[2014] UKUT 0395 (TCC)
Appeal number: FTC/112/2013

Procedure – preliminary issue – Capital Gains Tax – appeal against discovery assessment on basis both that HMRC not competent to make assessment and that taxpayer not in fact resident during year of assessment – whether competence of HMRC to make discovery assessment should be heard as a preliminary issue – s. 29 Taxes Management Act 1970

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

JOHN HARGREAVES **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at the Rolls Building, London EC4A 1NL on 22-23 July 2014

David Goldberg QC & Conrad McDonnell instructed by KPMG LLP for the Appellant

Akash Nawbatt & Christopher Stone instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Mr Justice Nugee:

1. This is an appeal, brought with the permission of the Upper Tribunal (Judge Herrington) given on 27 September 2013, against a decision of the First-tier Tribunal (**"FTT"**) (Judge Gort) given on 21 May 2013 in which she dismissed an application by the Appellant, Mr Hargreaves, that a preliminary issue be heard, thereby in effect requiring the issues to be determined at a single hearing. The question before me is whether she was right to do so.

Background Facts

2. No facts have yet been found but I take this brief summary from a statement of facts relied on by Mr Hargreaves in relation to an application for judicial review which, as appears below, he brought but subsequently discontinued.

3. Mr Hargreaves was born in the UK and it is common ground that he was resident (and ordinarily resident) in the UK until 2000. He lived in Lancashire, until 1988 at a family home with his wife, and from 1989 (after he separated from his wife) to 2000 at a house called the Coach House in Barton, initially alone and subsequently with his current partner. He was a very successful businessman and his main business was Matalan, a clothing retailer. He was the largest shareholder in Matalan plc and worked in it full-time. Matalan plc was floated on the London Stock Exchange in May 1998. Mr Hargreaves gave an undertaking at the time not to sell his shares for 18 months, but in May 2000, after the undertaking had expired, he sold a tranche of his shares realising a substantial capital gain. If he were non-resident in the tax year 2000/01 that gain would not be subject to UK capital gains tax (**"CGT"**).

4. Mr Hargreaves therefore took steps with the aim of becoming non-resident which involved him and his partner going to live in Monaco, at first in March 2000 at a suite in a hotel, then from August 2000 on a yacht he bought which was based in the harbour, and then from December 2000 at an apartment which he had leased. He kept The Coach House however and continued to come to the UK on a frequent basis. In 2000-1 he says that he came to the UK 41 times, virtually all of them of short duration, and related to his work at Matalan where he had since March 2000 had a new contract as Executive Chairman. Most of the trips were to Matalan's head office in Lancashire, and on those occasions he would typically spend the night at The Coach House, accompanied by his partner.

5. The underlying substantive question is whether the steps Mr Hargreaves took to acquire non-resident status were effective, or whether he in fact remained resident in the UK. As appears from *R (Gaines-Cooper) v HMRC* [2011] UKSC 47 that question turns on whether Mr Hargreaves effected "a distinct break in the pattern of his life in the UK". The requirement of a distinct break

mandates a "multifactorial inquiry"; and a distinct break encompasses a "substantial loosening" of the taxpayer's social and family ties in the UK: see per Lord Wilson at [20].

6. HMRC rely on various matters including the fact that he spent on average 3 days per week working at Matalan's head office, that he bought a private jet to enable him to return to the UK regularly, that he had two cars in the UK, and that he continued to see his UK doctor and dentist and had hospital and physiotherapy treatment in the UK.

The appeals

7. On 15 March 2000 PricewaterhouseCoopers (**"PwC"**), Mr Hargreaves' then tax advisers, sent to the Inland Revenue a completed form P85 confirming his departure from the UK. This form is headed "Income tax form for those Leaving the United Kingdom" and indicated that Mr Hargreaves was leaving the UK on 11 March 2000 to go to Monaco and intended to live outside the UK permanently. PwC said in their covering letter that Mr Hargreaves "will be regarded as provisionally not resident and not ordinarily resident in the UK with effect from 12 March 2000."

8. Mr Hargreaves' self-assessment tax return for 2000/01 declared his liability to tax on the basis that he was non-resident. It included two "Non-Residence etc" pages which, as completed, said that he was not resident and not ordinarily resident in the UK, that the country in which he was resident was Monaco, that he had left the UK and intended to live outside the UK permanently, that he had spent 72 days (excluding days of arrival and departure) in the UK during the tax year and 77 since he originally left the UK. It added:

> "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."

