[2016] UKFTT 0114 (TC)

TC04902

Appeal number: TC/2015/02085

INCOME TAX – discovery assessment for 2009/2010-whether conditions for assessment met - yes-s 29(4) TMA 1970

Residence-whether taxpayer resident and ordinarily resident in the UK for years 2009/2010 and 2010/11-held resident but not ordinarily resident

Whether particular travel costs incurred deductible-no-s 338 ITEPA 2003

Double taxation-whether appellant entitled to further credit for foreign tax-no-s 18 Taxation (International and Other Provisions) Act 2010

Penalty-whether penalty correctly applied for deliberate and concealed behaviour in relation to errors in appellant's self-assessment returns-adjourned for further consideration

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT WARD **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
DEREK SPELLER FCA (MEMBER)

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 24 November 2015

The Appellant in person

Lynne Gray, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Mr Ward") appeals against the following three decisions of the Respondents ("HMRC") as follows:

(1) A discovery assessment dated 1 October 2014 pursuant to which HMRC assessed Mr Ward for additional tax of £1,128.60 in respect of the year ended 5 April 2010;

(2) A closure notice, also dated 1 October 2014, pursuant to which HMRC amended Mr Ward's self-assessment tax return for the year ended 5 April 2011 so as to show that Mr Ward was due to pay £16,596.20 income tax in respect of that year instead of the nil the amount shown on the original return; and

(3) An inaccuracy penalty in an amount of £13,736.71 charged under Schedule 24 Finance Act 2007 on the basis that Mr Ward incorrectly stated his residence position for the years 2009/2010 and 2010/2011 in his self-assessment tax returns for those years, the penalty being calculated on the basis that Mr Ward's behaviour which led to the inaccuracy was "deliberate and concealed" and that the disclosure of the inaccuracy was prompted.

The amount due in respect of income tax for the year 2010/2011 was reduced on review to £14,891 with a corresponding reduction in the penalty, so that the total penalty charged for the two years in question was £11,222. 70.

2. There are five issues in dispute which form the basis of Mr Ward's appeal as follows:

(1) Whether the conditions for a discovery assessment under s 29 Taxes Management Act 1970 ("TMA") in respect of the year 2009/2010 are satisfied;

(2) Whether Mr Ward was ordinarily resident in the United Kingdom for the years 2009/2010 and 2010/2011;

(3) Whether travel expenditure costs can be claimed for the years 2009/2010 and 2010/2011;

(4) Whether additional foreign tax credit can be claimed for the years 2009/2010 and 2010/2011 beyond the small amount given in respect of the second of these years; and

(5) Whether the penalty imposed for "deliberate and concealed" behaviour is correctly applied at 70% of the potential tax lost for both tax years.

Evidence

3. Mr Ward, who represented himself, also gave evidence on which he was cross-examined. In addition, we had a bundle of documents, including the extensive

correspondence between HMRC and Mr Ward on the matters to which this decision relates. In the event, it transpired that there was little dispute between the parties on the primary facts, but merely on the correct inferences to be drawn from those facts, which we deal with when discussing separately the five issues set out at [2] above.

Findings of fact

4. From the evidence that we heard and the documents we have seen we make the following general findings of fact. We make further specific findings of fact in relation to each of the issues we need to determine on this appeal when dealing with those issues in this decision.

5. Mr Ward was at all material times an Australian citizen employed as Group Tax Manager within the Macquarie Bank group. Mr Ward arrived in the UK initially in July 2006 and stayed until December 2006. During this initial period he was working on a short-term project in the UK at the request of his Australian employer, Goodman Property Services (Australia) Pty Limited ("Goodman Australia") and continued to be employed and paid by that company, all of his salary for that period being paid in Australia and subject to tax only in that jurisdiction.

6. In January 2007 Mr Ward agreed to be seconded temporarily to London to work for a UK company within the group, Arlington Securities Limited. Mr Ward was to continue to work as Group Tax Manager, reporting to a named individual back in Australia. The secondment commenced from 5 March 2007 and it was expected to continue for just under 2 years ending on 4 March 2009, but could be extended by mutual agreement. A secondment agreement was entered into between Goodman Australia and Arlington for the expected period of the secondment pursuant to which Goodman Australia agreed to make Mr Ward services available to Arlington. For Australian tax purposes Mr Ward ceased to be a resident of Australia during this period and his salary was paid by Arlington in the UK, subject to the usual deductions of tax, Mr Ward being subject to tax in the UK as a resident but non-domiciled individual. There has never been any suggestion by HMRC that Mr Ward was to be regarded as ordinarily resident in the UK during the period of this secondment. The secondment arrangements also provided for Mr Ward to be entitled to a housing allowance of £40,000 per annum, his employer taking on the lease on the property chosen by Mr Ward and deducting from his housing allowance and salary the actual cost of the lease payments. Mr Ward was granted a work permit by the UK Border Agency for a two-year period expiring on 3 March 2009.

