[2022] UKUT 00034 (TCC)

Appeal number: UT/2021/000067

INCOME TAX, CAPITAL GAINS TAX – whether preconditions to the making of a discovery assessment were satisfied – yes

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

JOHN HARGREAVES **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE EDWIN JOHNSON
JUDGE JONATHAN RICHARDS

Sitting in public (by way of hybrid hearing) at Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL on 13, 14 and 17 January 2022

David Goldberg QC, Amanda Brown QC, and Conrad McDonnell instructed by KPMG Law for the Appellant

Akash Nawbatt QC, Christopher Stone and Marianne Tutin, instructed by The General Counsel and Solicitor for Her Majesty's Revenue and Customs for the Respondents

DECISION

Introduction

1. HMRC are entitled to make what practitioners refer to as "discovery assessments" under s29 of the Taxes Management Act 1970 ("TMA") where an officer of HMRC discovers that a taxpayer has paid insufficient tax. This appeal concerns HMRC's entitlement or otherwise to make such a discovery assessment on Mr Hargreaves in respect of income and gains arising in the 2000-01 year of assessment.

2. Mr Hargreaves submitted his self-assessment return (his "Return") for 2000-01 on 31 January 2002 (the "Return Date") on the footing that he was not resident or ordinarily resident in the UK in that year. HMRC formed the view that he was so resident and made an assessment (the "Assessment") on 9 January 2007 on the basis that he was liable to both income tax and capital gains tax ("CGT") in amounts greater than those stated in the Return.

3. The text of s29 so far as relevant and applicable at the relevant time is set out in the Appendix to this decision. HMRC considered that they were entitled to make the Assessment by applying the following line of reasoning:

> (1) An HMRC officer had "discovered" a situation mentioned in s29(1)(a) and s29(1)(b) of TMA, namely that income and chargeable gains that should have been assessed on Mr Hargreaves were not so assessed and that Mr Hargreaves' self-assessment of tax due for 2000-01 was insufficient (the "Situation").
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> (2) Because Mr Hargreaves had submitted the Return, HMRC could, by s29(2), make a discovery assessment only if the condition set out in s29(4) or s29(5) was satisfied.
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> (3) The condition set out in s29(4) (the "Negligence Condition") was satisfied because the Situation was attributable to the negligent conduct of Mr Hargreaves and/or of PricewaterhouseCoopers ("PwC") who were acting on his behalf.
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> (4) Alternatively, the condition set out in s29(5) (the "Information Condition") was satisfied because an officer of HMRC could not have been reasonably expected to be aware of the Situation by the deadline for opening an enquiry into Mr Hargreaves' return under s9A of TMA (the "Information Date" being 31 December 2003), on the basis of information that Mr Hargreaves had provided before that date.

4. Mr Hargreaves appealed against the Assessment to the First-tier Tribunal (Tax Chamber) (the "FTT"). In those proceedings Mr Hargreaves originally sought to challenge the Assessment on two grounds. The first ground was that he had in fact been neither resident nor ordinarily resident in the UK in the 2000-01 tax year. The second ground was that HMRC had not, for various reasons, been entitled to make the Assessment, with the consequence that the Assessment was invalid. Shortly before the hearing in the FTT Mr Hargreaves abandoned the first of these grounds, accepting that

he had been resident and ordinarily resident in the UK in the 2000-01 tax year. This left, for the determination of the FTT, the question of whether the Assessment had been invalid.

5. In a decision notice released on 12 April 2019 (the "Decision") the FTT allowed Mr Hargreaves' appeal against the Assessment. Its core conclusion (the "Staleness Point") was that the "discovery" on which the Assessment was based had become "stale" as a consequence of HMRC's delay in making the Assessment. That conclusion was itself sufficient for Mr Hargreaves' appeal to be allowed. However, in case it was wrong on the Staleness Point, the FTT made the following other determinations and findings:

(1) It concluded that the Negligence Condition was satisfied.

(2) It concluded that the Information Condition was satisfied.

(3) It also concluded that Mr Hargreaves had not submitted the Return in accordance with practice generally prevailing ("PGP") within the meaning of s29(2) of TMA. Accordingly, the condition set out in s29(2) of TMA (the "Practice Condition") was not satisfied so as to preclude HMRC from making the Assessment.

6. There are two challenges to the Decision before us:

(1) HMRC appeal against the FTT's conclusion on the Staleness Point. Both parties agree that HMRC's appeal must be allowed given the judgment of the Supreme Court in *HMRC v Tooth* [2021] 3 All ER 711 which was handed down after the Decision.

(2) Mr Hargreaves challenges the FTT's conclusions on the Negligence Condition, the Information Condition and the Practice Condition. (Mr Hargreaves says that his challenge is brought by way of a respondent's notice that responds to HMRC's appeal. HMRC say that he is making a separate appeal against the Decision. For reasons that we will come to, we do not consider that the precise mechanism by which Mr Hargreaves makes his challenge matters greatly).

7. Mr Hargreaves does not challenge any of the findings of fact underpinning the FTT's conclusions on the Negligence Condition or the Information Condition, but he does submit that the FTT's conclusions on those issues were either irrational or not available to the FTT as a matter of law in the light of its factual findings. Mr Hargreaves' appeal relating to the Practice Condition is, Mr Goldberg QC accepted, a pure *Edwards v Bairstow* challenge. Mr Hargreaves argues that the FTT's factual finding to the effect that the Practice Condition was not satisfied was irrational.

8. We have had the benefit of three days of detailed oral argument from counsel, in addition to their helpful skeleton arguments. Counsel referred us to a substantial quantity of case law, which was collected into a main bundle of authorities and a supplementary bundle of authorities. We were also provided with a core bundle and 11 bundles of documents, although reference to the content of the 11 bundles of documents was fairly limited. In reaching our decision on this appeal we have taken into account

everything drawn to our attention, in both the written and oral submissions. It is however inevitable, given the detail of the arguments and given the quantity of material before us, that not everything in the appeal can be given specific mention in this judgment.

The proper approach to the appeals as a procedural matter

9. The circumstances in which this matter has come before the Upper Tribunal (the "UT") raise some novel questions as to the scope of our power to interfere with the Decision and the procedure that we should adopt. The relevant procedural background is as follows:

> (1) As we have noted, the Decision contained the FTT's conclusions on four issues: the Staleness Point, the Negligence Condition, the Information Condition and the Practice Condition. The FTT's conclusion on the Staleness Point was itself enough to determine the proceedings in Mr Hargreaves' favour. The FTT's conclusions on the other three issues were in HMRC's favour.
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> (2) Therefore, Mr Hargreaves was successful before the FTT. HMRC appealed to the UT against the Decision with their grounds of appeal relating to the only issue on which they had lost, namely the Staleness Point. That appeal was assigned reference UT/2019/000074.
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> (3) Mr Hargreaves argued that the FTT was wrong on the Negligence Point, the Information Condition, the Practice Condition (the "Remaining Points"), so that the Decision should be upheld, even if HMRC's appeal on the Staleness Point succeeded. He initially advanced his arguments to this effect by way of a respondent's notice served on 16 July 2019.
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> (4) Subsequently the Court of Appeal gave judgment in *HMRC v SSE Generation Limited* [2021] EWCA Civ 105 which caused Mr Hargreaves to become concerned that he might not be able to make his arguments on the Remaining Points by way of respondent's notice and might instead need permission to appeal. He therefore applied, on a precautionary basis, to the FTT for permission to appeal on the Remaining Points. The FTT granted permission to appeal on 9 April 2021. The UT gave Mr Hargreaves' appeal its own reference, (UT/2019/000067). As part of that process, neither the FTT nor the UT expressed a concluded view on whether the Remaining Points required an appeal of their own or could be raised by way of a respondent's notice.
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> (5) The next relevant event was the acceptance of Mr Hargreaves that HMRC's appeal on the Staleness Point should be allowed, by reason of the decision of the Supreme Court in *HMRC v Tooth*.
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> (6) That resulted in the UT making, by consent, directions on 13 July 2021 (the "Disposal Directions"). Those directions provided for the two appeals to be joined. They contained case management directions providing for Mr Hargreaves' appeal under reference UT/2019/000067 to proceed towards a

hearing. They also provided for HMRC's appeal under reference UT/2019/000074 to be dealt with in the following way:

> HMRC's appeal in the matter of HMRC v John Hargreaves (UT/2019/000074) is allowed and is hereby disposed of.