9. On 9 January 2007 HMRC issued a Notice of Assessment to Mr Hargreaves for the tax year 2000/01. This was in the sum of £84m, made up of income tax (at 40%) on foreign income of £10m, and CGT (also at 40%) on a capital gain of £200m from the sale of his Matalan shares, and was on the basis that he was in fact resident in the UK for that tax year.

10. On 20 June 2007 HMRC issued a Notice of Determination of Ordinary Residence to Mr Hargreaves. This was a determination by an officer of HMRC that he was ordinarily resident during the tax years 2000/01 and 2001/02.

11. Mr Hargreaves appealed both the Notice of Assessment and Notice of Determination, but the appeals were not progressed as Mr Hargreaves also issued judicial review proceedings on 19 September 2007 seeking to quash the determination on the grounds that HMRC had failed to apply the terms of a

booklet (IR 20) issued by them in relation to the liability of residents and non-residents to tax in the UK; this claim was itself stayed behind *R (Gaines-Cooper) v HMRC* which raised similar issues. The Supreme Court handed down judgment in that case on 19 October 2011, rejecting by a majority the claims by the taxpayers for judicial review, following which Mr Hargreaves discontinued his own claim for judicial review.

12. On 8 March 2012 HMRC issued a Closure Notice to Mr Hargreaves for the year 2001/02. On the basis that Mr Hargreaves was resident and ordinarily resident in the UK during the year, it amended Mr Hargreaves' assessment by adding an additional amount of tax of over £6m. Mr Hargreaves appealed the Closure Notice, again on the grounds that he was not resident in the UK.

13. HMRC conducted a review of the decisions but the conclusion of the review, expressed in a letter of 24 July 2012, was that there was nothing to lead the reviewing officer to think that HMRC's conclusion that Mr Hargreaves remained resident and ordinarily resident in the UK in the years 2000/01 and 2001/02 was incorrect, based as it was on the substantial and continuing ties which Mr Hargreaves had with the UK.

14. Mr Hargreaves appealed to the FTT by Notice of Appeal dated 16 August 2012 against (i) the Notice of Assessment for 2000/01; (ii) the Notice of Determination of Ordinary Residence for 2000/01 and 2001/02; and (iii) the Closure Notice for 2001/02.

15. In respect of all 3 appeals Mr Hargreaves relies in his Grounds of Appeal on the contention that he was not in fact resident or ordinarily resident in the UK in either of the years in question, there having been, it is said, a distinct break in the pattern of his life in March 2000 when he left the UK for the settled purpose of living abroad permanently. I will call this question **"the substantive issue"**. It is agreed between counsel that the onus on this issue is on Mr Hargreaves.

16. Mr Hargreaves relies on a further ground in respect of the appeal against the Notice of Assessment for 2000/01. This assessment was purportedly made under s. 29 of the Taxes Management Act 1970 (**"TMA 1970"**) which, as set out in more detail below, enables an assessment to be made where HMRC discover that there has been an under-assessment for the year. Mr Hargreaves contends that this discovery assessment (as it is called) was made without HMRC having any power to do so and so was invalid. I will call this **"the competence issue"**. It is agreed between counsel that in most respects (as set out in more detail below) the onus in relation to this issue is on HMRC.

17. After HMRC had served its Statement of Case Mr Hargreaves applied for a direction that the competence issue be heard as a preliminary issue. It was this application which came before Judge Gort and which she dismissed. In essence she relied on the decision in *Hankinson v HMRC* 2007 WL 4265973 (***"Hankinson (SCD)"***) in which Sir Stephen Oliver QC as a Special

Commissioner had rejected a similar application in another residence appeal; dealt with each of the matters relied on by Mr Goldberg QC (who appeared for Mr Hargreaves as he did before me) as reasons for distinguishing that decision; and concluded that there was no proper reason for distinguishing it.

5 18. Mr Goldberg's submissions in support of the appeal fall under two heads which were labelled "the justice point" and "the convenience point" in Mr Hargreaves' Grounds of Appeal to the Upper Tribunal. The justice point was that the requirements of justice in effect required the competence issue to be determined separately; the convenience point was that there were good
10 practical reasons why it was preferable to hear the competence issue first.

s. 29 TMA 1970

19. In order to explain these issues I should first set out the relevant parts of s. 29 TMA 1970. The background to the section is explained by Lewison LJ in *Hankinson v HMRC* [2011] EWCA Civ 1566 (***"Hankinson (CA)"***) at [3]-[5].
15 (This was not an appeal against Sir Stephen Oliver's decision but an appeal against the subsequent decision on the merits by the Upper Tribunal in the same case). In essence, under the self-assessment scheme a taxpayer is obliged to make a tax return by the 31 January following the year of assessment and assess his own tax liability. HMRC can open an enquiry into
20 the return (in which case the assessment remains subject to enquiry until the enquiry is closed by the issue of a closure notice), but unless an enquiry has been opened within 12 months after the filing date (referred to as the enquiry window), the assessment becomes final, subject only to the possibility of a discovery assessment under s. 29.

