TC03767

Appeal numbers: TC/2011/03801, 03803, 05873 & 05874

INCOME TAX – Use of company assets by directors – whether "benefit" under s 201 Income Tax (Earnings and Pensions) Act 2003 – If so whether entitlement to deduction under s 365 Income Tax (Earnings and Pensions) Act 2003 – Whether "discovery" within s 29 Taxes Management Act 1970 – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

GILLIAN ROCKALL **Appellant**

- and -

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

MICHAEL ROCKALL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
ANTHONY HUGHES

Sitting in public at 45 Bedford Square London WC1 on 8 and 9 May 2014

Keith Senior of Jacobs Allen Chartered Accountants for the Appellant

Anthony Wallace, of HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Gillian Rockall and Mr Michael Rockall appeal against income tax assessments for 2000-01 to 2008-09 inclusive. Although the assessments originally included other matters these were withdrawn by HM Revenue and Customs ("HMRC") leaving outstanding those assessment made in relation to Mr and Mrs Rockall's use of assets owned by two companies of which they were the directors and jointly controlled, Whittlebury Hall Limited ("WHL"), formerly known as Macepark (Whittlebury) Limited, and Macepark Limited ("ML"). The assets concerned consist of an ocean going yacht, owned by ML, jewellery owned by WHL and antique clocks also owned by WHL.

2. Mr and Mrs Rockall were represented by Mr Keith Senior of Jacobs Allen Chartered Accountants and HMRC by its presenting officer, Mr Anthony Wallace.

Evidence

3. In addition to several bundles of documentary evidence from each of the parties we were provided with the following witness statements on behalf of the appellants:

(1) Mrs Rockall;

(2) Mr Rockall;

(3) Peter Harrup of BDO LLP regarding the long case antique clock;

(4) Jason Hill a chartered surveyor employed by WHL and ML in relation to the business and assets of the companies in particular the *Masquerade of Sole*;

(5) Vincent Titchmarsh, who had travelled on the *Masquerade of Sole* and whose evidence was in respect of the yacht and business activities of the companies;

(6) Captain Colin Boyle, Master of the *Masquerade of Sole*;

(7) Dr Peter Schofield and Dr Anne Price, who are husband and wife and who travelled on the *Masquerade of Sole* in the Caribbean during 2006;

(8) Michael White, a yacht broker and charterer, of Cavendish White Limited who acted as the *Masquerade of Sole* charter marketing agents;

(9) Anna Maria Cioffi, who was Mr Rockall's former personal assistant in relation to the use of the *Masquerade of Sole*;

(10) Paolo Conteddu in relation to the use of the *Masquerade of Sole* in connection with a project in Sardinia;

(11) David Barrett of Cobra Insurance Brokers Limited regarding the insurance of the jewellery; and

(12) Ian Clouting, the Finance manager of WHL in relation to the jewellery.

4. With the exception of Mr and Mrs Rockall's witness statements, those of their other witnesses were not challenged by HMRC and were admitted in evidence.

5. Mr Rockall, whose statement was challenged by HMRC, gave evidence before us and was cross-examined by Mr Wallace. We found Mr Rockall to be a credible witness and although he could not remember every detail (which is not surprising given that some of the matters on which he was questioned had occurred many years previously) he did seek to assist the Tribunal when giving evidence.

6. Although Mr Wallace had indicated that he wished Mrs Rockall to be available for cross-examination we were told that she was unable to attend the hearing for health reasons. In the circumstances HMRC did not object to her evidence or seek to exclude its admission. In any event rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that the Tribunal may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". We therefore admitted Mrs Rockall's witness statement as hearsay evidence (ie a statement made otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated) but attach less weight to it than would have been the case had she given oral evidence under oath or affirmation which could have been tested under cross-examination.

7. We were also provided with a witness statement made by Mrs Lindsey Riley, who until September 2003 was an Investigator at HMRC's Special Investigations in Nottingham. It was Mrs Riley who undertook the enquiry into ML, WHL and Mr and Mrs Rockall's tax affairs. She also gave evidence before us and was cross-examined by Mr Senior.

Facts

Background

8. WHL was incorporated in 1983 and, since September 2011 has been in administration. ML was incorporated in 1983 and was dissolved in 2012. The registered and working offices of both companies was at the private residence of Mr and Mrs Rockall who were, during the periods with which we are concerned (2000-01 to 2008-09), the directors and controlling shareholders of both companies. Mr Rockall was responsible for the strategic decision making and high level financial planning aspects of the business while leaving the day to day matters to operational employees. However, other than provide support for her husband, Mrs Rockall had very little involvement in the business.

