[2014] UKFTT 916 (TC)

TC04030

Appeal number: TC/2011/01653

PROCEDURE – application to set aside decision (or part) – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 38 – whether failure to determine an application made following the hearing to admit new evidence and/or the determination by the FTT of an issue that was alleged not to be part of HMRC's case were procedural irregularities – whether in the interests of justice to set aside decision of FTT or part of it – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL DANIEL **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 15 September 2014

Keith Gordon and Ximena Montes Manzano, instructed by Smith & Williamson LLP, for the Appellant

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

DECISION

1. This is an application by the Appellant, Mr Daniel, to set aside the decision of the Tribunal (Judge Nowlan and Mrs C Farquharson) ("the FTT") released on 10 February 2014 ("the Decision"), by which the FTT dismissed Mr Daniel's appeal against a discovery assessment in respect of the tax year 1999-2000.

2. By the Decision, the FTT determined two issues adversely to Mr Daniel. The first was that the FTT found that, in the relevant period, Mr Daniel was resident in the UK. It rejected, for reasons I will describe later, his contention that he was engaged in a full-time and continuous employment abroad for the duration of tax year 1999-2000, and thus should be treated as not resident and not ordinarily resident in the UK in that period. Secondly, it found that the discovery assessment had been validly made, because, having regard to the then-applicable wording of s 29(4) of the Taxes Management Act 1970 ("TMA"), there had been a loss of tax attributable to negligent conduct on the part of Mr Daniel or a person acting on his behalf.

The application

3. The application is made under rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, under which the Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if (a) the Tribunal considers that it is in the interests of justice to do so, and (b) a relevant condition is satisfied, which for these purposes is that there has been a procedural irregularity in the proceedings.

4. In his application, Mr Daniel refers to what he submits are two fundamental procedural irregularities in the handling of his case, each of which, it is said, have had a major impact on the outcome, such that it is in the interests of justice that the Decision be set aside so far as those issues are concerned. The issues are (a) the failure to take into account material evidence (to which should also be added the failure to deal with an application, after the hearing, to admit new evidence), and (b) what is described as an unexplained and unjustified expansion of the issues in dispute in the appeal.

5. In the application, which was made on 21 February 2014, and thus very shortly after the release of the Decision, the relief sought was the set aside of findings of the FTT confined to s 29(2) and s 29(4) TMA and a re-hearing of those matters as if they were the subject of a discrete appeal. This was thus an application for a set aside of part only of the Decision. However, in the skeleton argument for this hearing, and in oral submissions, Mr Gordon, for Mr Daniel, expanded the application to seek a set aside of the whole of the Decision. No objection was raised by Mr Nawbatt, for HMRC, and the application accordingly proceeded on that basis.

The law

6. Ordinarily, there are two ways in which an unsuccessful party can seek to challenge a decision of the Tribunal of the nature of the Decision in this case. The first, and most common, is by way of an appeal to the Upper Tribunal on a question of law, under s 11 of the Tribunals, Courts and Enforcement Act 2007. The second is by way of set aside under rule 38 in the case of a procedural irregularity.

7. In argument, Mr Gordon submitted that, although permission to appeal the Decision could (and would, if required) be made, it was more appropriate and proportionate for the matter to be dealt with by way of a set aside under rule 38. He described the set aside procedure as having a lower threshold that would be the case for an appeal on the ground that the FTT had made an error in law in reaching the conclusion it came to on the facts. I do not agree. As Mr Nawbatt rightly submitted in my view, the test under rule 38 is not aptly described as less onerous, it is simply different.

8. For an application to succeed under rule 38 there has to be a procedural irregularity, and the Tribunal must consider that it is in the interests of justice to set aside the decision or part of it. There are two general points to be made on the application of rule 38. The first is that there must be a link between the procedural irregularity and the injustice that must be remedied by a set aside. It is not sufficient for an applicant to identify a procedural irregularity, and then to make a general, and unrelated, attack on the findings of the Tribunal. Such a challenge should more properly be made by way of an appeal. Secondly, in considering the interests of justice, the Tribunal must have regard to all the circumstances, and not just the procedural irregularity and what has flowed from it. Those circumstances include the availability of an appeal to the Upper Tribunal, and consideration of whether that would best achieve justice in a particular case.

9. In support of his argument that rule 38 imposed a lower threshold than an appeal related to the tribunal's findings of fact, Mr Gordon sought to rely on the description given by Moses J, in *R (on the application of Aston) v Nursing and Midwifery Council* [2004] EWHC 2368 (Admin), to an appeal which fell within part 52, rule 11, of the Civil Procedure Rules 1998, under which an appeal could be allowed either where the decision of the lower court was wrong or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court. After describing the approach in criminal appeals where a complaint was made of incompetent representation, in which the question was whether a conviction was thereby rendered unsafe, Moses J said (at [10]):

> "In the context of part 52, rule 11, the test is not safety. The appellant need not show that the decision was wrong, but he must show that the decision was unjust. The decision will only be unjust if the incompetence led to irregularities which rendered the process of the trial unfair or the conclusion unsafe."

10. Although there can be no direct read-across from the CPR provision and rule 38, which is both expressed in different terms, and involves a different process from an appeal, the observations of Moses J do, in my view, lend support to the conclusion

that the tests are simply different, and that neither can be characterised as more or less onerous than the other, and that the injustice must flow from the procedural irregularity.