25 20. s. 29(1)-(5), as they stood at the relevant time, provided as follows:

"(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
30 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
35 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–

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(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 be 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 of 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 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."

s. 29(6)-(7) specified what information was "made available to an officer of the Board" for the purposes of s. 29(5). s. 29(8) provided as follows:

"(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."

21. I was helpfully referred to various authorities on s. 29 from which the following points emerge:

(1) s. 29(1) applies if an officer of HMRC "discovers" any of various matters (which can be referred to generically as an undercharge). The word "discovers" has a long history: it means that the officer "finds", or "satisfies himself", or that "it newly appears" to him, that there has been an undercharge; it is not necessary that the officer has discovered some new facts. s. 29(1) is concerned with the officer's subjective views: see *Hankinson (CA)* at [15]-[18]. Mr Goldberg described it as a "loose and wobbly" provision, by which I understood him to mean that it is difficult in practice to challenge an officer's assertion that he has come to the view that there has been an undercharge.

(2) s. 29(2) prevents a discovery assessment being made if the taxpayer's return, although erroneous, is in accordance with generally prevailing practice at the time of the return. The onus of establishing the generally prevailing practice is on the taxpayer: *Hankinson (CA)* at [19], approving the statement to that effect by Henderson J in relation to the equivalent provision for corporation tax in *HMRC v Household Estate Agents Ltd* [2007] 1684 (Ch) (***"Household Estate Agents"***) at [45]. In the present case Mr Goldberg accepted that, at any rate as the law stands, the onus would be on him to establish a case under s. 29(2).

(3) s. 29(2)(b) refers to "the situation mentioned in subsection (1) above" being attributable to an error or mistake in the return. This makes it clear that "the situation mentioned in subsection (1)" is the fact that there has been an undercharge, not the officer's discovery of that fact. It makes sense to say that the undercharge is attributable to an error in the return; it makes no sense to say that the officer's discovery of the undercharge is attributable to the error in the return,

(4) s. 29(4) and s. 29(5) provide two alternative conditions one of which must be fulfilled before HMRC can make a discovery assessment. (There are different time-limits for invoking s. 29(4) and s. 29(5) of 20 years and 5 years respectively but nothing turns on that in the present case where it is accepted that HMRC are in time under either subsection). The first condition in s. 29(4), referred to as "culpable mistake", is where "the situation mentioned in subsection (1) above" is attributable to fraudulent or negligent conduct. HMRC do not suggest fraud in the present case but they do rely on negligence under s. 29(4). The onus is on HMRC to establish negligence: *Hankinson (CA)* at [22], approving *Household Estate Agents* at [48].

(5) The second condition in s. 29(5), referred to as "innocent mistake" applies where the information (as specified in s. 29(6)-(7)) available to the officer at the close of the enquiry window or when giving a closure notice was such that he could not reasonably have been expected to be

aware of the "situation mentioned in subsection (1) above". Again the onus is on HMRC to establish this: *ibid*.

(6) Both s. 29(4) and s. 29(5) use the same language as s. 29(3) in referring to "the situation mentioned in subsection (1) above". Mr Nawbatt, who appeared for HMRC, submitted that this referred to the fact of the undercharge, and had nothing to do with the officer's discovery of the fact. I accept this submission which seems to me plainly to be right as a matter of language. Moreover, as decided by the Court of Appeal in *Hankinson (CA)*, it is not necessary before HMRC can invoke the power in s. 29 for an officer to consider whether either or both of the conditions in s. 29(4) and s. 29(5) have been fulfilled. Unlike s. 29(2), s. 29(4) and s. 29(5) are not concerned with the officer's subjective views, but with the objective facts: has there been fraud, or negligence, or was the information objectively insufficient: *Hankinson (CA)* at [21]-[28].

