[2017] UKFTT 0629 (TC)

TC06065

Appeal number: TC/2015/02945

PROCEDURE – application to vary directions – payments made to third party in respect of footballer's image rights – HMRC alleging that image rights agreements uncommercial and payments excessive – payments alleged to be footballer's earnings – whether HMRC effectively alleging sham – burden of proof in relation to an allegation of sham – whether HMRC should be directed to serve their witness evidence and skeleton argument first – whether HMRC should prepare hearing bundles

FIRST-TIER TRIBUNAL
TAX CHAMBER

HULL CITY AFC (TIGERS) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

Sitting in public at Alexandra House, Manchester on 15 March 2017

Keith Gordon (counsel) instructed by Jacksons for the Appellant

Akash Nawbatt QC (counsel) instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Contents

DECISION

Introduction

1. This is an application by Hull City AFC (Tigers) Limited ("**the Appellant**") to vary the directions that have been made in its appeal. The current directions are those previously agreed between the parties and endorsed by the Tribunal on 20 September 2016. I shall refer to the Respondents as "**HMRC**". At the hearing, the Appellant was represented by Mr Keith Gordon and HMRC by Mr Akash Nawbatt QC.

2. The appeal arises from three Directions under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 and three Decisions under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 in respect of the tax years 2008/2009, 2009/2010 and 2010/2011. The Directions and Decisions were made in respect of payments made by the Appellant to a British Virgin Islands' service company (Joniere Limited) in respect of the image rights of Geovanni Deiberson Mauricio Gómez (who evidently is known simply as Geovanni but who will be referred to in this decision as "**Mr Gómez**"). I understand that Mr Gómez is an attacking midfield player who played once for Brazil in 2001 and was contracted to the Appellant between 2008 and 2010 after playing in previous years for Cruzeiro, Barcelona, Benfica and Manchester City. I believe that he made 60 appearances for the Appellant and scored 11 goals.

3. The agreements with which the appeal is concerned are two Premier League contracts between the Appellant and Mr Gómez of 7 July 2008 and 23 September 2009 and two contracts between the Appellant and Joniere Ltd of 3 November 2008 and 24 March 2010. The latter contracts are those in respect of Mr Gómez's image rights (evidently granting the Appellant a licence to exploit for commercial purposes his name, image, signature and other characteristics). These contracts were not produced for the purposes of the hearing although certain terms in the agreements are referred to or reproduced in HMRC's statement of case.

4. The Appellant appealed the Directions and Decisions and, following a review upholding them on 1 April 2015, the Appellant notified its appeal to the Tribunal on 14 April 2015. The appeal was allocated to the standard category on 12 May 2015. HMRC served their statement of case on 9 July 2015 and at the same time they submitted to the Appellant's representative, Jacksons, a set of draft directions for his agreement. These proposed that the appeal be allocated to the complex category and that (so far as relevant to the present application) the Appellant's witness evidence should be served first.

5. On 10 July 2015 Mark Jackson of Jacksons replied that he did not agree HMRC's proposed directions and responded with alternative proposals. These proposed that the appeal be allocated to the standard category and that (so far as relevant to the present application) HMRC should serve their witness evidence first.

6. On 15 July 2015 HMRC objected to the Appellant's proposed directions because that they were predicated on the basis that HMRC bore the burden of proof. Instead it was said that it was incumbent on the Appellant to produce sufficient evidence to prove their case i.e. that on the balance of probabilities HMRC's Directions and Decisions were wrong. In particular, it was said regarding the proposal that HMRC should serve their witness evidence first that:

> *"The Appellant's Directions provide for the Commissioners to serve witness statements before the Appellant. As explained above, the burden in this appeal is on your client and as such it is for them to prove their case. This sequence is therefore illogical. The Commissioners are entitled to be aware of your client's witness evidence before they provide their witness evidence in reply (if any such evidence is required)."*

7. A similar comment was made in relation to the proposal that HMRC should serve their skeleton argument first.

8. Mr Jackson responded on 18 July 2015 to explain that he had not checked the draft directions before they had been sent out and that the typist had transposed the references to appellant and respondent. So, in fact, he had no intention of suggesting that HMRC should serve their witness statements or skeleton argument first.

9. HMRC then submitted to the Tribunal on 24 July 2015 an application for directions and draft directions, together with the previous correspondence with Jacksons. HMRC's original draft directions and those submitted with its application envisaged that the Appellant should serve a statement of case on the basis that the Appellant's grounds of appeal were brief and formed bare assertions unsupported by legislation, authority or reference to evidence. In summary, the grounds were that, "*the amounts [assessed] relate to image rights payments made under a bona fide commercial arrangement*" and that no NIC or PAYE was payable on such payments.

10. Mr Jackson communicated with the Tribunal on 28 July 2015 pointing out that HMRC's directions were not yet agreed and making various points (including his unfamiliarity with Tribunal procedure). Mr Jackson objected to HMRC's request that the Appellant provide a statement of case but he did not raise any issue about the order of service of witness statements.

11. On 17 August 2015, the Tribunal allocated the appeal to the standard category and issued its usual directions (although mistakenly dated 2016) rather than those proposed by HMRC. On 15 September 2015, following further correspondence between the parties and the Tribunal, the judge to whom the papers had been referred confirmed the categorisation as a standard case and on 22 October 2015 the Tribunal wrote to the parties indicating that it was now listing a case management hearing in the appeal to determine the directions that should be made pursuant to HMRC's application. This was listed for 12 January 2016.

12. On 8 January 2016 HMRC indicated that directions had been agreed between the parties and submitted the draft for the Tribunal's approval. HMRC requested that

the case management hearing listed for 12 January 2016 be vacated. The Tribunal issued the directions with one slight amendment (being the period for the dates to avoid) on 11 January 2016. Those directions envisaged that the Appellant would serve a statement of its case by 1 March 2016 and serve its witness evidence first.

13. On 1 April 2016, the Appellant served its statement of case as envisaged by the directions (a month later than originally set) and on 20 April 2016 it served its list of documents (just over a month later than originally set). A reason for the delay may have been due to a change of representation for the Appellant from Jacksons to IPS Law LLP. On 8 June 2016 HMRC served their list of documents (over two months later than originally set) and indicated that HMRC proposed to apply for new directions resetting the timetable to take account of the delay.

14. The Tribunal issued revised directions on 20 September 2016 with an updated timetable. These envisaged that by 26 October 2016 the parties should agree a statement of facts and issues and that the Appellant should serve its witness statements on 23 November 2016, to be followed by HMRC's witness statements by 23 December 2016 and listing information on 9 January 2017.

15. On 6 October 2016, the Tribunal was notified that there had been another change in the Appellant's representation, with a reversion to its original representative, Jacksons. At the same time, the Chairman of the Appellant requested that for health reasons on his part the timetable should be stayed until 30 November 2016.

16. There then followed in December 2016 exchanges of correspondence regarding the draft statement of agreed facts and issues. In a letter of 8 December 2016 Jacksons asked this:

> *"In view of your deletion of the final two paragraphs, please make clear HMRC's position on sham? Is sham the basis of HMRC's case? If so, do you agree that HMRC bear the burden of proof to show sham? If HMRC are not alleging sham, please explain clearly the basis of the decisions under appeal and the nature of HMRC's case in defending these decisions."*

17. HMRC answered these questions on 9 December 2016 as follows:

> *"It is for HMRC to decide which legal arguments it wants to run and to amend/expand its arguments as the case evolves. HMRC's case has been amply explained in our Statement of Case."*

18. Jackson's responded on 12 December 2016 with a revised draft of the statement of agreed facts and issues taking account of other comments. At the same time Mr Jackson expressed his concern with the response on sham. He considered it unhelpful and repeated the questions posed on 8 December 2016. At the same time, he made it clear that the Appellant would apply to the Tribunal for a direction if HMRC failed to give a clear response.

19. On 14 December 2016 HMRC replied as follows:

"With regards sham – Our contentions are that the payments (or a part thereof) are in fact salary, wages or "other emoluments of the employment". HMRC considers that they are too excessive to be commercial, suggesting that there may be some other reason why the club decided to enter into the agreements. Our contention is that they represent remuneration of the employee for performing their duties for the club as a player and are liable to PAYE/NIC. HMRC reserves its position with regard to the sham point. We would point out that HMRC does not have to plead sham in order to argue that what the contract claims consideration is being paid for may not be reflective of what the consideration was in actual fact paid for (see the recent case of Acornwood & Ors v HMRC *[2016 UKUT 361] especially paragraph 59)."*

20. On 15 December 2016 Mr Jackson set out his understanding of the position, to avoid any misunderstandings, in the following terms:

"1. HMRC do not currently consider the "image rights" contracts to be sham, but HMRC reserve the right to contend sham should the need arise.

2. Consequently, HMRC currently take the view that the "image rights" contracts were enforceable contracts (of which the parties were Hull City Tigers and Joniere and) (sic) *under which Hull City Tigers became obliged to make quarterly payments to Joniere.*

3. HMRC consider, however, that those payments were in fact not (despite the description in the contracts) in respect of image rights, but instead were salary, wages or other emoluments of employment, assessable (so far as income tax is concerned) directly on the player under ITEPA 2003 (and, therefore, liable to deductions under PAYE and NIC). In short, it is HMRC's position that Joniere was effectively a nominee of the player, receiving sums that were legally due to the player himself.

4. Similarly, HMRC consider that no rights were passed by Joniere to Hull City Tigers in consideration for the quarterly payments made by Hull City Tigers to Joniere under the terms of the contract.

5. HMRC's position is based on the assertion that the amount of the payments were too excessive to be commercial (as image rights payments) and instead represent part of the remuneration of the employee for performing his duties for Hull City Tigers as a player."

21. Mr Jackson asked HMRC to confirm their agreement to this summary or otherwise clarify their position. On 19 December 2016 HMRC replied to the effect that these questions were matters for litigation rather than correspondence between the parties and that HMRC did not intend to be drawn into lengthy correspondence on this issue, particularly as they had made their position clear. They nevertheless responded to Mr Jackson's five points as follows:

"1. HMRC reserves its position on the sham point. As we have previously said, HMRC's case is not contingent on being able to prove an intention to deceive.

It is well established that the circumstances described by Diplock LJ in Snook (i.e. sham) are not the only ones in which the court may disregard provisions in the documents which do not represent the reality of the transaction. … [HMRC then referred to the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41 and to the Upper Tribunal in *Acornwood*.]

