THE RECENT CASE OF: *DTE FINANCIAL SERVICES v WILSON*

James Henderson[1]

Schemes to avoid National Insurance Contributions ("NICs") by awarding employees with unusual benefits in kind have become well known. One such scheme has been to provide employees with bonuses by way of reversionary interests in offshore trusts ("RIOTs"). Mr Paul De Voil has held in the recent case of *DTE Financial Services Limited v Wilson (HMIT)* SpC 188 that an employer providing such bonuses has to account for them under the PAYE system.

The case concentrated on the RIOT given to Mr MacDonald, a director of DTE Financial Services ("DTE"), who was well aware of how the scheme involving the granting of RIOTs worked. Following the decision by the board of DTE on 19th April 1995 to award him a bonus, he faxed a Monacan company with the details required to implement the scheme in relation to himself.

The scheme was, briefly, as follows. On day 1 of the scheme, Goodvale Limited, an offshore company, settled £40,300 on an offshore trust company called Moorgate Trustee Company Limited. On day 4, Moorgate appointed the entire capital of the Settlement in favour of Goodvale with effect from day 8. On day 5, Goodvale assigned this reversionary interest to DTE for £40,600. On day 6, DTE assigned the interest to Mr MacDonald. Two days later the interest fell in and Mr Macdonald received £40,000 from the Settlement.

Although in entering into the scheme the taxpayer really did think that the bonuses would fall outside the PAYE system, the intention of the scheme was not to avoid Schedule E income tax altogether. The scheme was really trying to avoid NICs . The bonus received by Mr MacDonald was accepted to be taxable as a benefit in kind under Schedule E, and, indeed, as Mr De Voil noted, the Revenue might have achieved a financially more favourable result, even taking interest into account, by going down the "benefits in kind" route rather than the PAYE route. The Revenue

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nevertheless argued that the bonuses should be brought within the PAYE system and Mr De Voil agreed with them.

In reaching this conclusion, Mr De Voil addressed three issues:

(a) Did DTE make a payment within the meaning of section 203 ICTA 1988?

(b) Did DTE provide a tradeable asset within the meaning of section 203F ICTA 1988?

(c) Did the *Ramsay* principle apply?

The Revenue succeeded only on the *Ramsay* issue.

Did DTE make a payment within the meaning of section 203 ICTA 1988?

Section 203 provides that: "On the making of any **payment** of, or on account of, any income assessable to income tax under Schedule E, income tax shall, subject to and in accordance with regulations made by the Board under this section, be deducted ...by the person making the payment."

Mr De Voil concluded that DTE did not, absent the *Ramsay* principle, make a payment within the meaning of the section. He found that DTE had made a payment but that this was made to Goodvale to purchase their reversionary interest. In doing this, DTE was in no way legally obliged to assign the interest to Mr MacDonald. Further, when the company assigned its interest to Mr MacDonald, on day 6, it was doing something that "would enure to his benefit but it was not making a payment to him".

Mr De Voil sought to side-step the recently decided and controversial decision of *Dunstall v Hedges* SpC 179 by saying that it did not apply to the facts of the DTE case. In *Dunstall* the word "payment" in section 203 was given a surprisingly wide meaning, and it is an interesting question how Mr De Voil would himself have decided the case of *Dunstall*.

Did DTE provide a tradeable asset within the meaning of section 203F ICTA 1988?

Mr De Voil also found in favour of the taxpayer on this issue. The asset which the company provided was an interest in a settlement consisting of a sum of money. The employee, being a secondary assignee, could not under the terms of the Deed of

Settlement assign that interest; all he could do was to wait a day or two for it to fall in. In Mr De Voil's view, the RIOTs were not therefore tradeable assets within the meaning of section 203F since there were no "trading arrangements" (as defined by section 203K) in existence for them.

Did the *Ramsay* principle apply?

It was on this issue that Mr De Voil found against the taxpayer. He found that all the "essentials" of the *Ramsay* doctrine as set out by Lord Oliver in *Craven v White* [1988] STC 476 were to be found in the present case. The series of transactions was pre-ordained in order to produce the result that Mr Macdonald received £40,000; the intermediate transactions had no other purpose than tax mitigation; there was no practical likelihood that the pre-planned events would not take place in the order ordained; those events did in fact so take place.

Mr De Voil was of the view that since £40,000 started in DTE's bank account and ended up in Mr MacDonald's, the *Ramsay* principle could apply so that DTE was to be treated as having made a payment to Mr MacDonald of £40,000 within the meaning of section 203. It follows from this that it did not matter that the reason the money was eventually paid to Mr MacDonald was because he was a beneficiary under a trust whose interest had fallen in. Further, Mr De Voil was happy to apply *Ramsay* in the context of section 203, which is a "pure machinery section". He also stated that he found it unnecessary to address the question of how DTE was to deduct the tax.