



TC03312

Appeal number: TC/2011/01653

Capital Gains Tax - Whether the Appellant's employment in the tax year 1999-2000 involved "full-time work abroad", and thus sustained his claim to be non-UK resident for the year - whether the Appellant had been responsible for "negligent conduct" in filing his relevant tax return and claiming to be non-UK resident, so validating the assessment that was otherwise "out of time" - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL DANIEL

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
CATHERINE FARQUHARSON**

Sitting in public at 45 Bedford Square in London on 11 to 19 November 2013

Robert Venables QC, Keith Gordon, Ximena Montes Manzano and Oliver Marre, counsel, on behalf of the Appellant

Akash Nawbatt and Christopher Stone, counsel, on behalf of the Respondents

DECISION

Introduction

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1. This was a hard-fought residence Appeal involving principally two relatively simply-stated points.

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2. The first was whether the Appellant could establish that he had left the UK and worked full-time abroad for the whole of the tax year 1999-2000. It was common ground between the parties that if the Appellant satisfied that test then he would be non-UK resident for the relevant year, and thus exempt from UK capital gains tax on a large capital gain, and also common ground that there was no other basis on which he could sustain the claim to have been non-resident.

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3. The second fundamental issue, rendered relevant by the fact that HMRC had failed to make a discovery assessment within the 6-year period, was whether their later assessment could nevertheless be sustained. This required HMRC to demonstrate that the claimed under-assessment of tax for the year 1999-2000 was “attributable to negligent conduct” on the part of the Appellant or those acting on his behalf in completing his tax return and in claiming in that return that he had been non-UK resident.

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4. There were in fact a considerable number of more minor points, all of which we will deal with in due course, but the two points just summarised are clearly the important ones in this case.

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5. With a view to indicating the significance of the case, we will mention that the discovery assessment assessed capital gains tax in respect of a gross gain of approximately £20 million, and income tax in respect of £5 million. The capital gain resulted from the sale of shares or options in Morgan Stanley that the Appellant had acquired whilst formerly working there, and that were realised in March 2000. Matters of quantum were not before us in this Appeal and so there is no need to make further reference to those figures, save to mention that in all likelihood they were both wrong. It very much seemed that the assessment to income tax was based on the erroneous supposition on the part of HMRC that equivalent income might have arisen in the year 1999-2000 in respect of zero-coupon securities, to that that arose in the following year. It appears now that no zero-coupon income arose at all in the year 1999-2000, and that indeed the assumption as to the level of such income in the following year was wrong as well. So far as the capital gains assessment was concerned, we believe now that the suggested gain of £20 million was the gross gain, giving no deduction for any base cost, and HMRC has indicated that there will have to be a discussion as to whether, and if so what amount of, cost should be deducted in computing the chargeable gain if the gain is shown to be chargeable. Beyond thus recording that the amount of tax at stake was significant, we will make no further reference to any matters of quantum.

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6. There are, however, four points that it is worth flagging in this Introduction.

7. The first relates to burden of proof. The Appellant contended that it was actually for the Respondents to bear the burden of proof to demonstrate that the Appellant had been UK resident in the relevant year; in other words to demonstrate that he had not worked full-time abroad. Our decision on the legal issue concerning
5 burden of proof is that, while we must deal with various relatively minor points in connection with the validity of the discovery assessment, if we conclude that the discovery assessment was valid (as indeed we do), the burden of proof then falls on the Appellant to establish that he was not UK resident for the period, not for HMRC to establish the reverse. The point that we flag at this stage, however, is the
10 important point that, even if that conclusion is correct, the burden of proof in relation to the separate issue of whether there was negligent conduct on the part of the Appellant or those acting on his behalf in his claim to be non-UK resident in his tax return falls on HMRC. Both parties accepted that HMRC would fail in demonstrating negligent conduct if the Appellant had had an honest and tenable claim
15 for making his claim that he had been non-resident. In order to sustain their contention therefore that there had been negligent conduct, HMRC would accordingly have to demonstrate something along the lines that the Appellant knew, or ought to have known, that his claim to have been non-resident was decidedly doubtful. Whilst, thus, HMRC's task in this regard was not strictly to demonstrate that the
20 Appellant had indeed been UK resident, it came close to that.

8. Accordingly the first important point is that we are going to have to address the facts in relation to the Appellant's residence status on the basis that for one purpose the burden is on the Appellant to establish non-residence, and for the other purpose
25 the burden is effectively on HMRC virtually to establish that he was resident, and that when filing his tax return the Appellant knew or ought to have known that.

9. The second point that we must flag is that, whilst normal appeals before the First-tier Tribunal deal only with the strict legal position, as opposed to "legitimate expectation" type points that are reserved for judicial review (such that we would not normally be able to allow an appeal on the basis that an appellant had met the conditions for establishing non-UK residence set out in HMRC's publication IR20), this case is an exception to that normal position. It was again common ground
30 between the parties that if the Appellant had sought to act on the guidance given in IR20 (as he had done) then provided that he had a tenable claim to have satisfied the criteria laid down in IR20 in paragraphs 2.2 and 2.3 of that publication, he could not be said to have been responsible for negligent conduct in making the relevant claim of non-residence in his tax return. In thus addressing the negligent conduct issue, we will have to address the issue of whether the Appellant had relied on, and satisfied, the
35 criteria laid down in the relevant paragraphs of IR20, regardless of whether those paragraphs faithfully reflected the strict legal position.
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10. The third preliminary point is to indicate that there are essentially three grounds on which HMRC suggested that the Appellant had failed to establish non-residence.
45 The broadest was simply that the time spent under his contract of employment was not sufficient to sustain the claim that he was employed full-time abroad. The second was the feature that some substantive duties had been performed in the UK and that the level, and the particular significance, of those UK duties also undermined the claim that the employment was one that was in substance performed abroad. The
50 third point was a transitional point to the effect that, even if in later months of the year

1999-2000 the Appellant was working “full-time abroad”, he did not satisfy that requirement at or before the commencement of the relevant tax year, so that he failed to establish full time work abroad for the whole tax year on that transitional point, and that would have undermined the claim to be non-resident for the entire year.

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11. The fourth introductory point explains why this case is a difficult one for us. There was evidence to the effect that the Appellant had worked full-time abroad but this consisted simply of the claim that he had worked full-time abroad by the Appellant, and a claim principally advanced (on some of the relevant points) in oral evidence during the hearing. That evidence was not however backed up by our having sight of a single written document of any sort (fax, e-mail, records of phone calls, any sort of time sheets or any copy of any presentation made to any potential customers of the Appellant or of the company that he formed). We did not doubt that the Appellant had been engaged throughout the year in one highly-significant transaction in which his contribution was almost certainly vital. We also accept that he was involved with a few other activities of some, but minor, significance. The difficult question that we have to answer is essentially whether his role in the major transaction that we have just referred to was not only a crucial role, but whether the role, and thus the work in the employment as a whole, was full-time work abroad. There are various factors that throw considerable doubt on the proposition that the work was full-time, and thus much depends on the credibility of the Appellant’s evidence, and the task of balancing that evidence against the factors that throw doubt on the evidence.

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12. Our conclusion is that the employment was not one the duties of which were performed full-time abroad. There are essentially three reasons for this conclusion. During the majority of the year, the Appellant was so often travelling (usually between London and Brussels, or London and Nice) that periods “not working” in London (or elsewhere) in countless weeks meant that the work for the week could only have been full-time work were the amount of work undertaken in the remaining days to have been at an improbably intense level. For the balance of the year, when the Appellant was not travelling and not regularly in London but living permanently at his holiday home in the south of France, often with his wife and children living with him, the reasoning is different. In this situation we still consider that the nature of the work in the project with which he was principally engaged, and the Appellant’s realistic work role in relation to that project, balanced against the attractions of being with the family at the holiday home, again rendered it extremely improbable that the continuous work hours that the Appellant claimed to have dedicated to the project were remotely realistic. Thirdly, when the two most significant contributions made by the Appellant to the project in the year were made at crucial meetings actually in London, and we have good grounds to suspect that more preparatory work in London was done than was conceded, we even have strong concerns that the requirement of the job being substantially one to be performed outside the UK was not met either.

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13. On the “negligent conduct” issue we also conclude that the Appellant made his claim of non-residence without reviewing at the time (many years before he eventually had to seek to do so) how much time he had dedicated to his employment as a whole, and whether important work in the UK should also be taken into account. Since these vital factors appear to us to have been completely ignored when the claim

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was made, we consider that he, or those acting on his behalf, were responsible for “negligent conduct”.

The evidence

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14. Extensive evidence was given during the hearing. The Appellant was cross-examined at very great length. Other significant factual witnesses supporting the Appellant’s case included:

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- Mr. Giles Mackay, (“Mr. Mackay”) the property specialist who devised the structure of the major transaction (“the Sainsbury deal”) in which the Appellant was also engaged during the period March 1999 to August 2000;
- Ms Shanti Sen, (“Shanti Sen”) managing director of Parkes & Co, a real estate investment banking boutique acting as the principal adviser to J.S. Sainsbury Plc (“Sainsburys”) on the Sainsbury deal;
- David Merchant, formerly of Morgan Stanley, the person with day-to-day responsibility at Morgan Stanley for Morgan Stanley’s role in structuring and underwriting and marketing the bond issues made by the vehicle company in the Sainsbury deal, and responsibility for other aspects of Morgan Stanley’s involvement in the Sainsbury deal as a whole;
- Simon Tate of Savills; and
- Marie-Sybille Wolf, (“Ms. Wolf”), personal assistant to the Appellant in Brussels from early December 1999 to December 2000.

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We will refer to the evidence in summarising the facts.

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15. Expert evidence was given in relation to the practice prevailing in 1999-2000 in relation to sustaining a claim to have been working full-time abroad pursuant to the guidance offered by HMRC’s “residence” publication IR20. The expert appearing on behalf of the Appellant was Peter Ashby (“Mr. Ashby”) and the expert on behalf of HMRC, Stephen Symonds of HMRC (“Mr. Symonds”). We will refer to that evidence in due course, though might immediately make the point that on the basis that we decide this case, the expert evidence was of very marginal significance.

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The facts in detail

Background

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16. The Appellant had spent his whole career, following a law degree at UCL in 1981, as an investment banker. He had initially worked for County Bank in London, Tokyo and London again and then in 1985 he joined the swaps department of Morgan Stanley in London. In 1993 he moved to Hong Kong to run Morgan Stanley’s fixed interest business in Asia, and moved in January 1996 to New York to be co-head of Morgan Stanley’s global derivatives business. By this time he and his wife had three children, born respectively in 1989, 1991 and 1994.

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17. In January 1998 he moved back to London with his family, bought a family house in central London and commenced the job of running Morgan Stanley’s European fixed income business, in which capacity he had responsibility for several hundred staff.

18. Fairly shortly after his move back to London, he realised that the new assignment had been a mistake because it effectively amounted to a managerial and administrative role of running the department, rather than a transactional role which he would have preferred. Accordingly he began to conclude that he needed to leave Morgan Stanley and set up on his own. We are not particularly concerned with whether the aim to avoid tax or the business desire to set up some form of financial company in Europe came first, but it was clear that the Appellant knew that he would be able (after February 2000) to realise various stock options and/or shares that he had been awarded during his period at Morgan Stanley, and that the realisations would occasion large capital gains, the tax on which he could avoid if he could demonstrate that he was non-UK resident at the point of realisation.

The Arthur Anderson tax advice

19. Arthur Anderson were the accounting and tax advisers to Morgan Stanley and Morgan Stanley had always arranged that Arthur Anderson would give tax advice to Morgan Stanley executives, particularly when they were transferred from one country to another, with attendant tax complications.

20. On 10 November 1998 the Appellant had a meeting with Noorie Hirji (“NH”) a tax assistant at Arthur Anderson in relation to tax planning. It seems that at the time of this meeting, the Appellant had already been discussing tax planning opportunities with another Arthur Anderson tax specialist named Nigel (nobody could remember his surname), and that the initial thoughts had focused on the possibility that the Appellant might move to Monaco, and commence an employment “managing his own funds”. This was with a view to working full-time abroad, thereby ceasing to be UK resident, and avoiding tax on the Morgan Stanley securities that he would be able to realise after February 2000. The various rules tightening the circumstances in which an individual could avoid capital gains tax in the UK by becoming non-resident and non-ordinarily resident for a short period had been introduced by this time, but the Appellant’s understanding of Nigel’s advice was that because of the long periods during which the Appellant had been non-resident by working in Hong Kong and New York, he still had a window of opportunity to move to Monaco and realise the various shares or stock options. The rules of the various schemes precluded the shares or options from being realised prior to about March 2000, but it was obvious that if the Appellant was to be non-UK resident by March 2000, and to achieve that by working full-time abroad for at least a full tax year, he would need to commence that employment prior to 5 April 1999.

21. NH believed that the advice that Nigel had given to the Appellant had been wrong, and that his periods of residence and non-residence in the past did not give him the “window of opportunity” to become non-resident as he had envisaged by moving to Monaco. NH advised, however, that if he moved to a country which had a double tax treaty with the UK that would render the Appellant non-chargeable to UK capital gains tax if he became resident in the particular treaty country and if he could also demonstrate that he had ceased to be UK resident (so that dual residence could not be reconciled in favour of the UK), he could still escape capital gains tax. The Appellant was obviously annoyed about the wrong advice given earlier and complained that he had done a certain amount of now irrelevant planning. However

NH suggested that the double tax treaties with Spain, Belgium and Switzerland all contained the required provisions that would exclude the Appellant from liability to UK capital gains tax if the gains were realised when he was resident in any of those countries and not resident in the UK, so that his best course was to move to one of those countries.