11. The Tribunal should be mindful to avoid effectively acting as an appeal tribunal. The category of what may be described as procedural irregularities ought not to be expanded so as to trespass on what are more naturally dealt with by the Upper Tribunal as arguable errors of law. Although rule 38 does not limit the category of procedural irregularities, the specific irregularities it does describe (documents not having been sent or received, and non-attendance by a party) do suggest that the nature of procedural irregularity contemplated by rule 38 ought not to be too widely construed.

12. In my view, a distinction falls to be drawn between an irregularity of a procedural nature, and one that arises as a consequence of the exercise by the Tribunal of its judicial function. The latter is not, in my judgment, a procedural irregularity of the nature described by rule 38; it is an error of law which should in an appropriate case be remedied by the Upper Tribunal on an appeal. In reaching this view, I am mindful of the impossibility of laying down a rigid rule as to where the boundaries of procedural irregularity lie (see *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] EWCA Civ 1046, per Ward LJ at [33],), and that everything depends on the subject matter and the facts and circumstances of each case. That does not, however, mean that, in construing the particular rule applicable in this Tribunal, no distinction can be drawn between procedural errors on the one hand and judicial errors on the other.

13. That is an important distinction in this case, having regard to the way in which Mr Gordon presented Mr Daniel's case. To the extent that the argument on occasion strayed into the territory of the FTT having as a general matter failed to take any, or any proper, account of the evidence, that is in my judgment not a proper area of enquiry for this Tribunal on a rule 38 application. Thus, whilst I was urged by Mr Gordon to read the transcript of the evidence before the FTT and the witness statements of witnesses who gave unchallenged evidence, and in one case who made a witness statement but who did not appear for cross-examination, I decline to do so otherwise than to consider whether injustice has arisen as a consequence of a procedural irregularity. Rule 38 certainly does not permit a wholesale re-assessment of the factual findings of the FTT. Whilst, as Mr Gordon submitted, the test as regards a procedural irregularity is whether a fair-minded observer would say that the case had been decided in a way which could not reasonably have been anticipated (as to which see *Stanley Cole*, per Ward LJ at [32]), that does not open the door to a wholesale re-examination of the evidence. That is something that the Upper Tribunal might be asked to do on an application of *Edwards v Bairstow* [1956] AC 14, but it is not appropriate on a set aside application except to the extent that a procedural irregularity bears on the evidence.

14. Having said that, it is necessary to consider all the circumstances in determining whether the specific irregularities asserted by Mr Daniel in his application are potential procedural irregularities for the purposes of rule 38. The failure of a tribunal to consider or determine an application to admit further evidence is procedural in

nature. The failure to give a party an opportunity to address an issue on which the tribunal makes a determination could amount to the party in question not being afforded a fair hearing, which would, if established, be a procedural irregularity. I therefore turn to consider whether the existence of a procedural irregularity has in each case been established and, if it has, whether it is in the interests of justice to set aside the Decision in whole or in part.

The new evidence

15. There was no dispute as to the circumstances in which Mr Daniel made an application, on 13 December 2014, for the admission of new evidence in the form of (a) a letter dated 25 March 1994 from Miss Sheila Adey, an inspector of taxes (Residence) working in Claims Branch, International in Bootle, to Mr Hilton-Gee of Coopers & Lybrand, and (b) a document which appears to show copies of two documents, the first being the text of a letter from Miss Adey to a Mr McLennan of Coopers & Lybrand dated 22 July 1994, and the second a note of a telephone conversation between Miss Adey and Mr (Martin) McLennan with a date of 19 May 1994 and headed "Claims for Non-Residence"; the note appears to be that of Miss Adey.

16. This material, which I describe as "the 1994 documents", had come to light after the hearing before the FTT, and after Mr Daniel had served a written reply to HMRC's closing submissions and, on 2 December 2013, HMRC had sought to make further written submissions and on 4 December 2013 Mr Daniel had objected to those further submissions.

17. For reasons which the parties did not attempt to explore before me, and which it is unnecessary for me to determine, the application to admit the new evidence was not dealt with by the FTT. The Decision was released on 10 February 2014 without reference to the new evidence. That was a failure by the FTT (making no distinction for this purpose between the panel that made the Decision and the administrative arm of the Tribunal) which amounted to a procedural irregularity. The only question in that regard, therefore, is whether that has given rise to an injustice such that it would be in the interests of justice to set aside the Decision in whole or in part.

Background to the 1994 documents

18. It is necessary to understand the context in which the correspondence and discussion evidenced by the 1994 documents.

19. Although of doubtful provenance, at one time the Inland Revenue (as it then was) applied a so-called "available accommodation rule" when determining whether an individual was UK resident. Under that rule, as a general matter, an individual who had accommodation available for his use in the UK would be regarded as resident in the UK if he was present in the UK at any time in the relevant tax year, however short that period of presence might be.

20. That rule did not, at least from 1956, apply to individuals working full-time abroad. Thus, at the material time prior to 1993-94, s 335 of the Income and Corporation Taxes Act 1988 ("TA 1988") provided that where a person worked in full-time employment and all the duties of the employment were performed outside the UK, the question whether he was resident in the UK was to be decided without reference to any place of abode maintained in the UK for his use.

