[2019] UKFTT 0244 (TC)

# TC07090

**Appeal number: TC/2012/08116**

*Capital Gains Tax/Income Tax – £84m 'discovery' assessment – Whether a 'discovery' was made – Yes – Whether 'stale' – Yes – Appeal allowed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**JOHN HARGREAVES** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN BROOKS**

**Sitting in public at the Rolls Building, Fetter Lane, London on 12 – 16, 19 – 22 and 26 November 2018**

**David Goldberg QC, Conrad McDonnell and Amanda Brown (of KPMG), instructed by KPMG LLP, for the Appellant**

**Akash Nawbatt QC, Christopher Stone and Marianne Tutin, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr John Hargreaves appeals against the decision of HM Revenue and Customs ("HMRC"), dated 9 January 2007, to issue a discovery assessment, under s 29 of the Taxes Management Act 1970 ("TMA"), in the sum of £84 million in respect of a capital gain on a disposal of shares and his estimated foreign income for 2000-01.

2. Mr Hargreaves initially appealed on two grounds, first, that he was not in fact resident or ordinarily resident in the UK during 2000-01 and secondly, that the discovery assessment was invalid. However, in September 2018 he amended his grounds of appeal, maintaining his appeal against the validity of the discovery assessment but accepting that he was resident and ordinarily resident during 2000-01. At the same time, and pursuant to a s 54 TMA agreement of 19 September 2018, Mr Hargreaves withdrew his appeals against a closure notice amending his 2001-02 self-assessment tax return and notice of determinations issued by HMRC, on 20 June 2007, that he was resident and ordinarily resident in the UK during 2000-01 and 2001-02.

3. Accordingly, the sole issue before the Tribunal is the validity of the s 29 TMA discovery assessment (the "Discovery Assessment") issued on 9 January 2007, in particular:

> (1) Whether there was a discovery and if so whether it was stale (s 29(1) TMA);
>
> (2) Whether there was a loss of tax was the result of negligent conduct by Mr Hargreaves or by someone acting for him, in this case his then agent PricewaterhouseCoopers ("PwC") (s 29(4) TMA);
>
> (3) Whether 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 insufficiency of tax (s 29(5)TMA); and
>
> (4) Whether the return was made on the basis or in accordance with the practice generally prevailing at the time when it was made (s 29(2) TMA).

4. HMRC, represented by Akash Nawbatt QC, Christopher Stone and Marianne Tutin, contend that the assessment was valid, there was a discovery, the conditions in both s 29(4) and s 29(5) have been fulfilled and Mr Hargreaves has not established that his 2000-01 self-assessment tax return was made on the basis or in accordance with the practice generally prevailing at the time when it was made.

5. David Goldberg QC, Conrad McDonnell and Amanda Brown (of KPMG), who appeared for Mr Hargreaves, do not accept that there has been a valid assessment. They say that HMRC have not identified with any precision what the discovery was or when it was made. But even if a discovery had been made, they contend that it was stale at the time of the assessment. It is also disputed that the conditions, in s 29(4) and 29(5) have been fulfilled and even if they have, it is contended, that HMRC is precluded from making an assessment as the return was made in accordance with the practice generally prevailing at the time is made.

6. Although throughout this decision I have referred to the respondents as HMRC, this should be read, where appropriate, as a reference to the Inland Revenue. I should

also mention that, although carefully considered, it has not been necessary in this decision to refer to every argument advanced for and on behalf of the parties, or refer to all of the material to which I was taken.

## Law

7. Section 29 TMA, as in force at the material time, provided:

> **29 Assessment where loss of tax discovered**
>
> (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.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (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.
>
> (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.
>
> (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.

(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 19A of 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.

(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 year of assessments; 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.

(7A) …

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) …

8. In relation to the first of the above issues identified in paragraph 3, above, whether there was a “discovery” and if so whether it was “stale” (s 29(1) TMA), the

applicable test for a discovery was summarised by the Upper Tribunal in *HMRC v Charlton Corfield & Corfield* [2013] STC 866 ("*Charlton*") at [37] as follows:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive [the Inspector's] conclusions of their essential newness for s 29(1) purposes."

The Upper Tribunal went to say at [42]:

> "… on the basis of our finding that nothing new is required except the conclusion, the question in a case such as that put by [counsel for the taxpayer] would, we suggest, not be on the collective corporate knowledge of HMRC, but on the newness of that conclusion. Without deciding the matter, we can certainly envisage an argument that the passing of a file from one HMRC officer to another could not have the effect of refreshing a conclusion that was no longer new. But that does not depend on something new being discovered by reference to HMRC's collective knowledge. It is solely concerned with the newness of the conclusion."

9. It is common ground that that HMRC have the burden of establishing that a discovery was made and that the threshold for doing so is low. This is clearly apparent from the observations of the Upper Tribunal in *Charlton*, eg a "change of view, change of opinion or correction of an oversight."

10. In *Pattullo v HMRC* [2016] STC 2043 ("*Pattullo*") the Upper Tribunal, having considered the above passages from *Charlton*, particularly at [37], observed, at [52]:

> "So far as [it] concerns the question of law, namely whether any discovery under s 29(1) has to be acted upon while it remains fresh (or before it becomes stale), I prefer the submissions for the taxpayer. Quite apart from the support given to this submission by the passages in *Charlton* and *Corbally-Stourton* to which I have referred, which are highly persuasive, the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That subsection provides that 'if' HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word 'if', like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression 'if and when' (eg if

> the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of 'if'. The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1)."

It was considered by the Upper Tribunal, at [57], that a discovery would become stale "on any view" after a period of 18 months.

11. Having also cited [37] of *Charlton*, the Upper Tribunal in *HMRC v Tooth* [2018] STC 824 said, at [79]:

> "Broadly speaking, we agree with this statement of the law. However, for the purposes of determining this case, it is necessary to consider the question of 'newness' and its corollary 'staleness' in a little greater detail:
>
> (1) The 'discovery' in s 29(1) TMA relates to one of the three situations set out in s 29(1)(a), (b) or (c). <u>If</u> it is discovered that such a situation pertains (or may pertain: all that is required is for the officer to act honestly and reasonably), then the officer is at liberty to make an assessment under s 29 TMA.
>
> (2) We should say that we see no reason why one officer cannot make the discovery and delegate to another officer the making of the assessment. That is what occurred in this case: see [32] to [35] of the Decision, set out in para [40] above. However, it is important, we consider, to bear in mind that s 29 TMA envisages <u>two</u> stages—(i) the discovery and (ii) the making of the assessment consequent upon the discovery.
>
> (3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is 'new'.
>
> (4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for <u>different</u> reasons, discover that one of the situations set out in s 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then—for different reasons—discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.
>
> (5) The position is, obviously, a fortiori where two <u>different</u> officers are <u>independently</u> involved. Again, provided the basis for the discovery is different, there is a statutory basis under s 29(1) for issuing two assessments.
>
> (6) What, however, if two <u>different</u> officers independently make the <u>same</u> discovery? In our judgment, as a matter of ordinary

> English, a discovery can only be made once. We accept that s 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a 'discovery' is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery. [Presumably, the Upper Tribunal meant to refer to the second, and not the first, officer who cannot be said to have made a discovery in such circumstances.]
>
> (7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC:
>
> (a) The taxpayer, as we have found, should be protected from stale assessments. It follows that, if the first officer—for whatever reason—having made the discovery and (following the two-stage process we have described in para [79](2) above) having determined not to issue an assessment, that outcome ought to be binding on HMRC. No doubt such an officer would record his discovery, and the reason for not issuing an assessment, in the files.
>
> (b) As to HMRC's position, in their own interests, officers need to have clarity as to what constitutes a 'discovery' for the purposes of s 29 TMA. For example, any second officer making a 'discovery' in succession to another officer might, should an assessment be issued, be faced with a contention that his 'discovery' was in some way an illicit attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's 'discovery' was related to that of the first officer and so not his own at all. As can be seen from para [88](7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of s 29 TMA."

12. In *Tooth*, at [83] the Upper Tribunal commented that a discovery would be stale if the assessment was issued five years later.

13. The issue of a discovery being "stale" was also considered by the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 380 (TCC) ("*Beagles*"), which having considered the relevant authorities, observed:

> "59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] 35 STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other 40 similar (obiter) statements and so we will follow it.

> 60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s 34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end.
>
> 61. On that basis, we reject [counsel for HMRC's] submission that there is no concept of "staleness" involved in a discovery."

14. Given the First-tier Tribunal ("FTT") is bound by the decisions of the Upper Tribunal, it follows that, insofar as the present case is concerned, the concept of staleness is applicable.

15. Section 29(3) TMA provides that where, as in this case, a return has been submitted, a taxpayer "shall not be assessed unless one of the two conditions mentioned below is fulfilled." The first condition, contained in s 29(4) TMA, is that the insufficiency of tax was due to the negligent or fraudulent of the taxpayer or a person acting on his behalf. The second condition, in s 29(5) TMA, is that at the time the enquiry window had closed or an enquiry was completed, 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 insufficiency of tax. It is clear from *Hankinson v HMRC* [2012] 1 WLR 2322 at [30] that it is for the Tribunal to decide on the basis of all relevant evidence, whether either condition is satisfied.

16. In respect of the first, s 29(4) TMA, condition, as fraud is not alleged in this case the issue is whether the insufficiency of tax was the result of negligent conduct by Mr Hargreaves or PwC. On what constitutes such conduct Judge Bishopp in the Upper Tribunal in *Moore v HMRC* [2011] UKUT 239 (TCC) said:

> "8. The [First-tier] tribunal referred at [8] to the observation by Judge Berner in *Anderson (deceased) v HMRC* [2009] UKFTT 206 at [22]. After remarking that "[t]he making of an innocent error, and negligent conduct, are not mutually exclusive" he said:
>
> > "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."
>
> 9. The First-tier Tribunal in this case then went on to say, at [9]:
>
> > "We consider that, viewed objectively, such a taxpayer would, unlike Mr Moore, have referred to the guidance provided to him, made use of the working sheet to which he was directed and not have relied on informal advice received in a social context as the basis for completing his returns."

He continued:

> "13. … counsel appearing before me for HMRC, argued that a determination of negligence required a two-stage approach. First, one

must consider whether a person whose conduct is under scrutiny had a duty of care and, if so, the nature of the duty. That, he said, was a question of law. Once a duty of care has been identified, it is necessary to go on to decide whether the person has satisfied the duty. That, he said, is a question of fact. I agree with that analysis, which is consistent with authority, particularly *Qualcast (Wolverhampton) Ltd. v Haynes* [1959] AC 743, a decision of the House of Lords. At p 757 Lord Somervell observed that:

> "Whether a duty of reasonable care is owed by A to B is a question of law. ... When negligence cases were tried with juries the judge would direct them as to the law as above. The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question for the jury."

14. At p 759 Lord Denning added:

> "In the present case the only proposition of law that was relevant was the well-known proposition – with its threefold sub-division – that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact – be it judge or jury – can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law."

15. There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return. Mr Moore did not suggest otherwise; his argument was that he endeavoured to do so, and that, taken together, the return and the added sheet discharged the obligation. The First- tier Tribunal evidently did not accept that proposition, preferring the view that the duty of care required Mr Moore to enter accurate figures in the boxes."

17. It is apparent from the decision of the Tribunal in *Paul Daniel v HMRC* [2014] UKFTT 173 (TC) at [13] and [159] that where, as in the present case, there is a claim to non-residence, a failure to review the relevant circumstances can amount to negligent conduct on the part of a taxpayer or those acting on his behalf.

18. The second, s 29(5) TMA), condition, whether 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 insufficiency of tax, was considered by the Court of Appeal in *Sanderson v HMRC* [2016] STC 638 in which Patten LJ, giving the judgment of the Court said:

> "22. It is important to emphasise that the decision in *Lansdowne* did not involve any qualification of what Auld LJ in *Langham v Veltema* identified as the question posed by the second s.29(5) condition. The hypothetical officer must, on an objective analysis, be made aware of an actual insufficiency in the assessment by the matters disclosed in the s.29(6) information. This is made clear by the Chancellor at [55] of his

judgment in *Lansdowne*. The sole dispute in that case was whether the disclosures made by the taxpayer's accountants were sufficient to cause the hypothetical officer to conclude that there was an insufficiency.

23. The passages in the judgments of the Chancellor and Moses LJ as to the level of the officer's awareness were directed to the Revenue's argument that the disclosures made required inferences to be drawn about the accuracy of the self-assessment based on certain legal assumptions and that the officer could not be expected to resolve issues of law in determining the impact of the information supplied. In the face of such uncertainties, the officer could not be taken to be "aware" of an insufficiency. The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context.

…

25. I do not accept that ss.29(1) and (5) import the same test and that the Revenue's power to raise an assessment is therefore directly dependent on the level of awareness which the notional officer would have based on the s.29(6) information. The exercise of the s.29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made. Section 29(5) operates to place a restriction on the exercise of that power by reference to a hypothetical officer who is required to carry out an evaluation of the adequacy of the return at a fixed and different point in time on the basis of a fixed and limited class of information. The purpose of the condition is to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s.29(1) power. Although there will inevitably be points of contact between the real and the hypothetical exercises which ss.29(1) and (5) involve, the tests are not the same."

19. In *Beagles* at [100], the Upper Tribunal endeavoured:

"… to summarise the principles that we derive from Patten LJ's judgment as follows:

(1) The test in s 29(5) is applied by reference to a hypothetical HMRC 15 officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s 29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

> (3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).
>
> We agree therefore with [Counsel for Mr Beagles] that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.
>
> (4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17(3)]).
>
> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33] [34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).
>
> (6) As can be seen from the discussion in Sanderson (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in Lansdowne [70]). The information made available must "justify" raising the additional assessment (Moses LJ, Lansdowne [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2011] STC 372 at [48])."

20. Turning to the issue of whether a return was made on the basis or in accordance with the practice generally prevailing at the time when it was made (s 29(2) TMA). As Henderson J (as he then was) observed in *HMRC v Household Estate Agents Ltd* (*Household Estate Agents*) at [45], in relation to the equivalent corporation tax discovery provisions contained in paragraphs 43, 44 and 45 of schedule 18 of the Finance Act 1998 which mirror s 29(4), s 29(5) and s 29(2) TMA:

> "… it is only necessary to consider paragraph 45 in a case where the conditions of either paragraph 43 or paragraph 44 are satisfied, and it operates as a further restriction on the power of HMRC to make a discovery assessment."

21. In *Hankinson v HMRC* [2012] 1 WLR 2322, Lewison LJ said, at [19]:

> "Sub-section (2) [TMA] refers to the making of an error in a return which was in fact made in accordance with generally prevailing practice. The burden of proving the existence of the error and a generally prevailing practice rests on the taxpayer. In *HMRC v Household Estate Agents Ltd* [2007] EWHC 1684 (Ch) [2008] STC 2045, para 45 Henderson J said of equivalent provisions relating to corporate taxpayers:

> "it seems clear to me as a matter of general principle that the burden of proof must rest on the party who asserts that there has been an operative mistake in the return, and that the return was in fact made in accordance with the generally prevailing practice. That party will inevitably be the taxpayer, not HMRC. In other words, the burden lies on the taxpayer to establish that para 45 [of schedule 18 to the Finance Act 1998] applies, not on the revenue to establish that it does not apply."

22. Therefore, it is for a taxpayer to establish the practice generally prevailing at the time the return was filed and that the return was filed in accordance with that practice.

23. At [56] in *Household Estate Agents* Henderson J said that the practice relied upon must be:

> "… relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike."

