TC07785

Income Tax – Charity – whether or not loan to company was an approved charitable investment – whether loan for the benefit of the charity and not for the avoidance of tax – determination of amount of non-allowable expenditure – whether or not FTT has full appellate jurisdiction or merely supervisory jurisdiction – held that loan was for the benefit of the charity but also for the avoidance of tax – held that the amount of non-allowable expenditure should be determined by reference to payments made in tax year – held that FTT's jurisdiction was merely supervisory as regards HMRC's decision but that HMRC's decision was not unreasonable in principle but had determined the amount of non-allowable expenditure wrongly – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07803V

BETWEEN

REB MOISHE FOUNDATION **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE PHILIP GILLETT
RAYNA DEAN

The hearing took place on 9 and 10 July 2020. With the consent of the parties, the form of the hearing was a video hearing, with all parties attending remotely, using the Tribunal video platform. A face to face hearing was not held because of the continuing Coronavirus pandemic and the judge decided that in these circumstances a remote hearing was appropriate.

The documents to which we were referred are set out in the decision.

Michael Firth, counsel, instructed by Brian White Ltd, for the Appellant

Sade Ajose, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal by Reb Moishe Foundation ("RMF") against a decision by HMRC that the loan arrangement between RMF and Gladstar Ltd ("Gladstar") cannot be treated as an approved charitable investment nor as an approved charitable loan.

2. It was an appeal against closure notices and amendments issued by HMRC for the tax years 2006/07, 2007/08, 2009/10 as follows:

2006/07 - £159,500
2007/08 - £39,380
2009/10 - £41,109

THE FACTS

3. We received witness statements and oral evidence from Moises Gertner, a director of Gladstar, and Michael Higham, an officer of HMRC. We also received an electronic hearing bundle of 380 pages, a supplementary bundle of 142 pages, consisting of the accounts of RMF, Gladstar and Bridgemere Holdings Ltd, the parent company of Goldstar, and an authorities bundle of 193 pages.

4. HMRC also provided us with a copy of HMRC's published guidelines as to how it approaches the question of whether or not a loan qualifies as an approved investment. This was not of course evidence as such but it did provide the tribunal with an insight into how HMRC had approached the case and explained the significance of their arguments, which in many cases effectively referred to these guidelines and not directly to the legislation.

5. We noted that Mr Higham had only been involved with this case since January 2018. His evidence as to events which took place before that time could only therefore have been based on his review of the HMRC files and not on his own personal knowledge. There was however no significant dispute as to the majority of this evidence.

6. We make the following findings of fact.

Principal Facts

7. RMF is and was a registered charity (Charity No 1106737) whose main objective is

> "…the relief of poverty, advancement of education amongst persons of the Jewish faith, the advancement of the Orthodox Jewish faith and the promotion of the study of the Torah"

8. The charity was registered on 12 November 2004.

9. Gladstar was a wholly owned subsidiary of Bridgemere Holdings Ltd, a company registered in Gibraltar, and was in the business of providing short term bridging finance for property development. Bridgemere Holdings was owned by a family, but we were given no further details of this.

10. At the time of the transactions in question, RMF had two trustees, Jacob Plitnick, who was also the company secretary and, from 28 October 2010, a director of Gladstar, and Ruth Feingold. Ms Feingold has since died and Mr Plitnick is 97 years old, in poor health and suffering from dementia. He did not attend the hearing.

11. Gladstar made a number of donations to RMF during the periods under consideration. The schedule provided by RMF shows the following:

30 March 2005	£1,000,000
1 November 2005	£127,962
29 March 2006	£25,000
29 March 2006	£650,000
27 March 2007	£700,000

12. By a contract dated 10 March 2006, RMF made a loan facility available to Gladstar, the terms of which were:

(1) Principal sum available: £2m.

(2) Available to drawdown immediately.

(3) Repayable on demand or at the lender's option in the event of default (defined in clause 8(a) of the loan agreement),

(4) The loan was to be secured by a guarantee from Gladstar's parent company, Bridgemere Holdings Ltd.

(5) Interest rate of 24% per annum, accruing daily and payable annually in arrears.

