by the assessment, once it has been established that the assessment was validly issued. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809 (*‘Tower MCashback’*), at [17]-[18], the taxpayer’s self-assessment constitutes the final determination of his liability, subject to three circumstances; namely (i) an amendment to the return; (ii) an enquiry by HMRC; or (iii) a discovery assessment.

33. The discovery assessment was made on 31 March 2020. HMRC’s case is that a discovery had been made within the meaning of s 29(1) TMA. The Appellant’s 2015-16 tax return was made in accordance with s 8 TMA and s 29 TMA is, accordingly, on point. The discovery assessment which HMRC purported to make in the present case was on the basis that an officer had discovered, as regards the Appellant, that an assessment to tax was or had become insufficient. This was because the Appellant was considered to have made remittances to the UK, and those remittances were subject to income tax under the remittance rules. It was not submitted on the Appellant’s behalf that there was no discovery. The case advanced on the Appellant’s behalf was that the discovery assessment was not valid in the sense that HMRC failed to make their case on the gateway conditions referred to at s 29(3), specifically s 29(4) (deliberate behaviour).

34. Section 29(3) TMA provides that a taxpayer who has made a self-assessment return can only be assessed under a discovery assessment if one of two conditions is met. Section 29(4) TMA provides for one of the conditions which must be satisfied for a valid discovery assessment in a case where a return has been made; namely that the loss of tax was brought about ‘carelessly’ or ‘deliberately’ by the taxpayer, or a person acting on his behalf. On the issue of deliberateness, the Supreme Court in *R & C Comrs v Tooth* [2021] UKSC 17 (*‘Tooth’*), said this, at [47]:

“47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) Page 19 there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.”

35. This includes “blind-eye” knowledge: *CPR Commercials Ltd v HMRC* [2023] UKUT 00061 (TCC) (“*CPR*”). It is, however, clear that HMRC are only required to show a *prima facie* case within their Statement of Case: *Atherton v HMRC* [2017] UKFTT 831 (TC), at [35]. The requirement for the tribunal is then to consider the totality of the evidence and decide if the Appellant acted deliberately. In this respect, in *Addo v R & C Comrs* [2018] UKFTT 93 (TC) (Judge Richards), the tribunal held, at [14], that:

“14. ...I accept, therefore, that the Tribunal may feel that it would be unfair or wrong in principle to determine whether HMRC have discharged their burden on the discovery issue without hearing the totality of the evidence.”

36. Similarly, in *Sheth & Ghazi v HMRC* [2022] UKFTT 167 (TC) (Judge Bowler), the tribunal held, at [309] to [312], that:

“309. Furthermore, we have to decide the most just way to proceed, having regard to the overriding objective encapsulated in rule 2 of the Rules. That must guide our actions and our decisions in this tribunal. In the case of *Addo v Revenue and Customs* [2018] UKFTT 93 (TC), Judge Richards (at paragraph 14) commented specifically in the context of the overriding objective that the tribunal may consider it unfair or wrong to determine whether HMRC have discharged their burden without hearing the totality of the evidence. This is a case raising a series of issues and the delineation of the Appellants’ election would itself pose further issues.

310. We agreed with Ms Rao’s interpretation of “no case to answer” being interpreted with regard to the case put, in this case, by HMRC. That seems to us to follow the normal meaning of the words “no case to answer”. According to the case presented by HMRC, the Appellants did have a case to answer on that issue. That did not mean that we had decided that HMRC’s case was correct. It simply meant that the case the Appellants were answering was that put forward by HMRC. We had regard to Brown LJ’s judgment in *Benham* where he said (at paragraph 39):

“have the claimants advanced a *prima facie* case, a case to answer, a scintilla of evidence to support the inference for which they contend, sufficient evidence to call for an explanation from the defendants? That it may be a weak case **and** unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendants' not calling any evidence, would not allow it to be dismissed on a no case submission.”

311. Mr Sherratt’s submission that either the election only covered the issue as understood and submitted by the Appellants, or the Tribunal would have to rule on the correct interpretation of deliberateness in advance of the election, emphasised the problems which would arise if we entertained the submission. A submission of no case to answer would involve us determining the dispute in law about the interpretation of “deliberate” in the context of these appeals. Were we to apply HMRC’s interpretation of the law we would expect the Appellants to provide evidence about the transactions and the background to them which we had not yet heard.

312. We did not consider it right potentially to dissect the case unless we were clear that the outcome of the submission was manifestly obvious and that entertaining the submission at this stage would be in accordance with rule 2 of the Rules. We would effectively be deciding the interpretation of “deliberate” as a preliminary issue. There would be potential prejudice in terms of resources for the Tribunal in stopping at this point. If we did not entertain the submission we considered there would not be prejudice to the Appellants - they had already prepared for the three-week case. What the Appellants were facing was the possible loss of the opportunity to save costs by bringing the case to an end earlier, when, in fact, given the likelihood of onward appeal, that opportunity cost itself was probably illusory.”