7. It is clear that Mr Ward's employer's preference was for him to return to Australia at the end of this period of secondment. However, for personal reasons, Mr Ward asked if he could remain in the UK and on the UK payroll for the period between March and June 2009. This request was agreed to on the basis that Mr Ward obtained the necessary work permit. Goodman Australia required Mr Ward to vacate the accommodation provided by the company and remove all his furniture and personal effects from it no later than 16 March 2009. Mr Ward was informed that he could arrange for repatriation of his furniture and household effects to Australia, as

well as a BMW vehicle which he had purchased in the UK, although the export of that vehicle would be at Mr Ward's expense.

8. Mr Ward's work permit was extended for 6 months. The personal reasons which led Mr Ward to request an extension of his time in the UK concerned his girlfriend who in due course became his wife. Mr Ward met his girlfriend sometime in 2008. When he was required to vacate the property provided by his employer in March 2009 Mr Ward went to live with his girlfriend in a property that she rented and which could be vacated on short notice.

9. Mr Ward said that in April 2009, it was his intention to move back to Australia in June or July 2009 after taking some holidays. However, at the same time his girlfriend's mother was seriously ill and in July 2009 it became clear that she only had a short period to live. Accordingly, Mr Ward's girlfriend requested that he remain in the UK for a further short period to assist with her treatment, and also to care for her father, who had dementia. Additionally, in July 2009 Mr Ward learned that his girlfriend had become pregnant and she wished to stay in the UK to have the baby.

10. As a result of these developments, Mr Ward asked Goodman Australia to extend his period in the UK. He indicated that he wished to be in the UK until around April 2010 to allow for the birth. The child was born in January 2010.

11. Goodman Australia agreed that Mr Ward could remain in the UK, but on the basis that he was effectively doing the job that he would have done in Australia had he returned rather than continuing to provided services to the UK operation. It remained clear that Goodman Australia's preference was that Mr Ward returned to Australia perform his duties there. In April 2009 Mr Ward's furniture and other personal effects, including his BMW car which he had purchased in the UK, had been sent to Australia in anticipation of his return.

12. As a consequence of Mr Ward no longer providing his services for the benefit of the UK company, it was agreed that he would transfer to the Australian payroll with effect from July 2009.

13. A further work permit extension was applied for in September 2009 for 12 months. This was granted with an expiry date of 14 October 2010.

14. Mr Ward's future mother-in-law passed away in July 2010 and it appeared that at that time there were concerns about the ability of his future father-in-law to cope. Mr Ward's girlfriend then again asked him to remain in the UK until arrangements had been put in place to ensure that his future father-in-law had appropriate care.

15. In September 2010 Mr Ward married his girlfriend. In October 2010 a further work permit extension for a period of 12 months was applied for, with a request that it be processed quickly as Mr Ward needed his passport back in time for his honeymoon trip which was scheduled for 25 November 2010. It seems that Mr Ward had to withdraw his application for an extension of his work permit on 24 November 2010 to ensure that his passport was returned in time to go on his honeymoon. Mr Ward made

no further applications for an extension of time to remain in the United Kingdom and he finally returned to Australia in January 2011.

16. On 27 April 2011 Mr Ward filed his completed self-assessment tax return for the year 2009/2010. Mr Ward completed this return on the basis that he was non-resident in the United Kingdom for tax purposes but he did not declare that he was resident in Australia for the year in question or claim any relief under double taxation agreements. He did however declare that he was domiciled outside the UK. He detailed his days in the UK as being 86 for the year in total and of those 60 were described as workdays. The return also stated that he left the UK on 1 July 2009 and that he had only been in the UK on one separate occasion during the tax year. Mr Ward also answered positively the question as to whether he worked full time abroad. Mr Ward claimed to be taxed on a remittance basis. Notwithstanding the fact that it had been agreed that he would be transferred to the Australian payroll, his employer during the period was disclosed as Goodman Real Estate Adviser (UK) Limited ("Goodman UK"). Employment income of £143,222 was disclosed, and UK tax of £6,127 deducted from this income was disclosed. The return also disclosed foreign earnings not taxable in the UK of £108,986.

17. It is common ground that the statements that Mr Ward only spent 86 days in the United Kingdom during the 2009/2010 tax year and that he left the United Kingdom on 1 July 2009 were incorrect. There was considerable correspondence between HMRC and Mr Ward on the question of how many days he actually spent in the UK following HMRC's decision to enquire into Mr Ward's returns. There were two further occasions on which Mr Ward provided incorrect information on this point and in due course HMRC checked the position with the UK Border Agency.