2. We acknowledge that there is a legal document that provides HCT with a license to exploit whatever image rights in respect of [Mr Gómez] are legally held by Joniere and require HCT to pay consideration. We say that the consideration agreed is uncommercial. However, we question whether it was ever the intention or understanding of the parties that HCT would act in accordance with the rights conferred by the license agreement. Consequently, the consideration that HFC (sic) *was legally required to pay should be construed as additional remuneration of [Mr Gómez], which he directed should be paid to Joniere.*

3. See 2 above.

4. See 2 above.

5. This is a mischaracterisation of HMRC's argument. Yes, we think the consideration agreed is uncommercial but see also our SoC, especially paragraphs 34-41."

22. I am unclear why point 5 is a mischaracterisation of HMRC's argument given that point 5 in Mr Jackson's letter of 15 December 2016 appears to repeat what he had been told by HMRC on 14 December 2016. Nothing, however, seems to turn on this and later in this decision I shall need to consider more closely HMRC's statement of case in the light of this correspondence (see paragraph 168 below). At present, however, it suffices to note that paragraphs 34 to 41 are the section of HMRC's statement of case in which HMRC set out their case (coming after sections that provide an overview, a summary of the legislation and an exposition of the facts as HMRC understand them). Paragraph 34 of HMRC's case draws attention to gaps that HMRC allege exist in the documentation produced by the Appellant. Paragraph 35 questions whether Mr Gómez had any image rights of real commercial value and asserts that the image rights payments were used to achieve an appropriate level for Mr Gómez's net salary. Paragraphs 36 to 39 consider various aspects of the image rights agreements, their relationship with Mr Gómez's employment and their use or value to the Appellant. Paragraph 40 concludes that:

"In all the circumstances, the Club did not genuinely expect or intend to exploit the rights under the Image Agreement (sic) and to make money from them. It is HMRC's case that the Image and Variation Agreements entered into in respect of Mr Gómez were not genuine commercial agreements and that the amounts paid in respect of the "image rights" constitute disguised employment income upon which PAYE should have been operated."

Paragraph 41 invites the tribunal to dismiss the appeal.

23. The statement of agreed facts and issues was agreed by the parties and sent to the Tribunal on 20 December 2016. On 21 December 2016 Mr Jackson replied to HMRC's latest 'clarification' on the sham point. He suggested that, essentially, HMRC were saying that they were not relying on the 'sham' doctrine but were making assertions that could only be explained by reference to that doctrine. He concluded:

> *"Essentially, we understand that (however one describes the phenomenon) HMRC's case is founded on the basic premise that the agreements at the heart of the case do not represent the true intentions of the parties. That is something that HMRC are required to prove. Consequently, we consider that the case management directions should be redrafted to reflect that the burden of proof in this case lies on HMRC. Therefore, we would propose that the directions be revised so as to require HMRC to produce their evidence ahead of the Appellant and in due course a reversal of the order for serving skeleton arguments."*

24. Needless to say, HMRC objected to this proposal and drew attention to Mr Jackson's earlier acceptance that the burden of proof was on the Appellant (see paragraph 8 above). Accordingly, on 22 December 2016 the Appellant applied to the Tribunal for a variation in the existing directions to require HMRC to serve their witness evidence first and in due course to serve their skeleton argument first on the basis that they were alleging sham or something that came extremely close to it without formally acknowledging the doctrine.

25. In response to the Appellant's application, HMRC wrote to the Tribunal on 9 January 2017 as follows:

> *"The Appellants now say that they have come to realise that the burden should be reversed because HMRC is arguing sham. HMRC has stated on several occasions that whilst we reserve the right to argue sham, HMRC's case is not primarily based on sham or contingent upon being able to prove an intention to deceive which is the test for sham. …* [HMRC then repeated what they had said at point 1 in paragraph 21 above.]
>
> *HMRC accept the existence of a legal documents* (sic) *which provides HCT with a license to exploit whatever image rights in respect of [Mr Gómez] are legally held by Joniere and require HCT to pay consideration. However we question whether it was ever the intention or understanding of the parties that HCT would act in accordance with the rights conferred by the license agreement. This is because, inter alia:*
>
> *1. [Mr Gómez] did not have an "image rights" agreement with his previous club suggesting his image was of no commercial value;*
>
> *2. The agreement inflated his net salary to a figure close to what he received at his previous club;*
>
> *3. HCT failed to exploit or extract any value from the agreement;*

4. There was no option for HCT to review the "Image Rights" agreement before renewal;

5. There was no valuation of [Mr Gómez's] "image rights" prior to entering the agreement;

6. The agreement only related to territories outside the UK and HCT were not in a position to exploit an overseas market as a recently promoted club;

7. [Mr Gómez] was not in the elite group of recognisable sports people having only played international football once seven years previously;

8. [Mr Gómez's] playing contract already conferred upon HCT the right to exploit his image worldwide and so the "image rights" agreement conferred no additional benefit.

On the basis of the above, HMRC say that the agreement is not a genuine commercial agreement and the amounts paid in respect of "image rights" constitute disguised employment income. HMRC's case does not rely upon having to show sham as the terms of the agreement can be disregarded if, as the evidence suggests, they do not truly reflect what the consideration was paid for."

26. It is against that background that the Appellant's application to vary the current directions has come before me. Whichever way I decide it is apparent that I will need to amend the current directions to allow for the further lapse in time that has occurred to resolve this issue.

The Appellant's submissions

27. Mr Gordon for the Appellant outlined the background to the current application and took me through the correspondence on the 'sham' issue, which I have set out in some detail in previous paragraphs.

28. He noted that while it is generally asserted (and usually correct) that the taxpayer bears the burden of proof in tax cases, it is not universally true or without relevant qualification. Leaving aside penalty cases and discovery assessments made outside the usual time limits, Mr Gordon noted that even in 'standard' appeals (and discovery cases once the extra conditions have been established) HMRC might have to show that they had reason to believe that there had been an under-assessment and that any assessment reflected their reasonable views. As he put it, an assessment had to be shown to be procedurally valid before the burden of proof was transferred to the taxpayer to displace it. He cited Floyd J in *HMRC v Rogers* [2010] STC 236 at [19] in support of this proposition.

29. He noted that there were other cases in which the Courts had decided that the burden of proof should fall on HMRC. One example was that of VAT abuse and another was that of sham (for which he cited *Massey t/a Hilden Park Partnership v*

HMRC [2015] UKUT 405 (TCC) at [59] and [60]). He suggested that one reason underlying this point might be that any appealable decision by HMRC must have some factual or legal basis; thus, if an assessment relied on the fact that a particular document did not have the legal effect it purports to have, HMRC must have some evidence that calls into question its authenticity or genuineness. Whether or not that is correct, he said that the burden of proof shifted because an allegation of sham was such a serious matter (in support of which he cited *Schechter and Schechter v HMRC* [2017] UKFTT 189 (TC) at [139] and [140]).

30. Mr Gordon suggested that HMRC's disavowal of any sham argument in the Appellant's case should be seen as no more than a ploy to avoid assuming the burden of proof. Whether or not that view of the matter was correct, however, HMRC were not absolved from proving their case. First, he submitted that they were bound to show that their decisions represented a reasonable conclusion. Second, he said that it was wrong to say that the burden only fell on them when they *expressly* relied on sham; in other words, they could not avoid the burden that fell upon them through the expedient of denying sham when in reality that was the essence of their case. Third, he submitted that there was no difference in principle between a case in which it was asserted that a document was a sham and one in which it was suggested that only certain elements of the document were intended by the parties – or, put the other way, that certain elements of the document were *not* intended by the parties to have the effect they purported to have.

31. Mr Gordon referred to what Lady Justice Arden had said at [85] and [86] in *Hitch v Stone* [2001] STC 214 about the possibility that part of a document may be found to be a sham while another part is effective, provided it concerns a transaction divisible into separate parts. He noted that in the present case the image rights agreements were single indivisible contracts to which the only parties were those concerned in the arrangement and, unlike the situation being considered by Arden LJ in *Hitch v Stone*, did not involve a transaction divisible into separate parts to which the *Snook* concept of sham could then be applied in part. Either the image rights agreements were genuine or they were not. If HMRC wished to assert that they were not genuine (as their statement of case and the correspondence clearly suggested) that amounted to an allegation of sham.

32. He said that the essential argument that HMRC was putting forward was that, in one respect or another, the parties' written contractual documents did not tell a true – or the whole – story. Mr Gordon said that, ultimately, it did not matter whether what was being alleged amounted to 'full sham' as in *Snook* or 'partial sham' as recognised in *Hitch v Stone*. In either case the burden fell on the person alleging the essential 'falsehood' of the written documents or sham (full or partial) to prove their case. Accordingly, the burden of proof lay with HMRC and they should be required to serve their witness evidence and skeleton argument first.

33. Mr Gordon took me to the Upper Tribunal's decision in *Acornwood LLP and Others v HMRC* [2016] STC 2317, [2016] UKUT 361 (TCC). He noted that HMRC relied upon paragraph 59 of that decision (set out in paragraph 136 below) to support their contention that they were entitled to call into question particular elements of the

image rights agreements even though they were not alleging sham in the *Snook* sense. In their e-mail of 19 December 2016 (see paragraph 21 above) HMRC had noted Mr Justice Nugee's conclusion in *Acornwood* that, "*HMRC's acceptance that the contractual documents entered into by the parties were not shams or pretences does not preclude them from contending that a statement in a contract that £x is paid in consideration of Y is not reflective of what the consideration truly was for which £x was paid.*"

34. Mr Gordon said that this did not assist HMRC. Even if it were true that the arrangements in question were not sham in the classic sense explained by Diplock LJ in *Snook*, the nature of their allegation remained one in which they were calling into question whether the image rights agreements properly reflected the intentions of the parties (i.e. whether money was paid for something other than what was specified in the contract). In this respect, the distinction to which Nugee J drew attention in paragraph 59 of *Acornwood* between "sham" and "mislabelling" – or (as Mr Gordon characterised it) full and partial sham – was not one that led to different conclusions on where the burden of proof fell. (I consider what I believe Nugee J meant by "mislabelling" in paragraph 139 below.)

35. Mr Gordon drew my attention to paragraphs 65 to 67 of Nugee J's decision (see paragraph 138 below). These made the point that HMRC, as the person alleging sham or mislabelling, might seek to make good their allegation in more than one way. Mr Gordon said, however, that this did not change the position that in either case the burden fell on HMRC to prove their allegation. It was not for the taxpayer to disprove it. With this in mind, Mr Gordon said that it was unnecessary for me to decide whether HMRC were in reality alleging sham in the *Snook* sense or some lesser degree of sham or pretence. In either case the burden of proving what HMRC were alleging in relation to the image rights agreements fell upon them.