9. Until 1982, Mr Rockall was a senior employee of Barclays Bank. Having attended many residential courses and seen the facilities of other large companies he concluded that improvements could be made to the standard of service, accommodation and cost of such courses. He therefore resigned from the bank and in 1983 established ML which purchased Scalford Hall in Melton Mowbray to pursue this business opportunity. Following a rapid programme of refurbishment and the building of new training and syndicate rooms and utilisation of his contacts, made

during his time with the bank, the business flourished not least due to the effort put in by Mr and Mrs Rockall.

10. Mr Rockall worked 100 hour weeks at Scalford Hall which included networking with senior managers and directors of the companies using the Hall for residential courses. Mrs Rockall, who was described by her husband as a "Lady Bountiful", would ensure that the delegates were well looked after as they found it more likely to get repeat business for residential courses at Scalford Hall if the delegates who attended were satisfied with the facilities provided.

11. As expansion of the Scalford Hall site was not possible Mr Rockall began to look for additional sites to establish more specialist management training venues. He did not limit his search to the United Kingdom and considered overseas business opportunities especially in Spain and Portugal. However, in 1986 when in Portugal Mr Rockall suffered a cardiac arrest and as a result had to reduce his involvement with Scalford Hall which was then placed under alternative management.

12. WHL operated a hotel and conference centre at Whittlebury Hall in Northamptonshire which was, Mr Rockall explained, developed on a site adjacent to the Silverstone motor racing circuit. This business came about as the result of a lead he had obtained on the motor yacht *Lady Gilly* when she was moored at St Catherine's Dock in London (see below).

13. In view of its close proximity to Silverstone, Whittlebury Hall, which was opened in 1999, became closely associated with Formula 1 and a significant part of its business came from Formula 1 teams and prestigious motor manufacturers using the hotel around the time of the British Grand Prix. This, according to Mr Rockall, amounted to a direct income stream for Whittlebury Hall in excess of £1.5m a year.

Yachts

14. Despite his health, which required open heart surgery in June 1988, Mr Rockall continued to look for business opportunities and in September 1988 he purchased a 48 foot motor yacht, *Amicula*. In 1990, she was sailed to Spain with the intention of exploring the coastline of Southern Europe to find suitable sites for the development of residential and/or leisure facilities whiles taking advantage of EU development grants for marinas. Mr Rockall explained that the purpose of the yacht was not only to provide a business base for these activities but to add gravitas to the company's presence and impress local businessmen. She was sold to ML in November 1996.

15. However, while the *Amicula*, to use Mr Rockall's words, "excited interest from smaller local businessmen, it became clear that she did not have the same effect upon the majority of bigger concerns, local politicians/officials". Therefore a larger vessel, the 108 foot *Helena II* (subsequently re-named *Lady Gilly*) was acquired. As with *Amucula* the *Lady Gilly* was originally owned by Mr Rockall before ML purchased her from him in February 2001 for £1,205,400.

16. In addition to providing a base for the directors to develop business opportunities for residential, hotel and marina developments the *Lady Gilly* was available for charter and also used as an annual London marketing base, moored at St Catherine's Dock, for management training venue contracts at Scalford Hall and Whittlebury Hall. However, she not only proved to be too small for these purposes but also developed unforeseen problems with her hull and was replaced in 2001 by the *Masquerade* (subsequently re-named the *Masquerade of Sole*) a 140 foot ocean going yacht at a cost of US $11.9m. The *Lady Gilly* was subsequently sold in 2003.

17. It is not disputed that the *Masquerade of Sole*, which was described by Mr Rockall in an article in the *Financial Times* of 18 July 2003 promoting the charter business, as "the ultimate toy", was available and used for charter and that while Mr Rockall managed the yacht for ML it used third party brokers, Cavendish White, to obtain charter business. It was also accepted that the charter season lasts approximately 10-12 weeks a year with peak times being July and August in the Mediterranean and Christmas and New Year in the Caribbean.

18. Following her acquisition by ML the *Masquerade of Sole* was chartered by WHL from 28 September to 1 November 2001, 29 October to 5 November 2002, 24 September to 18 October 2003, 3 September to 17 October 2004 and 29 October to 21 November 2005. In addition to the WHL charters she was used by Mr and Mrs Rockall on the following occasions:

(1) January 2005 to 16 February 2005;

(2) 20 – 25 May 2005;

(3) 16 – 25 June 2005;

(4) 22 – 25 September 2005; and

(5) 7 – 22 January 2006.

In January and February of 2005 and 2006 the *Masquerade of Sole* was in the Caribbean and at all other times when Mr and Rockall were on board she was in the Mediterranean. The Monaco Grand Prix took place on 22 May 2005.