21. However, that dispensation from the available accommodation rule for full-time workers did not apply if the individual performed duties in the UK, unless those duties were merely incidental to the duties performed abroad. Section 335(2) provided that, for the purposes of s 335, it was only incidental duties in the UK that could be regarded as performed outside the UK. So if an individual performed non-incidental duties in the UK, his residence position would remain subject to the available accommodation rule.

22. Prior to 1993-94, there was no dispensation from the available accommodation rule in determining whether a temporary resident in the UK had obtained UK residence. Section 336(2) TA 1988 provided that a person who was in the UK for a temporary purpose only and not with the intention of establishing his residence in the UK was only to be treated as UK resident if he had spent at least six months of the tax year in the UK. But in determining whether such a person was in the UK for a temporary purpose and not with the intention of establishing a UK residence, the available accommodation rule would apply. Accordingly, if an individual working abroad under a full-time employment also carried out non-incidental duties in the UK, and had accommodation available for his use in the UK, he could be regarded as UK resident.

23. That position was, prior to 1993-94, reflected in IR20 (the guidance published by the Inland Revenue on the liability to tax in the UK of residents and non-residents) at para 2.2, where one of the conditions for establishing non-residence on the basis of full-time work abroad under a contract of employment was that either all the duties of the employment were performed abroad or the only duties performed in the UK were incidental.

24. The position changed in 1993-94 by virtue of s 208 of the Finance Act 1993. That provision did not make any amendment to s 335 TA 1988, but it amended s 336 by providing that, in determining whether a person was is the UK for a temporary purpose only and not with the intention of establishing his residence there, any living accommodation available in the UK for his use was to be disregarded. That meant that even though a person working abroad performed non-incidental duties in the UK, available accommodation would no longer be a factor in determining the residence question. IR 20 (November 1993 version), para 2.2, reflected the change by omitting the condition requiring all the duties to be performed abroad or only incidental duties performed in the UK, and adding:

> "for tax years before 1993-94, where there was accommodation in the UK available for your use, either all duties of your employment were

performed abroad, or any duties you performed in the UK were incidental to your duties abroad …"

25. The updated position of persons working abroad following the 1993 changes was described in IR20, para 2.2, as follows:

> "If you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet all the following conditions
>
> - your absence from the UK and your employment abroad both last for at least a whole tax year
> - during your absence any visits you make to the UK
>
> -total less than 183 days in any tax year, and
>
> -average less than 91 days a tax year (the average is taken over the period of absence up to a maximum of four years; any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose)"

26. It was in that context that Miss Adey wrote the letter of 25 March 1994. The letter responded to questions raised by Mr Hilton-Gee in a letter dated 10 March 1994. I did not have a copy of that latter letter (and it did not form part of Mr Daniel's application to the FTT). The relevant part of the March 1994 letter states;

> "One effect of Section 208 FA 1993 is that when deciding an individual's residence status for periods from 6 April 1993 it is no longer necessary to consider whether any duties of an employment are performed in the United Kingdom. So the retention of United Kingdom directorships will not prevent an individual attaining not resident and not ordinarily resident status provided the absence includes a complete tax year and any visits to this country are within the prescribed limits. The only instance which I can think of where United Kingdom directorships might affect the position is if the amount of time spent in the UK on the duties of those directorships made it doubtful that the individual was in fact working <u>full time</u> outside the United Kingdom. But in any event in such a situation it is unlikely that the individual would satisfy the time limits for visiting the United Kingdom."

27. A similar confirmation was given in Miss Adey's letter of 22 July 1994 to Mr MacLennan, with the addition of a reference to available accommodation. Again, the letter from Mr MacLennan dated 28 June 1994, to which Miss Adey was replying, is not available. The July letter states:

> "I confirm that from 6 April 1993 when considering an individuals (sic) residence status for tax purposes it is no longer necessary to consider whether any duties of an employment are performed in the UK. Thus, an individual who has accommodation in the UK available

> for use but who is working full time outside the UK for a period which includes a complete tax year and any visits are within the prescribed periods, will attain not resident and not ordinarily resident status."

28. The note that it appears Miss Adey made of a telephone conversation with Mr MacLennan on 19 May 1994 includes:

> Q. Where an individual is working wholly abroad but commutes to and from work coming to the UK at weekends, to stay with his family who remain in the UK, do the Revenue count the days of arrival and departure in determining whether the individual has been present in the UK for an average of more than 90 days?
>
> A. No. For example, if somebody returned to the UK on Friday evening and left for the Continent on Monday morning, 2 days would count towards the 90 day average. If they returned on Friday evening and left on Sunday evening 1 day would be counted. The individual would of course probably remain resident if he spent bank holidays and his annual holiday entitlement in the UK because he would break the 90 day average.
>
> …
>
> Q. Was the residence position of the commuting individuals (sic) any different if he performed some duties in the UK, for example, a European marketing director, who spent 95% of his working time on the Continent but who was also responsible for the UK operation and spent 5% of his working time in the UK?
>
> A. No. His position would be no different. The essential point is whether or not the individual breaks the 90 day average test. If part of his duties were in the UK the individual would be more likely to break the test, but in counting the average, days of arrival and departure would be ignored."