10. Section 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") sets out the powers of the UT on an appeal against a decision of the FTT. By s12(2), if the UT decides that a decision of the FTT contains an error of law, the UT may (but is not obliged to) set the decision aside. If it does so, the UT is given the power either to remake the decision or to remit it back to the FTT. The Disposal Directions did not address what should happen to the Decision beyond saying that HMRC's appeal was "allowed" and "disposed of". That, however, is not to make any criticism of the Disposal Directions or the parties. If HMRC's appeal under reference UT/2019/000074 had been the only appeal in existence against the Decision, then clearly Mr Hargreaves' acceptance that the Staleness Point had been wrongly determined in the light of the Supreme Court's judgment in *Tooth* would have resulted in the UT setting the Decision aside and either remaking it or remitting it back to the FTT. However, Mr Hargreaves was also challenging the Decision and the UT could not know whether it was appropriate to set aside the Decision until it had dealt with those challenges.

11. Mr Hargreaves argues that the Decision still stands and has not been set aside by the Disposal Directions. He says that we (the UT) should approach the Decision on the basis that the FTT's conclusions on the Remaining Points were *obiter* and so not formally part of the reasoning by which the Decision was reached. Moreover, since Mr Hargreaves accepts that the FTT erred in its determination of the Staleness Point and has properly raised his arguments on the Remaining Points by way of a respondent's notice, we are considering the Remaining Points as part of the process of deciding whether we should set the Decision aside and if we do, whether we should remake the Decision or remit it back to the FTT. In those circumstances, Mr Hargreaves argues that he does not need to establish that the FTT's determination of the Remaining Points was wrong in law. Instead, the UT should approach the matter afresh with HMRC retaining the same burden of establishing satisfaction of the Negligence Condition and the Information Condition as they had before the FTT and Mr Hargreaves being required to discharge his burden in relation to the Practice Condition.

12. Mr Hargreaves is correct to say that the Decision still stands and that part of our task is to consider <u>whether</u> it should be set aside and, if so, whether we should remake it or remit it. As we have explained in paragraph [10] the UT cannot determine these matters without first considering the parties' respective arguments on the Remaining Points.

13. However, we do not accept the remainder of Mr Hargreaves' submissions set out in paragraph [11] for the following reasons:

> (1) The FTT's decision to make determinations going beyond the Staleness Point was quite deliberate. At [111] of the Decision, the FTT said that it would determine the Remaining Points because "these issues were argued before me and in case of any further appeal". The FTT, very sensibly and

quite correctly, decided the Remaining Points so that its findings and decisions on those points would be in place, in circumstances where (i) its decision on the Staleness Point turned out to be wrong, and (ii) Mr Hargreaves challenged its decisions on the Remaining Points. In the event this is precisely what has happened. The wisdom of the FTT's approach is demonstrated by the fact that we now have the benefit of the findings and decisions of the FTT on the Remaining Points and we consider it would not be appropriate in this case for us simply to approach matters as if the FTT had made no findings or determinations on the Remaining Points.

(2) The legal system within which the UT operates pays particular respect to findings of fact made by the primary fact-finding tribunal, recognising that this tribunal has the advantage of having seen and heard the totality of the evidence and recognising the dangers of an appellate tribunal "island hopping in a sea of evidence" to borrow from the terminology of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]. Since the FTT consciously has sought to assist both us and the parties by making findings on factual issues relating to the Remaining Points, we consider that it would be wrong in principle for us to relegate those to the status of mere *obiter dicta*, thereby losing the benefit of the distinct advantage that the FTT had.

(3) We acknowledge that, looking at matters as at the date of the Decision, the FTT's conclusions on the Staleness Point were determinative so that its conclusions on the Remaining Points did not influence the outcome. However, that does not make the FTT's conclusions on the Remaining Points *obiter* now. Once it is acknowledged that the FTT's determination of the Staleness Point was wrong in the light of the Supreme Court's decision in *Tooth*, its conclusions on the Remaining Points assume central importance, as the FTT foresaw that they might. As an appellate tribunal, we should not interfere with those determinations unless satisfied that they were wrong in law.

14. We were referred to examples of how the UT had proceeded with points raised in a respondent's notice, having determined an error of law in an FTT decision in *HMRC v Rogers and Shaw* [2019] UKUT 406 (TCC), *HMRC v Bella Figura Ltd* [2020] UKUT 120 (TCC) and *Eynsham Cricket Club v HMRC* [2019] UKUT 47 (TCC). We quite accept that the UT's approach to the issues that Mr Hargreaves raises will take as its starting point the issues that were, or were not, determined in the relevant FTT decision. So, for example in *HMRC v Rogers and Shaw*, the FTT decided, wrongly, that penalties that HMRC imposed in relation to tax returns submitted late were invalid and so made no finding as to whether the taxpayers had a "reasonable excuse" for submitting those returns late. On appeal, having identified the error of law, the UT felt able to make determinations on the "reasonable excuse" issue by reference to the FTT's findings of primary fact and other documentary evidence shown to the UT. However, we see nothing in these authorities to preclude us from proceeding on the basis that in this case the FTT has reached conclusions of both fact and law that should stand until they are shown to be wrong.

15. It follows that the legal landscape in this appeal is exactly the same as it would have been in any appeal where a party wishes to challenge a conclusion of the FTT that has had an effect on the overall result. Both sides are agreed that the FTT dealt with the Staleness Point wrongly. They are not agreed on the Remaining Points. It is for Mr Hargreaves to establish that the FTT erred, in a material respect, in its decisions on the Remaining Points.

16. The above analysis renders it unnecessary to decide whether Mr Hargreaves' challenge to the decisions of the FTT on the Remaining Points was properly made by respondent's notice, or needed to be the subject of the appeal for which permission was granted by the UT. Reference to Mr Hargreaves as making an "appeal" is simply a label of convenience which fits with terminology used by the parties. Whether Mr Hargreaves is proceeding by way of appeal or respondent's notice, his task is to demonstrate how the FTT went wrong in law, in a material respect, in its decisions on the Remaining Points.

