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Case Number: TC09383

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal references: TC/2019/05354
TC/2019/05346
TC/2019/05391

INCOME TAX – payments made under the NHS Continuing Healthcare redress arrangements – whether interest element is "interest" for the purposes of section 874 of the Income Tax Act 2007 – yes – appeal dismissed

Heard on: 23-25 October 2023
Judgment date: 4 December 2024

Before

TRIBUNAL JUDGE KIM SUKUL

Between

NHS MID & SOUTH ESSEX ICB
NHS NOTTINGHAM AND NOTTINGHAMSHIRE ICB
NHS LINCOLNSHIRE ICB

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Hui Ling McCarthy KC, instructed by Bevan Brittan LLP

For the Respondents: Christopher Stone KC and Sam Way of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The hearing was conducted over 3 days. The documents to which I was referred were contained within the 1,433-page hearing bundle, authorities bundle (684 pages) and skeleton arguments from both parties.

2. The Appellants are Integrated Care Boards ('ICBs'). Due to organisational changes across the NHS, their names have changed from NHS Castle Point & Rochford Clinical Commissioning Group CCG (now NHS Mid & South Essex ICB), NHS Nottingham and Nottinghamshire CCG (now NHS Nottingham and Nottinghamshire ICB) and NHS Lincolnshire CCG (now NHS Lincolnshire ICB). They were formerly referred to as 'CCGs' in these proceedings.

3. The appeals are against assessments to income tax issued by the Respondents ('HMRC') on 23 March 2018 and 7 January 2019. Similar appeals were notified to the Tribunal by 216 other CCGs and I issued an order, on 15 March 2022, that the appeals be heard and case managed together, with the appeals of all other CCGs stayed under Rule 5 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

4. The appeals concern whether an amount of certain payments made by ICBs to various individuals under the NHS Continuing Healthcare ('CHC') Redress arrangements is "interest" for the purposes of section 874 of the Income Tax Act 2007 ('ITA 2007').

5. Having carefully considered the detailed submissions made by both parties, I dismiss this appeal. My conclusions regarding the key arguments are set out below.

LEGISLATION

6. Section 874 ITA 2007 provides:

> **"874 Duty to deduct from certain payments of yearly interest**
>
> (1) This section applies if a payment of yearly interest arising in the United Kingdom is made–
>
> (a) by a company,
>
> (b) by a local authority,
>
> (c) by or on behalf of a partnership of which a company is a member, or
>
> (d) by any person to another person whose usual place of abode is outside the United Kingdom.
>
> (2) The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the basic rate in force for the tax year in which it is made.
>
> …
>
> (5A) For the purposes of subsection (1) a payment of interest which is payable to an individual in respect of compensation is to be treated as a payment of yearly interest (irrespective of the period in respect of which the interest is paid)."

7. It is common ground that the ICBs meet the definition of a company for the purposes of the statute.

GROUNDS OF APPEAL

8. The ICBs appeal on the following grounds:

"a. The Amount paid by the Appellant to an individual under the CHC Redress arrangements is not a payment of "*interest arising*" (per s.874(1)) and therefore falls outside the scope of s.874 ITA 2007.

b. Further or alternatively, the Amount paid is not a payment of "*yearly interest arising*" (per s.874(1)) and therefore falls outside the scope of s.874 ITA 2007.

c. Further, the Amount paid is not "*a payment of interest which is payable to an individual in respect of compensation*" (per s.874(5A)) because:

i. it is not "interest" (per paragraph a above); and/or

ii. it is not "payable… in respect of compensation".

Accordingly, the deeming in s.874(5A) does not apply and the Amount paid therefore falls outside the scope of s.874 ITA 2007."

ISSUES FOR DETERMINATION

9. The issues to be determined are:

(1) Are the sums assessed by HMRC "interest arising" within the meaning of section 874(1) ITA 2007?

(2) If so, are the sums "yearly interest" within the meaning of section 874(1) ITA 2007?

(3) If the sums are not "yearly interest", are they nevertheless treated as yearly interest because they are "payable to an individual in respect of compensation" within the meaning of section 874(5A) ITA 2007?

BURDEN OF PROOF

10. The burden of establishing that the conditions in section 874 ITA 2007 are not satisfied rests with the ICBs by virtue of section 50(6) Taxes Management Act 1970. The standard of proof is the civil standard, namely on a balance of probabilities.

AGREED FACTS

11. The parties agreed the following facts:

"CHC FRAMEWORK

Preamble: Rights to care in the NHS

2.1 The NHS is a national publicly-funded system of healthcare. The relationship between the NHS and patients is described by the NHS Constitution.

2.2 NHS services are either provided through direct access or on a referral basis following consultation with primary healthcare services. Some services, known as secondary care, are only available through referral by a primary healthcare provider.

Current NHS CHC Approach

2.3 CHC is a complete package of ongoing care arranged and funded solely by the NHS, where it has been assessed that the individual has a "primary health need".

2.4 Guidance on provision of CHC is contained in the National Framework for NHS Continuing Healthcare and NHS funded Nursing Care, first published by the Department of Health in June 2007. This document has been updated in 2009, 2010, 2012 and 2018.

2.5 The process since 2007 (and throughout the period covered by the assessments in this case) has been as follows:

2.5.1 If it appears to a CCG that an individual may have a need for NHS funded continuing healthcare, the CCG must conduct an assessment; and

2.5.2 If the individual is assessed to be eligible for NHS continuing healthcare because they have a 'primary health need' the CCG must then make a service provision offer. (This may be care at home or in a care home. If the individual wants a care at home package this may involve consideration of a direct payments arrangement.)

2.6 In deciding whether an individual has a 'primary health need' the CCG must consider whether the nursing or other health services required are (a) in circumstances where residential accommodation with personal care or nursing care is to be provided, more than 'incidental or ancillary' to the provision of accommodation which a social services authority is (or would be but for a person's means) required to provide or (b) of a nature beyond which a social services authority could be expected to provide, and, if so, it must decide that the person has a primary health need.

2.7 A person only becomes eligible for CHC once a decision on eligibility has been made by a CCG.

2.8 If the outcome of the CCG's assessment is a determination of eligibility, this means that the NHS takes over the whole of the funding of the health and social care needs of the individual. Where the individual is placed in residential accommodation such as a nursing home, this means paying the full cost of the nursing home subject to any non-care add-ons that the patient may choose to buy. The NHS does not generally fund housing costs when the individual is receiving a CHC package at home.

2.9 If an individual or their relatives are unhappy with the decision on an assessment for CHC, they have a statutory right to a review within the CCG and, if they are still dissatisfied with the outcome, a further right to ask for a referral to an Independent Review Panel convened by NHS England.

Eligibility and payment of CHC funding

2.10 Where a person is eligible for CHC, in terms of effecting payment, the following mechanisms apply:

2.10.1 Where CHC funding is available, the care home (which may be run by private companies, voluntary or charity organisations, or sometimes by local authorities, but not the NHS or CCGs) will invoice the CCG directly.

2.10.2 Where a patient makes the arrangements themselves and does not receive fully funded care, the patient is required to pay (in full or in part) the care home's invoices directly for the services they receive. It is not the case that the NHS runs care homes (and therefore that either the NHS in general or CCGs receive patients' money that they should not have received).

