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Case Number: TC09363

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House
88 Rosebery Avenue
London
EC1R 4QU

Appeal references: TC/2022/11989, TC/2022/12295, TC/2022/12650
TC/2023/08862, TC/2023/09163

INCOME TAX-PAYE - Section 80 Determinations – NICs - payments made on termination of employment - whether "earnings" - whether £30,000 exemption applies - time limits - whether Appellants "careless"

Heard on: 6 November 2024
Judgment date: 28 November 2024

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MRS SONIA GABLE

Between

(1) SIMRAJSAR LIMITED
and
(2) ACHILLES PRODUCTS LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Robert Grierson, barrister

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

DECISION

INTRODUCTION

1. These are joint appeals by Simrajsar Limited (Simrajsar) and Achilles Products Limited (Achilles) (jointly "the Appellants") against the Notices of Determination under Regulation 80 Income tax (PAYE) Regulations 2003 (Determinations) and Section 8 Notices under the Social Security Contributions (Transfer of Functions) Act 1999 (Section 8 Notices) issued to them in respect of tax years from 2015/16 to 2018/19. HMRC allege that there were inaccuracies in the PAYE Real Time Information submissions made by the Appellants attributable to a failure to take reasonable care.

2. The Determinations and Section 8 Notices related to payments made to five directors of Simrajsar and Achilles on the termination of their respective directorships.

3. HMRC contend that the payments are taxable as "earnings" within section 62 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). The Appellants argue that the payments fall within section 401 of ITEPA and are exempt under section 403(1) ITEPA. The Respondents also submit that National Insurance Contributions (NICs) are payable in respect of the payments, as set out in the Section 8 Notices.

4. In addition to the documentary evidence contained in a Hearing Bundle of 910 pages, we heard witness evidence from Mr Mark Reid, who was a director of both of the Appellants (and received a payment from each of them) and Mr Andrew Grant, the HMRC officer who was the lead investigator into the Appellants' Corporation Tax returns. Three of the other directors, Ms Sarbjeet Nandra, Mrs Letitia Reid (formerly Miss Gough) and Ms Samantha Murray had also made witness statements which were in the Bundle. They were unable to attend the hearing and were not cross-examined on their witness statements so we attach appropriate weight to them. The fifth director, Dr Simon Emblin, did not make a witness statement although facts relating to him were included in Mr Reid's statement. We will refer to these individuals collectively as "the directors".

5. All statutory references are to ITEPA unless otherwise specified.

6. We have carefully considered all the submissions and authorities put forward by both parties but in order to keep this decision as concise as possible we have not necessarily referred to them all in detail.

THE PROCEDURAL FACTS

7. Officer Grant was the lead investigator into enquiries into the wider "Redbox Group". In the course of those investigations, enquiries were opened into the Corporation Tax returns of Achilles for the accounting periods ending 31 March 2015, 30 September 2015, 31 March 2016, 2017, 2018 and 2019 and of Simrajsar for the accounting periods ending 31 January 2015 and 31 January 2018.

8. As a result of those enquiries, HMRC identified a number of termination payments to individuals connected with Redbox. They requested further information, which was provided, in some cases following formal Information Notices.

9. The procedural history in relation to each of the payments was similar.

10. Following a consideration of the information provided and correspondence with Withers, the Appellants' agent, HMRC issued a Regulation 80 Determination in respect of unpaid PAYE income tax which, HMRC say, should have been deducted from the termination payment and a Section 8 Notice in relation to unpaid NICs on the payment. The Appellants' agent appealed against the Determination and the Section 8 Notice. HMRC rejected the appeals and offered a statutory review. The Agent requested a review. The

Review Conclusion Letter in each case upheld the decision. In each case, the Appellants made an in-time appeal to the Tribunal.