17. We will, therefore, approach the proceedings before us as follows:

> (1) This hearing is not a rehearing. We will interfere with the FTT's conclusions on the Remaining Points only if satisfied they are wrong in law.
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> (2) Where the FTT has made findings of fact or, in evaluating facts, has given weight to certain factors, the findings of the FTT can only be overturned where the UT concludes that the FTT's fact finding process was flawed because either (i) irrelevant considerations were taken into account, (ii) relevant considerations were ignored or (iii) no reasonable tribunal, properly directed in law, could have reached that finding. The test in *Edwards v Bairstow* [1956] AC 14 HL applies.
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> (3) It is not open to us, as an appellate tribunal, to engage in an island-hopping exercise in a sea of evidence; see the well-known statement of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at [114], and see also what was said by the UT in *Carter & Kennedy v HMRC* [2021] UKUT 0300 (TCC), at [24]. That is a particularly pertinent consideration in the present case, given the mass of documentary and oral evidence that was before the FTT. The documentary evidence ran to 17 lever arch files and the FTT heard oral evidence from seven witnesses (this number includes one of HMRC's witnesses, Mr Symonds, who was called to give evidence, but was not cross-examined). In this hearing, we did not hear the witnesses, and we have been taken to only a small part of the documentary evidence which was before the FTT.
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> (4) If we find that the FTT did make an error of law in relation to a particular issue, it does not necessarily follow that the FTT reached the wrong decision on the relevant issue. It is still open to us to decide that the FTT reached the right result, if the error of law was not material to the relevant decision of the FTT; see Henderson LJ in *Degorce v HMRC* [2017] STC 2226 at [103].

The Decision

18. Given our conclusion on the procedural issues, we will take the Decision as the starting point for our analysis. The Decision is lengthy. We will not even attempt to summarise the entirety of it and we do not need to do so. Rather, in this section, we will simply seek to set out the key background facts and the FTT's reasoning on the Remaining Points in sufficient detail to put the parties' arguments into context. References to numbers in square brackets are to paragraphs of the Decision unless we say otherwise.

Relevant factual background

19. Mr Hargreaves is a successful businessman. He was, until May 1998 the majority shareholder in Matalan plc ("Matalan"), the well-known retailer. He was, from 1 March 2000, Matalan's executive chairman.

20. On 11 March 2000, Mr Hargreaves started to spend time in Monaco. Initially he lived in a hotel suite at Le Meridien Hotel. On 1 September 2000, he obtained the lease of an apartment in Monaco. He continued, however, to work as Matalan's executive chairman and still spent a lot of time in the UK. In the 2000-01 tax year, he spent 71 full days in the UK (ignoring days of arrival and departure), was in the UK at midnight on 112 days and was present in the UK for at least part of 152 days [28(18)].

21. Mr Hargreaves also owned a property in the UK ("the Coach House") that was available for his use even after he started spending time in Monaco.

22. Part of Mr Hargreaves' object in moving to Monaco was to ensure that he was no longer resident in the UK for tax purposes so that he could dispose of shares without becoming liable to CGT. He took professional advice from PwC over a period on the steps that he would need to take in order to establish residence outside the UK. One particular piece of tax advice provided by PwC was written on 18 February 2000 (the "Advice").

23. On 15 March 2000, Mr Hargreaves submitted a Form P85 indicating his view that he would be leaving the UK to live in Monaco. In that form, Mr Hargreaves said that he expected to spend "no more than two months" per annum in the UK.

24. The Return was prepared by PwC on Mr Hargreaves' behalf. Mr Hargreaves answered the various questions raised in the Return. He did not include the capital gains pages of the Return, but that was consistent with HMRC guidance to the effect that persons claiming not to be resident or ordinarily resident in the UK did not need to fill in these pages. Mr Hargreaves also made clear, on the face of the Return and his accompanying calculation of tax due that he had calculated his liability to income tax without regard to £5,570,259 of investment income and £54,453.64 of employment income on the basis that he considered these items not to be liable to income tax because he was not resident in the UK. He made an entry in the "white space" of the Return as follows:

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

25. On 16 May 2000, Mr Hargreaves disposed of shares in Matalan for a consideration of approximately £231m. Because Mr Hargreaves did not complete the capital gains pages of the Return for the reasons we have given, HMRC would not have been aware of any gain that this disposal generated by the Information Date.

26. The deadline for HMRC to open an enquiry into the Mr Hargreaves' tax return for 2000-01 expired on the Information Date. HMRC did not open any such enquiry. Instead, after a period of discussion with Mr Hargreaves and his advisers, HMRC made the Assessment on 9 January 2007. The Assessment was made by reference to HMRC's estimate that Mr Hargreaves owed £84m of additional tax for the 2000-01 tax year: £4m of which was estimated to relate to income tax and national insurance contributions and £80m to CGT on his disposal of Matalan shares.

HMRC's published guidance and Gaines-Cooper

27. A central issue in the Decision was the effect and status of HMRC's published practice on taxpayers' claims to be resident or ordinarily resident outside the UK. This issue has been the subject of protracted litigation between taxpayers and HMRC over the years which has resulted in a judgment of the Supreme Court in the joined cases of *R (on the application of Davies) and another v HMRC* and *R (on the application of Gaines-Cooper) v HMRC* [2011] UKSC 47 ("*Gaines-Cooper*").

28. We will not attempt to summarise all aspects of this litigation. However, by way of very broad summary, HMRC published guidance on the meaning of "residence" and "ordinary residence" set out in, among other publications, their booklet entitled "IR20". Some taxpayers considered that HMRC's guidance set out a benevolent practice, binding on HMRC, to the effect that a person's residence status in a tax year could be determined solely by counting the number of days that they spent in the UK both in the tax year in question and as an average over other tax years, and considering whether the person had the subjective intention to live permanently outside the UK for a requisite period. HMRC did not accept that. They argued that this was not the true meaning of their published practice and that, instead, the practice made it clear that a more "multi-factorial" examination of the nature of a person's ties to the UK was required. Litigation ensued and, in *Gaines-Cooper*, the Supreme Court held (Lord Mance dissenting) that HMRC's practice set out in IR20 did not indicate that residence could be determined solely by considerations of "day count" and the taxpayer's subjective intention. Rather, the conclusion of the majority in *Gaines-Cooper* was that IR20 made it sufficiently clear that a multi-factorial enquiry as to the extent of a taxpayer's ties to the UK was necessary in order to determine residence status.

29. The judgment in *Gaines-Cooper* settled the true interpretation of HMRC practice as set out in IR20 and elsewhere. However, there remained scope for argument as to whether, looking at matters in 2000-01, before the interpretation of IR20 was settled, it was reasonable for Mr Hargreaves to conclude that his residence status could be determined solely by considerations of a "day count" and his subjective intention. It

also raised the question of whether there was any PGP to that effect. These questions also lay behind the parties' competing submissions on the Negligence Condition and the Practice Condition.

The FTT's conclusion on the Negligence Condition

30. At [16] and [17] of the Decision the FTT quoted from relevant authorities. It concluded that a "failure to review the relevant circumstances" before making a claim to be non-resident was capable of constituting negligent conduct.

31. Mr Hargreaves did not give evidence in the FTT proceedings. The FTT considered that the only contemporaneous correspondence he had put forward to show that he had taken advice as to his residence in 2000-01 consisted of the Advice referred to in paragraph [22] above. Events had moved on, however, after the Advice was given. HMRC had published additional material including Tax Bulletin 52. There had been a meeting between HMRC and Arthur Andersen on 22 June 2001 which was "disseminated through professional bodies". There were also articles in *Taxation* magazine in February 2000 and February 2001 which addressed issues of residence ([117]). Mr Hargreaves' circumstances did not fully accord with those set out in the Advice. Moreover, PwC would have been aware that HMRC had indicated that they would be scrutinising the factual basis underpinning claims of non-residence more carefully than they had in the past. In those circumstances, there was a prima facie case that there was negligence on the part of either Mr Hargreaves or PwC consisting of a failure to obtain further advice in the light of those changed circumstances ([119]).