18. With regard to the 2009/2010 tax year, HMRC subsequently informed Mr Ward that information provided by the UK Border Agency suggested that he was in the UK for at least 10 months of the 2009/2010 tax year. On the basis of these figures, which showed that Mr Ward was in the UK for more than 183 days in that year he was undoubtedly resident in the UK for tax purposes in that year. Mr Ward did not dispute that position.

19. In the light of this information, the question arises as to why Mr Ward said on his 2009/2010 tax return that he was only in the UK for 86 days and why he left the UK on 1 July 2009. His explanation given at the hearing was that when completing the return he had taken the view that as from 1 July 2009, when he was transferred on to the Australian payroll, he should be taxed as an Australian resident and accordingly he took the view that he ceased to be resident in the UK tax purposes at that point. Consequently in his view it was correct to say that he was only resident in the UK for 86 days. It is implicit from that answer that in effect Mr Ward answered the question differently to what the form actually called for. The form simply asked the taxpayer, if he had disclosed in his earlier answers (as Mr Ward did) that he was not resident in the UK, how many days he had spent in the UK during the tax year in question not how many days he had spent before he ceased to be non-resident.

20. The disclosure that Mr Ward made on the tax return as to who his employer was during the year 2009/2010 is inconsistent with his contention that he was paid by his Australian employer. The small amount disclosed for PAYE deductions in respect of the year, is presumably because it relates purely to the period up to 1 July 2009, and consistent with Mr Ward's disclosure of foreign earnings of £108,986, which was presumably made on the basis that he was being paid by an Australian employer from that point onwards.

21. Mr Ward maintained that position in correspondence with HMRC after they started to enquire into his returns. It is clear, however, that the payments of Mr Ward's salary did in fact continue to be made by Goodman UK after 1 July 2009 and that no PAYE deductions were made from that salary. HMRC established that to be the case and in due course Goodman UK accounted to HMRC for the PAYE deductions which it should have made, the effect of which was to give Mr Ward a corresponding credit against his UK tax liability for the year in question.

22. Mr Ward's tax return for 2009/2010 also made a claim for travel expenses in an amount of £10,000. This figure is unexplained, although during HMRC's enquiry, the claim was reduced to a figure of £5,928, which was supported by the evidence Mr Ward provided of two flights to Australia; one where he left the UK on 25 July 2009, returning to the UK on 8 August 2009 and the second where he left the UK on 17 September 2009, returning to the UK on 2 October 2009.

23. During the course of the enquiry into Mr Ward's tax return for 2010/11 Mr Ward made a claim for travel expenses in an amount of £1,352. This figure was supported by the evidence Mr Ward provided of a flight to Australia where he left the UK on 12 May 2010 and returned on 16 June 2010.

24. Mr Ward contends that these flights were for business purposes. He accepts that he did not spend the whole time in Australia working; he also took short periods of holiday, had a knee operation and visited his mother whilst he was in Australia. Nevertheless, for the rest of the time he said he was performing his duties which he would otherwise have undertaken in the UK. He said it was useful to talk to and get to know the senior executives and his employer's advisers based in Australia with whom he worked, and it was easier to negotiate the various agreements with which he was involved from Australia than from the UK. He accepted in his cross-examination that his employer did not specifically ask him to come to Australia to perform the tasks in question, but Mr Ward himself found it easier to do so and therefore decided on his own initiative to make the trips.

25. Mr Ward filed his 2010/11 tax return on 25 October 2011. As he did for 2009/10 Mr Ward declared that he was not resident in the UK for 2010/11. He detailed his days in the UK as being 105 for the year in total and of those 69 were described as workdays. He left blank the question which asked him to enter the date he left the UK if it was after 6 April 2010 and he stated that he had been in the UK on three separate occasions during the year. He did not answer the question as to whether he worked full time abroad. He stated that he was resident in Australia for tax purposes for the year 2010/11 and also that that was the case for the previous tax year,

although as we observed above, he did not make that disclosure on his 2009/10 tax return. He made no claim for relief under double taxation agreements and did not disclose whether he was domiciled outside the UK. Neither did he ask to be taxed on the remittance basis. Although Mr Ward disclosed that he needed to complete an employment page, he did in fact not do so and therefore did not record any details of pay in respect of the year or any tax paid on that remuneration.

26. In the course of HMRC's enquiries into his 2009/2010 tax return Mr Ward finally provided a detailed schedule to HMRC as to where he was for every day during the 2010/2011 tax year which showed that he was in the United Kingdom for 230 workdays. As with 2009/10, because Mr Ward was in the UK for more than 183 days he was undoubtedly resident in the UK for tax purposes in that year. Mr Ward did not dispute that position.