22. In November 1998 the Appellant formally resigned from Morgan Stanley but he was persuaded to continue working until February in order to ensure a smooth handover to his successor.

23. The formal tax advice from NH was given in a letter dated 19 January 1999. The presently relevant part of that letter that dealt with the requirements for establishing non-UK residence by working full-time abroad were as follows:

“However, there are special rules that apply to employment-related moves, permitting an individual to be treated as not resident and not ordinarily resident in the UK from the day following the date of transfer until the day prior to the date of return to the UK at the end of the employment abroad. In order for these rules to apply, you must meet all of the following conditions:

- *Leave the UK to take up a full time and continuous employment abroad for the duration of a complete UK tax year;*
- *During this absence, any visits (for these purposes, days of arrival in and departure from the UK are usually ignored) made to the UK must:*
 - *total less than 183 days in any tax year, and*
 - *average less than 91 days a tax year.*

In order to create a full time and continuous employment, it will be necessary to create an employer by setting up a company somewhere outside the UK.

[Presently irrelevant text about counting days in the UK for the purposes of the quite separate 91-day test]

I understand that you may spend a relatively significant amount of time in the UK. If you fall foul of the 91-day averaging rule set out above, you will continue to be regarded as resident and ordinarily resident in the UK beyond your date of transfer. Nevertheless, even if you will not be considered a resident under the 91-day rule, it is possible that the UK Inland Revenue will consider that you have not left the UK, or not to be working overseas in a full-time employment, if a significant amount of time is spent in the UK shortly after the “assignment” commences. For this reason, I would recommend that the level of visits (amount and duration) be kept to a minimum. The ideal situation, of course, would be that you do not enter the UK at all during the “assignment” abroad. Given the amount of the tax at stake, I would recommend this.

We have discussed the possibility of you relocating to either Belgium or Switzerland and I have outlined the taxation implications of the capital gains tax treatment and income tax treatment in those countries below.”

24. Initially it appears that the Appellant would have preferred to set up business and work in Switzerland, rather than Belgium. Spain appears to have been rejected at the outset partly because the flight to and from London was too long, when his wife and family were to continue living in London. Furthermore, whilst the Appellant spoke French, he spoke no Spanish. Switzerland was rejected as well in due course because there was a local requirement that new businesses engage three employees, and the Appellant did not want the overhead cost of such staff unless and until he knew that the business would be viable. Accordingly the decision was made to form a company in Belgium, and commence the planning for creating a company, acquiring accommodation and securing Belgian residence status.

25. There appears to be some doubt as to what the Belgian company that was to be formed, and that was to employ the Appellant to render full-time services, was actually to do. The Appellant asserted in giving evidence that the fact that Arthur Anderson were confused about this was irrelevant because he was only looking to Arthur Anderson for tax advice, and he himself would deal with the business decision as to what the company should do. There is no doubt, however, that initially NH was under the firm impression, derived it seems from discussions with the Appellant, that he intended the company to manage his personal investments. NH passed on this information to her Belgian colleague when the Belgian office of Arthur Anderson was engaged to assist him in relocating to Brussels, and one consequence of that was that advice was given that no regulatory requirements would have to be satisfied if the company was simply going to provide the service of managing the Appellant's own investments. It seems however that the plan may have changed by the time the company was set up in March 1999.

26. One intervening event of some significance is that although the Appellant was clearly resigning from Morgan Stanley, he was asked by senior management to take up an appointment as a non-executive director of one of the Morgan Stanley companies. He was led to believe that his role would only involve occasional attendance at board meetings and, as we understand it, that proved to be the case. He attended two in person in the UK and two by phone during the tax year 1999-2000. The present significance of this point was that the Appellant appreciated that he needed to seek assurance from Arthur Anderson that by acceding to the request to act as a non-executive director he would not undermine his tax planning geared to working full-time abroad. His request for further advice from Arthur Anderson prompted NH to write to the Appellant on 12 February 1999, the letter being headed "Full-time Employment Abroad".

27. While the Arthur Anderson letters and incredibly efficient file notes were generally beyond criticism, the letter of 12 February was slightly muddled in that it confusingly set out some of the general tests for full-time work abroad, and sometimes considered the relevance of the separate non-executive role that was the ostensible subject matter of the letter. The relevant passages were as follows:

"There is no statutory definition of "full-time employment abroad" or any court decisions that could form a precedent. As such, the Revenue will look at the particular facts of each case.

5 *In general, where a job involves a standard pattern of hours, and you are
doing what is clearly recognisable as a full working week, the Inland Revenue
will accept that your employment is full time. There is no fixed minimum
number of hours per week for this purpose, but as a general rule the Revenue
often look at a typical UK working week of 35-40 hours. The Inland Revenue
recognises however that some jobs do not have a straightforward structure
and regular hours, or indeed days. In such circumstances the Inland
Revenue typically look at the nature of the job and, if appropriate, take into
account local conditions and practices in the particular occupation and
10 particular country. I have been advised that the standard working hours in
Belgium are 38 hours per week.*

15 *It follows therefore that if you have an employment abroad, but will also be
working in the UK as a non-executive director for Morgan Stanley, then the
Inland Revenue may question whether you really do have a full-time
employment outside the UK. Again, the Revenue will look at the particular
facts in your situation i.e. the actual time spent in the UK, the frequency of
visits etc.*

20 *With regard to the duties performed in the UK, if these are merely incidental
to the performance of other duties outside the UK whilst a non-resident, the
incidental duties will not be subject to UK taxation. However, duties that
cannot normally be regarded as incidental include attendance of directors'
meetings in the UK by a director of the company who normally works abroad.
25 As such it will not be possible to avoid UK taxation on the compensation from
your non-executive directorship with Morgan Stanley.*

30 *However, if your only UK work consists of the board meetings, and you are
not resident and not ordinarily resident here, no UK National Insurance
contributions will be payable provided you attend no more than 10 board
meetings in the tax year, none of which lasts longer than 2 days. If the
periods in the UK for the board meetings exceed this time, UK National
Insurance contributions will also be payable.*

35 *Finally, if your wife were to be a director of the Belgian company that is being
set up by Patrick Derthoo [of AA Brussels], it would be advisable to have at
least four Directors meetings a year in Belgium, which should be documented.
Your wife should be formally invited to attend, although her presence is not
essential."*

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28. We might mention, to save confusion, that we regarded the separate Morgan Stanley non-executive directorship to be completely irrelevant in this case. It took up only the very limited time mentioned above, and was unpaid. The relevance of the passages that we have quoted from the 12 February letter are that some parts of the letter gave an indication of what the Revenue were likely to regard as constituting full-time work. Furthermore the very feature that the letter was slightly confused, switching between the main job and the non-executive directorship, addressing factors relevant to both residence and whether remuneration of the non-executive directorship might or might not be taxable, and touching on "incidental duties" (but not the issue

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of whether any “substantive” duties were fatal) will be something to which we will have to revert.

The formation of the Belgian company and other events in and around March 1999

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29. In February 1999 the Belgian company European Financial Products SA (“EFP”), was formed, with the Appellant holding 99 of the shares and his wife 1 share. Whilst we were never clear of the status of the document in which the following statement was recorded, it was nevertheless said in a paragraph dealing with EFP’s proposed business plan, that “*EFP will aim to provide financial advice in the form of both consulting assignments and transaction structuring advice to financial institutions throughout the world. The main area of focus will be on strategic advice to large global financial institutions. EFP will trade on its own account in financial and finance related instruments. This will involve trading in European, far eastern and US shares and bonds*”. In the event there was no trading of the type just contemplated.

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30. With the aid of Arthur Anderson in both Brussels and London and local Belgian lawyers, a fairly standard employment contract was entered into between the EFP and the Appellant. The contract provided that the Appellant’s working week would be of 38 hours but that the time could be varied. There had been considerable discussion between Arthur Anderson’s London and Brussels offices to ensure that the contract provided for full-time work in the requisite manner, and it is fair to presume that the Appellant was aware of the importance attached to this feature. The contract did not require the work to be performed in any particular place and certainly did not require the work to be performed solely in Belgium. One particular form that had to be completed for Arthur Anderson’s Brussels office to enable them to run the payroll for EFT indicated that none of the Appellant’s work would be conducted outside Belgium, but this was not based on anything in the terms of the contract.

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31. The Appellant also registered in the manner required in Belgium to class him as a resident for tax purposes in Belgium. No further mention was made of this save that we were told that the registration alone rendered the Appellant a resident for tax purposes regardless of how much time he eventually spent in Belgium, so that nothing turned on the fact that he eventually spent relatively little time in Belgium. He also took a lease of premises that were sufficiently large to provide living accommodation for himself and his family in one part of the apartment, and office space in a separate part of the apartment.

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32. Ignoring momentarily the facts concerning the Appellant’s initial arrival to work in Brussels, two other events occurred towards the end of March which emerged to be of great significance.

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33. First, the Appellant and his wife completed the purchase of what appeared to be a very substantial holiday home in the south of France at a place called Ramatuelle, located on the St. Tropez peninsula and about 10 kilometres from St. Tropez. The house was purchased as a holiday home. The family had very much enjoyed a holiday in the same area in the previous year and the house would enable the family to be together in the spring and summer when the Appellant’s permitted time in London would be restricted. The substantial garage to the house had been converted into an

office by the previous owner. Although in 1999 communications were much less sophisticated than they have subsequently become, we understood that the Appellant was able to send and receive e-mails and faxes from his office, albeit with some difficulty.

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34. The other far more significant event that occurred at some time in March 1999 was that the Appellant was approached by his good friend, Mr. Mackay, with a request that he be involved in a project that Mr. Mackay had been working on for some months, and particularly with a request that the Appellant seek to involve Morgan Stanley in the project. Whilst it seems that prior to the invitation to become involved, the Appellant had been unaware of the particular project, and EFT was certainly not set up principally to perform any role in the project, this project became by far the most significant source of work for EFT and the Appellant not only in the tax year 1999-2000, but from March 1999 until August 2000. In March the Appellant was unlikely to have appreciated all the details of the project, so that to summarise the project in outline at this stage will be slightly out of sequence. It will however be clearest to give an outline of the project at this stage. We emphasise strongly that the project was never explained to us fully, and that even the summary that we will now give may be technically inaccurate. This is irrelevant because the only purpose of describing the project and the particular transactions is to give some coherent background information that will assist in describing, and then evaluating, the various roles that the Appellant was called upon to perform. In other words the only thing that is material to this Appeal is that enough of the background is understood to enable us, and any readers of the decision, to have a reasonable picture of the realistic role of the Appellant in the transactions, rather than to describe the intricacies of a very complex deal correctly in all its detail.

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The Sainsbury deal

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35. The project in question, the Sainsbury deal, was an off-balance sheet and seemingly tax-efficient property financing structure devised by Mr. Mackay. For quite possibly a long period prior to March 1999 Mr. Mackay had been working closely with the securitisation, property and tax specialists at Clifford Chance to devise a structure that would enable a major PLC to finance or re-finance some of its principal properties in an attractive manner. The essence of the transaction was that the PLC would select a portfolio of its properties that were first-class properties that were likely to retain their value or rather increase in value, and then transfer these properties to an off-shore Special Purpose Vehicle or "SPV" that would pay for them out of the proceeds of one or more bond issues that the SPV would issue. Having paid the PLC for the properties, the SPV would then lease the properties back to the PLC at a rent designed to service not only the interest on the bonds, but also, over the 23-year life of the bonds, sufficient to provide for the repayment of 40% of the principal of the various bonds. It was then envisaged that the balance of the principal on the bonds would be repaid by resort to the residual value of the properties, still held by the SPV. While it might have been confidently expected that the properties would be worth at least 60% of their initial value at the expiry of the 23-year period, it was obviously necessary for that residual value to be guaranteed in some way in order to secure the appropriate attractive credit rating from the rating agencies for the bonds, and resultant attractive interest rates on the bonds.

36. There must initially have been thought to be problems in the PLC guaranteeing that residual value and in having rights to re-acquire the properties at the end of the 23-year period, presumably because those steps would have undermined the off-balance sheet nature of the proposed financing. Accordingly the initial plan was that an insurance company, Centre Re, would guarantee that the properties would be worth the required 60% of the original principal amount of the bonds at the redemption date, and in return would receive a fee, plus a share of any residual value of the properties, should it emerge that the properties were worth not only the 60% figure, but perhaps considerably more. It was also envisaged that Morgan Stanley, Mr. Mackay and the Appellant would take their remuneration in the form of fees (1.3 million Euro each in the case of Mr. Mackay and EFT) and also in the form of having nil cost rights to acquire the percentage interest in the residual value at year 23 of the properties not flowing to Centre Re. We are not certain that the initial percentages were as follows, but they may have been in the ratio of 50% to Centre Re, 25% to Morgan Stanley (whose role we deal with below) and 12.5% each to Mr. Mackay and EFT (i.e. the Appellant).