32. Since Mr Hargreaves had not given evidence, the FTT concluded that the evidence he could have given would not have supported his case. Accordingly, the FTT decided that the prima facie case of negligence was not rebutted and the requirement of s29(4) was satisfied ([120] and [121]).

The FTT's conclusion on the Information Condition

33. At [17] and [18] of the Decision, the FTT referred to the judgment of the Court of Appeal in *Sanderson v HMRC* [2016] STC 638 and the decision of the UT in *Beagles v HMRC* [2018] UKUT 380 (TCC) as to what level of knowledge on the part of the hypothetical HMRC officer referred to in s29(5) would cause the requirements of s29(5) to be met. Central to the FTT's conclusion was the proposition, set out in paragraph [100(5)] of *Beagles*, to the effect that:

> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6). … The information need not be sufficient to enable HMRC to prove its case but it must be more than would prompt the hypothetical officer to raise an enquiry.

34. At [122] of the Decision, the FTT concluded that this requirement was not satisfied. The Returns did not refer to any capital gains. Accordingly, the hypothetical officer could not have known that Mr Hargreaves had a CGT liability consequent on his sale of Matalan shares and so would have lacked knowledge of an "actual insufficiency".

35. At [123], the FTT concluded that references in the white space of Mr Hargreaves' tax return to the fact that he was regarded as "provisionally not resident or ordinarily resident" would not have raised any "red flags" or "question marks". Those references, therefore, would not even have prompted a hypothetical officer to make enquiries and so could not have amounted to awareness of an actual insufficiency.

36. At [124], the FTT determined that the s29(6) information made available to the hypothetical officer would not, in any event, have been sufficient for that officer to determine that Mr Hargreaves was resident in the UK. The information did not, for example, make it clear how and when Mr Hargreaves used the Coach House property available to him in the UK. It did not refer to the fact that Mr Hargreaves continued to work as executive chairman of Matalan, a large UK company, and it did not give information on his pattern of work.

The FTT's conclusion on the Practice Condition

37. Mr Hargreaves sought to persuade the FTT that there was a PGP at the relevant time under which his residence status would be determined by the considerations of "day count" and subjective intention set out IR20 (see [126] of the Decision). He relied on evidence from four practitioners to seek to make that proposition good. At [70] to [99] of the Decision, the FTT considered the evidence from practitioners in the light of contemporaneous documentation which it considered to shed a light on the approach of HMRC and practitioners to residence issues at the time Mr Hargreaves' tax return was submitted.

38. At [127] and [128] of the Decision, the FTT rejected Mr Hargreaves' proposed formulation of the PGP. It concluded that:

> … 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.
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> 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.

Mr Hargreaves' challenges relating to the Information Condition

The law

39. By s29(5) of TMA, a discovery assessment can be made only if the hypothetical officer mentioned in that section could not have been reasonably expected, on the basis of a specified body of information, to have been aware of the "situation" mentioned in s29(1). Central to the dispute on the Information Condition are the questions of (i) what level of awareness s29(5) is concerned with and (ii) what precise "situation" is being addressed in s29(5).

40. The FTT directed itself on these issues by reference to passages from the decisions of the UT in *Beagles* and the judgment of the Court of Appeal in *Sanderson*. In our judgment, the FTT's self-direction as to the law was entirely correct.

41. We will not attempt to give a comprehensive summary of all the law in the area, and so will not address questions such as the skill or knowledge that the hypothetical officer mentioned in s29(5) is assumed to have. Rather, we confine ourselves to the principles at issue in the present proceedings and conclude that:

> (1) The awareness referred to in s29(5) is of an "actual insufficiency" in the amount of tax that Mr Hargreaves self-assessed in the Return. (per Auld LJ at [33] of *Langham v Veltema* [2004] EWCA Civ193 and Patten LJ in paragraph 17(4) of *Sanderson*)
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> (2) A mere awareness that HMRC should prudently ask further questions is not enough to constitute awareness of an "actual insufficiency" (paragraph [33] of *Langham v Veltema* and paragraph [35] of *Sanderson*).
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> (3) HMRC's power to make a discovery assessment is not directly dependent on the level of awareness that the hypothetical officer would have had based on the body of information specified in s29(6). The purpose of the Information Condition is to test the adequacy or otherwise of the taxpayer's disclosure, not to prescribe the circumstances that would justify the actual HMRC officer in exercising power to make a discovery assessment ([25] of *Sanderson*).

42. In his submissions, Mr Goldberg QC argued on behalf of Mr Hargreaves, that the phrase "actual insufficiency" appeared nowhere in the statutory provisions and amounted to an impermissible gloss on the legislation. We reject that submission. In using the expression "actual insufficiency", the Court of Appeal in *Langham v Veltema* and *Sanderson* gave guidance, binding on this Tribunal, as to how s29(5) should be construed and applied.

43. Mr Goldberg also argued that the authorities to date have ignored a crucial aspect of s29(5). Section 29(5) is expressed in the negative asking whether the hypothetical officer could not have been reasonably expected to have a particular level of awareness. That, he argued is a very different question from asking whether the hypothetical officer could reasonably have been expected to have the requisite awareness. Moreover, he argued that the difference was deliberate: Parliament consciously wished to make it "hard" for HMRC to make discovery assessments since the self-assessment regime envisaged that HMRC should be opening enquiries under s9A of TMA in cases where they had concerns about a taxpayer's self-assessment. Accordingly, Mr Goldberg's submission was that Parliament had deliberately provided for s29(5) to permit the making of a discovery assessment only where the hypothetical officer could not have had any reasonable doubts as to the correctness of a taxpayer's self-assessment on the basis of the information specified in s29(6).

44. We reject that argument. Auld LJ considered and rejected a variant of it in paragraph [35] of his judgment in *Langham v Veltema* as follows:

> 35. Accordingly, I do not agree with Mr. Sherry that the Commissioners, in considering whether the Inspector could not have been reasonably expected to be aware of the insufficiency, were entitled to take into account what enquiries he could reasonably have been expected to undertake from the information provided to him under section 29(6) and what he could have reasonably learned from them. The fact that the statutory test is framed in the negative, that the Inspector could *not* have been reasonably expected to have been aware of the insufficiency, does not, in my view, affect the subject matter of the objective awareness with which the provision is concerned, actual insufficiency.

45. In a similar vein, Mr Goldberg argued that s29(5) is asking whether the hypothetical officer has sufficient information to justify opening an enquiry under s9A of TMA with a view to amending Mr Hargreaves' self-assessment. If the officer has that information, then the Information Condition is not met, on the basis that in such a case HMRC should instead be using the enquiry powers they have under the self-assessment regime. Mr Goldberg supported that argument by reference to paragraph [70] of the judgment of Moses LJ in *HMRC v Lansdowne Partners Limited* [2011] EWCA Civ 1578 where he said:

> The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency.

46. However, the Court of Appeal's judgment in *Sanderson* demonstrates that Mr Goldberg's reliance on the above passage is misplaced. As Patten LJ emphasised in paragraph [22] of his judgment in *Sanderson*, Moses LJ was not intending to reformulate the requirements that had been established in *Langham v Veltema*. The question, therefore, remained whether the hypothetical officer was aware of an "actual insufficiency" in the taxpayer's self-assessment return. Moses LJ's passage was addressing a different issue, namely whether the hypothetical officer should be taken as having resolved all points of difficulty or whether the "actual insufficiency" had been established to a particular standard of proof. Section 29(5), therefore, is intended to direct attention at the quality of the taxpayer's disclosure in the relevant self-assessment return, not to invite speculation as to how a hypothetical officer might have acted. As Patten LJ said at [25] of *Sanderson*:

> 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.