11. The Determinations and Section 8 Notices are summarised in the table below.

Appellant	**Tax year**	**Director**	**Income Tax £**	**NICs £**	**Determination/Notice issued**
Achilles	2015/16	Letitia Reid	6,000	Out of time	29 March 2022
Achilles	2017/18	Samantha Murray	11,887.80	4,944.25	29 March 2022
Achilles	2018/19	Mark Reid and Simon Emblin	7,912.40	5,566.61 5,566.61	16 February 2023
Simrajsar	2015/16	Sarbjeet Nandra	12,000	Out of time	23 March 2022
Simrajsar	2016/17	Mark Reid	6,000	5,653.34	28 February 2023

12. HMRC accept that they were out of time to collect the NICs due in respect of the 2015/16 tax year and they do not form part of the appeals.

13. The Regulation 80 Determinations and Section 8 Notices issued to Achilles in respect of the 2017/18 and 2018/19 tax years are within the normal four year time limit and HMRC does not have to satisfy any additional conditions.

14. The Determinations issued to Achilles and Simrajsar in relation to the 2015/16 and 2016/17 tax years are outside the four year time limit but within the six year time limit which HMRC may assess if they can show that the Appellants had failed to take reasonable care when submitting their returns. If HMRC cannot demonstrate that the Appellants were "careless", those Determinations are out of time.

FACTS RELATING TO THE APPELLANTS

15. Both of the Appellants were connected with a limited liability partnership called Redbox Tax Associates LLP (Redbox). All of the directors were limited partners in Redbox. Mr Reid and Dr Emblin are the majority owners of Redbox.

16. Simrajsar was a limited partner in Redbox between January 2013 and March 2015.

17. Ms Nandra stated, in her witness statement that she had at all times been the only shareholder in Simrajsar. This was true, but misleading, in that Mr Reid's evidence was that Ms Nandra was at all times holding the shares on bare trust for his children, one of whom was a minor at the time when the arrangement began.

18. We find as a fact that Simrajsar was not, and is not, part of the Redbox "group" in that it has never been owned by Redbox, nor did it control Redbox.

19. Achilles was also, briefly, a limited partner in Redbox.

20. Achilles was incorporated in 2006. Mrs Reid's witness statement indicates that it was originally owned by Mr Reid and Dr Emblin. In 2010, when Redbox was formed, a further

company called SLAP 8 Limited was formed as a holding company. Achilles is owned by SLAP 8 Limited. SLAP 8 Limited is owned by Redbox.

21. Achilles is and was, accordingly, a member of the Redbox "group" as it was indirectly owned by Redbox.

22. Redbox's business was the promotion of tax arrangements. The Appellants participated in the arrangements. Simrajsar's role was to make loans to Achilles so that Achilles could subscribe for an offshore bond - an insurance product. Achilles would sometimes borrow from Redbox for this purpose. Achilles would charge the bond and assign the bond to a third party subject to the charge. The third party cashed in the bond and the charge (and loan) were paid off.

23. Achilles had also been involved in other arrangements which involved subscribing for insurance policies. The company was registered with the FCA.

24. Simrajsar's business was the making of loans to facilitate the arrangements. It has continued to make loans to group entities.

25. Achilles' business was a substantial one. In the accounting period to 30 September 2015 it made an operating profit of £1.9 million on a turnover of £132.4 million. This fell to a profit of £1 million and turnover of £25 million in the period to March 2016. Redbox ceased to offer the arrangements and Achilles' business continued to decline. In the period to 31 March 2018 the profit was £198,318 and turnover £10.6 million. The company remains in existence, but the 2023 micro-entity accounts show a loss on the balance sheet.

26. Simrajsar also remains in existence and is still trading. Its accounts show only the financial position of the company, but the shareholders' funds increased from £299,591 on 31 January 2017 to £358,481 on 31 March 2023.

FACTS RELATING TO THE PAYMENTS

27. The circumstances of the directorships and the payments made on their termination are similar for all six payments (Mr Reid received payments from both Appellants). We will consider the work carried out and reasons for resigning of each of the individuals below, but first set out the facts which were common to all.