2.10.3 Where the resident is entitled to local authority support in whole or in part, the general practice will be for the local authority to be invoiced and pay for the full sum, and then recover the resident's contribution separately. There is an exception to this where the resident has exercised the right to choose a care home which is more expensive than the local authority would pay for, and the resident will then be invoiced for the 'top-up' fee.

3 THE OMBUDSMAN REPORTS

3.1 A report by the Health Service Commissioner in 2003 ("NHS Funding for long term care", the "2003 Ombudsman Report") identified issues with the decision-making process and assessment criteria for determining eligibility for CHC funding. More specifically:

3.1.1 The 2003 Ombudsman Report concluded that as a result of maladministration by both the Department of Health and local health authorities, a significant group of patients might have been wrongly made to pay for their care in a home. One example of such maladministration was that health authorities had in some cases been using unlawfully restrictive criteria in order to determine whether or not CHC funding was available with the result that CHC funding had wrongly been denied in certain cases.

3.1.2 The Report concluded (at para.38) that:

- "The Department of Health's guidance and support to date has not provided the secure foundation needed to enable a fair and transparent system of eligibility for funding for long term care to be operated across the country;

- What guidance there is has been mis-interpreted and mis-applied by some health authorities when developing and renewing their own eligibility criteria;

- Further problems have arisen in the application of local criteria to individuals;

- The effect has been to cause injustice and hardship to some people."

3.1.3 The Commissioner recommended that strategic health authorities and primary care trusts should (at para.39):

- "Review the criteria used by their predecessor bodies, and the way those criteria were applied, since 1996. They will need to take into account the Coughlan judgment, guidance issued by the Department of Health and my findings;

- Make efforts to remedy any consequential financial injustice to patients, where the criteria, or the way they were applied, were not clearly appropriate or fair. This will include attempting to identify any patients in their area who may wrongly have been made to pay for their care in a home and making appropriate recompense to them or their estates."

3.1.4 The Commissioner also recommended that the Department of Health should (at para.40):

- "Consider how they can support and monitor the performance of authorities and primary care trusts in this work. That might involve the Department assessing whether, from 1996 to date, criteria being used were in line with the law and guidance. Where they were not, the Department might need to co-ordinate effort to remedy any financial injustice to patients affected;

- Review the national guidance on eligibility for continuing NHS health care, making it much clearer in new guidance the situations when the NHS must provide funding and those where it is left to the discretion of NHS bodies locally. This guidance may need to include detailed definitions of terms used and case examples of patterns of need likely to mean NHS funding should be provided;

- Consider being more proactive in checking that criteria used in the future follow that guidance;

- Consider how to link assessment of eligibility for continuing NHS health care into the single assessment process and whether the Department should provide further support to the development of reliable assessment methods."

3.2 A follow-up report was published by the Health Service Commissioner in December 2004 which recorded, inter alia:

'Restitution

40. The aim of carrying out the retrospective reviews was to identify any individuals who had been wrongly refused continuing care full funding in the past and to make appropriate restitution. The Department of Health have provided about £180 million in funding for restitution to date. However, we have received a number of complaints concerning delays on the part of some NHS bodies in paying monies owed or recompense agreed. In addition, some claimants have been required to sign a declaration that the payment is for 'full and final settlement' when the payment is for monies that should rightly have been paid to the patient or the relatives at the time. We are also considering some complaints that the rate of interest applied to some retrospective payments has not been appropriately calculated or that the level of restitution granted does not provide adequate compensation for the previous failure to grant continuing care funding.'

3.3 In March 2007, the Health Service Commissioner (by this point renamed the Parliamentary and Health Service Commissioner) published a further report ('Retrospective funding and redress HC386') which recorded that whilst some people had received redress for the maladministration identified in 2003, a number of complaints had been received about the amount of redress paid by CCGs. The nature of the complaints was that the redress received had failed to compensate patients or their relatives fully for all the financial losses they had suffered.

3.4 In summary, the Commissioner recommended, inter alia, that (pp.5-6):

- 'There should be properly considered national guidance which includes a reminder that PCTs can make compensation for financial loss, including interest, which is demonstrably attributable to the wrongful denial of continuing care funding and is aimed at returning the individual to the financial position he or she would have been in but for the maladministration; …

- [Published guidance from the Department of Health] should give clear guidance to the NHS about how to calculate interest payments;

- and make it clear that, where inconsistencies in using the Retail Price Index have resulted in significant financial injustice, adequate remedy should be made;'

3.5 On 14 March 2007, Guidance was issued by the Department of Health entitled "NHS Continuing Healthcare: Continuing Care Redress". This was refreshed and reissued in 2015 by NHS England."

EVIDENCE

12. The documentary evidence before the Tribunal has been referred to at [1] above. In addition, witness statements were adduced from Nicky Yiasoumi on behalf of the ICBs and David Gallagher on behalf of HMRC. Neither party disputed the evidence led by the other party and the witnesses were not required to attend the hearing to be cross-examined on their statements.

Witness Evidence

13. The evidence from Nicky Yiasoumi, Deputy Director in the All-age Continuing Care Programme at NHS England, included the following:

> "14. If it was decided that a reimbursement would be made, the CCG then needed to work with the individual and/or the individual's family to ascertain the amounts they had paid out for care and the provision of healthcare. This would usually include the individual and/or their family providing invoices and bank statements to the CCG. I would work with the strategic finance team to obtain this information and would then make sure that it was all collated as well as checking identification documents to ensure that any reimbursements were going to the correct person and bank account.
>
> 15. Using the evidence provided by the individual and/or their family, I would then work with the strategic finance team to work out what kind of re-imbursement was required in the circumstances. This would be logged in the claims management process.
>
> 16. An element referred to as "interest" was generally considered at this point and would be calculated up to the date that the BACs payment went out. Up until April 2015, when the NHS Continuing Healthcare: Refreshed Redress Guidance was published, there were two rates that could be used; the retail price index (RPI) or the county court judgment rate. In deciding which rate to use, this would usually be the rate that was most favourable to the CCG, however sometimes calculations using both rates would be sent out to the relevant individual/family for them to decide. After April 2015, guidance was in place that only the RPI would be used.
>
> 17. I also engaged with the Strategic Health Authority from a claims and compensation component to determine what ex gratia meant in the context of these calculations. Such a payment would be an acknowledgement that the individual/their family had suffered some sort of disadvantage in not having received the continuing healthcare funding at that time, for example if an individual had spent a significant sum of money on staying in a hotel. There was no set basis or calculation to use here and whether an ex gratia payment was made was decided on a case by case basis.
>
> 18. Once the above calculations had been completed, the CCG would send out a letter to the individual and/or their family confirming what it was believed that they were owed. This would often include a template of how the sums had been calculated. The letter would ask them to sign and return a signed copy of the letter to the CCG if they were happy with the amount. Sometimes an individual and/or their family would respond to the CCG and confirm they were happy with the calculation or sometimes they would come back to us and say it needed to be adjusted, from which the reasoning provided would be considered by the CCG."