The FTT's application of the law to the facts

47. Once the above propositions of law are appreciated, it is clear that the FTT made no error of law in its conclusions on the Information Condition.

48. HMRC could be precluded, by application of the Information Condition, from making the Assessment only if the information specified in s29(6) would have alerted a hypothetical officer of HMRC to the fact that Mr Hargreaves had understated his liability to income tax or capital gains tax. That could only be the case if, looking at matters on the Information Date, the information provided indicated that, despite Mr Hargreaves' claim to be non-resident, he was actually both resident and ordinarily resident in the UK in 2000-01.

49. The FTT found, at [123] and [124] of the Decision, that the information Mr Hargreaves had provided did not establish that he was actually resident and ordinarily resident in the UK. In his skeleton argument, Mr Nawbatt QC provided a list of 13 important facts that were missing from the body of information treated as available to the hypothetical officer. The FTT did not refer to all of these, and did not need to do so since its conclusion on the Information Condition was amply justified by its findings that the following were excluded from the body of information treated as available:

> (1) The fact that Mr Hargreaves spent substantial periods of time in 2000-01 in the UK as part of his duties as executive chairman of Matalan.
>
> (2) The fact that Mr Hargreaves continued to have the very same residential property, the Coach House, in which he lived with his partner prior to 11 March 2000, available to him when he visited the UK after that date.
>
> (3) The fact that Mr Hargreaves' pattern of visits to the UK was regular and that he would typically be in the UK for three full days per week in connection with his duties with Matalan.

50. Mr Hargreaves places considerable emphasis on his disclosure in the "white space" of the Return that he was only "provisionally" non-resident. That, he argues means that the hypothetical officer would have been well aware that there was a possibility that he was actually resident and ordinarily resident in the UK, despite his claim in the Return to the contrary. He emphasises evidence that HMRC approached taxpayers' claims to be non-resident with a degree of scepticism, with standing instructions set out in paragraph 41 of HMRC's Inspector's Manual that final decisions about residence could not be made until an individual's absence from the UK had extended for a complete tax year at the least. Therefore, as it was put in Mr Hargreaves' skeleton argument:

> The officer knows that he is not looking at a guarantee of non-residence: he is looking at a case of possible non-residence.

51. However, given the legal tests that we have summarised in the section above, this argument can be of no assistance to Mr Hargreaves in circumstances where the FTT found, as it was entitled to do, that the information provided would not have alerted a hypothetical officer of HMRC to the fact that Mr Hargreaves was actually both resident and ordinarily resident in the UK for the period in question.

52. In our judgment, there was no error of law in the FTT's conclusion at [123] of the Decision and so no error of law in the FTT's conclusion on the Information Condition. That conclusion is itself sufficient to dispose of Mr Hargreaves' arguments on the Information Condition. However, the parties made full submissions on other aspects of the Information Condition and it is appropriate that we should express some views on them.

53. At [122] of the Decision, the FTT referred to the absence of any capital gains pages from the Return. That, concluded the FTT, was itself sufficient to demonstrate that the Information Condition was satisfied since Mr Hargreaves had not alerted HMRC to the presence of any capital gains with the result that the hypothetical officer could not reasonably be expected to be aware of any actual insufficiency in the amount of Mr Hargreaves' (nil) self-assessment to CGT.

54. That, submits Mr Hargreaves, ignores a critical point on income tax. As we have noted in paragraph [24], Mr Hargreaves disclosed, on the face of the Return, that some of the income he received in 2000-01 had been excluded from chargeability to income tax because of his perception that he was resident outside the UK. Accordingly, submitted Mr Hargreaves, HMRC would have been aware from the face of the Return that if Mr Hargreaves was UK resident there would be some "actual insufficiency" because income that should have been charged had been excluded. That awareness of an actual insufficiency in relation to income tax meant that s29(5) operated with the result that HMRC were precluded from making <u>any</u> discovery assessment under s29(1) for that tax year, including a discovery assessment relating to CGT even if the hypothetical officer could have no awareness of an insufficiency as regards CGT.

55. HMRC take the diametrically opposite view. They reason that s29(1) permits HMRC to make a discovery assessment if they "discover" that, among other matters, any income or capital gains have not been assessed. Therefore, when s29(5) asks about the awareness of a hypothetical officer of the "situation mentioned in subsection (1)", that is a reference back to "any" income tax or CGT not being assessed. Since the hypothetical officer could not have been aware that there was any insufficiency as regards Mr Hargreaves' self-assessment to CGT (because Mr Hargreaves had not completed the capital gains pages of the Return), HMRC argue that they would not be precluded from making a discovery assessment as regards both income tax and CGT even if (which they do not accept) any insufficiency of income tax was readily apparent from the face of the Return.

56. We do not regard this point as straightforward and, for reasons that we have given, it is not necessary to our conclusion. We consider that some support for HMRC's approach can be found in paragraphs [46] and [47] of the judgment of Arden LJ (as she then was) in *Hargreaves v HMRC* [2016] EWCA Civ 174 where she said:

> *Draconian effect of tiny error?*
>
> 46. Mr Goldberg submits that the power to make a [discovery assessment] is penal in its effect. He submits that, if the taxpayer makes a small mistake, the door is open to HMRC to reopen the computation of all tax for the relevant period. This is because "the situation mentioned in subsection (1) above" (used in subsections (2) and (5)) is that "any income which ought to have been assessed to income tax" has not been assessed. Thus, if the taxpayer had treated income of £100 as not liable to tax, and HMRC assesses the full £100 to tax but HMRC can show that the conduct condition is met only in respect of £50, then on a literal reading of section 29 it would appear to follow that the whole of the assessment meets the conduct/officer condition and is validly made. This is a startling conclusion.
>
> 47. I do not consider that this difficulty exists. I accept the submission of Mr Nawbatt that, once HMRC have shown that the conduct/officer condition is met, the taxpayer can show that the amount assessed is excessive. The position under section 29 is analogous to that where an assessment is made under section 36 TMA on the grounds of the taxpayer's fraudulent or negligent conduct…

57. In this passage, Arden LJ does not expressly accept the premise of Mr Goldberg's argument set out at [46] of the extract. She states only that its effect was not "draconian" because if HMRC made the assessment of £100 the taxpayer would be entitled to appeal to the FTT and seek to establish that the assessment was excessive. However, it might be expected that, if she disagreed with the premise of Mr Goldberg's submission, she would have said so. Accordingly, we prefer HMRC's submission set out in paragraph [55] above to Mr Hargreaves' competing submission set out in paragraph [54].

58. On that basis, we consider that the FTT's conclusion on the Information Condition would be correct even if, contrary to our conclusion, the hypothetical officer would have been aware that Mr Hargreaves was actually resident and ordinarily resident in the UK in 2000-01. The FTT was entitled to conclude at [122] of the Decision that the s29(6) information would not have alerted the hypothetical officer to any insufficiency in respect of CGT since, by not completing the capital gains pages of the Return, Mr Hargreaves had not told HMRC that he had made any chargeable gains in that period. Accordingly, on the basis of Arden LJ's statements in *Hargreaves v HMRC* which we have quoted, we consider the better view is that HMRC would not be precluded by s29(5) from making either an assessment to income tax or an assessment to CGT even if the hypothetical officer could have realised that Mr Hargreaves was in fact UK resident in 2000-01.