24. Further guidance on "practice generally prevailing" was given by the Tribunal in *Boyer Allen Investment Services Ltd v HMRC* [2012] UKFTT 558 (TC), from which I take the following propositions:

> (1) The practice has to be one adopted by taxpayers and HMRC alike (see *Boyer Allen* at [30]);
>
> (2) The practice must be capable of being "readily ascertainable by the parties" ie it "must have substance (in the sense of not being inchoate), and be sufficiently precise and devoid of uncertainty as to its application" (see *Boyer Allen* at [34]);
>
> (3) A practice would not exist "if it was equivocal or dependent on the ascertainment of facts, except where the criteria for its application by reference to the facts were themselves understood with a sufficient degree of precision so as the make the practice one that can be readily applied in any given case" (see *Boyer Allen* at [34]);
>
> (4) The practice "must have been adopted by HMRC and generally, if not universally, by the taxpayer community" (see *Boyer Allen* at [39]);
>
> (5) "A practice will not be generally prevailing if it is not agreed, or respected, as a whole, either by HMRC failing to apply every element of the practice in every case where it should be applied, or by taxpayers adopting only those parts that are favourable to them, but disputing others that are not" (see *Boyer Allen* at [39]);
>
> (6) The practice must be settled which will not be the case "if it is articulated or applied otherwise than in a consistent manner" or if it is based on criteria which are "subject to change depending on the particular circumstances or the facts of a particular case" (see *Boyer Allen* at [40]);
>
> (7) "If the facts are relevant to the application of a practice, the relevant factors must themselves be clear and unequivocal" (see *Boyer Allen* at [40]); and
>
> (8) "Mere inactivity" can in "appropriate circumstances" give rise to a practice. "But such an omission must also be capable of articulation in the

same way as a positive act. It must have both clarity and substance. Its parameters must be clearly defined so that the general acceptance amounts to the same unequivocal understanding" (see *Boyer Allen* at [41]).

**Evidence**

25. In addition to some 17 lever arch files containing documentary evidence, which included copies of correspondence between the parties, Mr Hargreaves's 2000-01 self-assessment tax return, form P85, IR20 and other relevant publications I heard from the following witnesses:

(1) David West, a former officer of HMRC who retired from HMRC as Inspector Senior Principal at the Centre for Non-Residents ("CNR") on 31 March 2015. His evidence concerned the Discovery Assessment which was issued on his instructions. I agree with Mr Goldberg's description of Mr West as a "patently honest and admirable witness.";

(2) Susan McLean-Tooke, a policy adviser employed by HMRC whose evidence concerned the practice of HMRC in determining the residence status of taxpayers as at 31 January 2002. Although I found Ms Mclean-Tooke to be a straightforward witness as she did not have actual knowledge of the circumstances of the appeal her evidence was, at best, of limited value;

(3) Stephen Symonds, of HMRC's International Technical Team in Bootle which provides expertise and guidance to Inspectors of Taxes on issues of residence. Although called to give evidence Mr Goldberg did not have any questions for him in for cross examination as his evidence was not disputed;

(4) Andrew Conder, a partner in the Private Client Department at Macfarlanes LLP, who gave evidence in relation to the practice prevailing in relation to the completion of a personal self-assessment tax return for a taxpayer who claimed to have "gone abroad permanently" and how HMRC's guidance was understood by practitioners as at the time Mr Hargreaves filed his 2000-01 return. Although Mr Condor had a tendency on times to seek to give answers that he considered to be supportive of Mr Hargreaves, I found him to be an honest, credible witness always seeking to assist the Tribunal;

(5) Richard Citron, an international tax partner in BDO LLP. His evidence concerned his understanding of how he would have acted in the period between 2000 and 2002, particularly January 2002, in relation to the practice prevailing at the time, his reliance and that of the tax profession and HMRC on IR20 and how he would have advised a taxpayer wanting to leave the UK whilst retaining a property in the UK. Mr Citron was a good and helpful witness giving clear answers in a straightforward manner even if, on occasions during cross examination, he was somewhat argumentative;

(6) John Loebl, of Grant Thornton who gave evidence on how he would have advised an individual taxpayer who considered him or herself to be non-UK resident, having gone abroad permanently, to complete their UK tax return for 2000-01 given the practices generally prevailing up to 31

January 2002. Notwithstanding some reluctance to agree to any proposition put to him that he thought would not help Mr Hargreaves, I found Mr Loebl to be a good credible witness who sought to assist the Tribunal; and

(7) David Kilshaw, a tax partner with EY who between 1996 and 2013 was a private client tax partner with KPMG LLP. He has advised clients on matters of personal taxation for over 35 years and has lectured to tax professionals on the question of residence status for tax purposes. His evidence concerned the prevailing practice in relation to the form of a 2000-01 tax return filed by an individual claiming to be non-UK resident. Although initially somewhat evasive during cross examination, after it was explained to him that any answers given could be clarified in re-examination, Mr Kilshaw gave good clear answers clearly seeking to assist the Tribunal.

*Approach to evidence*

26. As Stewart J observed in *Kimathi & Ors v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB):

> "95. In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence. Three decisions in particular require citation. These are:
>
> - *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) – Leggatt J (as he then was)
> - *Lachaux v Lachaux* [2017] EWHC  (Fam) – Mostyn J
> - *Carmarthenshire County Council v Y* [2017] EWFC 36_– Mostyn J
>
> 96. Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:
>
> i) *Gestmin*:
>
> - We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.
> - Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
> - Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
> - The process of civil litigation itself subjects the memories of witnesses to powerful biases.
> - Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by

a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

- The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) *Lachaux*:

- Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities (The dissenting speech of Lord Pearce in Onassis and *Calogeropoulos v Vergottis* [1968] 2 Lloyd’s Rep 403, 431; Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd’s Rep 1, 57). I extract from those citations, and from Mostyn J's judgment, the following:
- "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"
- "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"
- Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) *Carmarthenshire County Council*:

- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

- However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said:

  "…this approach applies equally to all fact- finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

97. Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory."

27. Given that this appeal concerns a tax return filed in January 2002 and issues relating the prevailing practice in determining the residence of an individual at that time, some 16 years prior to the date of the hearing, I have adopted such an approach in this case placing greater reliance on contemporaneous documents and publications than the recollections of the individuals concerned.

**Facts**

28. The following Statement of Agreed Facts was produced by the parties:

(1) John Hargreaves was born in England on 4 January 1944.

(2) Until March 2000, John Hargreaves was resident in England for tax purposes. The position thereafter is in issue.

(3) On 11 September 1989, John Hargreaves became the owner of the property known as The Coach House, Tarn House Farm, Barton, Preston, Lancashire ("**The Coach House**"), which was purchased for £175,000.

**Matalan**

(4) John Hargreaves was until May 1998 the majority shareholder in Matalan plc (formerly J H Holdings Ltd). Matalan plc owned Matalan Retail Limited, a company which operates retail businesses throughout the United Kingdom under the brand 'Matalan'.

(5) In May 1998, shares in Matalan plc became listed on the London Stock Exchange. John Hargreaves retained his own shareholding at that time.

(6) As at 1 March 2000, John Hargreaves was employed by Matalan plc as Chairman. His contract of employment dated 6 May 1998 required him to devote "the whole of his time, attention and abilities to the business of the Company" (clause 4.2).

(7) From 1 March 2000, John Hargreaves continued to be employed as Executive Chairman on the terms of a new contract of employment with Matalan Plc which required him (clause 4.2) to devote "such of his time, attention and abilities to the business of the Company as shall be required to carry out such duties". Clause 6 stated that his "principal place of

employment shall be at Matalan Plc's head office in Skelmersdale and the Director may also in the performance of his duties be required to travel overseas".

(8) On 15 March 2000, John Hargreaves submitted to HM Revenue & Customs the Form P85:

> (a) In answer to question 4 he stated that he had left the UK on 11 March 2000.
>
> (b) In answer to question 6 he ticked the box confirming he intended to live outside the UK permanently.
>
> (c) In answer to question 7 of the form he ticked the box confirming he would be visiting the UK while living abroad and stated that he expected to spend over the following three years "no more than two months per annum" in the UK.
>
> (d) In response to question 17 he disclosed that he would have accommodation (The Coach House) in the UK while he was away.
>
> (e) In response to question 28 he confirmed he would continue to have the following sources of income in the UK after he had left: "Remuneration", "Bank/building society interest" and "Dividends".

(9) John Hargreaves disposed of part of his shareholding in Matalan plc on 16 May 2000 following a public Regulatory News Service (RNS) announcement of the share placing on 9 May 2000 receiving proceeds (gross of the fees of UBS Warburg) of approximately £231 million. The quantum of the resulting gain is not agreed.

(10) The shares sold represented approximately 29.3% of John Hargreaves's beneficial interest in Matalan plc and following the disposal he continued to have a beneficial interest in 26.7% of the shares in the company. Following the disposal, the Hargreaves family (including shares held by other Hargreaves family members and by family trusts), retained a beneficial interest in over 50% of the shares in Matalan plc.

(11) John Hargreaves filed his tax return for 2000-01 on 31 January 2002. In that return, on the page entitled 'Non-Residence, etc', he ticked box 9.2 stating that he was "not resident in the UK" and box 9.4 stating that he was "not ordinarily resident in the UK". He gave additional information in the return in boxes 9.7 to 9.36.

(12) John Hargreaves filed his tax return for 2001-02 on 31 January 2003. He again completed that return on the basis that he was not resident and not ordinarily resident in the United Kingdom.

(13) HMRC did not open an enquiry into the 2000-01 return. However, on 9 January 2007, HMRC issued a notice of assessment for that year charging tax of £84,000,000.00.

(14) HMRC opened an enquiry into the 2001-02 return. This enquiry was closed by closure notice dated 8 March 2012. The closure notice (which concerned the tax year 2001-02 only) concluded that John

Hargreaves was "resident and ordinarily resident in the UK during 2001-02" and amended the self- assessment to charge additional tax of £6,134,065.89.

**Monaco**

(15) On 11 March 2000, John Hargreaves travelled to Monaco.

(16) Prior to travelling to Monaco on 11 March 2000, John Hargreaves agreed with the Le Meridien Hotel, Monaco, that he would occupy a suite from 10 March 2000 to 15 September 2000.

(17) With effect from 1 September 2000, John Hargreaves leased an apartment in Monaco whose address was First floor, Block C, Houston Palace, 7 Avenue Princesse Grace, Monaco.

**The United Kingdom**

(18) After 11 March 2000, John Hargreaves travelled to the United Kingdom on multiple occasions.

(19) In the tax year 2000-2001, John Hargreaves was in the United Kingdom on 41 separate occasions. In that tax year: he spent 71 full days in the United Kingdom (ignoring days of arrival and departure); was in the United Kingdom at midnight on 112 days and was present in the United Kingdom for at least some part of 152 days.

(20) In the tax year 2001-2002, John Hargreaves was in the United Kingdom for part of the day on 6 April 2001 and was then in the United Kingdom on 31 separate occasions[1]. In that tax year: he spent 94 full days in the United Kingdom (ignoring days of arrival and departure); was in the United Kingdom at midnight on 124 days and was present in the United Kingdom for at least some part of 155 days.

(21) In the tax year 2001-2002, John Hargreaves was admitted to hospital in the United Kingdom twice in connection with two separate in-patient attendances for spinal surgery.

*Further Findings of Fact*

29. Although helpful, it is necessary to expand on the Statement of Agreed Facts by reference to the evidence and contemporaneous documents to fully understand the circumstances of the case.

30. Paragraph 28(15) of the Statement of Agreed Facts records that Mr Hargreaves departed for Monaco on 11 March 2000. In a letter to him, dated 18 February 2000, PwC set out the advice given to him in relation to his departure and assure him that "everything that needs to be done is now in hand". Although the letter was long (some eight pages) Mr Hargreaves was encouraged to read it or if he just wanted to "skim

[1] The figure of 31 is provided on the basis that Mr Hargreaves's presence in the UK on 6 April 2001 is not considered a "separate occasion". Mr Hargreaves's presence on 6 April 2001 was part of a visit spanning 3 April 2001 to 6 April 2001 which has already been counted in the 41 "separate occasions" for the 2000-2001 tax year described at paragraph 28(19), above.

through", it could be used as a basis for a meeting to be held on 7 March 2000. Material parts of the letter explain that:

> "The purpose of your move to Monaco is as we know a change of lifestyle and we have also discussed that there are some potential tax advantages to the arrangement. In particular the capital gains tax sheltering which is discussed in a little more detail in the section on your departure to Monaco.

Under that section, 'Your departure for Monaco' the letter states:

> "I thought it would be helpful to set out the Inland Revenue requirements in order to be considered as not resident and not ordinarily resident in the United Kingdom. I have also set out the steps we have put in place for obtaining your residence permit when you next arrive in Monaco. Obviously we can discuss both the UK and Monaco position in our meeting on 10 March at which time we can also complete the further documentation for the Inland Revenue.
>
> In order to be regarded as not resident and not ordinarily resident in the UK for tax purposes, an individual must be seen to have "left" the UK. If you are not leaving the UK to work abroad full time (as in your case) the you must be able to demonstrate that you have set up a permanent home abroad and that your absence is intended to be for at least three years. This is typically achieved by buying a home overseas, even where this merely on a rental basis. The Inspector may enquire as to which you have retained a property in the UK although, in practice, provided you meet the time tests then your non-resident status should be confirmed.
>
> An individual must inform the Revenue of his departure from the UK by filling in a departure questionnaire (form P85) which, as mentioned above, we will complete in our meeting next month. We will indicate on the questionnaire your departure date and intentions for the future with regard to the time that you will spend in the UK. At that point we will ask the Revenue for a provisional non-resident ruling. …
>
> Following the submission if your departure questionnaire the Revenue may ask you to provide evidence that you have "left" the UK for at least three years. This will typically involve disclosing the steps you have taken to acquire a permanent home abroad. Clearly the ideal scenario is that you purchase a property or at the very lease acquire it on a long-term lease (of at least three years). In this regard I note that the copy lease that you kindly provided for Apartment I, The Roccabella is in the name of [another person] who in turn is permitting you to live there. We would ideally want a more tangible arrangements to present to the Revenue to support the claim for non-residence in the UK. Maybe we can discuss this further at our meeting.
>
> Further, the Revenue may ask why you have continued to retain a property in the UK for your use. Our response will need to support your declaration that you have left the UK to establish a permanent home in Monaco. The Transporting of personal belongings to Monaco, acquiring a local residence permit which I have addressed separately below, opening local bank accounts etc. all support the premised that you have left the UK and moved you home overseas.

> We also discussed how, if questioned, we can relate your move to a change in lifestyle following the successful flotation of Matalan. Whilst you will still be required to perform some duties in the UK the nature of your duties has changed as has the quantum of in that number of hours that you will be required to spend in the performance of those duties will be significantly reduced … hence the proposed revision to your service agreement. …
>
> Subject to the Revenue's acceptance of the above, you will be regarded as resident and not ordinarily resident from the day after your departure."

The letter continued explaining the necessity of keeping a precise record of any trips to and from the UK and the purpose of the visit. It was recommended that:

> "Due to the critical nature of this information … it is recorded by your secretary (as well as your pilot) as we agreed. It would be sensible to limit your time in the UK so that we are not bordering on the maximum time allowed. This is particularly so as we will need to formally record days spent in the UK on your tax return."

31. Although the Statement of Agreed Facts records that Mr Hargreaves purchased the Coach House on 11 January 1989 for £175,000 (see paragraph 28(3), above) it does not explain that it was his home for 11 years before 11 March 2000 from which time it became his sole home which he shared with his partner Joan Hargreaves. The Coach House, which was sold in 2005 (with its furniture), is a three bedroomed house near Preston, Lancashire with two acres of land, half an acre of which was used as a garden. It is located in a small cul-de-sac of four farm buildings in a very rural and secluded area. It was used by Mr Hargreaves when in the UK on business but when not in use the Coach House was locked up and left unoccupied.