28. In each case, the director was a member of Redbox both before and after the period of their directorship and received their share of the partnership profits throughout the period during which they were a member.

29. There was no contract of employment or director's service contract with the relevant Appellant.

30. The directors received no remuneration for their work for the Appellants, except that Achilles paid each of Mr Reid and Dr Emblin £15,000 in 2017 and £21,000 in 2018. Both were directors of the company from 2006, when it was formed until 2019, and there were no other payments. Mr Reid said he could not remember why they were paid in those years.

31. Each of the directors resigned or expressed a wish to resign.

32. The relevant Appellant made a payment of £30,000 to each director on their resignation which was described as "compensation for loss of office".

33. There was no indication as to how the figure of £30,000 had been arrived at, except in a letter from Withers to HMRC dated 21 September 2022 in relation to Mr Reid's payment from Simrajsar which stated:

> "…the directors took into account the number of years Mr Reid was a director of the company [two years in the case of Simrajsar], the profitable

> position of the company and limited any payment to an amount which was fiscally efficient".

34. There was no written correspondence or documents relating to the decision to make the payment except as set out below.

35. There was no written termination agreement or similar document.

36. None of the directors declared the payment on their self-assessment tax return. Mr Reid said that this was because they believed it was tax free.

37. We now turn to the individual payments.

Sarbjeet Nandra

38. Ms Nandra was a director of Simrajsar between 2013 and 2016.

39. In her witness statement and in a letter of 3 November 2021 to HMRC, she said that her duties as director included the preparation of draft accounts and annual returns and "recouping money from the Group for and on behalf of Simrajsar".

40. In her witness statement, Ms Nandra states that she resigned her directorship because Simrajsar had ceased to be a member of Redbox and Simrajsar "no longer required my services as a full time director and administrator". In the letter of 3 November 2021, she stated: "As Simrajsar was no longer a member of the Group, and I wanted to concentrate on the activities of the Group, I decided to resign as a member of Simrajsar". As Ms Nandra did not attend the hearing and could not be cross-examined we were unable to resolve this discrepancy.

41. Ms Nandra resigned as a director on 29 January 2016. A board meeting was held on the same day and her directorship was terminated. The Minutes stated:

> "In compensation for loss of office, it was resolved to make an *ex gratia* payment of £30,000 to SN."

42. We note that, at this meeting, another director was appointed. One of the reasons given for Ms Nandra's resignation was that her services were no longer required as Simrajsar's business was winding down. When we asked Mr Reid why she was replaced, he indicated that the company did not need her and the new director did other things, but we obtained no further details.

43. This counted as taxable income (subject to any relief) for the 2015/16 tax year, although paid on 6 April 2016, by virtue of section 686 ITEPA.

Letitia Reid (formerly Gough)

44. Letitia Reid was a director of Achilles from December 2011 to July 2015.

45. A schedule of her duties and responsibilities was provided to HMRC with a letter from Taylor & Co Tax Services Ltd. dated 20 August 2021. Mrs Reid carried out the following work for Achilles:

(1) Maintaining Statutory Books

(2) Drawing up and maintaining all documents relating to bond sales by Achilles

(3) Supervising and controlling the receipt and processing of all enquiries to Achilles from third parties

(4) Chief Liaison Officer with third parties in relation to bonds held by Achilles from time to time

(5) Responsible for benchmarking all KYC [know your customer information] received by Achilles, updating and maintain KYC requirements and notifying the same to third parties

(6) Signatory to documents effecting transfer of bonds to third parties

(7) Co-ordinator in conjunction with Mark Reid in ensuring Achilles adheres to procedures and systems necessary to conform with FCA Regulations and procedures.

46. Mrs Reid resigned as a director on 14 July 2015. The reason given in her witness statement was that she was in the process of stepping back from full-time work due to stress and various related health issues. She also said she was to be replaced as director by Samantha Murray, although Ms Murray was not appointed until 2 November 2016, some 15 months later. We do not know who was doing the work in the meantime.