36. Mr Gordon noted what Neuberger J had said in *National Westminster Bank plc v Jones* [2000] BPIR 1092 at [59] (incorrectly cited in *Schechter* at [140] as *National Westminster Bank plc v James*) that, "*there is a strong and natural presumption against holding a provision or a document a sham.*" This recognised the possibility that it might just be a provision in a document that might be called into question but nevertheless recognised that there was a strong presumption against finding the provision was a sham.

37. In the present case, however, Mr Gordon said that it was not just some provision of the image rights agreements that HMRC were seeking to call into question but the very agreements themselves. It was impossible to sever the agreements into different parts, one of which gave effect to the parties' intentions and the other of which was a sham. Mr Gordon referred to HMRC's assertion that the Appellant had paid Joniere an excessive sum for Mr Gómez's image rights. He said that to assert (as HMRC were doing) that the Appellant's payments under those agreements were in fact disguised remuneration was in fact an allegation of sham and required considerably more explanation and analysis than HMRC had provided to date.

38. With this point in mind I asked Mr Gordon at the end of his submissions whether he was suggesting that HMRC should be directed to provide further and better particulars of their case. As to this he said this was not what the Appellant was seeking. In essence, as it seems to me, the Appellant contends that HMRC's case can only be understood on the basis that HMRC are alleging sham or something akin to sham because the Appellant's payments are said to be made for something other than what the contract provides for (see also paragraph 115 below). The Appellant is therefore entitled to know on what basis they make that allegation before the Appellant is required to respond with its witness evidence and its skeleton argument.

HMRC's submissions

39. Mr Nawbatt QC for HMRC emphasised that the subject matter of the hearing was a case management issue: which party should be required to serve their witness evidence and skeleton argument first. In this respect, he handed up a chronology of the procedure to date and noted that the existing directions had previously been agreed to by the parties and endorsed by the tribunal, although he recognised that I had discretion to vary the directions if I considered that that was the appropriate course to take. In so far as the hearing raised issues as to the burden of proof involved in the appeal, however, he suggested that it would not be appropriate for me to seek to bind the tribunal that would eventually hear the appeal. (This is not, of course, something I can do in any event but I may need to reach my own view of the matter if I am to respond appropriately to the Appellant's application.)

40. He took me through the correspondence leading to the agreed directions and noted in particular the Appellant's acceptance that the burden of proof fell on the taxpayer. He drew my attention to the statement of agreed facts and issues in which the issue in the appeal was stated to be, "*whether those payments made by Hull City Tigers to Joniere Ltd constituted "general earnings" and "earnings" under ITEPA 2003*".

41. Mr Nawbatt said that HMRC had put the Appellant on notice of their reasons for calling into question the arrangements entered into with Joniere and had reserved their position pending service of the Appellant's witness statements. As Nugee J had recognised in *Acornwood*, it was unnecessary for HMRC to allege that the image rights agreements with Joniere were a sham. HMRC had disavowed any reliance on sham in the *Snook* sense. The question instead was whether the sums paid were in fact taxable as earnings.

42. Mr Nawbatt noted that the burden of proof was ordinarily placed on the taxpayer because it was the taxpayer, and not HMRC, that had the necessary information to demonstrate why tax was not due as HMRC was suggesting. The parties would be serving their witness statements against the backdrop of HMRC's statement of case, the Appellant's reply and the statement of agreed facts and issues. It would then be for argument before the tribunal that heard the appeal as to the nature of HMRC's case and the evidence supporting it. However, it was for that tribunal to determine the character of the payments and, ultimately, the burden was on the

Appellant to show that the Directions and Decisions against which it was appealing were wrong.

43. In conclusion, Mr Nawbatt said that it was too late to change course with the directions and, in any event, the Appellant's submissions on burden were wrong. He submitted that the Appellant should be directed to serve its witness statements within 28 days, with HMRC's witness statements to follow 28 days thereafter. Listing information should then be provided 7 days after that.

The Appellant's reply

44. In reply, Mr Gordon said that HMRC were wrong to suggest that it was too late to change the course of the directions and that the Appellant was in some way bound by its earlier agreement that the burden of proof lay with the Appellant rather than HMRC. While HMRC had served their statement of case on 9 July 2015 and the Appellant had replied to that on 1 April 2016, the appeal was still at an early stage of the proceedings leading to an eventual appeal hearing given that each party had still to serve their witness evidence, that hearing bundles had to be agreed and prepared and skeleton arguments served.

45. He said that the Appellant's application was within the scope of the existing directions (which recognised that either party might apply for the directions to be amended or for further directions to be made) and was perfectly appropriate for it to make following the service of each party's case, the agreement of a statement of facts and issues and the ensuing course of correspondence in which HMRC had been asked to elaborate upon the case that they were advancing (and had done so). Once it became clear that the essential nature of HMRC's case was such that it raised issues in respect of which the burden fell on them rather than on the Appellant, the Appellant was entitled to ask the tribunal to vary the directions that it had previously made to recognise the nature of the case that each party was advancing.

46. Mr Gordon emphasised that the Appellant's application was not designed as a revolutionary one to suggest that the tribunal should ordinarily direct HMRC to serve their witness evidence or skeleton argument first. It related instead to a case in which HMRC were advancing an argument that said that the agreements in question did not in fact reflect the reality of the parties' intentions. Referring to Mr Nawbatt's submissions on *Acornwood*, Mr Gordon noted regarding the 'mislabelling' of legal agreements that a court was entitled to disregard the fact that an agreement was headed 'contract for services' and instead have regard to the terms of the agreement to conclude whether or not it was in legal form such a contract. In that case he accepted that the burden fell on the taxpayer to displace a determination that payments under the agreement were employment income rather than payments to a self-employed contractor.

47. On the other hand, if the contract included a particular provision and it was alleged that that provision was a pretence, because it did not represent the true intentions of the parties, the burden fell on the party who alleged that – in this case HMRC. In the present case, the true meaning of the image rights agreements and the

nature of the payments made under them were the only issues. It was for HMRC to prove what they now alleged about those payments.

Hilden Park

48. At the hearing Mr Gordon referred in passing to the decision in *Hilden Park LLP v HMRC* [2017] UKFTT 217 (TC) ("***Hilden Park No 2***"), which had been released on 8 March 2017 (and in which Mr Gordon had represented the taxpayer). The decision concerned the appropriate case management directions that should be made in a VAT case in which HMRC were alleging abuse of the type epitomised in C-255/02 *Halifax plc and Others v HMCE* [2006] STC 919 ("***Halifax* abuse**"). *Hilden Park No 2* concerned a successor arrangement to that considered by the Upper Tribunal in *Massey t/a Hilden Park LLP v HMRC* [2015] UKUT 405 (TCC) ("***Hilden Park No 1***"), on which Mr Gordon had relied (see paragraph 29 above).

49. For present purposes, among the issues for consideration in *Hilden Park No 2* were (i) whether the burden of proof to show abuse lay on HMRC or on the taxpayer, (ii) whether that issue should be resolved before case management directions were issued and (iii) whether HMRC should be required to lead their evidence first. All of these bear a close resemblance to the issues that I have to address here.

50. At the hearing of the Appellant's application, my view, which I expressed to the parties, was that it might be inappropriate for me to attempt to pre-empt the tribunal that would ultimately hear the Appellant's appeal as to where the burden of proof lay in respect of the case advanced by HMRC. As I have already noted, I do not think that I can tie that tribunal's hands but I note that in *Hilden Park No 2*, Judge Mosedale concluded as follows:

> "19. Nevertheless, I was persuaded that a hearing could not take place unless the burden of proof was resolved in advance. It was vital for HMRC to know whether they had to open the hearing and lead evidence to establish a prima facie case of *Halifax*-abuse. It was vital for them to know this because if they were required to but could not establish a prima facie case, the appeal should be allowed without the appellant being obliged to refute the assessments.
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> 20. I was also easily persuaded by both counsel that it was inappropriate for exchange of evidence to take place before the issue of burden of proof was resolved. As Mr Jones explained, and Mr Gordon agreed, if HMRC had the burden of proof, their approach to the case would be quite different. HMRC would have to call witnesses, possibly even expert witnesses, such as on valuation, to establish their case of *Halifax*-abuse. On the other hand, if HMRC did not have the burden of proof, they might elect (as they had done in *Hilden Park 1*) to call no evidence at all but rely on cross-examination to challenge the appellant's evidence that there was no abuse.
>
> 21. Indeed, the appellant would need to know who had the burden of proof no later than exchange of evidence because otherwise it would be prevented from making the application which an appellant which does not have the burden of

proof is entitled to make where the evidence (or lack of it) served by HMRC so indicates. And that is an application for HMRC to be barred on the grounds that its case does not have a reasonable prospect of success. The right to make such an application, where circumstances indicate that it is appropriate, is a valuable right as, if successful, it obviates the need for an appellant to prepare for a hearing it is virtually certain to win. It saves costs."

51. The tribunal in *Hilden Park No 2* concluded that the burden of proof in a *Halifax*-abuse case lay with HMRC. As neither party had made any submissions on *Hilden Park No 2* I invited written submissions from the parties after the hearing.

52. The Appellant submitted that *Hilden Park No 2* was a clear example of an exception to the usual rule that taxpayers bear the burden of proof. It pointed out that it was common ground that the burden was on HMRC in a sham case of the *Snook* variety and noted that the current dispute was whether that also applied in other situations where HMRC are arguing that a contractual document is not a genuine reflection of the contracting parties' intentions. The Appellant noted that it was also common ground between the parties that the image rights agreements were in addition to an employment contract between the Appellant and Mr Gómez. The Appellant agreed with Judge Mosedale's observations at paragraphs 20 and 21 of *Hilden Park No 2* and also with her conclusions at paragraphs 39 to 46 of her decision. Those paragraphs emphasised in the Appellant's view the importance of determining at an early stage in the proceedings where the burden of proof lies.