32. With regard to his employment by Matalan, the Statement of Agreed Facts refers to new employment arrangements from 1 March 2000 (see paragraph 28(7), above). However, as of that date and 6 April 2000, as is clear from minutes of a meetings of the Remuneration Committee of Matalan held on 13 June, 18 September and 15 December 2000, the new terms were the subject of ongoing negotiations. These negotiations were not concluded until December 2000 when the contract was backdated to 1 March 2000. Therefore, as at 6 April 2000, the provisions of Mr Hargreaves's 1998 contract of employment by Matalan continued to apply which, as noted in the Statement of Agreed Facts (at paragraph 28(6), above) required him (with emphasis added) to "devote the **whole of his time**, attention and abilities to the business of the Company." This can be contrasted with the equivalent provision, in clause 4.2, of the 1 March 2000 contract (again with emphasis added) under which Mr Hargreaves was required to, "devote **such of his time**, attention and abilities to the business of the Company **as shall be necessary** to carry out such duties" (see paragraph 28(7) of the Statement of Agreed Facts, above).

33. Concerns raised by PwC on reviewing the 1998 Service Agreement included Mr Hargreaves's position as Executive Chairman of Matalan and whether his "going non-resident … was realistic for a plc". PwC were also concerned that given the contractual place of employment (see paragraph 28(7), above) it seemed "a little incongruous" to have a Monaco resident with a place of employment in Skelmersdale. In addition, in regard to his Bentley, PwC considered that it was "going to seem a little strange to have a non-UK resident director with a company car."

34. Paragraph 28(8) of the Statement of Agreed Facts refers to the P85 submitted by Mr Hargreaves on 15 March 2000. In it Mr Hargreaves states that he is British, he was born in the UK and is going to Monaco on 11 March 2000 having lived in the UK "since birth". In answer to question 7 of the P85, Mr Hargreaves confirmed that he would be visiting the UK while living abroad stating that he expected to spend "no more than two months" per annum in UK. However, the time actually time spent in the UK was 152 days in 2000-01 and 155 days in 2001-02. Mr Hargreaves also provided details of the Coach House in the appropriate section of the P85.

35. On 15 March 2000, PwC wrote to HMRC:

> "… on behalf of our client his completed P85, confirming his departure from the UK. Mr Hargreaves will be regarded as provisionally not resident and ordinarily resident in the UK with effect from 12 March 2000."

36. Paragraph 28(9) and (10) of the Statement of Agreed Facts refers to the disposal, by Mr Hargreaves of his Matalan shares. As was to be expected the disposal of these shares was the subject of tax planning discussions between Mr Hargreaves and his advisers which began in 1998 and considered, amongst other matters, whether Mr Hargreaves should emigrate to "shelter" gains. A fax from PwC to Mr Hargreaves's advisors, dated 6 January 1999, summarised the tax position and background information of Mr Hargreaves and his family and noted that the objective of the advice was to "minimise the tax liability on the future disposal of shares and that Mr Hargreaves was:

> "… considering emigrating for five years with a view to becoming neither resident nor ordinarily resident in the UK. If he does so successfully then any gain from the disposal of his shares will be free from capital gains tax if the shares are sold in a year in which he is neither resident or ordinarily resident. It is worth noting that the split year concession was amended in the 1998 Budget and therefore JH should only sell his shares after the end of the tax year in which he leaves the UK."

Another PwC document, dated 19 January 1999, referred to Mr Hargreaves losing "his UK ordinary residence status":

> "… by leaving the UK prior to 6 April 1999 (preferably pre-Budget) and remain out of the UK until at least 6 April 2004 with visits to the UK restricted to an average of 90 days per year. He intends to reside in a tax haven, possibly Monaco."

37. Paragraph 28(11) of the Statement of Agreed Facts notes that Mr Hargreaves filed his 2000-01 tax return on 31 January 2002 completing the "employment", "land and property", "trusts etc" and "non-residence etc" pages but not the "foreign" or "capital gains" pages of the return. The employment pages indicate that his employer is Matalan in Skelmersdale, Lancashire and sets out his salary and company car details. In addition to the answers given in boxes 9.2 and 9.4 of his 2000-01 tax return, to which the Statement of Agreed Facts refers (see paragraph 28(11), above), the following information was given; that Mr Hargreaves was a commonwealth citizen (box 9.9); that he spent 72 days in the UK (box 9.11); that he was resident in the UK during 1999-00 (box 9.12); that up to 5 April 2001 he had spent 77 days in the UK since his departure (box 9.14); that his country of nationality was Great

Britain (Box 9.15) and country of residence was Monaco (box 9.16). Under "Information required if you claim to be not ordinarily resident in the UK for the whole of 2000-2001 Mr Hargreaves has answered that he was ordinarily resident in the UK in 1999-00 (box 9.17) and that having left he intends to live outside the UK permanently (box 9.22).

38. In the "white space", box 9.36. Mr Hargreaves stated:

> "I left the UK permanently on 11 March 2000 and I am regarded as provisionally not resident and not ordinarily resident with effect from 12 March 2000. I previously completed and submitted form P85"

Mr West said that he did not understand what "provisionally non-resident" meant on that return and said that it did not raise a "red flag" or a "question mark" in his mind. The unchallenged evidence of Mr Symonds was that the use of "provisional" would not have caused HMRC "to believe that [Mr Hargreaves] in fact remained in the UK."

39. As stated in paragraph 28(13) & 11(14) of the Statement of Agreed Facts there was no enquiry by HMRC into Mr Hargreaves's 2000-01 return but there was into his 2001-02 return.

40. Both Ms Mclean-Tooke and Mr West explained that self-assessment returns are dealt with under a "process now check later" regime. Mr West added:

> "The taxpayer self assesses. Unless it's challenged that it processed; the tax is charged as per that return. So if the return suggests that there is X pounds to pay, that's what is processed through the computer system. "Check later" is that the department would, after the processing is done and within the statutory time limits – would check to see if they wanted to raise an inquiry into that return."

41. Mr West also confirmed that the processing of a return was "essentially" an automated process and agreed that the following description, of Auld LJ in *Langham (Inspector of Taxes) v Veltema* [2004] STC 544 at [10], accurately recalled his memory of what was happening:

> "Miss Ingrid Simler, on behalf of the Inland Revenue, informed the Court that, whatever the Manuals say, the reality is that Inland Revenue staff in the main simply data-process the information on the returns, largely as a consistency check, and scrutinise only a very small number of them on a random basis or where there is thought to be high risk. She also noted - whilst maintaining its irrelevance to the issue of the Inspector's knowledge of the insufficiency of Mr. Veltema's assessment - that the General Commissioners, in their decision, made no finding as to what the Inspector should have done in the circumstances or as to general practice. She acknowledged that what happened in practice by way of scrutiny of returns is no aid to construction of the Act, any more than that which, according to the Manuals, should have happened."

42. However, the enquiry into Mr Hargreaves's 2001-02 tax return was not the result of scrutiny of that return by HMRC but rather an article published, on 23 March 2003, in *The Sunday Times*. This described Mr Hargreaves, who it said "made £230m when he sold some of his shareholding in Matalan in May 2000", as a "Monaco tax exile who spends three days a week at Matalan's headquarters in Skelmersdale."

43. Mr West said that, as expected, HMRC officers take a particular interest in articles or other information provided by the media, particularly those which concern high net worth taxpayers. As a result of *The Sunday Times* article, on 16 January 2004 Mr West's colleague, Paul Worth, wrote to Mr Hargreaves and his representatives, PwC, to open an enquiry into Mr Hargreaves's 2001-02 self-assessment tax return. The letter explained that the enquiry concerned Mr Hargreaves's claim to be "non-resident in the UK" and that no other areas would be checked unless PwC's reply or other information gave a reason for doing so.

44. In a further letter to Mr Hargreaves and PwC, dated 5 March 2004, Mr Worth enclosed a schedule of the information he sought to deal with the enquiry which he requested be provided by 5 May 2004. The information sought by HMRC included the following:

> (1) For the whole of the period from the date of Mr Hargreaves's departure from the UK to 5 April 2002 a schedule showing:
>
> > (a) the date of each full day in the UK
> >
> > (b) the date of each separate arrival in the UK
> >
> > (c) the date of each separate departure from the UK
> >
> > (d) the purpose of each visit to the UK including any work/business carried out here
> >
> > (e) the accommodation address for the duration of each separate visit to and/or overnight stay in the UK
> >
> > (f) identify any days excluded for medical treatment with full details of why it was carried out in the UK
> >
> > (g) the date of each full day in Monaco
> >
> > (h) the date of each separate arrival in Monaco
> >
> > (i) the dates of each separate departure from Monaco
> >
> > (j) the dates and addresses of where Mr Hargreaves stayed during each separate absence abroad in Monaco or elsewhere and to identify the date when engaged in the duties of employment
> >
> > (k) Mr Hargreaves's records/work diaries were also requested to support the above information.
>
> (2) A copy of the computation in support of the entries at boxes 9.11 and 9.14 of Mr Hargreaves's tax return.
>
> (3) Particulars of whether Mr Hargreaves's had any accommodation available for your use in the UK during the year ended 5 April 2002 including the following information in respect of each such property.
>
> > (a) the full address
> >
> > (b) particulars of Mr Hargreaves's interest in the property (ie owned or rented)
> >
> > (c) the date the accommodation was acquired

(d) the cost of the property, particulars of any mortgage and current valuation

(e) if rented, the particulars of the terms and a copy of the rental agreement

(f) particulars of any lettings/sub-lettings during 2001-02

(g) full description of the property with particulars of any improvement work carried out since 11 March 2000

(h) a copy of any mortgage or loan application made during 2001-02

(4) Prior to and since Mr Hargreaves's arrival in Monaco any correspondence with immigration authorities there.

(5) Confirmation that [Mr Hargreaves's] had registered with the tax authorities in Monaco and,

(a) copies of any tax assessments by the Monaco tax authorities

(b) copies of any returns submitted to the Monaco tax authorities

(c) copies of any correspondence with the Monaco tax authorities

(d) a copy of any residence permit issued by the authorities in Monaco

(6) In respect of [Mr Hargreaves's] property in Monaco

(a) a full description of the property with photographs and a detailed description of the living area

(b) the date of purchase

(c) the cost of the property together with mortgage details, with a copy of supporting documentation

(d) any particulars of improvements made to the property since purchase with dates

(e) if rented a copy of the rental agreement

(f) a copy of any mortgage or loan application made during 2001-02

(7) In respect of all of his properties in the UK and overseas copies of

(a) utility bills

(b) itemised telephone bills (including mobile phone)

(c) building and contents insurance policies and copies of schedules for 2001-02

(d) property/council tax bills

(8) Particulars of arrangements made to transfer furnishings and personal belongings from the UK property with supporting documentation

(9) Particulars of how Mr Hargreaves commutes to work from Monaco

(10) A schedule of all bank, building society and credit card accounts operated in 2001-02.

(11) A schedule of all road vehicles available for Mr Hargreaves's use.

(12) A schedule detailing social interests and hobbies with documentation relating to membership of clubs etc.

(13) A copy of Mr Hargreaves's contract with Matalan and particulars of:

(a) the address supplied as Mr Hargreaves's home address for communication

(b) the emergency contact details supplied including the names of next of kin, doctor etc.

(c) a full description of Mr Hargreaves's duties carried out for Matalan and where and when these have been undertaken

(d) all records showing how the figures to the UK and non-UK work days were established.

45. On 15 March 2004 Mr Worth received a telephone call from Mr Richard Wynne of PwC in relation to the request for information. He asked whether all of the information asked for was necessary to confirm the residence status of Mr Hargreaves. Mr Worth's note of that telephone conversation records that Mr Wynne agreed to the provide this information but that further correspondence or discussion might be necessary to discuss certain details. At the end of the note Mr Worth recorded that:

> "During the conversation Mr Wynne mentioned several times the amount of time spent in the UK by [the] taxpayer was under the 90 days. He seems to be placing much emphasis on this point. I am not sure that he fully appreciates that obtaining non-residence in the UK involves more than day counting."

46. Although PwC enclosed most of the information to HMRC with a letter of 3 June 2004 it did not include everything that had been sought. Mr Worth wrote to PwC on 29 October 2004 apologising for the delay in responding and explaining that it had been necessary for him to consult with "specialist colleagues" in relation to Mr Hargreaves's claim to be non-UK resident. In that letter Mr Worth also asked for the outstanding information to be provided giving reasons why it was required.

47. Mr West became involved with the enquiry into Mr Hargreaves's 2001-02 return around November 2004, effectively taking over from Mr Worth who, he said, was clearly concerned about the risk that Mr Hargreaves had "not gone non-resident". Having read into the papers he was concerned that in addition to the enquiry year, 2001-02, similar issues arose in relation to Mr Hargreaves's 1999-00 and 2000-01 tax returns.

48. On 15 November 2004 Mr West wrote to PWC requesting a detailed response to Mr Worth's letter of 29 October 2004. The letter explained that Mr West had:

> "… recently joined CNR to work … on a wide range of non-residence compliance projects.

> Your client, Mr Hargreaves, is a high profile businessman. And the question of his residence status has substantial tax implications. As such I have decided to take personal responsibility for his case. Paul Worth will assist as appropriate."

49. PwC initially responded on 17 December 2004 with a "holding" letter. On 23 February 2005 further information was provided by PwC who also suggested a meeting between that they met with HMRC on 7 March 2005 to discuss any issues with regard to Mr Hargreaves. The 'Draft Agenda' for that meeting included the following items:

> (1) Reason for meeting (fact gathering – general discussions on residence issues);
>
> (2) IR Guidance IR20 (in particular basis of non-residence claim eg paragraph 2.7); and
>
> (3) "Leaving the UK" (details of what actually happened on what date).

50. The notes of the meeting record that Mr West explained that HMRC "were still at the fact finding stage and [he] hoped that the meeting could help him better understand" Mr Hargreaves's claim for non-residence. Having discussed the information already provided to HMRC and the further information that was required the meeting turned to the revenue guidance in its booklet IR20 (which is considered in greater detail below) and the basis of Mr Hargreaves's claim for non-residence. This was confirmed as being on the grounds that he had left the UK permanently or indefinitely. The meeting concluded with PwC agreeing to "go away and look at the information that had been sent and in light of the discussion what further information could be provided." There were also a number of specific questions raised that required addressing. PwC agreed to provide the information which would assist Mr West in deciding whether, following a review of HMRC's file, additional information was needed.

51. However, as is apparent from a note of a telephone conversation between Mr Andrew Walker of PwC and Mr West which took place on 11 April 2005, PwC had mistakenly thought that HMRC would write to PwC following the meeting. But as it was appreciated that this was not the case PwC proposed to prepare a report addressing all issues raised by HMRC and to set out in detail Mr Hargreaves's non-residence claim. On 14 April 2005 Mr West wrote to PwC outlining the further information HMRC required to progress the enquiry. This included a schedule of all accounts held in the UK, France, Monaco or elsewhere with copies of statements, credit card statement not previously provided and telephone statements. Mr West explained in the letter that he appreciated that:

> "… a lot of the information requested here is personal in nature. However, I am sure you will appreciate how important lifestyle questions are in coming to a reasonable conclusion of resident status. It might be of little consolation to Mr Hargreaves but the information requested is entirely routing in a non-resident enquiry. If your client refuses to provide the records etc I will issue a formal notice for their production.
>
> You also asked me to remind you of the specific questions I raised at our meeting on 7 March. Incidentally I agree to your suggestion that the best way forward is for you to provide a detailed report. Along with

the information requested above, the report should provide a useful basis for further face to face discussions.

