TC01354

Appeal number: TC/2010/865

INCOME TAX – discovery assessment – negligence of appellant – yes – whether HMRC could reasonably have been expected to have been aware of relevant facts – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

EA MANISTY AND A MANISTY AS TRUSTEES OF THE EA MANISTY FURBS TRUST **Appellant**

- and -

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

TRIBUNAL: Nicholas Aleksander (Tribunal Judge)
Mrs R A Watts Davies FCIPD MIH

Sitting in public at 45 Bedford Square, London WC1 on 8 and 9 March 2011

Edward Manisty, a trustee of the Appellant

Andrew Pickering, an officer of HM Revenue and Customs

DECISION

1. This appeal relates to the taxation of the EA Manisty Funded Retirement Benefit Scheme Trust ("the FURBS"), and the power of HM Revenue and Customs to raise a "discovery" assessment in respect of the year of assessment 2006/7.

2. The FURBS was represented by one of its trustees, Edward Manisty. For the first day of the hearing, Mr Manisty was assisted by Laura Coutts as a “Mackenzie friend”. HMRC were represented by Andrew Pickering, an officer of HM Revenue and Customs. We heard oral evidence from Mr Manisty and from Mr Paul Callaway, the HMRC officer who raised the assessment which is the subject of this appeal. In addition we had two bundles of documents submitted in evidence.

3. We would also note that this appeal was the subject of a lengthy pre-trial review held on 30 September 2010 before Judge Hellier. Following that hearing, directions were issued by Judge Hellier. Representations were made by the parties in respect of the directions, and in consequence minor amendments were made to the directions by Judge Hellier. The (amended) directions, amongst other things, limited the substantive hearing to consideration of the following points:

> (1) Whether one or other or both of the conditions in sections 29(4) and (5) Taxes Management Act 1970 (“TMA”) (taken together with the later associated subsections) were satisfied; and
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> (2) What the law (having regard to the provisions not only of the Taxes Act but also the Human Rights Act and any other relevant legal principle) required the proper form of the assessment to be and whether there were conditions therefore other than those appearing on the face of section 29 TMA and section 30A TMA; and
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> (3) Whether the assessment under appeal satisfied the test to be determined under (2).

4. In view of the limitations imposed by Judge Hellier's directions, we declined to hear argument from Mr Manisty that HMRC had a duty to correct any "obvious mistake" contained in the tax return of the FURBS trustees.

5. One of the issues before the tribunal was the application of section 29(5) TMA, and the approach that an “ordinary competent inspector” would take to the information before him. As noted in Judge Hellier’s directions, evidence of an experienced officer of HMRC could be material to these issues, but we considered that Mr Callaway, who was a very experienced HMRC officer (first appointed as an Inspector of Taxes in 1985, and who had worked on trust cases since 1994) was competent to given evidence on these issues. We declined to admit in evidence the witness statements of Mr Andrew Pickering or Mr David Smith. Mr Smith is a senior HMRC manager responsible for its Trusts and Estates division. He generally has no involvement in the casework relating to individual taxpayers, and had no involvement in this case. He could therefore give no relevant evidence to the Tribunal. Mr Pickering is the officer conducting this appeal on behalf of HMRC. His only involvement in this matter has been in the conduct of the Appeal. He had no

involvement in the decision by HMRC to raise a discovery assessment, and he only became involved in this matter after the FURBS raised its appeal. Accordingly we considered that he could give no relevant evidence to the Tribunal.

6. We would also note that Mr Manisty's bundle of authorities contained thirty seven references, and during the course of argument, he referred us to a number of further authorities. Most of these authorities had little (if any) relevance to the issues before us. We refer in this decision only to those authorities which we consider relevant to our decision, but for the sake of completeness, a complete list of all of the case authorities cited by the parties is appended to the end of this decision.

Background Facts

7. Although the parties were unable to reach agreement on a statement of facts not in dispute, the background facts are for the most part not in dispute, and we find them to be as follows.

8. Mr Manisty is a solicitor. He qualified in 1967, and for 20 years was a partner with the City of London firm, Stephenson Harwood, where he specialised in estate planning and trust related matters. In April 1992 he gave up private practice, and became a director of Christie, Manson & Woods Ltd ("Christies"), the well known auctioneers, in charge of its Heritage and Taxation Advisory Service. He retained this position until his retirement from Christies in 2006. From 1999 until his retirement, he was Vice-chairman of Christies. Since leaving Christies, he has returned to private practice as a consultant to Farrer & Co LLP, where he advises on heritage property and estate planning. He is a member of the Society of Trust and Estate Practitioners. He is a regular contributor to technical journals on the administration and taxation of chattels.