27. It appears to us that Mr Ward completed the pages in this tax return regarding his residence status the way he did because he had taken the view that he had ceased to be resident in the UK after 1 July 2009 so that his disclosures as to the number of days he spent in the UK would be in the context of him regarding himself as working full-time in Australia, although this does not explain why he did not answer the question as to whether he worked full time abroad.

28. The enquiry into Mr Ward's tax affairs was prompted by the enquiries that HMRC had conducted into the manner in which Goodman UK had operated PAYE in relation to Mr Ward's UK earnings for the years 2009/10 and 2010/11. On 29 June 2012 an internal HMRC memorandum asked the relevant team to review Mr Ward's residence position for the years 2009/10 and 2010/11 in the light of the evidence obtained from Goodman UK to the effect that Mr Ward had remained in the UK beyond July 2009 which was at variance with the statements made on his personal tax returns.

29. Accordingly on 20 September 2012 HMRC wrote to Mr Ward informing him that they would be opening an enquiry into his 2009/10 tax return pursuant to s 9A TMA. By that time the enquiry window in respect of Mr Ward's 2009/10 tax return had closed.

30. On 26 September 2013, towards the end of HMRC's enquiries into Mr Ward's 2009/2010 tax return, HMRC notified Mr Ward that following its discovery of errors made by him regarding the disclosure of his residence position HMRC needed to extend its enquiries back to the 2009/2010 tax return and consider raising an assessment for the additional tax due. The letter also warned Mr Ward that HMRC would consider whether any penalties should be charged on the additional tax that arises as a result of the errors made.

31. Mr Ward questioned whether it was open to HMRC to enquire into the 2009/2010 tax return. HMRC's response, in its letter dated 4 June 2014, was that the information obtained which enabled HMRC to establish that an error had been made regarding the residence position for 2010/11 also covered the 2009/10 tax year as Mr Ward claimed to have left the UK on 1 July 2009, which led HMRC to discover that

an error had also been made regarding the 2009/10 residence position after the enquiry window had closed. HMRC contended that in those circumstances it was open to it to make a discovery assessment pursuant to s 29 TMA.

32. As detailed at [1] above, a discovery assessment for the year 2009/2010, a closure notice for the year 2010/2011 and a penalty charge in respect of inaccuracies in the returns for those years were issued on 1 October 2014.

33. Against that factual background, we turn to the five issues to be determined on this appeal.

Discovery assessment

34. Section 29 TMA, so far as is material to this appeal, and as applicable to the assessment made by HMRC on 1 October 2014, provides as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (*a*) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (*b*) that an assessment to tax is or has become insufficient, or
>
> (*c*) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (*a*) in respect of the year of assessment mentioned in that subsection; and
>
> (*b*) ... in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—

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

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

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

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

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

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

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

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

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

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

(7) In subsection (6) above—

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

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

…

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

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

> (9) Any reference in this section to the relevant year of assessment is a reference to—
>
> (*a*) in the case of the situation mentioned in paragraph (*a*) or (*b*) of subsection (1) above, the year of assessment mentioned in that subsection; and
>
> (*b*) in the case of the situation mentioned in paragraph (*c*) of that subsection, the year of assessment in respect of which the claim was made.

35. Under s 29 (3) TMA, an assessment under s 29 (1) can only be made if one of the two conditions set out in subsections (4) and (5) is fulfilled. HMRC argued their case purely on the basis of s 29 (4) and in relation to that provision purely on the basis that Mr Ward had been careless in the manner in which he had completed the pages of his tax return dealing with his residence position.

36. Mr Ward made submissions that it would have been open to HMRC to have opened an enquiry into his 2009/10 return during the statutory enquiry window because it had received the necessary information which indicated that his return was incorrect during the course of its enquiry into the PAYE position with Goodman UK. It seems from the submissions that Mr Ward was contending that at the time the enquiry window had closed, HMRC already had sufficient information on the basis of which they could conclude that insufficient tax had been paid, in other words that the condition in s 29 (5) TMA had not been met. However, the submissions are not relevant because HMRC only have to show that one of the conditions has not been met and they chose to focus their submissions purely on the condition in s 29 (4).

37. We need to consider first whether HMRC have made a "discovery" on the basis of which an assessment could be made. It is absolutely clear from the evidence that in the course of the enquiry, having received no detailed response from Mr Ward as to the actual number of days that he spent in the UK in 2009/10, HMRC made enquiries of the UK Border Agency which revealed that the number of days that Mr Ward had actually spent in the UK during that year was well in excess of the 86 he had declared and indeed was in excess of the 183 days which would be sufficient to make him resident in the UK for tax purposes. This information was clearly a "discovery" within the scope of s 29 as it was information that was not previously available to HMRC so that if such information revealed that insufficient tax had been paid then clearly an assessment can be made if one of the two conditions in s 29 were met.