1. What is the longest uninterrupted period Mr Hargreaves has spent in Monaco? …
2. Can you confirm the following figures are correct?

| **2001/02** | **UK** | **Monaco** |
|---|---|---|
| Full days | 93 | 108 |
| Part days | 64 | 51 |
| Total days | 156 | 159 |

3. What evidence is there to support the contention that Mr Hargreaves "left" the UK permanently on 11 March 2000? What actually happened on 11 March? Please provide actual evidence such as records and documents wherever possible."

52. After several emails and telephone calls by Mr West chasing a response, PwC's report on Mr Hargreaves's residence status was provided to HMRC on 15 December 2005. It included, in its appendices, information not previously disclosed to HMRC.

53. The PwC report, after providing a summary of the meaning of "residence" in the UK, analysed the factual background in relation to the "tests which have historically been used by the courts and HMRC" as identified in the previous section. In doing so it described the Coach House and how it was used by Mr Hargreaves both before and after 11 March 2000. It explained that Mr Hargreaves initially intended to lease an apartment at the exclusive Roccabella Building, one of two exclusive buildings in Monaco where the wealthy reside. However, as no accommodation was available there he placed himself on the waiting list for an apartment to become available.

54. The PwC report continued:

"3.26. On leaving the UK on 11 March 2000, Mr Hargreaves move to a hotel suite at Hotel Le Meridian, … Monte-Carlo, Monaco. The Hotel Le Meridian is one of the finest and most exclusive hotels in Monaco. It is the only hotel with a private beach.

…

3.28 Mr Hargreaves arranged the stay at the Hotel le Meridian personally during trips to find suitable accommodation in Monaco. He arranged a long term residency that commenced on 10 March 2000 and ran for an initial period of 6 months. Correspondence with the hotel began in early February 2000 and confirmation of the booking was received on 16 February 2000. …

3.29 the hotel suite at Hotel Le Meridian consisted of a large lounge/dining room, a bedroom, a bathroom and a terrace. The suite was on the special executive floor of the hotel ($7^{th}$ floor) and came with a dedicated maid service plus the usual services available from room service. … The hotel suite also came with valet parking, a private beach and swimming pool with leisure facilities. The hotel is very prestigious.

…

3.32 Due to the uncertainty over the availability of suitable rented accommodation, Mr Hargreaves personally extended the booking with the hotel in May for a period up until 25 December 2000.

3.33 However, the booking was not required for the full period. In approximately July 2000, following the purchase of the first yacht, Lady Christina, both he and Joan Hargreaves moved out of the Hotel Le Meridian to live on the yacht. They remained on the yacht until November 2000 when they moved into Houston Palace, following the completion of the refurbishment work. Mr Hargreaves advised that he and Joan Hargreaves spent the summer of 2000 sailing around the Mediterranean."

I should mention that Mr Hargreaves took up the lease of at Houston Palace whilst on the waiting list for the Roccabella Building after being approached in March 2000 by an estate agent he knew socially who had told him about an apartment at Houston Palace becoming available at short notice. Mr Hargreaves had paid the agent £150,000 key money to secure the lease. He and Joan Hargreaves moved into the Houston Palace apartment in November 2000

55. Returning to the PwC report, this described how Mr Hargreaves did not move any significant chattels from the Coach House to Monaco as, other than family photographs which he did take with him, there was little there which had any sentimental value to him or which could be treated as heirlooms. Additionally, when he moved into the Houston Palace property Mr Hargreaves purchased new items and decorations rather than move furniture from the UK. The PwC report emphasised the exclusive nature of the Houston Palace apartment noting that one of Mr Hargreaves's neighbours was "the actor, Roger Moore."

56. The report described the accommodation at Houston Palace as a "duplex apartment with a large terrace", something that Mr Hargreaves advised was "unusual" for a property in Monaco. It had four en-suite bedrooms and a kitchen, dining room, pantry, shower room and toilet for the maid, two cloakrooms, guest toilet and shower, a large lounge and formal dining room downstairs. The property was considered "large" by Monaco standards. The report continued referring to the "considerable sums" Mr Hargreaves spent on redecorating and refurbishing the apartment in an antique French style (Louis Quinze).

57. The PwC report then considered the lifestyle and social ties of Mr Hargreaves, stating:

3.41 Mr Hargreaves's life prior to March 2000 centred on his role as chairman of Matalan. He worked extremely long hours, effectively a 7 day week. by his own admission he could have been described as a workaholic. He did not have time or inclination to pursue either leisure or social activities. The motivation for the move to Monaco and the decision to sell some of his shares was to provide the case, time and lifestyle to enjoy his wealth.

3.42 Following his move to Monaco in March 2000, there have been significant changes in Mr Hargreaves's lifestyle. In essence Mr Hargreaves has focussed much more on enjoying his life and wealth than he ever did prior to leaving the UK.

3.43 Elements of his new lifestyle include:

- not working seven days a week and as a result having much more leisure time
- the very expensive and lavish new home
- the acquisition of two private aeroplanes and a number of yachts
- learning how to play golf, something Mr Hargreaves had never done prior to March 2000
- an intention to get fit and improve his health, Mr Hargreaves joined two gyms, one at the Hotel Meridian and one at the Hermitage
- regularly socialising with friends, attending parties and other social functions
- becoming a member of Le Meridian Monte Carlo Sea Club
- joining a private members club in Monaco (The Churchill Cub) something Mr Hargreaves had never done when living in the UK. Guest speakers at the Churchill Club include political figures such as Michael Howard MP.

3.44 As mentioned above, as a direct consequence of his move away from the UK Mr Hargreaves has purchased two aeroplanes. The first aircraft, a Hawker 800XP, was purchased around the end of January 2000 and delivered from the US at the end of March 2000. In addition, and in preparation for the change in lifestyle and operation of the aircraft, Mr Hargreaves employed the services of a fully qualified pilot, Mr Barton, with effect from 1 February 2000. The second aircraft, a Falcon, was purchased in September 2001 and delivered in October 2002. Both these aircraft are owned personally by Mr Hargreaves and he covers all the associated costs from his personal funds.

3.45 The aircraft are based at Blackpool airport. It should be noted that this is for the convenience of the staff that administer and maintain the aircraft rather than the convenience of Mr Hargreaves. The location of the aircraft when not being used are of little relevance or importance to Mr Hargreaves. Of primary importance is that they are available to him when he requires them. The aircraft are available to go wherever Mr Hargreaves requires. The flight logs indicate that the aircraft are also extensively used by Mr Hargreaves's daughter and sons. The fact that the family has the use of two private jets further illustrates that Mr Hargreaves and his family are internationally mobile. Copies of the flight logs have been provided to HMRC.

3.46 Mr Hargreaves also purchased a hanger at Blackpool airport and a business, called JMAX Air Travel, is run from a hanger on a commercial basis. The details of the business venture are entered annually on Mr Hargreaves's Tax Return. Mr Hargreaves has no day-to-day involvement with this business and it is run by his chief pilot, Mr Barton. Mr Barton is responsible for the running of the aircraft.

3.47 The aircraft are on permanent standby for Mr Hargreaves and are used to fly him, amongst other destinations, from his home in Monaco, flying from Nice airport, to his work in the UK, flying into Blackpool airport and vice versa.

3.48 A further consequence of the increased leisure time available to Mr Hargreaves is his interest in yachts. Mr Hargreaves purchases his first yacht, the Lady Christina, in around July 2000 for $16 Million. This yacht was recently sold and a further yacht purchase for €36 Million. Additionally, Mr Hargreaves has contributed to the acquisition of two further yachts by family members, the Oscar and the Jade May.

3.49 Mr Hargreaves spends a large proportion of his time onboard these yachts. During the period of the report the crew were personally employed by Mr Hargreaves. It is apparent from the sheer size of the financial investment in tis activity in Monaco that this is a significant change in Mr Hargreaves's lifestyle and of his ties to Monaco. …

3.50 Mr Hargreaves also purchase a Porsche 911 in March 2000 shortly after his arrival in Monaco. Strictly a car in Monaco can only be purchased by holders of a Monegasque driving licence. A driving licence cannot be obtained without a residence permit. The residence permit took a number of weeks to arrange but during this period Mr Hargreaves required transport to move around Monaco so purchased the Porsche through a friend.

…

3.51 Mr Hargreaves owns a holiday property in Barbados. He has owned this property for a number of years. Barbados is Mr Hargreaves's main holiday destination and a place he visits a number of times each year … including Christmas 2000 and Christmas 2001."

58. The PwC report then described the business/employment activities of Mr Hargreaves and how, as he was responsible for building the business of Matalan from its "humble beginnings", he personally held many of the key relationships with suppliers and manufacturers both in the UK and overseas but took a less active part in this area after March 2000. The report also referred to the change in contractual arrangements between Mr Hargreaves and Matalan mentioned above (at paragraph 32). In relation to specific days spent in the UK which did not appear to be work days and about which HMRC had requested further details, paragraph 3.70 of the report explained:

"The days are as follows:

- 4 July 2001 – The manual diary indicates that this was a work day.
- 8 July 2001 - Wimbledon Men's final.
- 14 and 15 December 2001 – Family Christmas celebration. Due to the fact that the Hargreaves family are not UKcentric they decided to have a pre-Christmas celebration as each family member is in a different location/country during the festive period. The UK was the most convenient location for that celebration in 2001.
- 8-10 February 2002 – This was a short break in the UK to celebrate John Hargreaves's birthday.

59. After dealing with the sale by Mr Hargreaves of his Matalan shares (see paragraph 36, above) the PwC continued:

"**Leaving the UK – 11 March 2000**

3.95 Mr Hargreaves left the UK on [Saturday] 11 March 2000. He boarded an EasyJet flight from Liverpool airport to Nice at 08:40am. On arrival at Monaco, he went straight to the Hotel Le Meridian where he had established the long term residency of his hotel suite.

3.96 The move from the UK on 11 March was not marked by any leaving party or similar celebration. As noted above, the price sensitivity of Mr Hargreaves's role change and emigration meant that it need to be managed without publicity. Mr Hargreaves's family was largely based outside the UK and his friends and associates in the UK were more business than social contacts. He did not, therefore, feel the need to mark the occasion of his departure by reference to a party or other celebration. Additionally, Mr Hargreaves was accustomed to travel overseas and was used to spending considerable amounts of time outside the UK on buying trips. The move overseas was not, therefore, as significant as it might have been for an individual with more significant social and family ties in the UK.

3.97 The weekend was to be taken up with a number of pre-arranged appointments. In the period leading up to his departure Mr Hargreaves had arranged these appointments in Monaco in connection with his move there in order to commence the process of obtaining Monegasque residency. These included a meeting with the Chief of Police and a medical appointment. Unfortunately due to a misunderstanding these appointments did not take place on the planned dates and had to be re-arranged. …

3.98 Following his departure from the UK on [Saturday] 11 March 2000, Mr Hargreaves came back to the UK for business purposes on Tuesday 14 March 2000 [staying at the Coach House]. He flew back to Monaco again on 18 March 2000 and stayed there until 23 March."

60. The PwC report then described how Mr Hargreaves, "as soon as he could following his departure from the UK", commenced the process of obtaining Monaco residency. However, it is clear from a letter of 27 May 1999 that PWC had advised Mr Hargreaves of the necessary to steps to establish residence in Monaco sometime before his departure and that number of these had not been taken as at 11 March 2000. Mr Hargreaves did not obtain his residence card, the carte sejour, proving that he had the right to live in Monaco until August 2000 and, as PwC's letter of 27 May 1999 explained, without the card he was "technically, for Monaco purposes, a tourist."

61. Having considered the report, Mr West sent an email, to PwC on 11 January 2006 to arrange a meeting at which it could be further discussed. Later that same day, 11 January 2006, he sent an email to a colleague, explaining the circumstances and noting that:

> "… we [HMRC] will need to consider discovery assessments at some point. As we are still in information gathering mode, it would be inappropriate to raise these now. I suggest that once we have completed the information gathering and we express a formal position on the R[esidence] position generally, we should raise discovery assessments for 1999/2000 and 2000/01. Do you agree?

Although Mr West agreed, in evidence, that it was at this time that he had made a discovery he confirmed that his view on the residence status of Mr Hargreaves had not changed since November 2004 when he had first became involved in the case.

62. On 12 January 2006, in a further email to PwC, Mr West explained that, "after a first look through the extensive appendices" to the report he considered it necessary to "step back slightly from a meeting" as there were several issues which needed to be settled first. These included the continued omission of the joint credit card statements of the period under discussion and a missing page from the diary analyses. The email continued with Mr West describing how he was putting a small team together to thoroughly review the appendices and how it was "essential" to complete the "fact gathering stage" before another meeting. The email concludes by saying that if HMRC "do eventually come to the view" that Mr Hargreaves was/is UK resident it would be necessary to consider formal determinations an discovery assessments.

63. By 15 March 2006, as is clear from an email to PwC sent by Mr West, HMRC had completed the review of the report and were seeking to arrange a meeting. As agreed in email correspondence, by letter of 31 March 2006 to PwC, Mr West set out his broad areas of concern about Mr Hargreaves's claim to be non-UK resident in which he wrote:

> "There is no dispute between us to the facts that Mr Hargreaves was born in the UK, is domiciled here and has been resident (R) and ordinarily resident (OR) for many years. Therefore a fundamental issue must be whether or not Mr Hargreaves has "left the UK" other than for some "temporary" purpose. In other words, does the time Mr Hargreaves spends in Monaco constitute "occasional residence abroad?"
>
> On the basis of the facts presented thus far, and with particular reference to your extensive report, I can only conclude that Mr Hargreaves has remained R and OR in the UK."

64. Mr West then set out the reasons for that conclusion. These include the retention by Mr Hargreaves of his "home" in the UK, his role as CEO of Matalan, that the pattern of trips to Monaco show only "occasional residence" abroad at most and the personal interests of Mr Hargreaves in the UK eg his attendance at various dinners and balls, Wimbledon tennis finals and concerts. Mr West also set out the specific areas he wished to discuss with PwC which included the day count, the centre of family life, use of the term "emigrate", fixing of the departure date, the issue of the carte sejour, the relative cost of the UK and Monaco properties and the relevance of s 336 of the Income and Corporation Taxes Act 1988 ("ICTA").

65. PwC responded on 20 April 2006 requesting that HMRC set out the "legislation or case law" to support their view that Mr Hargreaves remained resident and ordinarily resident in the UK and the technical analysis relied upon which HMRC relied. Mr West replied, by letter dated 24 April 2006, stating that he did not consider it "either appropriate or cost effective" to set out a written technical analysis but was happy to attend a meeting. On 23 May 2006, in an email to PwC, Mr West asked if it was still considered that a further meeting would be "useful" as he intended, "as things stand", to submit the case to HMRC's technical advisers over the "next couple of weeks" for them to consider preparing formal submissions. This was followed by a telephone conversation between Mr West and Mr Pannu of PwC on 30 May 2006.

66. On 6 June 2006 Mr West wrote to PwC outlining the reasoning behind his view that Mr Hargreaves was resident and ordinarily resident in the UK.

67. In a subsequent telephone conversation, on 10 July 2006, Mr Pannu (of PwC) explained to Mr West that PwC did not think that a meeting would serve any useful purpose at this stage. PwC wrote to HMRC on 7 August 2006. That letter, having noted Mr West's intention to refer the matter to HMRC's technical adviser to consider formal determinations on the basis of Mr Hargreaves being resident and ordinarily resident in the UK, requested a further review of the facts.