37. It is clear that after all his work with Clifford Chance, Mr. Mackay was confident that he had devised a workable and attractive structure that he could commend to a major “property-heavy” PLC, Sainsburys obviously being an ideal candidate. Whilst he was a specialist property financier, his own company was relatively small and Mr. Mackay also realised that the project would never get off the ground unless he could persuade other significant players to perform various roles. He needed, of course, a suitable PLC to adopt the structure and in this respect it seems that Shanti Sen of Parkes & Co was ideal because she had a close relationship with Sainsburys and was simultaneously comparing various possible financing structures for that major client.

38. Mr. Mackay also needed a firm of valuers, and a firm that could be involved in structuring the leasebacks of the various properties, since special terms were going to be required to deal with the feature that the properties would be held in the SPV for a long period, and trading requirements in the period might require modifications to the structure. If therefore the financing structure was adopted by Sainsburys, the leases would have to deal with such matters as possible extensions to superstores over the 23-year period, and the feature of withdrawing one or more stores and substituting others if for some trading reason some stores might have to be removed altogether from the Sainsbury’s business, and extracted therefore from the SPV. While Mr. Mackay was himself able to deal with issues of this nature, he certainly needed expert valuers (again to satisfy the rating agencies, since to some considerable degree the credit standing of the bonds was dependant on the value of the properties) and therefore Savills were engaged. We also understand that Simon Tate of Savills introduced Mr. Mackay to Centre Re, the insurer that was initially selected to guarantee the residual value of the properties.

39. The other key role that had to be filled was of course the requirement to find an investment bank, ready and able to underwrite and market the bond issues. Mr. Mackay knew that he had no experience in this area and that his company could not possibly perform these roles, and so he approached the Appellant, a good friend of his albeit that they had not worked together before. He knew that the Appellant had recently left Morgan Stanley, having previously held a very senior position there.

Other roles emerged later, as we will describe, but the initial role envisaged by Mr. Mackay for the Appellant was for him to secure the involvement of Morgan Stanley, and moreover it seems their involvement on the basis that they would essentially only be remunerated by way of fees paid out of the proceeds of the bond issues (i.e. therefore only if the project succeeded) and by having some percentage of the residual value of the properties, should they be worth more than the 60% figure at year 23.

40. The final feature, of course, was that while the task became somewhat easier as Clifford Chance, Savills, Parkes & Co, the Appellant and Morgan Stanley became involved, the team still had the task of persuading a major PLC to adopt the structure. We were repeatedly told during the hearing that the proposed structure, and in the event the Sainsbury deal, was the first major corporate off-balance sheet property securitisation structure implemented in the UK, and therefore the task of commending the structure to a major PLC was a considerable challenge.

The lay-out of this decision

41. This Appeal revolves principally around the extent of the work undertaken by the Appellant in the relevant tax year, and the issue of whether that work was full-time work abroad. Since there was no objective documentation to back up the Appellant's claim that he satisfied this requirement, we must reach our conclusion via three lines of enquiry.

42. The first is whether time spent in London (when the Appellant himself claimed that he did virtually no work when in London) or time when he was obviously unavailable for work for some other reason, made it impossible or at least highly improbable that his work for particular (but still numerous) weeks could have ranked as full-time work abroad, whatever the meaning of that phrase. In a survey undertaken by the Respondents' counsel, every week of the year to which this line of challenge was applicable (and not just specially selected weeks) were examined and the Respondents' claim was that in week after week, the Appellant could not have performed full-time work abroad on account of time spent in London or otherwise obviously not available for work. In some weeks the Appellant accepted this contention. In others the Appellant claimed that on his general evidence he could have worked extraordinary hours in the days not blocked out by being unavailable for work so that that might have led to 30 hours being worked. The question for us then is whether those claims of intense work abroad were credible.

43. The Respondents' counsel's survey based on periods plainly not available for work was inapplicable to the period from roughly May to September 1999 because for that period the Appellant was not flitting to and from London, but was living continuously at his holiday home in Ramatuelle. There was certainly evidence that he had an office there, and we accept that he did some work there, particularly in discussions with Mr. Mackay who also had a holiday home close by. The main way in which we must test the full-time work claim during the periods of residence at Ramatuelle is to analyse the work roles that the Appellant had, and seek to evaluate whether work on them could possibly have been full-time. In particular the Appellant made great play of the time spent in reading the voluminous documentation, and we need to consider whether this claim was cogent.

44. We also need to evaluate the work actually done by the Appellant in London and to consider whether that undermined the claim that the work was “in substance conducted full-time abroad”.

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45. We also need to consider other evidence given by witnesses other than the Appellant.

46. The format, accordingly, of this part of this Decision is that:

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- in paragraphs 47 to 56 below we will consider the Appellant’s work pattern in the short period between 1 March and 7 May 1999. The principal reason for looking in detail at this period is that it is relevant to the Respondent’s claim that the Appellant did not leave the UK for work abroad until well after the start of the tax year, even if he did so eventually;

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- in paragraphs 57 to 72 we will consider more generally the facts in relation to those periods when the Appellant was periodically in London or otherwise unavailable for work, and the resultant claims by the Appellant in relation to the continuous hours that he might have worked in remaining available days for work abroad in the relevant weeks;

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- in paragraphs 73 to 90, we will consider the different projects, and the roles that the Appellant had to play in relation to the key Sainsbury deal, in order later to evaluate whether those projects and roles could realistically have involved full-time work;

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- in paragraphs 91 to 98 we will summarise the other evidence.

The Appellant’s whereabouts and activity in the early period from 1 March 1999 to 7 May 1999

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47. On 1 March 1999, the Appellant’s contract with EFP commenced, and on Wednesday 5 March he took a morning flight to Brussels, took some clothes with him, moved into his apartment and started to set up his office, and acquire the required office equipment, phones, fax and computers etc. During this period according to his witness statement, he started working on the Sainsbury’s deal, preparing the pitch to Sainsburys or assisting Mr. Mackay in that work. He also arranged meetings with various banks in Geneva. He claimed that he hoped to interest European banks in securitisation transactions, concluding that the US and UK markets were already dominated by the major banks, but feeling that there were opportunities to export similar transactions to the European private banks. He claimed that he worked for 60 hours in this week, though that was clearly a recollection of the time spent, rather than any calculation based on any records.

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48. On Friday 12 March he returned to London, with a view to being with his wife and family over the weekend and then attending a leaving dinner arranged for him by Morgan Stanley on Monday 15 March.

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49. On Monday 15 March he attended an appointment with an ENT specialist since his throat had been giving him trouble and she recommended that he have a fairly urgent operation to remove his tonsils. He still attended the Morgan Stanley dinner on the Monday evening, naturally in some pain.

50. Instead of returning to Brussels, he stayed in London since on Thursday he had the tonsillectomy operation. He explained that this operation could be accompanied by continuing bleeding, which he happened to suffer from and so on the next day he went back to hospital to have the wound cauterised. He was then advised by the specialist that he should convalesce for a period, keeping speech to a minimum. During his final appointment with the specialist on 24 March, she told the Appellant not to travel until 28 March.

51. We should mention that there was some dispute as to whether the appointment on 15 March had been pre-booked, so in other words that he would have been committed to having treatment in the UK if it was required, or whether the appointment was simply booked on the Monday morning because the pain had become worse. There was also slight dispute as to whether the specialist advised the Appellant not to work as well as not to travel until 28 March. Neither of these points was resolved and they are of very marginal significance.

52. On 28 March the Appellant flew to Geneva where he said that he had 10 meetings with banks in 4 days. No written confirmation of the meetings was given to us, and we were told that even if in a few cases there was enough interest to justify a follow-up meeting, the interest soon waned, and no written presentations were made at all. On Friday 2 April, it seems that the Appellant joined a Hong Kong friend, Chris Botsford, who had been appointed as a director of EFT, and who was on a skiing holiday in Switzerland, and the two spent the weekend skiing.

53. On 4 April, the Appellant returned to London, but was very likely met by his wife at Heathrow and the two left for a pre-booked holiday in Mauritius, returning to London on 18 April. The holiday was described as “pure holiday”, in that it was not a trip combining business and holiday, but the Appellant claimed that he worked for about 3 hours a day during this holiday. In the chart that the Appellant’s representatives produced on the final day of the hearing (which we will refer to as “the multi-coloured chart”), that chart claimed that he was working for 1 hour a day during this holiday.

54. At the end of the holiday, the Appellant remained in London on the Sunday afternoon, the Monday and the Tuesday morning, and flew back to Brussels on what (from mobile phone records) must have been a late afternoon flight. Late in the day of Tuesday 20 April, therefore, the Appellant first set foot in Brussels, after his departure on 12 March.

55. The Appellant acknowledged that it had initially been the intention that his wife and children would join him in Brussels at the weekends. This soon emerged to be impractical because of the difficulty of travelling with three young children, but the Appellant accepted the Respondents’ counsel’s suggestion that it was likely that his presence in Brussels on the weekends of 24/25 April and 1/2 May probably resulted from his wife’s initial plan that she and the children would join him in Brussels at the weekends. On Tuesday 27 April the Appellant (and perhaps his wife and children) flew back to London and then flew to Nice on 28 April, returning to Brussels on Thursday 29 April. HMRC’s counsel suggested that since he and his wife had only secured completion of the Ramatuelle property on 31 March and he had not visited it

since then, the travel around 27 to 29 April was all geared to going to Ramatuelle to obtain the keys and check the property. In the following enquiry by the Respondents' counsel as to whether he could have been working full-time in the last two weeks of April, it was demonstrated that if he was not working in the period 27 to 29 April, then he would only have had 3 working days in the earlier week and 2 in the later week, so that it was difficult to conclude that he could have been working full-time abroad in those weeks (or in other words, in the whole of April). The Appellant suggested that there was no evidence that his flight to Nice on 28 April involved a visit to Ramatuelle, and that he might have been working full-time in Monaco. Since no other mention was made of his working in Monaco and it was not immediately obvious where he would have worked in Monaco, we reject this suggestion as unrealistic.

56. We will have, in due course, to address the two questions of whether the above facts undermine the Appellant's claim that he "left for Brussels" and became non-resident on and after 5 March, and also whether during April he can sustain the claim to have been working full-time abroad.

The Appellant's claims as to time spent working, and the general pattern of how time was spent in the rest of the tax year, after 7 May 1999

57. We deal with the substantial residue of the tax year more generally.

58. The Appellant's claim was very simple and general. He claimed that he did little work in London, but that he worked virtually the whole time he was in Brussels. He said that he was generally on his own there and had nothing else to do.

59. Although he had been in Brussels in late April and early May for respectively 6 and 7 full and consecutive days, the pattern changed very significantly after 7 May. In part this was presumably because he very often returned to London at the weekends (his wife no longer being happy to travel with the children to Brussels for the weekends). Whatever the reason, he spent relatively little time in Brussels. In terms of full and consecutive days spent in Brussels, there were 2 in the remainder of May, 3 in June, none in July and August, 3 in September and 2 in each of October, November and December. From 11 July to 17 September, the Appellant appeared to have been present on every single day at Ramatuelle. Taking the longer period from 7 May right through to 28 December 1999 the pattern appeared to be that he was generally at Ramatuelle, but if not he was far more commonly in London than in Brussels. There were a considerable number of full days spent in London, generally over weekends but during the whole year 27 week-days were also spent in London.

60. There was no information from the Appellant as to when his wife and children joined him at Ramatuelle. The Respondents' counsel suggested that as the period from 27 May to 8 June included the school half-term week, it was relatively likely that the family would have been at Ramatuelle for most of that period, and since the Appellant's last visit to London in July was for the weekend of 10/11 July, with no further visit to London until Friday 17 September it seemed equally likely that the family would have been with the Appellant in Ramatuelle for much of that period, since it included the school summer holidays. Had that not been so he would not have seen his wife and children for a very long period.

61. The Appellant's evidence in relation to the time spent working while he was at Ramatuelle was that certainly when the family were there he would work quite extensively. At one point he said that he worked early in the morning, often rising at 5 6.00 a.m., and also late in the afternoon or evening. At another point, he said that he worked somewhat more extensively, merely having lunch with the family. The Respondents' counsel referred to a reference in a letter to HMRC from Deloitte (as successors to Arthur Anderson) which had explained that the Appellant could not attend one particular meeting in London "because he was on holiday in the south of 10 France", and the Respondents' counsel also referred to the fact that in all early discussions with HMRC, and to a considerable extent in his witness statements, there had been less of a claim about full-time work when the Appellant was at Ramatuelle, and certainly less claim about time spent reading the voluminous documentation (to which we will refer below). For present purposes, we simply record the Appellant's 15 own claims. We will be better able to evaluate those claims after considering the Appellant's various roles in relation to the Sainsbury transaction, and the other minor projects, and after recording evidence from other witnesses.

62. We need now to deal with two further factors as to how time was spent by the 20 Appellant in the residue of the tax year after 7 May.

