TC01755

Appeal number: TC/2009/12293

INCOME TAX - discovery assessment – negligent conduct of taxpayer or advisors – no - sufficiency of information disclosed in prior enquiry – section 29 TMA 1970 – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY WHILE **Appellant**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER
I B ABRAMS

Sitting in public at 45 Bedford Square, London WC1 on 22 June 2011

Keith Gordon, counsel, instructed by Tax Aid for the Appellant

C J Brown, an officer of HM Revenue & Customs, for the Respondents

DECISION

1. This appeal is against an assessment originally made on 13 January 2005. The delay between the making of the assessment and this appeal reflects the fact that this appeal was first heard by the General Commissioners, but was subsequently set aside by them. The appeal was then transferred to this Tribunal pursuant to the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009.

2. Mr While was represented by Mr Gordon and HMRC by Mr Brown. A bundle of documents was presented to the Tribunal, and the Tribunal also heard evidence from Mr While. Written submissions were also made by the parties following the conclusion of the hearing in accordance with direction given by the Tribunal.

3. We would note that Mr While had raised issues of whether HMRC had acted "fairly", but these arguments were not pursued on his behalf before the Tribunal.

Background Facts

4. The background facts are not in dispute and we find them to be as follows:

5. In 1982, Mr While started employment as a life assurance salesman with a company in Wolverhampton ("Lincoln"), rising up the ranks until he became a director. During this time he did not manage his tax affairs efficiently, and ended up owing over £150,000 to the Inland Revenue (as was) in tax, interest and penalties. Mr While agreed a programme of payments with the Inland Revenue.

6. The payment programme was interrupted when, in 1992, he and colleagues were dismissed. Mr While made a claim against Lincoln for wrongful and unfair dismissal and damages for the negligent provision of an incorrect reference. It took some six years for the case to be resolved. Part of this claim was successful before the Industrial Tribunal (the predecessor to the Employment Tribunal). Following a further claim in the High Court, Mr While and colleagues were awarded further damages. Mr While was awarded £300,000 in damages in respect of the incorrect reference, and £54,571 for wrongful dismissal. In addition interest and costs were awarded.

7. During the progress of the litigation, Mr While kept the Inland Revenue's Enforcement Office up-to-date with progress, including court dates. He was threatened by the Inland Revenue with bankruptcy on several occasions, but managed, with the help of his solicitor, to convince them to defer any enforcement action until after his court case had been determined. Following judgment, Mr While contacted the Enforcement Office to tell them of the successful outcome, and sent them a copy of a newspaper cutting giving details of the case (the article expressly mentions that damages were awarded against Lincoln both for wrongful dismissal and for negligent references). He discussed with the Enforcement Office his need to settle many creditors, and reached an agreement to pay the arrears of tax in full out of the damages, and to pay the interest due on those arrears by way of instalments. The tax arrears were paid on 7 December 1998.

8. The assessment under appeal relates to the liability of Mr While to taxation on the damages he received. It is common ground that the greater part of those damages is exempt from tax pursuant to section 51(2) Taxation of Chargeable Gains Act 1998 (as it relates to damages to his personal reputation arising from the negligent reference, rather arising from his employment).

9. In calculating the amount of the award, the High Court sought to follow the principle in *British Transport Commission v Gourley* [1956] AC 185 and determined the award on an "after tax" basis. Thus the amount awarded for damages to reputation is reduced to take account of the fact that the damages are not liable to tax. However in this case the High Court did not take account of the fact that awards in respect of loss of employment are taxable to the extent that they exceed £30,000, and the calculation of damages needs to be further adjusted (and increased) to take account of the taxation payable on the excess.

10. In Mr While's case, the judge was specifically asked by Lincoln's counsel whether the award he was making was determined before or after the "deduction of tax", and it was agreed that it was to be the latter. The judge subsequently confirmed that the award was "net of all deductions".

11. In the light of the judge's comments, Mr While and his solicitor thought, as is the case with non-employment related damages that he would not need to make any reference to the damages on his tax return for 1998/9. No reference was made to the damages in Mr While's tax return, which was submitted on 10 January 2000, before the due date. In fact this was wrong. None of the parties, KPMG (who prepared the schedule of loss used by the court in determining the amount to be awarded) nor the court had taken section 148 Income and Corporation Taxes Act 1988 ("ICTA") into account, which brings damages for loss of employment into charge to income tax to the extent that they exceed £30,000. The correct treatment under *Gourley* principles should have been (in respect of the part of the damages relating to wrongful dismissal) to determine the "after tax" damages, and then "gross up" that amount to take account of any tax payable under section 148. The damages for wrongful dismissal should then have been declared on Mr While's tax return. This was not done, as everyone had, wrongly, assumed that no tax would be payable.

