TC01559

Appeal number TC2010/6372

INCOME TAX – DISCOVERY ASSESSMENTS – ***whether the second condition in s29(5) TMA 1970 has been met – Yes – assessments validly made – Appeal dismissed***

FIRST-TIER TRIBUNAL

TAX

ABDUL OMAR **Appellant**

- and -

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

TRIBUNAL: Michael Tildesley OBE (Tribunal Judge)
Elizabeth Bridge

Sitting in public at 45 Bedford Square, London WC1 on 13 October 2011

Michael Sherry, counsel instructed by PKF Accountants, for the Appellant

Jane Hodge, HM Tax Inspector, for HMRC

DECISION

The Appeal

1. The Appellant appealed against discovery assessments for unpaid income tax in respect of years ending 5 April 2005 and 2006. The assessments were issued on 17 September 2008. The amounts charged under the assessments were £210,000 and £231,400 respectively for the said years in dispute.

2. The assessments related to a tax charge on the value of property interests transferred from Paramount Knitwear (Leicester) Limited, a company controlled by the Appellant and his wife, to The Meridian Funded Unapproved Retirement Benefit Scheme (FURBS). The Appellant and his wife were the only members of FURBS. Under section 386 ITEPA 2003 a charge to tax is raised where an employer pays a sum into an unapproved retirement benefit scheme with a view to the provision of retirement benefits to an employee. Any sum so paid counts as the employee's employment income.

3. The sole issue in this Appeal was whether the assessments complied with the specific statutory requirement set out in section 29(5) of the Taxes Management Act 1970 (TMA) (the second condition). The Appellant argued that he had disclosed details of the property transfers to HMRC prior to the closure of the enquiry window, in which case HMRC was precluded from issuing discovery assessments. HMRC disagreed, arguing that an Officer on the information disclosed could not reasonably have been expected to be aware the Appellant's self assessments for the said tax years were insufficient. The facts in this Appeal were agreed. The resolution of the dispute turned on the Tribunal's interpretation of the facts in accordance with the law as to whether the assessments met the requirements of section 29(5) TMA 1970.

4. The issue to be determined as set out in paragraph 11 of the Statement of Agreed Facts was:

> "In respect of each assessment raised on the value of the property interests transferred to the FURBS in the First Contribution and in the Second Contribution respectively whether the second condition set out in section 29(5) of the Taxes Management Act 1970 was satisfied".

5. During the course of the hearing Appellant's counsel intimated that the dispute might extend to other aspects of the statutory requirements for discovery assessments, particularly whether there had been a discovery under section 29(1) TMA 1970. The Tribunal sought clarification of the Appellant's position, which resulted in counsel confirming that the dispute was restricted to the second condition in section 29(5).

6. The quantum of the assessments was not in dispute. If this Appeal went against him, the Appellant, however, wished to reserve his position on whether transfers of property interests to FURBS were in law subject to a tax charge. The Tribunal understood that the Court of Appeal decision in *Irving v HMRC* [2008](EWCA Civ 6) which had determined the correct tax liability under section 386 ITEPA 2003 (the successor to section 595 ICTA 1988) was subject to a further challenge, namely,

whether the decision was consistent with Article 1 of Protocol 1 of the Human Rights Convention. The Tribunal agreed with the Appellant's request.

7. The Tribunal received in evidence a joint documents bundle which incorporated a statement of agreed facts. The Tribunal heard representations from the parties supported by skeleton arguments, after which it reserved its decision.

The Legislation

8. Section 29 of the TMA 1970 permits an officer of the Board to make an assessment in the further amount which ought in his opinion to be assessed when he discovers that a taxpayer's assessment to tax has become insufficient.

9. The provisions of section 29 so far as is relevant to this Appeal are as follows:

> **"Section 29 Assessment where loss of tax discovered**
>
> 29(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment–
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
> (b) that an assessment to tax is or has become insufficient, or
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> 29(2) *Not applicable*
>
> 29(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above–
>
> (a) in respect of the year of assessment mentioned in that subsection; and
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> 29(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.
>
> 29(5) The second condition is that at the time when an officer of the Board–
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
> (b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably

expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

29(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if –

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19Aof this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above–

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

29(7) In subsection (6) above–

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes–

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf".