63. Firstly just counting days for the entire tax year, the Appellant spent 65 full days in the UK, and 61 part days (on account of travel). He spent 46 full days and 44 part days (on account of travel) in Brussels. In HMRC's colour chart that 25 illustrated where each day had been spent, travel days were generally split on a 50/50 basis. This was because the Appellant had only retained flight details for 8 flights during the year. In the case of those 8 flights for which times or flight numbers were available, all or the great majority revealed that when the Appellant flew out of Brussels (generally to London) he took an early morning flight, whilst when he flew 30 out of London, he took a late afternoon or evening flight. HMRC's colour chart reflected this feature, where the flight times were known, by showing the majority of the day being spent in London. We cannot know for certain that the same morning and evening pattern was generally followed (there being no details for all other flights) but obviously if it was, then the time spent in London would realistically have 35 been increased, and that in Brussels reduced (in contrast to the 50/50 split actually shown on HMRC's colour chart).

64. The other points to mention relate to the Appellant's description as to the work that he did do in London, the reason he claimed that he did little or no other work than 40 that revealed, and the claim that he spent much of the non-London time (including most of the travel, and the time spent waiting at airports) working. The time spent working during flights and while waiting at airports was said to have been spent reading the voluminous documentation in relation to the Sainsbury deal.

65. The Appellant's evidence in relation to the time spent working in London was 45 that he had formal meetings on 2 days, and beyond that he spent about 5 days working in London. So far as the meetings were concerned, the claim was that on each of the 2 days when there were meetings, matters had been so arranged that he could attend a Morgan Stanley board meeting (generally a fairly short affair) and also attend an 50 important London meeting in relation to the Sainsburys deal. The first of the key

Sainsburys meetings was on Monday 24 May, this being the meeting at which Mr. Mackay's team sought to persuade Sainsburys to adopt the structure that Mr. Mackay had devised. Whilst the principal players at that meeting were almost certainly Mr. Mackay and Shanti Sen, because they were the ones particularly familiar with the complex structure and the tax planning, the Appellant was also present at that meeting. The second relevant Sainsburys meeting was on Monday 8 November, this being the meeting at which the team, and probably the Appellant leading the discussion, had to persuade Sainsbury that the proposal for Centre Re to guarantee the residual property values should be dropped because of the problems occasioned by Centre Re that we will refer to below and that Sainsburys should take on that role themselves, confining their resultant interest in the upside residual values of the properties in the SPV to just less than 50% in order to preserve the off-balance sheet nature of the financings.

66. It was not clear how the Appellant had arrived at the claim, or admission, that he had spent 5 further days working in London. We will mention marginal evidence from other witnesses below, but at this point simply record that the 5 days probably represented an aggregation of work undertaken on many more days than 5, rather than simply 5 full workdays.

67. 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 company was a non-UK resident company. We were unclear why the Appellant had formed this view, and it is not particularly material. Speculating, it may have been because the attention to London work in the Arthur Anderson letter quoted in paragraph 27 above had concentrated on his role as a non-executive director of a Morgan Stanley company, and perhaps that company had been a UK company. It may have been because he had suffered no UK tax concerns when earlier working basically in Hong Kong, should he have returned to work in London for about a month during a tax year. 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.

68. The Appellant's explanation was that he worked full-time in Brussels and on flights because he had nothing else to do, but when he was in London, he wanted to be with his wife and family. He was of course in London on 27 weekdays when, as the Respondents' counsel pointed out, his children would usually have been at school, but nevertheless that was why he claimed not to have done further work in London. He did accept that he would take in-coming phone calls relevant to his work, and perhaps (when obviously required) make calls himself, but beyond that he claimed to have done virtually no work. He could also send and receive e-mails since he had an available laptop computer. Any documents to be read were, however, not read but might be read on the return flight.

69. This claim led to a further enquiry as to why, therefore, the Appellant had worked so extensively when at Ramatuelle, particularly when the family were there

with him. The explanation offered was that he had only been in London for a few days at a time, and so he sought to dedicate most of that time to the family. When the family were at Ramatuelle for long periods, it was unnecessary to restrict his working time in a similar manner because he saw everyone daily.

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70. In referring in the previous paragraph to the suggestion that the Appellant worked extensively whilst at Ramatuelle, we must refer to the Appellant's multi-coloured chart produced on the final day of the hearing. This chart was designed to show, so it was claimed (though the Appellant himself was never asked to comment on whether the numbers inserted in respect of each day were realistic), not the maximum time that the Appellant could have worked abroad, but a summary or suggestion of the time that he might realistically have worked on each day. From 4 July to 16 September, this chart records 10 hours being worked on every single weekday and 3 on all the weekend days, i.e 56 hours a week during that period when the Appellant (and for most of the time doubtless, his family) were in Ramatuelle. The purpose of the chart was to provide a running total, week by week, of the average hours that it was suggested that the Appellant had worked in each week, and it ends up implicitly suggesting that 35 hours had been worked, on average, in each week. If that figure is then adjusted to credit the Appellant with 8 weeks holiday in the year, then the weekly average rose from 35 hours to 41 hours.

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71. We will in due course have to decide whether we consider that the claim that the Appellant worked for 10 hours on every single weekday during the relevant period in the summer spent at Ramatuelle was credible.

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72. We will now leave the subject of the Appellant's whereabouts and the Respondents' challenge as to whether, purely on an "available time" basis he could have worked full-time abroad, and deal with the work topics that were attended to throughout the year.

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A general description of the various categories of work that the Appellant undertook in the tax year 1999-2000

73 By far the most significant work undertaken by the Appellant for EFP in 1999-2000 consisted of his work on the Sainsbury deal. Beyond that his work included:

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- attending on various European banks endeavouring, but failing, to interest them in securitisation deals;
- assisting in a small capital raising for a UK company called DecisionSoft;
- making visits to consider a few possible property investments in Shannon and near Alicante; and
- a small project (involving it seems little work and anyway spanning the tax years 1999/2000 and 2000/2001) trying (in the event unsuccessfully) to interest the European Community agricultural specialists in some sex testing device for meat devised by an American company called XY Inc.

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The much more significant work on the Sainsbury deal involved principally the following aspects of the deal:

- persuading Morgan Stanley to join the project team and deal with, and underwrite, the bond issues;
- very limited involvement in the early period (around 11 May 1999) when Centre Re were initially approached to provide the residual value guarantees, but more involvement with Centre Re in August and September, particularly in supporting Mr. Mackay, when Centre Re tried to re-negotiate the deal and increase their share of the upside residual value, to the detriment of Mr. Mackay's and the Appellant's shares;
- involvement, when the relationship with Centre Re broke down, in suggesting that Sainsburys could guarantee the residual value, provided that their percentage interest in the upside year-23 value did not exceed 49.9% for off balance sheet purposes, and securing Sainsbury's acceptance of this alternative value guarantee solution;
- dealing with Morgan Stanley in relation to an interest swap entered into in late 1999, enabling Sainsburys to lock into an acceptable interest rate, should movements in interest rate move adversely against Sainsburys between that date and the date of actually completing the transactions, and issuing the bonds; and
- the transaction that secured to Mr. Mackay and the Appellant their percentage interests in the upside residual value at year 23.

While no mention had been made of spending countless hours reading the transaction documentation in the witness statements, in oral evidence it was claimed that the Appellant spent an enormous amount of time reading and considering the documentation, and that it was that element of the work that he could so easily do wherever he happened to be.

74. We will not give our conclusions at this stage in relation to the time spent on each of the elements of work just summarised, but we will give further facts in relation to each which we will have to weigh up in our decision.

75. We accept that the Appellant will have had meetings with some European banks, but consider the time spent on these marketing trips was very modest, and without any detail of the actual meetings, it is difficult to weigh up the time spent. The meetings in Geneva that we referred to in paragraph 52 above were followed by a weekend skiing with Chris Botsford, and were in any event not in the relevant tax year. The Appellant had made no mention in meetings with HMRC or in his witness statements of meetings in Milan with Italian banks, albeit that he had listed the various countries in which he had visited banks. Nevertheless he claimed that a trip to Milan from 10 to 14 May 1999 was for the purpose of meeting Italian banks. He still failed to name any banks and although he said "*No, I don't think so*", when asked by the Respondents' counsel whether the trip to Milan was in fact one with his wife, he seemed vague about this. That trip sounds not to have been a serious business trip.

76. There was a trip in early October, with two days of meetings with Irish banks, again without any detail, followed by a weekend with relatives.

77. We attach very little significance to the capital raising for DesisionSoft. It seems that the Appellant only made about 2 phone calls to each person on a short list

of people who he thought might invest in the company and some of those did invest. His role was however modest as was the fee that he charged for his limited involvement.

5 78. The role in considering property investments was also modest. He made a trip
to Shannon in November, and whilst accompanying his son to Alicante and La Manga
in December, when his son was participating in a tennis camp, the Appellant said that
he reviewed some possible property investments. However, he also said that he was
10 making calls on the Sainsbury deal and reading documents while his son was playing
tennis.

15 79. The work for XY Inc in relation to trying to secure a role for that company in
enabling the EU agricultural specialists to detect the sex of the animals from meat
samples, involved a full week's trip to Denver, albeit that some of the week (Thursday
and Friday) may have involved skiing in Aspen. Little work then appears to have
been done on the project (certainly in the relevant tax year). We were shown a
report prepared by Ms. Wolf prepared much later. She had had previous experience
of working with EU officials, and so she had sought to make appropriate contacts with
20 those officials in order to progress the plan that XY Inc could offer its technology to
the EU. Most of the report indicated that the officials had largely ignored the
approaches, and there was little evidence of the Appellant having further involvement
with that project.

25 80. We turn now to the Appellant's various roles in relation to the Sainsbury deal.

81. His key role, and the reason why Mr. Mackay initially contacted him, was to
secure the involvement of Morgan Stanley. No evidence was given as to how much
persuading was required, and therefore as to the time involved in this particular
30 aspect. It was, however, clearly vital.

82. At the early point when Centre Re were first approached with a view to their
providing the residual value guarantees (on 11 May 1999) the Appellant appears to
have had little involvement with the initial proposal. The contact with Centre Re
was provided by Simon Tate of Savills, and it seems reasonable to suppose that Mr.
35 Mackay was principally involved in explaining the envisaged role.

83. There is no doubt that when the Centre Re relationship deteriorated, Mr.
Mackay and the Appellant (both of whom were living in or near Ramatuelle by the
July and August dates when the problems emerged) had significant conversations
40 about defending their respective percentage shares in the residual value of the
properties that Centre Re appeared to be trying to reduce. The whole crisis resulted
from Centre Re being ignorant of the percentage shares that Morgan Stanley, Mr.
Mackay and the Appellant respectively had in that residual value, but there was no
doubt that the Centre Re objective was to diminish what happened to be the shares
45 held by Mr. Mackay and the Appellant, and to increase their own share.

84. Although at one point the problem was thought to have been solved, in
September the problem revived and Mr. Mackay had to write a firm letter to Centre
Re which recorded his whole role in relation to the project and the structure,
50 emphasising how he had been the architect of the structure, and why therefore he and

the Appellant deserved their respective interests. This approach obviously failed to solve the Centre Re problem.

5 85. Whilst the Appellant had undoubtedly had several or perhaps many conversations with Mr. Mackay in relation to the Centre Re issue during the summer, it appears that contact with Centre Re itself cannot have been that regular because one of the September complaints had been about Centre Re's reluctance to engage in further discussion.

10 86. There is no doubt that the Appellant had a very significant role in the meeting on Monday 8 November, at which Sainsburys were approached with a view to their adopting the Appellant's suggestion of providing the residual value guarantee themselves in place of Centre Re. There was no information as to whether the Appellant had been involved in pre-meetings, prior to the Sainsburys meeting on 8
15 November, but we do note that if preparatory discussions had been held formally or informally before that meeting, the Appellant was in London for all but one full day and two travel periods in the previous week from 1 to 8 November 1999.

20 87. The Appellant was also involved in discussions with Sainsbury and Morgan Stanley in relation to an interest rate swap. This was designed to enable Sainsburys to lock into acceptable interest rates at the point the swap was written so that if by the projected time at which it was expected that the bonds would actually be issued interest rates had generally risen, the swap would still result in the net interest rate being at the fixed and acceptable level. The Appellant said that he repeatedly looked
25 at interest rates with a view to considering the optimum time at which to enter into the swap, though since Morgan Stanley were more directly involved with Sainsburys in relation to the swap it is difficult to be definite about the extent of the Appellant's role.

30 88. The final significant transaction with which the Appellant was concerned in relation to the Sainsbury deal was the transaction (or transactions) that gave Mr. Mackay and himself the respective 12.5% shares of the residual value. We should record that while initially nothing was paid for these rights, and similarly Morgan Stanley paid nothing for its equivalent right to 25% of the residual value, the rights
35 have emerged to be very valuable. The Appellant informed us that while many years have yet to pass before 2023, the value of the rights currently held by Mr. Mackay and the Appellant together is about £100 million. Whilst this figure was mentioned to us presumably to emphasise the significance of the Sainsbury deal, and the significance of their rights to the residual values, we are unclear whether or not much thought had
40 to be given to the actual contract that conferred their rights on them. In cross-examination, prompted by a question as to whether independent lawyers were engaged to protect the validity and terms of their respective rights to the residual value, Mr. Mackay gave the following answer:

45 *“No, I had – we had, I had another firm looking at that which was – golly, they became - they changed names three times since. Essentially a property company - there wasn't that much to do on the residual piece to be honest and remarkably little conversation about the residual piece. The structure
50 involved somebody holding the residual piece, but in terms of doing a lot of planning around that there wasn't much effectively – which was I suppose also*

defined by the fact that there was zero cost base for that residual piece of real estate.....”