53. HMRC considered that the decision in *Hilden Park No 2* did not assist in the resolution of the issue that I have to decide. HMRC noted that *Hilden Park No 2* was a VAT case involving *Halifax* abuse. They also noted Judge Mosedale's reservations in paragraph 74 on the Upper Tribunal's reasoning in *Hilden Park No 1* and that in paragraph 75 Judge Mosedale rationalised the Upper Tribunal's conclusion on the basis that an allegation of *Halifax* abuse "*could be seen as an allegation of misbehaviour*" which, like fraud, HMRC should have to prove. According to HMRC, that reasoning does not apply in the Appellant's case, which falls within the usual rule expressed in *Grunwick Processing Laboratories Ltd v HMCE* [1987] STC 357, that HMRC have no burden to prove anything before the Tribunal, and the principle identified by the Upper Tribunal in *Acornwood*.

Discussion

54. In considering the issues raised by the Appellant's application, I start by setting out the statutory basis for the Directions and Decisions. I then consider the nature of the burden that falls upon HMRC in relation to an assessment and in a case in which they can be taken to allege sham or abuse (whether explicitly or by implication having regard to the case that they advance in support of an assessment). Finally, I shall consider HMRC's Statement of Case in the light of the principles I have identified and having regard to the various submissions before me.

The statutory basis for the Directions and Decisions

55. Under regulation 80(2) of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682 ("**the PAYE Regulations**"), HMRC may determine the amount of the tax that appears to them to be payable to the best of their judgment and serve notice of their determination on the employer. Regulation 80(6) provides that a determination under that regulation is subject to Part 5 (Appeals and Other Proceedings) of the Taxes Management Act 1970 ("**TMA**") as if the determination were an assessment and the amount of tax determined were income tax charged on the employer. Part 5 of the TMA accordingly applies with any necessary modifications.

56. Similarly, a decision with respect to National Insurance Contributions under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 may be appealed to the tribunal under section 11 of that Act. Regulation 3(1) of the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 ("**the 1999 Regulations**"), requires that any decision must be made to the best of the officer's information and belief and there are requirements as to the persons to whom a notice of the decision must be given and its contents. Regulation 7 applies sections 49A to 49I TMA to any appeal against a section 8 decision, allowing for a review of the decision and the transmission of the appeal to the tribunal for it to determine the matter in issue.

57. In the case of an appeal within Part 5 TMA against an assessment (and therefore a regulation 80 determination), section 50(6) provides that the tribunal may reduce the assessment if it concludes that the appellant has been overcharged, "*but otherwise the assessment shall stand good*". Section 50(7) allows the tribunal to increase the assessment if it concludes that the appellant has been undercharged to tax. In relation to a section 8 decision, regulation 10 of the 1999 Regulations allows the tribunal to vary the decision if it concludes that it should, "*but otherwise [the decision] shall stand good*".

The significance of an assessment "standing good"

58. This "stand good" language has been part of the Management Acts since at least section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be the Revenue which is asserting that tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayer's explanation is untrue but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.

59. This was firmly established (assuming there had previously been doubt on the issue) as far back as 1927 by the Court of Appeal in *T Haythornthwaite and Sons Ltd v Kelly* 11 TC 657 (see Lord Hanworth MR at page 667). Thus, as tax appeals were originally conceived, the inspector of taxes had no need to say anything at the hearing of the appeal and, indeed, had no need to appear at all, although the Inland Revenue was (and HMRC now are) invariably represented. It nevertheless remained the taxpayer's responsibility to satisfy the Appeal Commissioners that he was overcharged by the assessment (see *Vandervell Trustees Ltd v White and Others* [1971] AC 912 per Lord Diplock at 942E-F).

60. The latter part of Lord Diplock's dictum in *Vandervell*, to the effect that the inspector was not entitled to argue for an increase in the assessment, has been doubted and was not followed by the Court of Appeal in *Glaxo Group Ltd and others v IRC* [1996] STC 191. In *Glaxo*, Millett LJ concluded at 199-200 that section 50(7) TMA required the Appeal Commissioners to increase the assessment if the evidence showed that to be the appropriate course. As he noted, the Commissioners could only act on evidence, as was at that time spelled out in section 50(6), and that requirement was necessarily imported into section 50(7). Accordingly, unless the inspector could tender evidence and invite the Commissioners to increase the assessment, it was difficult to see on what basis and in what circumstances the Commissioners would act under section 50(7), it not usually being in the taxpayer's interests to argue for an increase in the tax payable. In this respect, it might be open to the inspector to raise an additional assessment, which not only would have the benefit of quantifying more precisely the tax that was said to be due but also had the beneficial effect (so far as the Revenue was concerned) of absolving the inspector from the need to argue for an increase in the original assessment and of transferring the burden to the taxpayer to show why he was overcharged by the combination of the original and additional assessments (see *Duchy Maternity Ltd v Hodgson* (1985) 59 TC 85, per Walton J at 106A-C).

61. The specific reference to the production of lawful evidence and the examination of the appellant on oath or affirmation, which was found in section 50(6) TMA as enacted and in its predecessor provisions, may have derived from the fact that the Commissioners started life as the administrative body of persons responsible for making the assessment. That part of their function finally disappeared with changes made by the Income Tax Management Act 1964, following which their function became wholly appellate. The explicit reference to lawful evidence in section 50(6) disappeared with the abolition of the Appeal Commissioners and their replacement by this tribunal with its own rules of procedure, including those relating to evidence.

The obligation on HMRC to validate the assessment

62. Notwithstanding the direction in section 50(6) and Regulation 10 of the 1999 Regulations that the assessment or decision should 'stand good', it is accepted that in certain cases HMRC bear an initial burden of showing that the assessment is validly made. Most obviously, if the assessment is for a year of assessment that is out of time HMRC must be able to demonstrate the basis for saying that circumstances exist permitting the assessment to be made for that year. I do not, however, accept that

HMRC's initial burden in relation to an assessment goes as far as Mr Gordon appeared to suggest (see his submissions as summarised in paragraph 28 above).

63. In *HMRC v Rogers* [2010] STC 236, to which Mr Gordon referred me, counsel for HMRC noted that an assessment may necessarily involve some guesswork, especially where information is not forthcoming from the taxpayer. Floyd J accepted that this was so but nevertheless commented that, "*HMRC have a duty to exercise due care and diligence and come to a bona fide belief as to the amount of tax chargeable*". As authority for this proposition Floyd J cited *R v Commissioner of Taxes for St Giles and St George, Bloomsbury (ex parte Hooper)* [1915] 7 TC 59.

64. The Bloomsbury General Commissioners had raised additional assessments on Mr Hooper and his alleged partner, Mr Jackson, on the basis that the Surveyor of Taxes had made a discovery for the years 1910 to 1912 leading him to believe that Hooper and Jackson were conducting a business in partnership and that no full and proper return had been made of the partnership's profits. Mr Hooper responded to the assessments by seeking a writ of prohibition prohibiting the Commissioners from making and acting on the assessments in question. Accordingly, the main question for determination was whether Mr Hooper's remedy should be through an appeal to the General Commissioners or by way of a writ of prohibition.

65. Having regard to the Income Tax Act 1842 and the Taxes Management Act 1880, the court considered that the answer to this question depended upon the meaning to be given to "discovers" and whether it was sufficient that the Surveyor had honestly arrived at his conclusion based on the material then before him that Hooper and Jackson were in partnership and had not made a proper and full return of their profits, or whether those facts had to be established by sufficient legal evidence justifying that conclusion.

66. Having considered the scheme of the Acts, the Lord Chief Justice concluded (at page 65) that:

> "… the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact sometimes very complicated, which may arise. … The obligation is placed, for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable but not to the extent of the assessment made upon him. I am therefore of the opinion that it is for the Commissioners to decide whether or not a person assessed by the Additional Commissioners after 'discovery' by the Surveyor, is in fact chargeable. But there must be information before the Surveyor which would enable him, acting honestly, to come to the conclusion that a person is chargeable."

67. For his part Avory J considered that a court should only interfere if it were shown that there were no grounds upon which the Surveyor or Commissioners could honestly have believed that the appellant was chargeable to tax (see at page 69). Lush J thought that the court could and should interfere to stop proceedings if it were proved or admitted that the Surveyor never had satisfied himself that a person was chargeable and had acted without any enquiry or if it were proved or admitted that his belief was founded on an obvious and manifest mistake in law (see at page 73).

68. It is clear that the judges in *ex parte Hooper* were considering circumstances in which the validity of a discovery assessment might be challenged by way of (what is now) judicial review. Where a surveyor made a discovery, he was bound to satisfy the Additional Commissioners as to what he had or believed he had discovered and if they were satisfied they would make the additional assessment. When the matter came before the Appeal Commissioners, however, the burden of proof was no different than in the case of an original assessment: in other words, it lay on the taxpayer to displace the assessment. It was unnecessary for the appeal proceedings to start with the Revenue discharging the burden of showing that there was some *prima facie* case of discovery (see *Jones v Mason International (Luton) Ltd* (1966) 43 TC 570 and *Hume v Asquith* (1968) 45 TC 251 per Pennycuick J at 270-271).

69. The law in relation to discovery assessments and judicial review has moved a long way since 1915. The High Court may still have been prepared in exceptional circumstances to contemplate whether it should grant judicial review of an assessment (see e.g. *R v IRC ex parte Caglar* (1995) 67 TC 335), although the majority of the House of Lords in *Autologic Holdings plc v HMRC* [2006] 1 AC 118 have emphasised the usual need to follow the statutory appeal route where that is open to the taxpayer. Section 29(8) TMA now specifically provides that any objection to a discovery assessment on the ground that neither of the two conditions mentioned in subsections (4) and (5) is fulfilled shall only be made on an appeal against the assessment, even though HMRC accept that there may be situations in which judicial review remains open to the taxpayer (see *Hargreaves v HMRC* [2016] STC 1652 at [18]).

70. Section 29(8) only applies to the specific conditions that have been introduced in subsections (4) and (5). The tribunal in *Hankinson v HMRC* [2009] UKFTT 384 (TC), 81 TC 424 at [85] considered in relation to a discovery assessment under the amended section 29 TMA that the relevant standard to be applied to the discovery under subsection (1) was that,

> "the officer must have evidential basis beyond mere suspicion in order to arrive honestly at the conclusion that, on balance, there is an insufficiency. The test is subjective, in that the officer must have satisfied himself that this is the appropriate conclusion."