47. The 20 August 2021 letter stated that it was agreed by all parties that Mrs Reid's employment [presumably directorship] would be terminated. Mrs Reid submitted a letter of resignation on 14 July 2015. Achilles subsequently informed Mrs Reid that it would make a payment of £30,000 in respect of her employment being terminated. The payment was made on 28 July 2015.

48. Mrs Reid's resignation letter stated:

> "I wish to resign my offices as Director and Company Secretary of Achilles Products Limited forthwith.
>
> I confirm that I have no claim against the Company nor against any other person, firm or company, for loss of office or at common law or under statute or (without limitation) on any other account and that there is no agreement or arrangement, whether performed or executory, under which the Company might be or become liable to me on any account."

Samantha Murray

49. Ms Murray was a director of Achilles from 2 November 2016 to 12 October 2017.

50. From her witness statement and a letter dated 26 February 2021 from Withers LLP (Withers) to HMRC, it seems that Ms Murray undertook a limited amount of administration work, whilst her main role was management. Ms Murray stated that she became a director of Achilles because Mrs Reid had ceased to be a director of Achilles on 14 July 2015 as she was stepping back from full-time work.

51. As noted above, although Ms Murray was a "replacement" for Mrs Reid, she was not appointed until over a year later. We also note the difference in the description of the work done by Mrs Reid and Ms Murray. As neither of them attended the hearing, we were unable to pursue this.

52. Ms Murray states that she ceased to be a director because of the substantial contraction in Achilles' business activities and the company no longer needed her services.

53. The 26 February 2021 letter stated that Ms Murray's resignation was by mutual agreement. Ms Murray submitted a letter of resignation and the company informed her that it would make a payment of £30,000 in respect of her loss of office. The payment was made on 13 October 2017. Withers' letter states that the letters could not be found but the company minutes and resolution concerning the termination were enclosed. Unfortunately, these were not in our Bundle.

Mr Reid and Dr Emblin

54. Mr Reid and De Emblin were the two "controlling minds" of the Redbox Group. Dr Emblin did not provide a witness statement or attend the hearing. Mr Reid's witness statement and evidence covered the payments to each of them.

55. Mr Reid was a director of Simrajsar from 6 April 2015 to 3 April 2017 and both Mr Reid and Dr Emblin were directors of Achilles from 20 November 2006 until 31 January 2019.

56. Mr Reid was FCA authorised. He signed documents for Achilles including the sale contracts for the investment bonds. He ensured compliance with regulations. His duties for Simrajsar included signing documents in relation to the loans made by Simrajsar to other group companies. A letter from Withers to HMRC dated 21 September 2022 described Mr Reid's role at Simrajsar as to ensure the company complied with its compliance obligations. A letter from Withers to HMRC dated 1 April 2021 to Mr Grant in relation to Achilles stated "The individuals undertook a limited amount of administration work for the company, whilst their main role was that of management to ensure that any work deadlines were met for the company".

57. Mr Reid explained the reasons for his, and Dr Emblin's, resignations.

58. In relation to Simrajsar (Mr Reid only) Mr Reid's evidence was that Simrajsar's business had substantially contracted and so his services as a director were no longer required. Although the company no longer lent money as part of the tax arrangements, it continued to hold money and make loans to group entities. A letter of 21 September 2022 from Withers to HMRC, stated: "Mr Reid…decided to retire as the director. His son became 18 in June 2027, Mr Reid decided that, subject to the completion of his son's studies, he wanted his son to take a more active role in the company, hence he took the decision to retire". This discrepancy has not been resolved.

59. The reason given for the resignations of both Mr Reid and Dr Emblin as directors of Achilles was that the business activities had substantially contracted and the company no longer required their services as directors.

60. The payment to Mr Reid from Simrajsar was made on 3 April 2017, the day of his resignation. We do not have any documents setting out the decision to make the payment or the reason for it.