12. At about the same time, the Inland Revenue opened an enquiry into Mr While's tax return for 1997/8, mainly focused on expense payments received in the course of self-employment in respect of a business that he had established following the termination of his employment. In the course of that enquiry, the investigating officer, Mrs Graham, held a meeting with Mr While and his then accountants on 14 April 2000. In anticipation of the meeting, Mrs Graham prepared notes of issues to raise. These notes include reference to the damages paid to Mr While by Lincoln.

13. At the beginning of that meeting, Mrs Graham formally opened an enquiry into the 1998/9 tax return.

14. In giving evidence before us, Mr While stated that Mrs Graham asked him many questions, including "Did you receive anything else?", to which Mr While replied

"Yes, £350,000+ for negligent referencing and interest." Mr While told us, and we believe him, that he was so pleased with the award made by the court, that he told everyone about it.

15. Mr While's evidence is consistent with Mrs Graham's preparatory notes and her notes of the meeting. On 28 April 2000, Mrs Graham sent a copy of her meeting notes to Mr While's accountants for review. The notes included the following passage:

> "**Other Matters**
>
> MG [Mrs Graham] said at various times during the meeting Mr While had mentioned that he had received a large sum of money in respect of damages for wrongful dismissal and asked for further information regarding these. Mr While said he received £354,000 in October 1998 and although initially on legal aid he had had to pay some of this money back in expenses. MG asked what had happened to the money and whether he had a financial stake in Essential Mortgages [the business with which he had commenced employment in 1999]. Mr While said no money was invested in this company and explained that the £345,000 was accounted for as follows:
>
> £150,000 as payment against mortgage arrears
> £90,000 to the Inland Revenue
> £20,000 to Barclays Bank
> £17,000 to clear his overdraft
> approximately £3000-£4000 to American Express
>
> MG said she understood that there was still a substantial amount owed to the Inland Revenue – arrears being dealt with by Enforcement Office – Mr While said that he had paid off all the capital and was awaiting confirmation of the interest – adding that he had received contradictory figures."

16. The accuracy of this passage in the notes was not challenged, and we find that it presents an accurate record of what was said by Mr While to Mrs Graham at the meeting.

17. Although Mr While voluntarily disclosed in the meeting that he had been paid damages, Mrs Graham had made reference to those damages in advance of the meeting in her preparatory notes. She must therefore must have become aware of the damages payment from some source other that Mr While's statements in the meeting. It is clear from the notes of the meeting that Mrs Graham was aware that Mr While owed a substantial sum to the Inland Revenue in respect of tax arrears and that these were being dealt with by the Enforcement Office. We infer (and find) that Mrs Graham must have had access in some way to information about Mr While's relationship with the Enforcement Office and at least some of the information provided by Mr While about his damages to the Enforcement Office must have been transmitted within the Inland Revenue to Mrs Graham.

18. The enquiries were closed in January 2001 without any reference to the damages.

19. In 2004 Mr While received a letter from HMRC stating that he owed £42,338.40 in tax in respect of the damages payment, and a discovery assessment in this amount for the tax year 1998/9 was issued on 13 January 2005. The assessment was increased to £94,622.20 by a notice of amended assessment on 2 November 2005, and reduced to £35,769.54 by a further notice of amended assessment dated 20 August 2007. It is this last assessment that is the subject of the appeal.

20. It appears that HMRC's "Termination Payments Unit" alerted their colleagues to the damages received by Mr While. It is not clear how the Termination Payments Unit became aware of the damages, nor how this then led to the discovery assessment.

Discovery Assessments

21. The provisions of section 29 Taxes Management Act 1970 ("TMA") relevant to this appeal are as follows:

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

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

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

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

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

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

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

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer whether in pursuance of a notice under section 19A of this Act or otherwise; or

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

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

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

(7) In subsection (6) above—

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

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

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

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

[…]

22. We note that a tax return had been submitted by Mr While for the tax year 1998/9, and by January 2005 HMRC had ceased to be entitled to open an enquiry into the return. So for HMRC to make a “discovery assessment" in the circumstances of this case:

(1) HMRC must have made a “discovery” for the purposes of section 29(1); and

(2) either:

(a) insufficient tax was paid by the Mr While for 1998/9 because of fraudulent or negligent conduct on the part of Mr While (or a person acting on his behalf) (section 29(4)); or

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

23. Therefore either there must have been negligent conduct on the part of Mr While (or his representative), or HMRC could not reasonably have been expected to be aware that Mr While was liable to tax on the wrongful dismissal element of the damages on the basis of the information before them.