29. Mr Gordon submitted that the 1994 documents show that specialist advice had been received from a residence specialist within the Revenue to the effect that it would be possible to remain within the scope of "full-time work abroad" whilst also working in the UK, so long as visits to the UK did not exceed the 90-day average. I agree that, taken at face value, some of the text can be read in that way. But in context I do not consider that the correspondence and note of discussion can be properly so construed. I say that for the following reasons.

30. The real effect of s 208 FA 2003 was to eliminate the concern for a person working full-time abroad, but who had available accommodation in the UK, and who performed some duties in the UK. Prior to the legislative change, it was only if those duties were incidental to his non-UK duties that he could avail himself of the protection of s 335 TA 1988. Otherwise, his UK accommodation would have prevented him from claiming that any presence in the UK was for a temporary purpose under s 336(2).

31. Section 208 changed that. It meant that such a person's presence in the UK could be disregarded so long as his visits did not exceed the 90-day average. It no

longer mattered for this purpose whether he carried out duties in the UK or whether those duties were incidental or not. But it remained a fundamental condition that the person had left the UK to work full-time abroad.

32. The letter of 25 March 1994 concerned, in its material part, the effect of s 208. That section had no effect on the requirement for full-time work abroad; it was limited to the removal of the available accommodation obstacle for s 336 purposes. Miss Adey herself recognised that the full-time condition remained. Her remark that someone failing the full-time test would also be likely to have failed the time limits for UK visits cannot be taken as advice that the test would only be failed if the visits did exceed the 90-day average.

33. The letter of 22 July 1994 is, in my view, clearly directed to the change effected by s 208. It specifically refers to the issue of available accommodation and, importantly, to that issue in the context of someone who is working full-time outside the UK. That condition is assumed to be met for the purpose of the advice given. Whilst it would, post-FA 1993, have been unnecessary to enquire whether UK duties were being performed in order to ascertain the position of a person with available accommodation in the UK, it is self-evident that a preponderance of UK duties in the UK would have been a material issue in assessing whether the person was working full-time abroad. The statement that it was no longer necessary to consider whether duties of an employment were preformed in the UK cannot therefore logically have been thought to apply as a general matter.

34. A similar conclusion must be drawn in relation to the note of the May 1994 telephone conversation. The European marketing director, spending 5% of his working time in the UK, is assumed to be the same as the commuting individual whose family home is in the UK. Once more, the focus is on the fact that the individual is commuting and has available accommodation in the UK. The question whether the time spent working in the UK would prejudice the full-time work abroad is not specifically addressed. The more natural reading is that Miss Adey's response is directed towards the fact that the nature of the UK work is no longer important after FA 2008 in determining the position of a commuter who has available accommodation in the UK. However, it remained clear that to claim non-residence on the basis of para 2.2 of IR20, it was still necessary for the individual to be working full-time abroad.

35. My own view of the 1994 documents, therefore, is that they do not support Mr Gordon's submission that the Revenue had promulgated a view that, in determining the residence of an individual asserting that he was not resident by virtue of full-time work abroad, the amount of UK work was not limited otherwise that by the 90-day rule. The question whether the individual was indeed in working full-time, and abroad, would still require to be determined according to the circumstances, and would not itself necessarily depend on the application of the 90-day rule.

36. That said, I have no doubt that the failure of the FTT to consider and determine the application to admit into evidence the 1994 documents was a procedural irregularity. I do not think that it is necessary to speculate on whether the FTT would

have acceded to the application had it considered it. That would have depended on the view taken by the FTT as to the relevance of the new material; there is of course a presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary (see *Mobile Export 365 Limited and another v Revenue and Customs Commissioners* [2007] EWHC 1737 (CH), per Lightman J at [20]). But here the question of relevance is one of the factors to be considered in determining whether it would be in the interests of justice to set aside the decision.

37. I therefore turn to the question of relevance. In considering this, I shall have regard to Mr Gordon's interpretation of the import of the 1994 documents as well as my own.

38. If Mr Gordon is right, it can be argued that there existed, by virtue of the 1994 documents, a tenable belief that, otherwise than by reference to the 90-day rule, no amount of UK work would prevent a person being treated as not resident in the UK by reason of full-time work abroad. That would be relevant in assessing the state of mind of Mr Daniel for the purpose of determining whether the loss of tax was attributable to his negligent conduct under s 29(4) TMA. It would also be relevant in considering whether, in accordance with s 29(2), Mr Daniel's return had been made on the basis or in accordance with the practice generally prevailing at the time it was made. The relevance of the 1994 documents to those questions would take a different form in each case. In the case of s 29(4), the question would concern the belief of Mr Daniel when he made his return, and whether, in the light of the 1994 documents, that was a reasonable belief. In the case of s 29(2), the issue would be whether the 1994 documents evidenced a generally prevailing practice at the material time, and whether Mr Daniel's return was made on the basis of or in accordance with that practice.

39. Mr Gordon's argument went further than the discovery assessment issues. He submitted that the 1994 documents showed, on his argument incontrovertibly, that the FTT had been wrong to doubt Mr Daniel's credibility in respect of his perception of the position regarding working in the UK, and that this erroneous perception of his credibility is the only reasonable explanation for the FTT's conclusions on the evidence, not only of Mr Daniel but of other witnesses. Not only therefore does Mr Gordon submit that this gave rise to an injustice on the discovery assessment issue, it so infected the FTT's consideration of the evidence that it gave rise to an injustice on the issue of residence itself.