10. The Higher Courts in *Langham v Veltema* (2004) 76 TC 259, *R (on the Application of Pattullo) v HMRC* [2010] STC 107, and *Tower MCashback LLP1 v HMRC* [2010] STC 809 have considered the purpose of the new discovery provisions following the introduction of self assessment. Moses LJ in *Tower MCashback LLP1 v HMRC* [2010] STC 809 at 814 explained:

> **"**[17] As Dr Avery Jones remarked, self-assessment made a major change to the system of appeals. The requirement to deliver a return for the purposes of establishing the amounts charged to income tax and

> capital gains tax is contained in s 8 of the TMA 1970. Section 9, substituted by the Finance Act 1994, introduced, with effect from the year 1996-97, the obligation to include in the return a self-assessment of the amounts chargeable to income tax and capital gains tax on the basis of the information contained in the return. As I have indicated, the taxpayer's self-assessment is the final determination of his taxable income and chargeable gains for a particular year of assessment, subject to three exceptions. Sections 59A(1), (2) and 59B(1) impose a requirement to make payments on account and balancing payments on specified dates in accordance with those self-assessments.
>
> [18] There are only three circumstances in which the self-assessment does not constitute the final determination of liability: firstly, when a taxpayer amends his return within twelve months of the filing date (ss 9ZA and 12ABA TMA 1970); and secondly, when the Revenue gives notice of enquiry into the return and either the taxpayer amends his return during the enquiry pursuant to s 9B or s 12AD or the Revenue amends the return in accordance with a closure notice under s 28A or s 28B, or amends the self-assessment during the enquiry to prevent loss of tax pursuant to s 9C. The third exception occurs when the Revenue makes an assessment in accordance with powers conferred under a new s 29 substituted by FA 1994 with effect from the year 1996-97".

11. Lord Bannatyne in *R (on the Application of Pattullo) v HMRC* [2010] STC 107 at 130 applied the underlying purpose of the new section 29 in his construction of section 29(5):

> "…. In my view in approaching the construction of section 29(5) as he has done Auld LJ has arrived at a construction which is in line with the underlying purpose of the new scheme in that: the right is given to the taxpayer of early finality of assessment. However, that right is balanced by corresponding duty incumbent upon the taxpayer, namely to clearly alert the officer to an insufficiency. It appears to me that if the section were read in any other way it would render the system of self assessment unworkable. In that without such a duty being incumbent upon the taxpayer the whole system would be open to the clearest abuse and would be likely to lead to material losses in tax to HMRC. It accordingly seems to me that he has correctly identified the scheme".

12. The Upper Tribunal in *Hankinson v HMRC* [2010] STC 2640 at paragraph 24 re-iterated the purposive construction of section 29(5):

> "…..The purpose of the new section 29 is to protect the taxpayer who has made an honest, complete and timely return from a late assessment. We agree with Miss Simler that the need to demonstrate fulfilment of one or both of the objective conditions found in sub-ss(4) and (5), far from undermining the protection is the means by which it is directed at those for whom it is intended".

The Facts

13. The Appellant was a director of Paramount Knitwear (Leicester) Ltd, a company controlled by him and his wife.

14. On 22 December 2003, by way of a Trust Deed, Paramount Knitwear (Leicester) Ltd established The Meridian Funded Unapproved Retirement Benefit Scheme (FURBS). The only members of the FURBS were the Appellant and his wife.

15. In the year ended 31 March 2005 Paramount Knitwear (Leicester) Ltd transferred property with a value of £525,000 to the FURBS. That property comprised a 35 per cent interest in two industrial units and the company's valuations of the units were not in dispute.

16. On 14 April 2005 Paramount Knitwear Limited sent Inland Revenue (Cumbernauld Department) its monthly PAYE return with an accompanying letter signed by the Appellant which said:

> "We are enclosing a return for the month ending 5 April 2005 and should advise you that the company made a contribution to the FURBS during that month. The contribution will be for the benefit of the members of the FURBS who are directors of the company, namely, the *Appellant and his wife*. The contribution was a cash payment of £300,000 together with a transfer of part of some properties owned by the company, the value of which is currently indeterminable. No PAYE is due in respect of such contributions, and we are of the view that no National Insurance Contributions are payable and consequently none are included in this return".