Documents

14. Template letters proposing payment in a specified amount include the following:

> "To ensure that you are reimbursed correctly, and within Department of Health guidelines I have performed a calculation that adds inflation value to the basic sum due based on the movement in the Retail Price Index over the period from when the costs were originally incurred to the final date of payment by the NHS."

15. The Retrospective Continuing Care Funding and Redress report of 13 March 2007 states:

"Final guidance on interest rates

16. In November 2003, the Department issued 'Continuing Care guidance on interest payments' to the NHS. They advised that, subject to local legal advice, the NHS should include interest based on the Retail Price Index (RPI) when paying recompense. This developed their earlier advice of April 2003 to NHS finance managers: 'the NHS may be expected to pay interest on claims. Further advice is being developed… it may be appropriate for NHS bodies to make provision for interest based on the base rate in operation for each financial year affected.' The Department have since clarified to my staff that the April 2003 guidance on estimating provisions was not intended to give advice to the NHS about interest for individual payments. In the course of my investigation, the Department provided the formula that they had expected the NHS would use to calculate RPI as a simple rate of interest. The Department clarified that they expected that PCTs should satisfy themselves that their method of calculation had a minimal financial impact on the final value of recompense and that if the impact was significant PCTs might use the more complex formula to calculate compound interest.

17. The November 2003 guidance on interest rates did not include the Department's rationale for advising the NHS to use the RPI and I have seen no evidence that this was provided in any subsequent communication with SHAs and PCTs. Further, in the complaints put to me, the rational for, and in some cases an explanation of how, the RPI had been applied was not communicated by PCTs to individuals when it was used to uplift restitution payments.

18. In January 2004 a SHA queried the Department's November 2003 guidance on interest payments. They asked whether a higher rate than the RPI might be appropriate and how to respond to complainants on this point. In response, the Department's Continuing Care Lead wrote 'The answer is don't draw attention to it and say Department has issued guidance on interest… The explanation is that recompense means restitution of the actual cost of NHS continuing care that should have been provided… so recompense is of the funds not properly provided, not what the individual might have paid… The recompense therefore covers the cost of services not provided. This is the system being used across the country, and money has been made available to the NHS to support this' (by email dated 16 January 2004). This response did not explain why the Department decided to advise the use of the RPI, or that this decision should be subject to local legal advice.

19. In the course of my investigation, the Department subsequently provided to my staff two explanations for the use of the RPI. The first reason the Department gave was that the RPI was widely used by the NHS to measure increases in the cost of care. They said that they had reasoned that the NHS's experience in making such calculations based on a RPI formula would make it the most straightforward method for them to use when calculating interest for continuing care recompense payments. A second reason given by the Department was that they wished to avoid overcompensating individuals because some individuals, when they were wrongly denied continuing care funding, received benefits they would not otherwise have been entitled to. The Department, therefore, contend that the retention of these benefits, combined with the use of the RPI, was equivalent to the use of a higher rate of interest.

…

> 32. There are individuals who complain that, had their relatives' continuing care been correctly funded, they would have received a higher rate of interest on the money used to fund care in a bank or building society savings account or through other financial investment. On the issue of interest payments on financial redress, I consider that normally interest should be paid at the rate applied to County Court judgment debt. However, I also consider that payments made from the public purse should be considered in the round. Therefore, in the example of redress for the wrongful denial of continuing care funding, I would also take account of social security benefits and state pension payments received by care home residents which they would not have been entitled to had their care been correctly funded by the NHS. Many individuals retained benefits and state pension payments, as a result of the incorrect decision about continuing care funding. Having considered some specific cases it appears that, in the round, some individuals have been financially advantaged by the combination of retaining benefits and state pension payments, receiving recompense for the amount of fees paid and, in addition, receiving interest using the RPI. This is when compared to receiving interest at the rate applied to County Court judgment debt and taking account of benefits retained.
>
> …
>
> 34. I would not consider the use of the RPI to be reasonable as a rate of interest unless a clear case was made that it was appropriate. In the circumstances of continuing care retrospective recompense, considering financial recompense individuals have received in the round, including their retained benefits (arising from the national agreement between the Department of Health and the Department for Work and Pensions), I have concluded that this has not resulted in an unremedied injustice for most people."

16. The NHS Continuing Healthcare: Continue Care Redress report of 14 March 2007 states:

> "1. Further to the Parliamentary and Health Service Ombudsman's report, "Retrospective Continuing Care Funding and Redress" (dated 13 March 2007), this guidance aims to help PCTs review the approach they took, and are taking, to settle cases arising from Continuing Care reviews since 1996. It is relevant to cases where it has been decided that continuing care funding has been wrongly withheld. This includes cases which have already been considered, where there is a risk that the original settlement falls short of that which the Ombudsman would expect, and outstanding cases which have yet to be concluded. It has been prepared in consultation with the Ombudsman's office.
>
> 2. The purpose of this guidance is to:
>
> - remind PCTs of their responsibilities concerning maladministration and redress;
>
> - remind PCTs that they are empowered to make ex-gratia payments where appropriate;
>
> - advise PCTs how to calculate interest payments for redress;
>
> - remind PCTs about the powers of local authorities regarding deferred payment agreements."

17. The NHS Continuing Healthcare Refreshed Redress Guidance of 1 April 2015 states:

> "4. This guidance also retains the previously established principle that 'where maladministration has resulted in financial injustice, the principle of redress should generally be to return individuals to the position they would have been in but for the maladministration which occurred.'
>
> 5. This guidance does not remove the requirement for CCGs to consider the specific circumstances of each individual case when determining the appropriate level of redress.
>
> 6. The guidance recommends that the Retail Price Index is the appropriate interest rate to apply to redress.
>
> …
>
> Interest rate
>
> 3. Redress is about placing individuals in the position they would have been in had NHS Continuing Healthcare been awarded at the appropriate time and not about the NHS or the public profiting from public funds.
>
> 4. CCGs are advised to apply the Retail Price Index for calculation of compound interest when considering redress cases. The index is calculated monthly, with an average for each calendar year. CCGs are advised to apply the average rate for the year for which care costs are being reimbursed."

FINDINGS

18. The evidence to which I have referred makes reference to maladministration. I make no finding on the issue of whether there was maladministration on the part of the ICBs. That is not a matter for determination before this Tribunal and it is not a matter which requires consideration for the purposes of this appeal.

19. The parties are in agreement that patients had no legal entitlement to CHC payments from an ICB prior to the ICB making a decision in their favour, and that patients had lawfully been required to pay for their care prior to that decision being made.

20. On the basis of the evidence before me, it is my finding that redress payments were made by the ICBs to make restitution for patients being wrongly refused continuing care full funding at the appropriate time. The redress payment compensates the patient for not having the CHC payment sooner, such that they had to expend their own money in the interim.

21. The interest element was included to ensure that the redress payments placed individuals in the position they would have been in had CHC payments been awarded at the appropriate time. I therefore find that the interest element of the payment was made because the patients had been deprived of that money for a period.

DISCUSSION

22. The three issues to be determined concern whether, for the purposes of section 874 ITA 2007, the sums assessed by HMRC are "interest arising", whether the sums are "yearly interest" and whether they are "payable to an individual in respect of compensation".