The time spent reading and commenting on documents

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89. Although there was less reference made to this in the Appellant’s witness statements and in early meetings with HMRC officers, during cross-examination the Appellant emphasised the extensive nature of the documentation, and the time he spent reading it. This seemed effectively to be his “in-fill” work in that it was something that he could do when travelling, when on trips to Geneva, Dublin, tennis camp in Alicante etc. At one point during his cross-examination he produced a calculation indicating that the documentation in relation to the Sainsbury deal ran to 11,000 pages. He then indicated that on reading pages at 3 minutes a page it would have taken 72 days of reading, or 14.4 weeks of solid reading, to complete the task. He calculated that 72 days represented 1/3 of a working year. When we worked through the list of documents, however, it became obvious that there were many that the Appellant would not have read, when, for instance, documentation to deal with the leasebacks of numerous properties all conformed to a standard draft. The Appellant then said that he skim-read many but had to read others, and sometimes up to five drafts of others, at much greater length.

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90. We specifically put to the Appellant our reluctance to accept that a senior merchant banker, particularly one entirely conversant with the terms of bond issues (most of the terms being standard terms) would need to have read, or would have read, anything approaching all the documents. We also said that we supposed that when he had been heading teams at Morgan Stanley, his role would have been that of an overseer with the principal relationships with the clients, and not the role of the person responsible on a day-to-day basis for the detail. The role would obviously have extended to “fire-fighting” when difficult issues and problems arose. His response was that matters were very different when, as here, the detail affected him personally, in the respect that his residual value interest gave him such a potentially valuable asset. When that was so he did read all the documentation.

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The evidence provided by other witnesses

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91. We need only refer to the evidence given by four of the witnesses of fact, other than the Appellant.

92. Mr. Mackay confirmed that the Appellant had been extensively involved with the Sainsbury deal, particularly in relation to those aspects of it that we have dealt with in paragraphs 73 and 80 to 88 above. The Appellant’s single most important contribution had been to secure the participation of Morgan Stanley, but Mr. Mackay and the Appellant had discussed many other topics.

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93. Mr. Mackay indicated that his firm had not simply been involved with the Sainsbury deal during the relevant year. They had been involved with other quite distinct transactions, but Mr. Mackay had managers or assistants to do most of the work on other topics so that most of his time had been spent on the Sainsbury deal. His involvement had been rather more substantial than the Appellant’s of course because he had devised the structure in the first place with the considerable aid of

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Clifford Chance. He was also the pivotal member of the team, with the key relationships with Shanti Sen, in due course Sainsburys, Simon Tate as well as the Appellant, so that his involvement had been much more all-embracing.

5 94. Mr. Mackay confirmed the Appellant's account that he and the Appellant both
had houses close to each other in London and at Ramatuelle. He also spent much of
the summer at his holiday home with his young children. Mr. Mackay liked sailing
and after the Sainsbury deal he and the Appellant jointly bought a powerboat, he
10 already having a sailing yacht. Mr. Mackay confirmed the Appellant's account that
during the summer they often discussed the problems with Centre Re and other
matters as they arose on the Sainsbury deal, more usually at the Appellant's house
because Mr. Mackay's house only had office facilities in a corridor. They also met
in London (obviously not during the summer period) but Mr. Mackay said that that
was normally for a purely social Sunday drink at a pub.

15 95. In terms of Mr. Mackay's far more extensive involvement in the project, he
confirmed that when the drafting meetings commenced, he attended numerous
meetings at either Clifford Chance or Morgan Stanley dealing with both substantive
points and perhaps pure drafting points on the vast documentation. The Appellant
20 attended none of these meetings. We were not told when most of the detailed
drafting was done. Since however the swap was entered into in late 1999, and the
deal closed on 20 March 2000, we imagine that most of the drafting would have been
dealt with in the period October to March. We note that in January the Appellant was
away in the first week on what he confirmed was almost certainly a skiing holiday
25 near Geneva, and away in the first week of February on the Denver trip in relation to
XY Inc, and on holiday in Barbados and Calgary in the two weeks surrounding the
end of February and the beginning of March.

30 96. There were witness statements from various senior people at Morgan Stanley,
but the only statement to which we need refer was that by David Merchant, formerly
of Morgan Stanley, who had had the day-to-day responsibility for the bond issues in
the Sainsbury deal, as well as several other such issues, such as the interest rate swap,
in the year. He confirmed that on average throughout the year, he had phone or e-
35 mail contact with the Appellant *"an average of a couple of times a week, but at
various points that contact would have been multiple times per day, particularly
during the summer of 1999 when there were a number of significant problems with
the involvement of Centre Re which Paul was heavily involved in trying to resolve and
in the closing stages of each transaction."*

40 97. Shanti Sen of Parkes & Co confirmed the Appellant's role in relation to the
transaction but also rather emphasised the more key and central role by Mr. Mackay.
There was some inconclusive discussion as to whether she remembered a further, and
thus third, meeting that the Appellant attended with Sainsburys in London. More
relevantly, she recorded that, following the reference to one meeting at Sainsburys
45 *"Thereafter, Mr. Mackay only attended all meetings with Sainsbury which were
innumerable. Mr. Mackay and I probably met twice a month on average and on
innumerable occasions as the due diligence intensified towards the end."*

50 98. The final witness evidence to which we must refer is that from Ms. Wolf. We
should indicate immediately that we are not particularly influenced by it. She was

engaged in December 1999, and confirmed as permanent in January 2000, whereupon she acted as the Appellant's Brussels personal assistant until the liquidation of EFT in December 2000. The first relevant evidence was that when the Appellant was in London she would phone him and send him, and receive from him, e-mails, and she assumed therefore that he was working fairly extensively in London. Secondly she said that in the month of July 2000 (i.e. in the following tax year), neither she nor the Appellant did much work in accordance with the French, and presumably the Belgian, tradition. We must, however, immediately record that while the Appellant of course confirmed that he took and perhaps made some business calls while in London, Ms. Wolf would not have been in a position to know whether the Appellant was working at all extensively in London. Equally she would not have known what the Appellant was necessarily doing when in Ramatuelle in July 2000.

The second Sainsbury deal

99. We have hitherto referred to the Sainsbury deal as one deal. In fact there were two, in that following the successful completion of the first on 20 March 2000, a second deal was implemented. The work on this commenced in April 2000, and the deal was launched in August 2000.

100. Since the second deal was implemented in the following tax year, its relevance was rather more marginal. The Respondents' counsel did, however, claim (and demonstrate to a considerable degree) that the Appellant had equivalent problems to those suggested in relation to the year 1999-2000, in showing that he could possibly have worked full-time abroad during the second tax year. In other words there were again periods in the vast majority of the weeks when, on the Respondents' calculations, the Appellant could not possibly have worked full-time abroad, and that left too little time abroad for work in the remaining days to satisfy the full-time working abroad test. Moreover since work on the second deal ended in August 2000, and there were then four months during which EFT remained in existence (it being liquidated in December 2000), there was a four-month period in that year when effectively no work appeared to have been done under the contract that still subsisted. The Appellant then claimed that when he returned to the UK, and ostensibly resumed UK residence in February 2001, he was entitled to "split year relief" since he claimed that his full-time employment abroad claim enabled him to claim to have been non-resident for the whole period from 5 March 1999 to the February 2001 date of return. There were therefore two potential additional problems in relation to that claim for the second tax year in that for four months, no work appeared to have been done under the continuing employment. And then, following the December liquidation of EFT, the company no longer existed and there was no longer an employment relationship, but approximately two months elapsed before the Appellant returned to the UK. The Appellant's counsel suggested that that gap between cessation of employment and return might not be fatal to the continued application of the protection of paragraphs 2.2 and 2.3 of IR20 and indeed "split year relief", but even if that contention was sound, it failed to address the earlier problem of seemingly no work being done for the four months preceding the liquidation whilst the contract did still subsist.

101. The limited relevance of these points, as advanced by the Respondents, was that we might be more inclined to conclude that there had been negligent conduct in

relation to the return for the period 1999/2000 if we concluded that the similar claim for split period relief in 2000/2001 was even more dubious.

The expert evidence

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102. The assessment, against which this present Appeal had been filed, was a discovery assessment. One of the defences to a discovery assessment is provided by section 29(2) Taxes Management Act, 1970 which provides that where the relevant under-assessment to tax in respect of a tax return was “*attributable to an error or mistake in the return as to the basis on which [the taxpayer’s] return ought to have been computedthe taxpayer shall not be assessed.....if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.*”

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103. On account of this available defence to assessments, it was thought by the parties, the Appellant in particular, that we might derive some assistance in applying HMRC’s guidance given in paragraphs 2.2 and 2.3 of IR20, in interpreting the expression “full-time work abroad”, and in considering the relevance of both incidental duties and very limited substantive duties performed in the UK, if expert evidence was provided.

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104. We summarise the general consensus between the two expert witnesses as follows.

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105. It was agreed that for employment to be full-time, there was no definite number of hours that had to be worked per week on average. A starting figure for a fairly standard 9.00 a.m. until 5.00 p.m. job might be of between 35 and 40 hours a week, with say 4 or 6 weeks holiday. But those figures could vary, depending on the nature of the employment, the work practice in the country where the employment was basically to be performed and industry practice. It was common ground that, particularly in the case of some employments, it was perfectly acceptable for more time to be spent in some weeks and less in others, provided that the average hours worked met whatever figure was considered appropriate for the job in question. In the case of sportsmen and actors and others who would obviously work in some periods and rest in others, the test would be adjusted to one that would sensibly apply in those situations. Nothing recorded in this paragraph departed materially from the guidance given in paragraphs 2.2 to 2.5 of the 1996 version of IR20, the one (as the Appellant claimed) that the Appellant and his advisers would most obviously have been considering when the tax planning was undertaken.

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106. The two most relevant matters to emerge from the expert evidence related to the issue of whether it was fatal or not for substantive duties of the employment to be conducted in the UK, and secondly the standard that should be applied by the taxpayer when actually filling in the tax return, and ticking or not ticking the relevant box on the tax return, in which the person completing the return could “claim to be non-UK resident”.

45

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107. We were told by Mr. Ashby that he and other residence specialists in the big five UK accounting firms had had confirmation from HMRC a few years before the 2013 change in the residence rules that up to roughly 10 days of substantive duties,

rather than just incidental duties, performed in the UK would not, or at least would not necessarily, undermine a claim of reliance on paragraph 2.2 of IR20. Mr. Symonds' evidence was that he considered that that concession had not been made before 2007 (at which point his work area at HMRC moved from the team dealing principally with residence matters), and certainly not in 2000, and it appeared that Mr. Ashby agreed with that proposition. In other words, he appeared to have been quite surprised when the 10-day concession had later been confirmed, which appeared to support his view that reliance could not have been placed on this concession at earlier dates. There still seemed to be some acceptance, however, that whilst the figure of 10 days might not have been applicable back in 2000, there was still some notion that a very few days of substantive duties (perhaps 2 or 3) undertaken in the UK would not undermine the claim to have in substance worked full-time abroad.

108. The Appellant's counsel also pointed out that a paragraph that had appeared in the 1996 version of IR20 (albeit being omitted from the later 1999 one) also suggested, by implication, that some substantive duties performed under the employment in the UK would not necessarily be fatal to the claim, though it gave no indication of the level such duties performed in the UK might extend to. The relevant paragraph read:

"For tax years before 1993-94 there was a further condition. Where there was accommodation in the UK available for your use, either all duties of your employment had to be performed abroad, or any duties you performed in the UK had to be incidental to your duties abroad (see paragraphs 6.7 – 6.8 for the meaning of "incidental" and Chapter 4 on the meaning of "available accommodation)."

109. We accept that the clear implication of that paragraph was that if, as suggested, the position became less restricted after 1993-94 then it had to follow that some duties performed in the UK that were not incidental (i.e. they were substantive) could be performed without jeopardising the paragraph 2.2 and 2.3 claims. Of course no indication was given as to how extensive those duties might have been. We also accept the Appellant's counsel's suggestion that when the paragraph just quoted was omitted, without comment, from the later 1999 version of IR20, it seemed more likely that this was just because, by then, reference back to the position prior to 1993-94 ceased to be necessary, rather than that it had suddenly been realised that the quoted paragraph was misleading or completely wrong. It is fair to say that it was not terribly obvious why the allusion to substantive and incidental duties was actually affected by the statutory change that was made in 1993, but we accept that the implication of this paragraph was to concede that a few substantive duties performed in the UK would be unproblematic.

110. Arthur Anderson had made no reference in the advice given to the Appellant to anything in relation to some substantive duties being "permissible" in the UK, and so far as the Appellant himself was concerned his actual belief at the time that work done in London for the Belgian company would constitute "work done abroad" rendered this topic irrelevant.

111. In view of the doubts as to the applicability and extent of some sort of concession that substantive duties performed on a very few days of the employment,

would not have undermined a non-residence claim based on full-time work abroad, we will lean in favour of the Appellant and assume that some such practice applied in the year 2000, albeit not we believe extending to the figure of 10 days.