9. Although Mr Manisty is not an expert on pensions or pensions taxation, it is clear from his background, the contents of his correspondence with HMRC and the manner in which he gave evidence before us (and we find) that he is meticulous and pays great attention to detail, he has (and had at all material times) a thorough understanding of trusts and trust law, he can read and understand complex trust and legislative drafting, and he has a good understanding of the general principles of income tax and capital gains tax.

10. When Mr Manisty agreed to join Christies, it was acknowledged that it would no longer be feasible for him to build up provision for his retirement at the same level as had been possible whilst a partner at Stephenson Harwood. Accordingly Christies agreed to establish a funded unapproved retirement benefit scheme for him. The trust deed establishing the FURBS was executed on 24 May 2001, appointing senior Christies executives (not Mr Manisty) as trustees. Until Mr Manisty's retirement, Christies made regular contributions to the FURBS, and advisors appointed by Christies provided investment advice to the trustees, prepared annual accounts and tax returns.

11. A copy of the FURBS trust deed was sent to HMRC on 29 January 2003, by the trustees' then tax accountants, but it was returned by HMRC with a covering letter stating that in accordance with their prevailing practice it had not been read.

12. Mr Manisty's 65th birthday was on 12 May 2006. Approximately a year prior to that date, Mr Manisty had decided that he would retire from full-time involvement at Christies at the end of May 2006. Mr Manisty was aware that significant changes to pensions taxation would be brought into effect on "A Day" in April 2006, and that these changes would affect his own pensions arrangements. He sought advice during 2005/6 from Mercer & Hole on various taxation matters (including the impact of the A Day reforms) in the light of his impending retirement. Mercer & Hole are a firm of chartered accountants, who were responsible for the preparation of the FURBS tax returns.

13. In particular, on 4 April 2006, Mr Manisty wrote a long letter to Lisa Spearman, a tax partner at Mercer & Hole seeking comprehensive advice about the tax position of the FURBS. Ms Spearman recommended that they should meet after the Finance Bill 2006 had been published. He had a meeting with Ms Spearman on 5 May 2006. At the meeting Ms Spearman advised that there were no material changes to the taxation of FURBS in the Finance Bill, and confirmed that the FURBS would not be subject to income tax at 40%. Mr Manisty made a contemporaneous note of this advice in manuscript on the copy of the 4 April 2006 letter which he had kept. Following the meeting, on 8 May 2006 Mr Manisty sent Ms Spearman a comprehensive note of the meeting, which included a statement that the FURBS would be liable to basic rate income tax. Ms Spearman responded by letter on 26 May 2006, making no comments on the contents of the note of the meeting. We find that Mr Manisty was advised by Ms Spearman on 5 May 2006 that for the tax year 2006/7, the FURBS would be liable to income tax at the basic rate. At no subsequent point was that advice qualified. The advice was incorrect (and probably negligent), as the FURBS was liable to income tax at the trust rate (40%). Although in his witness statement Mr Manisty stated that he did not allege that the advice given in relation to the FURBS was wrong or negligent, during the course of cross-examination he acknowledged that their advice was negligent – both as regards the rate of income tax applicable to the FURBS for 2006/7, but also as regards certain aspects relating to the completion of the FURBS's tax returns.

14. The tax returns prepared by Mercer & Hole for the FURBS trustees for the tax years 2005/6 and earlier contained errors. In particular in the 2004/5 and 2005/6 returns, against the question "Are you completing this Tax Return as the trustee of an employee related trust?" the "No" box (box 8.5) was ticked, whereas the correct answer to the question was "Yes".

15. By a supplemental deed dated 4 April 2006, the Christies executives retired as trustees of the FURBS, and Mr Manisty and his son Alexander were appointed in their place. A copy of the deed was sent to HMRC on 26 May 2006.

16. On 6 April 2007 the trustees of the FURBS were served with a notice under s8 Taxes Management Act 1970 ("TMA") to file a tax return for the FURBS for the tax

year 2006/7. The completed tax return was received by HMRC on 14 May 2007, having been signed by Mr Manisty (as a trustee) on 12 May 2007 as being complete and correct to the best of his knowledge and belief.

17. In this tax return, it was stated that the FURBS was:

(1) not an employment related trust (box 8.5);

(2) not an Employer Financed Retirement Benefit Scheme (box 8.9); and

(3) not liable to income tax at the rate applicable to trusts (box 8.15)

All these entries were wrong.

18. The tax return for the FURBS for the tax year 2006/7 was prepared by Mr Manisty. In evidence he stated that when he prepared the return, he also had before him the FURBS tax return for 2005/6 (prepared by Mercer & Hole) and HMRC's Trust and Estate Return Guide for 2006/7. Mr Manisty stated that he had no doubt that the 2005/6 return had been correctly prepared, and since Ms Spearman had advised that there were no changes in the tax treatment of FURBS, the 2005/6 return could be used as a precedent for the completion of the 2006/7 return.