17. On 10 May 2005 Paramount Knitwear Limited sent HM Inspector of Taxes (Leicestershire and Northants Area) the annual employer's return (P35) for the year ended 5 April 2005. The company referred HM Inspector of Taxes to its earlier letter of 14 April 2005 with regards to FURBS contributions made during the year.

18. On 6 July 2005 PKF on behalf of Paramount Knitwear Limited sent HMRC ((Leicestershire and Northants Area) the relevant P11D forms dealing with employee benefits. The letter also stated that

> "We refer you also to our client's letter of 14 April. The £300,000 cash contribution to Meridian FURBS which is taxable under section 595 TA 1988 is shown on the form P11D of *the Appellant*. The company also contributed to the Meridian FURBS by way of a transfer of a part interest of some properties which our clients understand are liable to neither income tax nor NIC.

19. In his 2004-05 Tax Return dated 26 January 2006 the Appellant included assessable income of £300,000 in relation to a separate cash contribution by Paramount Knitwear (Leicester) Ltd to the FURBS. There was no inclusion of any income in respect of the property transfers referred to in the above paragraph.

20. The Appellant, however, made the following entry in his Return in box 1.40, *Additional information*:

> "The other benefits figure of £302,122 includes the amount of £300,000. Paramount Knitwear (Leicester) Ltd made a cash contribution of £300,000 to Meridian FURBS. This is taxable under Section 595 TA 1988 and was shown on the form P11D of *the Appellant*. It is therefore included in his return. The company also contributed to Meridian FURBS by way of a part interest of some properties."

The taxability of the cash contribution of £300,000 was not in dispute.

21. On 13 April 2006 Paramount Knitwear Limited sent HMRC (Cumbernauld Department) its monthly PAYE return with an accompanying letter signed by the Appellant which said:

> "We are enclosing a return for the month ending 5 April 2006 and should advise you that the company made a contribution to the FURBS during the month. The contribution will be for the benefit of the members of the FURBS who are directors of the company, namely *the Appellant and his wife*. The contributions were transfers of parts of some properties owned by the company, the value of which is currently indeterminable. No PAYE is due in respect of such contributions, and we are of the view that no National Insurance Contributions are payable and consequently none are included in this return".

22. On 8 May 2006 Paramount Knitwear Limited sent HM Inspector of Taxes (Leicestershire and Northants Area) the annual employer's return (P35) for the year ended 5 April 2006. The company referred HM Inspector of Taxes to its earlier letter of 13 April 2006 with regards to FURBS contributions made during the year.

23. On 6 July 2006 PKF on behalf of Paramount Knitwear Limited sent HMRC ((Leicestershire and Northants Area) the relevant P11D forms dealing with employee benefits. The letter also stated that

> "The company also contributed to the Meridian FURBS by way of a transfer of part interests of some properties which our clients understand are liable to neither income tax nor NIC".

24. On 18 September 2006 an enquiry was opened by Mr Royal, HM Inspector of Taxes, into the company return of Paramount Knitwear (Leicester) Ltd for the year ended 31 March 2005. As part of the enquiry further information concerning the property interests transferred to the FURBS was requested which was:

(1) The full names of the directors/employees in respect of whom the contributions were made.

(2) The dates, amounts and form of those contributions made in respect of each of them.

(3) Confirmation that all of these amounts (cash contributions of £300,000 and property transfers of £525,000) has been charged to income tax on the directors/employees for the year ended 5 April 2005.

25. On 16 October 2006, the company's representatives, stated that the contribution of £300,000 had been assessed as a benefit in kind on the Appellant's self assessment return for the year ended 5 April 2005. The transfers of the interests in the two properties have not been assessed to income tax.

26. On 16 November 2006 Mr Royal responded to the letter of 16 October 2006 and made the following enquiry:

> "In relation to the property interests transferred to the FURBS at a combined value of £525,000, please let me know:
>
> a) how this amount has been allocated between the FURBS members under paragraph 5.2 and/or paragraph 5.3 of the FURBS deed, and
>
> b) having regard to the Special Commissioners' decision in *Irving v HMRC (SpC 526)*, why the transfers of the property interests are not considered to be assessable on the FURBS members under section 386 ITEPA 2003".