(7) Two further points can be made on s. 29(5). First, the Court of Appeal held in *Langham v Veltema* [2004] EWCA Civ 193 that the subsection was concerned with awareness of an actual insufficiency of tax and that awareness that the return was questionable would not suffice: *Hankinson (CA)* at [21]-[23], *Household Estate Agents* at [24]-[33]. See also the useful summary of the principles to be derived from that decision by the FTT in *Blumenthal v HMRC* [2012] UKFTT 497 (TC) at [167].

(8) Second, as Henderson J pointed out in *Household Estate Agents* at [48] (referring to the equivalent provisions for corporation tax), although the onus under s. 29(5) is on HMRC as it is under s. 29(4), in practice the question is unlikely to be of much practical significance, because the return and accompanying documents in fact submitted to HMRC should always be available and the nature of the enquiry is an objective one.

22. With this introduction I now consider the arguments made by Mr Goldberg in support of the justice point and the convenience point.

The justice point

23. Mr Goldberg developed the argument at some length under this head but it can I think be adequately summarised as follows:

(1) The burden is on HMRC to establish that one or other of the conditions in s. 29(4) and s. 29(5) is satisfied.

(2) It follows that if those were the only issues in the appeal, Mr Hargreaves could insist on HMRC opening their case first and calling their evidence first.

(3) This would enable Mr Hargreaves to decide, after hearing HMRC's evidence and having had it tested by cross-examination, whether to call any evidence and if so what. This right to elect not to call evidence is a valuable procedural advantage for the taxpayer.

5 (4) This advantage can be preserved for Mr Hargreaves by directing the competence issue to be heard as a preliminary issue.

(5) If however no preliminary issue is directed and the substantive issue and competence issue are heard together at a single hearing, this will, or may, have the practical effect of requiring Mr Hargreaves to give or 10 call evidence before he has tested the ability of HMRC to prove their case on s. 29(4) and s. 29(5).

(6) This would be unjust to Mr Hargreaves who would thereby be deprived of his right to elect not to call evidence. In these circumstances justice requires that a preliminary issue be directed as 15 the only means of properly allowing the taxpayer to rely on the burden of proof.

24. I have no difficulty with steps (1) to (5) in this argument. Taking them in turn:

(1) It is as already said common ground that the onus under s. 29(4) and s. 29(5) is on HMRC.

20 (2) I agree that it follows that if these were the only issues in the appeal Mr Hargreaves could insist on HMRC opening the case first. Mr Goldberg referred me to examples where the burden of proof in relation to particular matters had been held to lie on the Inland Revenue Commissioners: *Dixon & Gaunt Ltd & James Hare Ltd v IRC* 25 (1947) 29 TC 289 (excess profits tax), *IRC v Transport Economy Ltd* (1955) 35 TC 600 (surtax), *IRC v Garvin* [1979] STC 98. In the *Dixon & Gaunt* case Atkinson J equated the burden of proof with the right and duty to begin (at 298); and in the *Transport Economy* case Upjohn J held that the Special Commissioners had been right to direct that it 30 was for the Crown to open its case and call evidence, and that since the Crown had called no evidence the Special Commissioners had been right to discharge the direction in question. It seems that it had been the practice for taxpayers to open appeals to the Special Commissioners, but although there is nothing improper in such a 35 course where the parties agree, it does not affect the onus of proof: see per Upjohn J at 608 (and see the similar comments of Slade J in *IRC v Garvin* [1979] STC 98 at 126). If therefore the onus on all issues in an appeal falls on HMRC the taxpayer can insist on HMRC beginning and calling evidence first.

40 (3) I also accept that a litigant who has the right to require the other party to begin can take stock at the end of his opponent's case and decide at

that stage whether to call evidence or not, and if so, which witnesses to call. This is simply a consequence of the way in which civil litigation is ordinarily conducted in this country. If the party going second is confident, once all his opponent's evidence has been called, that the case against him has not been established, he can not only shorten the case and save time and money by electing not to call any evidence, but he can by doing so also avoid the risk that by exposing his own witnesses to cross-examination, they might give evidence bolstering his opponent's case. I accept that even though this opportunity is not in my experience very often made use of, it can in appropriate cases confer a useful procedural advantage on the party going second.

(4) In the present case Mr Hargreaves' Grounds of Appeal in relation to the competence issue rely not only on s. 29(4) and (5) but also on s. 29(2) where as I have said Mr Goldberg accepts (at least unless and until there has been a decision to the contrary) that the onus is on the taxpayer to establish that there was a generally prevailing practice. But Mr Goldberg made it clear before me that if the competence issue were directed to be heard as a preliminary issue he would not pursue the s. 29(2) ground of appeal (while reserving the possibility of deploying what he asserted to be the usual practice on the s. 29(4) question). This means that were a preliminary issue to be directed the onus on all matters in that issue would be on HMRC with the consequences outlined above.