19. In his witness statement and in oral evidence Mr Manisty stated that in completing the 2006/7 return, he followed Mercer & Hole's lead in the 2005/6 return by ticking box 8.5 "No" to the question "Are you completing this Tax Return as the trustee of an employment related trust?", having duly considered the guidance on pages 10 and 11 of the Trust and Estate Tax Return Guide for 2006/7. This was on the basis that he considered that the question was directed as other kinds of trust arrangements established by employers (such as in connection with loans to employees, share schemes and school fees plans). Yet when Mr Manisty was taken to the guidance by Mr Pickering during the course of cross-examination, it was clear that Mr Manisty had no difficulty in understanding the guidance, and that the only correct answer to the question was "Yes" (box 8.6).

20. In his witness statement and in oral evidence Mr Manisty said that he noted the new question "Are you completing this Tax Return as the trustee of an Employer Financed Retirement Benefit Scheme (EFRBS)?", and ticked box 8.9 "No". He said that this was because the return itself and the Tax Return Guide "did not spell out that the term "EFRBS" included a FURBS"; and "because the guidance on page 11 of the Tax Return Guide pointed to the future – i.e. post 5 April 2006 – establishment of such schemes", and Mr Manisty took this to refer to some kind of "new fangled pension arrangement" inaugurated by the Finance Act 2006.

21. In relation to the question "… is the trust liable to Income Tax at … the rate applicable to trusts …?" Mr Manisty said that he ticked box 8.15 "No" because this followed the 2005/6 return completed by Mercer & Hole, and was consistent with the advice given by Ms Spearman on 5 May 2006, and because there was nothing in either the tax return itself, nor in the Tax Return Guide, to suggest that these boxes were linked to anything other than the same kinds of trusts as in previous years (notably discretionary trusts) plus EFRBS ("whatever that might mean"). Yet when

Mr Manisty was taken through the guidance line-by-line by Mr Pickering during the course of cross-examination, it was clear that Mr Manisty had no difficulty understanding the guidance, and that the only correct answer to the question was "Yes" (box 8.16).

22. We do not find Mr Manisty's evidence as to why he ticked boxes 8.5 and 8.15 credible. The rubric in the tax return expressly states that the guidance in the Tax Return Guide should be read before answering the questions. If Mr Manisty had followed the guidance in the Tax Return Guide, it would have been clear to him that his only course of action was to tick boxes 8.6 and 8.16. Given the conflict between the guidance, and Mercer & Hole's advice and previous answers, we would have expected, at the very least given Mr Manisty's meticulous nature and attention to detail, that he would have telephoned or e-mailed Ms Spearman to ask why her advice differed from the Tax Return Guide. He did not do so. In our view (and we so find) Mr Manisty did not consider the guidance in the Tax Return Guide when he completed the 2006/7 tax return, and just copied the answers to the corresponding questions from the 2005/6 tax return.

23. We are also not convinced by Mr Manisty's reasons why he ticked box 8.9 and not 8.10. Although the guidance in the Tax Return Guide is thin, we find nothing in it nor on the face of the tax return that could be said to "point to the future" as he claims. Mr Manisty was well aware that the FURBS had been established and financed by Christie's, his former employer, to provide him with retirement benefits. We consider that the term "Employer Financed Retirement Benefit Scheme" was self-defining and would have put Mr Manisty on notice that the FURBS might be an EFRBS.

24. On 31 May 2007, HMRC issued a calculation of the FURBS's tax liability for 2006/7 on the basis that the FURBS was taxed at basic rate only.

25. The FURBS's tax return for 2007/8 was submitted by Mr Manisty to HMRC on 29 May 2008. As with the 2006/7 return, boxes 8.5, 8.9 and 8.15 were all incorrectly ticked "No". On 16 June 2008 HMRC issued a calculation for the tax liability of the FURBS for 2007/8 on the basis that the FURBS was taxed at basic rate only.

26. On 6 May 2009 HMRC wrote to Mr Manisty opening an enquiry into the 2007/8 return. The enquiry into the 2007/8 return was completed by the issue of a closure notice on 25 November 2009 on the basis that tax was payable at the trust rate. The amount of tax due for the 2007/8 tax year has been paid and is not the subject of this appeal.