27. On 22 December 2006 the company's representatives replied that they were taking their clients' advices regarding the allocation between members of the property interests transferred as contributions to the Meridian FURBS, and that they would let Mr Royal know as soon as they received the advice. The representatives also suggested that the point arising from the Special Commissioners' decision in *Irving* be kept in abeyance in view of the pending appeal against the decision.

28. On 19 January 2007 Mr Royal agreed to keep the point from *Irving* in abeyance until the outcome of the Appeal was known.

29. In the year ended 31 March 2006 Paramount Knitwear (Leicester) Ltd transferred property to the FURBS with a value of £578,000. The property comprised a further 35 per cent interest in the two industrial units partly transferred in the previous year. The company's valuations were not in dispute.

30. The Appellant's Tax Return for 2005-06 signed 29 January 2007 did not include any income in relation to the further property transfers referred to in the above paragraph. The Appellant stated in Box 1.40 of the return:

> "Paramount Knitwear (Leicester) Limited contributed to Meridian FURBS (of which *the Appellant* was a Member) by way of transfer of part interest of some properties".

31. On 10 July 2008 Mr Royal wrote to the company's representatives advising them that the Court of Appeal had delivered its judgment in *Irving* and that he considered that values of the property interests transferred by Paramount Knitwear (Leicester) Limited to the FURBS were chargeable to tax on the Appellant and or his wife. In those circumstances Mr Royal requested the representatives to provide details of the transfer values for both 2005 and 2006, between the Appellant and his wife.

32. On 13 August 2008 the company's representatives advised that the property interests transferred were allocated wholly to the Appellant. The representatives added that

> "We would be grateful if you could please advise how you intend to assess the relevant amounts on the Appellant given that there has been no enquiry notices into his 2005 and 2006 self assessments and no discovery has been made given the previous full disclosures of the transactions".

33. On 17 September 2008 Mr Royal issued discovery assessments for the years ending 5 April 2005 and 2006.

34. In each of the respective tax years the Appellant submitted his tax return before the filing date of 31 January. HMRC ceased to be able to enquire into the Appellant's 2004/05 tax return on 31 January 2007. The corresponding date for the 2005/06 tax year was 31 January 2008.

Reasons

35. The assessments dated 13 August 2008 against the Appellant were issued after an officer of the Board had ceased to be entitled to give notice of his intention to enquire into the Appellant's tax returns for 2004/05 and 2005/06. Thus in order for the assessments to be valid they would have to meet the requirements of section 29 TMA 1970. HMRC has the burden of proving on the balance of probabilities that the requirements have been met.

36. The Appellant accepted that an Officer of the Board had made a discovery pursuant to section 29(1) TMA 1970, namely, that the Appellant's self assessments for 2004/05 and 2005/06 were insufficient in that the property transfers into the FURBS were allocated wholly to the Appellant who was liable to pay tax on the value of the transfers under section 386 ITEPA 2003.

37. Section 29(3) TMA 1970 stipulates that despite there being a discovery under section 29(1), no assessment shall be issued unless one of the two conditions specified in sub sections (4) and (5) has been met. The parties accepted that the first condition in subsection (4) that the insufficiency was due to the negligent or fraudulent conduct on the part of the Appellant was not applicable to the facts of this Appeal.

38. The dispute, therefore, was whether HMRC could establish on the balance of probabilities that the second condition in subsection (5) was satisfied. The salient part of the second condition was that an Officer could not have reasonably been expected on the basis of the information made available to him *before the closure of the enquiry window* (our italics) to be aware the assessment to tax was insufficient.

39. The wording of the second condition in subsection (5) has been the subject of extensive judicial analysis. Lewison J in *R & C Comrs v Landsowne* [2011] STC 372 at paragraphs 46 and 49 summarised the key propositions underpinning the interpretation of subsection (5).