23. The submissions made by the ICBs are focused on the first issue, namely whether the sums are interest. No separate arguments were made on behalf of the ICBs regarding the yearly interest or compensation points. The ICBs submit that it is open to the Tribunal to determine the appeal on the basis of those other grounds, should it decide to do so.

Interest Arising

The ICBs argue that:

(1) The element of a composite redress payment that has been labelled "interest" in the redress guidance and calculated by reference to RPI or the County Court rate is not

"interest" within the meaning of the tax legislation because a sum is not interest just because it might be labelled "interest", and a sum is not interest just because it is calculated in the same way as interest. Other than the label and the method of calculation, nothing in the nature of the payments themselves is capable of making them interest for tax purposes.

(2) The cases show that "the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date" (*Riches v Westminster Bank Ltd* [1947] AC 390 ('*Westminster*') at 400). In other words, interest is a payment designed to compensate a claimant for being kept out of his money (i.e. from the time that he had an entitlement to that money to the date of eventual payment) – or, to put the same point another way, because the defendant ought to have paid the money claimed at an earlier date and had not done so (taken from the Supreme Court's summary of the case law in *Joint Administrators of Lehman Brothers International (Europe) (In Administration) v HMRC* [2019] UKSC 12 ('*Lehman Brothers*') at [46]).

(3) In contrast, because of the particular way in which the healthcare regime operates in law, the individuals never had any entitlement to the money they latterly received by way of redress as there is no directly enforceable right to healthcare. A right to CHC arises if and only if the individual has had an eligibility decision in their favour. If a person is not eligible for CHC because no such assessment has been made, they are also not entitled to money.

(4) The CHC Redress scheme was not created as a mechanism of settling valid legal claims of individuals or of repaying money that the individuals had an entitlement to. No right to any money existed. Rather, the scheme was created to correct perceived injustice.

(5) The amount under dispute is not "interest" properly understood because there is no principal sum (in the relevant sense) to which the interest relates. This is because there was no entitlement or debt due to an individual throughout the period of time where they had no eligibility decision and thus had to pay for their own care – and so no period of time during which the individual could be said to be kept out of their money.

(6) Matters would have been different if there was a general statutory right to CHC. In that case, it would be the case that an individual having to pay his own care home fees was wrongly parting with "his" money – and from the day he paid it away, he would have a legal entitlement to its return, which is not the case here.

24. HMRC argues that:

(1) The word "interest" is not a mere label that the parties used in an agreement. Rather, it is the word used by the NHS, in various Ombudsmen reports, by an ICB when communicating to patients, and by their witness in her witness statement, precisely because it is the most accurate word to describe that element of the payment made to patients.

(2) The interest element was intended to be, and was, compensation to the recipient for the time value of the money that he was required to incur on social care and healthcare because he was not correctly assessed for CHC payments at an earlier date. The interest element compensates the patient for not having had enjoyment of that money in the period between when it was spent and when it was reimbursed by way of the restitutionary redress payment.

(3) The character of the payments and the reason why they were made is described consistently throughout the documentary evidence spanning 20 years. The substance of the interest element and the reason it was paid was that it compensated the patient for not having the money when he should have received it – compensation for the time value of money.

(4) It is incorrect to say that in law there can be no principal sum in respect of which interest is calculated if there is no subsisting legal entitlement to the principal sum. The requirement for a pre-existing debt is demonstrably not correct because it fails to address an entire class of case in which one party successfully sues another in the civil courts for damages. Statutory interest is discretionary but invariably awarded. In respect of special damages (pecuniary loss suffered by the claimant), interest is typically awarded from the date of loss until the date of judgment. In those circumstances (typified by a personal injury claim), the claimant will have no legal entitlement to the principal sum on which the interest is calculated until judgment for that sum is ordered by the court. There is no sense in which prior to judgment the sum of money representing the damages ordered belongs to the claimant or is owing by the defendant to the claimant. The claimant has no proprietary or other legal right to that sum until they receive judgment. The interest represents compensation for the time value of money, recognising the fact that the claimant has incurred losses and been required to expend his own money (e.g. on medical costs) as a result of the fault of the defendant, who conversely has had the benefit of the use of that same money in the period between the loss being incurred and judgment.

(5) There is no relevant distinction for present purposes between a contested personal injury claim for damages and the CHC redress scheme under which the payments were made:

> (a) As a result of the actions of the payor, the payee has suffered loss and incurred expense that they would not otherwise have done. When the payee incurred the expense, the payor had no obligation to make any payment to him.
>
> (b) At a later date, the payor is required to make a payment to the payee to recompense him – in a personal injury claim as a result of a judgment by the court; under the redress scheme as a result of the ICB making a decision in his favour.
>
> (c) The measure of damages is the tortious measure intended to place the payee in the position he would have been in but for the actions of the payor.
>
> (d) Interest is awarded on the principal sum to reflect the period of time since the payee has suffered loss.

(6) A payment of compensatory damages (which is the fundamental nature of a redress payment), is a sum that is paid following a recognition that a person has suffered a wrong which has caused them financial loss. The effect of a subsequent decision that a person is entitled to redress is to recognise retrospectively that the person was due a payment of money, or should not have had to make payments of their own, at an earlier time, and therefore should be placed in the position that they would have been in had they either been paid that money or not been required to make payments of their own.

(7) In the present case, although there is no entitlement to funding under CHC unless and until a decision is made in an individual's favour, the payment of redress to an individual for maladministration in making that decision is premised on that individual

having had to wrongly make payments to fund care that they should not have been required to pay. The redress is an amount which is properly a sum which the ICBs accept that they have an obligation to pay to that person in restitution of those losses. Although that person may not have had a directly enforceable claim in law for those sums, they have incurred a loss which the ICBs are obliged to compensate them for.

Legal Principles

25. There is no statutory definition of "interest". Descriptions of "interest" given in the cases cited by the parties include, "payment by time for the use of money" (*Bennett v Ogston* (1930) 15 TC 374 at 379), "compensation for delay in payment" (*Bond v Barrow Haematite Steel* [1902] 1 Ch 353 at 363) and "compensation by time for the use of the money" (*Chevron Petroleum (UK) Ltd v BP Petroleum Development Ltd* [1981] STC 689 ('*Chevron*') at 697).

26. In the case of *Westminster*, the House of Lords held that the part of the overall damages payment for a failure to receive a sum of money which would have been due had the defendant not acted fraudulently, calculated by applying an interest rate to the sum which should have been received, from the date when it should have been received to the date of the judgement, was "interest" for the purposes of the relevant tax legislation. The judgment states, at 396–397:

> "The appellant contends that the additional sum of £10,028, though awarded under a power to add interest to the amount of the debt and though called interest in the judgment, is not really interest such as attracts income tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest. Before the coming into force of the Act of 1934, the rule at common law prevailed that when an action for the payment of a debt succeeded the court could not add interest on the debt down to judgment unless interest was payable as of right under a contract expressed or implied. Provisos (b) and (c) of s 3 show that these exceptions were not touched by the Act of 1934 and the discretion conferred on the court by the enacting words is a direction to add interest when judgment is given for a debt or damages, although there is no contractual right to interest. The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest. This is the view taken by Evershed J and by the Court of Appeal (Du Parcq, and Morton LJJ and Cohen J) and this view, in my opinion, is correct."