(5) I also accept that if there were a single hearing, Mr Hargreaves would not enjoy the same advantage. To some extent, as Mr Goldberg recognised, his position if there were a single hearing would depend on who opened the appeal. If Mr Hargreaves were to open the appeal he would in practice have to call his evidence on the substantive issue (unless he was prepared to abandon it without having heard HMRC's evidence on the competence issue, which seems unlikely). If HMRC were to open, this would give Mr Hargreaves the opportunity to elect to call no evidence at the close of HMRC's case but this would be a more high-risk strategy as in doing so he would have to abandon any possibility of calling any evidence on the substantive issue if he lost the competence issue. Both counsel were agreed that the FTT had not yet been asked to make, and had not made, any direction as to who should go first; and neither suggested that I should consider the question so I propose to say nothing about it beyond noting that it is not yet settled and may have to be. But it is apparent that if there is a single hearing, Mr Hargreaves' position would not be as advantageous as it would be if there were a preliminary hearing of the competence issue, regardless of who goes first in the single hearing.

25. I do not however accept the final step in the argument. The position seems to me to be as follows. Subject to the powers of a court (or tribunal) to compel the giving of evidence, a party always has the right to decide whether, and if

so what, evidence to call. The practical consequences of doing so depend however on the nature of the issues in the case, and in particular on where the burden of proof lies.

26. If in litigation between A and B, the burden on all issues lies on A, it follows as stated above (i) that B can require A to go first and (ii) that B can elect at the close of A's case to call no evidence.

27. If however the burden on some issues lies on A and on others lies on B, then the position is not the same. There are many different types of case where this is so: sometimes A may bear the burden on a claim and B on a counterclaim; sometimes A and B each bear the burden on different issues on the claim. In such cases the question of who starts is not dictated solely by the burden of proof, but by reference to what is fair and just: as it was put long ago by Brett LJ in *Thomson v South Eastern Railway Co* (1882) 9 QBD 320 at 27 (dealing with the case of cross-claims), there are no hard and fast rules but:

> "I think that the judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties"

This does not seem to me to be any different from the modern requirement to decide procedural matters by reference to the overriding objective of dealing with cases fairly and justly, which applies in the FTT to proceedings such as these: rule 2 of the Tribunal Procedure (First-tier Tribunal)) (Tax Chamber) Rules 2009, 2009/273.

28. In such a case if B chooses to call no evidence he will lose the issues on which he bears the burden (unless he can make his case on them through A's evidence). B therefore usually has to give or call evidence himself purely as a practical matter. But this is not an infringement of his rights, or a subversion of the principle that A has to make his case on the issues on which A bears the burden and B does not have to assist him to do so. It is just a consequence of the fact that in a case where B bears the burden on any issue it is seldom sensible for B to choose not to call evidence.

29. The present case seems to me no different. Mr Hargreaves could by abandoning any attempt to establish that he was in fact resident outside the UK in the years in question confine the issues to the competence issue. Then (assuming he also abandoned the s. 29(2) ground) HMRC would go first and he could call no evidence if he wanted to. But if he wishes, as he evidently does, to appeal not only on the competence issue but also on the substantive issue on which the burden lies on him, he is obliged in practice to call his evidence to establish the substantive ground. (The practice of requiring the taxpayer to assume the burden of challenging an assessment to income tax as too high is apparently of very long-standing and was explained by Atkinson J in the *Dixon & Gaunt* case at 293 as being justified by the "very good reason" that "otherwise the taxpayer would only have to keep no books, no banking

account, insist on being paid in Treasury notes, and no one living could ever prove what his income was or establish any liability to Income Tax"). This does not subvert the burden of proof on the s. 29(4) and 29(5) issues or infringe his right to call no evidence: it is just the ordinary consequence of bringing a case in which the burden on some issues lies on him and in which it is therefore unlikely to be advantageous to him to exercise the right.

30. So although I accept that in a case where the burden on all issues lies on A it can indeed be a valuable procedural advantage to B to have the opportunity to decide whether to call evidence after hearing A's case, it is wrong in my judgment to elevate this into a principle or right which mandates any particular outcome in a case where the burden on some issues lies on A and some on B. It does not dictate that a separate hearing has to be held on the issues where A bears the burden. Whether there should be such a separate hearing is in my judgment a matter of discretion not of right, and is to be determined, like other procedural questions, by reference to the overriding objective.