68. In evidence Mr West said:

> "… it became fairly clear that PwC weren't particularly interested in having another meeting, so once it appeared to me that PwC didn't want to engage in discussion anymore, I decided that I wasn't going to get any more factual information and I made my decision at that point."

When it was put to him by Mr Goldberg that he made the discovery on 11 January 2006 when he wrote to PWC, Mr West said:

> "… the first stage of an enquiry should be to collect as many facts as possible. So whilst PwC were engaging with me – they came to a meeting, it was their idea to write a report – the suggestion then, when I was reviewing the report, was that we would have another meeting. So at that stage mentally, if you like, I'm thinking fact-gathering, fact-gathering. It then became clear that there weren't going to have a second meeting, so at that point my judgment was, "I have to make a decision now", and nothing that had cropped up, none of the facts that I'd obtained while I'd been involved, caused me to change my view. At that point I submitted it to Mr Symonds [HMRC's technical adviser] to see if he confirmed my view."

69. As Mr West said, the matter was referred to HMRC's technical adviser, Mr Symonds, and PwC were advised of this by letter dated 21 August 2006. HMRC informed PwC, by email of 20 November 2006, that there would be some delay in the matter being considered by the technical team as they were "very much tied up with the Gaines-Cooper case" at the Special Commissioners. On 8 January 2007 Mr West sent an email to PwC to advise that having reviewed the papers a discovery assessment for 2000-01 was to be issued before 31 January 2001. As noted above (at paragraph 1) the discovery assessment, the subject matter of this appeal, was issued on 9 January 2007.

*Practice Generally Prevailing*

70. Turning to the practice generally prevailing in relation to a taxpayer becoming non-UK resident at the time Mr Hargreaves filed his 2000-01 tax return, 31 January 2002. The evidence of Mr Condor, who gave evidence in support of Mr Hargreaves, which was supported by that of Mr Hargreaves's other witnesses, Mr Citron, Mr Loebl and Mr Kilshaw, was that:

> "… the practice generally prevailing was to adopt 90 days or less as a cut off between being regarded as non-resident provided the individual had gone to live overseas whether simply for lifestyle reasons or to work or retire."

71. He agreed that the important issue in deciding whether Mr Hargreaves had become non-resident was whether his intention had been to go an live overseas. Although this was a subjective question Mr Condor accepted that, for the answer to be credible, there must be objectives factors which supported it. Having considered all of the relevant factors in this case Mr Condor concluded that Mr Hargreaves could file his 2000-01 tax return as a non-resident.

72. However, in view of the approach to the evidence that I have adopted (see paragraphs 26 and 27, above) it is necessary to consider the contemporaneous documents and publications in relation to this issue.

73. The sixth edition of *Booth: Residence, Domicile and UK Taxation* ("*Booth*"), current at the date of the submission of Mr Hargreaves 2000-01 return, 31 January 2002, which was described by Mr West in evidence as "my bible" and was, as Mr David Kilshaw and Mr Richard Citron confirmed, relied on by practitioners when advising clients on questions of residence at that time.

74. At [2.03] of the chapter headed "Residence" it is noted that:

> "The facts on which the Commissioners make their findings as to the residence or non-residence differ from case to case, but have tended to be facts concerning a person's physical presence in the United Kingdom or absence from it, facts concerning his history of residence or non-residence, facts concerning his present habits and manner of life, facts as to his nationality, facts as to the purpose, frequency, regularity and duration of his visits to the United Kingdom or to places overseas, facts as to ties of family and ties of business in the United Kingdom, and facts as to ties of family and ties of business in the United Kingdom, and facts as to the maintenance or availability of a place of abode in the United Kingdom.

> Such facts do not all carry equal weight and, indeed, facts which in one case carry no weight at all may, in another case, be so significant as to completely tip the scales. This is what is meant when residence is referred to (as, from time to time, it has been) as a 'question of degree'."

75. *Booth* additionally refers to the following principles derived from the pre-1999 authorities:

> (1) The word "reside" is a familiar English word which means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place": *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505 (see *Booth* at [2.07]);
>
> (2) Where a person resides "is essentially a question of fact and degree"; the circumstances of particular cases vary widely such that "each case must depend on its own facts": *Reed v Clark* [1986] Ch 1, 6F and 9E; (see *Booth* at [2.03]);
>
> (3) A person may simultaneously reside in more than one country: *Levene* at 505. Therefore in determining if a person has become non-resident the fact that he has a home elsewhere is of limited consequence: (see *Booth* at [2.08]);
>
> (4) No duration is prescribed by statute and it is necessary to take into account all the facts of the case. The duration of an individual's presence in the United Kingdom and the regularity and frequency of visits are facts to be taken into account. Also, birth, family and business ties, the nature of visits and the connections with this country, may all be relevant: *Commissioners of Inland Revenue v Zorab* (1926) 11 TC 289; *Commissioners of Inland Revenue v Brown* (1926) 11 TC 292; (see *Booth* at [2.03, 2.10, 2.15-2.18]);
>
> (5) Short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation, such as business obligations, and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 529; Booth at [2.12, 2.17];
>
> (6) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom, or to have "*left*" the United Kingdom, unless there has been a definite break in his pattern of life: *Re Combe* (1932) 17 TC 405, 411; (see *Booth* at [4.14-4.15]);
>
> (7) The cases in which the taxpayer has living accommodation available in the United Kingdom are "comparatively simple": *Levene* at 505 per Viscount Cave, applying *Cooper v Cadwalader* (1904) 5 TC 101 and *Loewenstien v de Salis* (1926) 10 TC 424 (see *Booth* at [2.07, 4.05]);
>
> (8) A person will not be in the United Kingdom for a temporary purpose if he is here in pursuance of the regular habits of life: *Cooper v Cadwalader* at 109 (see *Booth* at [4.03]); and

(9) IR20 does not affect the meaning of residence and ordinary residence at common law: *Reed v Clark* at 19 (see *Booth* at [1.18]).

76. IR20, referred to above, was one of a range of booklets produced by HMRC each designed "to explain a different aspect of the tax system in plain English". The subject matter of IR20 was "Residents and non-residents, Liability to tax in the United Kingdom" which was first published in 1973. The edition in force as at 31 January 2002 explained in its preface:

> "The notes in this booklet reflect the law and practice at October 1999. They are not binding in law and do not affect rights of appeal about your own tax.
>
> You should bear in mind that the booklet offers general guidance on how the rules apply, but whether the guidance is appropriate in a particular case will depend on the facts of that case. If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office – see paragraphs 7 [&] 9 of the Introduction on contacting the Inland Revenue.
>
> Some practices explained in this booklet are concessions by the Inland Revenue. A concession will not be given in any case where an attempt is made to use it for tax avoidance.

77. In relation to the second paragraph of the preface, Lord Wilson JSC observed, in *R (Gaines-Cooper) v HMRC* [2011] 1 WLR 2625 ("*Gaines-Cooper*"), at [35], that:

> "… it stressed that the guidance was general; that its application to a particular case depended upon its facts; and that, in the event of any difficulties in its application to his case, the individual should consult a revenue tax office."

78. Other material parts of IR20 state (with emphasis as stated in the booklet):

> **Introduction**
>
> *General*
>
> …
>
> 3. The first part of this booklet explains what is meant by '**residence**', '**ordinary residence**' and '**domicile**'. The second part explains how these factors affect how much income tax and capital gains tax you have to pay in the UK, and how the normal rules of taxation may be modified where a **double taxation agreement** applies.
>
> …
>
> *Contacting the Inland Revenue*
>
> 7. If you have any queries on your tax position, you should contact your Tax Office. Your employer will normally be able to tell you the address. If you have just come to the UK, or for any other reason you do not know which office deals with your tax affairs, you should write to your local Tax Office – the address is in the phone book under 'Inland Revenue'. If you have a National Insurance number, please give it in your letter.
>
> 8. A system of **Self Assessment** applies to individuals from 1996-97. This requires you to work out for yourself what tax you owe

(calculating your own tax is however, optional if you submit your tax return by a certain date, normally 30 September following the tax year). Initially, we will accept and process the figures in your return – except for any obvious mistakes, which we will correct. After processing, we will check all cases and select some for further examination.

…

9. In a number of places this booklet refers to matters that are dealt with by specialist offices of the Inland Revenue. These offices and their address are as follows

[list of offices]

**Part 1 Meaning of 'residence', 'ordinary residence' and 'domicile' for tax purposes**

**1.** ***Residence and ordinary residence***

1.1 The terms '**residence**' and '**ordinary residence**' are not defined in the Taxes Acts. The guidelines to their meaning in this Chapter and Chapter 2 (residence status of those leaving the UK) and 3 (those coming to the UK) are largely based on rulings of the Courts. This booklet sets out the main factors that are taken into account, but we can only make a decision on your residence status on the facts in your particular case.

As mentioned in paragraph 1.4, even if you are resident (or ordinarily resident) in the UK under these rules, the terms of a double taxation agreement with another country might affect your final tax position if, for example, you are resident in both that country and the UK.

Lord Wilson said, In relation to paragraph 1.1, at [33] of *Gaines-Cooper*:

> "The paragraph therefore told the taxpayer that the booklet set out only the "main" factors to be taken into account and repeated that the decision in relation to residence could be made only upon an evaluation of the facts of the case."

79. IR20 continued:

*Residence*

1.2 To be regarded as **resident** in the UK you must normally be physically present in the country at some time in the tax year. You will always be resident if you are here for **183** days or more in the tax year. **There are no exceptions to this**. You count the number of days you spend in the UK – it does not matter if you come and go several times during the year or if you are here for one stay of 183 says of more. If you are here for less than 183 days, you may still be treated as resident for the year under other tests (see Chapter 3, and in particular paragraph 3.3).

The normal rule is that days of arrival in and departure from the UK are **ignored** in counting the days spent in the UK, in all the various cases where calculations have to be made to determine your residence position. …

*Ordinary Residence*

1.3 If you are resident in the UK year after year, you are treated as **ordinarily resident** here. …

*Residence in both the UK and another country*

1.4 It is possible to be resident (and ordinarily resident) in both the UK and some other country (or countries) at the same time. If you are resident (or ordinarily resident) in another country, this does **not** mean that you cannot also be resident (or ordinarily resident) in the UK. …

Lord Wilson said of paragraph 1.4, at [34] of *Gaines-Cooper*:

> "So here the taxpayer learned that it would be insufficient for him to become resident abroad: if he was to become non-resident in the UK, more was needed."

80. The next section of IR20 concerns leaving the UK. In *Gaines-Cooper*, at [35] Lord Wilson observed:

> "Crucial to the appeals is the second chapter of the booklet, entitled "Leaving the UK". Paragraph 2.1, headed "Short absences", stated: "You are resident and ordinarily resident in the UK if you usually live in this country and only go abroad for short periods—for example, on holiday or on business trips." The appellants stress the reference to "short periods" and they reasonably submit that the day-count proviso was the other side of the same coin. The revenue, by contrast, stresses the word "usually". I accept its submission that the word conveyed to the reasonably sophisticated taxpayer that the inquiry would encompass consideration of various aspects of his life with a view to the identification of its usual location."

81. Paragraph 2.2 of IR20 which is headed "Working abroad" states:

2.2 If you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet **all** the following conditions

- your absence from the UK and your employment abroad both last for at least a whole tax year
- during your absence any visits you make to the UK
  - total less than 183 days in any tax year, and
  - average less than 91 days a tax year (the average is taken over the period of absence up to a maximum of four years – see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or member of your immediate family, are not normally counted for this purpose.)

2.3 If you meet all the conditions in paragraph 2.2, you are treated as not resident and not ordinarily resident in the UK from the day after you leave the UK to the day before you return to the UK at the end of your employment abroad. You are treated as coming to the UK permanently on the day you return from your employment abroad and as resident and ordinarily resident from that date.

> …
>
> If you do not meet all the conditions in paragraph 2.2, you remain resident and ordinarily resident unless paragraphs 2.8 – 2.9 apply to you. …

Lord Wilson said of paragraph 2.2, at [36] of *Gaines-Cooper*:

> “The second bullet point, which has two parts, represented the day-count proviso. Although the first part of it was statutory (now section 830 of the 2007 Act), the second part of it reflected long-established revenue practice: thus, if the individual visited the UK for six months or more in any year of assessment, he was treated as resident here for that year but, if he did not do so and his visits to the UK averaged less than 91 days each year during up to four tax years, he was treated as not resident here for those years. Reluctant though I am to be distracted from consideration of the substantive issues in the appeals, it is convenient here to append a footnote about an alternative ground of appeal on the part of the first appellants, which their leading counsel described as peripheral and which he did not address in oral argument save to decline formally to abandon. The argument is based on their alternative, fall-back assertion that it was only after 5 April 2001, namely during the weeks which followed it, that they began the full-time work in Belgium which has since proceeded for a number of years and at least throughout the year 2002–03. On that basis the argument is that the revenue is required to treat the first appellants as not resident and not ordinarily resident in the UK even in the crucial year 2001–02 because they had left the UK prior to the start of that year and because they had left “to work full-time abroad” even though the work did not begin until after the start of that year. But no rational taxpayer could imagine that the route to non-residence by his pursuit of full-time employment abroad throughout a tax year could be successfully traversed even in relation to a preceding year. It is only the individual’s full-time employment abroad which yields the distinct break in the pattern of his life in the UK (see para 21 above) and the terms of paragraph 2.2 adequately convey its status as a pre-requisite to non-residence.”

82. He continued, at [37] in relation to the subsequent paragraphs:

> “Paragraphs 2.7 to 2.9, which lie at the centre of the appeals, were headed “Leaving the UK permanently or indefinitely” so their content was entirely governed by that rubric, in which the two adverbs provided important colour to the type of “leaving” which the revenue was proposing to address. I also agree, however, with the observation of Moses LJ [2010] STC 860, para 44 that: “It makes no sense to construe ‘leave’ when qualified by the adverbs permanently or indefinitely as referring to the process of going abroad. They clearly require consideration of the quality of the absence …”

83. Paragraphs, 2.7 to 2.9, of IR20 state:

> *Leaving the UK permanently of indefinitely*
>
> 2.7 If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days of more a year – see paragraph 2.10. Any days spent in the UK

because of exceptional circumstances beyond your control, for example the illness of yourself or member of your immediate family, are not normally counted for the purpose of averaging your visits.

2.8 If you claim that you are no longer resident and ordinarily resident, we may ask you to give some evidence that you have left the UK permanently, or to live outside the UK for three years or more. This evidence might be, for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more. If you have left the UK permanently or for at least three years, you will be treated as not resident and not ordinarily resident from the day after your departure providing

- your absence from the UK has covered at least a whole tax year, **and**
- your visits to the UK since leaving
  - have totalled less than 183 days in any tax year, and
  - have averaged less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years – see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or member of your immediate family, are not normally counted for this purpose.)

2.9 If you do not have this evidence, but you have gone abroad for a settled purpose (this would include a fixed object or intention in which you are going to be engaged for an extended period of time), you will be treated as not resident and ordinarily resident from the day after the date of your departure providing

- your absence from the UK has covered at least a whole tax year, **and**
- your visits to the UK since leaving
  - have totalled less than 183 days in any tax year, and
  - have averaged less than 91 days a tax year.

If you have not gone abroad for a settled purpose, you will be treated as remaining resident and ordinarily resident in the UK, but your status can be reviewed of

- your absence actually covers three years from your departure, or
- evidence becomes available to show that you have left the UK permanently

providing in either case your visits to the UK since leaving have totalled less than 183 days in any tax year and have averaged less than 91 days a tax year.

84. Lord Wilson said of these paragraphs, at [39] of *Gaines-Cooper*:

> "On any view the three paragraphs were very poorly drafted. But does it follow that, when read in conjunction with the other parts of the booklet to which I have drawn attention, they amounted to a clear representation of the types for which the appellants respectively contend? Regrettable though it would be, a confusing presentation would be likely to have lacked the clarity required by the doctrine of legitimate expectation."