Evidence of Mr Daniel's belief

40. During the course of cross-examination, Mr Daniel was asked questions concerning the advice he had received from Arthur Andersen on the requirement for full-time work abroad. He confirmed that he had sought advice about work in the UK for Morgan Stanley on certain non-executive directorships, and that he had done so because he had been aware that attendance at such board meetings might affect his claim to be working full-time abroad. He was then asked whether he had been aware that work on the Sainsbury's deal in the UK would also impact the claim.

41. It was at that point that Mr Daniel explained his understanding that there was an essential difference between the Sainsbury's deal, where he had been working as an employee of a Belgian company, and the non-executive directorship with Morgan Stanley which was in theory an employment in the UK. His understanding was that when working for the Belgian company, any work done in the UK would not impinge on a claim to be working full-time abroad. He went on to say that he worked only five days in the UK for the Belgian company, and did not consider that to be a significant factor.

42. Later, Mr Daniel was asked about his evidence that, apart from the five days spent working in London, he had not worked in the UK on the Sainsbury's deal. The explanation given by Mr Daniel was that whilst in London he gave his family priority. It was put to him that his evidence that he had to keep his work days in London to a minimum had been contradictory to his professed belief that, when working for a Belgian company, any work in London would not prejudice or affect his full-time working abroad.

43. Mr Daniel's response to that was that he did not think that the limited working in London over five days would prejudice the position. He reiterated his belief that, generally speaking, he would be treated as working in the country where the employing company was located, whether the actual work was in that country or abroad. When questioned by Judge Nowlan in this regard, he confirmed that he believed that if he was working for a Belgian company, it did not much matter where the work was done, because it was done for a Belgian company. But he went on to say that he expected there was a limit to the proportion of time that could be spent working in the UK; he suggested that less than 10% would be acceptable. However, his position remained that he tried to focus his work outside the UK, because at that time he was away from his family, and thus spent only five days working in the UK in any event.

The FTT's Decision

44. The FTT considered this aspect of Mr Daniel's evidence both in the context of its analysis of his work during the relevant period and in connection with the assertion of negligent conduct as regards the discovery assessment. As to the former, at [67] the FTT said:

> "We must now mention the very important, and somewhat extraordinary, point that the Appellant claimed or admitted that he had thought at the time (and actually appeared still to consider during the hearing) that days spent working in London for a Belgian company would all count as days spent working 'abroad', simply because the Belgian company was a non-UK resident company. We were unclear why the Appellant had formed this view, and it is not particularly material … Whatever the explanation, the Appellant plainly considered that there was no taxation reason why he should restrict work done in London to avoid undermining his non-residence claim, and so we turn to the Appellant's explanation for why he claimed that he did virtually no work in London other than for the admitted 2 and 5 days."

45. The context for this enquiry into the number of days on which Mr Daniel had worked in London can be discerned from the summary, at [10] of the Decision, of the grounds on which HMRC had submitted that Mr Daniel had failed to establish non-residence. They were:

(1) The first, described by the FTT as the broadest ground, was simply that the time spent by Mr Daniel under his contract of employment was not sufficient to sustain the claim that he was employed full-time abroad.

(2) The second was that some substantive duties had been performed in the UK and that the level, and the particular significance, of those UK duties also undermined Mr Daniel's claim that the employment was one that was in substance performed abroad.

(3) The third was that Mr Daniel had failed to establish full-time work abroad for the entire tax year, and that undermined the claim to have been non-resident for the full year.

46. The passage of the Decision at [67] is in a section of the Decision dealing with the evidence both as to Mr Daniel's work in the UK (a total of two days at formal meetings and five other days working in London) and his work abroad. The FTT accepted that Mr Daniel had no taxation reason to restrict his work done in London, and examined the reasons given by him for the limited amount of work done there. The FTT, at [68] – [69], drew a contrast between the position in London, where the explanation was that Mr Daniel restricted his work because he wanted to be with his family, and the position in Ramatuelle in France where, despite the presence there of his family, Mr Daniel had claimed to have carried out extensive work.

47. This feature was described by the FTT, at [141], as an "all or nothing" pattern, which the FTT remarked seemed very improbable. At [142] the FTT expressed the view that the claimed work pattern was "not particularly credible". This was based, not on any general impression as to Mr Daniel's lack of credibility because of the "extraordinary" revelation of his belief that work for a Belgian company ranked as work done abroad simply because it was done for a non-UK company, but on an acceptance of his belief in that respect, which meant that he had no taxation reason for restricting his work in the UK. The FTT did not accept the distinction drawn by Mr Daniel between the restricted working in London because of family commitments, and the full-time working at Ramatuelle when the family was also present.

48. It is clear from the Decision that the finding that Mr Daniel was resident in the UK in the relevant period was based, not on any adverse finding as to the number of days that Mr Daniel worked in the UK, but on the conclusion reached by the FTT, for the reasons it gave, that Mr Daniel's generalisations of having worked full-time, or anything approaching full-time, during the relevant tax year (whether in the UK or abroad) could not be relied upon (Decision, [138]). The finding is succinctly summarised at [150]:

> "The fundamental basis on which we decide this Appeal on the residence point is that we do not accept that the Appellant's role was full time. We accept the Respondents' contentions that for countless

> weeks, this was just untenable because of periods when work could not have been undertaken, and we conclude that the nature of the Appellant's role was to be on call for particular aspects of the project. It did not involve full-time work."