37. Returning, therefore, to the absence of any application to amend the pleadings by either representative, Mr Firth submits that HMRC rely on deliberateness in making the discovery

assessment. In this respect, he submits that HMRC have failed to make a case on the deliberateness issue and that there is no case to answer. I pause at this stage to mention that the Grounds of Appeal did not raise any issue about the validity of the discovery assessment, or indeed that HMRC are barred from assessment under s 29(2) TMA. The issue relating to deliberateness only arose as a result of HMRC's Statement of Case, which only referred to the assessment being justified on the basis of deliberate concealment.

38. During the appeal hearing, Officer Clough stated in evidence that HMRC were not taking the view that the Appellant's actions were careless, or deliberate, in nature. We find, however, that HMRC pleaded their case on the basis of deliberate behaviour, in the absence of any application by HMRC to amend their pleadings either prior to, or during, the hearing. The full parameters of HMRC's case were set out in the Statement of Case, as repeated in the RSA:

"46. HMRC also note that both assessments are validly issued in line with s.29 TMA 1970

s29(3) TMA 1970 – Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

s29(4) TMA 1970 – The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

47. HMRC views all omissions from the Appellant's SATR(s) as being done deliberately in order to obscure the appropriate position that these remittances were at all times taxable in the United Kingdom.

...

49. The Respondents submit that the first test was met as the officer arrived at the conclusion there was a deliberate understatement of tax and acted to address the failure."

[Emphasis added]

39. We find that the manner in which HMRC's case was argued blurred the distinction between s 29(1) TMA (the issue of what amounts to a discovery at all) and s 29(3)/(4) TMA. It is abundantly clear that in the Statement of Case, HMRC initially sought to justify the assessment purely on the basis of deliberate omission by the Appellant (i.e., under one limb of s 29(4)). We find that deliberateness is not made out by HMRC, and this is the case that HMRC specifically advanced. We further find that it is insufficient for HMRC to simply say that the pleadings may have been over-prescribed, in an attempt to depart from the original case pleaded in the absence of any application to amend the pleadings.

40. In *First Choice Recruitment Ltd v HMRC* [2019] UKFTT 412 (TC), which we consider to be persuasive though not binding on us, Judge Nicholas Aleksander said this:

"31... It is unacceptable for a public authority to make allegations of fraud where they have not credible evidence upon which to make even a prima facie case."

41. Having considered the case advanced by HMRC, we hold that the issue of deliberateness was not substantiated by HMRC, in relation to the gateway conditions in s 29(4) TMA. The full parameters of HMRC's case were set out in the Statement of Case and the Appellant was not cross-examined on the issue of deliberate behaviour. Mr Hunter's cross-examination of the Appellant focused, solely, on whether he had initiated the transfer of money to the UK. We are, further, unable to uphold the discovery assessment on the basis of s 29(5) TMA as HMRC did not plead their case on that basis.

42. The purpose of the restrictions on HMRC's right to make a discovery assessment was to afford taxpayers a greater sense of finality in self-assessment. In cases where a taxpayer has submitted a tax return for the relevant year, as well as showing that they have made a discovery of a loss of tax, HMRC will need to satisfy at least one of the two additional conditions for a discovery assessment to be valid. Where HMRC allege careless or deliberate conduct, the statute is clear in that it requires the situation to have been brought about carelessly, or deliberately, by the taxpayer or a person acting on their behalf. Having considered the totality of the documentary and oral evidence, we are satisfied that this has not been established by HMRC in the circumstances of this appeal.

43. The 2015-16 assessment must, therefore, be set aside in full.

THE CLOSURE NOTICE

44. HMRC's primary method for correcting under-assessments is through formally opening an enquiry into the return and then making any necessary amendments by way of a closure notice, which closes the enquiry. It is only if HMRC are too late to open an enquiry that they will then proceed by means of a discovery assessment. In relation to the enquiry opened in this appeal, HMRC received the Appellant's self-assessment tax return for the year ending 5 April 2017 on 11 January 2018 and the Appellant made a claim to the remittance basis of taxation. On 18 December 2018, HMRC opened an enquiry under s 9 TMA in order to consider the Appellant's domicile position, and to review his means. Mr Firth submits that HMRC have failed to explain which transactions gave rise to a remittance, in order to allow quantum to be properly tested.

45. We have considered the transactions that are relevant to this appeal in light of the case advanced on behalf of the Appellant on the issue of whether the Appellant made taxable remittances:

Transfers by Appellant from a non-UK bank account to the UK bank account of non-relevant person (such as IM and other family members/friends) and a non-relevant person who provides/has provided services to a non-relevant person in the UK (IM's university and landlord)

46. In respect of the bank transfers made by the Appellant from his offshore bank account into IM's UK bank account to meet IM's personal expenses whilst he was studying in the UK; transfers made to other family members/friends; the bank transfers made to IM's university bank account in respect of IM's tuition fees and to IM's landlord (for rent and accommodation expenses), the relevant statutory provision with which we are concerned is s 809L(2)(a), which provides that:

“(a) money or other relevant property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person.”