40. At paragraph 46 Lewison J said:

> "In *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193, [2004] STC 544, 76 TC 259 the Court of Appeal considered s 29 and discovery assessments. In my judgment that case establishes the following propositions:
>
> i) 'Awareness' is the officer's awareness of an actual insufficiency in the self-assessment in question, rather than an awareness that he should do something to check whether there is an insufficiency (para [33]);
>
> ii) The test whether an officer could reasonably have been expected to be aware of an actual insufficiency is an objective test (para [33]);
>
> iii) The sources of information referred to in s 29(6) are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency (paras [36], [51]);
>
> iv) The information in question must clearly alert the officer to the insufficiency of the assessment (para [36]).

41. At paragraph 49 Lewison J said

> "In *Corbally-Stourton* Mr Hellier pointed out (correctly in my judgment) that:
>
> i) The statutory reference is to 'an officer' of the Board, not to any particular officer;
>
> ii) This entails a hypothetical officer rather than any real individual;
>
> iii) The hypothetical officer must be endowed with knowledge of elementary arithmetic, and some knowledge of tax law, all of which he will apply to the prescribed sources of information".

42. The interpretation of subsection (5) must also be viewed in the context of the purposive construction of section 29 which was discussed in paragraphs 10-12 above and summed up by the Upper Tribunal in *Hankinson* as:

> "The purpose of the new section 29 is to protect the taxpayer who has made an honest, complete and timely return from a late assessment".

43. Lewison J having regard to his analysis of subsection (5) put forward a question to be asked when determining disputes regarding compliance with subsection (5). The Tribunal adopts the same question appropriately adapted to suit the facts of this case to resolve this dispute which is as follows:

> "Whether an officer of the Board could not have been reasonably expected:
>
> i) On 31 January 2007 (31 January 2008 in the case of the 2005/06 return).

ii) on the basis of the information disclosed to him in the returns and accompanying documents by or on behalf of the Appellant. The information for the 2005/06 tax year also included that declared by the Appellant in the 2004/05 return.

iii) to be aware of an insufficiency in the Appellant's tax returns for 2004/05 and 2005/06.

44. Before considering the parties' submissions the Tribunal considers it necessary to highlight the following facts:

(1) The information disclosed by the Appellant to HMRC regarding the transfer of property from his company to the FURBS was confined to that set out in the additional information sections (white spaces) of the 2004/05 and 2005/06 tax returns which was:

> "The other benefits figure of £302,122 includes the amount of £300,000. Paramount Knitwear (Leicester) Ltd made a cash contribution of £300,000 to Meridian FURBS. This is taxable under Section 595 TA 1988 and was shown on the form P11D of Mr A S Omar. It is therefore included in his return. The company also contributed to Meridian FURBS by way of a part interest of some properties."

> "Paramount Knitwear (Leicester) Limited contributed to Meridian FURBS (of which Mr A S Omar was a Member) by way of transfer of part interest of some properties".

(2) From 14 April 2005 to 13 August 2008 Paramount Knitwear (Leicester) Ltd as the Appellant's employer made separate disclosures regarding the transfers of property to the FURBS to HMRC in monthly and annual PAYE returns, P11Ds and in response to HMRC's enquiry into its corporation tax return

(3) Mr Royal was the Officer responsible for conducting the enquiry into the tax affairs of Paramount Knitwear (Leicester) Ltd. It was as a result of the information gained from this enquiry which prompted Mr Royal to issue discovery assessments against the Appellant.

(4) Appellant's counsel suggested that Mr Royal's enquiry went wider than the tax affairs of the company. He referred to Mr Royal's request dated 18 September 2006 for confirmation that the property transfers of £525,000 had been charged to income tax on the directors/employees for the year ended 5 April 2005. HMRC disagreed with counsel's contention arguing that the request was directly related to the corporation tax liability of Paramount Knitwear (Leicester) Ltd. HMRC relied on section 76 of the Finance Act 1989 which showed that Mr Royal required this information to determine the appropriate deduction in respect the company's corporation tax liability. The Tribunal is persuaded by HMRC's submission.

45. Turning now to the parties' submissions on the disputed issue. HMRC argued that the information provided by Paramount Knitwear (Leicester) Ltd was not information made available to HMRC within the terms of section 29(6) TMA 1970. The company was a separate person from the Appellant. Thus the Tribunal in

determining whether the requirements of subsection (5) had been met was restricted to considering the information supplied by the Appellant which was that contained in the white spaces of the Appellant's 2004-05 and 2005-06 returns.