38. With regard to the condition in s 29 (4), Mr Ward stated at several points during the enquiry that he did not have the relevant evidence to hand in order to check the number of days he spent in the UK to ensure that it was accurate. He repeated that submission at the hearing, but also conceded that he could have taken more care to check the position and primarily relied on the fact that he regarded himself as non-resident as far as the UK was concerned from the 1 July 2009 for the reasons we mention at [19] above. We have seen in the documents provided to us a schedule that Mr Ward at some point prepared which showed where he was on every day during the 2009/10 tax year. Mr Ward did not explain why the information on that schedule was not available to him when he completed his tax return for that year. It seems to us that

it is incumbent upon the taxpayer who believes he is non-resident in the UK to make careful enquiries as to the true position by reference to his passport, flight records and electronic diaries (which Mr Ward said he maintained) and have undertaken those enquiries, even if that means obtaining access to information that was not at the relevant time immediately to hand, before completing the form. A taxpayer who fails to do so must be regarded as careless. We would also regard such a taxpayer as being careless, particularly one in Mr Ward's position who as a group tax manager has considerable expertise in the area of tax, if he did not (as Mr Ward said he did not) look at relevant HMRC guidance which would have told him that if he spent more than 183 days in the United Kingdom in the tax year in question he would be regarded as resident there for tax purposes.

39. In so far as Mr Ward believed that he could answer the questions as to his residence on the basis that he need only disclose his presence in the UK in relation to those days which occurred before he believed he ceased to be resident, we regard such a belief as an unreasonable belief and it is at the very least careless not to have considered whether the question should be answered in the same simple manner in which it is put, namely by providing a straightforward answer as to the actual number of days spent in the UK. If Mr Ward believed that any further explanation was needed as to his residence status, he should have done so in the section of the form which allowed additional information to be provided.

40. We therefore conclude that HMRC has satisfied us that the conditions for a discovery assessment in respect of the tax year 2009/10 in the case of Mr Ward have been met.

Ordinary residence

41. As the Upper Tribunal observed in *Tuczka v HMRC* [2011] UKUT 113 (TCC) the meaning of ordinary residence received full consideration by the House of Lords in *Shah v Barnet LBC* [1983] 2 AC 309 and that the principles in reasoning of that case are to be applied to tax cases dealing with the concept.

42. The following passages from the speech of Lord Scarman in *Shah* are relevant in the context of this appeal:

(1) At 340G-341G:

"Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the 19th century. The words have been a feature of the Income Tax Acts since 1806. They were used in the English family law when it was decided to give a wife the right to petition for divorce notwithstanding the foreign domicile of a husband…"

(2) At 343E in commenting on the matrimonial case of *Stransky v Stransky* [1954] P 428:

"I do not read the judgment of Karminski J as importing into ordinary residence and intention to live in a place permanently or indefinitely... . But if he did hold that such an intention was necessary he would, in my view, have erred in law."

(3) At 343G –H:

"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short tour of long duration."

(4) At 344 B-F:

"There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, maybe for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning M. R. in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman L. J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the word supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.

An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt that it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled purpose as a professional business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: nor will enquiry into such questions call for any deep examination of the mind of the "propositus." "

43. In *Tuczka* the Upper Tribunal observed that the distinction between the concept of residence and ordinary residence was not a wide one. It said at [18]:

"Once it is found or accepted that the taxpayer is resident in the United Kingdom, the question whether he is also ordinarily resident here involves a factual evaluation to determine whether his residence has acquired a sufficient settled purpose to be part of the ordinary pattern of his life..."

44. In this context, the Upper Tribunal recognised that a critical question was: at what point did the purpose of the taxpayer becomes settled? : see [20] of the decision.

45. Ms Gray submitted that at some point after April 2009, when his initial secondment period ended, Mr Ward became ordinarily resident in the United Kingdom. She submits that the evidence shows that Mr Ward decided voluntarily to stay in the United Kingdom until January 2011 and his presence during that time was not casual or occasional. He voluntarily requested his employer to allow him to stay in the United Kingdom. He resided in the family home, married and had a child, and then continued to live in the same property. He had an established life and settled purpose in the United Kingdom with his family, work and home here and his presence in the United Kingdom was in the ordinary course of his life. The authorities show that work can be a settled purpose and adding the family ingredients to it shows, in Ms Gray's submission, that Mr Ward was in the United Kingdom for a settled purpose from April 2009. His residence here was part of his everyday life which had a degree of continuity which gave him the necessary settled purpose.