47. Mr Firth submits that:

(1) firstly, consideration must be had to the law concerning the analysis of the property involved in an electronic bank transfer; and

(2) secondly, consideration must be had to the meaning of “brought to” in s 809L ITA 2007, and the purpose of s 809L.

48. In further amplification of the first of these submissions, Mr Firth submits that a person whose account is credited in a bank transfer does not receive property from the person whose account is debited, but that what they receive is new property that never belonged to anyone else, with the original *chose in action* being extinguished. He adds that the Appellant did not remit property (money) to the UK and did not have any right, or entitlement, to property in

the UK. Mr Firth refers to the position as described by the House of Lords in *Foskett v. McKeown*, which held that a bank account consists of a debt owed by the bank, and that no money passes when there is an electronic bank transfer.

49. Mr Firth relies on the legal analysis of property in relation to a bank account, described in *Foskett v. McKeown*, at p 127-8:

“We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder. The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim. Instead a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands. These consist of the debt or part of the debt due to him from the bank. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked.”

50. The legal nature of a funds transfer was also considered by the House of Lords in *Preddy*. The case concerned dishonesty in the making of mortgage applications. In making their applications for mortgage advances, the defendants had deliberately given false information to the lending institutions. In cases where the advances were approved, they were paid, not in cash but by the CHAPS electronic transfer of funds from the bank account of the lending institution to the account of the defendant (or his solicitor).

51. The key question for the House of Lords in *Preddy* was whether the process meant that the defendants had obtained property belonging to another. The property was the credit balance in the bank account. The House of Lords held that it did not. The specific questions of law before the House of Lords in *Preddy* were: (i) whether the debiting of a bank account and the corresponding credit of another’s bank account brought about by dishonest misrepresentation amounts to the obtaining of property within the meaning of s 15 of the Theft Act 1968; (ii) is the answer to (i) different if the account in credit is that of a solicitor acting in a mortgage transaction?; and (iii) where a defendant is charged with obtaining intangible property by deception, namely an advance by way of a mortgage, is his intention to redeem the mortgage in full relevant to the question of permanent intention to deprive or only to dishonesty? Essentially, the House of Lords was satisfied that credit into an account represented a debt due from the bank and, therefore, a *chose in action*.

52. Mr Hunter, on the other hand, submits that notwithstanding the underlying mechanics of an international bank transfer, such a transfer should be viewed in a “real world and commercial manner”. During the appeal hearing, Mr Hunter submitted that the Appellant’s argument that money should not be thought of as a thing which can be moved is a fiction designed to obscure the transfer of money from one country into the UK, and that it is false to suggest that no remittance has taken place by the substitution of an offshore bank debt for a UK bank debt. He further submits that the Appellant brought money to the United Kingdom by transferring it to the UK bank account of a non-relevant person.

53. In further amplification of this position, he submits that HMRC’s “RDRM 36120 – Residence, Domicile and Remittance Basis” manual provides that:

“to the extent that a taxpayer has foreign income and gains in an overseas bank account, a transfer of funds from that account to an account in the UK should be treated as a taxable remittance.”

54. Mr Hunter, therefore, submits that HMRC’s view is consistent with the courts’ established attitude towards banking methodologies in the remittance basis context, as demonstrated by the House of Lords in *Thomson v Moyse*. The question for determination in *Thomson v Moyse* was whether the respondent was liable to assessment to income tax in respect of income from securities in the United States, and in respect of income from possessions in that country. HMRC however quote from the judgment of Wynn-Parry J in the Chancery Division (at 301), whose decision was under appeal before the House of Lords. In *Thomson v Moyse*, Mr Moyse had Case IV and Case V income in his bank account in New York. He then drew cheques on the New York bank and sold these cheques in London to English banks in return for the Sterling equivalent of the number of dollars in the cheque. Thereafter, the English banks cashed the cheques in New York and received the dollars in New York. I shall return to consider *Thomson v Moyse* later.

55. We have also considered the second of Mr Firth’s submissions that by initiating bank transfers the Appellant merely “sent” money to the UK; and that sending the money does not amount to “bringing” it to the UK. In further amplification of this submission, Mr Firth states that HMRC’s reliance on *Thompson v Moyse* is misconceived as that case does not assist in interpreting the current legislation, specifically the concept of “brought to” the UK. He submits that Parliament, in drafting legislation such as the remittance basis, legislated in the knowledge of the law, and that it would have been a relatively simple and straightforward matter for Parliament to include “sending” into the legislation, but did not do so.

56. He referred us to *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27 (*Lachaux*), where the Supreme Court (Lord Sumption - with whom Lords Kerr, Wilson, Hodge and Briggs agreed) said this, at [13]:

“There is a presumption that a statute does not alter the common law unless it so provides, either expressly or by necessary implication. But this is not an authority to give an enactment a strained interpretation. It means only that the common law should not be taken to have been altered casually, or as a side-effect of provisions directed to something else.”