24. HMRC have stressed, and we agree, that there is no question of the conduct of Mr While being fraudulent.

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

Discovery

26. We address first the question of whether there was a "discovery".

27. Section 29(1) is substantially a re-write of the equivalent provision that operated prior to the introduction of self-assessment, and indeed for very many years before that introduction. In this context the battleground between the parties was all in relation to the meaning of the simple requirement that an officer of the Board must “discover” some sort of “understatement”. There would clearly be a discovery if the officer of the Board discovered new facts that had not been disclosed, and if a new view of the law was shown to be the correct view of the law (albeit then subject to the sub-section 29(2) saving provision). But could there be a discovery if for instance the original Inspector simply changed his mind, and concluded that there was an adequate ground for making a further assessment, or if a new Inspector took over the taxpayer’s affairs and, without learning any new facts, simply reached a different conclusion from the original Inspector, and decided for his part that a further assessment was justified?

28. Mr Gordon's contention was that while the "discovery" test presented HMRC with only a very low and modest hurdle to surmount in justifying a discovery assessment, something new had to emerge. Since nothing new emerged after the closure of Mrs Graham's enquiry, no proper "discovery" had been made. This point had been argued by Mr Gordon in another case before the Tribunal (Judge Nowlan and Ms Watts Davis) – *Charlton and others v HMRC* [2011] UKFTT 467 (TC). The decision in the *Charlton* case was released in July 2011, after the date of the hearing in this case (but before the further written submissions were received from the parties).

29. HMRC's contention was that it was sufficient to justify the making of a discovery assessment simply that an Inspector had changed his mind, or that a new Inspector had emerged and that new Inspector had taken a different view from the original Inspector. HMRC contended that the Appellants' submissions overlooked the fact that the authorities that required new facts to have emerged or for a different general view of the law to have emerged were relevant only when the initial assessment had been the subject of "a section 54 agreement".

30. We consider that HMRC's contentions are correct. A discovery assessment can be made merely where the original Inspector changes his mind, or a new Inspector takes a different view. We agree entirely with the reasoning of the Tribunal in paragraphs 51 to 80 of the decision in *Charlton* which address in detail all of the arguments raised before us. We therefore do not propose to set out in this decision the reasons for reaching our conclusions, and are content to adopt the reasons given in the decision in *Charlton*.

31. We find that the relevant officer of HMRC had made a "discovery" for the purposes of section 29(1).

Fraudulent or negligent conduct

32. HMRC submit that the conduct of Mr While in failing to record the damages for wrongful dismissal on his tax return was negligent, and that the fact that no tax was paid in respect of the damages for wrongful dismissal was attributable to his negligence.

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

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

34. We agree with the Special Commissioners in the case of *AB v HMRC* [2007] STC (SCD) 99 (not cited by the parties) at paragraph 105 that:

> "… the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the

> statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue."

35. Mr Gordon contends that Mr While was not negligent. Although it is admitted that he made a mistake by not recording the wrongful dismissal damages on his tax return, the mistake was not negligent. The provisions of section 148 had also been overlooked by KPMG in preparing the schedule of loss, by his solicitor, his experienced barrister and by the court itself. Mr Gordon notes that whatever error had been made by Mr While, it was replicated by Mrs Graham during the course of her enquiry. She was (he submits) in full possession of the facts and yet did not make any adjustment to Mr While's tax return in respect of the damages payment.

36. We also note the statement by the judge that the damages were determined "net of all deductions", which we find was reasonably understood by Mr While to mean that no tax needed to be paid by him in respect of the award.

37. We are satisfied that in the circumstances Mr While acted reasonably in deciding that he did not need to record the damages for wrongful dismissal in his tax return and self-assess income tax on those damages. We note that the impact of s148 was overlooked by a number of experienced professionals who were in full knowledge of all relevant facts, and was also overlooked by the court. We do not consider that Mr While can be considered negligent for failing to spot a point which had not been picked up by his professional team and by the court.