46. In HMRC's view, the information made available in the Appellant's tax returns did not clearly alert the hypothetical officer to an actual insufficiency in the Appellant's self assessments. The information was not a full and adequate disclosure of the property transfers. The entries did not explicitly state that the properties were transferred to the FURBS wholly or even partly for the Appellant's benefit. Further the entries failed to set out the full factual or legal position. Given those circumstances HMRC submitted that an officer of the Board could not have been reasonably expected to be aware of an actual insufficiency.

47. The Appellant's counsel's principal argument was that the information in the Appellant's tax returns was good enough to alert an officer of the Board of an actual insufficiency in the returns. Counsel contended that an officer could reasonably infer from the Appellant's disclosure in his 2004/05 return that some or all of the value of the part interest in the transferred properties related to the Appellant, and the tax charge on that value had been omitted from the return. In counsel's view the fact that the disclosure was included in the Appellant's return meant that it could only relate to the Appellant. Counsel made the same submission in respect of the 2005/06 return, adding that it could be read in conjunction with the information in the 2004/05 return.

48. Counsel, however, advanced a further argument, namely, that the Tribunal was also entitled to consider the context of the disclosures as well as their content in determining whether the requirements of subsection (5) had been met. Counsel pointed out that Paramount Knitwear (Leicester) Ltd, which was a company controlled by the Appellant and his employer, made a series of disclosures to HMRC about the property transfers during the period before the closure of the enquiry windows. Further the assessing officer actually knew the value of the transferred interests as at 31 March 2005, and that the value of the transfers had not been assessed to income tax. Further the officer knew that the only members of the FURBS were the Appellant and his wife.

49. In counsel's view it would be wrong to ignore the actual knowledge of the assessing officer as at the close of the enquiry windows in deciding whether the requirement of subsection (5) had been satisfied because:

(1) It would offend against the principle of finality if the actual knowledge of the assessing officer was ignored.

(2) It would be inconsistent with the approach adopted by the Court of Appeal in *Langham v Veltema* 76 TC 259 (2004), in particular with the need for new facts to be discovered.

(3) The assessing officer was an officer of the Board.

50. The Tribunal starts with counsel's proposition that the context of the Appellant's disclosures and the actual knowledge of the assessing officer can be taken into account in deciding whether the requirements of subsection (5) have been satisfied.

51. The Tribunal finds that the source of the information for the context and the actual knowledge was the disclosures made by the Appellant's employer in various returns associated with its responsibilities as an employer under the PAYE scheme, and in its response to the enquiry into its corporation tax returns. The Tribunal considers that if it took account of such information it would offend the requirements of section 29(6) TMA 1970 which defines the scope of information for determining whether the requirements of subsection (5) have been met.

52. Section 29(6) TMA 1970 restricts the type of information to that provided in and with the Appellant's tax returns, and to information in documents which the Appellant has notified in writing of its existence and relevance to HMRC. The information provided by Paramount Knitwear Limited was in its capacity as the Appellant's employer. The Appellant did not supply it in connection with his personal tax returns even though some of the documents from Paramount Knitwear Limited were signed by the Appellant in his capacity of director. Further the information from the employer did not identify the relevance of that information to the insufficiency in the Appellant's personal tax returns for 2004/05 and 2005/06. In this respect the Tribunal considers that the assessing officer's actual knowledge fell foul of the requirements of section 29(6), in that the source of his knowledge was his enquiries into the corporation tax affairs of the employer.

53. In the Tribunal's view, there is another reason why the assessing officer's actual knowledge was not pertinent to the disputed issue. Section 29(5) TMA 1970 is concerned with a hypothetical officer of the Board, not the actual officer issuing the assessment, and what that hypothetical officer can reasonably infer from the information provided in accordance with section 29(6) TMA 1970. The test about what an officer could reasonably have been expected to be aware of is an objective test, not a subjective one which was implied by counsel's reliance on actual knowledge. Also counsel's proposition subverted the correct sequence of analysing the provisions of subsection (5) by starting with the actual knowledge of the assessing officer rather than considering first the information supplied by the Appellant.