31. Mr Goldberg described HMRC's opposition to the application for a preliminary hearing as a "procedural scoop or manoeuvre." I do not accept this. What Mr Hargreaves really wants, as is apparent from the argument, is to have two attempts to challenge the assessment, first by a preliminary hearing of the competence issue at which he can call no evidence if so advised; and then if he loses that challenge, at a subsequent hearing of the substantive issue at which he can deploy his evidence to the full. It seems to me to be rather Mr Hargreaves who is attempting a procedural manoeuvre by which he can have two separate bites at the cherry in this way. This does not seem to me to be something that he is entitled to as of right.

32. That is sufficient to dispose of the justice point, but I will briefly note some other points made by Mr Goldberg. First he submitted that although there was in form one appeal against the assessment, the substantive issue and the competence issue were in substance two separate appeals and should be treated as such. Indeed he described his application as not so much for the competence issue to be heard as a preliminary issue, but for a separate hearing of the competence issue as opposed to what he called a mixed hearing.

33. I do not accept this submission. It is evident from s. 29(8) that Parliament intended that the only method of challenging the competence of a discovery assessment was by way of appeal against the assessment. This no doubt precludes an application for judicial review on the basis that HMRC was acting beyond its powers in making a discovery assessment; but it also it seems to me has the effect that where a taxpayer wishes to challenge a discovery assessment, whether for competence or on the underlying merits, he has to do so within the framework of an appeal, and there is nothing to suggest that he can at the same time have two separate appeals against the one assessment. It makes the competence of a discovery assessment a possible ground of appeal, not a separate appeal.

34. No doubt in some cases where the facts relevant to the substantive issue and the competence issue are discrete, it may be sensible to have separate hearings: see *Hankinson (CA)* at [26] per Lewison LJ:

> "He [Mr Mathew, counsel for the taxpayer] went on to say that another purpose [of s. 29(8)] was to protect the taxpayer against the possibility of substantive appeals when the real battle was over the question whether either or both conditions had been satisfied. He may well be right about that; but in an appropriate case in which that question can be decided as a discrete question, sensible case management would allow a preliminary issue to be determined. In some cases however (and this was one) the question of satisfaction of the conditions and the underlying tax liability cannot be divorced."

This seems to me entirely consistent with the idea that the substantive and competence issues both arise in the same appeal and are not to be regarded as in effect separate appeals; in an appropriate case it may be sensible for them to be heard separately, but this is a matter of sensible case management (that is, a discretionary decision on the facts of a particular case) not a matter of justice or right.

35. Second, Mr Goldberg said that one consequence of having a single hearing would be that Mr Hargreaves would in practice be required to give evidence on the facts relating to residence and that HMRC were relying on him doing so in order to make their case on s. 29(4) and (5). Mr Goldberg's own position was that the underlying facts in relation to residence were irrelevant to the s. 29(4) and s. 29(5) issues, but he said that since HMRC regarded his evidence on the underlying issues as potentially relevant to the competence issue, Mr Hargreaves ought not to be put in a position where, whether rightly or wrongly, HMRC would seek to rely on his evidence in support of an issue on which the burden lay on them.

36. Again I do not accept that this is a valid objection. I consider below the question whether there is an overlap between the facts relevant to the substantive issue and the competence issue, (where I conclude that there is indeed a potential overlap); but even so, this does not seem to me to require a separate hearing. Mr Nawbatt disclaimed any need to rely on Mr Hargreaves' oral evidence to make out his case, as he said he already had sufficient documentary evidence to do so; but even if this were not the case, it is another feature of our system of litigation that a person who chooses to give evidence can be cross-examined about any of the issues and what he says is evidence for all parties. It is not so much the fact of having a single hearing that requires Mr Hargreaves in practice to give evidence but the fact that he has appealed the assessment on substantive grounds. Having done so, he cannot in my judgment legitimately complain that if he gives evidence in support of his appeal he may be cross-examined; and if cross-examined his answers may (or may not) be helpful to HMRC on the competence issue.

37. Third, Mr Goldberg said that if HMRC were relying on fraud under s. 29(4), there would undoubtedly be two hearings, and that the same should apply where HMRC were relying on negligence, which was itself a matter of some seriousness. Mr Nawbatt did not accept that this would be the practice in fraud cases (and no examples had been produced), and in any event pointed out that if HMRC were alleging fraud it would perhaps be unlikely that there would be much dispute about the underlying facts. I do not think I should on the limited material before me try and identify what the practice might be, or ought to be, in fraud cases, nor do I find it helpful to do so. The present case should be decided on its own facts.