38. We have also considered whether anyone acting on his behalf in relation to the tax return was negligent for the purposes of section 29(4). A person does not act on behalf of a taxpayer for the purposes of section 29(4) if they merely provide advice to the taxpayer; they would need to have prepared the tax return, filed it with HMRC or engage in correspondence with HMRC. They would have had to have represented Mr While in his dealings with HMRC, and not merely provided advice to him. For these reasons, none of the advisers representing Mr While in relation to his litigation with Lincoln would have been "acting on his behalf" for section 29(4) purposes. Mr While's tax adviser at the time was a Mr Herbert, who prepared his tax return for 1998/9. Mr Herbert was therefore acting on behalf of Mr While for the purposes of section 29(4). Included in the bundles was a statement from Mr Herbert (which was not challenged and which we accept) stating that although Mr Herbert was aware that Mr While had been awarded damages, Mr While did not advise Mr Herbert that any part of those damages represented taxable income. Mr Herbert says (and we so find) that if had been made so aware, then he would have included the income on the tax return. We therefore find that Mr Herbert was not negligent. Accordingly we find that no one acting on behalf of Mr While for the purposes of section 29(4) was negligent.

39. HMRC submit that Mr While's ignorance of the effect of s148 cannot be an excuse (see *Adojutelegan v Clerk* (2004) SpC 430). Further, Mr While was negligent in failing to give to Mr Herbert the same information that he subsequently gave to

Mrs Graham at the meeting on 14 April 2000, or that he ought to have realised that he should have made further enquiries about the taxability of the damages payment (or mentioned it in the "white space" on the tax return or ticking "yes" in box 13 (that he had received other income not mentioned in the tax return).

40. We disagree. The point in *Adojutelegan* was whether the appellant could exercise due care in respect of a matter of which they were ignorant. The Special Commissioner held that the appellant was not as ignorant as claimed, and that she had some knowledge of her obligations, and was sufficiently aware of the issues to be on notice that she should have made some enquiries. The circumstances in this case are very different. Mr While is not asserting that he was ignorant of his obligations to pay income tax. Rather that he had reasonable grounds for believing that no tax needed to be paid in respect of the award, in the light of the statement of the judge that the award was net of all deductions and that KPMG's schedule of loss did not bring tax into account. Given that Mr While had reasonable grounds for believing that no tax was payable by him in respect of the award, we consider that it was reasonable (and not negligent) for him to have acted as he did.

41. We therefore find that the condition in section 29(4) has not been satisfied.

Information available to HMRC

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

43. “An officer of the Board” is for these purposes a hypothetical “ordinary competent” HMRC officer.

44. Section 29(6) sets out “information made available” to the HMRC officer for the purposes of section 29(5). Subsection (7) extends the information to include also information in the tax returns for the preceding two years.

45. It is common ground that no reference was made to the damages payment in any of Mr While's tax returns or in any documents accompanying those returns, and that no claims were made that were relevant for section 29(6)(b).

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

(1) it was contained in any documents, accounts or particulars which were produced or furnished to an officer of the Board for the purpose of the enquiry into the 1998/9 tax return; or

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

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

(b) had been notified in writing by Mr While to HMRC (section 29(6)(d)).

47. In relation to this information, we note the principles set out by the Court of Appeal in *Langham v Veltma* (2004) 76 TC 259. The principles can be summarised as follows:

(1) "Awareness" is the officer's awareness of an actual insufficiency in the self-assessment in question, rather than an awareness that he should do something to check whether there is an insufficiency;

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

(3) The sources of information referred to in section 29(6) are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency; and

(4) The information in question must clearly alert the officer to the insufficiency of the assessment.

48. In addition the statute requires the taxpayer when providing information to notify HMRC not just of the existence of the information, but also of its relevance to the insufficiency for the period in question.

49. The first question that arises is whether (a) the newspaper cutting sent by Mr While to the Enforcement Office, or (b) Mrs Graham's notes of the meeting of 14 April 2000 fall within section 29(6). If they do, the next question is whether the information contained in those documents was sufficient to clearly alert an officer to the insufficiency.

50. The notes of the meeting with Mrs Graham were sent to Mr While's then accountants to review, and it is likely that those notes would have been returned by his accountants to Mrs Graham. Although documentary evidence to that effect was not available, Mr Brown for HMRC accepted that the notes of the meeting should be treated as falling within the scope of section 29(6).

51. As regards the newspaper cutting, this was sent by Mr While to the Enforcement Office, and not to Mrs Graham. In addition there is no evidence that the cutting itself was sent by the Enforcement Office to Mrs Graham. We have found that some of the information in the cutting must have been transmitted in some way to Mrs Graham, as she was aware that a substantial damages payment had been made to Mr While. However there is no evidence to support a finding that Mrs Graham would have been aware of the detailed content of the cutting, and in particular that the cutting expressly referred to the damages having been paid for wrongful dismissal and negligent references. Mr Brown submits that information sent to the Enforcement Office would not normally form part of an inspector's checks, and following *Langham v Veltema*, the cutting did not fall within section 29(5).