27. and at 399–400:

> "The contention of the appellant may be summarily stated to be that the award under the Act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due to the respondent from the appellant and hence the deduction made as being required under the All Schedules Rules of the Income Tax Act, 1918, r 21, is not justified because the money was not interest. In other words, the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. Evershed J, in his admirable judgment, rejected that distinction. The appellant's contention is, in any case, artificial and is, in my opinion, erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he

> had had the use of the money, or conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract, express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute, as, for instance, under the Bills of Exchange Act, 1882, s 57, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same and the compensation is properly described as interest."

28. In *Chevron*, contributions for shared expenditure on the development of an oil field required payment of total sums including "interest", which was to be ascertained by adjustments as work progressed. The decision on whether tax should be deducted from the interest element of the payments states, at 695-696:

> "The basic submission of counsel for the Chevron group was that for a payment to be 'interest' in the true sense of the word there must be some subsisting indebtedness during the period for which the 'interest' was accruing. If there was no such indebtedness, then no subsequent computation of 'interest' for some past period could give that 'interest' the true quality of being interest at law. He took as an example a purchase of whisky in bond by A for £100, with A thereupon giving his friend B an option to buy that whisky at any time in six months for £100 plus 'interest' at the rate of 12% per annum from the time when A bought the whisky until the time when B exercised the option. If B exercised the option after three months, he would have to pay £103; and this would be a simple purchase for the single sum of £103, and not a purchase for £100, with £3 as interest, in the true sense of that word, on the £100.
>
> Counsel for the BP group saw nothing to quarrel with in the whisky example of counsel for the Chevron group; nor did I. The option is a simple option to purchase at a price calculated in a particular way. The 'interest', like the 'interest' in the Euro Hotel case, is a mere unit of calculation, and not interest in the true sense. At no time before the option was exercised was B under any obligation whatever to A, whether vested or contingent, or whether for the £100 or for an indeterminate sum, or anything else. B could, of course, put himself under an obligation to A by exercising the option; but unless he did this, he was free from even a contingent liability to A for anything.
>
> That, however, seems to me to be quite different from the present case. Here, from the outset the operating parties were making themselves legally liable… to share the expenditure according to their respective interests in the oil field, as estimated from time to time, and to make further payments, or become entitled to repayments, when their respective interests were redetermined. All that was done was done under a continuing legal obligation binding all the parties; and each party knew from the outset that if at any stage it was found that any party's payments had exceeded the true liability, as redetermined, that party would receive a sum in respect of the excess payment, while if it was found that that party had not paid enough, that party would have to pay a further sum. In each case the sum received or paid would include a sum in respect of what was called 'interest'. True, this would not be calculated directly on the rest of the sum that was repayable or receivable, but by more complex means. Nevertheless, for those who

received it, it would represent some compensation for their money having been used towards the discharge of an obligation which had since been ascertained to be an obligation of another, and, for those who paid it, it would represent some compensation for those whose money had been used towards the discharge of what had since been ascertained to be an obligation of the payers. Though the case is more complex than that of a simple debt carrying interest, I think that the requirements set out in the *Euro Hotel case* [1975] 3 All ER 1075 at 1084, [1975] STC 682 at 691 are satisfied.

Counsel for the Chevron group contended that since it could not be foretold which of the operating parties would become debtors and payers, and which would become creditors and receivers, the liability of the former was contingent and not vested, and so there was no debt or other sum on which there could be 'interest' in the true sense of the word. I do not think that this follows. I cannot see why the contingency should deprive the so-called 'interest' of the quality of being true interest. If X lends £100 to Y, the loan to carry interest at 10% per annum, why should a provision for repayment and interest to be waived in certain events, or for repayment with interest to be made only in certain events, prevent the interest from being true interest if in the event it becomes payable?

Counsel for the BP group naturally relied on the decision of the House of Lords in *Riches v Westminster Bank Ltd*. There, it was established that when the court exercised the power conferred by the Law Reform (Miscellaneous Provisions) Act 1934, s 3(1), to make an award of interest when giving judgment for the recovery of a debt or damages, the sum awarded as interest was truly 'interest of money' for income tax purposes. The power is a discretionary power; if an award is made, it may be made on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, and the rate of interest is to be such rate as the court thinks fit. It is therefore plain that until the court has made an award of interest, it is wholly uncertain whether any interest at all will be given, and, if it is, for what amount it will be. It is also clear that when a sum of interest is awarded, covering a period which may be many years in length, that sum comes into existence uno flatu by the judgment of the court. Despite these characteristics, the sum so awarded is of an income and not a capital nature; and this depends not on the statutory use of the word 'interest' but on the substance and nature of the sum so awarded.

Counsel for the Chevron group contended that this decision did him no harm. Although the obligation to pay interest was created by the judgment, the award was sum awarded as interest was truly 'interest of money' for income tax an award of interest when giving judgment for the recovery of a debt made on the basis that the defendant ought to have paid the money sued for at an earlier date and had not done so. The interest awarded was interest in respect of the plaintiff having been wrongfully kept out of the money... That was not so in the present case, where the operating parties had duly paid all that was due from them under the contract at the time when it was due.

I do not think that this point, or, indeed, any other point, suffices to distinguish the *Riches* case. If a contract (eg with a builder) provides for specified payments to be made on account of the final liability, and for interest at a specified rate to be paid on any balance when the final accounts have been agreed, the fact that all the specified payments on account were punctually made does not, it seems to me, prevent the interest payable on the

> balance from being truly 'interest'. Even though the paying party has been guilty of no default, the receiving party has been kept out of the use of the balance found to be due on the taking of the accounts. I certainly do not think that it is essential to the nature of 'interest' that it should be a form of punishment for wrongdoing or failure to perform an obligation; it suffices that it is compensation by time for the use of the money... After all, if the payments on account turn out to be under-estimates, and the accounts show that a further sum is payable, the money in the hands of the payer has been (or could have been) earning interest in the meantime; and the provision in the contract that he is to pay it over with interest in essence means that he will not profit, and the receiver will not suffer, from the payment being delayed until the accounting has taken place.
>
> I have more than once referred to the nature of the payments being a matter of substance…. Stripped to its essentials, the obligation here is for each operating party to pay to the UO the appropriate percentages of the entire expenditure from the start, with interest, if that exceeds the total payments made by the operating party, with interest. That appropriate percentage has been expended by the UO on behalf of the operating party, and I can see no reason for treating the interest payable to the UO as not being truly interest, subject to credit against it being given for the interest due on the payments to the UO made by the operating party."

29. In determining whether the sums in question in this case are "interest", I am guided by the decision in *Pike v HMRC* [2014] STC 2549 at [18] where the Court of Appeal summarised six characteristics of interest which had been identified by the Upper Tribunal:

> "The UT, whilst noting that paragraph 13 did not define 'interest', said that 'interest' for paragraph 13 purposes did not bear any special meaning. It was possible to identify certain characteristics of an amount payable by way of interest. First, it is calculated by reference to an underlying debt. Second, it is a payment made according to time, by way of compensation for the use of money. Third, the sum payable accrues from day to day or at other periodic intervals. Fourth, whilst the payment so accrues, it does not, in order for it to be interest, have to be paid at any intervals: it is possible for interest not to become payable until the principal becomes payable (see *Willingale*). Fifth, what the payment is called is not determinative; the question must always be one as to its true nature. Sixth, the fact that an interest payment may be aggregated with a payment of a different nature does not 'denature' the interest payment (*Chevron Petroleum UK Ltd v. BP Petroleum Ltd* [1981] STC 689, at 694, per Megarry V-C)."