13. It should be noted that this contract predated the introduction of the "substantial donor" legislation. HMRC have not challenged the date of this contract.

14. We were provided with a copy of minutes of a trustee meeting at which this loan was approved, although these minutes were not dated.

15. Mr Gertner explained this series of transactions in early 2006 as follows:

(1) Mr Gertner said that the family interests behind Gladstar and Bridgemere were a very charitable family, who were keen to support education for Jewish children, and RMF was therefore a good vehicle for this as it was looking to build schools in Israel and help other Jewish Orthodox education matters.

(2) Gladstar had therefore approached RMF in early 2006 with a view to making another donation to RMF, as it had done the previous year.

(3) However, RMF explained that it did not have immediate use for the monies because there was a delay in one of the schools' building programmes.

(4) Mr Gertner suggested that RMF should accept the donation but then loan the funds back to Gladstar, which could make very large margins on short term loans in the property market, which was "very hot" at that time.

(5) Having considered what Gladstar might do with the monies and what sort of profits it could make, Gladstar suggested an interest rate for the loan of 2% per month, ie, 24% per annum. This sounded like a very high rate, but the loans being made by Gladstar were unsecured and quite high risk and it was charging 3% per month, ie, 36% per annum, on those loans. It could therefore afford to pay RMF 24% per annum and still make a healthy margin on the monies being loaned to it by RMF.

16. The tribunal did not however find this explanation totally convincing. It does not make any commercial logic. In addition, HMRC had identified a number of issues which they contended indicated that this was not a conventional commercial arrangement:

(1) Mr Plitnick was the company secretary of Gladstar and was not therefore independent. He was an employee of Gladstar, of which Mr Gertner was a director.

(2) The trustee minutes provided showed no evidence that qualified independent investment advice was taken. Mr Gertner stated in his witness statement that RMF did take independent advice, but there was no evidence of this and subsequently Cohen Arnold, auditors of RMF and Gladstar, advised that they had not given any specific investment advice to RMF or to its trustees in respect of the loans made to Gladstar and had only given general advice as to the need for security, the charging of an interest rate which would be beneficial to the charity, and the need to have clearly defined terms of repayment.

(3) HMRC alleged that no interest was actually paid to the charity under the terms of the loan agreement, but this was not correct.

(4) The interest rate was lowered from 24% to 10% with no consideration of the terms of the agreement.

(5) The creditworthiness of Gladstar or Bridgemere Holdings Ltd was never considered.

17. In addition we note that Mr Gertner said that he occasionally stood in for Mr Plitnick in trustee meetings and that Mr Plitnick only became a director of Gladstar, on 28 October 2010, to cover for Mr Gertner's absences abroad. This further indicates the closeness of the two bodies and the fact that Mr Plitnick was very much Mr Gertner's employee. It is clear that Mr Gertner was very much the controlling mind behind these transactions.

18. Having considered the above therefore the tribunal decided that a much simpler, and, in the tribunal's view, a much more likely explanation of these transactions is that it was agreed between Gladstar and RMF, primarily Mr Gertner, that the money should flow in a circle, from Gladstar to RMF and then back to Gladstar. This produced two tax deductions in Gladstar, the first for the donation to RMF and the second for the interest paid on the loan. Indeed, this seems to be precisely the sort of arrangement at which the subsequent "substantial donor" legislation was aimed. In reality the money returned to where it had started, within a few days of it being paid out, and two tax deductions were obtained by Gladstar. On the balance of probabilities, this is what the tribunal decided had happened and we find this as a matter of fact.

19. On 21 March 2010 the rate of interest was reduced to 10% following an approach by Gladstar. This reflected the more difficult trading conditions following the credit crunch of 2008, which was not of course forecast at the time the loan was agreed. Gladstar suffered significant losses during this period, mostly arising from the write-off of bad debts, but it continued to make positive margins on its lending activity up to and including the year ended 31 March 2009.