5 112. The other relevant point to emerge from the expert evidence related to the
issue that the tax return questions did not expressly require the taxpayer to assert that
he had been non-resident for a year. The wording merely required the taxpayer to
claim to have been non-resident. It appeared at one point in Mr. Symonds' evidence
10 (Mr. Symonds being the HMRC officer) that he was suggesting that a return would
not be a wrong return, and potentially a fraudulent or negligent return, if a taxpayer
claimed to be non-resident even if the claim was without foundation. HMRC would
routinely consider such claims and if they considered the claim to be false or wrong,
they would adjust the return in an enquiry and reject the claim. But there would have
15 been nothing wrong with the feature of the taxpayer having initially claimed
something even if it was obviously and properly to be rejected. On reflection,
however, it emerged that this was not the right construction to put on the point that the
tax return merely required the taxpayer to make a claim to have been non-UK
resident. Such a claim could obviously not simply be made fraudulently. Equally
20 it could not be made negligently. The claim had to be an honest claim, based, to
adopt one of the tests propounded in the Appellant's skeleton argument "*on a tenable
view of the law of residence, in the application to the facts of his [i.e. the taxpayer's]
case.*"

The contentions on the part of the Appellant

25 113. The Appellant advanced the following contentions. We will list and number
them, since numbering will assist in referring back to the particular points in the
course of our decision.

30 It was contended that:

1. to be valid, a discovery assessment could not just refer to an estimated amount
of tax but had to be based on a figure of tax said to be owing and thus under-
assessed;
- 35 2. to be valid, a discovery assessment had actually to demonstrate that there was
an under-assessment, and since in the present case there would only have been
an under-assessment had the Appellant been UK resident in 1999/2000, the
burden of proof was on the Respondents to demonstrate that he had indeed
been UK resident in that period;
- 40 3. the discovery assessment was invalidated by the fact that the officer making
the assessment had not made the assessment in the amount "*in his opinion ..
... [required to be charged] in order to make good to the Crown the loss of
tax which [the officer] had discovered*". This contention was dropped
during the hearing because it was accepted that it would be dependent on
45 obtaining evidence of the officer's intention and that since this had not been
indicated in advance, it could not be tested.
4. since the lead-in wording to both sub-sections (2) and (3) was identical, and it
was clear that the burden of proof in showing that the taxpayer had been
responsible for fraudulent or negligent conduct for the purpose of sub-sections
50 (3) and (4) fell on the Crown, it followed that the burden of proof for the

purposes sub-section (2) also fell on the Crown. In other words, where there was an issue as to whether a return had been made “in accordance with practice generally prevailing at the time it was made”, the burden fell on the Crown to establish that this had not been so;

- 5 5. in making a discovery assessment, the officer had to be satisfied before making the assessment that neither of the protections of sub-sections (4) and (5) was in point, and that those provisions (dealing respectively with fraudulent and negligent conduct and whether there had been sufficient information in the return etc to flag to a reasonably competent officer that there was an under-assessment) were not tests that could simply be applied, following the making of a valid discovery assessment;
- 10 6. there was no negligent conduct involved in the making of the return in the present case;
- 15 7. the expression “negligent **conduct**” required some statement or act, as distinct from an omission to involve “conduct”, and in this case there had been no such positive statement or act;
- 20 8. had there been negligence on the part of Arthur Anderson in failing to inform the Appellant of sufficient detail as to what was required to establish “full-time work abroad”, this would absolve the Appellant himself from a challenge of negligent conduct, and Arthur Anderson ranked as an adviser, and so not an “agent”, that being the proper meaning of someone “acting on behalf of the taxpayer” so that their negligence would not be material for the purposes of section 29(4);
- 25 9. if the point at item 8 above was wrong, and negligent conduct on the part of Arthur Anderson could involve the negligent conduct that might justify an otherwise “out of time” assessment, it was too late, and improper, for the Respondents to raise the point at this stage, without any prior notice, and in relation to absent parties who could not defend themselves;
- 30 10. even if the points in items 6 to 9 were all wrong, the resultant assumed negligent under-assessment in question was no longer attributable to the relevant neglect because HMRC had had ample time and information in which to make an assessment before and after 31 January 2006, the date when the ordinary time limit had passed, so that the continuing under-assessment was attributable to the failure of HMRC to act, as they could have done.

35 114. In terms of factual contentions, we have already mentioned that the Respondents produced the multi-coloured chart on the final day of the hearing. This chart purported to illustrate a reasonably realistic calculation of the hours that the Appellant had worked on every day of the year. This chart indicated that in
40 occasional weeks, the daily total of hours worked had been 12 on every weekday of the week, and throughout the long summer period that we mentioned in paragraph 59 above, the chart indicated that the Appellant had worked for 10 hours a day on every weekday of every week between 11 July and 17 September.

45 **The contentions on the part of the Respondents**

115. We will not record the Respondents’ contentions on the legal points because our decisions in relation to most of the legal points advanced on behalf of the Appellant will in any event be broadly in line with the Respondents’ contentions.

There were no contentions in relation to one or two of the Appellant's contentions listed in paragraph 113 above, but nevertheless we deal with each in our decision.

5 116. So far as factual contentions were concerned, our summary of the facts will have made it clear that the basic contention by the Respondents was that for many weeks of the year, the time identified when no work could have been done abroad, and indeed the time when no work could or would have been done anywhere (on account of the Appellant's claim that he virtually never worked in London) rendered it impossible in many weeks and improbable in many others that the Appellant could have satisfied any "full-time work" requirement. In relation to the period when the Appellant was continuously at Ramatuelle, the contention was that, properly appraised, the evidence that the work realistically required of the Appellant had been full-time was simply not credible.

15 117. In relation to neglect, the Respondents' contention was that by having provided no detail or record of any sort to Arthur Anderson, or by Arthur Anderson themselves having requested no clarification in relation to the full-time work requirement the return had been made negligently when it was clear that it was extremely unlikely that the Appellant's work had indeed been full-time work abroad.

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Our decision

The legal issues

25 118. As we said in the Introduction, this Appeal revolves largely around our consideration of the factual evidence and the two questions of whether the Appellant did indeed work full-time abroad in the period 1999-2000 and, if he did not, whether "he or those acting on his behalf" were responsible for negligent conduct in claiming in his return that he was non-resident. We will first, however, consider all the relatively minor legal points that were advanced on behalf of the Appellant. Since we consider the answer to many of these points to be reasonably clear, or not particularly central to the issues in the case, we will deal with the points quite shortly. In particular we will assume a familiarity with the provisions of section 29 Taxes Management Act 1970 and will not quote them in full.

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The Appellant's legal contentions

40 119. We reject the contention that the discovery assessment was invalid because it was just an estimate. This is the point addressed in paragraph 113.1. We accept that the officer making a discovery assessment cannot just make an assessment on a purely speculative basis without any view that there has been an under-assessment. Provided however that an officer has a bona fide belief that there has been an under-assessment, and that there is a realistic chance of the assessment being sustained if the taxpayer appeals against it, then the assessment can be made. Where the figures of under-assessed tax are not for some reason clear, a bona fide estimate can still be made. In the present case, our understanding is that the income tax assessment will almost certainly be withdrawn because it sounded as if that had been made on the basis of an erroneous belief that such income had arisen in the year. The capital gains tax assessment appeared to reflect the correct amount of gross proceeds, and since it was anyway conceded that, if properly deductible, a deduction would in due

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course be given for the properly calculated base cost, we consider that the assessment was valid. The fact that the base cost had not yet been deducted was not only acknowledged, but irrelevant since we were asked only to consider the points of principle, rather than quantum. .

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120. We reject the contention mentioned in paragraph 113.2 to the effect that the assessment could only be valid if HMRC themselves satisfied the burden of proof in demonstrating that there had actually been an under-assessment and in other words that the Appellant had been resident. As indicated in paragraph 119 above, the officer making the assessment must have a bona fide view that tax has been under-assessed and must consider that there is a sensible prospect that the assessment will be upheld if the taxpayer appeals on the substantive points. As with any normal assessment, however, the burden of proof is on the taxpayer to demonstrate that the assessment is wrong. In other words, in this case the burden is on the Appellant to show that, on the balance of probability (and ignoring the negligent conduct issue at this stage) he was non-resident.

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121. We are going to ignore the contention recorded at paragraph 113.4 concerning the burden of proof in relation to the defence geared to showing that a return had been made in accordance with prevailing practice at the time the return was made. For several reasons we consider that this point is irrelevant. Firstly, the relevant defence is far more apt in the situation where the practice (possibly the well-published availability of some concession, or some well-established practical approach to a particular subject matter) has actually changed. The sub-section (2) defence then provides the fair defence that if the quantum of the assessment in the return was in accord with the prevailing practice at the time the return was filed, then there should be no discovery assessment, merely because the assessment is made at some later time when the practice has clearly been withdrawn or changed.

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122. In the present case, there was no relevant change in the practice between the dates 2000 and 2009 when respectively the original return was filed, and when the discovery assessment was made. The only conceivable change was in the wrong direction for the purpose of the sub-section (2) defence in that Mr. Ashby's evidence about 10 days of substantive work in the UK not undermining the full-time working abroad test actually made it easier, not more difficult, for the Appellant to satisfy the test in 2009, rather than 2000.

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123. Everything in the present case revolves around a fair interpretation of the terms of IR20 in relation to leaving the UK for the purpose of full-time work abroad. On account of the "negligent conduct" issue, it is clear and was accepted by both parties that we could, and indeed had to, address the proper application of IR20. Since it was also common ground that there would only have been negligent conduct if the Respondents surmounted the burden of proof in showing that the Appellant had had no tenable view that he had satisfied all the tests of paragraphs 2.2 and 2.3 of IR20 (i.e. conceding to the Appellant some degree of latitude as to whether, on reflection, his original view was justified), it appears that the Appellant has a better chance of properly sustaining his Appeal by showing that the Respondents have failed to surpass the burden of proof in demonstrating negligent conduct, than by advancing contentions (wherever the burden of proof might lie) in relation to section 29(2), and

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“prevailing practice at the time of the return”. The Appellant’s counsel suspected that we would ignore the section 29(2) defence for this reason and he was right.

124. It has been established in relation to the point raised in paragraph 113.4 that in making a valid discovery assessment the officer does not have to consider in advance the possible defences under sub-sections (3) to (5). Of course where HMRC have failed to make the assessment within the 6-year time period, as they have done in this case, HMRC will have in due course to sustain the assessment by showing that the under-assessment in question was attributable to fraudulent or negligent conduct. Accordingly the officer may well choose to consider this issue in advance, but he does not have to have been considered it and concluded that there had been such conduct in order for the assessment to be valid.

125. The issue raised at paragraph 113.6 is fundamental and we will defer dealing with it until dealing with our analysis of the facts.

126. We reject the point raised at paragraph 113.7, to the effect that negligent conduct requires some positive act, rather than just an omission, on one or other of two grounds. The first is that an omission to consider relevant facts is anyway conduct. The second is that there was in any event a positive act, namely the making of a claim that the Appellant was non-resident, and if that was not only wrong but manifestly untenable, and the Appellant knew or ought to have known that the claim was untenable, then the very making of the claim was negligent conduct.

127. We reject the point at paragraph 113.8 to the effect that Arthur Anderson were not a person acting on behalf of the Appellant. The phrase “a person acting on his behalf” does not necessarily mean that the person must be an agent, and in the context that the negligent conduct must relate to the making of a tax return, it seems inexplicable that there is a contention that the adviser who has advised in relation to the tax planning, and who has also dealt with the making of the tax return is said not to be a person acting on behalf of the Appellant. The person with those roles is precisely the person, and really the only conceivable person, who could be regarded in the relevant context as a person acting on behalf of the taxpayer.

128. 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 letters quoted at paragraphs 23 and 17 above. 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.

129. The material point, it seems to us, is that HMRC is indifferent to where there may have been neglect. Where there was muddle or absence of communication and clarification, the question is whether between the Appellant and those acting on his behalf there has been negligent conduct. If the taxpayer wishes to demonstrate that the neglect was on the part of the adviser rather than on his part, he may seek to do so,

but this does not have to be addressed by HMRC, and is of no relevance to the ability of HMRC to make an assessment out of time when there has been such negligent conduct.

5 130. Irrespective of whether the conclusion summarised in paragraphs 128 and 129 above is correct or not, in dealing with the fundamental issue of whether there was negligent conduct, we will address this on the alternative basis that (i) we consider the Appellant and Arthur Anderson together, and (ii) we consider the Appellant's conduct in isolation.

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131. The final legal contention was that because HMRC failed to make an assessment, not only within the 6-year time period that ended on 31 January 2006, but indeed for another 3 ½ years thereafter, the under-assessment of tax (this and "negligent conduct" naturally both being assumed when considering this final contention) ceased to be **attributable** to any neglect on the part of the Appellant and those acting on his behalf in having filed a wrong return, but was rather attributable to HMRC's failure to assess at an earlier point. It is the case of course that had the assessment been made prior to 31st January 2006, HMRC would have had no need to establish neglect. Equally it is obvious that while the Appellant might then have sought to undermine the assessment by reliance on section 29(5) Taxes Management Act, 1970, in other words by suggesting that the return had disclosed sufficient information to enable the assessing officer to detect the under-assessment initially, that defence, on the facts of this case, would have been extraordinarily unlikely to have prevailed. Accordingly, on the assumption that the Appellant had failed on the merits of the residence dispute, and had failed to establish that he had been non-resident, the assessment would immediately have been confirmed. As it is, the Respondents have the additional burden of now having to show negligent conduct.