30. I am also guided by the High Court decision in *Re Euro Hotel (Belgravia) Ltd* [1975] STC 682 ('*Euro Hotel*'), which states, at 690:

> "The word "interest" has a wide and flexible meaning; … It has, quite rightly, not been suggested that the language used by the parties to an instrument in describing payments to be made under it can bind the Inland Revenue, or affect the operation of a statute. The question must always be one of the true nature of the payment. The language, of course, is important, for the words used may mould or affect the nature of the obligation; but one must always return to a consideration of what, given that language, the payments made under the obligation truly are: are they "interest of money" within the meaning of the statute?
>
> The relevant sense of the word "interest" as given in the Shorter Oxford English Dictionary is "Money paid for the use of money lent (the principal),

> or for forbearance of a debt, according to a fixed ratio (rate per cent)". A similar idea is conveyed by the language used in certain authorities …
>
> It seems to me that running through the cases there is the concept that as a general rule two requirements must be satisfied for a payment to amount to interest, and a fortiori to amount to "interest of money". First, there must be a sum of money by reference to which the payment which is said to be interest is to be ascertained. A payment cannot be "interest of money" unless there is the requisite "money" for the payment to be said to be "interest of ". Plainly, there are sums of "money" in the present case. Second, those sums of money must be sums that are due to the person entitled to the alleged interest; and it is this latter requirement that is mainly in issue before me."

31. Having considered the relevant cases, I agree with the comments made by Judge Beare in *Wilkinson v HMRC* [2020] UKFTT 0362 ('*Wilkinson*'), a case which concerned whether the interest element of a redress payment for mis-sold interest rate hedging products was "interest" for the purposes of the Income Tax (Trading and Other Income) Act 2005. Judge Beare stated as follows:

> "60. It may be seen from the cases described above that:
>
> (1) if a payment constitutes "interest" properly so called, it will not cease to be such merely because it is included in a greater aggregate sum of money – see *Westminster*;
>
> (2) in order for a payment to be "interest" properly so-called, it merely needs to be compensation for the time value of money. In other words, it must be compensation to the recipient for the profit that the recipient might have made if he or she had had the relevant money on time or compensation to the recipient for the loss the recipient has suffered because he or she did not have the relevant money on time – see *Westminster*;
>
> (3) in order for a payment to be "interest" properly so called, there needs to be a sum of money by reference to which the payment was ascertained and that sum of money needs to be due to the person entitled to the payment– see *Euro Hotels*; and
>
> (4) however, it is not necessary for the sum of money in respect of which the payment has been calculated to be known to be due on the date on which the payment starts to accrue. It is possible to determine with the benefit of hindsight that the relevant sum should have been due on a particular date and then to calculate the payment on the relevant sum from that date – see *Westminster* and *Chevron*."

Ballantine

32. The ICBs argue that their position is analogous to the position in the case of *IRC v Ballantine* (1924) 8 TC 595 ('*Ballantine*'), a decision of the Court of Session which held that an amount included in an award made by an arbitrator was not "interest of money" for the purposes of income tax, but was instead "substantially an assessment of compensation to the contractors for their outlays and losses under the particular circumstances in which those outlays and losses were incurred". The Lord President commented (at 611-612):

> "It is impossible of course to know precisely the reasons which influenced the arbiter in taking the plan of fixing three capital sums in the first instance as at the date of the lodging of the amended claim, and then adding interest on those sums from that date until payment. It is enough that that was the mode he thought fair for the purpose of assessing compensation to the contractors in the circumstances of the case before him. Now it is familiar that an assessment of the kind may contain as one if its constituent elements

an allowance in respect that the claimant has lain for a long time out of his remedy. The propriety of such an allowance may depend on the character of the claim, and its amount may depend on many considerations of which time is only one. But an interest calculation is a natural and legitimate guide to be used by an arbiter in arriving at what he thinks would be a fair amount. In most cases in which such an allowance is a constituent of an award it does not separately appear, but is slumped along with other elements in the gross sum decerned for; but there is nothing to prevent an arbiter, if he thinks it just and reasonable in a particular case, to make the allowance in the form of an actual interest calculation from a past date until the sum fixed as at that date is paid. In all such cases, however, whether the allowance is wrapped up in a slump award or is separately stated in the decree - the interest calculation is used in modium aestimationis only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time. It is not therefore "interest of money" chargeable under Case III of Schedule D.

It is possible that a different question might have been presented if the arbiter had made a slump award assessing compensation to the claimants for their "additional costs, loss and damage" as at its own date, and providing that the claimants should be entitled to interest on the amount so awarded from that date until payment. The form of the award in the present case seems to me to make it impossible to distinguish the character of the so-called interest (a) between the 4th of November, 1918, and the date of the award, from its character (b) between the date of the award and the date of payment. We heard no argument specially directed to the case of interest ordered to run on a slump award of compensation or damages, and I express no opinion upon it. It may be observed, however, that there is at least one recorded opinion adverse to the chargeability of such interest. In *Lee's Trustee v Inland Revenue* ([1916) S.C. 188), Lord Johnston, speaking I think of ordinary judicial decrees, thought that the assessability of such interest to Income Tax under Case III of Schedule D depended on the character of the debt or obligation in respect of which the decree was pronounced, and that, if the decree was substantially one of damages, the interest ordered to run on it was just part of the damages, and not therefore chargeable to Income Tax."

33. Lord Sands agreed, stating (at 612):

"In this case the amount in dispute is small and the circumstances somewhat peculiar. It does not therefore appear to be a case appropriate for the determination of any general question under the Revenue Statutes. If the arbiter had awarded the amount which has been recovered under the arbitration without any indication of how that amount was arrived at no question of interest could have arisen. The arbiter has disclosed that in the course of his assessment the matter of interest was a factor. I am not satisfied, however, that there was, during the period in respect of which the claim is made, any sum of money bearing interest within the meaning of the Income Tax legislation."