57. So far as the “bringing/sending” issue is concerned, Mr Hunter submitted that the initiator of the bank transfer brings the money to the UK. Ultimately, Mr Hunter submits that there are taxable remittances because the Appellant “brought” money to the UK from an overseas bank account by initiating a transfer of money to the UK. He further submits that it matters not that the Appellant did not receive, or benefit from, the money as a relevant person.

58. Returning to *Thomson v Moyse*, the legislation at that time was different from the current remittance rules. Case IV’s remittance rule was as follows:

“The tax in any such case shall be computed on the full amount, so far as the same can be computed, on the sums which have been, or will be, received in the United Kingdom in the year of assessment without any deduction or abatement.”

59. Mr Firth helpfully set out the Case V remittance rule, with formatting added for ease, in his ASA:

“The tax in respect of income arising from possessions out of the United Kingdom, other than income to which rule 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom [:]

[1] from remittances payable in the United Kingdom, or

[2] from property imported, or

[3] from money or value arising from property not imported, or

[4] from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed.”

60. A majority of the House of Lords (Viscount Simonds and Lords Reid, Radcliffe, Cohen and Denning) held that the four specific instances did not limit the general words, such that there was a remittance if sums were received in the UK. The House of Lords further, unanimously, held that the third illustration (money or value arising from property not imported) was satisfied, as follows:

“I do not think that the first, second or fourth heads apply in the present case but, in my opinion, the third does apply- "money or value arising from property not imported." The money arising is the price of the cheques received here by the respondent, and it arose from the respondent's property in New York - his right to the sums at his credit there which he assigned by means of the cheques.” (Lord Reid at 332; 990-991)

“The point is of no practical significance in the case now under review, since even if the respondent's sterling credit was not a sum received from remittances payable in the United Kingdom, as I think that it probably was, it was certainly money or value arising from property not imported, that is the dollar credit in New York which he sold.” (Lord Radcliffe at 336; 996)

“But if a choice has to be made, I put this case under head (c). The New York bank account of Mr. Moyse was "property not imported" into the United Kingdom. When Mr. Moyse drew a dollar cheque on that account and used it to pay his English banker, he brought into existence "money or value arising from property not imported.” (Lord Denning at 342; 1005)

61. Their Lordships emphatically stated that property had not been brought to the United Kingdom, this being the reason why the case was within the third illustration (rather than the second). Lord Reid added this, at 329; 987:

“At first sight it would seem that the requirements of these provisions are satisfied. As regards Case IV, the Respondent undoubtedly received in the United Kingdom the sums paid to him as the price of the cheques and, in each case, by virtue of the contract under which he received the sum, the amount of accrued income held by him in New York was diminished by a correspond- ing amount. And, as regards Case V, again he undoubtedly received such sums and they would appear to be money arising from property not imported; that is, his accrued income in New York, which he assigned in order to get these sums. ...The main ground of judgment in each case was that the sums paid to the Respondent had not been brought into the United Kingdom and that there is nothing to show that any money was ever brought into the United Kingdom in connection with these transactions. That is quite true. But there is nothing in Case IV requiring that money should be brought into the United Kingdom, and this requirement is only attached to one head of Case V which does not apply to the present case.”

[Emphasis added]

62. Lord Radcliffe observed, in respect of the rules:

“As I have indicated, I am clearly of opinion that this conception is a mistaken one and served only to obscure the significance of the true statutory test, whether income arising abroad has or has not been received as sums of money in the United Kingdom....

The second rules under Case IV and Case V are concerned with the turning of income which has arisen in one country into the expendable resources of its owner in another.”

63. Lord Radcliffe concluded that a sum represents “income” if it is derived from that income (p 995).

64. Under s 809L ITA 2007, we accept that this would be a straightforward case: (i) Condition A: Moyse received property in the UK (Sterling); and (ii) Condition B: that property (Sterling) derived from his foreign income (the funds in his New York bank account). The analysis in *Thomson v. Moyse* confirms that no money or other property was brought to the UK. It is, indeed, not surprising that Mr Moyse was regarded as remitting income by receiving Sterling in the UK, which derived from his foreign income. We are satisfied that there was no requirement to “bring” for Case IV to apply.

65. This issue is now addressed by the legislation in the form of s 809L(1)(a) ITA 2007, Condition B, which requires the property brought to/received in the United Kingdom by the taxpayer (or a relevant person) to derive from the income (s 809L(3)(b)).

66. We find that whilst there was considerable force in Mr Firth’s analysis of the logistical and legal mechanics of international bank transfers, we are not in agreement with his submissions in respect of the issue of whether the remittance basis applies to international bank transfers. We further find that *Preddy* was concerned with the offence of obtaining property by deception under s 15 of the Theft Act 1968, and not the situation that has arisen in the appeal before us. The Appellant in the appeal before us effected transfers from an offshore bank account to a UK bank account.