20. The main movements on the loan account with Gladstar were as follows:

		£
3 April 2006	Advance	375,000
18 May 2006	Advance	50,000
25 May 2006	Advance	300,000
31 December 2006	Accrued interest	123,500
9 January 2007	Advance	300,000

13 March 2007	Repayment	(300,000)
31 March 2007	Accrued interest	56,500
31 December 2007	Accrued interest	162,720
16 January 2008	Advance	25,000
21 January 2008	Advance	175,000
4 February 2008	Repayment	(2,000)
10 March 2008	Repayment	(198,000)
31 March 2008	Accrued interest	65,936
31 October 2008	Accrued interest	162,410
31 October 2008	Repayment	(1,295,066)
1 April 2009	Advance	1,133,586
31 December 2009	Accrued interest	204,045
31 March 2010	Accrued interest	68,015

The repayment on 31 October 2008 and the advance on 1 April 2009 do not appear on RMF's bank statements but there is no dispute as regards their existence and it was later explained that these movements took place through another bank account for which no statements have been provided.

Procedural Facts

21. On 10 August 2012 RMF filed tax returns for the tax years ending 5 April 2006, 2007, 2008, 2009, & 2010. HMRC opened an enquiry into these tax returns on 4 July 2013. The initial Case Officer was Mr Paul Johnson and a request for information accompanied the Opening Notices.

22. A response was due by 30 August 2013. There was no reply to the initial information request so an information notice was issued under Paragraph 1 Schedule 36 Finance Act 2008 on 10 September 2013 with a deadline of 1 November 2013. There was no reply to this information notice until 30 January 2014 when Mr Plitnick contacted Mr Johnson by telephone. The note of telephone call states that Mr Plitnick explained he was 90 years of age, had suffered a recent bereavement and RMF's bank account had only 13p so RMF could not pay the penalties for failing to comply with information notices.

23. During the call Mr Plitnick confirmed that there was an outstanding loan balance between RMF and Gladstar.

24. On 20 February 2014 Mr Plitnick wrote to Mr Johnson on Gladstar headed notepaper and in his letter stated the following:

(1) Previous correspondence had not been received as the charity had left the address to which it had been sent 2 years previously.

(2) RMF was now defunct and had not been active for a number of years.

(3) He (Mr Plitnick) was the sole trustee as the other trustee had recently passed away.

(4) The dormant [bank] account of RMF contained £1,457.18 and Mr Plitnick would like to settle the fines from this amount so the account can finally be closed.

(5) Mr Plitnick was born in 1923 and so could not be of further assistance due to his age.

25. On 23 January 2015 Cohen Arnold, auditors of RMF and Gladstar, wrote to HMRC and provided the following documents:

(1) The HSBC bank statements of RMF.

(2) A schedule of donations received.

(3) The loan agreement with Gladstar.

(4) Two copies of minutes of meetings of the trustees.

26. Clarifying information and further bank statements were provided on 29 April 2015.

27. The bank statements provided show that payments totalling £2,000,000 were made by Gladstar on 30 March 2005 and 29 March 2006, in two equal payments of £1,000,000 each. HMRC were unable to reconcile the second payment with the schedule provided by RMF referred to above. Neither were we.

28. Mr Hughes, who had taken over from Mr Johnson, wrote to Mr Schwarz of Cohen Arnold on 6 February 2015. This letter covered the following points and a reply was requested by 20 March 2015:

(1) The donations received from Gladstar based on the schedule provided could not be reconciled with the bank statements of RMF.

(2) The loans to Gladstar might be subject to the "substantial donor legislation" contained at Section 549(2)(a) Income Tax Act 2007. This might result in a charge to tax as it may be classed as non-charitable expenditure. This was because Gladstar appeared to have made several large donations to RMF and RMF had then granted Gladstar a loan facility.

(3) Before a decision could be made a schedule of all advances made to Gladstar would be needed.

(4) As no response was received Mr Hughes issued a further information notice to RMF on 20 March 2015. The notice re-iterated the request for information originally requested in Mr Hughes' letter of 6 February 2015.

29. Cohen Arnold wrote to Mr Hughes on 29 April 2015. The letter provided:

(1) A schedule of donations received, and stated that £325,000 of the £1,000,000 paid by Gladstar on 29 March 2006 was a loan. (We note in passing that £375,000 was loaned to Gladstar on 3 April 2006.)