34. The decision in *Ballantine* was referred to in *Westminster*, at 408, as follows:

"My Lords, having discussed in a general way the nature of a sum of money awarded as interest under s. 28 of the Civil Procedure Act, I turn to the cases decided under the Income Tax Acts to see whether they assist the appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature :that is the test for income tax purposes, not whether it is called "interest" or "damages". Thus

> in Inland *Revenue Commissioners v. Ballantine*, arbitrators to whom a claim for (inter alia) "additional costs, loss and damages" was referred awarded an amount which included a sum described as interest.
>
> The Court of Session, having concluded that what was described as interest was in fact part of the total sum awarded by way of damages, rejected the claim of the Revenue to tax upon it. As Cohen L.J. has said, the matter is summed up in the judgment of the Lord President where he says:
>
> "If the decree was substantially one of damages, the interest ordered to run on it was just part of the damages, and not therefore chargeable to income tax." Again in *Glenboig Union Fireclay Co. Ld. v. Inland Revenue Commissioners* the claim to tax was rejected because, though certain sums were described as interest, yet in substance a capital sum of compensation was awarded, the element of interest being introduced in modum aestimationis. So also in *Simpson v. Maurice's Executors* tax was held not to be exigible upon any part of a sum which was paid by way of compensation under art. 297(e) of the Treaty of Versailles. It is sufficient to cite a sentence from the judgment of Lawrence L.J. in that case to show how different were its circumstances from those where interest was allowed under the Civil Procedure Act, 1833, or is ordered under the Act of 1934: "Article 297 of the Treaty" he said "says nothing about the payment of interest, and the money paid under the direction of the Mixed Arbitral Tribunal was paid as compensation and not as interest." Numerous cases also were cited which fell on the other side of the line, i.e., in which sums of money described and paid or received as interest were held to be "interest of money" and taxable as such."

35. With reference to *Ballantine*, the ICBs argue that, in circumstances where the main sum of money at issue was an amount of damages (rather than, say, an outstanding amount due under a contract), the fact that the arbitrator decided to award a further amount to reflect part of the time it had taken for the proceedings to run their course did not result in that further sum being interest. The main part of the award did not fall due for payment until the date of the award itself. Accordingly, there was no basis for discerning that sums relating to a prior period of time were, properly construed, interest. The matter may well have been different in terms of any further sums accruing between the date on which the award was made – and thus when payment fell due – and the eventual date of payment itself.

36. They further argue that the position in *Ballantine* is analogous to the position here because unless and until the ICB has determined that the patient should have received a decision that he was eligible for CHC, then no money is due to that patient. All that is occurring here is that the patient is being compensated for the financial consequences flowing from an incorrect decision on eligibility – comparable to the loss suffered which was being compensated by the arbitral award.

37. Having carefully considered these submissions on behalf of the ICBs, as well as the comments made in *Ballantine* and *Westminster*, I do not agree that the position in *Ballantine* and this case are analogous.

38. The decision in *Ballantine* concerned an assessment of compensation to the contractors for their outlays and losses under particular circumstances. The circumstances of the case were described by Lord Sands as "somewhat peculiar", who also commented that this "does not therefore appear to be a case appropriate for the determination of any general question under the Revenue Statutes". The finding in *Ballantine* was that the sum described as interest was in substance a capital sum of compensation, where the element of interest was introduced as a method of evaluation. Although both cases could be said to involve an amount of

'damages', as opposed to, say, an outstanding amount due under a contract, I do not consider the finding in *Ballantine*, in the specific circumstances of that case, forms a proper basis for a finding in favour of the ICBs in the circumstances of this case.

39. In this regard, I agree with the approach taken in *Gadhavi v HMRC* [2018] UKFTT 600 as follows:

> "***The interest element***
>
> 66. The Appellant argues that the interest was not true interest, but part of the "package" of compensation and therefore is not taxable, relying on the *Commissioners of Inland Revenue v Ballantine* 8 TC 595. On the facts of that case, it was held that an amount computed as interest was not a separate item charged on a sum, but was part of the overall award of damages and was not chargeable to income tax. The Court of Session stated that it might have been different had the damages been awarded and interest charged on the damages from the award until payment.
>
> …
>
> 68. In the present context, the basic redress and the refund of bank charges (which we consider also to be revenue expenses) represent the damages and the banks agreed to add simple interest of 8% a year to these amounts. This is a time based payment. It was paid only for the period during which the claimant was deprived of the money which was the subject of the claim. It was not part of the package of compensation claimed. The interest payment was intended a rough and ready way of compensating claimants for the opportunity cost they had suffered by reason of the mis-selling and to avoid the need for many to make consequential loss claims. The payment did not preclude a consequential loss claim where the claimant could demonstrate specific losses and as noted, the Appellants have made such a claim which is still pending.
>
> 69. In our view the interest element of the compensation is an additional amount which has been added to the award of the Basic Redress and refund of charges because the Appellants had been deprived of that money for a period. It is interest properly so called and is taxable under section 369(1) of ITTOIA. The award letters show gross amounts for the interest from which basic rate tax has been deducted at 20%. HMRC confirmed that the Appellants would receive a credit for the basic rate tax deducted at source in computing their tax liability."

Entitlement

40. I agree with the ICBs' submissions that the label attached to a payment is not definitive for tax purposes, that a sum is not "interest" merely because there is another sum of money from which the so-called "interest" will be ascertained, and that the mere fact that a sum has been calculated in the same way as interest does not in and of itself make the sum "interest".

41. The ICBs argue that, unlike the circumstances in *Chevron*, in the present case, there is no liability or obligation of the ICBs nor any entitlement of the patient at the outset. Nothing is owed to the patient by the ICBs. With regard to the issue of entitlement, the ICBs argue that the meaning of interest from the perspective of the lender was addressed in *Westminster* where Lord Wright said (at 400):

> "… the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The

> general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law."

42. Accordingly, the ICBs submit, the critical question is whether the principal amount paid by an ICB to a patient can properly be said to have been "the patient's money" throughout the entire period beginning with the point in time that the patient first had to pay for his care. They argue that the money eventually paid over to the patient was not "due to him" throughout that period because once the ICB had reached the decision that the patient was ineligible for CHC, the money that the patient paid over to the care home was paid away by him once and for all. The ICBs say, in other words, interest is a payment designed to compensate a claimant for being kept out of his money (i.e. from the time that he had an entitlement to that money to the date of eventual payment).

43. The ICBs refer to the observations made by the Supreme Court in *HMRC v Prudential Assurance Company Ltd* [2018] UKSC 39 at [71]-[77] about the nature of interest, the essential point being that a sum has the quality of "interest" if it arises out of the failure to pay a debt on the due date. As no money is "due" by an ICB to a patient who does not have a formal decision on eligibility in his favour, the position here can be distinguished from the situation where money is due under a contract from Day 1 (with interest accruing daily until payment). Here, nothing is due to the patient at all because a right to CHC arises if and only if the individual has had an eligibility decision in their favour. Therefore, if a person is not "eligible for NHS continuing healthcare" because he has no such decision, he is also not entitled to money.

44. The ICBs further contend that the CHC Redress scheme was not created as a mechanism of settling valid legal claims of individuals or of repaying money that the individuals had an entitlement to, as no right to any money existed. Rather, the scheme was created to correct perceived injustice. The amount under dispute is not "interest" properly understood because there is no principal sum (in the relevant sense) to which the interest relates. This is because there was no entitlement or debt due to an individual throughout the period of time where they had no eligibility decision and thus had to pay for their own care – and so no period of time during which the individual could be said to be kept out of their money. Matters would have been different, the ICBs submit, if there was a general statutory right to CHC. In that case, it would be the case that an individual having to pay his own care home fees was wrongly parting with "his" money – and from the day he paid it away, he would have a legal entitlement to its return.

45. I am unconvinced by the ICBs' submissions on this point. I am mindful of the comments made by Lord Wright in *Westminster* (at 400), set out above, that the "general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract… or a statute, or whether the money was due for any other reason in law" (*Westminster* at 400). I also recognise that the question must always be one of the true nature of the payment (see *Euro Hotel* at 690).