19. In addition to the Grand Prix the *Masquerade of Sole* was used to explore potential business opportunities throughout the Mediterranean including that of Spain, France, Italy, the Greek Islands and Sicily in whichever area as available or convenient as a result of charter bookings. However, it was Sardinia which Mr Rockall said "seemed to provide the best potential and gradually became a venue for super yachts outside the already famous Porto Cervo" and as a result he not only made business contacts but employed Anna Maria Cioffi as a personal assistant on a monthly basis, which continued for some 57 months. He also retained the services of an architect on the island.

20. Mr Rockall also explained that he and Mrs Rockall were in the Caribbean during January 2005 and 2006 to consider potential projects in Mexico, Panama, Cuba, St Kitts, Dominica, Guadeloupe, St Lucia, St Vincent and Grenada, Anguilla, Antigua, Barbados, Trinidad and Tobago, the British Virgin Island and Bahamas but

that the most promising opportunity was on the Isle of Quatra off Bequia from which Mustique, with its exclusive reputation, could be seen. Although a brochure was produced for this development, as a result of the worldwide recession of 2008, it never came to fruition.

21. However, in January 2005, in order to obtain further advice and "expert" opinion on the projects Mr Rockall invited Mr and Mrs Vincent Titchmarsh, Mr and Mrs Cook and Mrs Scantlebury to join him and Mrs Rockall on the *Masquerade of Sole*.

22. Mr Titchmarsh, who has been continuously engaged in the marine leisure industry from 1949, has from 1970 been involved with marina development culminating in the design and construction of the "Titchmarsh Marina" on the East coast of England for which Mrs Titchmarsh provided the administration and sales experience.

23. The late Mr Peter Cook had worked with Mr Rockall at Barclays Bank and had retired with the position of "Risk Director" where he had advised on the viability, financing and pitfalls of potential projects. Mrs Cook, who accompanied her husband, assisted Mrs Rockall by visiting spas and leisure activities with, as Mr Rockall put it, "the woman's view on any particular site or venue." Mrs Scantlebury was a very close friend of the Cooks and had recently been widowed. Mr and Mrs Cook were providing her with support and did not feel able to leave her in the UK when joining Mr and Mrs Rockall on the *Masquerade of Sole* and because of this was invited to accompany them. However, her daughter was a personal assistant working in the clocks department at Chrisites and as a result of discussions about the "Silverstone Project" (described below under "Clocks") Mrs Scantlebury introduced Mr Rockall to her daughter who advised him in relation to the acquisition of the clocks.

24. Dr Peter Schofield, Mr Rockall's cardiologist, and his wife Dr Anne Price, who at the time was the Chief Medical Officer for Marks & Spencer, were invited on the *Masquerade of Sole* in February 2006. Although they lived in the UK it was not possible to arrange a meeting with Mr Rockall due to their busy lives. Therefore, Drs Schofield and Price broke a journey home from Florida to spend a night on the *Masquerade of Sole* to discuss potential future projects and, as they owned a Caribbean property to provide, what Mr Rockall described as a "punter's view on possible" Caribbean sites which could be developed.

25. None of those who stayed on the *Masquerade of Sole*, whom Mr Rockall described as "friends", charged for their advice and did not produce any reports. However, they were not charged for the time spent on the yacht and any use made of her facilities.

26. The *Masquerade of Sole* was chartered by WHL and used by Mr and Mrs Rockall between 9 and 12 of May 2006, for the Spanish Grand Prix at Barcelona, and 22 to 27 May 2006 for the Monaco Grand Prix, where she was moored at Cap Ferrat on the French Riviera, for Formula 1 networking and discussions on the ongoing Silverstone Project. WHL also chartered the *Masquerade of Sole* the following year

between 15 and 19 May for the Spanish Grand Prix and 20 to 26 May 2007 for the Monaco Grand Prix again based at Cap Ferrat.

27. Although the *Masquerade of Sole* brought a significant amount of direct income to ML from chartering, in 2007 this was over £1.2m, it also raised indirect income from business at Whittlebury Hall and training and accommodation contracts for UK companies. However, the business was badly affected by the 2008 recession and although interest payments were effectively up to date the bank called in the debt on the yacht resulting in her sale.

28. In the circumstances, as described above, we find that Mr and Mrs Rockall did not use of the *Masquerade of Sole* and previous yachts for their private purposes but that their use of the vessels was for business purposes only.