61. Achilles wrote materially identical letters to Mr Reid and Dr Emblin on 12 February 2019 confirming that:

> "…the company has agreed to make an *ex gratia* payment of £30,000 to compensate you for loss of office".

THE LAW

62. The Appellants contend that all the payments fall within section 401 ITEPA and are exempt under section 403. Section 401 provides, so far as material:

> "**401 Application of this Chapter**
>
> (1) This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment,

by the person, or the person's spouse [or civil partner], blood relative, dependant or personal representatives.

(2) Subsection (1) is subject to subsection (3) and sections 405 to [414A] (exceptions for certain payments and benefits).

(3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter."

63. Section 403 provides an exemption for the first £30,000 of a payment to which section 401 applies:

> "**403 Charge on payment or other benefit [where threshold applies]**
>
> (1) The amount of a payment or benefit to which this [section] applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold."

64. The Respondents submit that the payments constitute taxable "earnings" within section 62 ITEPA, so that section 401(3) excludes the payments from section 401(1) and the exemption in section 403 cannot apply.

65. Section 62 provides, so far as relevant:

> **"62 Earnings**
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means—
>
> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment."

BURDEN OF PROOF

66. The burden of proof is on the Respondents to show that the Determinations and the Section 8 Notices were procedurally valid and served.

67. The burden of proof then passes to the Appellants to displace the amounts of the assessments.

68. The burden of proving that the Appellants failed to take reasonable care falls on the Respondents.

69. In each case the proof required is to the normal civil standard; on the balance of probabilities.

THE APPELLANTS' SUBMISSIONS

70. The Appellant's submissions are the same for each of the Appellants and each of the appeals.

71. Mr Grierson submits that the payments were clearly paid on the termination of the employment of each of the directors and so fall within section 401(1)(a) ITEPA.

72. There is no need to prove any financial loss or financial disadvantage to fall within section 401(1)(a). The legislation applies where the payment is made in connection with the termination of the employee's employment.

73. Each of the directors received significant sums by way of profit share from their roles as partners in Redbox and this included payment for the work they did for the Appellants and they did not require separate remuneration for that work.

74. The payments were genuine termination payments and not part of any tax avoidance scheme.

75. Although there was no evidence as to how the amount of £30,000 was calculated, there was nothing objectionable in paying the maximum tax free amount and in the light of the profit shares received from Redbox, it was not a disproportionate amount.

76. The Appellants were not in any way careless. They created and kept all relevant and accurate records and made all relevant disclosures to HMRC. Accordingly, the six year time limit did not apply and the Determinations in relation to Mr Reid (Simrajsar), Ms Nandra and Mrs Reid were out of time.

HMRC'S SUBMISSIONS

77. Mr Gyasi submitted that each of the payments was remuneration for past work and was accordingly, "earnings" within section 62 ITEPA. They could not therefore be termination payments within section 401.

78. It had also been suggested that the payments to Mr Reid could have been taxable as payments from an Employer Funded Retirement Benefits Scheme (which would also have disqualified the payments from section 401) but this argument was, rightly, not pursued.

79. Mr Gyasi further submitted that the Appellants had been careless in not operating PAYE on the payments.

DISCUSSION

80. Section 5 ITEPA provides that the provisions of that Act apply to offices, such as directorships, as well as to employments.

81. HMRC's position is that the payments were remuneration for past work and were therefore "earnings" within section 62 ITEPA. If the payments are chargeable to tax under section 62, they cannot fall within section 401 by virtue of section 401(3). They would not therefore be eligible for the £30,000 exemption.

82. There is much case law on what is meant by an "emolument of the employment" and, accordingly, earnings.

83. Mr Gyasi took us to the well-known House of Lords case of *Shilton v Wilmhurst* [1991] STC 88. Lord Templeman said at page 91:

> "…an emolument 'from employment' means an emolument 'from being or becoming an employee'. The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived 'from being or becoming an employee' on the one hand, and an emolument which is attributable to something else on the other hand, … If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received 'from the employment'."