71. The subjective nature of this test was endorsed by the Court of Appeal (see 81 TC 424 at 533, [18]). This does not allow HMRC *carte blanche* in terms of the tax assessed. The amount assessed must be based on known facts or on reasonable inferences drawn from known facts so that it can be said to be 'fair' (see *Johnson v*

Scott (1978) 52 TC 383 per Walton J at 394, approved by the Court of Appeal at 403). However, as regards the validity of a discovery assessment, the two additional conditions that now attach under section 29(1) TMA (one of which must be satisfied) are objective in character. Their satisfaction or otherwise, determined on the appeal as a matter of objective fact (irrespective of the officer's view or whether he even considered the matter), will decide whether the discovery assessment is a valid assessment or not. The burden of showing that one or other of those conditions is satisfied so that the assessment is validly made lies with HMRC.

72. This appears from Henderson J's decision in *HMRC v Household Estate Agents Ltd* [2008] STC 2045, 78 TC 705 where he considered the equivalent corporation tax provisions in Schedule 18 to the Finance Act 1998 (see in particular [48] to [50]). His conclusions were endorsed by the Court of Appeal in *Hankison* and, more recently, in *Hargreaves v HMRC* [2016] STC 1652. Accordingly, an assessment will fail if HMRC neglects to produce any evidence to show that the relevant conditions for its issue under section 29(4) and (5) TMA are satisfied and, where appropriate, that it can be made out-of-time. It is not enough that HMRC assert in their statement of case that the assessment is validly made nor, indeed, does it make any difference that the tribunal (without having considered the question of validity) has concluded that the assessment should stand good (see *Burgess & Another v HMRC* [2016] STC 579, [2015] UKUT 578 (TCC)). I do not need to deal with this further because there is no suggestion in the Appellant's case that section 29(4) or (5) is in point.

The burden of satisfying the statutory conditions for raising an assessment

73. Before reaching a conclusion on this aspect of the matter, however, I note that in *Hargreaves*, Arden LJ, after setting out section 50(6) TMA, noted by reference to *IRC v Transport Economy Ltd* (1955) 35 TC 601 and *IRC v Garvin* (1979) 55 TC 24 that the onus of justifying an assessment is on HMRC. I do not, however, think that she was intending to place a more general and unspecified obligation to justify an assessment (or direction) than that previously described.

74. *Transport Economy* concerned a surtax direction under section 21 of the Finance Act 1922, where the Special Commissioners concluded that the onus was on the Revenue to show why the direction ought to be made and directed that the Revenue should open the case and call the necessary evidence to support the direction. The Revenue called no evidence and the Commissioners accordingly discharged the direction.

75. Upjohn J noted that section 21 involved three steps: (i) a direction that the company's income should be treated as the shareholders' income; (ii) an apportionment of the company's income to its members, and (iii) an assessment to surtax on the company in respect of the apportioned income. Paragraph 1 of Schedule 1 to the 1922 Act allowed an appeal against a direction and imported the usual appeal provisions, including the 'stand good' language, "*with any necessary modification*". Nevertheless, the Revenue were unable to persuade Upjohn J that this meant that the burden fell on the taxpayer to displace the direction or required the taxpayer to open the appeal against the direction with its evidence.

76. Atkinson J had reached a similar conclusion in *Dixon & Gaunt Ltd and James Hare Ltd v IRC* (1947) 29 TC 289 in relation to a direction by the Revenue under section 35 of the Finance Act 1941 relating to Excess Profits Tax. The direction could be made where the Revenue considered that a main purpose of a transaction was tax avoidance. The taxpayer submitted that it was for the Revenue to open the appeal and present their evidence first. The Special Commissioners disagreed and the taxpayer elected to call no evidence, following which the Commissioners confirmed the direction after the Revenue submitted that this was the course they should adopt in the absence of any case being presented by the taxpayer.

77. Atkinson J disagreed. Having noted that (unlike section 21 Finance Act 1922) there was no express incorporation of the usual appeal provisions but (somewhat like the National Insurance provisions in issue here) that there were regulations conferring powers on the Special Commissioners to deal with Excess Profits Tax appeals, he continued (at page 295)—

> "But no provision anywhere in connection with Excess Profits Tax has been called to my attention which in any way incorporates Section 137 of the 1918 Act where the burden is put upon the Appellant.
>
> At this point I ought to add this. The Commissioners of Inland Revenue have very extensive powers of getting all the information they want … they have the fullest power of demanding particulars and seeing accounts and books and anything they want. Therefore, it is, or ought to be, certain that they have in their possession before they make any direction sufficient information to make it appear that a direction should be made.
>
> Both Section 21 of the 1922 Act and Section 35 of the 1941 Act start with what is in effect a charge of evasion. Under Section 21 it is a charge of not distributing profits for the purpose of avoiding taxation, and under Section 35 it is a charge of entering into some transaction for the purpose of evading Excess Profits Tax. The Commissioners of Inland Revenue ought not to make those charges unless they have formed an honest opinion that they are justified. That means that they must have certain facts in their possession upon which they have formed their view. There can be no difficulty about placing those facts before the Special Commissioners. They are under no disadvantage if called upon to justify their claim. On the other hand, it is not intended that they should be able to say to themselves: Well, let us draw a bow at a venture and allege that such and such a transaction is intended to evade taxation and then we will try and justify it by cross-examination. That is not the intention of these Sections.
>
> Quite apart from authority, it seems to me that a man charged with evasion should be told what the facts are upon which the Inland Revenue Commissioners rely, upon which they base their opinion and their charge. The question on an appeal is not whether the Commissioners of Inland Revenue had been of that opinion, but whether it appears to the Special Commissioners hearing the appeal that such and such a result must be expected to follow from the transaction. It is a procedure which is intended to get the view and judgment of the Special Commissioners who are hearing the appeal. To my mind the

answer to the question asked in this case must depend upon the answer to the question: Where lies the burden of proof?"

78. The answer, he concluded was that (at page 298)—

"Therefore there is clear authority [e.g. *Thomas Fattorini (Lancashire) Ltd v IRC* (1942) 24 TC 328] as to where the burden of proof rests. The Commissioners have to put before the Special Commissioners facts sufficient to justify the direction. The Solicitor-General agreed that, at the end of the day, the Special Commissioners must be satisfied affirmatively that the Commissioners of Inland Revenue are right and that the direction is well founded. But he argued that the Appellant must at any rate begin, and must do something by calling somebody to say: "This charge is not true", or something of that sort. I cannot follow that. The "end of the day" may come quite early in the day. At the conclusion of this case, were there any facts before the Special Commissioners to justify their conclusion? There were none. It was not the fault of the Appellant because the duty was upon the Commissioners of Inland Revenue to put the necessary facts before the tribunal.

At Common Law, in the King's Bench Division, the question of the burden and the right or duty to begin frequently arises. It does not mean that the plaintiff has always to begin. One asks the question: If no evidence is given, who wins? That settles the question of the burden of proof. It seems to me, on these authorities, the answer to the question is clear: namely, if no evidence is given the Appellant must win, because the result of the giving of no evidence is that there are no facts before the Special Commissioners to enable them to form any view. In this case there was no material before them which could justify their confirming the direction."

79. The last case in this particular triumvirate is *IRC v Garvin* (1981) 55 TC 24, where the statutory provision in question was section 460 Income and Corporation Taxes Act 1970 negating the tax advantages derived in certain circumstances from a transaction in securities. Under section 460(3) the Revenue could serve a notice specifying how the advantage was to be counteracted in a case in which the section applied. Slade J, having outlined the special procedure to be followed before a notice was given, nevertheless rejected Revenue Counsel's submission that on an appeal against the notice under section 460(3) the burden of proof lay on the taxpayer. Having referred to the decisions in *Dixon & Gaunt* and *Transport Economy*, Slade J said (at pages 55-56)—

"Mr. Vinelott pointed out that the relevant statutory provisions in [*Dixon & Gaunt*] empowered the Commissioners to make the requisite direction where they were "of opinion that the main purpose for which" the relevant transaction was as stated in the relevant statute, and that in [*Transport Economy*] the relevant statute conferred the relevant powers on the Special Commissioners where "it appeared to them" that the company concerned had not done certain stated things. In such circumstances, it was suggested on behalf of the Crown that it was logical that the burden should be placed on the Inland Revenue of justifying its opinion or justifying what it stated had "appeared" to it. Section

460 in contrast is prefaced by different words. With respect to this argument, I think that it involves the making of a distinction which is without any real difference relevant for present purposes. Under the express opening words of s 460(3), it is a condition precedent to the exercise of the Board's powers to serve a notice in writing of the nature therein mentioned, that the section "applies" (that is to say actually applies) to the recipient of the notice in respect of the transaction or transactions relied on by the Revenue. This difference in the wording seems to me if anything to render the ratio of the *Dixon & Gaunt* decision and of the *Transport Economy* decision applicable *a fortiori*. … It was submitted on behalf of the Crown that such a conclusion would place the Crown at a great disadvantage in attacking tax avoidance schemes of the nature which the Legislature had in mind in enacting s 460, on the grounds that it has none of the relevant information while the taxpayer has all of it. I do not find this point a compelling one, bearing in mind the powers to obtain information expressly conferred on the Revenue by s 465 of the Act which are exercisable in any case "where it appears to the Board that by reason of any transaction or transactions a person may be a person to whom section 460 above applies". It seems reasonable to assume that the Revenue will not serve a notice under s 460(3) on a taxpayer before it has obtained evidence sufficient at least to satisfy itself that there is a reasonably strong case for saying that the section applies."

Application of the above principles to the Appellant's case

80. I think it is clear, therefore that the burden falls on HMRC to demonstrate that an assessment has been validly made where the statute attaches conditions to the making of the assessment, such as those that allow HMRC to raise an 'out of time' assessment or as currently attach to the making of an in-time discovery assessment. HMRC may also bear the burden of showing that the circumstances for claiming tax exist where the liability to tax in the circumstances involves some prior administrative action as a precursor to raising an assessment or otherwise taking whatever steps are needed to negate the tax benefits that the taxpayer might otherwise claim. One reason for this may be that the precursor action relates to a provision which aims specifically to overturn the tax treatment that would ordinarily apply to the taxpayer's transactions; in other words, HMRC are invoking a provision without which the assessment could not stand good. Having satisfied the tribunal on that, and demonstrated that the assessment is validly made, the burden then falls on the taxpayer to displace the assessment.