27. On 8 December 2008 HMRC issued a "discovery" assessment under s29 TMA in respect of the tax year 2006/7. It is this discovery assessment that is the subject of this appeal

Discovery Assessment

28. The provisions of section 29 TMA relevant to this appeal are 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

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

[…]

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

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

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

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

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

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

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

(7) In subsection (6) above—

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

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

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

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

[…]

29. We note that a tax return had been submitted on behalf of the FURBS under s8 TMA for the tax year 2006/7, and by December 2009 HMRC had ceased to be entitled to open an enquiry into the return. So for HMRC to make a "discovery" assessment in the circumstances of this case:

(1) HMRC must have made a "discovery" for the purposes of section 29(1) (it is not in dispute that such a discovery had been made); and

(2) either:

(a) insufficient tax was paid by the FURBS for 2006/7 because of fraudulent or negligent conduct on the part of the trustees of the FURBS (or a person acting on their behalf) (section 29(4)); or

(b) an HMRC officer could not have been reasonably expected, on the basis of the information made available to him before that time, to have been aware that insufficient tax had been paid by the FURBS (section 29(5)).

30. Therefore either there must have been negligent conduct on the part of the trustees of the FURBS (or their representatives), or HMRC could not reasonably have been expected to be aware that the FURBS was taxable at the trust rate on the basis of the information before them.

31. HMRC have stressed, and we agree, that there is no question of the conduct of Mr Manisty or of Mercer & Hole being fraudulent.

32. The burden of proof as regards the satisfaction of either of the conditions in sub-sections (4) or (5) falls upon HMRC and the standard of proof is the balance of probabilities – the benefit of any doubt is to be given to the Appellant.

Fraudulent or negligent conduct

33. HMRC submit that the conduct of both Mr Manisty and of Mercer & Hole was negligent, and that the fact that tax for the FURBS for 2006/7 was paid at basic rate only was attributable to their negligence.

34. "Negligence" is not defined by statute. HMRC rely on the case of *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 (at 784) to define negligence by reference to the conduct of a reasonable person:

> "… the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

35. Mr Manisty criticised HMRC's invocation of an old tort case.

36. We agree with the Special Commissioners in the case of *AB v HMRC* [2007] STC (SCD) 99 at paragraph 105 that:

> "… the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue."

37. We have found that Mercer & Hole gave incorrect (and probably negligent) advice to Mr Manisty on the taxation of the FURBS, and had incorrectly completed the FURBS's tax returns for 2005/6. However this is not sufficient to satisfy the condition in section 29(4), because negligence of an advisor only satisfies the section 29(4) condition if the advisor is "acting on behalf of" the taxpayer. In relation to the 2006/7 tax return, Mercer & Hole merely provided advice to Mr Manisty. For Mercer & Hole to be treated as "acting on behalf of" the FURBS, they would need to have

prepared the tax return, filed it with HMRC or engage in correspondence with HMRC. They would have had to have represented the trustees of the FURBS, and not merely provided advice to them (see *Trustees of the Bessie Taub Trust and others v HMRC* [2010] UKFTT 473 (TC) at paragraph 93). As Mercer & Hole were mere advisors, we find that they were not "acting on behalf of" the trustees of the FURBS, and that their negligence was not sufficient to satisfy the test in s29(4).

38. We find the conduct of Mr Manisty in completing the tax return for 2006/7 to have been negligent in ticking boxes 8.5, 8.9 and 8.15. Mr Manisty says that he did so in reliance upon the advice of Mercer & Hole, and that it cannot be negligent to rely upon the advice of a reputable advisor (even if it subsequently transpires that the advice given was wrong) (see *AB v HMRC* at paragraph 105 cited above).

39. Even though Mercer & Hole advised Mr Manisty that the FURBS was liable to income tax at the basic rate, we find that Mr Manisty was negligent in ticking boxes 8.5, 8.9 and 8.15. We find that it would be negligent not to read and follow the guidance in HMRC's Tax Return Guide when completing the tax return. Mercer & Hole's advice related to the rate of income tax payable by the FURBS, and was relevant only to the completion of boxes 8.15 and 8.16 (and not to the other questions on that page of the tax return). If (as in this case) the HMRC guidance relating to boxes 8.15 and 8.16 clearly contradicted any advice received, a non-negligent taxpayer would have gone back to his advisor (or HMRC) to seek clarification on why there was a difference. We have found that Mr Manisty did not read and follow HMRC's guidance in relation to boxes 8.5/8.6 and 8.9/8.15 – and even if he had, he had certainly not sought clarification from Mercer & Hole (or from HMRC) as to why the guidance contradicted the advice he had received. We find this conduct to have been negligent.