46. Ms Gray submitted that although Mr Ward may have had the intention of going back to Australia what happened in the event was that he remained constantly in the United Kingdom until January 2011, a period of 3 years and 10 months from when his secondment started. In her submission the case law attaches little importance to intention; it is necessary to examine what actually happened. The facts show, as Mr Ward has acknowledged, that he was resident in the United Kingdom for both of the tax years in question. He purchased a vehicle. He asked his employer for permission to remain in the United Kingdom when they wished him to return to Australia. He moved into live with his girlfriend who subsequently became pregnant and with the health issues concerning his mother-in-law and father-in-law there was a strong family connection which caused him to stay in the United Kingdom and support them. All this amounted to a settled purpose and once the same had been acquired then a distinct break was required to show that it ceased to be so.

47. We recognise the force of these submissions but have decided that on balance Mr Ward has satisfied us that his residence in the United Kingdom during the two tax years in question did not acquire a sufficient settled purpose to be part of the ordinary pattern of his life.

48. Ms Gray did not challenge Mr Ward's evidence that it was his intention to move back to Australia in June or July 2009 following the end of his secondment after taking some holidays. We accept his evidence and find that at that time he had a clear intention to return to Australia very shortly. We cannot therefore say that the pattern of his life at that stage demonstrated a settled purpose to remain in the United Kingdom. This finding is fortified by a number of other matters. First, he arranged for his furniture and personal effects to be sent to Australia, including his BMW motor car which it acquired in the UK. Second, his employment arrangements were such that the focus of his work was now on assisting Goodman Australia in relation to its tax affairs at group level rather than, as before, focusing on issues for the UK and the rest of Europe. It is clear that his employer did not regard it as being satisfactory that such a role should be performed by somebody who was based in the UK and accordingly in our view the position was that both parties regarded that as being no more than a temporary arrangement until Mr Ward was able to return to Australia as soon as his personal circumstances allowed. We do not therefore regard the position

being that he was content to remain in the UK for the time being. The evidence shows that he was keen to return to Australia as soon as circumstances allowed. Although the evidence shows that in practice he continued to receive his salary from Goodman UK, it appears that the intention was that he should be regarded as being on the Australian payroll. The fact that Mr Ward found it necessary to return to Australia during the two tax years in question in order to keep close to his Australian managers and the key executives there and took the necessary steps to become recognised by the Australian tax authorities as being resident in Australia for tax purposes are also significant factors in this regard.

49. It is also the case that work permit extensions were applied for only for limited periods. We accept that it is not necessary to constitute a settled purpose that there is an intention to remain indefinitely, but in our view the approach of applying purely for short extensions adds weight to our finding that Mr Ward's settled purpose was to return to Australia as soon as possible.

50. It transpired that the period of stay in the UK following the end of the secondment period lasted for a period of 18 months during which he became married and a father and lived in the same residence. However, it appears that there was a succession of events which led to the extension of Mr Ward's time in the UK but in our view none of these events were sufficient to conclude that despite his continuing clear intention to return to Australia as soon as possible the ordinary pattern his life was to be resident in the United Kingdom. The illnesses to his mother-in-law and father-in-law were clearly likely to be of limited duration. The communication with his employer in July 2009 which indicated that he wished to remain until after the birth of his child but that he expected to return at that stage in April 2010 indicated that there was no desire to remain in the UK for any significant period following the occurrence of that event. Whilst we accept that Mr Ward remained voluntarily in the UK, and the fact that he did so at the request of his wife makes no difference to that position, none of these factors in our view are consistent with a settled purpose to be resident in the UK as part of the ordinary pattern of his life. As far as his accommodation was concerned, as his evidence shows, the accommodation concerned was held on a tenancy arrangement which could be terminated on short notice.

51. Therefore, we have not been able to identify any particular point during the period after April 2009 at which it could be said that Mr Ward's residence in the United Kingdom acquired a sufficient settled purpose to become part of the ordinary pattern of his life which, as *Tuczka demonstrates*, is the critical question. In our view neither the circumstances of his work, his family commitments or his accommodation arrangements point to any particular time at which such an event occurred, in circumstances where he was back on the Australian payroll, considered tax resident in Australia and his personal effects had been sent back to Australia.

52. We therefore conclude that although he was resident in the UK for tax purposes for the tax years 2009/10 and 2010/11 Mr Ward was not ordinarily resident in the UK for tax purposes in those years.

53. As a consequence, it may be that the assessments to UK tax for the years in question need to be reduced. That will be the case if Mr Ward satisfies HMRC that during those years part of his remuneration related to duties performed in Australia.