(2) A schedule of grants made.

(3) Missing bank statements.

Issue of Closure Notices

30. In a letter dated 18 May 2015 Mr Hughes explained the following:

(1) The trustee minutes provided show no evidence that qualified independent advice was taken which HMRC would expect in these circumstances, to ensure the transaction was at arm's length.

(2) No interest was actually paid to the charity under the terms of the loan agreement.

(3) The interest rate was lowered from 24% to 10% with no subsequent consideration of the terms of the agreement.

(4) The creditworthiness of Gladstar Ltd was never considered.

31. The letter concludes with the following opinion:

(1) Mr Hughes is of the opinion that the loans were not qualifying investments.

(2) In particular, the loan facility with Gladstar did not meet the definition of a Type 1-11 investment contained within s558 ITA. It must therefore be considered under Type 12. Type 12 states, as set out below:

> "A loan or other investment as to which an officer of Revenue and Customs is satisfied on a claim, that it is made for the benefit of the charitable trust and not for the avoidance of tax (whether by the trust or any other person).

(3) Mr Hughes is unable to see how the investment was made for the benefit of the charity.

32. A letter from Cohen Arnold dated 18 June 2015 refuted this view on the following grounds:

(1) Mr Plitnick was not a director of Gladstar at the time the loan was made.

(2) Some interest was paid on 31 January 2008 and 6 March 2008.

(3) In addition the interest "rolling up" with the capital amount enabled RMF to charge interest on the gross amount of the outstanding balance.

(4) Gladstar had gross assets in excess of £13 million with the only material creditor being the parent company, which had effectively subordinated its loan to Gladstar by guaranteeing the loan from RMF to Gladstar.

33. A further letter was issued by Mr Hughes dated 17 July 2015. In this letter, Mr Hughes accepted that the loan was made for the benefit of the charity, but then stated that he was not satisfied that the loan was not for the avoidance of tax. Mr Hughes referred to the fact that the loan was not on an arm's length basis, as a loan could have been taken from a commercial bank at 2 - 3 % above the Bank of England base rate, which was at the time 4.5%. Mr Hughes noted that the non-payment of interest constituted an event of default, and asked whether these clauses were invoked. Mr Hughes stated his concern regarding the deductions Gladstar would have benefitted from, in terms of the charitable donations made to RMF and the deductions for interest due to RMF. As a result, he concluded that the loan was still a non-qualifying investment.

34. Closure notices for the periods ending 5 April 2007 MH/20, 5 April 2008 and 5 April 2010 were issued on 17 May 2016 by the new case officer Mr Rob Fitzgerald. The closure notices stated that the loan was not a qualifying investment as defined in s558 ITA.

35. Importantly, the calculations in the closure notices were calculated on the basis of the movements in the loan balances shown in the accounts of RMF for the relevant periods, which were drawn up to 31 December in each year. HMRC took the movement in the loan balances at each year end and took the difference between the two balances to have been the amount of any additional investment during the year, as set out below:

Basis Period y/e	**Balance**	**Change in Year**	**Tax Year Ending**
31 December 2006	£725,000	£725,000	5 April 2007
31 December 2007	£904,000	£179,000	05 April 2008
31 December 2008	£0	(£904,000)	05 April 2009
31 December 2009	£1,337,631	£1,337,631	05 April 2010
31 December 2010	£1,796,279	£458,648	05 April 2011

31 December 2011	£2,063,978	£267,699	05 April 2012

36. Using these figures as the amount of any non-allowable investment, HMRC then calculated the tax assessments for the years under enquiry.

37. There then followed a hiatus in proceedings while the Charity Commission ("CCEW") carried out its own review of the activities of RMF. We discuss the implications of this review and the weight which we should give to it further below.

Independent Review

38. On 12 October 2018 Mr White, of Robert White Ltd, tax advisers, who had by this time taken over as the representative for RMF, requested an Independent Review from HMRC. The case was therefore referred to an internal review officer of HMRC and the Review Conclusion Letter was issued on 28 November 2018. This letter agrees the points made previously by HMRC that the loan did not benefit RMF as:

(1) The balance was only repaid following the issue of two orders by the CCEW to recover the unpaid balance.