46. Having carefully considered the relevant cases and principles, I agree with HMRC that there is no requirement that a payee has an ongoing entitlement to receive a payment from a payor for a sum of money which compensates the payee from not having that money earlier to be properly described as interest. I consider the correct tax treatment is determined by considering the true nature of the payment, that is the substance of what is paid and why, and not, as submitted by the ICBs, a detailed technical analysis of subsisting legal rights.

47. The submissions made by the ICBs on this point are similar to those advanced by the Appellant in *Wilkinson* at [50]:

> "Mr Bowe submitted that, before an amount could constitute "interest", it needed to be calculated by reference to an amount which was due. In this case, he said, no amount became due from Barclays until the offer to pay the Basic Redress Element was accepted and that amount became a debt. However, the Interest Element was calculated by reference to periods which largely fell well before that time. It followed that the Interest Element could not be "interest" properly so called."

48. I agree with the approach taken by Judge Beare when considering that argument. He said, at [69]:

> "It does not matter that, at the time when each excessive payment under the Swap was made, it was not known to be excessive. The same could be said of the damages for fraud in *Westminster* and the contractual payments in *Chevron*. The key issue is that, by the time that the redress offer was made by Barclays, it had been determined that those payments were excessive at the time when they were made and that the Appellant needed to be compensated for being out of his money from the time when they were made. That is why the Interest Element was added to the amount which had to be refunded. It was added in order fully to compensate the Appellant for the impact of the mis-sale because simply refunding the excess payments on its own wouldn't be sufficient to do that."

49. It seems to me that the position is similar in this case in that, by the time that the redress offer was made, it had been determined that the payments made by the patients were excessive at the time when they were made, and that the patient needed to be compensated for being out of his money from the time when they were made. I also find in this case that the interest element was added to the amount which had to be refunded in order fully to compensate the patient, because simply refunding the excess payments on its own would not be sufficient to do that.

Euro Hotel

50. The ICBs argue that their appeal is supported by the case of *Euro Hotel* referred to at [30] above. In that case, a sub-building agreement provided that from the point at which the total payments made to a developer by a bank reached a particular sum until the grant of an underlease, the developer shall pay to the bank quarterly interest at an agreed rate upon an amount representing broadly the bank's current stake in the enterprise. The court concluded at 692 that:

> "The payments are not compensation for delay in payment but for delay in performance of other obligations: and the payments are not payments by time for the use of money but payments by time for non-performance of those obligations. It is not easy to think of a suitably comparable case, but there seems to be a possible analogy if a landowner were to sell part of his land, covenanting to erect a dividing wall within three months of completion, and also, if the wall was not then complete, to pay 'interest' on the purchase money paid by the purchaser until the wall was completed. Such payments do not seem to me to wear any of the guise of 'interest of money'."

51. The ICBs contend that the critical feature of the putative "principal" sum, by reference to which the "interest" was said to be calculated was that it could not be said to be money that belonged to the bank and had merely been lent to the developer. Rather, those sums had been paid to the developer once and for all, and the sums labelled "interest" were in fact compensation for the developer's delay in complying with his building obligations. ICBs'

submission is that, applying *Euro Hotel*, in the present case, the redress awarded to a patient by an ICB is to compensate for the ICB originally reaching an incorrect decision on eligibility. In essence, the ICB did not properly perform its legal obligations to reach the correct decision on eligibility. It is not the case that the money that a patient paid to a care home remained his throughout, accumulating interest over the period of time before the sums were paid back. Rather, the patient was forced to part once and for all with his money because the ICB took too long to reach the correct decision on eligibility (e.g. by initially reaching an incorrect decision that the patient was ineligible).

52. I disagree with this submission. Whilst the sums paid to the developer in *Euro Hotel* could be said to have been paid once and for all, the critical finding in that case was that the payments in issue were not payments by time for the use of money but payments by time for non-performance of obligations. In this case, I consider that the payment in issue was for the ICB not having made the CHC payment sooner, such that the patient had to expend their own money in the interim. It is my finding in this case that the true nature of the payments in issue are payments by time for the use of money and not payments by time for non-performance of an obligation to reach a correct decision on eligibility.

53. I consider in this case there are sums of money for the payment to be said to be interest of, and those sums of money were due to the person entitled to the alleged interest. I therefore find that the requirements set out in *Euro Hotel* at 691 are satisfied and the sums assessed by HMRC are "interest arising" within the meaning of section 874(1) ITA 2007.

Yearly Interest

54. HMRC refers to *Lehman Brothers,* at [47]-[48], where the Supreme Court considered whether statutory interest payable to a creditor under the Insolvency Rules was "yearly interest" and determined that the relevant period was the period between the beginning of the administration and the date on which payment of the debts was made in full. Further, that it was of no consequence that the interest was paid in respect of a period during which it was not known whether any payment was to be made at all, that there was no liability to pay interest during the period as it was payable in a single lump sum, and that it was payable after the event as a form of compensation for the recipients being in some way out of their money during the period.

55. The ICBs seek to distinguish this decision on the basis that the character of the amounts under appeal here are different from the sums at issue in *Lehman Brothers*, where the amounts owed to the creditors had been outstanding from the outset. The fact that the obligation to pay interest on those outstanding amounts only crystallised nearing the end of the administration did not mean that additional payments were not yearly interest. In contrast, they argue, in the present case, no money was due to the patient at all prior to the decision on redress, since no immediate right or entitlement arose for the patient to have his care costs funded by the NHS at the time that the patient had to fund his own care costs.

56. I have considered and rejected the ICBs' arguments regarding entitlement above (at [40] onwards). I am satisfied, on the basis of the decision in *Lehman Brothers*, that the relevant sums in this case are "yearly interest" within the meaning of section 874(1) ITA 2007.

Payable in Respect of Compensation

57. The ICBs contend that the deeming provision in section 874(5A) ITA 2007 cannot apply because the interest element of the redress payments was not "interest" and/or because it was not "payable in respect of compensation".

58. I accept HMRC's submissions on this point, namely that compensation is that which returns an individual to the state that they were in had that individual not been subjected to the wrong for which they are to be compensated (see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39). I also accept that interest is "payable in respect of compensation" if the base amount by reference to which the amount of interest is calculated is a sum which is properly characterised as compensation. I consider the redress payment in this appeal, by reference to which the amount of interest is calculated, is properly characterised as compensation.

59. Therefore, if I am wrong and the sums are not "yearly interest", they are nevertheless treated as yearly interest, as the deeming provision in section 874(5A) ITA 2007 applies because the interest element of the redress payments was interest payable in respect of compensation.

CONCLUSION

60. Having considered the issues to be determined in this appeal, I have concluded that:

(1) The sums assessed by HMRC are "interest arising" within the meaning of section 874(1) ITA 2007.

(2) Those sums are "yearly interest" within the meaning of section 874(1) ITA 2007.

(3) If the sums are not "yearly interest", they are nevertheless treated as yearly interest because they are "payable to an individual in respect of compensation" within the meaning of section 874(5A) ITA 2007.

61. For the reasons set out above, I dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

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