54. There is some suggestion in the correspondence between Mr Ward and HMRC during the course of the enquiry that HMRC accepted that Mr Ward had carried out some of his duties in Australia in both tax years with the result that those earnings would be taxable only in Australia and his earnings in the UK correspondingly reduced for tax purposes, were he to be found not to be ordinarily resident in the UK.

55. However, it was clear that the parties were not in a position to deal at the hearing with the situation were the Tribunal to find, as we have, that Mr Ward was not ordinarily resident in the UK in the tax years in question. Therefore, regrettably there is no alternative but to seek further evidence and submissions on that point as there was insufficient evidence before us to make the necessary calculations. As indicated at the end of this decision, we are therefore making further directions to that end so that, unless the parties are able to agree the position, the Tribunal can determine the correct amount of UK tax to be assessed for the years in question.

Travel expenses

56. In view of our findings on the ordinary residence issue, it is questionable in any event whether Mr Ward's claim for travel expenses in respect of each of the tax years in question would be allowable in so far as he had elected to be taxed on the remittance basis: see s 335 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Nevertheless, we make findings on the issue as follows.

57. Section 338 (1) ITEPA provides:

> "A deduction from earnings is allowed for travel expenses if –
>
> (a) the employee is obliged to incur and pay them as holder of the employment, and
>
> (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment."

58. In relation to the flights made in 2009/10 Mr Ward submitted that he needed to be in Australia to assist with matters concerning the capitalisation exercise being undertaken by his employer's group in the light of the financial crisis. The company had no money to fund his flights but he took the view that it was urgent for him to be in Australia to assist with the capitalisation exercise. In relation to the trip made in 2010/2011, Mr Ward was then reporting to a new manager and he considered it necessary to spend some time in the Australian office to get to know him.

59. It is clear to us from this explanation and the findings we made at [24] above, that Mr Ward was not obliged by his employer to incur the expenses concerned. It is clear that when agreeing that Mr Ward should be able to stay on in the United Kingdom that it was done so on the basis that for all intents and purposes he was still

to be regarded as performing functions for the Australian office so that in so far as there were other expenses incurred as a result of his personal choice to remain in the UK then they would be for his own account and not for the account of his employer. It was on this basis that Mr Ward made no attempt to ask his employer to reimburse him with the cost of these flights. That would have been normal practice and it appeared to have happened in relation to those flights he took at his employer's request from the UK to Europe. Therefore, we agree with HMRC's analysis that the expense of travelling from the UK to Australia and back was a cost incurred by Mr Ward because of his choice to live in the UK whilst performing a role that was essentially based in Australia. The expenses were therefore not incurred as a result of his employer obliging him to incur the cost of the flights in question. Nor is there any evidence that it was necessary for Mr Ward to visit Australia to perform the duties he described; he simply found it more convenient to do so.

60. In those circumstances, it is clear that the expenses concerned do not meet the requirements of s 338 ITEPA and accordingly are not allowable expenses against Mr Ward's earnings for the tax years in question.

Foreign tax credit

61. Section 18 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA") in so far as relevant provides:

> "(1) Subsection (2) applies if –
>
> (a) under double taxation arrangements, or
>
> (b) under unilateral relief arrangements for a territory outside the United Kingdom,
>
> credit is to be allowed against any income tax, corporation tax or capital gains tax chargeable in respect of any income or chargeable gain.
>
> (2) The amount of those taxes chargeable in respect of the income or gain is to be reduced by the amount of the credit.
>
> (3) In subsection (1) "credit" –
>
> (a) in relation to double taxation arrangements, means credit for tax payable under the law of the territory in relation to which the arrangements are made, and
>
> (b) in relation to unilateral relief arrangements for a territory outside the United Kingdom, means credit for tax payable under the law of that territory,
>
> …."

62. During the course of HMRC's enquiries, Mr Ward provided copies of his Australian tax returns for 2009/10 and 2010/11 as well as copies of certificates of residency issued by the Australian Taxation Office for those years and a copy of the assessment made by the Australian authorities for the year 2010/11. The certificates

certified that Mr Ward was a resident of Australia for income tax purposes within the meaning of the Australia – United Kingdom convention and accordingly was liable to pay Australian income tax in accordance with relevant Australian legislation on his worldwide income.