67. Furthermore, whilst we generally accept Mr Firth’s submissions on the definition of “brought to”, this does not take the Appellant’s case any further. The relevant statutory test with which we are concerned is contained in Condition A(a), which describes circumstances that can be classified as free-standing provisions. The issue is whether money or other property was “brought to”, or “received” or “used” in the UK, “by” or “for the benefit of” a relevant person.

68. We are satisfied that the Appellant brought money (or other property) to the UK when he initiated bank transfers from his offshore account into the UK bank accounts of non-relevant persons such as IM, his landlord and his university, for reasons which I will now elaborate on.

69. In respect of whether the bank transfers initiated by the Appellant amounted to remittances, the meaning of ‘brought to’ in s.809L ITA 2007, and the purpose of s.809L, we are satisfied that the meaning of a word depends upon conventions known to the ordinary speaker of English, or ascertainable from a dictionary. However, the meaning of an English word is not a question of law because it does not, in itself, have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law.

70. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transactions, viewed realistically. The task in construing statutory language is to look at the mischief at which the Act is directed: *C & E Comrs v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171 (per Lord Upjohn). The principles of statutory construction were first applied by the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 (‘*Ramsay*’). Lord Wilberforce said this, at p 323, on the general approach to statutory construction:

“What are ‘clear words’ is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.”

71. At pp 323-324, on the application of a statutory provision so construed to a composite transaction, he said this:

“It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.”

72. The approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply, and then to decide whether the actual transaction answered to the statutory description.

73. The *Ramsay* case did not introduce a new doctrine operating within the field of revenue statutes. As Lord Steyn observed in *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999 (*McGuckian*), it rescued tax law from being “*some island of literal interpretation*” and brought it within generally applicable principles. Lord Steyn explained that the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose.

74. The need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance was shown by *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 (*MacNiven*), in which the question was whether a payment of interest by a debtor who had borrowed the money for that purpose from the creditor himself, and which had been made solely to reduce liability to tax, was a “payment” of interest within the meaning of the statute which entitled him to a deduction or repayment of tax. The House decided that the purpose of requiring the interest to have been “paid” was to produce symmetry by giving a right of deduction in respect of any payment which gave rise to a liability to tax in the hands of the recipient (or would have given rise to such a liability if the recipient had been a taxable entity). As the payment was accepted to have had this effect, it answered the statutory description, notwithstanding the circular nature of the payment and its tax avoidance purpose.

75. As Lord Nicholls of Birkenhead said at para. 8:

“The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.”

76. *MacNiven* illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires

77. In *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684, (*Barclays Mercantile*) (Lord Nicholls), the House of Lords was considering whether the relevant provision of the statute, upon its true construction, applied to the facts as found. In answering that question, the court will attach significance to the purpose of the legislation. The court said this, at [28]:

“...the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* case, however, revenue statutes were “remarkably resistant to the new non-formalist methods of interpretation”. The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute...”

78. And, at [32]:

“32. The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found...”

79. In *Astall v HMRC* [2010] STC 137 (“*Astall*”) at [44], Arden J, giving the leading judgment, said this:

“...applying a purposive interpretation involves two distinct steps: first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the statute: the court must not infer one without a proper foundation for doing so. The second stage is to consider whether the transaction against the actual facts which occurred fulfils the statutory conditions. This does not, as I see it, entitle the court to treat any transaction as having some nature which in law it did not have but it does entitle the court to assess it by reference to reality and not simply to its form.”

80. In *Berry v HMRC* [2011] STC 1057 (“*Berry*”) at [31], Lewison J set out the different elements of the *Ramsay* approach derived from the case law authorities. At [31(vi)] he added this:

“However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in *Astall v Revenue and Customs Comrs* [2010] STC 137 at [34], 80 TC 22 at [34]). As Lord Hoffmann put it in an article on ‘Tax Avoidance’ ([2005] BTR 197): ‘It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there’: see *Mayer v Revenue and Customs Comrs* [2009] EWHC 2443 (Ch) at [30], [2010] STC 1 at [30].”

81. In *Pollen Estate Trustee Co Ltd v R & C Comrs* [2013] 1 WLR 3785; [2013] EWCA Civ 753 (‘*Pollen Estate*’), Lewison LJ said this, at [25]:

“25. The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51; [2005] 1 AC 684 (§ 28). In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300, 323; *Barclays Mercantile Business Finance Ltd v Mawson* (§ 29). The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: (*Barclays Mercantile Business Finance Ltd v Mawson* (§ 32).

82. Lord Justice Lewison also considered what was said in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 (*Inco Europe*), where Lord Nicholls said this:

“It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ...

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.”

83. Legislation can, potentially, be rectified without the court being able to discern, with confidence, exactly what Parliament would have done had it realised its mistake. In *Inco Europe*, the House of Lords was considering the interpretation of an amendment to s 18(1)(g) of the Supreme Court Act 1981 made by the Arbitration Act 1996. The question was whether that provision, as amended, conferred jurisdiction on the Court of Appeal to entertain an appeal against the grant or refusal of a stay in favour of arbitration. Read literally, the provision appeared not to confer such jurisdiction. However, the House of Lords unanimously held that the sole object of the amendment had been to substitute a new paragraph (g) serving the same purpose as the original paragraph had done in relation to the Arbitration Act 1979 - which did confer such jurisdiction - and that although the draftsman had not used language apt to achieve the intention of the legislature, it was permissible to read words into the amended s 18(1)(g) to give effect to that intention.