40. If it really was the case, as Mr Manisty had stated in correspondence, that he had "not an inkling" as to what an EFRBS might be, we consider that he had a duty to have made additional enquiries to find out before answering the question (or to note in the "white space" at the end of the tax return that he did not understand the question). His failure to make any enquiries, or to record that he did not understand the question, amounted to negligent conduct. There was some discussion before us as to whether Mr Manisty should have been aware of the contents of HMRC's internal guidance in their manuals at TSEM 5300. We agree with Mr Manisty's submission that it is unrealistic to expect anyone other than a tax specialist to be familiar with the content of HMRC's internal manuals. However, this does not detract from our statement that if (after having read the Tax Return Guide) Mr Manisty did not have an inkling of what an EFRBS might be, he ought to have made further enquiries before ticking box 8.9 – and such further enquiries might have included a search on HMRC's website (which might have taken him to this section of the manuals) or calling Mercer & Hole or the HMRC helpline.

41. We find that HMRC rely on the ticks in boxes 8.5/8.6, 8.9/8.10 and 8.15/8.16 in determining the income tax rate applicable to the trust, and that if these questions are answered "no" (boxes 8.5, 8.9 and 8.15), HMRC treat the trust as taxable at the basic rate (this is discussed in more detail in relation to s29(5) below). Accordingly, Mr

Manisty's negligent completion of these boxes led directly to HMRC's tax calculations being prepared at basis rate income tax only, and we find that the condition in s29(4) is satisfied.

Information available to HMRC

42. A discovery assessment can also be made if the condition in section 29(5) is satisfied, namely that an officer of the Board could not have been reasonably expected, on the basis of the information made available to him, to be aware that the FURBS had paid insufficient tax.

43. "An officer of the Board" is for these purposes a hypothetical "ordinary competent" HMRC officer (see *Swift v HMRC* [2010] UKFTT 88 (TC) at para 34).

44. Section 29(6) sets out "information made available" to the HMRC officer for the purposes of section 29(5). Subsection (7) extends the information to include also information in the tax returns for the preceding two years. As the FURBS made no claims in 2006/7 and its tax return was not subject to any enquiries, paragraphs (b) and (c) of subsection (6) are not relevant.

45. Therefore in the circumstances of this case, information is to be treated as available if:

(1) it was contained in the FURBS tax returns for 2004/5, 2005/6 or 2006/7, or in any accounts, statements or documents accompanying those returns (section 29(6)(a) taken with section 29(7)); or

(2) it is information the existence and relevance of which—

(a) could reasonably be expected to be inferred by an officer of the Board from information contained in those tax returns or accompanying accounts, statements or documents; or

(b) had been notified in writing by the trustees of the FURBS to HMRC (section 29(6)(d)).

46. In relation to this information, we note the principles set out by the Court of Appeal in *Langham v Veltma* [2004] STC 544 (CA). The principles are helpfully considered by Lewinson J in *HMRC v Lansdowne Partners Limited Partnership* [2010] EWCH 2582 (Ch) at paragraph [46]:

> "In *Langham v Veltma* … the Court of Appeal considered section 29 and discovery assessments. In my judgment that case establishes the following propositions:
>
> i) "Awareness" is the officer's awareness of an actual insufficiency in the self-assessment in question, rather than an awareness that he should do something to check whether there is an insufficiency (para 33);

ii) The test whether an officer could reasonably have been expected to be aware of an actual insufficiency is an objective test (para 33);

iii) The sources of information referred to in section 29(6) are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency (paras 36, 51)

iv) The information in question must clearly alert the officer to the insufficiency of the assessment (para 36)."

47. Lewinson J notes that the awareness of the insufficiency, is not just the existence of an insufficiency, but of an insufficiency relating to particular period (in this case 2006/7). In addition the statute requires the taxpayer when providing information to notify HMRC not just of the existence of the information, but also of its relevance to the insufficiency for the period in question (2006/7)

48. We consider that the information which is to be treated as available to the officer is the following:

(1) The tax returns for each of the years 2004/5, 2005/6 and 2006/7 and accompanying schedules and the covering letter from the trustees (or their accountants)

(2) The supplemental deed dated 4 April 2006 pursuant to which the Christies executives retired as trustees of the FURBS, and Mr Manisty and his son Alexander were appointed in their place. This was sent to HMRC on 26 May 2006 with the tax return for 2005/6.

(3) Form 41G(Trust). HMRC had asked for this form to be completed by a letter dated 13 February 2003, and it was submitted to HMRC by Thompson Taraz (the then trustees' then tax accountants) on 4 April 2003.

49. Mr Manisty submits that the officer (being a competent officer) should also be imputed with knowledge of the changes introduced by Finance Act 2006 to the taxation of EFRBS, and in particular HMRC's internal guidance TSEM 5300 published on 13 February 2006 and subsequently updated on 16 April 2007. For the purposes of this appeal, we do not need to decide whether the hypothetical officer should be aware of every word in HMRC's comprehensive internal guidance manuals – but we consider (and find) that the officer should be aware that funded unapproved retirement benefit schemes with effect from 6 April 2006 automatically became EFRBS and taxable at the trust rate.