Jewellery

29. The clients of Whittlebury Hall were high net worth individuals, some of whom were involved in Formula 1 sponsorship and would have had the resources necessary to charter the *Masquerade of Sole* and influence over where their companies sent their staff on residential courses. As Mr Rockall explained, in order to move in such circles "one needs to convey the right image" and to this end WHL purchased jewellery, described below, to be worn by Mrs Rockall and their daughter at what Mr Rockall called "need to impress" occasions such as British Grand Prix dinners at Silverstone and an associated charity ball and a UK Olympic bid fund raising event, also at Silverstone. Other than on these occasions the jewellery was not used and kept in a safe in Whittlebury Hall.

30. The jewellery bought by WHL consisted of an All White diamond necklace of 103 Round Brilliant Cut diamonds bought on 29 May 2001 at a cost of £150,000 and the following items, all of which were purchased on 9 January 2002:

(1) drop line earrings with Round Brilliant Cut Diamond in 19ct white gold for £38,000;

(2) an emerald bangle for £2,200;

(3) diamond cluster earrings for £5,125; and

(4) An 18ct diamond pendant for £285.

In addition a yellow necklace of rubies and diamonds with flat curb chain was acquired by WHL on 11 November 2003 at a cost of £32,000. On 29 November 2004 WHL bought an Art Deco emerald and diamond bracelet for £27,000.

31. Given that the use of the jewellery by Mrs Rockall and her daughter was limited to the "need to impress" company occasions we find that its use was for the business purposes of WHL and not private purposes of Mrs Rockall and her daughter.

Clocks

32. In addition to his business interests described above, Mr Rockall sought to utilise his Formula 1 contacts in a development plan for Silverstone to include a hotel and exhibition space for car manufacturers to present their new models, the "Silverstone Project. His intention was to establish an exclusive club for wealthy prospective members at the new hotel. As a theme for this development he described how he had it in mind "to name the suites in the hotel after various premium clockmakers through the ages from the celebrated English masters of the 17th century to the electronics of today".

33. A Tompian long case clock was purchased at auction by WHL from Christies on 15 September 2004 for £460,000, to be the centrepiece in the club room. A smaller Tompian clock was also purchased on 15 September 2004 by WHL for £85,000 for the mantelpiece of the club room. However, the new hotel had not been built and both clocks were originally stored in a cupboard at Whittlebury Hall before being moved to Mr and Mrs Rockall's home address at Deer Park Lodge in Suffolk, where the offices of WHL (and ML) were located, before being sold at a loss in 2010 as the Silverstone development did not happen. Mr Peter Harrup, whose evidence was not challenged by HMRC, confirmed that the long case clock was kept in Mr Rockall's office where he attended meetings in his capacity as a partner in PKF (UK) LLP accountants to ML, WHL and Mr and Mrs Rockall.

34. Given the clocks were kept at Whittlebury Hall and subsequently in the company offices at Deer Park Lodge and not at Mr and Mrs Rockall's private residence we find that these were acquired and used for business, not private, purposes.

HMRC Enquiry

35. On 9 July 2007 Mrs Lindsey Riley commenced an enquiry into ML, WHL and Mr and Mrs Rockall under HMRC's Code of Practice 8 which took over the enquiry that had originated in HMRC's Local Compliance Office. A meeting took place between Mrs Riley and Mr Rockall and his then advisers, Pannell Kerr Foster ("PKF"), in relation to a personal benefit to the directors of ML and WHL as a result of the purchase of jewellery and operation of yachts by the companies.

36. This was considered in correspondence between HMRC and PKF. HMRC raised questions in this correspondence about how improvements to Mr and Mrs Rockall's private residence at Deer Park Lodge had been funded. Mr Rockall explained that the site originally was a lodge but has been expanded significantly to include offices and an extension to the private residence. The construction work was undertaken by WHL and on completion of the work payment was made by ML via loan accounts between the two companies. In turn Mr Rockall had an agreement with ML to reimburse the company via his positive director's loan account. However, due to an accounting error £974,000 of the work undertaken was treated as an asset of ML rather than an addition to Mr Rockall's director's loan account.

37. Therefore, on 7 July 2008 a voluntary disclosure in respect of this error was made on behalf of Mr and Mrs Rockall by their advisers. As a result of the disclosure HMRC's investigator registered the enquiries into Mr and Mr Rockall's tax affairs under Code of Practice 9 ("COP 9") "Civil Investigation of Suspected Serious Fraud".

38. In accordance with the COP 9 procedure Mr Rockall was invited to make a report of all irregularities giving rise to the disclosure which he instructed PKF to prepare. This was submitted to HMRC on 8 August 2009 and included the building work wrongly attributed as a company as asset and antique clocks costing £643,000 incorrectly treated as plant which had been disclosed at a COP 9 meeting with HMRC on 4 September 2008. It also referred to the disputed benefits in kind.