Having considered the arguments in relation to these paragraphs, he continued:

> "45. At last comes the moment in which to stand back from the detailed textual analysis of the booklet and to survey the wood instead of the trees. Unlike—so it seems—its successor, namely HMRC, the exposition in the booklet of how to achieve non-resident status should have been much clearer. My view however, is that, when all the passages in it to which I have referred were considered together, it informed the ordinarily sophisticated taxpayer of matters which indeed were unlikely to come as a surprise to him, namely that: (a) he was required to "leave" the UK in a more profound sense than that of travel, namely permanently or indefinitely or for full-time employment; (b) he was required to do more than to take up residence abroad; (c) he was required to relinquish his "usual residence" in the UK; (d) any subsequent returns on his part to the UK were required to be no more than "visits"; and (e) any "property" retained by him in the UK for his use was required to be used for the purpose only of visits rather than as a place of residence. He will surely have concluded that these general requirements in principle demanded—and might well in practice generate—a multifactorial evaluation of his circumstances on the part of the revenue albeit subject to appeal. If invited to summarise what the booklet required, he might reasonably have done so in three words: a distinct break.
>
> 46. The evaluative nature of the inquiry described in the booklet was fairly recognised by the first appellants' accountant himself when he stated:
>
> "What IR20 does (according to the understanding which I have always had as a practitioner) is to set out certain factors which will be taken into account. Some of these factors relate to the quality of the links which the taxpayer has with another country (eg fulltime employment for at least a whole tax year, settled purpose, acquiring accommodation abroad, living outside the UK for three years or more), and some of the factors relate to the extent of the links retained by the taxpayer with the UK (eg the number of days spent here, retaining a property in the UK). It follows from this that the revenue have set out their view of the quality of the links with another country and the extent of the remaining links with the UK which should together be taken into account in determining whether someone has ceased to be UK resident. The quality of the links with the other country are relevant insofar as they help to determine the extent to which the taxpayer has removed himself from the UK."
>
> 47. Were I wrong, however, to have concluded that the booklet succeeded in conveying to the taxpayer the information to which I have referred in para 45 above, it would in no way follow that, on this, the main, basis upon which they are advanced, the appeals should succeed. Were I wrong, I would feel driven to conclude only that the treatment

> in the booklet of the means of becoming non-resident was so unclear as to communicate to its readers nothing to which legal effect might be given. Such a conclusion would leave the appeals far short of their necessary foundation, namely of clearly specified criteria by reference to which they legitimately expected their claims to non-residence to be determined."

85. Lord Hope DPSC who agreed with Lord Wilson observed, at [62] of *Gaines-Cooper*, that the "primary difference" between Lord Wilson and the dissenting opinion of Lord Mance JSC turned on the meaning that paragraphs 2.7 to 2.9 of IR20:

> "… would convey to the ordinarily sophisticated taxpayer. Is the question whether the taxpayer has become non-resident and not ordinarily resident in the United Kingdom to be determined simply by reference to the taxpayer's intention when going abroad regarding the overall duration of his absence and counting up the days of any return visits? Or is it to be determined by evaluating the quality or nature of the absence and of any return visits that he has made?"

He continued:

> "63. There is an obvious attraction in keeping the test as simple as possible, especially as taxpayers are now responsible for self assessment when making their returns. But the underlying principle that the law has established is that it must be shown that there has been a distinct break in the pattern of the taxpayer's life in the UK. The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does or does not do to alter his life's pattern. His intention is, of course, relevant to the inquiry. But it is not determinative. All the circumstances have to be considered to see what light they can throw on the quality of the taxpayer's absence from the UK. The question then is whether on its proper construction the booklet sets out tests which are so clear that they eliminate the need for an inquiry into whether there was in fact a distinct break.
>
> 64. As Lord Mance points out, the requirement for a distinct break is not clearly expressed in the relevant paragraphs of the booklet. But I cannot agree with him that chapter 2 is to be read as substituting for that test a series of specifically delineated cases which clearly and unambiguously eliminated the need for such an inquiry: see para 100, below. The booklet must be read as a whole, including its introductory paragraphs. As the preface to the booklet made clear, it offered general guidance. Its application to a particular case was to depend on its own facts. So paragraphs 2.7-2.9 do not stand alone. Taken as a whole, the message that the booklet conveyed was that all the circumstances were open to evaluation in order to see whether the rules for non-residence were satisfied. I am in full agreement with Lord Wilson's careful analysis."

86. In addition to IR20, there are further contemporaneous documents from which the practice prevailing as at January 2002 can be ascertained.

87. An exchange of correspondence between Chris Whitehouse, then of Boodle Hatfield, and HMRC, published by the *Tax Journal* on 7 October 1993, addressed the

abolition of the 'available accommodation rule'. The final paragraph of the letter from Boodle Hatfield asks HMRC:

> "… for your confirmation that in determining the residence of an individual for all United Kingdom taxation purposes the availability or otherwise of accommodation in the United Kingdom will be ignored."

HMRC responded:

> "… where an individual, who is resident and ordinarily resident at present, leaves the United Kingdom, the retention of a home here will continue to be a factor in considering whether he has left the United Kingdom permanently. But the retention of accommodation in the United Kingdom will be no bar to that individual becoming not resident and not ordinarily resident, if his actions after leaving this country support a stated intention of living abroad permanently – for example, accommodation is acquired for permanent occupation abroad – the reason for any continuing ownership of property in the United Kingdom is consistent with the stated aim of permanent residence abroad and visits to the United Kingdom are within the prescribed limits."

88. Under the heading 'Self Assessment (SA): Residence Rulings and Domicile", the Inland Revenue Tax Bulletin Issue 29, published in June 1997, stated:

> "Where appropriate, individuals certify their residence status and domicile as part of their SA return. This article explains how we intend to continue to give guidance and advice on residence status and domicile; the action we will take on receipt of completed forms P85, P86 and initial non-UK domicile claims; and when section 9A Taxes Management Act (TMA) 1970 enquiries on residence status and domicile aspects may be made."

After stating that those who regard themselves as not resident, not ordinarily resident or not domiciled in the UK will be required to self-certify their residence status in their self-assessment returns and, where appropriate, complete the non-residence section, the Bulletin continues:

> "*'Notes on NON-RESIDENCE ETC'* pages are available with the SA tax return. These notes are intended to help individuals to decide their residence status or domicile position. And they will help individuals to complete the *'NON-RESIDENCE ETC'* pages NR1 and NR2. These notes are particularly comprehensive and include, for example:
>
> - a step-by-step guide to help individuals decide their residence status;
> - guidance on how residence and domicile affect an individual's UK tax liability;
> - guidance on split year treatment, domicile and double taxation agreements; and
> - tables showing the scope of tax liability on different types of income.

**Residence Rulings**

Because individuals will, in appropriate cases, self-certify their residence status on their SA return, there is no need for the Inland Revenue to give a prior 'ruling' on an individual's status. And so we have changed our procedures regarding such residence 'rulings'. We will continue to ask individuals for information about their residence or ordinary residence status. But neither tax offices not Financial Intermediaries and Claims Office (FICO) intend to provide residence 'rulings' as have done in the past.

Given that individuals will decide what they regard as their residence status to be, we propose to end our existing practice of advising an individual in the fourth year of the consequences of continuing to make regular visits to the UK exceeding an average of 90 days per year.

…

**Forms P85, P85(S) and P86**

We recognise that an individual may give us information about his/her residence position, for example on form P85 or form P86. We will use this information:

- to give an accurate PAYE code to someone arriving in the UK to take up employment; or
- to make an in-year repayment to someone leaving the UK who claims split year treatment.

In these and similar situations, we will normally act on the basis of the information the individual provides and treat the residence position accordingly. Tax offices will be prepared to tell individuals how the residence position has been treated for coding or repayment purposes. We do not regard that as deciding the individual's residence status. In appropriate cases, we may make enquiries into an individual's residence status as part of an enquiry into the return once it has been received.

…

**Advice, Guidance and Enquiries**

… There are a number of leaflets available on residence issues including, for example, booklet IR20 "Residents and Non-Residents", which explain the residence rules and their effect on an individual's liability. Individual's who would like further information or help in deciding their residence status can continue to contact FICO for guidance.

In some limited circumstances, FICO will give specific advice on an individual's residence status if asked to do so. In particular, FICO will be prepared to give specific residence advice on complicated issues. Answering the Yes/No questions in the '*Notes on NON-RESIDENCE ETC'* pages of the SA tax return will give the correct residence status in the vast majority of cases. But is was impossible to design these questions to deal with every single scenario. Bearing in mind, individuals whose circumstances are especially complicated, and fall outside the scope of the guidance in the *'Notes on NON-RESIDENCE ETC'* pages, can ask FICO for specific residence advice. Details

> regarding the information individuals should supply when asking for such specific guidance are set out on page 6 Code of Practice 10.
>
> …
>
> If an individual completes and files the supplementary *'NON-RESIDENCE ETC'* pages fully disclosing all the relevant information with his or her tax return, then, after the return statutory period for enquiring into the return has expired, the Revenue would not be able to challenge the individual's residence status or domicile for the purposes of calculating the tax liabilities shown in that return. That is, unless we subsequently receive or find information enabling us to make a discovery on the grounds of inadequate disclosure or fraudulent or negligent conduct on the part of the individual."

89. Around 2000 it transpired that there had been claims by mobile workers such as lorry drivers that, notwithstanding that their homes and families were in the UK, because they were only in the UK for a limited number of days a year that they were non-UK resident. This issue was addressed in a letter, dated 20 February 2000, from Mr Doug Devine, a Manager (Technical) in HMRC's Residence Advice & Liabilities Team who wrote:

> "The correct position in law, in the Revenue's view, is that mobile workers such as lorry drivers who usually live in the UK and have their homes and families here but make frequent trips abroad will generally remain UK resident for tax purposes. The fact that an individual has spent a limited number of days in the UK during a tax year is not of itself sufficient to establish non-residence."

The letter then explains that a statement has been produced explaining how HMRC considers the residence rules apply to mobile workers before continuing, under the sub-heading 'Past claims to non-residence':

> "A few practitioners and individuals have complained that they were misled by us. They say the Revenue advised them that mobile workers could attain non-residence status purely on the basis of day counting tests, and did not mention the condition that the individual should have left the UK.
>
> We initially were unable to find any evidence substantiating such complaints. However, we have thoroughly investigated this and now believe that there is some evidence that our staff <u>did</u> give misleading advice and failed to apply the rules correctly during 1999. We are very sorry this happened. Things occasionally go wrong, but when they do it is clearly essential that things should be put right as quickly and fairly as possible.
>
> The Board of Inland Revenue have considered very carefully how to proceed in order to achieve the fairest result. They have made the following decision. Claims to non-residence will now be <u>allowed</u> whether or not individuals have genuinely left the UK, where the following conditions are met.
>
> - the claims have been submitted to the Revenue by 31 January 2001;
> - they relate to the year 1999-2000 or earlier in date years;

> - they relate to mobile workers, that is individuals such as lorry drivers who usually live in the UK but make regular trips abroad for employment or business purposes;
> - the individuals can produce evidence that their absence and employment abroad last for at least a complete tax year, and during the year in question they have spent fewer than 183 days in the UK, and fewer than 91 days average a year over a maximum of four years;
> - the individuals have not submitted a claim to non-residence on the grounds that they have left the UK permanently or indefinitely.
>
> …
>
> You will appreciate that for the current and all future years, the strict technical position will be applied and the Revenue will be regard[ing] you as resident and ordinarily resident in the UK."

90. On 8 March 2000, HMRC (Mr Brian Wilks, Inspector (Residence)) responded to a letter from Mr David Sawyer of Wilfred T Fry Limited in connection with issues that Mr Sawyer had raised in connection with the FICO Non-Residents Newsletter published by HMRC on 6 November 1999. HMRC's letter (of 8 March 2000) stated:

> "In your letter you raised several concerns about the article that recently appeared in the FICO Non-Residents Newsletter.
>
> I think the most important qualification in the article was that it applies only to individuals *who live in the UK but travel frequently because of their work*. The article doesn't apply to individuals who don't live in the UK and it doesn't set out any change in our practices relating to residence, it was really just an attempt to add some useful additional explanation of the practice that has for many year appeared as paragraph 2.1 of IR20.
>
> I don't think we'd look to attach any specific quantitative definition to the term frequent. The word wasn't being used in any technical sense, it was intended to carry only its normal everyday meaning. Whether any specific individual should be treated as living in the UK but travelling abroad frequently would, as always, depend on the particular facts of the specific case.
>
> We're content that the article doesn't infringe any aspect of the Revenue's commitments under the Charter simply because it doesn't go into great detail on every different combination of circumstances that can arise when looking at individuals' varying circumstances. The article was never designed to do this, its intention was primarily to give a little more guidance in an area where it might assist to clarify our general approach.
>
> As you say, there would probably be little doubt that a UK resident national living in the UK operating short haul flights would be regarded as UK resident under any tests. Similarly, a foreign national, living abroad but flying into the UK on a short-term basis would almost certainly be not resident.
>
> As you identify, the problems arise when cases aren't at these relatively clear ends of the spectrum. Where this happens all we can do is to look at the full facts of the case to see whether the individual is

resident (on the basis that he hasn't already in reality *left* the UK) or not resident.

If an individual leaves the UK *permanently* (and this might be something we would ask him to prove rather than simply declare) and to work then then he could almost certainly anticipate that the application of the practice at paragraph 2.2 of IR20 would result in a status of not resident or ordinarily resident.

We haven't moved away from the application of the practices at paragraphs 1.2, 2.2 and 2.3. Any individual who satisfies the relevant conditions will be treated as not resident and not ordinarily resident. But, of course, if we conclude that an individual hasn't *left* the UK (and paragraph 2.2 is predicated on this) then we will look to treat him as remaining resident and ordinarily resident – not because we are not applying paragraph 2.2 but because the individual doesn't satisfy the conditions attached to the practice.

I don't think that we would anticipate any further expansion of our guidance material on this point. We feel we've gone as far as we can in setting out clearly the principles that we will use when looking at an individual's residence status. Any problems that may occur when doing this are more likely to stem from the unusual nature of an individual's circumstances than from any doubt as to the principle to be applied.

Overall, I think that if we work on the basis that

- the article applies only to people who live in the UK and not to those who live abroad and
- for people who are not (or who are no longer) living in the UK the other tests in IR20 (in other words not paragraph 2.1) will continue to apply

there should be no problems flowing from the content of the article. Although as always I'm sure we will continue to have to deal with difficult cases where the status requires careful consideration and examination."

91. Questions of residence were also raised in the 'Readers' Forum' of *Taxation* in which, in its edition published on 31 August 2000, one answer given noted that such questions were "largely defined by case law, rather than statute" and referred to the cases of *Lysaght* (see above) and *Levine v Commissioners of Inland Revenue* 13 TC 486 in which Mr Levine was found to be resident in the UK because he had decided to 'adopt a regular system of life in accordance with which he and his wife made their abode and lived in this country for a period of four or five months a year'. Another answer observed that:

"Assuming the client did not have any intention of taking up permanent residence in the United Kingdom and did not have accommodation in the United Kingdom, then it does appear that IR20 and the notes accompanying the non-resident pages of the self-assessment return conflict. When self-assessment was first introduced, the Inland Revenue through its Consumer User Group acknowledged that the non-resident supplementary pages would not cover all eventualities and there were likely to be situations where the answer given would be incorrect.