63. It is therefore clear that Mr Ward was assessed to income tax in Australia on the basis that he was a resident of Australia and not of the United Kingdom for treaty purposes. It is not clear on what basis Mr Ward's residency was determined by the Australian authorities or what information was available to them as regards the number of days he actually spent in Australia as opposed to the United Kingdom during the years in question. There are amounts recorded on Mr Ward's Australian tax returns for the years in question as tax withheld at source, but these are relatively small in relation to Mr Ward's total employment income declared for the relevant years, so it can be assumed that the amounts deducted relate to income referable to duties performed in Australia as opposed to the United Kingdom. As we know, PAYE was not operated in relation to Mr Ward's UK income after 1 July 2009 so that it is only by reference to the credit that Mr Ward was given for the PAYE amounts subsequently accounted for to HMRC by Goodman UK that Mr Ward was treated as having paid UK tax of an equivalent amount on that income.

64. In the event, Mr Ward paid very little Australian tax on his employment income for the years in question. For 2010, Mr Ward was able to introduce losses to reduce his total taxable income to nil. For 2011, he was able to introduce losses to reduce his taxable income to A$46,110 and the assessed tax payable for that year was A $3,779.40.

65. HMRC took the view that Mr Ward should only be given credit against his UK tax liability for the Australian tax that he had actually paid. On that basis it allowed no credit for 2009/10. In relation to 2010/11 the relevant income to which the tax paid related was, in sterling terms, £20,445.47. HMRC then calculated what the effective tax rate had been on Mr Ward's total net employment income, namely 1.11% and applied that tax rate to the sterling amount referred to above, giving a credit of £227 against Mr Ward's UK tax liability for the year in question.

66. Mr Ward disputes this methodology. It seems that his position changed during the course of the enquiry on his Australian resident status. Once he accepted that he had spent more than 183 days in the United Kingdom in both of the tax years in question he dealt with the foreign tax credit issue on the basis that he should for treaty purposes have been regarded as resident in the United Kingdom rather than in Australia for the years in question. On that basis, he took the position that foreign tax credit should be available for the Australian tax payable in respect of that part of his employment income which was referable to the days he actually worked in Australia during the years in question. It does not however, appear that he has addressed this revised position regarding his residence with the Australian authorities.

67. Mr Ward's approach is to seek a credit for the Australian tax payable in respect of the Australian taxable income for the two years in question, that taxable income being calculated by reference to the number of days worked in Australia. On Mr

Ward's figures, the Australian taxable income for 2009/2010 is £13,921 with Australian tax payable of £4,037.10 and for 2010/2011 the Australian taxable income is £20,445 with Australian tax payable of £5,929.05.

68. We accept HMRC's submission that the correct interpretation of s 18 TIOPA is that a credit should only be available for "tax payable" in the foreign jurisdiction concerned, and in this case the tax payable was reduced by losses to a nominal amount. It seems to us that the purpose of the legislation is to give credit for the foreign tax that has actually become payable as a result of the application of the foreign jurisdiction's statutory provisions rather than by reference to the gross amount payable in respect of the source of the income concerned, as Mr Ward contends. We therefore accept the basis of HMRC's calculations on this point.

69. In any event, we have no reliable figures as to what tax ought to be properly payable in Australia on the basis of Mr Ward's revised residence position. Mr Ward has not chosen to seek to have his Australian assessments for the years in question reviewed in the light of the position he now accepts as regards his residence for treaty purposes for the years in question and on that basis we see no reason to interfere with HMRC's calculations.

70. It may be the case that our findings on this point are academic in that it may well be the case that Mr Ward is entitled to a reduction in his tax liability for the years in question in any event as a result of our findings on the ordinary residence point.

Penalty

71. In view of the fact that our decision on the ordinary residence issue means that further work needs to be done in order to come to the correct result as to the amount of Mr Ward's liability for income tax in respect of both of the years in question, (which may indeed result in such liability being reduced to nil for either or both of the years in question) we shall defer our decision on the penalty issue until that exercise has been completed. We shall therefore issue a further decision after considering the further material we have asked for in the directions which are being released with this decision. For the avoidance of doubt, we need no further material or submissions in order to decide the penalty issue.

Conclusion

72. We conclude:

(1) HMRC is entitled to make a discovery assessment for the year 2009/2010;

(2) Mr Ward is to be treated as a resident but not ordinarily resident in the United Kingdom for tax purposes for the years 2009/2010 and 2010/2011;

(3) Mr Ward is not entitled to any deduction for travel expenses against his income for the years 2009/2010 and 2010/2011;

(4) Mr Ward is entitled to no further credit for foreign tax for either of the years in question; and

(5) We shall, unless there is agreement between the parties on the issue, determine the correct amount of income tax to be assessed Mr Ward for the years 2009/2010 and 2010/2011 and the amount of any penalty which we find to be justified in respect of the inaccuracies in Mr Ward's tax returns for those years after consideration of the further material and submissions which are the subject of the directions we have made today.

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

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2016