(2) The CCEW considered the loan facility placed the charity's funds at risk.

(3) The CCEW had to take recovery action to return the funds to RMF.

(4) There was a lack of due diligence applied by RMF in respect of the loan arrangements.

(5) There was a lack of recovery action from RMF in respect of the loan arrangements.

Alternate Dispute Resolution

39. At the request of Mr White and RMF, an application was made and accepted for HMRC's Alternate Dispute Resolution service ("ADR"). In advance of the ADR the following documents were provided which had not previously been supplied to HMRC:

(1) A letter dated 15 March 2006 signed by James David Hassan, a director of Gladstar, stating that the advances made by RMF to Gladstar are guaranteed.

(2) An undated cash flow statement titled "Gladstar Limited – Cash movement with the Reb Moishe Foundation".

(3) An unsigned witness statement dated 24 May 2017 by Janet Kelly of the CCEW.

(4) A signed settlement agreement dated 10 August 2017 between the CCEW and Mr Plitnick as a representative of both RMF and Gladstar.

40. The ADR took place on 27 February 2019 and Mr Higham represented HMRC. Unfortunately, the parties were unable to reach agreement.

41. It was agreed as part of the ADR Exit Agreement with Mr White that the cash flow statement would be reconciled with the bank statements. In an email dated 1 April 2019, Mr White explained that all movements were verified to debtor/creditor balances and the repayment of the loan on 1 October 2008 and subsequent loan on 1 April 2009 were recorded in a separate bank account at the time. To date the statements from this bank account have not been made available to HMRC and were not available to the tribunal.

42. RMF appealed to the tribunal on 30 November 2018.

THE LAW

43. The law relating to 2006/07 was contained in s505 and Sch 20 ICTA 1988, which provided exemptions from tax to charities in respect of various forms of income. For 2007/08

and subsequent years this was replaced by ss524-537 et seq ITA 2007. It was agreed between the parties that there was no material difference between the provisions in ICTA 1988 and those in ITA 2007 and therefore, for convenience we will refer solely to the legislation in ITA 2007.

44. Section 539 ITA 2007 limits the exemptions for the income of charities where a charitable trust has non-exempt amounts for a tax year:

> "(1) This section applies if a charitable trust has a non-exempt amount for a tax year (see section 540).
>
> (2) The exemptions under this Part do not apply, and are treated as never having applied, to so much of any income of the charitable trust for the tax year as is attributed under section 541 to the non-exempt amount.
>
> (3) Section 256(4) of TCGA 1992 contains corresponding restrictions which apply in relation to section 256(1) of that Act (gains accruing to charities not to be chargeable gains)."

45. The non-exempt amount is calculated by reference to the non-charitable expenditure of the trust for the tax year. Section 540(1) and (2) provide:

> "(1) A charitable trust has a non-exempt amount for a tax year if it has—
>
> (a) non-charitable expenditure for the tax year (amount A), and
>
> (b) attributable income and gains for the tax year (amount B).
>
> (2) The non-exempt amount for the tax year is—
>
> (a) amount A, or
>
> (b) if less, amount B."

46. Tax year means the year from 6 April to 5 April.

47. Non-charitable expenditure is defined in s543 and includes:

> "(i) the amount of any of the charitable trust's funds that is invested in the tax year in an investment which is not an approved charitable investment (see section 558)"

48. Approved charitable investments are then defined in s558. Type 12, which is the category of investment which RMF claim applies to their loan to Gladstar, is defined as follows:

> "Type 12 - A loan or other investment as to which an officer of Revenue and Customs is satisfied, on a claim, that it is made for the benefit of the charitable trust and not for the avoidance of tax (whether by the trust or any other person)."

49. We were also referred to

Hoyle v Rogers and another [2014] 3 All ER 550 as regards the admissibility of the report by the Charity Commissioners, and

GB Housley Ltd v Revenue and Customs Commissioners [2016] EWCA Civ 1299 as regards our jurisdiction in situations where we have only a supervisory jurisdiction.