84. Mr Gyasi submits that the payments were in respect of the past service as directors in the relevant companies. They were not for "something else".

85. The reasons for concluding this were as follows:

(1) There was no contract of employment setting out the director's rights or the circumstances in which the directorship could be terminated.

(2) None of the directors were paid for the work they did for the companies, except that Mr Reid and Dr Emblin received some pay for the last two years of their directorships of Achilles. Mr Reid was unable to explain why. We note that they were paid in the years when the business was in decline which seems somewhat odd.

(3) All of the directors were members of Redbox both before and after the period of their directorships. The directors argue that their profit share from Redbox also covered the work they did for the Appellants. They further stated that it is quite normal for the directors of subsidiary entities to be rewarded from the ultimate parent entity rather than being paid by the subsidiary entity. There was no evidence that the profit share did include payment for work for the Appellants, nor how much of the profit share might be attributable to that work.

(4) The profit shares did not alter when the directors became or ceased to be directors of the Appellants or, at least, there was no evidence to suggest this. Nothing changed by reference to their becoming or ceasing to be a director.

(5) The individuals resigned their directorships.

(6) There was no Termination or Settlement Agreement setting out why the payments were made or how the figure of £30,000 was arrived at.

(7) All of the individuals did, in fact, render services to the respective Appellants.

(8) There was little or no indication of how the amount of the payment had been calculated.

86. Mr Grierson submitted that HMRC had introduced a requirement that the individuals should have suffered a loss for section 401 to apply and this was not warranted by the legislation. Mr Gyasi explained that this was not the case. The payments had been described, in Minutes of the Appellants, in letters from the Appellants to the directors and in correspondence between the agents and HMRC, as "compensation for loss of office". As the directors had not suffered any financial loss as a result of ceasing to be a director (the directors had not been paid by the Appellants and they contended they were remunerated for the work by Redbox, and that remuneration did not change by reference to the directorships) it was difficult to see what the purpose of the "compensation" was. HMRC contended that the payments were not in fact compensation for loss of office as the directors suffered no financial loss and the payments must therefore have been made for some other reason.

87. Where a termination payment within section 401 is made, one would expect to see a Termination or Settlement Agreement. As HMRC pointed out in the Review Conclusion Letter of 23 June 2022 relating to Ms Nandra, compensation for loss of office is often calculated as damages. It often involves a compromise of claims with the employee releasing the employer from any claims that the employee may have against them.

88. In this context it is relevant that all the individuals resigned voluntarily. They were not required to go.

89. Further, there was no contract of employment to breach and if the directors had any claims against the Appellants, there was no document compromising them which might justify a compensation payment.

90. Indeed, we note that Mrs Reid's (then Miss Gough's) resignation letter expressly stated:

> "I confirm that I have no claim against the Company nor against any other person, firm or company, for loss of office or at common law or under statute or (without limitation) on any other account and that there is no

> agreement or arrangement, whether performed or executory, under which the Company might be or become liable to me on any account."

91. She was only later informed that the company was making a payment to her, so the payment could not have been in consideration of these assurances.

92. A major plank of the Appellants' argument was that the directors were paid for their services to the Appellants through their profit shares from Redbox and it was not unusual for remuneration for work for subsidiaries to be paid by the holding entity.

93. As we have noted, there is no evidence that the profit shares were intended to cover work for related entities. While the second point might apply in relation to Achilles, which was an indirect subsidiary of Redbox, it could not apply to Simrajsar. Although Simrajsar was a member of the LLP for a period, it never was a subsidiary, but a stand-alone company, beneficially owned by Mr Reid's children, albeit connected with Redbox as members of the LLP were directors. This throws further doubt on the Appellant's argument that the individuals were remunerated through their profit shares.