81. In the present case, regulation 80(2) specifically refers to the requirement of "best judgment" in determining the amount of tax payable (as to which there is no challenge by the Appellant) and contemplates a notice of determination rather than an assessment as such. The sentiments expressed by Atkinson J in *Dixon & Gaunt* in relation to the direction required in that case chime with Mr Gordon's submissions for the Appellant. In my view, however, regulation 80(2) does not correspond to the type of pre-assessment direction that was involved in the *Transport Economy* or *Dixon & Gaunt* cases. They were effectively precursors to an assessment but a determination under regulation 80 is treated as an assessment for the purposes of Part 5 TMA (see paragraph 54 above). Similarly, a decision with respect to NICs must be made to the

best of the officer's information and belief (as to which there is no challenge) but Regulation 10 of the 1999 Regulations then places the burden of displacing the decision on the taxpayer. There is therefore no precondition or precursor step involved for which the burden falls on HMRC in the Appellant's case to demonstrate the validity of the assessment.

82. Once it is concluded that the determination or decision has been validly made, the legal burden falls on the taxpayer to displace it. That is, in my view, the position in the Appellant's case. Accordingly, to the extent that the thrust of Mr Gordon's submissions for the Appellant was to the effect that there was some prior or initial burden on HMRC in this case to justify the Directions or Decisions I do not agree that that is so. That is not, however, the end of the matter, as Mr Nawbatt for HMRC may have wished me to conclude.

The power to bar HMRC from continued participation in proceedings

83. It is appropriate at this point to say something on one of the issues arising from Judge Mosedale's decision in *Hilden Park No 2* (see paragraph 48 above). Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**the Rules**") allows proceedings to be struck out if the tribunal considers that there is no reasonable prospect of the appellant's case, or part of it, succeeding. Rule 8(5) states that Rule 8 applies to the respondent as it applies to the appellant, save that the reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings.

84. Rule 8 therefore places HMRC, as the respondent, in a position analogous to that suggested by Lord Diplock in *Vandervell* to exist where an assessment had not been raised in a large enough sum (see paragraph 60 above). I do not think, however, that this affects the statutory direction that an assessment (or in this case the Directions and Decisions) shall stand good unless and until the appellant has demonstrated by appropriate evidence that he is overcharged. The legal burden is the burden of establishing the facts relevant to the determination of the disputed issue and, based on those facts, putting forward contentions that persuade the tribunal of the correctness of the appellant's case, namely that he is overcharged by the assessment. This remains constant throughout the appeal process.

85. Rule 8(8) certainly provides that if the respondent has been barred from taking further part in proceedings, the tribunal need not consider any response or other submissions made by the respondent and, "*may summarily determine any or all issues against that respondent*". Nevertheless, the language of rule 8(8) is permissive – the tribunal "need not consider" and "may summarily determine". If there are materials already before the tribunal that raise issues that the tribunal thinks need answering in order for it to be satisfied that the assessment should be reduced or discharged, there seems no reason why it should not take account of those materials and seek some explanation from the appellant; furthermore, I do not think that it would necessarily be open to the appellant to submit, without producing any evidence, that the assessment should be reduced or discharged, rather than standing good.

86. In saying this I am not necessarily disagreeing with what Judge Mosedale said in *Hilden Park No 2*. The particular circumstances that she was considering was a situation in which HMRC are barred from taking further part in the proceedings because the tribunal has concluded that there is no reasonable prospect of HMRC's case succeeding. In those circumstances, it might rightly be said that, having reached that conclusion, it is open to the tribunal summarily to determine the appeal in the appellant's favour.

87. On the other hand, brief consideration of how this particular state of affairs might come about reveals the possible tension between the statutory direction that the burden lies on the appellant to demonstrate that he is overcharged by the assessment (which does not require HMRC to say anything in support) and the proposition that the burden of proof is in some respect on the respondent (so that HMRC's case can be summarily disposed of). The situation cannot easily be compared to a submission that there is no case to answer. In criminal proceedings, the burden is on the prosecution and such a submission is designed to secure acquittal without the need to present a defence. Similarly, such a submission in civil litigation (although relatively infrequent) would be for the defendant to advance at the close of the claimant's case (see e.g. *Lipkin Gorman v Karpnale Ltd & Anor* [1989] 1 WLR 1340 at 1375A-B). In an appeal against an assessment, however, the burden is and remains on the appellant to displace the assessment. As Atkinson J put it (see paragraph 79 above), if there is no evidence, the assessment (if validly made) stands.

88. That said, the disposal of proceedings without a hearing is one of the tribunal's duties in furthering the overriding objective of dealing with cases justly, including saving expense, dealing with the matter in a proportionate manner and expeditiously (see rule 2(1), (2)(a)). The overriding objective may also be advanced through active case management which allows issues to be identified at an early stage as those requiring further investigation or as being capable of summary disposal. In this respect, the tribunal's powers under rule 8 correspond to an extent with a court's power under the Civil Procedure Rules to strike out a statement of case (or part thereof) where it discloses no reasonable grounds for bringing or defending a claim and its power to dispose of a case by way of summary judgment, both of which may apply to the claimant or defendant.

89. The resolution of the issue to which I have referred in paragraphs 86 and 87 above is likely to be that the tribunal would only reach the conclusion that there is no reasonable prospect of HMRC's case succeeding on an application to that effect by the taxpayer. As part of the hearing of that application, the taxpayer would very likely explain to the tribunal why he is overcharged and why HMRC's case cannot support the assessment, so enabling the tribunal summarily to determine the appeal in the appellant's favour. If, however, the appellant merely demonstrated that HMRC's case as stated had some fatal flaw without producing any material to explain why he was overcharged, it might be that the tribunal should demand more of the appellant before summarily determining the matter in his favour.

Occasions on which the burden of proof is on or shifts to HMRC

90. The burden that is placed on the taxpayer is not just to establish by evidence the primary facts needed to determine the tax liability (so far as in issue and unagreed) but extends to the inferences or conclusions of fact that should be drawn from the primary facts, which may then only be challenged on appeal on *Edwards v Bairstow* grounds (see e.g. *Kalron Food Ltd v HMRC* [2007] STC 1100, [2007] EWHC 695 (Ch) at [30]-[38]). Nevertheless, the taxpayer's obligation to displace the assessment does not mean that no evidential burden ever rests on HMRC, i.e. that HMRC are absolved entirely from the need to produce evidence to support an assessment. Even though the legal burden is on the taxpayer to displace the assessment, what is often referred to as the evidential burden (in the sense of the burden to adduce evidence) on an issue may shift to HMRC during the course of the hearing.

91. This appears from *Wood v Holden* (2006) 78 TC 1, where the main issue was whether a Dutch company (Eulalia) was resident in the United Kingdom. HMRC assessed the taxpayers on the basis that Eulalia was resident, which depended upon whether its central management and control was to be found in the United Kingdom. The taxpayer's case necessarily was that it was not. It did not suffice, however, for the taxpayer just to assert that the assessment was wrong because the company was not resident and that the burden of making the positive case that it was resident therefore fell upon HMRC. A submission to that effect as to burden of proof was accepted by the Special Commissioners in *Untelrab Ltd v McGregor* [1906] STC (SCD) 1 on the basis that the issue was whether HMRC had jurisdiction to make the assessment (i.e. as to the validity of the assessment) but this was not the approach adopted in *Wood v Holden*. In essence, the assessment was based on the fact that Eulalia was UK resident and it therefore put Eulalia's residence in issue so that the burden fell on the taxpayer notwithstanding that this required the taxpayers to prove the negative – that Eulalia was *not* resident – if they were to displace the assessments.

92. The Special Commissioners concluded that Eulalia was resident but Park J reversed their decision on appeal and his decision was upheld by the Court of Appeal. As Park J noted at paragraph [59] of his judgment, although under section 50(6) TMA the burden of displacing the assessment falls on the taxpayer, "*there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue.*" Park J summarised in paragraph [60] the nature of the evidence that the taxpayer had produced to prove the negative before concluding:

> "[60] … Surely at that point [the taxpayers] can say: We have done enough to raise a case that Eulalia was not resident in the UK. What more can the Special Commissioners expect from us? The burden must now pass to the Revenue to produce some material to show that, despite what appears from everything which we have produced, Eulalia was actually resident in the UK."

93. Having referred to Park J's judgment, Chadwick LJ observed that:

> "32. As the Judge pointed out, the Revenue had produced no positive material to show where the central control and management of Eulalia was. It was not

enough (as the Judge thought) for the Revenue to criticise the lack of evidence from some of those at Price Waterhouse and ABN AMRO who had been involved in the transaction in 1996. The Special Commissioners had said that they would not have been assisted, to any material extent, by oral evidence of events then some seven years in the past. Nor was it enough to demonstrate, as counsel for the Revenue had done convincingly, that the steps taken were part of a single tax scheme, that there were overall architects of the scheme in Price Waterhouse, and that those involved all shared the common expectation that the various stages of the scheme would in fact take place. As the Judge observed, those matters were not denied. Taken together they did not, of themselves, lead to the conclusion that Eulalia was resident in the UK.

33. In *Rhesa Shipping Co. SA* v. *Edmunds* [1985] 1 WLR 948, Lord Brandon of Oakbrook pointed out (*ibid*, pp 955H-956A) that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. But that is not a course which should be adopted unless owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take. It is a feature of tax litigation not least where the litigation arises from a tax avoidance scheme that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The Revenue will not have been party to the transaction; and will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the Revenues investigatory powers. I have no doubt that there are cases in which the evidence before the Special Commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof which s 50(6) TMA 1970 has placed upon him. But, equally, I have no doubt that the Judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases. There was no reason to think that the material facts had not been disclosed; and the Commissioners did not hold that it was for that reason that they were unable to decide the question of residence. I agree with the Judge that, in the present case, the third alternative to which Lord Brandon referred in *Rhesa Shipping* was not one which was properly open to the Special Commissioners."

94. As *Wood v Holden* illustrates, where the point in issue is one that necessarily flows from the assessment in respect of which facts need to be proved, in that case the residence of the company, the burden is and remains on the taxpayer to satisfy the tribunal that HMRC have got their facts wrong (so that the assessment should be reduced or discharged). There may come a point, however, at which it becomes necessary for HMRC to produce some evidence, not to prove on the balance of probabilities that Eulalia is resident but sufficient to support the assessment or otherwise cast sufficient doubt on the taxpayer's case to lead the tribunal to conclude that the assessment should stand good.