49. Although the FTT had "considerable misgivings" as to whether the work done by Mr Daniel in London in the relevant period was as minimal as had been suggested, it made clear, at [151], that the FTT's primary conclusion was based on Mr Daniel's failure to satisfy the full-time test, and not on speculation as to the level of work done in London, concerning which the FTT made no specific finding.

50. It was in the light of its findings of fact on the residence issue that the FTT considered the issue of negligent conduct for the purpose of determining the validity of the discovery assessment under s 29(4) TMA. In this regard, the FTT said (at [155]):

> "We consider that the test that we should apply is whether a reasonable man filing his tax return, and applying the right legal test (in other words certainly regarding substantive work done for the Belgian company when in the UK as occasioning, at the very least, doubt as to whether the employment had been performed full-time abroad) would have claimed non-UK residence when reviewing the facts. Those facts would unquestionably have involved the reality that there were countless weeks during the year 1999-2000 … when plainly the Appellant had not worked full-time abroad. Furthermore, whilst we can appreciate that the Appellant had had a rather successful and remunerative year, and had been part of a very major project, we consider that he must have been aware that his role had been intermittent. We simply do not accept that his evidence that he read the documentation for over 14 solid weeks can have been realistic or that he can have believed it himself. Furthermore it was a claim only first advanced during the hearing, and barely mentioned in the witness statements."

51. Although the FTT expressed its finding here as that Mr Daniel had not worked full-time *abroad*, it is plain that its findings related not to the place where the work had been carried out but to the fact that the work, wherever undertaken, was not full-time work. That reading is plain, and it is not rendered any the less so by the reference to Mr Daniel's belief as to the effect of work in the UK for a Belgian company. On the basis of the FTT's findings, it was not work in the UK that prevented him from satisfying the test of working full-time abroad, it was the fact that he did not work full-time during the relevant period.

52. Thus, even if it were the case that Mr Daniel's belief as to the effect of UK work was a reasonable one, in the light of the 1994 documents, it would nonetheless, according to the FTT's findings, have been unreasonable of him to consider that his work could be regarded as full-time, so as to enable him to be regarded as non-UK resident. His work in the UK, of seven days in total, was not a material factor, given the fact that he had not in any event worked full-time. Accordingly, even if I were to have decided that Mr Gordon's interpretation of the 1994 documents was the correct one, the failure by the FTT to take those documents into account would not have

affected its conclusions on the discovery assessment issue under s 29(4) TMA. And if my analysis of the 1994 documents is the correct one, and they do not address the question of what amounts to full-time work abroad, those documents would have had no impact at all on the FTT's conclusions. Furthermore, in terms of s 29(2) TMA, it is clear to me that the 1994 documents could not come close to evidencing a generally accepted practice of the nature submitted by Mr Gordon, and that in any event Mr Daniel's return could not, on the basis of the 1994 documents, be said to have been made on the basis of or in accordance with any such practice.

53. It follows also that the FTT's conclusions concerning Mr Daniel's belief that work for a Belgian company in the UK would qualify as work abroad cannot be affected by the 1994 documents. In any event, I do not accept that the FTT's conclusions in that regard had the effect that it took a general view that Mr Daniel was not a credible witness. The FTT, indeed, accepted that Mr Daniel genuinely held that belief (see Decision, at [67]); essentially its finding was that this was unreasonable, and not lacking in credibility. It was in respect of the specific issue of whether Mr Daniel was engaged in full-time work in the relevant period that the FTT formed the view that his evidence could not be accepted. The FTT found, at [142], that the distinction Mr Daniel had sought to draw between working very rarely in London and working full-time in Ramatuelle "seems incredible". The fact that he had a personal interest in the Sainsbury deal (an interest in the residual value of the properties, which Mr Gordon emphasised in his submissions to me) was considered by the FTT at [144] but rejected as an explanation of the level of work Mr Daniel had claimed to do. The notion that Mr Daniel had spent "countless hours" reading documents when he had not attended a single drafting meeting was described, at [145], as "very improbable", and at [147] the FTT found it "inconceivable" that Mr Daniel's role was as he had described it and that he had spent any significant time on reading documents.

54. It can thus be seen that the FTT did not decide to reject Mr Daniel's evidence because it had found him not to have been a credible witness as regards his belief as to the practice of determining what full-time work abroad entailed. It found instead that his evidence on what he was actually doing in the relevant period was not credible, and did not therefore support his claim to have worked full-time in that period. Mr Gordon might seek to argue that the FTT was wrong to have reached this conclusion, and indeed that the evidence was such that no reasonable tribunal could have reached that conclusion, but that is a separate matter – one that should properly be addressed by an application for permission to appeal - from the question whether an injustice can be said to have flowed from the procedural irregularity surrounding the 1994 documents. For the reasons I have given, there was no such injustice, and it would not therefore be in the interests of justice to set aside the Decision, or any part of it, on this ground.

Expansion of the issues in dispute

55. No particular authority is needed for the proposition that it is a fundamental requirement of a fair hearing that a party should be given the opportunity to respond to points asserted against him. A failure to give a party such an opportunity may be a procedural irregularity.