38. For these reasons I reject the appeal on the justice point. As Mr Nawbatt points out, the decision of the FTT in this case is the third time that a taxpayer in a residence appeal has unsuccessfully sought to have the competence of a discovery assessment heard as a preliminary issue. The other two were *Businessman v HMRC* [2008] STC (SCD) 1151, reported only on costs but where the report indicates (at [5]) that Dr Avery Jones sitting as a Special Commissioner had declined an application by the taxpayer to have the validity of discovery assessments dealt with as a preliminary issue; and the decision of Sir Stephen Oliver QC sitting as a Special Commissioner in *Hankinson (SCD)* which I have already referred to. It may well be that the argument put forward in those cases did not include that put forward by Mr Goldberg here, but it is apparent that in each case the question whether a preliminary issue should be directed was treated as a case management decision to be decided as a matter of discretion, as it was by Lewison LJ in the comments in *Hankinson (CA)* which I have set out above. For the reasons that I have given it seems to me that they were right to do so.

The convenience point

39. Since I have concluded that the question whether a preliminary hearing should be directed is a matter for the exercise of a discretion, the decision of Judge Gort in the FTT on the question can only be disturbed on the usual basis that such decisions can be disturbed, namely if she made some error of principle or exceeded the generous ambit within which reasonable disagreement is possible (*G v G* [1985] 1 WLR 647 at 652 E).

40. Mr Goldberg pointed to a number of respects in which he said that Judge Gort had made an error. The first was that she had uncritically followed the decision in *Hankinson (SCD)*. That was another case where the substantive issue was whether the taxpayer was resident during the relevant year of assessment, and where HMRC relied on s. 29(4) and s. 29(5) to justify a discovery assessment. Sir Stephen Oliver held (at [11]) that the issue whether Mr Hankinson was negligent in treating himself as non-resident and not ordinarily resident for the purposes of his self assessment tax return would depend on the same "substratum of facts" as would be relevant to the substantive issue as to whether he was in fact neither resident nor ordinarily resident during the relevant year. Judge Gort adopted a similar view in the

present case (at [16]). Mr Goldberg says that she was wrong to do so and that there was no overlap between the two issues. He said that the s. 29(4) and 29(5) issues turned on what the taxpayer did vis-à-vis HMRC, not what his actual lifestyle was.

41. I do not accept this submission. The question whether Mr Hargreaves was resident in the UK after May 2000, and the facts relevant to that question, seem to me to be plainly relevant to the s. 29(4) issue. (Mr Nawbatt submitted that they would also be relevant to the s. 29(5) issue but I do not need to consider that separately.) Under s. 29(4) the question whether Mr Hargreaves and his advisers were negligent in filling in his tax return in the way they did must depend on what the actual facts as to his residence are. Mr Goldberg said that he accepted that for the purposes of a preliminary hearing of the s. 29(4) issue it should be assumed that Mr Hargreaves was in fact resident. But this does not seem to me adequately to answer the point. There is a wide variety of circumstances in which a taxpayer may be held to be resident for tax purposes. In some circumstances the facts may be such that it would be obviously negligent for a taxpayer to assert that he was not resident; in other circumstances the position may be much more borderline and the question of negligence much more arguable. Where on the spectrum the facts of any particular case lie seems to me to be plainly not only relevant but central to the question of negligence, which will turn on whether it was unreasonable in the circumstances for the taxpayer to have submitted a return asserting that he was not resident. Whether he was or not depends on what his actual circumstances were.

42. This was the view reached by Sir Stephen Oliver QC in *Hankinson (SCD)*; and Lewison LJ evidently took the view subsequently that he had been right. A similar view was taken by the FTT in *Daniel v HMRC* [2014] UKFTT 173 (TC), another residence appeal where HMRC relied on s. 29(4) in support of a discovery assessment: the FTT there said that in addressing the negligent conduct issue they would have to address the issue whether the taxpayer had relied on "and satisfied" the criteria laid down in the relevant paragraphs of IR20 (at [9]), which necessarily required them to look at the actual facts in relation to residence; and in considering the question of negligence they indeed had regard to the detail of the actual facts (at [155]). In my judgment they were right to do so in that case, and Judge Gort was equally right in the present case (at [16]) that in order properly to decide the issue of competence the FTT would need to hear evidence relating to the substantive issue.