54. Even if the Tribunal is wrong on the exclusion of the actual knowledge of the assessing officer and the information provided by the employer, the Tribunal considers that this information and knowledge were lacking in material respects at the expiry of the enquiry windows. Mr Royal, the assessing officer, did not know that the property interests transferred were allocated wholly to the Appellant until the letter from the company's representatives dated 13 August 2008. The uncertainty over the allocation of the employer's contribution to the FURBS was demonstrated by the response of the company's representative to HMRC's request of 16 November 2006 for details of the amount allocated between the FURBS members. The representative said:

> "We are taking our client's advices regarding the allocation between the members of the property interests transferred as contributions to the Meridian FURBS. We will let you know as soon as we receive this."

The information about the precise allocation was not provided to HMRC until after the expiry of the enquiry windows for both years in dispute.

55. In view of the above analysis the Tribunal decides that it must determine the dispute on counsel's principal proposition which was that the Appellant's disclosures in his 2004/05 and 2005/06 tax returns were good enough to identify an insufficiency of the tax assessed.

56. The disclosures were as follows:

> "The other benefits figure of £302,122 includes the amount of £300,000. Paramount Knitwear (Leicester) Ltd made a cash contribution of £300,000 to Meridian FURBS. This is taxable under Section 595 TA 1988 and was shown on the form P11D of Mr A S Omar. It is therefore included in his return. The company also contributed to Meridian FURBS by way of a part interest of some properties" (2004/05 return).
>
> "Paramount Knitwear (Leicester) Limited contributed to Meridian FURBS (of which Mr A S Omar was a Member) by way of transfer of part interest of some properties" (2005/06 return).
>
> The 2005/06 return incorporated the disclosure in 2004/05 return (see section 29(7)(a)(i).

57. The Tribunal returns to the question posed in paragraph 43 which must be answered objectively:

> "Whether an officer of the Board could not have been reasonably expected:
>
> > 1. On 31 January 2007 (31 January 2008 in the case of the 2005/06 return);
> >
> > 2. on the basis of the information disclosed to him in the Appellant's 2004/05 and 2005/06 returns;
> >
> > 3. to be aware of an insufficiency in the Appellant's tax returns for 2004/05 and 2005/06.

58. The Tribunal finds the following facts in relation to the entries in the white spaces of the Appellant's 2004/05 and 2005/06 returns:

(1) The entries did not disclose the membership details of the FURBS, and in particular that the Appellant and his wife were the only members of the scheme. The 2004/05 return unlike the 2005/06 return did not explicitly state that the Appellant was a member of the FURBS.

(2) The entries failed to mention that the transfers of the property interests were wholly allocated for the Appellant's benefit.

(3) The entries contained no statement about the potential tax treatment of the property transfers, and whether it was in accordance with HMRC's published view on the tax position of such transfers.

(4) The fact that the entries were included in the Appellant's tax returns at its highest indicated that the Appellant was connected somehow with the property transfers. The Tribunal is satisfied that it would not possible for an officer of the

Board with this information to draw a reasonable inference of the precise nature of the connection.

(5) The Appellant was in a position to have made a full disclosure of the membership details of the FURBS, of the precise allocation of the property interests, and express a view on the tax position of the transfers but he chose not to do so.

59. The Tribunal concludes from its findings of fact that the Appellant's entries in its tax returns were carefully crafted disclosures seeking to pass through the initial checks carried out by HMRC but in no way meeting the test of clearly alerting an officer of the Board to an actual insufficiency. The entries fell far short of the requirement of a full and complete disclosure to justify an early finality of the assessments.

60. The Tribunal, therefore, decides that an officer of the Board could not have been reasonably expected on the basis of the Appellant's disclosures before the expiry of the enquiry windows to be aware of the actual insufficiency in the tax assessments for 2004/05 and 2005/06. The Tribunal holds that assessments for the disputed tax years were validly made. The Tribunal dismisses the Appeal.

61. 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.

Michael Aldersley

TRIBUNAL JUDGE
RELEASE DATE: 9 November 2011