Where the residence position of an individual is not clear, it is important to consider not only IR20 and the notes accompanying the self-assessment return, but also case law. For example, in the case of *Wilkie v Commissioners of Inland Revenue* 32 TC 495, the Revenue stated that fractions of days should count toward the number of days spent in the United Kingdom. Although this case is more relevant to the 183 day rule, the Revenue has tried to use it when considering the 91 day rule. Other cases cover the position where a client does spend a certain amount of time in the United Kingdom on a year-on-year basis."

92. The 7 December 2000 edition of *Taxation* reported on a conference on 'Tax Planning for High Net Worth Individuals'. In relation to 'Emigration and residence' it recorded that:

> "Robert Venables QC recommended caution when interpreting the Revenue booklet IR20 (residents and non-residents) with a tax planning motive. He said that where substantial amounts of tax are involved, the Revenue will tend to adopt a more restrictive view as was amply demonstrated in *Regina v Inspector of Taxes ex parte Fulford Dobson* 64 TC 343. Robert Venables also pointed out that there is a regrettable tendency to see available accommodation in the United Kingdom as unimportant following the abolition of that rule by Finance Act 1993. Advisers forget that in several double tax treaties it remains an important principle."

93. In April 2001 HMRC published Tax Bulletin 52. Although it was specifically concerned with the application of the residence rules to mobile workers living in the UK it could also be read as having wider implications. Relevant parts (with emphasis is as in the Bulletin) state:

> "Mobile workers
>
> 1. this note explains how the Inland Revenue consider the rules of residence and ordinary residence apply to '**mobile workers**', individuals who usually live in the UK but make frequent and regular trips abroad in the course of their employment or business.
>
> 2. For this purpose:-
>
> - the expression '**mobile workers**' includes **for example** lorry or coach drivers who drive their vehicle to and from the Continent; those working on cross-Channel transport; and sales persons who make frequent short business trips abroad;
> - Individuals **usually live** in the UK if their home continues to be in the UK and their settled domestic life remains here;
> - Trips abroad are **frequent and regular** where work patterns are such that individuals make trips abroad every two or three weeks or more often. It would **for example** include someone travelling to France most Sundays or Mondays in connection with their employment but returning to the UK by or at the following weekend.
>
> **Residence Status**
>
> 3. Such individuals sometimes claim to be not resident and not ordinarily resident in the UK, simply on the basis of the limited

number of days they spend in the UK in a tax year. While the precise facts of a particular case are always paramount in deciding residence status, we consider that where there are no special circumstances, such individuals are likely to remain **resident and ordinarily resident** here for tax purposes.

4. General guidance on how the residence rules normally apply to those leaving the UK is set out in chapter 2 of booklet IR20, 'Residents and non-residents'. Paragraph 2.1 sets out the general principle that individuals who usually live in the UK and only go abroad for short period, for example on business trips, **remain** resident and ordinarily resident here. Paragraph 2.2 explains a long-standing Revenue practice in the case of individuals who go abroad for full time employment. They are treated as not resident and not ordinarily resident if:-

- they have left the UK to work full time abroad under a contract of employment; **and**
- their absence from the UK and the employment abroad both last for at least a whole tax year; **and**
- during their absence any visits they make to the UK total less than 183 days in any tax year; **and** average less than 91 days a tax year over the period of absence up to a maximum of four years.

**All** these conditions must be met for this practice to apply. It is **not** sufficient merely for the day counting tests to be met.

5. The treatment under paragraph 2.2 is aimed at individuals who leave the UK for a complete tax year to live and work on assignments abroad. It might for example apply (assuming all the conditions mentioned above are met) to lorry drivers who go to live in Sweden to transport goods within Scandinavia for their firm. In the case of individuals living in the UK but making regular short trips abroad it is questionable whether they have genuinely **left** the UK in a residence sense, or can be said to be working **full time abroad**; and they could not satisfy the the condition that their absence and the employment abroad both last for a whole tax year. They have not in our view made the clear break with the UK that the practice in paragraph 2.2 requires.

6. The statutory provisions concerning the residence status of individuals are Sections 334 and 336 ICTA 1988. We have taken legal advice on how these apply to mobile workers. Our view is as follows:-

- **Section 334** broadly provides that Commonwealth citizens who have been ordinarily resident in the UK remain UK resident if they leave the UK 'for the purpose only of occasional residence abroad'. On the basis of case law, we consider that individuals who have no settled residence abroad, have no intention to stay abroad indefinitely, and return to a UK base and a UK abode at the end of each assignment, are unlikely to be able to show that they are absent for other than 'occasional residence' abroad.
- **Section 336** broadly provides for individuals to be treated as not resident in the UK if they are here 'for some temporary purpose only and not with any view or intent of establishing ... residence there', and have not actually spent six months here in the relevant tax year. Case law has indicated that all the facts and circumstances of a case must be considered, and not merely the number of days spent in the UK. We consider that individuals who have a UK-based

> employment or business, have strong ties with the UK and spend a sufficient amount of time in the UK in a tax year are unlikely to be able to show that they are in the UK for only the 'temporary purpose' specified in the statute.
>
> 7. In dealing with claims to not resident status from mobile workers who usually live in the UK and make frequent trips abroad, we will apply the law in the light of the facts and circumstances of the particular case. For the reasons considered in this note, it is likely in our view that such claims will probably be **invalid** on the facts. Nevertheless, taxpayers who disagree with our view that they are UK resident will have the usual right to appeal to the Commissioners. It should moreover be borne in mind that these guidelines are **general**. We accept that it might be possible for individual taxpayers to show that not resident status was correct on the facts of their particular case.
>
> **Mobile workers leaving the UK permanently**
>
> 8. This note is concerned with the residence status of mobile workers who usually live in the UK and have not genuinely left this country. Different considerations apply to those who have **left** the UK to live abroad permanently. Paragraphs 2.7-2.9 of booklet IR20 explain the circumstances in which such individuals may be treated as not resident and not ordinarily resident. Their return visits to the UK since leaving must have totalled less than 183 days in any tax year, **and** have averaged less than 91 days a tax year over the period of absence up to a maximum of four years; and they may be required to provide evidence that they have left the UK permanently, or to live outside the UK for three years or more. This group is otherwise outside the scope of this note, but we would like to mention one point.
>
> 9. We have recently encountered cases where mobile workers claim to have gone abroad permanently, but evidence has later emerged that the validity of these claims is in doubt. In such cases we may at the outset have allowed not resident status, accepting the claims in good faith on the facts available at the time; but we have later concluded that the individuals may not have disclosed all the relevant information. The fact that such claims may initially have been accepted will **not** of course prevent us reopening cases where we have reason to believe there may not have been a full and correct disclosure. Where it is established that claims of this sort are invalid, the individuals will then fall to be treated as resident and ordinarily resident in the UK, as explained earlier in this note, on the basis that they do in fact usually live in the UK."

94. However, in advance of its publication by HMRC in April 2001, the above section on mobile workers' in Bulletin 52 was published as an article in *Taxation* on 15 February 2001. In an article in published in *Taxation* on 28 April 2001 Rosemary Martin, then of Arthur Anderson, wrote:

> "… it is by no means certain exactly which employees could be affected by the Revenue's article. There are many uncertainties including:
>
> - whether or not an employee's contractual arrangements are important in determining whether or not the article applied to him;

- whether or not it makes any difference which corporate entity is the contractual employer and/or which corporate entity bears the relevant employee costs; and
- whether or not the pattern of return trips to the United Kingdom affects the employees position.

> Although not explicit in the article, the Revenue has confirmed that it does not regard the comments made as a change in its position, but simply a restatement and further clarification of existing practice. As a result, the Revenue may well review more rigorously the tax affairs of individual employees who appear to be living in the United Kingdom, but claim to be non-United Kingdom resident.
>
> The Revenue may also open formal enquires into such employees' tax returns if considered appropriate. Furthermore, the fact that the normal period within which an enquiry can be opened may have elapsed will be no protection if the Revenue can show that it could not have known from the information supplied on what basis the return was completed (section 29, Taxes Management Act 1970).
>
> Employees who believe that they could be affected by the Revenue's article will need to consider whether or not they are satisfied that tax returns for earlier years were completed on a correct basis and, if not, what action they should take. They will also need to consider the basis on which their tax return for the year ended 5 April 2001 should be completed."

95. Ms Martin's article is consistent with the observations that Lord Wilson subsequently made in *Gaines-Cooper* in which he referred to Bulletin 52 in the following manner:

> "55. … the gist of a tax bulletin, published by the Revenue in April 2001, was that, unless he was working full-time abroad for at least a whole tax year and so could satisfy the requirements of paragraph 2.2 of the booklet, it was probable that the mobile worker usually lived in the UK, thus also failed to fall within paragraphs 2.7 to 2.9 and so was resident in the UK. The bulletin explained that "individuals usually live in the UK if their home continues to be in the UK and their settled domestic life remains here". Although the bulletin related to mobile workers, tax advisers sought clarity as to how it affected the Revenue's treatment of business executives who were seconded to work abroad but who regularly returned to the UK. For example, one of the expert witnesses of the first appellants, Mr Hilton-Gee, who was a senior manager at PricewaterhouseCoopers LLP until 2006 but who never handled their case, spoke to a Revenue manager on 8 May 2001 and made the following note:
>
> > "I asked whether the Tax Bulletin article reflects a change of Practice by the Revenue or a change in policing standards. [He] confirmed that the article does not reflect any change in the Revenue's practice, but it does reflect their view that whereas in the past they might have taken a claim to non-residence at face value, they now feel that they should be asking for more facts. The article was directed at a specific category of individual… and [he] can see that, if you try to apply its literal wording to other categories of businessmen, one might get the wrong

> impression. The Revenue are attempting to describe the difference between a businessman who is based in the UK but travels abroad for most of the time, and a businessman who is based abroad but manages to visit the UK from time to time, and are saying that in a case which may not be clear-cut you need to look at all relevant factors."

> 56. In June 2001 accountants at Arthur Andersen raised analogous questions at a meeting with senior Revenue officers. According to the Revenue's note, its officers explained that paragraph 2.2 of the booklet still applied; that mobile workers who worked partly within the UK did not fall within it; but that business executives seconded to work abroad might well do so; and that they could fall within the paragraph without severing every link with the UK. Arthur Andersen acknowledged – in the words of the note – that: "If an individual had full time employment abroad, it was not necessary to look at the wider factors in paragraph 2.7 about personal circumstances such as accommodation, family life etc." Arthur Andersen, at any rate, were under no illusion about the nature of the inquiry into a claim for non-residence which was required by the booklet when it did not fall within paragraph 2.2."

96. The meeting 22 June 2001, to which Lord Wilson referred, which was called at Arthur Anderson's request to discuss their concerns about the Tax Bulletin 52 article on mobile workers and the implications it might have for other groups of workers such as senior managers and executives seconded to work abroad but who returned to the UK at weekends. HMRC were aware of the *Taxation* article by Ms Martin, who was present at the meeting.

97. The note of the meeting records that each case "was different and had to be determined on the facts" and that HMRC had produced a draft list of indicators, an informal working document, to identify factors which might cumulatively tip and individual in one direction or the other. A list setting out these factors was subsequently sent, in July 2001, to the Law Society, the Chartered Association of Certified Accountants, the Chartered Institute of Taxation, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Law Society of Scotland, the CBI and, as there then were, the 'Big 5' firms of accountants.

98. The 22 June 2001 meeting also discussed IR20 which HMRC accepted "did not cover everything". HMRC agreed that with faster means of travel and communications work patterns of senior executives had changed. The meeting note also recorded that:

> "Arthur Anderson noted that the end of the old system of residence rulings had had the inadvertent outcome that two way exchanges between the department and agents had largely stopped. Under SA the onus was on taxpayers to decide their own residence status, and the Revenue simply processed the returns as they were received. If an individual self assessed as NR, the district accepted this at the outset and marked the case for possible enquiry. Practitioners saw very few cases where the Revenue challenged non-residence claims in SA returns of a P85, or gave any sort of feedback. One problem the Revenue found was that a lay person might apply a different approach in deciding on their own residence status, perhaps after reading only

> one isolated part of booklet IR20. Where enquiries were made, it was often found that the facts which has been disclosed on the return were not in fact complete.
>
> Arthur Anderson noted that the residence rules could sometimes be unclear and difficult to apply, especially where an individual had complex affairs. Such individuals would in practice normally be advised by their employers to take professional advice on their residence position. Asked by the Revenue whether the rules were harder to apply for individuals coming to the UK or leaving, they thought the former, it was sometimes hard to pin down the precise date an individual arrived here. They recognised the problems of deciding whether someone had "left" the UK, but apart from that they found paragraph 2.2 of booklet IR20 straightforward. If an individual had full time employment abroad, it was not necessary to look at the wider factors in paragraph 2.7 about personal circumstances such as accommodation, family life etc.
>
> Arthur Anderson said that they would like to see improved linkages between practitioners and the Revenue. If firms knew what the Revenue's thinking was, they could advise their client correctly the first time, and not have to unravel arrangements which they later discovered were flawed. … The Revenue had set up CNR with the aim of concentrating expertise in one body. The recent CNR open days had produced two main conclusions: the Revenue should publish more of their thinking on the internet; and there should be more contact between the Revenue and the representative bodies and practitioners.
>
> Arthur Anderson asked whether there was likely to be any change in the rules of counting days of arrival and departure. The Revenue responded that they could only say that the current practice was normally not to count them, unless an individual travelled back and forth from the country on a daily basis. On changes to residence rules as a whole, that was a matter for Ministers who kept this area, like all others, under review."

99. Advice given, at the material time, by Arthur Anderson on the question of residence of corporate executives transferred from one country to another to can be found in *Paul Daniel v HMRC* at [23]. This explains that:

> "… there are special rules that apply to employment-related moves, permitting an individual to be treated as not resident and not ordinarily resident in the UK from the day following the date of transfer until the day prior to the date of return to the UK at the end of the employment abroad. In order for these rules to apply, you must meet all of the following conditions:
>
> - Leave the UK to take up a <u>full time</u> and continuous employment abroad for the duration of a complete UK tax year;
>
> - During this absence, any visits (for these purposes, days of arrival in and departure from the UK are usually ignored) made to the UK must:
>     - total <u>less than</u> 183 days in any tax year, and
>     - average <u>less than</u> 91 days a tax year.

> In order to create a full time and continuous employment, it will be necessary to create an employer by setting up a company somewhere outside the UK.
>
> [Presently irrelevant text about counting days in the UK for the purposes of the quite separate 91-day test]
>
> I understand that you may spend a relatively significant amount of time in the UK. If you fall foul of the 91-day averaging rule set out above, you will continue to be regarded as resident and ordinarily resident in the UK beyond your date of transfer. Nevertheless, even if you will not be considered a resident under the 91-day rule, it is possible that the UK Inland Revenue will consider that you have not left the UK, or not to be working overseas in a full-time employment, if a significant amount of time is spent in the UK shortly after the "assignment" commences. For this reason, I would recommend that the level of visits (amount and duration) be kept to a minimum. The ideal situation, of course, would be that you do not enter the UK at all during the "assignment" abroad. Given the amount of the tax at stake, I would recommend this."

**Discussion and Conclusions**

100. The first of the issues identified in paragraph 2, above, whether there was a discovery and if so when was it made raises a difficult question. As Mr West said in evidence:

> "The issue with all residency enquiries is that the whole way through you're trying to collect information. At what point you come to a conclusion [ie make a discovery] is how long is a piece of string to a certain extent. So there is always more information you can gather."