59. Mr Hargreaves also disputes that the hypothetical officer would have been unaware of any insufficiency of CGT, even if they had known he was actually resident and ordinarily resident in the UK in 2000-01. He points to what he terms an "admission" by HMRC's witness, Mr West, during the FTT proceedings that he, as an HMRC officer, was aware that it was common for a taxpayer to emigrate from the UK towards the end of a tax year with a view to making a significant capital gain in the next tax year that was said to be outside the scope of CGT. That was precisely what happened in Mr Hargreaves' case: he said that he had ceased to be UK resident from 11 March

2000, just before the end of the 1999-2000 tax year and made a significant gain by disposing of Matalan shares in the 2000-01 tax year. However, since the Information Condition is concerned with awareness of an "actual insufficiency", Mr West's evidence was not an "admission" that assisted Mr Hargreaves' case. At most it establishes that a hypothetical officer of HMRC would have realised that a wealthy taxpayer such as Mr Hargreaves might seek to make gains shortly after purportedly leaving the UK. It cannot establish that the hypothetical officer would have been aware of an actual insufficiency as regards CGT.

60. Finally, to address the statement of Patten LJ in *Sanderson* to the effect that the Information Condition is concerned to test the "adequacy" of a taxpayer's disclosure, Mr Hargreaves emphasises that the Return and Form P85 accurately answered all questions that HMRC posed. His responses to HMRC in those documents could not, he argued, be described as "inadequate". That, however, misunderstands the sense in which Patten LJ was referring to the "adequacy" of the disclosure. He was not inviting consideration of whether a taxpayer has fairly answered all questions that HMRC choose to pose. Rather, he was asking whether the information that a taxpayer does supply is sufficient to provide the hypothetical officer with awareness of an actual insufficiency. Accordingly, whether or not the Return or the Form P85 asked Mr Hargreaves for particulars of the matters set out in paragraph [49] above does not advance the enquiry. In a similar vein, the fact that HMRC told taxpayers that the capital gains pages should not be completed if a taxpayer was claiming non-residence is of little relevance either. That guidance suggests that Mr Hargreaves, having made a claim to non-residence in the Return, cannot be criticised for failing to complete the capital gains pages. However, it does not alter the fact that, since those pages were not completed, the hypothetical officer could not have been aware of an actual insufficiency in Mr Hargreaves' self-assessment of his CGT liability.

Mr Hargreaves' challenge relating to the Practice Condition

The law

61. The FTT directed itself, at [24] of the Decision, as to what constituted a PGP for the purposes of 29(2) of TMA. In doing so, it drew on another decision of the FTT in *Boyer Allen Investment Services Ltd v HMRC* [2012] UKFTT 558 (TC). Neither party argues that this self-direction was wrong in law. Importantly for present purposes, the FTT concluded that:

> (1) The practice has to be one adopted by taxpayers and HMRC alike ([24(1)]).
>
> (2) 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 ([24(5)]).
>
> (3) "Mere inactivity" can, in appropriate circumstances, give rise to a practice. However, such an omission must be capable of articulation in the same way as a positive act so as to have both clarity and substance. Its

parameters must be clearly defined so that the general acceptance amounts to the same unequivocal understanding ([24(8)]).

62. Mr Hargreaves drew attention to the wording of s29(2) which asks whether the Return was made "on the basis or in accordance with the practice generally prevailing at the time when it was made" (our emphasis). It was argued that there were, therefore, two "limbs" to s29(2): the first asking whether the Return was made on the "basis" of PGP and the second asking whether it was made "in accordance with" PGP. That submission formed part of Mr Hargreaves' wider argument that it was enough for there to be a PGP to the effect that taxpayers would submit returns that determined residence by reference purely to "day count" and subjective intention even if, in the small minority of tax returns that HMRC selected for further investigation, HMRC would consider other, multifactorial, indications of residence or non-residence.

63. We were not referred to any authority on whether s29(2) does indeed contain two "limbs" and we have therefore approached this question purely by reference to the statutory words used. In our judgment, Mr Nawbatt correctly explained the significance of the word "or" in the tailpiece to s29(2). A taxpayer might expressly invoke a particular PGP in a tax return or have it expressly in mind when making that return. Such a taxpayer would be making a return "on the basis of" the PGP. A different taxpayer might not expressly invoke a PGP and might not even be aware of it when preparing a return. However, that taxpayer's return might nevertheless be "in accordance with" the terms of that PGP if it complied with the requirements of the PGP. The word "or" ensures that both taxpayers are entitled to the benefit of s29(2).

64. We reject Mr Hargreaves' wider submission set out in paragraph [62] above. The Practice Condition considers whether Mr Hargreaves "made" the Return "on the basis" of or "in accordance with" the PGP. Given the FTT's self-direction of the law in [24] of the Decision, which is not challenged in this appeal, there cannot, as Mr Hargreaves appears to be arguing, be a PGP setting out a "basis" on which taxpayers submit returns which involves a completely different test of residence and ordinary residence from that which HMRC apply in enquiring into the small minority of self-assessment returns that are scrutinised. The very articulation of the PGP in those terms demonstrates that it would involve HMRC and taxpayers approaching the question of residence and ordinary residence in different ways. That would breach the FTT's self-direction of law in paragraph [24(1)] of the Decision, not challenged in these proceedings, to the effect that any PGP must be adopted by both taxpayers and HMRC alike. It would also breach the FTT's self-direction of law in paragraph [24(2)] of the Decision as it would mean that taxpayers whose returns were selected for further scrutiny would have their residence determined on a different basis from those taxpayers whose returns were accepted without challenge.

The FTT's application of the law to the facts

65. In his oral submissions on behalf of Mr Hargreaves, Mr Goldberg accepted that the challenge to the FTT's evaluation of the Practice Condition was a pure *Edwards v Bairstow* challenge based on the proposition that the FTT's conclusion, that there was no PGP, was irrational. Given that no challenge is made to the FTT's self-directions as

to law in paragraphs [23] and [24] of the Decision, that acceptance was correct. It follows from what we have said in paragraph [64] that it is not open to Mr Hargreaves to argue, in the proceedings before us, that there was a "limited" PGP that focused only on the way in which taxpayers submitted returns, and which was inconsistent with the way in which HMRC scrutinised those returns that were selected for inquiry. The FTT could not have found the existence of a "limited" PGP such as this, given its unchallenged self-directions of the law.

66. It follows that, to succeed in his challenge to the FTT's evaluation of the Practice Condition, Mr Hargreaves must establish that the only reasonable conclusion available to the FTT was that there was a PGP under which both taxpayers generally and HMRC accepted that a person's residence or ordinary residence status would be determined entirely by reference to (i) the number of days spent in the UK and (ii) the taxpayer's statements of subjective intention in leaving the UK. In short, Mr Hargreaves must establish that the FTT's contrary conclusion set out in paragraph [127] of the Decision was perverse or irrational.