50. There is however relatively little direct judicial guidance on the other points at issue in this case.

DISCUSSION

51. There are essentially two key points which we need to consider:

(1) What was the amount of the alleged non-charitable expenditure for the relevant tax years (s543(i)), and

(2) Was the loan in question "a loan or other investment as to which an officer of Revenue and Customs is satisfied, on a claim, that it is made for the benefit of the charitable trust and not for the avoidance of tax (whether by the trust or any other person)"?

52. Question (1) is a purely factual question on which we consider we have a full appellate jurisdiction. Question (2) is more difficult in that what is at issue is whether or not an officer of HMRC is **satisfied** that the investment is made for the benefit of the charitable trust and not for the avoidance of tax. In the absence of further judicial or legislative guidance, the use of these words indicates that we only have a supervisory jurisdiction as regards this test, ie, we can only disturb the finding of the officer of HMRC if we consider that his/her decision was unreasonable. We must therefore ask if the officer took into account facts which should not have been taken into account, if the officer failed to take account of facts which they should have taken into account, or if the decision was so unreasonable that no properly instructed officer could reasonably have come to that conclusion.

53. We will address these questions in order.

Amount of Non-Charitable Expenditure

54. Section 543(i) defines the amount of non-charitable expenditure as

"the amount of any of the charitable trust's funds that is invested **in the tax year** in an investment which is not an approved charitable investment."

55. There is a clear reference here to the amount of any non-allowable expenditure in the tax year. It will be recalled that HMRC's calculations were based on the accounts of RMF as drawn up to 31 December in the relevant years. They then looked at the year-end balances shown in those accounts for the amount of the debt outstanding from Gladstar and took the movement on those balances to be the amount of the additional "expenditure" for the years in question.

56. This approach has two problems:

(1) It is looking at the years to 31 December in each case, whereas the legislation clearly states that the relevant figure is the amount of expenditure in the tax year, ie the year from 6 April to 5 April.

(2) There is no consideration as to what other movements there might have been in the amount of debt outstanding which were not caused by actual expenditure. In fact the movements in the year-end balances also reflected the accrual of interest, which had been simply added to the amounts outstanding.

57. As regards the first point, HMRC initially directed us to s546 ITA as the justification for using the accounts figures. However, having considered the wording more carefully, they accepted that s546 did not have the effect for which they were arguing.

58. On the question of whether or not rolled up interest which was added to the loan account amounted to new expenditure, a point which it appeared that they had not considered previously, HMRC also accepted that this did not constitute new expenditure and, as such, should be left out of account.

59. We must therefore look at the actual new expenditure in each tax year to determine the amount of potentially non-allowable expenditure.

60. Looking at the figures set out above, the figures for new investment in the years subject to assessment are:

2006-07	18 May 2006	50,000
	25 May 2006	300,000
	9 January 2007	300,000
2007-08	16 January 2008	25,000
	21 January 2008	175,000
2009-10	Nil	

Note: The expenditure included by HMRC in their assessment for 2009-10 actually occurred on 1 April 2009, in the tax year 2008-09, in respect of which there has been no assessment.

61. We therefore find that the amounts of investment which should potentially be regarded as non-allowable expenditure for the relevant years are:

2006-07	£650,000
2007-08	£200,000
2009-10	Nil

Whether or not Non-Allowable Expenditure

62. We now turn to the question of whether or not the decision of the HMRC officer as to whether or not the loan was non-allowable expenditure was reasonable.

63. There are a number of letters from HMRC in which the reasons for this decision were set out and most of them suffer from the failing that they refer extensively to HMRC's guidance on this subject rather than the legislation. Nevertheless the reasons behind HMRC's decision can be summarised as follows:

(1) There was no evidence that the trustees had taken independent advice as to the suitability of this investment for a charity. This was especially important given that Mr Plitnick was the company secretary of Gladstar.

(2) The rate of interest was not an arm's length rate compared to the Bank of England base rate at the time.

(3) The loan appeared to be open-ended with no final repayment date and therefore there was no intention that the loan should be repaid.

(4) No interest was actually paid on the loan. It was all rolled up and added to the balance outstanding.

(5) RMF took no action to recover the loan when an event of default had taken place.