84. In *Inco Europe*, Lord Nicholls said that the court must be “*abundantly sure*” of the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used. The approach in *Inco Europe* may, therefore, be applied if the court “*can be confident of the gist or substance of the alteration, rather than its precise meaning*”.

85. This was confirmed in *Pollen Estate*, at [49] per Lewison LJ. To rectify legislation would, however, be to engage in judicial legislation and would not be discharging the courts’ interpretative function. It is only if the legislative instrument has a clear, objectively assessed, meaning having regard to all the circumstances and all indicators of the legislator’s intention available to the person subject to the law, and that meaning is contrary to the literal meaning of the text of the instrument, that it will be appropriate for the court to give a rectifying interpretation to the instrument.

86. In *Bogdanovic v Secretary of State for the Home Department* [2014] EWHC 2872, at [41], Sales J (as he then was) said this:

“It is important to emphasise that *Inco Europe* states a principle of interpretation of a legislative instrument. Effect is to be given to the intention of the legislator, as expressed in the instrument as objectively construed in accordance with the principles identified in cases such as *Black-Clawson International* and *Fothergill*, supra, and *R v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349, especially

at 396F-399E per Lord Nicholls. As Lord Nicholls there observed (at 397G), although it is legitimate to have regard to certain aids to interpretation of legislation which are external to the legislation itself, "This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned."

87. In *Eclipse Film Partners No 35 LLP v HMRC* [2015] EWCA Civ 95, at [110], the Court of Appeal held that:

"110. There is no special rule for interpreting tax legislation. *Ramsay (WT) Ltd v IRC* [1982] AC 300 marked the end of an unduly literal interpretative approach to tax statutes and a formalistic insistence on examining steps in a composite scheme separately. As Lord Nicholls, giving the judgment of the Judicial Committee, said in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL, [2005] 1 AC 684 at [32], the essence of the new approach was to give the statutory provision a purposive interpretation in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. This brought the interpretation of tax statutes into line with general principles of statutory interpretation and required notice to be taken of the reality of the transaction in issue. As the Judicial Committee observed in the *Barclays Mercantile Business Finance* case at [35] that approach has led the court in cases such as *Inland Revenue v Burmah Oil Co Ltd* [1982] SC (HL) 114, *Furniss v Dawson* [1984] AC 474 and *Carreras Group Ltd v Stamp Commissioner* [2004] STC 1377 to decide that elements which have been inserted into a transaction without any business or commercial purpose did not prevent the composite transaction from falling within a charge to tax or, as the case may be, bring it within an exemption from tax. To that list of cases may be added *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] WLR 3172. The effect of the *Ramsay* case and the modern approach was elegantly summarised by Ribeiro PJ in the following statement (approved by the Appellate Committee in the *Barclays Mercantile Business Finance* case) in *Collector of Stamp Revenue v Arrowsmith Assets Ltd* [2003] HKCFA 46, para 35:

"the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

88. In *Project Blue Ltd v R & C Comrs* [2018] UKSC 30; [2018] 1 WLR 3169 ('*Project Blue*'), Lord Hodge said this, at [31]:

"...it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results..."

89. The court will seek to avoid an interpretation which gives rise to absurd, or anomalous, consequences. The question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. There is a need to focus upon the particular statutory provision and identify its requirements before one can decide whether payments or elements should be disregarded or treated as irrelevant for the purposes of the statute. The courts' constitutional role in this field is interpretative.

90. The purpose of s. 809L ITA 2007 is to identify situations where remittance basis income is genuinely enjoyed in the UK by the taxpayer (or a relevant person). That conclusion is supported by the explanatory notes:

"The general aim is to ensure that income or gains to which the remittance basis applies are only excluded from charge to UK tax where they are genuinely kept offshore and not brought to the UK. But where they are in effect remitted to the UK in such a manner that the

individual has the use or enjoyment of them in the UK, the individual should be liable to tax on them, precisely because the individual has effectively remitted them to the UK.”
(Explanatory Notes to FA 2008, Clause 23, para 21)

91. A transfer will be a remittance if it meets the conditions set out at s 809 ITA 2007. A transfer of money to the UK by a relevant person meets Condition A and B because it is brought to the UK by the relevant person (including at his/her direction) and derives from foreign income or chargeable gains. We find that case law cannot override statute, which clearly defines when a remittance is made. We further find that there is no reference in the legislation to *choses in action*, simply to income/gains being “brought to” the UK by the relevant person

92. It is accepted by both parties that “property” includes “money”. Furthermore, Chapter A1, Part 14 ITA 2007, provides that property includes money. By making a direct transfer from an offshore bank account to a UK bank account, the Appellant brought money to the UK. We are satisfied that in respect of the remittance basis of taxation and the intention of Parliament, the bringing of money means effecting the transfer/transmission of money. In this respect, the emphasis is on the person who initiates the transfer. The incontrovertible fact in this appeal is that the person who initiated the transfer was the Appellant. It is of no relevance that the Appellant did not benefit from the money or other property as the Appellant made remittances when he initiated the transfers.