67. Mr Hargreaves sought to discharge this burden by reference to just four documents: the form of the Return, the IR20 booklet, the guidance notes HMRC published for completion of the non-resident pages of the Return and paragraph 41 of the Inspector's Manual to which we have already referred in paragraph [50] above. Yet it is clear from paragraphs [70] to [99] of the Decision that the FTT engaged in a detailed survey of a mass of contemporaneous documents and publications, by no means limited to the four documents on which Mr Hargreaves now relies. Therefore, Mr Hargreaves' entire approach involved putting forward a small cross-section of the evidence that was before the FTT together with submissions as to why that small cross-section supported his case on the Practice Condition, without saying anything about the significant other evidence that clearly weighed heavily in the balance in leading the FTT to a different conclusion. Such an approach is, in itself, incapable of succeeding since it involves precisely the "island hopping" in a "sea of evidence" that is deprecated by *Fage v Chobani*. Moreover, it is in direct contravention of the proscription that Evans LJ expressed in *Georgiou v C&E Commissioners* [1996] STC 463 in the following terms:

> It follows, in my judgment, that for a question of law to arise in the circumstances [i.e. where an appellant is challenging a factual finding], the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

68. We could have ended our analysis on the Practice Condition there. However, in deference to the FTT's detailed reasoning on the issue, we will point out just three points that, in our judgment, amply justify the FTT's factual conclusion.

(1) So far as IR20 is concerned, we have the benefit of the decision of the majority in the Supreme Court in *Gaines-Cooper*, which confirms that IR20 did not, on its correct construction, contain guidance to the effect that a valid claim to non-residence could be made simply on the basis of the required intention to leave the UK and satisfaction of the day-count requirement. The fact that the Supreme Court so decided does not prevent a PGP from existing on the Return Date, but if it did exist, it could not have owed its existence to what was actually said in IR20.

(2) The Advice makes it clear that PwC did not consider that Mr Hargreaves' residence status could be determined purely by reference to a day-count and his statements of subjective intention and instead involved a multi-factorial assessment. This approach, of a leading firm of tax advisers, clearly called into question whether the PGP for which Mr Hargreaves argued existed at all.

(3) The FTT referred in detail to the edition of a leading practitioner text: *Booth on Residence, Domicile and UK Taxation* that was current when the Return was submitted. At [74] of the Decision it quoted extracts from that text that set out the multi-factorial nature of the relevant enquiry. Mr Hargreaves sought to qualify the significance of this by arguing that *Booth* was concerned with "common law" tests of residence, but Mr Conder (for example) accepted in cross-examination that *Booth* sought to summarise the author's view of the correct approach to questions of residence taking into account both case law and HMRC practice (Transcript Day 5, p19 line 23 to p20 line 3).

69. Mr Hargreaves placed some reliance on evidence as to the approach that HMRC adopted when "checking" returns submitted by taxpayers claiming to be non-resident. Given the questions asked in the form of tax return current in 2000-01, he argued that HMRC's "checks" could only have involved verifying that the requisite day-counts put forward in a return met the requirements of IR20 and that the requisite statement of the taxpayer's subjective intention had been given. He pointed out that, by contrast with questions relating to a taxpayer's domicile, raised in boxes 9.27 and 9.28 of the template return, there was no request that taxpayers confirm that they had provided HMRC with "full facts" relating to their residence claim. Therefore, the only information that HMRC had, which they could check, related to the taxpayers' statements on day count and subjective intention.

70. We have already explained, in paragraph [64] above, why we reject Mr Hargreaves' argument that there was a PGP as to the "submission" of returns that stood separate from the practice HMRC employed in scrutinising them. In a similar vein, we reject Mr Hargreaves' argument that HMRC's practice in checking returns demonstrated that there was a PGP to the effect that claims to non-residence based on day-count would inevitably be accepted. It was a relevant factor, and one that the FTT had in mind because the FTT referred to HMRC checks of self-assessment returns at [40] of the Decision. However, the nature of HMRC's checks was certainly not dispositive. Even if there was no PGP, so that all claims to residence fell to be determined by application of a multi-factorial assessment, it would still make sense for HMRC to identify

obviously debatable cases by considering whether the day-counts set out in IR20 had been exceeded.

71. In conclusion, the FTT made no error of law in its evaluation of the Practice Condition.

Mr Hargreaves' challenge relating to the Negligence Condition

72. Our conclusions set out above on the Information Condition and the Practice Condition mean that the FTT made no error of law in concluding that the Assessment was validly made, whatever the position with the Negligence Condition. However, since we have heard full argument on Mr Hargreaves' challenge to the Decision based on the Negligence Condition, we will express our conclusions on that issue as well.

The law

73. The Negligence Condition required the FTT to consider three issues:

> (1) the nature of the duty owed by Mr Hargreaves, in respect of his completion of the Return;
>
> (2) whether that duty was breached;
>
> (3) if it was, whether the Situation was attributable to the breach of duty.

74. Although the FTT did not set out in a single place all of the legal tests it needed to apply, reading the Decision as a whole it is clear that FTT was proceeding on the basis that Mr Hargreaves owed a duty, when submitting the Return, to take care that the Return was accurate in what it said, specifically in relation to the claim to non-residence and in relation to the information about residence given in the Return. We took both parties to be agreed that this was a correct formulation of Mr Hargreaves' duty.

The FTT's application of the law to the facts

75. At the hearing before us, Mr Hargreaves made a sustained challenge to the FTT's findings that he, and PwC acting on his behalf, had been negligent for the purposes of s29(4) of TMA. He argued that:

> (1) The question of negligence needed to be determined on the Return Date. On that date, there was a respectable body of opinion to the effect that Mr Hargreaves could properly claim to be non-resident provided he satisfied the "day count" conditions of IR20 and had the subjective intention to live outside the UK permanently. That this was a respectable body of opinion was demonstrated by the dissent of Lord Mance in *Gaines-Cooper*. There was no negligence in Mr Hargreaves filing a tax return claiming to be non-resident in accordance with the practice set out in IR20.
>
> (2) The FTT was unduly swayed by Mr Hargreaves' acceptance, in [115] of the Decision, that he was in fact resident and ordinarily resident in the UK

in 2000-01. That acceptance was simply not relevant. The FTT should have focused only on the situation present on the Return Date.

(3) The FTT was wrong to conclude that Mr Hargreaves' circumstances had relevantly changed between February 2000 and the Return Date. On the contrary, Mr Hargreaves throughout was entitled to claim to be neither resident nor ordinarily resident in the UK on the basis of IR20 and a respectable interpretation of it.

(4) Even if there was negligence, the FTT was wrong to conclude that the Situation was "attributable to" that negligence. HMRC were at fault in failing to open an enquiry into the Return. Moreover, if Mr Hargreaves had sought further advice from PwC it was clear that PwC would have advised him, given the terms of IR20, that it remained proper for him to claim to be non-resident.

76. We reject Mr Hargreaves' argument set out in paragraph [75(1)]. That argument represented an attempt to re-argue the case before the FTT and take us island-hopping. The FTT did not base its conclusion on a conclusion that Mr Hargreaves adopted an unreasonable interpretation of IR20. Its conclusion was that Mr Hargreaves should have realised that further advice from PwC was needed but failed to obtain any further advice after February 2000. That is the conclusion that Mr Hargreaves needs to displace in these proceedings and therefore the starting point in the analysis has to be whether the FTT was entitled to reach that conclusion.