95. Even if the conclusion that the assessment should stand good might be said to carry with it an implicit allegation of dishonesty or fraud, that does not place any burden on HMRC to prove dishonesty or fraud. There are any number of decisions in cases where HMRC have alleged that the taxpayer has understated his income or profits in some way, or has unexplained assets or sums of money, and the Appeal Commissioners or tribunal have concluded that the assessment should stand good because at the end of the day the taxpayer has been unable to explain to their satisfaction that the assessment is wrong. Underlying many such assessments there may be an implicit allegation that the taxpayer has dishonestly under-reported or concealed income or profits. That does not, however, require HMRC to prove dishonest evasion or relieve the taxpayer of the legal burden to displace a valid assessment designed to recover tax in respect of the amount alleged to be involved. This is notwithstanding that it is normally for the party alleging fraud or dishonesty to properly plead and make good that allegation.

96. This appears from *Brady* v. *Group Lotus Car Companies Plc* (1987) 60 TC 359, in which the General Commissioners had to decide how much, if any, of considerable sums of money paid by the De Lorean Partnership and De Lorean Motor Cars Limited was in fact received by or was under the control of Lotus or its officers in their capacity as such. HMRC had assessed the amounts paid on the basis that they were so received or controlled. Lotus produced their accounts and their executives and auditors gave evidence on the matter, and neither the company's books nor the oral evidence disclosed any receipt of moneys or entitlement to receipt of moneys on which the Revenue could found the assessments. Lotus accordingly submitted that the burden of displacing this evidence and showing that there had been such a receipt of or entitlement to the money rested with the Revenue, given that the case that HMRC were asserting was fundamentally one of fraud by Lotus or its officers. The General Commissioners concluded in effect that HMRC had failed to discharge that burden.

97. In the High Court, the Vice-Chancellor noted that the burden of proof lay on the taxpayer to displace the assessment, and then continued (at 376-377):

> "If the technical phrase "burden of proof' had not been used by the Commissioners, in my judgment the Commissioners' approach was understandable. As a matter of practical common sense, if the company's documents showed no receipt or entitlement to receipt and the Commissioners accepted the oral evidence, in the absence of further evidence it would be understandable that the Commissioners would be likely to come to the conclusion that Lotus had discharged the burden of proof which was on them. This might be expressed technically as a shift in what (to my mind unfortunately) is frequently called the evidential burden of proof. The evidential burden of proof is not the same as the basic burden of proof. According to well-known principles, the burden of proof lies normally on the person alleging the fact, but in the present case it is established on the person seeking to set aside the assessment. That burden of proof in technical terms stays throughout where it starts. If on the other hand, evidence is given which in the absence of other evidence or other factors would be sufficient to discharge the burden, then as a

matter of ordinary common sense and judicial method the tribunal will decide that the burden of proof has been discharged. That is all that is meant by a shift in the evidential burden. …

… [The Commissioners] accepted the submission that it was incumbent on the Inland Revenue, if the burden had shifted, to prove fraud. Quite apart from the failure to identify what was the fraud, that in my judgment is a material misdirection even if the evidential burden had shifted. In my judgment the position was that the burden lay throughout upon Lotus to show that the assessment was wrong. The documents and the evidence of the executives showed no receipt or entitlement to receipt, and in the absence of other factors (and I stress those words) the Commissioners would have been entitled and I think probably bound to hold in favour of Lotus. But if the Inland Revenue showed circumstances which cast doubt on the whole position, the correct question which the Commissioners should have asked themselves was not, "Have the Inland Revenue proved fraud?" but, "In all the circumstances, including the background circumstances, the documents and the oral evidence, have Lotus shown the assessments to be wrong?". At no stage in my judgment could any shift in the evidential burden require the Revenue positively to prove fraud in order to succeed: all that is required, even if the evidential burden be shifted, would be for the Revenue to show circumstances which might leave the Commissioners in doubt, on a balance of probabilities, whether Lotus (either itself or through its officers) in fact received or was entitled to receive payments giving rise to the assessments."

The Vice-Chancellor went on to note that to cast real doubt on the books and executives of Lotus required hard evidence and not "a mere miasma of suspicion".

98. Lotus repeated its argument in the Court of Appeal, to which Mustill LJ responded as follows (at 390-392):

"In a letter of 14 December 1983 the Inspector notified the Appellants that a number of assessments would be made and went on to say that he had decided to make them "on the basis that there has been fraud, wilful default or neglect" on the part of the Appellant companies. … If this had indeed been the basis on which the hearing had been conducted before the Commissioners, it would indeed have been perfectly clear on general principle, without the need for recourse to specialist revenue law, that the burden of proof would rest on the Crown; and, if authority were needed on this particular field, *Hudson v Humbles* 42 TC 380, 384 is only one example of cases which could be called up in support. … [But] when it came to the hearing before the Commissioners, no attempt was made to advance a case [on that basis]. Rather, the matter was approached, so far as the Revenue were concerned, on an ordinary *Haythornthwaite* basis. If this is so, and the contrary has not, as we understand it, been asserted, the formal burden of proof was not assumed by the Revenue. The Commissioners had no ground for approaching their fact-finding functions on any other basis than that it was for the taxpayers to make the running.

It is, however, contended that there is a quite different reason why the Commissioners were right in their general approach, namely, that, once the Appellants had produced their books and had called their auditors to say that the books were in order, the Revenue could displace the Appellants' case only by putting in contention a rival account of events which necessarily involved an allegation that the taxpayers, or one or more of their senior officers, were guilty of fraud. Such an allegation, even if never explicitly articulated, must be a matter which the Revenue should prove as the party which had brought it into the arena. To express the same notion in different words, once the Appellants had made out a prima facie case that the returns were soundly based, the evidentiary burden of proof passed to the Revenue.

References to a shifting burden of proof can be found in many cases. The expression may have more than one significance. In some cases it signifies that, in order to reach a conclusion on the entire dispute, the Court must successively decide two or more issues, in respect of which the burden is not consistently on the same party. An example is furnished by *Slattery v Mance* [1962] 1 QB 676. Under an insurance against the risk of "fire" the insured must prove that the subject-matter was lost as a result of a fire. The right of recovery is, however, qualified by the general rule that an insured has no right of indemnity against his own deliberate and wrongful act. The claim will therefore fail, even upon proof of a loss by fire, if it is shown that the insured wilfully caused or connived in the loss. This is, however, something for the insurer to prove, not the insured to disprove. Accordingly, when the judge comes to arrive at a decision he must proceed by two stages: first, to decide whether the subject-matter is lost by fire - if this is not proved, the claim fails: then to decide whether, if so, the loss was brought about by the wilful act of the insured - if this is not proved, the claim succeeds. Thus, it may be said in one sense that the burden of proof shifts as the judge passes through the successive stages of his enquiry. In truth, however, this is an inaccurate use of language, for the dispute involves two separate issues, each with its own burden of proof, which remains unchanged throughout the course of the action.

If the Revenue had pursued before the Commissioners the line of attack foreshadowed in the Inspector's letter of 14 December 1983, the case would have fallen into this category, with the *Haythornthwaite* burden of proof on the Appellants and the burden of proof on the Revenue in respect of fraud, successively applied. In fact, however, the only question in issue was whether the Appellants could establish that the assessments were wrong, and the general burden rested on them alone throughout the hearing.

It is, however, submitted that the concept of a shifting burden has another meaning, relative to what is called the "evidentiary burden of proof". Although this term is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the

other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing, and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout - which will almost always mean that the party who relies on a particular fact in support of his case must prove it. I do not see how this fact of forensic life bears on the present case. It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. It may well be that, if the Appellants' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the Appellants' case, the Revenue have taken on the burden of proving fraud. Naturally, if they produce no cogent evidence or argument to cast doubt on the Appellants' case, the Appellants will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the Appellants because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the Appellants' version, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the Commissioners are left in doubt. In the world of fact, there may be only two possibilities: innocence or fraud. In the world of proof, there are three: proof of one or other possibility, and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned."

99. As Lord Justice Mustill indicates, if HMRC choose to base assessments on an allegation of fraud, they necessarily assume the burden of proving what they have alleged. That will rarely be necessary for in-time assessments, where HMRC need not assume the burden, but it does arise in cases of Missing Trader Intra-Community ("**MTIC**") fraud (where HMRC are necessarily seeking to deny VAT traders their entitlement to be repaid input tax because of the connection with fraud). The question that I have to decide is whether that is also the case where sham is alleged or said to be alleged and, if so, whether that is the basis of HMRC's case here and how I should then deal with the Appellant's application.

HMRC's obligation to state its case

100. In contrast to the procedure in place at the time of *Wood v Holden* and *Group Lotus*, rule 25 now obliges HMRC to state their case, setting out in particular the legislative provision under which the decision under appeal was made and HMRC's position in relation to the case. This should be to the taxpayer's advantage because if this is properly done, the taxpayer should usually be in no doubt as to what HMRC allege as the basis of the assessment and what facts the taxpayer must prove to

displace it. Where the burden does fall on HMRC, for example to demonstrate the validity of an assessment, asserting a positive case in their statement of case does not satisfy that burden nor does the failure by the taxpayer to respond to that case discharge HMRC from their burden (*Burgess and Another v HMRC* [2016] STC 579, [2015] UKUT 578 (TCC)).

101. The requirement that HMRC state their case as the first procedural step following the appellant lodging the appeal with the tribunal may make it more difficult for HMRC to 'sidestep' an allegation of fraud or dishonesty, as was essentially the taxpayer's contention in *Group Lotus*, if that is the essential nature of their allegation. The taxpayer, however, assumes the basic burden by appealing and the requirement that HMRC state their case following an appeal does not in my view affect the ordinary burden of proof in respect of an assessment or provide taxpayers with a means of suggesting that HMRC have assumed the burden of proving what they allege. The taxpayer's burden essentially extends to whatever facts are alleged to arise from the assessment and are therefore said to be relevant to a determination of the issues under appeal.

102. The essential questions, as it seems to me, are: what is HMRC's case and does it in fact raise a separate issue on which they must assume the burden of proof? The legislative scheme may necessarily involve two issues for which different parties must assume the burden; for example, where HMRC seek to impose a penalty (for which they have the burden) and the taxpayer claims he has a reasonable excuse (for which he has the burden). It may be less straightforward to identify a separate issue where it is said to arise from the case that HMRC is pleading. This is a difficulty that is not necessarily confined to the tax field (see, e.g. *IBM United Kingdom Holdings Ltd & Another v Dalgleish & Others)* [2017] EWCA Civ 1212 at [47]-[58]).