93. Condition A(b) deals with a service provided in the UK “to” or “for the benefit of” a relevant person. The only parts of Condition A that are disjunctive are sub-paras. (a) and (b). Once either of sub-para (a) of Condition A is satisfied (i.e., money or other property is “brought to”, or “received” or “used” in the UK), the focus of the enquiry then shifts to Condition B, which can adequately be described as the derivation condition. In respect of Condition B, we are satisfied that the property in question derives wholly and directly, or indirectly, from the income or chargeable gains given the acceptance by both parties that the Appellant’s offshore bank account became a mixed fund account from which transfers were initiated.

94. For completeness, no reliance was being placed on the issue of whether the money or other property was “received” or “used” in the UK as the money never went to the Appellant as he is not the holder of a UK bank account, but it was the Appellant who initiated the transfer of money from an offshore bank account into the bank account(s) of a non-relevant person.

95. Under the accepted canons of statutory interpretation, we are unable to interpret the effect of the remittance basis of taxation on electronic bank transfers in the manner in which Mr Firth suggests. Accordingly, therefore, we hold that when the Appellant made bank transfers from his offshore bank account to the UK bank accounts of non-relevant persons, such as IM and IM’s university or landlord, he remitted money to the UK. Consequently, therefore, we hold that the bank transfers fall within the statutory provisions and the Appellant, therefore, made remittances to the UK.

Paying for goods/services received by a non-relevant person in the UK by using a non-UK credit card (such as university accommodation payments, gifts to a non-relevant person and payment for flights)

96. In respect of payments of IM’s university-related expenses, accommodation expenses to his landlord and gifts (including jewellery) to non-relevant persons by the Appellant using his offshore credit card, the relevant statutory provision with which we are concerned is s 809L(7), as follows:

“(7) In this section “relevant debt” means a debt that relates (wholly or in part, and directly or indirectly) to

- (a) property falling within subsection (2)(a),
 - (b) a service falling within subsection (2)(b),
- [...]”

97. Subsections (2)(a) and (2)(b) are set out in the following terms:

(2) Condition A is that –

- (a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or
- (b) a service is provided in the United Kingdom to or for the benefit of a relevant person.”

(3) Condition B is that—

- (a) the property, service or consideration for the service is (wholly or in part) the income or chargeable gains,
- (b) the property, service or consideration (i) derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and (ii) in the case of property or consideration, is property of or consideration given by a relevant person,
- (c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or
- (d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c). [...]

98. Mr Firth submits that the thing that is enjoyed in the UK in this situation is the service by the non-relevant person, and that it is clear that the legislation does not treat the enjoyment of a service by a non-relevant person in the UK as a remittance. He further submits that it is clear from the legislation that Parliament does not intend to tax the taxpayer because property deriving from the taxpayer is enjoyed by a non-relevant person (who, as Parliament would be aware, may be a close family member, such as an adult son) in the UK.

99. Mr Hunter, on the other hand, submits that by using an offshore credit card in the UK, the Appellant created a “relevant debt” so that payment of that credit card with an offshore bank account amounted to the use of income or chargeable gains outside the UK in respect of a relevant debt (thus implicitly satisfying Condition B by falling within s 809L(3)(c)). In essence, HMRC’s case is that the purchase via a credit card is treated as being equivalent to the cardholder authorising the credit card company to pay the bill for the goods, or service, on their behalf, and that this creates a ‘relevant debt’, the definition of which encompasses a debt that relates to...property within subsection (2)(a) of s 809L(7).

100. Having considered the legislation, we are satisfied that the use of any credit card to make purchases in the UK of property falling within Condition A creates a relevant debt, so that payment of the credit card account from an offshore bank account containing foreign income or gains amounts to a remittance under s 809L(3)(c). Whilst a non-relevant person may have benefitted from the service/gifts, the Appellant is the person who made the purchases using his offshore credit card, using foreign income or gains to pay the offshore credit card company. In this respect, it was not suggested that the non-relevant person(s) made the purchases themselves using money given to them by the Appellant. In any event,

such a situation would still require the Appellant to have transferred the money from his offshore bank account (or to have physically brought it) for a non-relevant person.

101. We find that it is neither here nor there that the relevant person (i.e., the Appellant) purchased the gifts for a non-relevant person. The key consideration is that the Appellant first purchased the items in the UK, using funds held overseas, and then gifted the purchases to a non-relevant person. In further analysis of such transactions, the vendor from whom the Appellant made the purchases did not make a gift to the non-relevant person but sold an item to the relevant person who either gave it to a non-relevant person, or directed it to be delivered to a non-relevant person. The credit card payments/purchases emanated from foreign income or chargeable gains and a relevant debt was created.