52. Mr Gordon submits that it is irrelevant whether the cutting was sent to Mrs Graham. The test under section 29(6)(d)(ii) is whether the document had been

notified to HMRC. If it was, then its contents are deemed to be before the hypothetical officer.

53. The Tribunal's view is that the content of the press cutting is not within the scope of section 29(6). The two potentially relevant paragraphs are (c) and (d). For the cutting to fall within section 29(6)(c), in must have been produced or furnished to HMRC "for the purposes of any enquiries into the return". The cutting was not so furnished. Rather it was provided to the Enforcement Office to support Mr While's case for settlement of his arrears of tax through an agreed programme of payments and not bankruptcy Nor does the cutting fall within section 29(6)(d). We agree with Mr Gordon's submission that it is not relevant that the cutting was not sent to Mrs Graham. The tests in section 29 relate to a hypothetical officer, and not any officer in particular. You cannot therefore read in to section 29(6)(d)(ii) a requirement that the information be provided to the assessing officer (although it must be the case that the information must be provided to an office or officer who is in some way responsible for dealing with the taxpayer's affairs – to take an extreme example, it cannot have been in the contemplation of Parliament that section 29(6)(d)(ii) would be satisfied by a taxpayer based in Devon sending information to an HMRC officer in the highlands of Scotland who deals with alcoholic spirits excise duties). However, even if sending the cutting to the Enforcement Office meets the requirement of section 29(6)(d)(ii), this is not of itself sufficient for the information in the cutting to fall within section 29(6)(d). The introductory wording to the paragraph requires that both the existence and the relevance of the information must be notified by the taxpayer to HMRC. By sending the cutting to the Enforcement Office, Mr While may have an arguable case that he notified HMRC of the existence of the information, but he did not notify HMRC of its relevance to his affairs. Accordingly we find that the information in the press cutting should not be treated as being before the hypothetical officer for the purposes of section 29.

54. We now turn to consider whether the information treated as being available to the hypothetical inspector is such that the condition in section 29(5) cannot be met.

55. The hypothetical officer would be aware that the damages payment had not been included in Mr While's tax return for 1998/9.

56. The hypothetical officer would also be aware of the following statement contained in the notes of the meeting

> MG said at various times during the meeting Mr While had mentioned that he had received a large sum of money in respect of damages for wrongful dismissal and asked for further information regarding these. Mr While said he received £354,000 in October 1998 and although initially on legal aid he had had to pay some of this money back in expenses.

57. From this it can be inferred that the hypothetical officer would be aware that Mr While had received substantial compensation for wrongful dismissal, and that such damages had not been included in Mr While's tax return. He would be aware that the amounts involved were very substantial.

58. We also find that the hypothetical officer would be aware of the provisions of section 148 Taxes Act 1988, and that payment of damages for wrongful dismissal are taxable (at least to the extent that they exceed £30,000).

59. We therefore conclude that the four requirements listed above are met. Even though the hypothetical officer might not have known the precise amount of the compensation that was taxable, he would have sufficient information to reasonably conclude that there was an actual insufficiency in Mr While's self-assessment, rather than an awareness that he should do something to check whether there was an insufficiency.

60. We therefore find that the condition in section 29(5) has not been satisfied.

Conclusions

61. As neither of the conditions in section 29 (4) nor (5) have been satisfied, the discovery assessment falls.

62. The appeal is therefore allowed.

63. We were asked by Mr Gordon to consider the potential application of Extra Statutory Concession ESC A19, but as we have allowed the appeal, it is not necessary for us to consider this further.

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

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 17 January 2012

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on (20 April 2012).

Cases cited by the parties in their submissions and skeletons:

R v The Kensington Income Tax Commissioners (ex p Aramayo) (1913) 6 TC 279
R v Commissioners for Taxes for St Giles and St George Bloomsbury (ex p Hooper) (1915) 7 TC 59
Cenlon Finance Co Ltd v Ellwood (1962) 40 TC 176
Scorer v Olin Energy Systems Ltd (1985) 58 TC 592
Langham v Veltma (2004) 76 TC 259
Adojutelegan v Clark (2004) SpC 430
R v General Commissioners for Income Tax for Havering (ex p Knight) (1973) 49 TC 161
Blyth v The Company of Proprietors of the Birmingham Waterworks (1856) 11 Exch 781
Nicholson v Morris (1977) 51 TC 95
R (oao Weston) v Commissioners of Inland Revenue (2004) 76 TC 207
R (oao Esterson) v HMRC (2005) 77 TC 629
Charlton and others v HMRC [2011] UKFTT 467 (TC)