50. There is nothing in the tax return for 2006/7 to suggest an insufficiency, because the trustees declared the FURBS not to be an employment related trust, not an EFRB and not liable to income tax at the trust rate. There is nothing in the tax returns for 2004/5 or 2005/6 to suggest an insufficiency in the self-assessment for 2006/7, because the trustees declared the FURBS not to be an employment related trust.

51. There is nothing contained in the tax returns for 2004/5, 2005/6 or 2006/7 which objectively would have alerted the officer to an actual insufficiency.

52. The description of the FURBS as a "FURBS" on the face of the tax returns (and on the covering letter the schedules accompanying the tax returns for 2004/5 and 2005/6) does not of itself clearly alert the officer to an actual insufficiency. At most it might prompt the officer to make enquiries, but it does not alert the officer to an actual insufficiency. Moreover, the trustees had declared (by ticking box 8.9) that the FURBS was not an EFRBS, and without establishing the true nature of the FURBS (namely that it had been a funded unapproved retirement benefit scheme, and so automatically became an EFRBS on 6 April 2006), it would not be possible for an officer to conclude that the FURBS was chargeable at the trust rate for 2006/7.

53. There is no information in the tax returns, or which could be inferred from information in the tax returns which indicated that there might be an actual insufficiency. Mr Manisty referred to box 9A.1 on the tax return – which he had (in error) left blank. The amount of the standard rate band for the trust was to be inserted here. He noted that HMRC had completed the box by inserting £1000 – thus repairing the return. Mr Manisty submits that the £1000 band applies to trusts taxable at the trust rate, and therefore HMRC must have been aware that the FURBS was so taxable. In evidence, Mr Callaway told us that this box has to be completed on all trust tax returns. This is clearly stated in the Tax Return Guide on page 21. The standard rate band applies not only to trusts taxable at the trust rate, but also to certain income of other trusts (such as lease premia and gains on insurance policies). The fact that HMRC noted the omission and "repaired" the return by completing Box 9A.1 and inserting the maximum possible standard rate band of £1000 was not an indication that HMRC were aware that the FURBS was taxable on all of its income at the trust rate.

54. The supplemental deed, as described earlier, effected a change in the trustees of the FURBS and made some changes to the terms of the trust and its rules. The deed is entitled "Supplemental Deed relating to Christie's International PLC Senior Executives Retirement Benefits Scheme for E A Manisty". In the recitals of the deed it states "The Christie's International PLC Senior Executives Retirement Benefit Scheme for E A Manisty (the "Scheme" is a retirement benefit scheme that was established by the Company by a Trust Deed …" and "The sole purpose of the Scheme is to secure relevant benefits for an in respect of Mr Manisty who is employed by Christie Manson & Woods Limited ("CMW"), a subsidiary of the Company."

55. We note that the covering letter sent to HMRC on 26 May 2006 enclosing the tax return form 2005/6 and the supplemental deed, stated "we are also enclosing a copy of the deed of 4 April 2006 showing the change of trustees." Thus the relevance of the information in deed that had been notified to HMRC was the change in the trustees, and not the fact that the FURBS was a funded unapproved retirement benefit scheme. However, even if the officer had read and understood the title and the recitals, these would not of themselves have clearly alerted the officer to an actual insufficiency for 2006/7. As with the description of the FURBS on the tax returns and accompanying schedules, the title of the deed and the content of the recitals would merely have alerted the officer to make further enquiries, particularly as the trustees had ticked box 8.5 on the tax return stating that the trust was not employment related.

56. We have also considered whether information in any of the following documents should be considered to be available to the officer:

(1) The Trust Deed and Rules dated 24 May 2001

(2) Form 41G(Trust)

(3) HMRC's internal trust compliance form for 2005/6 dated 12 June 2006.

57. We consider that the Trust Deed and Rules are not to be treated as available to the officer. These were sent to HMRC on 29 January 2003 by Thompson Taraz, but were returned to the accountants by HMRC under cover of a letter dated 17 February 2003 stating that in accordance with HMRC policy the documents had not been read.

58. We consider that Form 41G(Trust) submitted to HMRC by Thompson Taraz on 4 April 2003 should not be treated as available to the officer. It was not sent with any of the returns for 2004/5, 2005/6 and 2006/7. The information in the document is therefore only to be considered if its existence and relevance has been notified in writing to HMRC. Although its existence had been notified to HMRC, the relevance of the information in the form to the insufficiency of the FURBS income tax for 2006/7 had not.