77. In our judgment, the FTT was entitled to its conclusion that there was a prima facie case that Mr Hargreaves had been negligent in failing to obtain further advice from PwC. The Advice demonstrates that PwC thought it was of some importance for Mr Hargreaves to have a lease of property in Monaco, in his own name, lasting at least three years, for him to have a residence permit issued by the Monaco authorities and to demonstrate that he had moved personal belongings to Monaco. Moreover, as the FTT noted at [36] of the Decision, Mr Hargreaves had been told that, for a disposal of Matalan shares in 2000-01 to escape CGT, Mr Hargreaves would need to be resident outside the UK throughout the 2000-01 tax year. Yet, as the FTT noted in paragraph [54] of the Decision, Mr Hargreaves initially stayed at a hotel in Monaco, then lived on a yacht and only obtained a lease of an apartment in November 2000. He did not obtain a residence permit until August 2000 (with the result that, until then, the Monaco authorities regarded him as a "tourist"). He did not move any significant belongings to Monaco. The FTT clearly had these issues in mind in paragraphs [116] and [118] of the Decision. It was entitled to conclude that these changes of circumstances would have caused a reasonable taxpayer to ask PwC whether it would still be appropriate to claim to be resident outside the UK throughout 2000-01 and that Mr Hargreaves' failure to do so amounted to a prima facie case of negligence.

78. Having permissibly found a prima facie case of negligence, the FTT was then entitled to ask whether Mr Hargreaves had done enough to displace that prima facie case. Conceptually, Mr Hargreaves could have adduced evidence that in fact further advice had been taken. He could have put forward an explanation as to why neither he nor PwC considered that further advice was necessary. However, when Mr Hargreaves

chose to put forward no evidence at all to answer the prima facie case, the FTT was entitled to conclude that he had indeed breached his duty. That said, the significance of Mr Hargreaves' decision not to give evidence is limited. It justified the FTT's conclusion that a breach of duty was established, but did not give rise to any special inference that all elements of HMRC's accusation of negligence were established. Specifically, it did not necessarily establish that the Situation was "attributable to" Mr Hargreaves' breach of duty.

79. We also reject Mr Hargreaves' argument set out in paragraph [75(2)] above. It was clearly relevant for the FTT to note that Mr Hargreaves ultimately accepted that he was both resident and ordinarily resident in the UK in 2000-01. If he were not, the Return would have been correct and no question of negligence would have arisen.

80. We do not accept that the FTT made any error of the kind alleged in paragraph [75(3)]. We have explained why the FTT was entitled to conclude that there was a relevant change in Mr Hargreaves' circumstances. The argument in paragraph [75(3)] does, however, raise a separate question which was expressly raised in the argument set out in paragraph [75(4)]; namely whether the Situation was "attributable to" Mr Hargreaves' negligence. The FTT concluded that Mr Hargreaves was in breach of duty in failing to take further advice from PwC prior to submitting the Return with the claim to be non-resident. The question which then arises is what would have happened if Mr Hargreaves had complied with his duty, and had sought and obtained the required further advice from PwC. That in turn raises the question of what advice PwC would have given in this hypothetical situation. By way of example, if PwC could legitimately (ie. non-negligently) have advised Mr Hargreaves that, despite the change in circumstances, it would still be appropriate for him to submit the Return with a claim to be non-resident, that would support Mr Hargreaves' argument that the Situation was not attributable to the negligence found against him by the FTT. The outcome would still have been the same, so the argument would go, even if the further advice had been sought. By contrast, if PwC could not legitimately (ie. non-negligently) have advised Mr Hargreaves that it was appropriate to submit the Return with a claim to be non-resident, that would support the argument of HMRC that the Situation was attributable to the negligence of Mr Hargreaves. On this hypothesis, so the argument would go, the claim to non-residence would not have been made if the required further advice had been obtained from PwC.

81. HMRC argue that, bearing in mind the issues raised in the Advice, the actual circumstances of Mr Hargreaves in 2000-01 tax year, and the FTT's express reference to s29(4) of TMA in paragraph [121] of the Decision, (i) it was reasonable for the FTT to find that PwC would have advised that the claim to non-residence could not be made, and (ii) the FTT did so find. We acknowledge that judgments are to be read as a whole and that a judge can be taken to have considered a point even if it is not expressly mentioned in the judgment. However, in this case we have concluded that on any fair reading of the Decision, the FTT made no finding on the question whether the Situation was attributable to Mr Hargreaves' negligence. Put more simply, it seems to us that the FTT made no finding on the causation question raised by s29(4). It follows that there is a "missing step" in the FTT's reasoning that underpins its conclusion in paragraph

[121] with the result that we are not satisfied that this conclusion was available to the FTT. As such, the conclusion of the FTT on the Negligence Condition cannot be upheld.

82. While this is a point which was not critical to the reasoning of the FTT on the Negligence Condition or to our own reasoning, we also have some concern that the FTT may not have been entitled to conclude that PwC, as distinct from Mr Hargreaves, might have behaved negligently. In paragraph [121] of the Decision the FTT concluded that the conduct of Mr Hargreaves and/or his advisers, PwC, was sufficient to satisfy the Negligence Condition. The negligent conduct the FTT identified was of Mr Hargreaves in failing to obtain further advice from PwC. It is not entirely clear to us that this supports the FTT's findings as to any negligence on the part of PwC. However, neither party sought to make anything of this point at the hearing before us. Therefore, since our conclusion in paragraph [81] is that the FTT made an error of law in its evaluation of the Negligence Condition, we need not address this point any further.

Disposition

83. The FTT's conclusion on the Staleness Point was wrong in law. However, there was no error of law in the FTT's conclusions on the Information Condition and the Practice Condition.

84. Since the Decision resulted in Mr Hargreaves' appeal being allowed, based on the error of law present in its determination of the Staleness Point, the correct course for us is to set aside the Decision. The FTT's findings demonstrate that, if it had reached the correct conclusion on the Staleness Point, it would have dismissed Mr Hargreaves' appeal based on its analysis of the Information Condition and the Practice Condition. Since there was no error of law in the FTT's determination of those other issues, we will remake the Decision so as to result in Mr Hargreaves' appeal against the Assessment being dismissed.

85. The FTT reached a decision on the Negligence Condition which was not open to it because the FTT had not considered whether the Situation was attributable to Mr Hargreaves' negligence. That was an error of law. However, it is not material to the proceedings before us because Mr Hargreaves' appeal would still have been dismissed based on the FTT's correct evaluation of the Information Condition and the Practice Condition.

86. For completeness, we record our view that, if the FTT's conclusion on the Negligence Condition had been material, we would have remitted that issue back to the FTT for reconsideration since we do not consider ourselves to be in a position to resolve the causation question of what advice PwC would have given if Mr Hargreaves had asked them for further advice before submitting the Return. We would, moreover, have made directions under s12(3) of TCEA to the effect that the matter should have been remitted to the same FTT with the reconsideration to take place on the basis of the existing evidence that was put before the FTT. In our judgment, if the matter had been remitted back to the FTT, it would have been appropriate to hold Mr Hargreaves to his decision to call no evidence from himself and it would not have been appropriate to permit Mr Hargreaves to seek to improve his case by producing further evidence. Had

we remitted the matter back to the FTT, the FTT would have needed to decide, on the basis of the evidence that was before it, which included evidence from leading tax practitioners, what supplementary advice PwC would have given if it had been requested. That task could appropriately and proportionately be performed by the same FTT that heard the evidence originally.

Signed on Original

MR JUSTICE EDWIN JOHNSON
JUDGE JONATHAN RICHARDS

RELEASE DATE: 11 February 2022

APPENDIX – SECTION 29 OF TMA AS IN FORCE AT THE RELEVANT TIME

At times material to these proceedings, s29 of TMA provided as follows:

> **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
>
> …
>
> 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 -

[not reproduced since the outcome of these proceedings does not depend on ascertaining the precise scope of information that is treated as made available to the officer]