94. Mr Grierson did not provide submissions on why the payments were not "earnings", other than the argument that the individuals were remunerated by their partnership shares. As we have found, there is no evidence for that. He submitted that the payments were connected with the termination of an employment and that was sufficient to bring them within section 401 so that section 403 applied.

95. HMRC submitted that the lack of calculations showing how the £30,000 was arrived at in each case and the fact that it was the maximum exempt amount pointed to it being earnings. There is nothing intrinsically wrong with the payment being the maximum tax-exempt amount, but the lack of any rationale for the figure coupled with the absence of any compensation element further suggests that the payments were not, in fact, compensation for loss of office.

96. The mere timing of the payment does not determine the matter. A payment made on the termination of an employment can be a payment in respect of past work, which is a payment from "being an employee" and so an emolument of the employment and "earnings".

97. Nor is it fatal that a payment is an "*ex gratia*" payment. The definition of earnings includes "any gratuity or other profit" obtained by the employee.

98. The burden is on the Appellants to show that the payments were not earnings (or otherwise taxable) so that they were capable of falling within section 401. Proving a negative can be difficult, but in this case, the burden could have been discharged by showing what the payments were in fact for.

99. Taking all the evidence, and lack of evidence, into account, we are not satisfied that the payments can properly be described as compensation for loss of office. Nor has Mr Grierson provided any other evidence that they are something other than earnings.

100. The question is, what *were* the payments for?

101. We accept that the payments were not back payments of wages/salary. The payments were all of the same amount, but the directors had different roles and had worked for the respective Appellants for different periods of time.

102. Having considered all the evidence and circumstances, in our view the payments were gratuitous lump sums paid in recognition of the past service of the respective directors. In other words, each payment was a "gratuity or other profit … obtained by the employee" within section 62(2)(b) ITEPA. The payments were derived, in Lord Templeman's words, "from being an employee" and were not "attributable to something else". Accordingly, the

payments were emoluments of the directors' employments and so "earnings" subject to income tax under section 62.

103. The Determinations were therefore correctly issued. It follows that the Section 8 Notices were also correctly issued.

DID THE APPELLANTS FAIL TO TAKE REASONABLE CARE?

104. There is much case law about what constitutes failure to take reasonable care. Mr Gyasi referred to the case of *David Collis v HMRC* [2011] UKFTT (588) (TC) in which the Tribunal said at [29]:

> "We consider that the standard by which this [reasonable care] falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question".

105. We asked Mr Reid what steps were taken to enable the Appellants to decide that the payments were not taxable.

106. The Appellants did not take any advice on the matter. Mr Reid said that a Mr Drury, who became the sole director of Achilles after Mr Reid and Dr Emblin resigned and who was a Chartered Tax Advisor "worked with Redbox" although it was unclear in what capacity. Mr Reid also said it was a "small office" and that Mr Drury was aware of the payments and had not raised any issues. It seems simply to have been assumed that the payments were tax free as Mr Drury did not volunteer a contrary view.

107. The Appellants' and Redbox's businesses were tax related. The directors would have been aware that tax was rarely straightforward and reliefs are usually subject to conditions. A reasonable taxpayer in the position of the Appellants would have taken some advice about the tax treatment of the payments, even if they thought they were tax free, in order to check that was the case.

108. It would have been perfectly acceptable to take advice from an internal person with the necessary knowledge, such as Mr Drury, but one would expect there to be evidence of advice being sought, and the advice given. In the present case, the Appellants did not seek advice.

109. We find that the Appellants did not take reasonable care in completing their PAYE Real Time Information submissions.

110. The time limit for assessment is therefore six years from the end of the year of assessment to which it relates.

111. All of the assessments were in time (except for the 2015/16 Section 8 Notices which HMRC acknowledge are out of time).

DECISION

112. For the reasons set out above, we have decided that the payments made by the Appellants to the directors were "earnings" within section 62 ITEPA and according subject to income tax and National Insurance Contributions.

113. We dismiss the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

114. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 28th NOVEMBER 2024