(6) The was no evidence that the trustees gave further consideration as to the suitability of the loan when the interest rate was reduced to 10%.

(7) There was no evidence that the trustees considered the creditworthiness of Gladstar or Bridgemere Holdings Ltd at any stage.

(8) HMRC was unable to see how this was for the benefit of the charity.

64. Looking at these concerns, points (3) is not totally correct in that although there was no final payment date the loan was stated to be repayable on demand or on the occurrence of an event of default.

65. Point (4) is incorrect in that there were payments of interest. Indeed a full repayment of the loan was made on 31 October 2008. This was readvanced on 1 April 2009, but that was five months later. The loan and the accrued interest had therefore been paid in full on 31 October 2008. There were no payments of interest after that date until at least 2014.

66. The rate of interest is clearly very high by normal standards, but we received evidence that Gladstar was still able to make a substantial margin on the onlending of these funds to its customers. RMF was simply receiving a significant share of the profits of this lending. It is hard to see how a higher than normal rate of interest was not for the benefit of the charity. It might not have looked normal but if it produced more income for RMF that would superficially appear to be for the benefit of RMF.

67. HMRC have compared the rate charged on the loan with the Bank of England base rate at the time of 4.5% and have alleged that Gladstar could have borrowed the funds from a bank at the Bank of England base rate plus 2 or 3%. We have seen no evidence that Gladstar could have borrowed at this rate and indeed the HSBC interest rate for an overdraft at the time was over 24%. We can therefore make no realistic finding as to what the "correct" rate might have been for a loan at that time which was only secured by a parent company guarantee. We were simply not presented with any evidence.

68. It does however seem quite clear that:

(1) The trustees did not take independent advice as to the suitability of this loan for an investment by a charity.

(2) RMF did not take any recovery action until it was forced into this by the Charity Commissioners report.

(3) There was no evidence that the trustees had considered the creditworthiness of Gladstar. The Charity Commission report did say that:

> "The inquiry was informed that the trustee A (Mr Plitnick) believed himself to have significant expertise in understanding what did or did not constitute a good loan agreement".

As discussed below however, we do not consider that we can place significant weight on the evidence presented in this report.

69. More importantly however, as we have found, we believe that the funds in question moved in a circle, from Gladstar to RMF, and then from RMF to Gladstar, leading to two tax deductions being claimed by Gladstar.

70. The HMRC letters are notable for their lack of focus on the legislation, and they generally only imply that tax avoidance was involved and do not make any direct allegation to this effect. They focus instead on whether or not the loan complied with their published guidance on this subject. The HMRC letters are also contradictory in that some state that they accept that the loan was for the benefit of RMF and others state that they do not. Much of this confusion seems to stem from HMRC's focus on their guidance rather than on the legislation.

71. In our view, what is important is not whether or not the loans complied with HMRC guidance, but whether or not they fall within the test set out in Type 12 of s558.

72. However, para [36] of HMRC's skeleton argument, which Ms Ajose asked us to consider, states:

> "It is the Respondents contention that GL would have received tax relief from the charitable donations made to the Appellant but there appears to be a circular movement

of those cash donations passing back to GL by way of a loan, which would suggest the arrangement was for the avoidance of tax."

73. This is at least a clear statement of HMRC's position.

74. Looking at the wording in Type 12 of s558 there are in our view two separate tests, joined by an "and" in this provision. Is the loan an investment:

"as to which an officer of HMRC is satisfied, on a claim, that it is:

(1) made for the benefit of the charitable trust, **and**

(2) not for the avoidance of tax (whether by the trust or any other person)."

75. As we have addressed above, we believe that we have only a supervisory jurisdiction on this issue and that therefore what we should be asking is was the decision of the officer reasonable.

76. However, were we making this decision, we would find it difficult to argue that the loan was not for the benefit of the charity. It is undoubtedly a high rate of interest, and the charity did not carry out the sort of due diligence which one would normally expect, probably because Mr Plitnick, as company secretary of Gladstar was well aware of the business and financial position of the company, and did not therefore feel the need to carry out extensive credit checks. The rate of return on the loan was however very good and, in the absence of the 2008 financial crisis, which nobody could predict, the profits earned from RMF would have been considerable. We would therefore conclude, if it were our decision to make, that the loan was for the benefit of the charity.