39. The report was considered by Mrs Riley who was unable to accept its contents and on 22 June 2010 she wrote to PKF advising that the benefits in kind were still in issue. On 17 September 2010 assessment on benefits in kind were issued for the years 2000-01 to 2008-09 which included the yacht and antique clocks. A further assessment was issued for 2005-06 in respect of the clocks on 8 October 2010.

Issues

40. In the circumstances the following issues arise:

(1) Whether, on the facts, Mr and Mrs Rockall are chargeable to income tax in relation to benefit provided by the assets owned by the companies being placed at their disposal;

(2) If they are chargeable to income tax whether a deduction may be claimed under s 365 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"); and

(3) Whether HMRC are entitled to issue "discovery assessments" in respect of the years before 2006-07

Benefit

41. Section 201 of ITEPA provides:

> (1) This Chapter applies to employment-related benefits.
>
> (2) In this Chapter–
>
> "benefit" means a benefit or facility of any kind;
>
> "employment-related benefit" means a benefit … which is provided in a tax year–
>
> (a) for an employee, or
>
> (b) for a member of an employee's family or household,
>
> by reason of his employment
>
> (3) A benefit provided by an employer is to be regarded as provided by reason of the employment unless–

(a) the employer is an individual, and

(b) the provision is made in the normal course of the employer's domestic, family or personal relationships.

42. It should be noted that benefits are not excluded if they happen to benefit the employer in addition to the employee (see eg *Rendell v Went* (1964) 41 TC 641). Neither are they excluded if the director or employee did not wish to have the benefit conferred on him and did not consider himself to have been benefited in any way (see *McKie v Warner* (1961) 40 TC 65).

43. In the present case, given the very wide definition of "benefit" in the legislation it must follow that the use of the yachts, jewellery and clocks by Mr and Mrs Rockall are to be treated as such. As these benefits were provided by ML and WHL, Mr and Mrs Rockall's employers, they are to be regarded as provided by reason of their employment in accordance with s 201(3) ITEPA and therefore are employment related benefits.

44. Section 203(1) ITEPA provides that the "cash equivalent of an employment-related benefit is to be treated as earnings from the employment for the tax year in which it is provided."

45. Under s 203(2) ITEPA the cash equivalent of the benefit, which is taxable in the hands of the employee, is "the cost of the benefit less any part of that cost made good by the employee to the persons providing the benefit". Section 203(3)(a) ITEPA provides that this is to be determined in accordance with s 204 ITEPA unless s 205 ITEPA provides "that the cost is to be determined in accordance with that section".

46. Section 205 ITEPA provides:

(1) The cost of an employment-related benefit ("the taxable benefit") is determined in accordance with this section if—

(a) the benefit consists in—

(i) an asset being placed at the disposal of the employee, or at the disposal of a member of the employee's family or household, for the employee's or member's use, or

(ii) an asset being used wholly or partly for the purposes of the employee or a member of the employee's family or household, and

(b) there is no transfer of the property in the asset.

(2) The cost of the taxable benefit is the higher of—

(a) the annual value of the use of the asset, and

(b) the annual amount of the sums, if any, paid by those providing the benefit by way of rent or hire charge for the asset,

together with the amount of any additional expense.

(3) For the purposes of subsection (2), the annual value of the use of an asset is—

(a) in the case of land, its annual rental value;

(b) in any other case, 20% of the market value of the asset at the time when those providing the taxable benefit first applied the asset in the provision of an employment-related benefit (whether or not the person provided with that benefit is also the person provided with the taxable benefit).

If those providing the taxable benefit first applied the asset in the provision of an employment-related benefit before 6th April 1980, paragraph (*b*) is to be read as if the reference to 20% were a reference to 10%.

(4) In this section "additional expense" means the expense incurred in or in connection with provision of the taxable benefit (including a proper proportion of any expense relating partly to provision of the benefit and partly to other matters), other than—

(a) the expense of acquiring or producing the asset incurred by the person to whom the asset belongs, and

(b) any rent or hire charge payable for the asset by those providing the asset.

Therefore in the present case, as the assets were owned either by ML or WHL and placed at the disposal of Mr and/or Mrs Rockall it is clear from s 203(3) ITEPA that that s 205 and not s 204 ITEPA applies. As such we reject the submission of Mr Wallace that "regard must always be paid to s 204 ITEPA".

47. Mr Senior accepted the assets had been placed at the disposal of Mr and Mrs Rockall and emphasised, as we have found, that these were not available for private use or used as such. He pointed to s 205(1)(a)(ii) ITEPA which refers to an asset being used for the "purposes of the employee" and contended that in the circumstances that the benefit, if any, should not be subject to tax.