56. What Mr Gordon submits in this respect is that the FTT made findings, as regards the question of the discovery assessment and the application of s 29(4) TMA, which went beyond the case put by HMRC. He points to the discussion by the FTT of the issue of negligent conduct, which can be found between [154] and [165] of the Decision. He argues that the emphasis of the FTT's analysis of this question was on whether or not Mr Daniel's advisers, Arthur Andersen, had been negligent, a question which was not relevant to the proceedings.

57. It is correct to say that HMRC's statement of case did not contain any case that Arthur Andersen had been negligent. It asserted that Mr Daniel had been negligent in submitting his return on the basis (amongst other things) that his employment abroad had been full-time throughout the relevant tax year. Nonetheless, the statement of case recognised the relevance to that case of the question whether the facts upon which any advice was given by professional advisers accurately reflected the true facts of Mr Daniel's life and/or whether he actually followed any tax planning advice he was given.

58. In their skeleton argument for the hearing before the FTT, HMRC asserted that, in the event the tribunal were to find that Mr Daniel had informed Arthur Andersen of the amount and pattern of the work he had carried out during the tax year, Arthur Andersen's conduct had been negligent. In the skeleton argument for Mr Daniel, his counsel objected to the raising of this allegation, and argued that the FTT should not allow it to be raised at such a late stage.

59. The objection was raised by leading counsel for Mr Daniel on the first morning of the hearing. Judge Nowlan indicated at that stage that he did not consider the point to be one of primary submission by HMRC, and that it would arise only if it were to be said on behalf of Mr Daniel that he had gone out of his way to point out doubts to Arthur Andersen and they had nevertheless advised him to make the claim for non-residence. That was then accepted as the position by Mr Nawbatt for HMRC.

60. In closing submissions before the FTT (and repeated in written closing submissions), leading counsel for Mr Daniel addressed the issue of whether Mr Daniel had been negligent. In the course of those submissions, he argued that Arthur Andersen had not explained to Mr Daniel what was meant by working full-time abroad, and when advising him on his tax return had requested only details of where he was on the days in the relevant period and not how many hours he worked abroad, the nature of the work and what sort of work had been done in the UK. It was submitted on that basis that Mr Daniel could not have been guilty of negligent conduct if Arthur Andersen had failed to communicate to him the importance of certain aspects. In response to questions from Judge Nowlan on this, leading counsel repeated the objection to the allegation of negligence on the part of Arthur Andersen, but in case the FTT decided that it could be brought raised a legal argument to the effect that Arthur Andersen were not acting on behalf of Mr Daniel within the meaning of s 29(4) TMA.

61. In his final submissions before the FTT, Mr Nawbatt emphasised the "backstop" nature of his argument that Arthur Andersen had been negligent. It was applicable

only in what Mr Nawbatt described as the unlikely event that the FTT were to have found that Mr Daniel had given Arthur Andersen the full facts (that is to say the full facts as Mr Nawbatt invited the FTT to find them).

62. The submissions on behalf of Mr Daniel in this respect were summarised by the FTT at [113.8] and [113.9]. As regards the issue of whether Arthur Andersen could be regarded as "acting on behalf of the taxpayer" within s 29(4), the FTT rejected that argument at [127]. The FTT also expressly addressed, and dismissed, the argument that it was too late and improper for HMRC to have raised the issue of negligent conduct in relation to Arthur Andersen. At [128] the FTT said this:

> "We also reject the point raised at paragraph 113.9. HMRC as the Respondents are not concerned with where any fault may lie. In the present case it may be arguable that there was some confusion in the Arthur Anderson (sic) letters [letters dated 19 January 1999 and 12 February 1999]. We will deal with that later. Equally there may have been fault on the part of Arthur Anderson in not requesting clarification by the Appellant, when the tax return was being prepared, that the work had been full-time in the requisite sense, or the fault might have been on the part of the Appellant for not seeking further advice. Arthur Anderson had after all stated that they would be making the return on the basis of the information provided by the taxpayer, and based on the expectation that that information would be right."

63. The FTT took this view on the basis that it would be of no consequence if a taxpayer argued that, instead of him being negligent, the negligent party had instead been a person acting on his behalf. In those circumstances, s 29(4) would be satisfied in any event, and no enquiry would be necessary as to who, as between the taxpayer and his agent, had been negligent. But the FTT went on to say, at [130], that it would in any event consider the question of negligent conduct on alternative bases; first considering Mr Daniel and Arthur Andersen together, and secondly considering Mr Daniel's sole position.

64. Mr Nawbatt submits that in this respect there was no procedural irregularity within rule 38. He says that the FTT specifically considered and rejected the argument on behalf of Mr Daniel that the tribunal should not consider the possible negligence of Arthur Andersen. He argues that if Mr Daniel considers that the FTT was wrong in taking Arthur Andersen's negligence into account, that part of the Decision must be challenged as an error of law on appeal. Mr Gordon criticises this argument as being doubly flawed. He submits that the FTT either misunderstood or failed to address the nature of the submissions for Mr Daniel. It was, he argues, inappropriate for the FTT to have considered the issue otherwise on the strictly limited basis it had indicated on the first morning of the hearing, but that if it did decide to do so, the principles of natural justice required that Mr Daniel be able to produce evidence and make submissions directed at that issue.