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132. In terms of this contention, which we might call the "attributable" point, there was a dispute between the parties as to how to apply this test. The Respondents contended that the relevant under-assessment that was under consideration was the initial under-assessment **at the time of the filing of the return**. If one had to concentrate solely on the under-assessment at that time, then it was obvious that the under-assessment would have been directly and solely attributable to the negligent conduct, and no possible significance could attach to any suggestion that HMRC had in some way been dilatory. The Appellant's converse case was that the under-assessment was a continuing matter, and when HMRC had had countless opportunities to reverse the under-assessment, but had inexplicably failed to seek to do so, it then became pertinent to attribute **the continuing under-assessment in 2008 and 2009** to the failure to act by HMRC. Were that technical approach correct of course, we would then have had to consider whether indeed HMRC had been dilatory, failing for instance to pursue the enquiries in an appropriate manner. Some of the Appellant's criticisms of HMRC's conduct did seem prima facie to be justified, and some of the extraordinary, and seemingly irrelevant, enquiries that had been pursued seemed quite extraordinary. The Respondents were, however, never called upon to explain why they had so delayed in progressing enquiries in this case, albeit that they had commenced their enquiries in relation to the tax year 1999-2000 in 2004. The feature that the Respondents had indeed not been called upon to explain the delays, for which conceivably there was good reason, would certainly make it more difficult

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for us to lay the entire blame for the continuance of the under-assessment on such delays.

133. Our decision on this point, however, is that the Appellant's contention is
5 incorrect. We should look principally if not entirely to the original under-
assessment, and that was entirely attributable to the neglect. Even at later dates, the
correct description is that the under-assessment in the return was attributable to the
neglect and what may have been attributable to delays on the part of HMRC is the
10 different matter of the failure to have reversed that under-assessment. At the very
least the under-assessment is attributable to both facts, in other words both neglect
and HMRC's failure to correct it, and that still means that it was still (at least in part)
attributable to the neglect. The point is rather akin to the observation that if a
15 person is injured through the negligence of another, then that negligence is not
undermined even if the conclusion is that the victim was also responsible for
contributory negligence. The other observation is that in the context of discovery
assessments, it is widely appreciated that all that is required is for an inspector to
change his mind, later deciding that some assessment earlier thought to be
20 inappropriate should be made, or for one inspector replacing another to decide
(contrary to the view of the earlier inspector) that an assessment is appropriate. The
spirit of that well-appreciated feature of discovery assessments runs counter to the
Appellant's present contention because that contention would mean that whenever an
assessment was made after the 6-year period, such that fraudulent or negligent
conduct had to be established, then there would always be the further hurdle of
HMRC having to establish that they had never delayed or pursued blind avenues
25 during their enquiries. The feature that HMRC would effectively have to assess at
the first realistic opportunity would run counter to both the remaining time limits and
to the general structure of the rules relating to discovery assessment. Quite apart
from this, nobody sought to ascertain whether HMRC had had justifiable grounds for
having been slow in pursuing their enquiries, and only making the assessment in the
30 year 2009.

134. We should refer to one other legal point that seems to us to be clear. The
Appellant contended that, since the present assessment was essentially for capital
35 gains tax, then the assessment could only be justified on the basis of a conclusion that
the Appellant had indeed been resident on what is periodically called the common law
test, and not by virtue of the operation of section 334 Taxes Act 1988. Section 334
applies for income tax purposes and can render a person chargeable to income tax as
if he was resident if the person in question was a formerly ordinarily resident
Commonwealth citizen, and he had only left the UK for the purpose of occasional
40 residence abroad. We agree with the Appellant's contention that this section does
not deem the person to be resident, but renders him chargeable to income tax as if he
had been resident. We also accept that this notion is not adopted when the capital
gains rules simply apply if the person in question is actually resident or ordinarily
resident. Since, however, our whole enquiry is based on the notion that the only
45 conceivable basis on which the present Appellant could escape capital gains tax was
by showing that he was non-resident, and that that could only be achieved by
demonstrating that he left for full-time employment abroad during a complete tax
year, and that is the only test that we are considering in this Appeal, the present point
is irrelevant.

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The factual analysis of the two fundamental questions

135. It is unfortunate in judging a tax appeal to have relatively little clear evidence on which to base a decision. In the present case, we will refrain from speculating but we are going to have to weigh up vague and general evidence about full-time work against various considerations that throw great doubt on the general evidence. To some extent we sympathise with the Appellant who is being asked to describe his movements and the nature and extent of his work 13 years ago. At the same time, he does (as against us) have the benefit of having known more clearly what he actually did, and he could have retained records, and produced more records in the first place in order to make his task easier. As it is, we have to judge this Appeal with the detailed flight times for only 8 of the countless flights taken in the period, and without a single piece of paper, such as a presentation to any bank prepared by the Appellant or a single e-mail either from or to him. We were shown some limited mobile phone records but these only covered some periods and were only produced in an effort, where the position was otherwise unclear, to indicate in which country the Appellant was at a particular time. We were never taken to phone records to demonstrate to whom, or from whom, calls and in particular long and significant calls had been made.

136. We were told that the Appellant did not retain the computer that was used in Begium and that it is now somewhere “in concrete in Belgium”, and we were told that on his later divorce (we are unclear of the date), the house at Ramatuelle and the computer in it passed to his wife, so that he had no access to that computer either. His house in London had an office but that was his wife’s office, though he did have a laptop in London. Again we obtained no evidence from any computer in his wife’s London office or from his laptop. We also note that whilst the Respondents managed to obtain 3 lever arch files of correspondence and attendant file notes from the liquidator of Arthur Anderson, which provided the clearest survey of the tax advice and, to a considerable degree, the Appellant’s own objectives and preferences back in 1998 and 1999, by contrast, not a single document had been obtained from Clifford Chance, Morgan Stanley, Parkes & Co, Savills, or Mr. Mackay’s firm by the Appellant. We were not told whether anything had been requested from any of those firms, but had there been significant e-mail or fax traffic between the Appellant on the one hand and either Clifford Chance or Morgan Stanley on the other, we would be surprised if those firms would have been unable to provide the relevant evidence.

137. In short, we have to decide this Appeal with “our hands tied behind our backs”, and effectively we must seek to balance the general evidence against the doubts by using common sense.

138. We will now list the factors that lead us to conclude that we cannot rely on the Appellant’s generalisations of having worked full-time or anything approaching full-time during the relevant tax year.

139. We note first that when the Respondents’ counsel took the Appellant through the various weeks of the tax year, and indeed the following tax year as well, and identified the periods when he claimed that the Appellant could not have been working full-time in each week, when the Appellant responded that with 2 ½ days available for work, he could have worked full-time during the week, the claim was

always what he could have done, and not what he actually did. Thus the general suggestion was that he could have worked 12 hours, 12 hours and 6 hours, aggregating 30 hours and that that was effectively full-time. But these claims were not based on fact or recollection, save for the very far-fetched suggestion that the Appellant worked virtually every available hour when abroad, on flights or when sitting at airports, albeit that he virtually never worked in London. These claims were just that it was still theoretically possible that the Appellant might have worked 30 hours during the week, not that he did. Ignoring the period in the spring and summer when the Appellant was continuously at Ramatuelle, we also add that the great majority of the weeks of the tax year were weeks to which this present observation is relevant.

140. We naturally accept that in some employments more work will be done in one period and less in another. We regard that as perfectly normal and acceptable and on appropriate facts, we would have had no difficulty in averaging the figures, and looking at the overall picture. In this case, however, we conclude that the Respondents' counsels analysis of the periods during which the Appellant could simply not have worked full-time abroad was entirely convincing, and that there were no other weeks or periods when, so to speak, time could be made up to enhance the average. Of course we accept that the day-count approach could not be undertaken when the Appellant was continuously at Ramatuelle, which is why we have had to address the period of presence there by considering the type of work done, and tried to judge whether that (and in particular the claimed reading of voluminous documentation that we find so unbelievable) could possibly have involved full-time work, particularly with the distraction of the family being with him for their first summer at Ramatuelle.

141. The next point that we make is that, as the Respondents' counsel remarked at one point, the pattern of work claimed by the Appellant ended up being quite extraordinary. There was the stark contrast between the proposition that, with the exception of 2 days of meetings, and possibly 5 other days during which he conceded that he had worked in London, he never worked at all while in London, but he worked every available hour when he was anywhere else. The "all or nothing" pattern seemed very improbable.

142. The point just made was made all the more curious by the revelation (extraordinary in itself) that the Appellant believed at the time that work done in the UK for a Belgian company still ranked as work done abroad, simply because it was done for a non-UK company. Whatever the explanation for the Appellant's misunderstanding, his belief that work done in London for EFT would constitute "work abroad" certainly meant that he cannot have been deliberately restricting his work in the UK to sustain the tax planning. He explained his claim that he had not worked in London by the fact that he preferred to be with his family when in London, and therefore refrained from working. Since he was present in London for 27 weekdays, and other part days, when the children would often have been at school, and since he claimed that he worked quite different hours at Ramatuelle, even when all the family were with him at the holiday home on a full-time basis, we did find the Appellant's "all or nothing" claimed work pattern to be extremely odd, and not particularly credible. Whilst the family were with him at Ramatuelle for a continuous period in the summer, so allegedly that it was no longer necessary to

restrict his work pattern, the family were nevertheless spending their first summer together at the newly-acquired holiday home, located in an area where there would have been countless opportunities for sporting and other holiday activities, so that the distinction between very rarely working in London but working full-time in Ramatuelle seems incredible.

143. No mention had been made in negotiation meetings between HMRC and the Appellant or his representatives, and no mention was made in his Witness Statements, that much of his time spent working was actually spent reading all the vast mass of documents. As we indicated in summarising the facts, the Appellant produced a sheet of paper indicating that it would have taken more than 14 weeks to read 11,000 pages of documents, at 3 minutes a page.

144. In his then recent role as a very senior executive at Morgan Stanley, effectively managing and supervising teams of specialists at a high level, we find it extremely improbable that the Appellant had spent his time for many years, involved full time with one major transaction and reading all the documentation in relation to it in absolute detail. With his experience in the bond issue and securitisation fields, we also find it inconceivable that he would have needed to do much more, in considering a proposed bond issue, or other documents involved in a securitisation, than to refer to the critical clauses, regarding much of the rest of very long documents as utterly standard terms that he could ignore. While he suggested, when we put this point to him, that matters were different when he had a personal interest in the transactions, geared in other words to his entitlement to a percentage of the upside residual value of the properties, we note the quite different indication from Mr. Mackay. He said that the transaction that gave him and the Appellant their residual interest was simple and little time was spent considering it. We also note that although this final document was of particular relevance to Mr. Mackay and the Appellant, it was doubtless also highly material to Morgan Stanley and Sainsbury, whose advisers would have been keen to confirm that it achieved the critical results. Furthermore all the other parts of the structure under which the properties were vested in the SPV were critical to the credit standing of the bond issues, the guarantee liability of Sainsburys and the whole credit rating of the bonds. Accordingly all parties had an identical interest in the cogency of the complex part of the structure. We would have thought that the specialists at Morgan Stanley and Clifford Chance would have been more than capable to ensure that all this documentation was entirely correct. The only transaction of particular relevance to Mr. Mackay and the Appellant was said by Mr. Mackay to have been simple.

145. We consider it highly significant that even though plainly the Appellant performed a crucial role in persuading Morgan Stanley to join the project team, and deal with, and underwrite, the bond issues, once he had done that the reality is still that Morgan Stanley would manifestly have had a full team dealing with the bond issue, and indeed a team backed up by Clifford Chance who would have drafted virtually all the documents. It might have been credible that the Appellant would have been heavily involved in reading, considering and commenting on the fine drafting if he had managed to persuade, say, an Italian bank to promote some securitisation, and the bank and its chosen lawyers had initially prepared documentation that was wholly defective. When however, once he had secured that Morgan Stanley in London joined the team, and when the drafting would all have

5 been done by Clifford Chance (and Cameron McKenna on behalf of Sainsburys), the
notion that he, as a senior investment banker, spent countless hours reading the
documents when he attended not a single drafting meeting on the documents, and
suffered the considerable handicap that he was trying to keep abreast of developments
in a series of transactions entirely negotiated and structured by a highly competent
team in London seems very improbable.