48. However, Mr Wallace, who equated "placed at the disposal" with being "available for use", submitted that s 205(1)(a) provides two alternative methods of charge; first being an asset "placed at the disposal of an employee" and secondly an asset "used by employee" for his purposes. As such, he contended that provided an asset was placed at the disposal of an employee it did not matter whether it was actually used or not. He also contended that any use of an asset by an employee represented a benefit describing the view that only the private use of an asset can be a benefit as a "common misconception."

49. Mr Senior did not accept that any use of an asset could amount to a benefit and suggested that such an interpretation was unsustainable and by way of an example contrasted the position of clocks in this case with that of an employee of the National Gallery asking if he should be subject to tax on the priceless works of art?

50. While we accept Mr Senior's point that difficulties could arise, we consider that this would only happen if "placed at the disposal" was to be regarded as synonymous with "made available". However, if this were the case those words and not "placed at the disposal" would have been used in the legislation as indeed they are elsewhere in ITEPA eg in relation to taxable benefits on the provision of cars, van and related

benefits in s 114 ITEPA. In our judgment "placed at the disposal" connotes something more than just "made available" and consider that for an asset to be placed at the disposal of an employee it should be under the power and control of that employee.

51. Such an interpretation of s 205 ITEPA would encompass the directors and those in control of a company but not its "ordinary" employees thereby avoiding the potential pitfalls identified by Mr Senior.

52. Where an asset is placed at the disposal of an employee for his use, given the use of the word "or" between s 205(1)(a)(i) and (ii) ITEPA, we agree with Mr Wallace that the section does not require actual use for a benefit to arise. Moreover, in the absence in s 205(1)(a)(i) ITEPA of any reference to the use of the asset being "for the purposes of the employee" (in contrast to s 205(1)(a)(ii) ITEPA) we consider, as Mr Wallace submitted, that s 205(1)(a)(i) ITEPA applies when the asset has been placed at the employees disposal for his use, irrespective of whether that use is private and personal or in furtherance of the business of his employer.

53. Therefore, as directors and controlling shareholders of ML and WHL, and despite the business use of the assets in the present case, Mr and Mrs Rockall, subject to whether they are entitled to deduction under s 265 ITEPA (which we consider below), are chargeable to income tax on the benefits received as a result of the yachts, jewellery and clocks being placed at their disposal for their use.

Deduction under Section 365 ITEPA

54. Section 365 ITEPA provides:

> (1) A deduction from earnings is allowed if—
>
> (a) the earnings include an amount treated as earnings under Chapter 10 of Part 3 (taxable benefits: residual liability to charge) in respect of a benefit, and
>
> (b) had the employee incurred and paid the cost of the benefit, the whole or part of the amount paid would have been deductible under Chapter 2 or 5 of this Part.
>
> (2) The deduction is equal to the amount that would have been so deductible.
>
> (3) For the purposes of this section, the cost of the benefit is determined in accordance with sections 204 to 206.

55. It is therefore necessary to consider whether if Mr and Mrs Rockall had paid for the use of the yachts, jewellery and clocks the amount paid would have been deductible under the relevant provisions of ITEPA.

56. The general rule for such deduction is contained in s 336 ITEPA. This provides:

> (1) The general rule is that a deduction from earnings is allowed for an amount if—

> (a) the employee is obliged to incur and pay it as holder of the employment, and
>
> (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.
>
> (2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.
>
> (3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses).

57. In the light of our above findings of fact we consider that if Mr and Mrs Rockall had paid the cost the of the benefit they received in relation to the *Masquerade of Sole* it would have been incurred as an obligation of their employment. However, we are unable to find that if they had they paid for the jewellery and clocks themselves, such expenditure would have been incurred as an obligation of their employment. As such, given it does not satisfy the requirement in s 336(1)(a) ITEPA, it must follow that there is no entitlement to a deduction in respect of the jewellery and clocks.

58. In considering whether an expense is wholly, exclusively and necessarily incurred in the performance of the duties of employment it is necessary to distinguish between an expense incurred in the performance of duties, which is deductible, and expenditure to put an employee in a position better to perform the duties, which is not (see eg *Humbles v Brooks* (1962) 40 TC 500; *Ansell v Brown* (2001) 73 TC 338; *Fitzpatrick and others v Inland Revenue Commissioners* [1994] STC 237).