101. Mr Goldberg contends that, although Mr West agreed in evidence that he made the discovery on 11 January 2006, it was in fact made sometime earlier, before Mr West became involved with the case, and quite possibly by Mr Worth. If that is the case then, as the Upper Tribunal observed in *Tooth*, at [79(6)] (see para 11, above), "a discovery may only be made once" and, as it has not been established by HMRC that Mr West made the discovery, it must follow that the discovery was made before November 2004 and, as such, must have been stale by the time the assessment was issued on 9 January 2007. Accordingly, he contends, the assessment cannot be valid.

102. Mr Nawbatt accepts that Mr West agreed during the hearing that he made the discovery in January 2006, but says that the discovery was actually made by Mr West on 6 June 2006, the date he wrote to PwC explaining why he considered that Mr Hargreaves to be resident and ordinarily resident in the UK (see paragraph 66, above).

103. Before then, as is clear from the contemporaneous documents, Mr Nawbatt says that Mr West was still gathering information in order to reach a conclusion, eg the email Mr West sent to his colleague on 11 January 2006 (see paragraph 61, above) and the email of 12 January 2006 to PwC in which Mr West states it is "essential" to complete the "fact gathering stage" before a further meeting (see paragraph 62, above). As for there being a discovery by Mr Worth, before Mr West became involved with the case, Mr Nawbatt contends that Mr Worth was concerned about the risk in this case but did not reach any conclusion himself but referred the matter to Mr

West which, he says, explains Mr West's involvement in the case (see paragraph 47, above).

104. Given that the test is subjective with the state of mind of the individual who made the discovery and not that of some hypothetical HMRC inspector being relevant, Mr Nawbatt compared Mr West to the Inspector, Dr Branigan, in *Pattullo*, of which the Upper Tribunal said, at [62]:

> "… Some inspectors might be cautious in coming to a conclusion that the tax return underestimated the amount of tax due. Others might be more ready to reach such a conclusion. The tribunal were concerned with Dr Branigan's state of mind, not with that of anyone else. They heard the evidence and for the reasons given in those paragraphs they formed the view that although at an earlier time he had suspicions, until the Court of Appeal gave its decision in *Drummond* in June 2009 those suspicions were not yet sufficient in his mind to lead him to form the view that there was an insufficiency in the tax declared in the assessment. His view that there was such an insufficiency 'newly appeared' to him between June and November 2009 (FTT at [53]). It may be that he was slower and more cautious about forming this view than some other HMRC officers might have been, but it is his characteristics which matter for this purpose, not those of other officers."

105. Although Mr Nawbatt contends that, like Dr Branigan in *Pattullo*, Mr West was slower and more cautious about forming his view than another officer might have been in similar circumstances, I consider rather than Dr Branigan in *Pattullo* it is Mr Manning, the officer in *Beagles* that provides a better comparison to Mr West.

106. In that case, Mr Manning had decided to defer taking any further action in respect of Mr Beagles's tax return until further progress had been made in challenges against the tax returns of the other participants in the same KPMG scheme as that utilised by Mr Beagles. Having written to KPMG on 1 August 2005 stating that "Leading counsel strongly supports HMRC's view that the scheme does not activate the tax loss" and confirmed in evidence that he did not think he would have changed his position, there was a delay, until 15 January 2008, in issuing the assessment because Mr Manning was awaiting the decision of the Special Commissioners in *Astall and Edwards v HMRC*[2] ("*Astall*") which confirmed that the scheme did not work.

107. Contrary to the conclusion of the FTT in *Beagles*, which considered that Mr Manning had not come to a firm conclusion until the decision of the Special Commissioners in the *Astall* was known, the Upper Tribunal, at [71], having accepted that there was a concept of "staleness" involved in a discovery and that it was "clear" that Mr Manning had made a discovery at the "very latest by 1 August 2005 and possibly earlier", observed that:

> "72. By that date, Mr Manning was of the view that the scheme did not operate to create a loss and was aware of the insufficiency in Mr Beagles's return. He had "found out" that there was an amount that

[2] The decision of the Special Commissioners is at [2008] STC (SCD), the High Court at [2008] STC 2930 and Court of Appeal at [2010] STC 137. Permission to appeal to the Supreme Court was refused.

> was omitted from the return. That was a reasonable belief to hold given the advice that had been received from leading counsel. The subjective and objective tests in *Anderson* were met.
>
> 73. The FTT's finding that the "discovery" took place at a later stage following the decision in *Astall* was on the grounds that Mr Manning did not actually reach his conclusion that the KPMG scheme did not operate to create a loss until that time (FTT Decision [59] and [61]) and that, although Mr Manning may have had a "strong suspicion" at an earlier stage that the KPMG scheme did not work it was not until that time that he came to a "firm conclusion" (FTT Decision [60]).
>
> 74. That finding was not consistent with the FTT's own findings of fact (at FTT Decision [24]). Those findings must, in our view, amount to a discovery. Whilst we accept that it might be possible for an officer to discover the same insufficiency in a return more than once if it is for different reasons, it is not, in our view, possible for an officer to make the same discovery twice for the same reasons. The insufficiency cannot "newly appear" to the officer for a second time (to use the words of Viscount Simmonds in *Cenlon*).

108. Like Mr Manning awaiting the outcome of *Astall* to form a "firm conclusion" that the scheme did not work, Mr West, as he confirmed in evidence (see paragraph 61, above), did not change his initial view on Mr Hargreaves's residence status notwithstanding the information he subsequently obtained. As such, he cannot have made a discovery on the basis of this additional information which merely strengthened his original view that Mr Hargreaves was non-UK resident and ordinarily resident.

109. I therefore find that if it was Mr West who made the discovery he did so at the time when he took "personal responsibility" for the case which was, as is clear from his letter of 15 November 2004 to PwC (see paragraph 48, above), in November 2004. However, it appears that it is quite likely that the discovery was made earlier than this, possibly by Mr Worth. If that is the case, as the Upper Tribunal said in *Tooth*, at [29(6)], it is the first officer that has made the discovery and the second officer, in this case Mr West, has simply found out something that is new to him and has not made a discovery.

110. There was therefore, at the very least, more than three years between the discovery and the assessment. In my judgment, given this delay, the discovery had lost its quality of newness and become stale by the time the assessment was made. Accordingly the assessment cannot stand.

111. As this conclusion is sufficient to dispose of the appeal it is not strictly necessary to address the remaining issues identified at paragraph 3, above. However, as these issues were argued before me and in case of any further appeal, I have considered them, albeit not as comprehensively as might have been the case had I reached a different conclusion in relation to the "staleness" issue.

112. HMRC contend that the condition in s 29(4) TMA is satisfied as a result of the negligent conduct of either Mr Hargreaves or PwC, in completing his 2000-01 tax return stating that he was not UK resident when it is now conceded that he was not.

113. Mr Goldberg, however, says that the approach Mr Hargreaves took to providing the information "was impeccable and complied with the highest standards of a person making a tax return". He contends that as HMRC have not established that Mr Hargreaves's claim that he was not resident was irrational rather than honest or tenable, there cannot be a beach of the duty of care. As the burden is on HMRC, he submits, that the allegation of negligence is completely unfounded.

114. However, Mr Nawbatt contends that, applying the test in *Moore v HMRC*, there is a prima face case of negligence on the facts and that in the absence of evidence to the contrary from or on behalf of Mr Hargreaves the condition of s 29(4) TMA is satisfied. In support he cites the following passage from the judgment of Nugee J on appeal by Mr Hargreaves to the Upper Tribunal in the interlocutory stages of this case (reported at [2015] STC 905 at [45]),:

> "The phrase "evidential burden" is a familiar one and as it was put by Mustill LJ in the same case on appeal [*Brady v Group Lotus Car Companies plc*] ([1987] 3 AER 1050 at 1059a-j), "simply expresses a notion of practical common sense" namely that even if the burden of proof is on A the evidence already adduced may be such that B in practical terms is going to lose unless he adduces some evidence to counter it. This does not change the ultimate burden of proof. … This does not alter the burden of proof, or impose any legal obligation on the taxpayer to make a positive case."

115. Mr Nawbatt points to the fact that notwithstanding his self-assessment as non-resident, Mr Hargreaves has conceded that, at the material time, he was resident and ordinarily resident in the UK. He contends that the issue for the Tribunal is whether in making and filing that self-assessment tax return on 31 January 2002, Mr Hargreaves and/or his advisers took reasonable steps to ensure that it was correct and says that the absence of correspondence of any such advice is critical.

116. The only contemporaneous correspondence that has been disclosed is the letter to Mr Hargreaves from PwC dated 18 February 2000 (see paragraph 30, above). There is no evidence that any further advice on Mr Hargreaves's residence status was provided notwithstanding the concerns raised in the letter, particularly that Mr Hargreaves must be seen to have "left" the UK and moved his "home overseas", transport his belongings to Monaco and demonstrate a change of lifestyle as well as the need for a "more tangible arrangement" than living in an apartment in the name of another individual who is "permitting" Mr Hargreaves to live there. There were also PwC's concerns in relation to the Service Agreement (see paragraph 33, above).

117. Additionally, between 18 February 2000 and 31 January 2002, when the return was submitted, HMRC had published additional material, the 20 February 2000 letter from Mr Devine (see paragraph 88, above), Tax Bulletin 52 in April 2001 (see paragraph 89, above) and the meeting with Arthur Anderson on 22 June 2001 which was disseminated through the professional bodies (see paragraph 97, above). There were also articles in *Taxation* in February 2000 and February 2001 which addressed the issue of residence (see paragraphs 92 and 94, above).

118. As 31 January 2002, Mr Hargreaves's circumstances did not accord with the advice he had been given in February 2000 which was on the basis, as stated on the P85 that Mr Hargreaves anticipated being in the UK for no more than two months

rather than the 152 actually spent in 2000-01 (see paragraph 34, above). Also PwC would have been aware that HMRC had indicated that the factual basis of claims for non-residence would be considered more carefully.

119. There is therefore, in my judgment, a prima facie case that by not seeking further advice before filing his 2000-01 tax return and not proffering any such advice at that time, there was such negligent conduct on the part of Mr Hargreaves and/or PwC so as to satisfy the condition of s 29(4) TMA. However, as no contrary evidence has been adduced on behalf of Mr Hargreaves to counter this I find myself in a similar position to Mr Robin Dicker QC sitting as a Deputy High Court Judge in *NRC Holding Ltd v Danilitskiy and others* [2017] EWHC 1431 (Ch) where he said, at [25], in relation to the burden of proof and adverse inferences:

> "Of more importance, in the present case, is that in *Prest v Petrodel Resources Ltd* Lord Sumption, in the context of discussing whether and if so when an adverse inference may properly be drawn against a party, said at [44] that, for his part, he would adopt, with one modification that is not relevant in this case, the view expressed by Lord Lowry in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300 that:
>
>> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."
>
> and also referred, by way of comparison, to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340. There is a line of Australian authority to similar effect, see, for example, *The Bell Group Ltd (in liquidation) v Westpac Banking Corp (No.9)* [2008] WASC 239 at [1003]-[1022]."

Applying this principle, in the absence of any evidence from Mr Danilitskiy in relation to his purchase of a property in the name of Opel Stem ( a British Virgin Islands company) Mr Dicker held, at [45], that:

> "… there are various possible reasons why Mr Danilitskiy may have chosen to purchase the Property in the name of Opal Stem. Some of those reasons might have indicated that Opal Stem was intended to be the beneficial owner of the Property and some that it was not. However, although he plainly has relevant evidence to give on this critical question and could have been expected to provide it on behalf of Opal Stem, there is no evidence from Mr Danilitskiy, or indeed anyone else, one way or the other. Nor have I been provided with copies of any board minutes of Opal Stem which assist on this issue, even assuming that such ever existed. In the absence of such evidence, I am not prepared to assume that Mr Danilitskiy intended to transfer

> the purchase monies to Opal Stem for its benefit nor that he intended Opal Stem to hold the beneficial interest. To the contrary, in my view the appropriate inference which is to be drawn from the decision that he should not give evidence, is that his evidence would not support Opal Stem's case."

120. Similarly, in the present case Mr Hargreaves, who was present for most of the hearing, clearly would have been able to give relevant evidence to explain the absence of further advice before the submission of his 2000-01 tax return. Therefore, like Mr Dicker in *Danilitskiy*, I consider that the appropriate inference to be drawn for this lack of evidence is that it would not support Mr Hargreaves's case in relation to the condition in s 29(4) TMA.

121. It therefore follows that by failing to take reasonable steps to review and consider Mr Hargreaves's position before filing the return on 31 January 2002 the conduct of Mr Hargreaves and/or his advisers, PwC was sufficient to satisfy the condition in s 29(4) TMA.

122. With regard to the condition is s 29(5) TMA, it is not disputed that there was no reference to any capital gain on Mr Hargreaves's 2000-01 return. Accordingly the hypothetical officer could not have been reasonably expected to be aware of an actual insufficiency arising as a result of the disposal by Mr Hargreaves of his Matalan shares on the basis of the information either on that return or indeed the P85 submitted by Mr Hargreaves. This is, in itself, sufficient to satisfy the s 29(5) TMA condition.

123. As for residence, although the white space disclosure on the return did state that Mr Hargreaves was "provisionally not resident or ordinarily resident with effect from 12 March 2000" Mr West said that this did not raise a "red flag" or "question mark" in his mind. However, unlike with a s 29(1) TMA discovery, it is not Mr West's mind that is to be considered but that of a hypothetical officer. In my judgment even if the reference in the return to Mr Hargreaves being "provisionally not resident or ordinarily resident" was sufficient to have alerted the hypothetical officer to make enquiries it cannot, in itself, be sufficient to amount to awareness of any insufficiency.

124. Moreover, the s 29(6) TMA information made available to the hypothetical officer would not have been sufficient for him to be aware of an insufficiency, eg, even if he were aware of the Coach House from the tax return, the information shown on it would not have enabled him to know how and when Mr Hargreaves used the property during the relevant tax years. The information on the return did not refer to Mr Hargreaves's continuing role as executive chairman of Matalan or his work pattern either. The extent of the information provided on the return can be contrasted with the detail contained in the report subsequently by PwC in the course of the enquiry which was instigated by the article in *The Sunday Times* and not the information in the return.

125. Therefore, the position in this case is similar to that in *Beagles* where the Upper Tribunal said, at [111]:

> "… whether or not it is correct to describe the disclosure in the return as inadequate, in any event it was not such as would have made the hypothetical officer aware of the insufficiency in the return."

Accordingly, I find that the condition in 29(5) TMA is satisfied.

126. Tuning to s 29(2) TMA, which precludes an assessment if the return was made on the basis of or in accordance with the practice generally prevailing at the time it was made. Mr Goldberg contends that the practice generally prevailing on 31 January 2002 was that evidenced by HMRC's published documents which provided that so long as a taxpayer confined his presence in the UK to less than 183 days in any one tax year and less than 91 days average per tax year and satisfied the stated requirements relating to intention and/or years abroad he or she was treated as not resident and not ordinarily resident for that year. Such a practice is, he says, in accordance with the questions asked on the tax return itself and the questions in the non-residence notes published by HMRC to assist in the completion of a return which do not refer to evidence of a "distinct break" from the UK.

127. However, contrary to Mr Goldberg's submission, it is clear from the contemporaneous documents and publications to which I have referred above, including PwC's letter of 18 February 2000 to Mr Hargreaves, that the practice did consist of a multi-factorial enquiry into an individual taxpayer's circumstances which, by clear reference to an individual having "left" the UK, did require there to be a "distinct break" from the UK in order to be able to attain non-resident status.

128. As such, I do not agree that Mr Hargreaves's return was made on the basis or in accordance with the practice generally prevailing at the time it was made.

## Decision

129. For the reasons above, the appeal is allowed.

## Right to Apply for Permission to Appeal

130. 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.

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 APRIL 2019**