59. Even if the contents of the form were to be treated as information available to the officer, we consider that the form would not have clearly alerted him to the insufficiency. The form gives details of the name of the trust, the names and addresses of the trustees, details of the settler and various other items of information. In particular, the form gives the full title of the trust as "Christie's International plc Senior Executive Retirement Benefits Scheme for EA Manisty", the "Yes" box is ticked to the question "Has the trust been set up for the benefit of employees or is it otherwise employment related, whether set up by an employer or by someone else?", and it gives Christie's International PLC as the name of the settlor. As with the description of the FURBS on the tax returns and accompanying schedules, the content of the form would merely have alerted the officer to make further enquiries, particularly given that the trustees had ticked box 8.5 on the 2006/7 tax return stating that the trust was not employment related.

60. We consider that the HMRC's internal trust compliance form for 2005/6 should not be treated as information available to the officer, as it had not been notified in writing by the trustees of the FURBS to HMRC, rather it had been generated internally by HMRC as part of their tax return checking and risk assessment procedures.

61. For the reasons given above, we find that an officer of the board could not have been reasonably expected, on the basis of the information made available to him, to be aware that the FURBS had paid insufficient tax.

Other matters

62. Mr Manisty submits that HMRC did not give adequate reasons for raising the discovery assessment, In particular he complains that the notice of assessment failed

to particularise the grounds upon which the alleged misfeasance was founded, and made no reference to the statutory or other legal basis on which it is written.

63. During the course of argument, Mr Manisty referred us to section 221 Inheritance Tax Act 1984, and the provisions in that section which govern the form that notices of determination for inheritance tax must take. However there are no equivalent provisions which apply to income tax.

64. There is nothing in the tax statutes which requires reasons to be given by HMRC. We therefore find that there is no statutory obligation for the reasons for a discovery assessment to appear on the face of the assessment or the accompanying documents. There is therefore no irregularity as a matter of "tax law" with the discovery assessment.

65. Mr Manisty also argued that the failure to give particulars and to state the relevant legislative provisions were in breach of the duties owed to him as a matter of English administrative law, and also breached his rights under the European Convention of Human Rights

66. As regards Mr Manisty's rights under English administrative law, Mr Manisty cited to us the well known case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA). This establishes the general principle that certain public authorities are required to act "reasonably". There is no doubt that this principle applies to HMRC. Whether the duty to act "reasonably" requires a public authority to provide reasons for all (or some) of its decisions is not an issue addressed in the *Wednesbury* case, and Mr Pickering submitted that no such principle applies to HMRC.

67. We are aware that there are many decisions of the courts relating to the requirement to give reasons, but none of these were cited nor discussed before us. In the absence of properly reasoned argument, we cannot reach any decision on whether HMRC are under an obligation to give taxpayers reasons for any decision they may make to raise a discovery assessment.

68. But even if HMRC were under such an obligation (and we make it clear that we make no finding that they are), in our view, that obligation would have been satisfied in this case. To the extent that HMRC were under any obligation to provide reasons as a matter of general principles of administrative law, that obligation would be satisfied by HMRC writing to the taxpayer setting our their reasons for raising the assessment. In this case, HMRC engaged in long and extensive correspondence with Mr Manisty, and the reasons for the discovery assessment were abundantly plain from HMRC's letters, in particular Mr Callaway's letter to Mr Manisty of 4 December 2009 (enclosed with which was a copy of section 29 TMA). Mr Manisty acknowledges that the letter of 4 December 2009 sets out the reasons for the discovery assessment – but his complaint is that the language of the letter would be too sophisticated for the average taxpayer. The fact that Mr Manisty was intelligent and had a sophisticated understanding of the tax system was apparent to Mr Callaway (and the other officers who had previously dealt with Mr Manisty) from the voluminous correspondence and

telephone calls that they had had with him. Writing a sophisticated and comprehensive letter to Mr Manisty about the reasons for the discovery assessment was entirely appropriate – indeed Mr Manisty may well have complained if he had received anything less. Whether the letter would have been too sophisticated for the average taxpayer is not relevant to this appeal. HMRC's letter of 4 December 2009 set out the reasons why HMRC raised their discover assessment in this case, and it was written in terms which were entirely understandable by Mr Manisty. That letter satisfies any duty HMRC might have to give reasons for the discovery assessment. For completeness we note that there was an error in the second paragraph of page 2 of Mr Callaway's letter, but in our view the error does not detract from the reasons given by Mr Callaway for raising the discovery assessment.