59. Although Mr Wallace referred us to s 356 ITEPA, which precludes the deduction of expenses incurred for the purpose of business entertainment, we do not consider this to be applicable. The question for us to consider is if Mr and Mrs Rockall had themselves paid for their use of the yacht (not the hospitality on board) the jewellery and the clocks, whether such expenditure would have been wholly, exclusively and necessarily incurred in the performance of their duties of employment with ML and WHL. In any event we consider that the advice and assistance provided by the expertise and contacts of Mr and Mrs Titchmarsh, Mr and Mrs Peter Cook, Mrs Scantlebury, Dr Schofield and Dr Price to be a proper and sufficient quid pro quo for any hospitality provided by ML on board the *Masquerade of Sole* (see *Customs and Excise v Kilroy Television Co Ltd* [1997] STC 901).

60. In view of Mr Rockall's description of his duties for ML and our findings of fact, above, in relation to the yachts we find that had he paid for their use that expenditure would have been incurred wholly, exclusively and necessarily in the performance of his duties of employment with ML and therefore is entitled to a deduction under s 365 ITEPA.

61. As we did not hear from Mrs Rockall we find it more difficult to determine whether she should be entitled to a deduction under s 365 ITEPA. However, after careful consideration we find, on balance, that she was acting in the performance of her duties whilst on board the *Masquerade of Sole* and previous company owned vessels and therefore find Mrs Rockall to be entitled to a deduction in this regard.

62. Even if we had found that Mr and Mrs Rockall had been obliged as holders of their employment to incur expenditure on the jewellery and clocks (which we accept were used for WHL's business purposes) we would have had difficulty in finding that, had Mr and/or Mrs Rockall paid for their use, such payment would have been incurred in the performance of their duties rather than to put them in a position to better perform those duties. In such circumstances an expense is not deductible and it follows that no deduction can be allowed in respect of the jewellery and clocks.

Discovery

63. Insofar as it applies to this appeal, s 29 of the Taxes Management Act 1970 ("TMA") provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (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 was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition [is not applicable to the present appeals]

64. It is not necessary for there to be new facts or a changed view of the law for there to be a discovery. As Lewison LJ said in *Hankinson v HMRC* [2012] STC 485:

> [15] "I begin with section 29(1) [TMA]. This sub-section comes into operation if an officer of the Board "discovers" an undercharge. The word "discovers" in this context has a long history. Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-

assessment regime, the meaning of the word "discovers" in this context has not changed. In *R v Commissioners for the General Purposes of the Income Tax for Kensington* [1913] 3 KB 870 Bray J said that it meant "comes to the conclusion from the examination he makes and from any information he may choose to receive"; and Lush J said that it was equivalent to "finds" or "satisfies himself". In *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 the House of Lords considered the meaning of the word "discovers". They rejected the argument that a discovery entailed the ascertainment of a new fact. Viscount Simonds said:

> "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation."

[16] Lord Denning said:

> "Mr Shelbourne said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes."

65. Therefore, the fact that Mrs Riley may have had sufficient evidence of the yachts, jewellery and clocks to reach a conclusion that there was an insufficiency of tax sooner than she did, does not, in our judgement, preclude her from reaching that conclusion and making a discovery at a later date.

66. It would seem from *HMRC v Household Estate Agents* [2008] STC 2045 at [48], confirmed by the Tribunal in *Poulter v HMRC* [2012] UKFTT 670 TC at [20] and accepted by HMRC in *Rhodes & another v HMRC* [2013] UKFTT 431 (TC) and the present case, that it has the burden of establishing that the conditions for making a discovery assessment are satisfied.

67. In the present case, as returns were submitted by Mr and Mrs Rockall, HMRC rely on the condition in s 29(4) TMA, This condition is fulfilled if the insufficiency or the loss of tax was due to the careless or deliberate action of Mrs and/or Mrs Rockall or a person acting on their behalf. The Court of Appeal in *Hankinson v HMRC* [2012] STC 485 decided that the question of whether this condition has been satisfied was a matter for the Tribunal and not the individual tax inspector who made the discovery.

68. Before its amendment, which came into effect from 1 April 2010, s 29(4) TMA referred to the loss of tax being caused be the “fraudulent or negligent” conduct of a

taxpayer or a person acting on his behalf as opposed to it being brought about "carelessly or deliberately" by him or someone acting for him. It is clear from the decision of the Upper Tribunal in *Colin Moore v HMRC* [2011] STC 1784 the question as to whether or not a taxpayer has been negligent is one of fact and it must follow that whether or not a person has acted carelessly or deliberately is a question of fact also. We find support for this in following comment of the Tribunal (Judge Tildesley OBE and Mr Laing) in *Rhodes & another v HMRC* at [106] that:

> "Negligent conduct is qualitatively different from fraud or deliberate concealment, in that negligence arises from a careless act of falling below the standards of a prudent tax payer, and does not involve a deliberate act as characterised in fraud or deliberate concealment."