10 146. There was considerable contention between the parties as to whether the
Appellant's employment had been generated for business reasons, with tax being a
subsidiary consideration, or whether the tax planning and the desire to avoid the
capital gains tax was the driver, and the employment was devised to fit the tax
planning. We do not consider this to be an important point, and we consider it
unnecessary to reach a conclusion in relation to it. We certainly have no doubt,
15 however, that the actual decision to move to Belgium was entirely dictated by the
critical double tax treaty point, and the rejection of Switzerland and Spain for
understandable reasons. It might conceivably have been true that European bankers
would be happier to deal with a Belgian, i.e. continental European, company than with
a UK company, but it was still obvious that the Appellant was himself British and not
20 Belgian. That one possible factor in favour of locating in Brussels apart, the
following observations seem fair. Whatever the Appellant may have said about not
requesting business advice, as opposed to tax advice, from Arthur Anderson, we are
firmly of the view that in late 1998 and during the first two or three months of 1999
the Appellant was not clear what the company would actually do. This is in part
25 confirmed by the fact that what it actually did could only have been anticipated at all
after the discussion with Mr. Mackay in mid- to late-March. Furthermore the
resultant role, almost entirely around the Sainsbury deal, was one that was not only
not assisted, but was greatly complicated, by the location of the Appellant in either
Brussels or Ramatuelle. Where an employee in a multinational company is sent
30 abroad for a job that is manifestly full-time and clearly to involve work abroad, the
nature of which is absolutely clear in advance, the application of the rule in IR20 is
clear-cut. Where the job was fitted around the tax advice, and the location of the
employee abroad was simply a complication, and the extent of the work in the job
also an unknown, compliance with IR20 was obviously far more difficult.

35 147. We are struck by the comparison between the roles of Mr. Mackay and the
Appellant. Nothing turns on whether Mr. Mackay's role was full-time, but he was
obviously the pivotal player in the Sainsburys deal; he had to deal with every aspect
of it, and had to oversee all members of the team, and he was obviously intimately
involved with the drafting exercise. He had also devised, and fully understood, the
40 off-balance sheet and the tax requirement of the structure. By contrast the Appellant
was initially involved in order to persuade Morgan Stanley to market and underwrite
the bonds issues, and thereafter as a fire-fighter to assist in particular aspects where
problems that he might assist in solving, emerged. This latter role included assisting
with the Centre Re problems, in particular to preserve his and Mr. Mackay's interests
45 in the residual value, engaging and cajoling Morgan Stanley in relation to the interest
swap, and generally attending to the rights to residual value which Mr. Mackay said
were simple and required little thought or discussion. We simply do not accept,
moreover, that the Appellant read anything approaching all the documents.
Handicapped by having to struggle with slow e-mails and poor phone connections,
50 and attending absolutely none of the drafting meetings, we find it inconceivable that

the Appellant's role was as all-embracing as he claimed and we find it inconceivable that he spent 14 weeks (or indeed very much time at all) in reading documents that it seems to us that he had not the slightest need to read. He needed to understand the points on which he was engaged, and those would have been second nature to him.

5 We also find the implicit claim by his counsel that he worked for 10 hours a day for every day of the summer months, whilst being with his family in the family holiday home, to be an unsubstantiated suggestion by his counsel, something that was not even put to him or claimed by him, and anyway to be completely unrealistic. We consider this claim to have undermined, by being so unrealistic, rather than bolstered
10 the Appellant's contentions.

148. We are surprised and troubled that every piece of objective evidence in this case, such as fax and e-mail correspondence, presentations, letters, and the very existence of at least 3 computers, is, and are, all unavailable to us. We do not
15 conclude that evidence has been destroyed because it would have revealed very little communication and involvement but that seems at least to be a possibility. We also record the Appellant's claim that he considered that he had not been told as clearly as he would have wished by Arthur Anderson that he should retain all such evidence. Nevertheless it would have seemed at least worth endeavouring to obtain evidence of
20 his suggested heavy involvement in all stages of the transaction from Clifford Chance and Morgan Stanley, or else to report that that had been sought but that it was unavailable. If we stop well short of suggesting that the absence of such evidence and documentation is actually suspicious, it certainly suggests some disdain for needing to confirm and support a tax contention that was clearly going to be
25 advanced, and that Arthur Anderson had made reasonably clear might at the least have to be supported by some evidence before HMRC acquiesced in the relevant tax planning.

149. We are also influenced by the feature that the full-time work contention was
30 advanced for the following year when, once the second transaction closed in August, there appeared to be even less support for the contention.

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
35 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.

40 151. We also observe that the explanation for why the Appellant did little work in London was a curious one; that he was somewhat vague in his contention that he had worked no more than 2 plus 5 days in London, and that in many respects the presence of all other players in London would have made it vastly easier to have been available in London for some discussions. We also note that in the run-up to the two crucial
45 meetings that the Appellant conceded he attended with Sainsburys, he had been present in London for several of the days preceding both of those meetings. It would seem to have been entirely natural that all parties would have wished to have pre-meetings to get the initial Sainsburys pitch, and the substitution of Sainsburys for Centre Re in the guarantor role, finely honed. When the Appellant was less than
50 unequivocal in whether he might have had a few other minor meetings or discussions

in London, and when we were unclear how the aggregate figure of 5 days of further work in London had been calculated, we have some considerable misgiving as to whether London work was as minimal as was suggested. We base our primary conclusion however on the failure to satisfy the full-time test, and not on what would rank as closer to speculation, namely the level of work done in London.

152. In recording the above conclusion, and the numerous reasons for arriving at that conclusion, we have rather ignored the key point that in relation to the residence, as opposed to the “neglect” issue, the burden of proof falls on the Appellant. Quite regardless of that, we conclude that the Appellant did not work full-time abroad in 1999/2000 (and equally it would seem in 2000/2001 as well) and that he was UK resident. Having regard to the burden of proof point that we consider falls on the Appellant in relation to the residence issue, we should record that the Appellant must have realised that in order to sustain a case that HMRC would be likely to question, it would be prudent to provide as much documentary and corroborative evidence as possible. The Appellant knew that enquiries in relation to 1999-2000 were being mounted from as early a date as 2004, and he has certainly not helped his case by providing no corroborative documentation whatsoever.

153. We have to date ignored the third basis on which the Respondents claimed that the Appellant had failed to establish non-residence, namely that he had not actually left the UK on 5 March, but only first ventured to Brussels on 21 April 1999. We accept that even this additional point is borderline. However, we are reluctant to base a decision on a transitional point, and while the Appellant may have returned to the UK on 12 March, quite possibly knowing that he had an appointment with an ENT specialist, he would be unlikely to have appreciated that he would need to have an operation. We also accept that some work was done in Geneva, albeit that it was blended with skiing, and we accept that since his wife would have delayed fixing a holiday until he had left Morgan Stanley, the pre-booked holiday in Mauritius is clearly explicable. Accordingly, had we reached the conclusion that the Respondents’ more general residence contentions were unsound, we would have been reluctant to have decided the case by suggesting that he failed to establish non-residence simply because of the unforeseen events in late March 1999.

Whether there was negligent conduct

154. We turn now to the issue of “neglect”.

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 (quite apart from the fact that there were almost certainly yet more weeks in the following period from 6 April 2000 to mid-February 2001) when plainly the Appellant had not worked full-time abroad. Furthermore, whilst we can appreciate that the Appellant might have thought that he 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.

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156. We have read a great deal of the Arthur Anderson advice, and most of it and the close attention to making file notes of everything, was extraordinarily impressive. It is, however, fair to say that there were three respects in which the advice may have been less than clear. The letter that we quoted at paragraph 23 above set out the correct requirement in the early paragraphs. And that, coupled with the fact that the Appellant must have known that there was considerable attention given in drafting the Belgian employment contract to seeing that it required full-time work makes it difficult to say that there was anything wrong with the letter quoted at paragraph 23. Nevertheless, the penultimate paragraph that we quoted is slightly muddling because it concentrates on the 91-day rule, and it treats pure time spent in the UK, particularly in the early period of the tax year, as being particularly significant. It did not as such emphasise the quite separate test that the Appellant had constantly to meet the full-time working abroad test, and that this was quite distinct from the 91-day presence rule. We find it impossible to attribute any blame to Arthur Anderson for the fact that the Appellant thought that work done in the UK for a Belgian company constituted work done full-time abroad. How the Appellant believed that, both originally and, it seems, for a very long time after the year 2000, we simply fail to understand.

157. The letter quoted at paragraph 27 was also slightly confused for the reasons that we have already mentioned. Nevertheless the first two paragraphs did set out the basic rules. Arthur Anderson were criticised (largely by the Appellant's counsel) for failing to give much detail in relation to the requirement about working full-time abroad, to which we consider that a very fair response was that there was not much more guidance that could be given. Reference was made in the hearing by the Appellant's counsel to remarks by Lord Justice Moses in the *Gaines-Cooper* case that not only were the rules about leaving the UK and severing or loosening family and social links hopelessly complex, but he also said that the "full-time working abroad" test was a difficult one. We accept that, in the sense that with any test that involves a slightly vague definition that must be applied in different ways in different circumstances, there is inevitably an element of difficulty. The test, however, is just one simple test. There is nothing like the confusion that there has been in relation to some of the other residence rules prior to 2013, and in the average case, the test is simple enough. So we consider that the proposition that the test was so difficult that surely no taxpayer could be expected to apply the test properly is quite wrong.

158. It also seems that when the tax return was filed, although Arthur Anderson made it clear that they would rely on the information provided by the Appellant, and would expect him to have complied with all the earlier advice that had been given, there is a slight notion that Arthur Anderson were again looking at the 91-day count rule, and not cross-checking on whether the full-time work test had also been met. Quite possibly this was natural because this was something on which they would inevitably need to rely on the Appellant to deal with, since without the same forensic analysis undertaken in this Appeal by the Respondents, Arthur Anderson could not

have cross-checked the Appellant's information, even if they had asked the questions. But the day count point was relatively easy, and purely a matter of counting the days.

5 159. Applying the test of looking at negligent conduct by considering the roles of Arthur Anderson and the Appellant together, we can see that there may have been an element of confusion between the two parties. Arthur Anderson had certainly said enough (coupled with the planning in relation to the Belgian employment contract) for a competent taxpayer either to have understood the requirements, or to have known in which areas he needed further clarification. Some of the advice that we have
10 commented on was, however, slightly confusing. As it is, on the crucial point, nobody appears to have re-visited the requirement concerning full-time work abroad, and for the reasons given in paragraph 155 they certainly should have done.

15 160. Considering the conduct of the Appellant in isolation, we consider that he was also singly negligent in claiming non-UK residence. Certainly for the following tax year, the claim appears to have been almost completely hopeless for the reasons that we have given. In the relevant tax year, however, the Appellant seems to have had a slightly remote attitude to his tax status as if it was something that his advisers had got to get right, and it is far from clear that he himself gave very much thought to it. The
20 approach was generally that he wanted Arthur Anderson to reconfirm the advice and to repeat that all would be well, rather than think about the tests that had been explained to him, and consider whether there were weaknesses in his own case.

25 161. We do not lose sight of the key point that it is for the Respondents to bear the burden of proof in relation to negligent conduct. We also note the quite difficult point that in addressing the question of whether a claim to have been non resident was negligent or not, there is arguably little middle ground between the claim having been tenable and honest, and the claim having been fraudulent. It is quite difficult to describe the circumstances where negligence is the apt expression to cover an
30 Appellant's conduct. In other words if the claim is plainly honest, and also tenable (even though borderline) there should be no risk of negligence being established. If the taxpayer thinks and decides that there are doubts, and perhaps major doubts, and he files the return on the basis of a hope that HMRC will fail to open enquiries, then that conduct comes closer to fraud than negligence. And in this case, HMRC has
35 never asserted fraud and we certainly do not suggest that the Appellant was fraudulent.

40 162. We consider that the fair description is that the Appellant may not have been given the very clearest of advice, but he certainly must have known that his work had to be full-time work in a reasonably conventional sense. And he knew, or most certainly 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 we consider that the Appellant concentrated on the 91-day test, relied on the fact that he had had an
45 extremely good year, and never bothered to re-appraise his work pattern. His attitude to the relationship with Arthur Anderson illustrated this. It was more for them to get it right than for him to do anything.

50 163. We should record that there was an inconclusive debate about a reference in a letter around the time that the tax return was filed that was prefaced with the words

“As discussed ...”. The letter then went on to deal with presently irrelevant points, but the Appellant asserted that he must have disclosed more information to Arthur Anderson and they must on this one occasion have failed to make a file note of the conversation and the information given. We consider that there was every indication that the words “As discussed” simply referred to a telephone mention that the information given or requested in the rest of the letter (i.e. presently irrelevant information) would be dealt with. We reject the suggestion that there was any credibility to the claim that much more information had been given and that Arthur Anderson had both forgotten about it and made no file note. We consider that this little episode again slightly illustrated the Appellant’s frame of mind that nailing Arthur Anderson to their earlier advice was all that he needed to do, and that it was not incumbent on him to think carefully about whether his return would be correct.

164. We mention one final point. The Appellant’s counsel claimed to illustrate how diligent and open the Appellant had been in preparing the tax return in that it revealed that a substantial capital gain had been realised, but that as he was going to become resident in the following year (or perhaps by then may have actually resumed residence), it was in the following year that the gain would be returned. It is possible that that does demonstrate how open the Appellant was being. It must, however, have been appreciated that although the gain might be returned in the following year, the claim to exemption under the Belgian treaty would refer back to the time when the gain was realised, and so the feature of returning the gain in the following year would be a non-event because it would be exempt from tax. This will obviously have been appreciated or else the whole of the planning would have been pointless. It is possible therefore that there is a less favourable inference to be drawn from this particular disclosure in the tax return.

165. Our conclusion on the “negligent conduct” issue was that, whether we address this by looking collectively at the conduct of the Appellant and those acting on his behalf, or whether we look solely at the Appellant, there was negligent conduct.

166. The Appeal is accordingly dismissed.

Right of Appeal

167. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 10 February 2014