69. Mr Manisty also submits that his rights under Article 6 of the European Convention (a right to a fair trial) have been breached by HMRC's failure to give reasons. Again, we find this submission unfounded. Comprehensive reasons for the assessment were given in correspondence by HMRC at the time the assessment was made. In relation to his appeal before this Tribunal, we note that HMRC prepared a Statement of Case in accordance with the rule of the Tribunal. Mr Manisty has therefore been given ample opportunity to understand HMRC's case and to prepare for this appeal.

70. We also note that Mr Manisty did not (as is his right) request that HMRC review their decision – but proceeded straight to an appeal. But if Mr Manisty had exercised his right for a review, he would have been given comprehensive written reasons by the reviewing officer for whatever decision he may have reached.

71. Mr Manisty has also submitted that HMRC's offers to settle this appeal were made in an inappropriate manner. Initially HMRC determined that penalties should be imposed because of the trustees' negligence in completing the 2007/8 tax return (which was the subject of an enquiry which is not under appeal). However HMRC made a "without prejudice" offer not to pursue penalties if the tax for 2006/7 (the subject of this appeal) was fully settled. After lengthy correspondence, on 27 November 2009 HMRC wrote formally to Mr Manisty to state that no penalty would be imposed for the 2007/8 return, and the penalty position for 2006/7 was cleared shortly afterwards.

72. As not all of the facts and circumstances relating to the 2007/8 return were before us, we cannot comment on the appropriateness of HMRC considering penalties for the negligent completion of that return. However in the light of our finding that the 2006/7 return had been completed negligently, in our view it was entirely appropriate for HMRC to have considered levying penalties for the negligent completion of that return. We also consider that it is an entirely proper exercise of HMRC's discretion to consider settling tax liabilities without recourse to litigation by agreement with taxpayers on a "without prejudice" basis – and such settlements could include an agreement by HMRC not to pursue penalties.

Conclusions

73. For the reasons stated above, the appeal is dismissed, and we uphold the assessment for £6,246 additional income tax for the year 2006/7 (excluding interest).

74. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE
RELEASE DATE: 26 July 2011

Cases cited by the parties in their submissions and skeletons:

Elkington v Holland (1842) 9 M&W 659
Blyth v Birmingham Waterworks (1856) 11 Exch 781
Wakelin v LSWR (1886) 12 AC 41
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (CA)
IRC v Garvin and *Rose v IRC* [1979] STC 98
Vickerman v Manson's PRs [1984] STC 231
Scorer v Olin Energy Systems Ltd [1985] STC 218
R v Ward and *R v Special Commissioners (ex parte Stipplechoice Ltd)(No 3)* [1989] STC 93
Luxmoore-May v Messenger May Baverstock [1990] 1 WLR 1009 (CA)
Hentrich v France (1994) 18 EHRR 440
Glaxo Group Ltd v IRC [1995] STC 1075
Armitage v Nurse [1997] 2 All ER 705
R v IRC (ex parte MFK Underwriting Agents Ltd) [1990] 1 WLR 1545
Cadogan Estates Ltd v Morris [1998] EWCA Civ 1671
Hurley v Taylor [1999] STC 1
King v Walden [2001] STC 822
Mashood and others v Whitehead [2002] STC (SCD) 166
Robertson v IRC [2002] STC (SCD) 182
Rowland v Boyle (2003) 75 TC 693
Langham v Veltma [2004] STC 544 (CA).
Two Settlors v IRC [2004] STC (SCD) 45

R (ex parte Johnson and others) v Branigan [2006] EWCH 885 (Admin)
AB (a firm) v HMRC [2007] STC (SCD) 99
R (ex parte Lower Mill Estate Limited and Conservation Builders) v HMRC [2008] EWHC 2409 (Admin)
HMRC v Household Estate Agents Ltd [2008] STC 2045
HMRC v Khawaja [2008] STC 2880
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R (oao) Patullo v HMRC [2010] STC 107
Cairns (personal representatives of Webb) v HMRC [2009] UKFTT 67 (TC)
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HMRC v Landsdowne Partners Limited Partnership [2010] EWHC 2582 (Ch)
Oxfam v HMRC [2010] STC 686
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R (ex parte Davies and another) v HMRC and *R (ex parte Gaines-Cooper) v HMRC* [2010] STC 860
Swift v HMRC [2010] UKFTT 88 (TC)
Hanover Company Services Ltd v HMRC [2010] UKFTT 256 (TC)
JCL Agnew v HMRC [2010] UKFTT 272 (TC)
Hankinson v HMRC [2010] UKFTT 361 (TC)
Trustees of the Bessie Taub Trust and others v HMRC [2010] UKFTT 473 (TC)
R (ex parte Cart) v The Upper Tribunal (Public Law Project intervening) [2011] EWCA Civ 859
Gunn v HMRC [2011] UKUT 59 (TCC)