Jewellery for his/his wife's own use, paid for with his non-UK credit card

102. In respect of the jewellery purchased by the Appellant for his own personal use (and for his wife), paid for with his non-UK credit card, s 809X ITA provides that:

“(1) Exempt property which is brought to, or received or used in, the United Kingdom in circumstances in which section 809L(2)(a) applies is to be treated as not remitted to the United Kingdom.

(2) Subsections (3) to (5) set out the cases in which property is exempt property.

[...]

(4) Clothing, footwear, jewellery and watches are exempt property if they meet the personal use rule (see section 809Z2).”

...

103. The personal use rule is stated as follows:

“(1) Clothing, footwear, jewellery or watches meet the personal use rule if they –

(a) are property of a relevant person, and

(b) are for the personal use of a relevant individual.

(2) In this section –

...

(b) ‘relevant individual’ means an individual who is a relevant person by virtue of section 809M(2)(a), (b), (c) or (d) (the individual with income or gains, or a husband, wife, civil partner, child or grandchild)”

104. Mr Firth submits, in reliance on s 809X ITA 2007, that the jewellery purchased by the Appellant is “exempt” property. He further submits that this position is not challenged by, or on behalf of, HMRC. We are satisfied that Mr Firth’s submissions are misconceived. This is because the exemption applies to property brought to, received, or used in the UK for personal use. The position in this appeal is that the Appellant actually purchased jewellery in the UK using his offshore credit card, and that jewellery was for a relevant person (the Appellant and his wife).

105. Returning to the issue of the use of an offshore credit card, whilst the jewellery may have been received by the Appellant in the UK once it was purchased, as the jewellery was purchased by the Appellant using his offshore credit card, the Appellant was making a remittance. This is because the Appellant was, effectively, authorising the offshore credit card company to make a payment in the same way as if he had instructed the credit card

company to make a direct payment to the person supplying the goods. Whilst the terms of credit card agreements may differ as to the moment of indebtedness between the cardholder and the credit card company, the use of the credit card to pay for goods used, or received, in the UK will create a relevant debt. The use of the Appellant's untaxed foreign income, or gains, to pay the offshore credit card company in respect of the debt is a taxable remittance.

CONCLUSIONS

106. In conclusion, therefore, we hold that the bank transfers initiated by the Appellant gave rise to taxable remittances and it is of no consequence that the Appellant did not have access to the money which formed the subject of those transfers, or that he did not personally benefit from those remittances. The fact of the matter is that the remittances were initiated *by* the Appellant. All that is required to be established is that he initiated those transfers from his offshore bank account. In respect of the purchases made by the Appellant using his offshore credit card (payment for services and gifts to non-relevant persons). The purchases were made by the Appellant using foreign income or gains emanating from a mixed fund account and created a relevant debt for the reasons given above. Finally, in respect of the jewellery purchased by the Appellant (for himself and his wife) using his offshore credit card, those purchases are not exempt and created a relevant debt for the purposes of the remittance basis of taxation.

107. On the basis of our findings above, we allow the appeal, in part, in light of our findings in respect of the discovery assessment.

108. In respect of the closure notice, and the issue of quantum, whilst we find that the Appellant did make taxable remittances, the quantum cannot be discerned from the evidence provided by either party. Mr Firth submits that the Appellant has set out his view of which specific transactions are in issue, and that HMRC have not identified any amounts going beyond that.

109. Paragraph 12 of the Appellant's witness statement identifies amounts, as follows:

	2016/17
Transfers to IM's UK bank account	£48,526
Direct payments of university-related expenses on behalf of IM	£26,712
Transfers to other non-relevant persons' UK bank accounts	£108,840
Jewellery received by non-relevant persons paid for using the Appellant's credit card	£84,958
Payments for services, including flights, for non-relevant persons	£29,188
Total	£298,225

110. HMRC rely on exhibit MAC21 to Officer Clough's witness statement. This identifies the following:

HMRC workings compared	HMRC
Remittance 16/17 Tax Year	
Payments to Ibrahim	40,860
Uni & Accommodation	58,784

Ibrahim/Imran Exp	10,562
Persona Spending	12,772
Flights	41,776
Jewellery	114,166
ATM cash	1,360
Misc	48,902
TOTAL REMITTANCE	380,182
...	...
Total Tax per HMRC	133,682

111. We, therefore, direct the parties to seek to agree the final figures in respect of quantum (in light of our findings above), with leave to apply to the Tribunal if an agreement on the figures cannot be reached.

112. For completeness, we note that the Appellant has paid tax on some remittances, as set out in the schedule to his witness statement. He has also paid tax on the cash withdrawals made from his offshore bank account and an item-by-item analysis of the expenditure incurred has been provided. In respect of flights with a UK element, the Appellant is prepared to pay a remittance charge on half of all travel originating from, or ending in, the UK in respect of relevant persons.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

113. 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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 23rd May 2024