77. However, we have also found that the arrangements in question meant that money flowed from Gladstar to RMF and thence back to Gladstar, creating two tax deductions for Gladstar in respect of funds which had not in reality moved anywhere. We also find that there is, in Mr Plitnick, the closest of connections between RMF and Gladstar. In our view, on the balance of probabilities, we consider that the motivation for these transactions was for the avoidance of tax by Gladstar. The HMRC letters do not state particularly clearly that this was a key factor in the decision but it is obvious by implication from what those letters did say that this was at the heart of their concerns.

78. In his closing remarks, Mr Firth argued that HMRC had not made a case for tax avoidance and that there was therefore no case for him to answer. We would agree with Mr Firth to the extent that HMRC's case had been made mostly by implication rather than by direct statement, but para [36] of HMRC's skeleton argument states:

"It is the Respondents contention that [Gladstar] would have received tax relief from the charitable donations made to the Appellant but there appears to be a circular movement of those cash donations passing back to [Gladstar] by way of a loan, which would suggest the arrangement was for the avoidance of tax."

79. In our view this amounts to a clear accusation of tax avoidance. RMF did respond to this, especially in Mr Gertner's explanation of the rationale for the transactions, but we did not find this explanation satisfactory and found, on the balance of probabilities that the motivation for the transactions was tax avoidance.

80. We are therefore faced with the question as to whether or not we should interfere with the decision of the HMRC officer on the basis that he/she took into account irrelevant information, which is what we have found, as set out above.

81. However, as was established in the case of *John Dee Limited v Commissioners of Customs and Excise* [1995] STC 941, even if the officer of HMRC took into account irrelevant

factors or failed to take into account relevant factors, we should not disturb that decision if, had the officer taken into account the correct matters, he/she would inevitably have reached the same decision.

82. In our view, had the officer explicitly taken into account the fact that these arrangements were entered into for the purpose of tax avoidance then it is inevitable that he/she would have reached the same decision.

83. On this basis therefore we consider that we should not interfere with the decision of the officer to refuse to accept that this loan was an approved charitable investment.

Charity Commission Report

84. We have referred only briefly to the report by the Charity Commissioners following their investigation into the affairs of RMF.

85. Mr Firth, for RMF, referred us to the case of *Hoyle v Rogers and another* [2014] 3 All ER 550, which he submitted prevented us from considering the outcome and conclusions of this report.

86. The principles to be followed in such circumstances were set out by Christopher Clarke LJ at [39] in that case:

> "As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision-maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it (the trial judge), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision-maker nor an expert in any relevant discipline, of which decision-making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

87. This seems to make it quite clear that we cannot treat the Charity Commissioners' report as a sound source of evidence. It is not based on evidence presented to us and as such we are instructed to treat it as irrelevant.

88. We have reviewed the report of the Charity Commissioners, and have included above a reference in it to statements allegedly made by Mr Plitnick in his evidence to the Charity Commissioners. We do not and cannot, in accordance with *Hoyle v Rogers*, consider this persuasive factual evidence on which we can rely for the purposes of our decision. We include it only because it provides a possible explanation for Mr Plitnick's failure to seek proper investment advice. We do not place any reliance on it.

Conclusion

89. We have therefore found:

(1) The figures used by HMRC were calculated incorrectly and not by reference to a correct interpretation of the legislation, and

(2) The decision of the HMRC officer to refuse to accept that the loan was an approved charitable investment was reasonable. The officer took into account irrelevant matters and failed to take into account specifically relevant matters, but nevertheless we consider

that had he/she taken into account all relevant matters and no irrelevant matters it is inevitable that they would have come to the same conclusion.

90. We therefore consider that the appeal should be ALLOWED IN PART, to the extent that the figures are incorrect but that, subject to the amendment of the figures, the closure notices should stand.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. 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.

PHILIP GILLETT

TRIBUNAL JUDGE

RELEASE DATE: 21 JULY 2020