43. That in my judgment is sufficient by itself to mean that her decision not to direct a preliminary issue is one that she could reasonably come to and that cannot be regarded as perverse or wrong in principle. Indeed it was to my mind clearly the more appropriate course. A preliminary hearing would involve the FTT forming a view on the facts relevant to Mr Hargreaves' residence, which means that it is unlikely that there would be much, if any, saving in time or costs, and if HMRC succeeded on the competence issue, the same material would then have to be gone into again on the hearing of the

substantive issue. This would be likely to give rise to a duplication of effort, and might very well also give rise to disputes as to the extent to which the findings of the FTT on the preliminary issue were binding for the purposes of the substantive issue. If (as I have concluded it is) the question of residence is relevant to both issues it is far preferable that it be dealt with at one hearing not at two. In *Boyle v SCA Packaging* [2009] UKHL 37 Lord Hope said (at [9]) that the power that tribunals have to deal with issues at a preliminary hearing should be used sparingly and with caution, the essential criterion being whether there is

> "a succinct knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary hearing cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute."

This guidance is exactly on point: a preliminary hearing here would not be a succinct knockout point, nor entirely divorced from the merits.

44. I will however briefly deal with the other matters relied on by Mr Goldberg as errors by the FTT. The second was that at [14] Judge Gort said that although the legal burden (under s. 29(5)) is on HMRC:

> "there may come a time when the evidential burden shifts. In the present case the practical effect of s. 29(6) is that the taxpayer must be able to point to information which he provided to HMRC before the end of the 12 months' enquiry window which he contends should have alerted HMRC to the error in his return to establish an evidential basis for his claim that the assessment is not competent."

Mr Goldberg referred me to the remarks of Sir Nicolas Browne-Wilkinson V-C in *Brady v Group Lotus Car Companies plc* [1987] STC 184 at 196h-j where he said that the phrase "evidential burden" was unfortunate and apt to lead to error; and submitted that Judge Gort had here in effect placed an obligation on the taxpayer to make out a positive case whereas the true position was that it was HMRC who had to establish the negative case that the information contained in the return and other documents specified in s. 29(6) was such that the officer could not have been reasonably expected to be aware of the undercharge.

45. I do not accept that this criticism is justified. The phrase "evidential burden" is a familiar one and as it was put by Mustill LJ in the same case on appeal ([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. In a case under s. 29(5) the taxpayer will no doubt submit

that the information available to the hypothetical officer was such that he could reasonably have been expected to be aware that the assessment was incorrect, and in order to make such a submission, it is in practical terms necessary to identify for the tribunal the information that is relied on. This does not alter the burden of proof, or impose any legal obligation on the taxpayer to make a positive case. I do not think Judge Gort was saying anything different. She expressly said that the tribunal would be quite capable of applying the appropriate test in respect of the burden of proof; and I see no reason to doubt that it would. Indeed *Daniel v HMRC* is an example (as Mr Goldberg accepted) where the FTT carefully and correctly directed itself in relation to the different burden of proof on the substantive and competence issues. I do not consider that Judge Gort made any error in this respect.

46. The third matter relied on by Mr Goldberg was that Judge Gort referred (at [13]) to the possibility, if there were a preliminary issue, of an appeal which would lead to an extensive delay. I see no error here. One of the disadvantages of directing the competence issue to be heard as a preliminary issue is that it will not be known whether a hearing of the substantive issue is necessary until the preliminary issue has been finally resolved. Given the amount at stake in the present case it is likely that whoever loses the preliminary issue will consider an appeal. I agree with Judge Gort that this is likely to cause further delay in what is already a stale case and that this would not be desirable.

47. Mr Goldberg said that various matters should be put in the scale on the other side to set against the delay. I do not think it necessary to deal with these in detail: in the absence of demonstrable error in Judge Gort's decision, the weight to be given to various factors is a matter for her and not for the Upper Tribunal. In any event as I read her decision, the main consideration was, as it had been for Sir Stephen Oliver in *Hankinson (SCD)*, that there was a significant overlap between the matters that would be relevant to the competence issue and the substantive issue.

48. I have not been persuaded that there is any basis to disturb the conclusion to which Judge Gort came and for reasons already given if the decision had been mine (which it is not) I would in fact have reached the same conclusion.

49. I therefore dismiss this appeal.

MR JUSTICE NUGEE

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