69. In *AB (a firm) v HMRC* [2007] STC (SCD) 99 the Special Commissioners (Stephen Oliver QC and Dr Brice) said, at [105]:

> "We are of the view 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. We also accept that a taxpayer who takes proper and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

70. In the present case Mr and Mrs Rockall had instructed appropriate professional advisers, PKF, taken advice from them and acted in accordance with that advice. However, an accounting error occurred, namely that £974,000 of work undertaken on the Rockall's private residence was treated as an asset of ML rather than addition to Mr Rockall's director's loan account. We consider that this error arose as a result of a failure to meet the standards of prudent taxpayer and as such was brought about carelessly by a person acting on behalf of Mr and Mrs Rockall.

71. Although this error only came to light as a result of a disclosure to HMRC it is not sufficient, in our judgement, to prevent the application of s 29(4) TMA to the present case. Accordingly we find that HMRC were entitled to make discovery assessments.

72. It therefore follows that we do not accept Mr Senior's submission that for an assessment to be made under s 29 TMA it is necessary for HMRC to make a separate discovery in respect of each of the assets concerned and not rely on the error caused by the erroneous allocation of work undertaken on private house as company asset. Although in *Rhodes v HMRC* the Tribunal did look at the individual assets in relation to whether there had been a discovery the issue in that case was very different to the present and concerned whether the taxpayer had been negligent (careless) in omitting to declare particular assets in his self-assessment tax return.

Summary of Conclusions on the Issues

73. To summarise our conclusions:

(1) A benefit to Mr and Mrs Rockall arose as a result of assets (the yacht, jewellery and clocks) being placed at their disposal for their use with the cost of such benefit to be determined in accordance with s 205 ITEPA;

(2) That Mr and Mrs Rockall are entitled to deduct the costs attributable to the yacht under s 365 ITEPA as, had they paid for its use, such expenditure would have been incurred wholly, exclusively and necessarily in the performance of their duties and as an obligation of their employment with ML;

(3) However, had any expenditure been made on the jewellery and clocks, although wholly and exclusively for business purposes, it would not have been necessarily incurred in the performance of the duties of employment but rather to enable those duties to be better performed. In any event such expenditure would not have been incurred as an obligation of Mr and Mrs Rockall's employment and therefore no entitlement to a deduction arises in respect of the jewellery and clocks;

(4) HMRC were entitled to issue discovery assessments for the years before 2006-07 on the basis of the careless accounting error of the work undertaken on Mr and Mrs Rockall's residence being treated as an asset of ML rather than addition to Mr Rockall's director's loan account

74. The appeal therefore succeeds in part.

75. The parties agreed that we should make a decision in principle on our findings of fact and application of the relevant law and that they would endeavour to determine the quantum of the assessments with the option of applying to the Tribunal should this not prove possible. Clearly, as s 205(4) ITEPA allows for the cost of a benefit to be apportioned where there are "other matters" concerned in the provision of the benefit, it is necessary for the cost of the benefits provided to Mr and Mrs Rockall to be apportioned. But as Sachs LJ said in *Westcott (HM Inspector of Taxes) v Bryant* (1969) 45 TC 476 at 493:

> "…such an apportionment must, … stated, necessarily be on a rough and ready basis. One must, of course, be on strict guard to avoid abuses such as by provision of benefits merely in reality adding to the remuneration of a director; but to my mind no precise formula can as a rule be applied."

We therefore leave it the parties to apportion the amounts accordingly and should this not prove possible an application may be made to the Tribunal for this purpose, with any such application to be made within 90 days of the release of this decision.

Costs

76. This case was originally allocated as a "Complex case" under rule 23 of the Tribunal Procedure Rules and, although there was a request by the taxpayer, under rule 10(1)(c)(ii) of the Rules, for the proceedings to be excluded from potential

liability for costs, a further application was made to withdraw that request and opt back into the costs regime. HMRC did not object to such a course of action and we allowed the request to be excluded from liability to costs to be withdrawn. As a result the Tribunal has a general discretion as to costs which were sought by both parties if successful.

77. Given our conclusions and the fact that we did not have the benefit of submissions on costs we are minded not to make any direction or order as to costs. However, this does not preclude either of the parties making an application for their costs. Should this be the case we direct that, given the decision and if advised to do so, any party may either file and serve written submissions in support of an application for costs on the Tribunal and the other party (to which the other party may respond within 28 days of receipt) within 28 days of release of this decision or alternatively make an application for an oral hearing within that time. In the absence of any application for an oral hearing and should either of the parties apply for their costs, we will decide the matter on the basis of written representations

Right to apply for Permission to Appeal

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

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 1 July 2014