65. I agree with Mr Nawbatt. It seems to me that this is a case where the alleged error on the part of the FTT falls on the judicial and not the procedural side of the dividing line. The FTT made a decision in this regard, and that decision can, in my

view, properly be challenged only on the basis that the FTT made an error of law in reaching its determination. That should be dealt with on appeal to the Upper Tribunal, subject to grounds being put forward on which permission to appeal may be granted.

66. In case I am wrong on that point, I move to consider whether the assumed irregularity is such that I should set aside the Decision or part of it. That turns on whether it would be in the interests of justice to do so. In this case, I am clear that it would not be.

67. Having set out, at [130], the way in which it intended to approach the question of negligent conduct, the FTT dealt with the issue in the passage of its Decision beginning at [154]. Consistently with the argument made for Mr Daniel that he had been given insufficient advice by Arthur Andersen, the FTT examined that advice. Although in general terms the FTT concluded that the advice, for the most part, was "extraordinarily impressive" (Decision, at [156]), the FTT noted that it may have been less than clear in three respects. First, the advice did not emphasise the distinction between the 90-day rule and the test of full-time working abroad ; secondly, the letter of 12 February 1999 was slightly muddled in relation to the general tests for working full-time abroad and the relevance of Mr Daniel's separate non-executive role; and finally, there was a "slight notion" that Arthur Andersen, in making it clear that they were relying on the information provided by Mr Daniel, were looking at the day count and not cross-checking whether the full-time working test had also been met.

68. The FTT explained that, on this basis, it could see that there might have been an element of confusion between Arthur Andersen and Mr Daniel. On the crucial point, as the FTT said at [159], nobody appeared to have re-visited the requirement that Mr Daniel should have been working full-time abroad, and "they certainly should have done". This led the FTT to conclude, at [165], that looking collectively at the conduct of Mr Daniel and Arthur Andersen, there was negligent conduct.

69. But that was not the end of the FTT's determination in respect of negligent conduct. It also addressed the position of Mr Daniel alone. It concluded, at [160] and [165], that Mr Daniel was also "singly negligent" in claiming UK residence. The FTT found that Mr Daniel seemed to have a slightly remote attitude to his tax status as if it was something that his advisers had to get right. The FTT considered that it was far from clear that Mr Daniel had himself given very much thought to his tax status. He did not want to think about the tests that had been explained to him and consider whether there were any weaknesses in his own case. At [162], the FTT found that, even if Mr Daniel had not been given the clearest of advice, he must have known that his work had to be full-time work "in a reasonably conventional sense". He knew, or should have known, that work done in the UK on substantive duties was highly problematic. He also knew that he had available advice to clarify or amplify anything where he had doubts. Against that background, the FTT considered that Mr Daniel had concentrated on the 90-day test, had relied upon the fact that he had had an extremely good year, but never bothered to re-appraise his work pattern. His attitude was that it was more for Arthur Andersen to get right than for him to do anything.

Finally, at [163], the FTT rejected the suggestion that Mr Daniel had given Arthur Andersen more information that had not been recorded by them.

70. In the light of these findings of the FTT in relation to the negligent conduct of Mr Daniel, I cannot conclude that, even if the approach to the issue of Arthur Andersen's negligence were properly to be regarded as a procedural irregularity, any injustice could be said to have flowed from it. The conclusion of the FTT was that, irrespective of any negligent conduct by the adviser, Mr Daniel was himself guilty of such conduct. The terms of s 29(4) TMA are satisfied therefore in any event. Mr Gordon argued that the finding in relation to Mr Daniel alone was itself tainted by the procedural error. I do not accept that argument. The FTT was careful to consider Mr Daniel's position in isolation, whilst acknowledging that the context was one in which the advice he had received had not been clear in all respects. Any challenge to the FTT's findings cannot be vitiated by the alleged procedural irregularity; any challenge to those conclusions can properly be made only by way of appeal.

71. Accordingly, I do not consider that it is in the interests of justice to set aside the Decision on the basis of the FTT having reached a conclusion of the question of negligent conduct by looking collectively at the conduct of Mr Daniel and Arthur Andersen, as well as at the sole conduct of Mr Daniel. I also dismiss the alternative course suggested by Mr Gordon, namely that I should set aside that part of the FTT's Decision that related to the collective conduct. In that way, he argued, at least an appeal in that respect would not be required. I decline to do so, on the basis, first, that I have concluded that there was no procedural irregularity in that respect, and secondly, that if the Decision is to be the subject of an appeal, it would be in the interests of justice for the whole of it to be considered by an appeal tribunal.

Decision

72. I refuse Mr Daniel's application to set aside the Decision in whole or in part:

(a) on the ground of the failure of the FTT to consider the application to admit the 1994 documents as new evidence, or the failure to take account of that evidence, on the basis that, although I accept there was a procedural irregularity in this respect, it would not, for the reasons I have given, be in the interests of justice to do so; and

(b) on the ground of unjustified expansion of the issues to include the possible negligent conduct of Arthur Andersen, on the basis, first, that there was no procedural irregularity, and secondly, if there were a procedural irregularity, it would not, for the reasons I have given, be in the interests of justice to do so.

Application for permission to appeal against this decision

73. 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.

Application for permission to appeal against the Decision of the FTT released on 10 February 2014

74. This document notifies the parties that the Appellant's application for the Decision released on 10 February 2014 ("the Decision") to be set aside has been unsuccessful. Any party dissatisfied with the 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 25 September 2014