103. It is clear, however, that if fraud or dishonesty is in fact alleged, a tribunal cannot conclude that the assessment should stand good on that basis without satisfactory evidence to support that conclusion having been adduced. A taxpayer is presumed to be honest in his dealings and arrangements and whatever facts must be proved to resolve the issues raised by the assessment can only be approached on that basis unless and until the contrary is shown. As Peter Gibson LJ said in *George Wimpey UK Ltd v V I Construction Ltd* [2005] EWCA Civ 77 at [31]:

> "It is trite law that dishonesty must be pleaded with full particulars and put to the person alleged to be dishonest … This is an essential procedural safeguard on which the courts insist. It is not open to the court to infer dishonesty from facts which have not been pleaded. Nor is it open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty."

In other words, HMRC effectively raising a separate issue by calling into question the taxpayer's honesty, so that the tribunal may have to proceed by two stages: first, to decide whether the taxpayer (being assumed to be honest) has demonstrated on the facts to the tribunal's satisfaction that the assessment should be discharged. If he is unable to discharge that burden, the assessment will stand good; but otherwise, the

tribunal may have to decide whether the assessment should nevertheless stand good because HMRC have demonstrated to the tribunal's satisfaction the taxpayer's dishonesty.

104. That is not to say, however, that HMRC should be regarded as alleging dishonesty merely because an explanation for some of their assertions could be that the taxpayer is dishonest. HMRC are entitled to set out in advance (for the taxpayer's benefit) the facts that they believe he must establish to displace the assessment. The fact that one explanation for his failure to do so could be fraud or dishonesty does not mean that that is what HMRC have alleged. In that sense the taxpayer is in the same position vis-à-vis the burden of proof as in *Group Lotus*, but potentially with more notice of the case he must make.

105. The Upper Tribunal has had to consider the level of particularity to be contained in HMRC's statement of case in the context of MTIC appeals. The burden of proof in such appeals is accepted to be on HMRC to show why input tax repayment should be denied. This is because underpinning the denial is an allegation that the transactions in question formed part of an overall scheme to defraud the revenue. In *E Buyer UK Ltd v HMRC* and *HMRC v Citibank NA* [2016] STC 1533, [2016] UKUT 123 (TCC) both appellants contended that HMRC had failed to plead their case with sufficient particularity. The First-tier Tribunal Judges who had initially considered the appellants' applications for further and better particulars (and in E-Buyer's case for further disclosure by HMRC) reached opposite conclusions on this question.

106. The central feature of the appeals to the Upper Tribunal was the principle established by the Court of Justice in Joined Cases C-439/04 and C-440/04 *Kittel v Belgium; Belgium v Recolta Recycling SPRL* [2008] STC 1537 ("the *Kittel* principle") that a taxpayer could be denied repayment of input tax if they knew or should have known that they were taking part in a transaction connected with fraudulent evasion of VAT. The Upper Tribunal conducted a detailed analysis of the relevant MTIC authorities to conclude that the *Kittel* principle was based on knowledge rather than dishonesty as such, but also that an allegation that the first limb of the *Kittel* principle applied (i.e. that the taxpayer knew that he was taking part in a fraudulent transaction) could amount to an allegation of dishonesty. Each case would turn on what HMRC had actually alleged (see the summary at [86]).

107. In *Citibank* HMRC denied that they were alleging dishonesty on the part of the taxpayer but Judge Mosedale at first instance nevertheless concluded that this was in effect what HMRC's statement of case had alleged. She therefore directed that HMRC should clarify their case in this respect. The Upper Tribunal agreed with her analysis and dismissed HMRC's appeal. As *Citibank* indicates, it is unnecessary to use the word "dishonesty" in a pleading if it is clear that that is what is being alleged. In Citibank's case HMRC were prepared to allege that the taxpayer knew that its transactions formed part of a contrived scheme designed to defraud the revenue, which (if proved) was not consistent with honesty, and yet HMRC were unwilling to accept that they were alleging dishonesty. In those circumstances, it was appropriate to direct HMRC to clarify their position (see [92]-[96]).

108. In *E Buyer*, HMRC had amended their statement of case to make the same allegation as in Citibank's case. The same conclusion therefore followed and the First-tier Tribunal's refusal to order further and better particulars of HMRC's case because it considered that there was only an allegation of knowledge in connection with fraud, understated the nature of the allegation (see UT at [102]). Accordingly, the taxpayer was entitled to proper particulars of what it was said to have known and the facts on which HMRC's case was based. As the Upper Tribunal noted at [104], however, this does not mean—

> "… that exhaustive and hugely detailed requests for further information are necessarily justified or proportionate. … the purpose of particulars is to elucidate the case to enable the party opposite to prepare for trial; particulars are not a game to be played, or a rigid entitlement."

109. Although the MTIC background to both cases meant that HMRC had accepted that the burden of proof lay on them, the point in each case was that the way in which HMRC had chosen to state their case could only be understood on the basis that they were alleging dishonesty (even though HMRC denied that that was so). That does not mean, however, that HMRC must be assumed to have alleged dishonesty (or in this case, as the Appellant suggests, sham) just because it may eventually be shown that the assessment can only stand good on that basis. If HMRC have failed to plead their case on that basis, it may be that they should apply to amend their statement of case to take account of that (and take on the burden in that regard) or accept the risk that the tribunal will conclude on the Appellant's case that the assessment should not stand good.

110. The sufficiency of HMRC's statement of case was put in issue in *Ingenious Games LLP v HMRC* [2015] UKUT 105 (TCC). The Upper Tribunal (Henderson J) approved at [47] the First-tier Tribunal's summary of the relevant principles that they could not find a witness to have been dishonest unless the allegation was plainly made and put to him with the evidence supporting the allegation and in a manner which gives him a fair chance to rebut it.

111. As Henderson J went on to note:

> "63. In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles [that the relevant allegations have been pleaded with full particularity and the taxpayer has been given a proper opportunity to respond to them] undoubtedly apply in the same way as they would in ordinary civil litigation. Examples include cases where HMRC wished to make assessments to income tax outside normal time limits on the ground (before 1989) of fraud or wilful neglect under section 36 of the Taxes Management Act 1970, or (in the modern world) where, relying on principles developed by the Court of Justice of the European Union, they wish to deny a VAT-registered trader his otherwise incontrovertible right to deduct input tax because of his alleged participation in, or connection with, "missing trader" (or MTIC) fraud."

112. But he continued:

> "64. The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC within normal time limits, and (in particular) to establish that the businesses of the relevant LLPs were carried on with a view to profit. This issue, as I have explained, is properly pleaded in HMRC's statement of case. No burden lies on HMRC to establish that the businesses were *not* carried on with a view to profit. It is for the Appellants to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them."

113. Thus, HMRC's stated case could not be said to be deficient (so that no allegation could subsequently be made) because it had not particularised an allegation (made in support of HMRC's contention that the business was not carried on with a view to profit) that the taxpayer's prospectus was inaccurate in certain respects (which, if correct, might mean that certain individuals had committed an offence). Furthermore, as the Upper Tribunal noted at [65], there is no requirement to have pleaded fraud or dishonesty before such matters are put to the taxpayer's witnesses in cross-examination together with any supporting evidence. There is, therefore, no necessary requirement for HMRC to amend its statement of case before attempting to expose a witness as dishonest in cross-examination, although (as Henderson J went on to direct in that case) it may be appropriate for HMRC to clarify the general nature of any allegations that they wish to put to a witness in advance of a witness being recalled.

Sham and abuse

114. Against that background I turn to consider the issues that have been raised before me regarding 'sham'. Mr Gordon said that it was common ground the HMRC assumed the burden of proof in a case in which they alleged sham. I did not understand Mr Nawbatt to dissent from that view but at the same time I do not believe that he necessarily conceded the point. His point for HMRC was that they deny that they are alleging that the image rights agreements entered into between the Appellant and Joniere are shams, although they reserve the right to submit that they are.

115. The Appellant for its part says that HMRC's case can only be understood on the basis that they are alleging sham. The essence of sham, as defined by Diplock LJ in *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786 ("***Snook* sham**"), is that the parties must have created an appearance different from the underlying legal reality; there must have been a common intention to do so; and there must have been an intention to give a misleading impression to third parties or to the court. In those terms, the essence of the Appellant's argument, as I perceive it, is that the payments which HMRC have assessed as earnings were paid to Joniere under agreements that licensed Mr Gómez's image rights. Absent an allegation of *Snook* sham, it is not disputed that, contractually, the payments were for image rights. Assuming that Joniere owned the particular rights to Mr Gómez's image (a point to which I return in due course – see paragraph 170 below), it is impossible to say that the agreement is a sham because the agreements would have created the legal reality that everyone intended. The only 'misleading impression' there could be (which the Appellant denies) would be the impression (looking at the image rights agreements alone) that

the Appellant's payments reflected the value of Mr Gómez's image rights when, in fact, the amount paid was influenced by Mr Gómez's agreement to play for the Appellant and exceeded the value of those rights. Nevertheless, it is said, the payments cannot be Mr Gómez's earnings because contractually they were paid to Joniere to licence his image rights (which absent sham HMRC must be taken to admit), and not to Mr Gómez for his footballing services.

116. In light of that, the Appellant might go on to suggest that HMRC should be directed to serve its evidence first because the Appellant may be entitled to apply to have HMRC's case 'struck out' under rule 8: either because sham is not HMRC's case (and they can only succeed if they allege and can prove sham) or, alternatively, because HMRC are in reality alleging sham but, as service of their evidence will demonstrate, they are unable to produce any sufficient evidence to support that allegation. Mr Gordon did not go that far in submission and that is not, of course, the Appellant's current application (even though it might be thought a possible next step).

117. *Hitch v Stone* (2001) 73 TC 600 is usually cited as authority for the proposition that the burden of proof is on HMRC where *Snook* sham is alleged. Before the Special Commissioners in that case the Revenue specifically alleged that particular agreements relied upon by the taxpayers were shams. The Commissioners agreed that an agreement of 16 April 1984 under which the taxpayers purported to grant a 999-year lease of land to a Singapore company was a sham. As a consequence, the Commissioners concluded that a second agreement of 17 April 1984 between the Singapore company and related entities purporting to assign the former's interest was a sham, as also the recitals in an agreement with a third party of 22 April 1984.

118. In reaching their conclusion the Special Commissioners recognised that the burden of proof was on the Revenue and that it was a heavy burden, not easily satisfied. They nevertheless rejected large parts of the taxpayers' and their adviser's evidence and also drew adverse inferences from various unexplained benefits that the taxpayers had derived from the arrangement over a number of years as well as a 10 per cent fee paid to their adviser. As Arden LJ noted (at page 663B-C), "*if there had been evidence on these points, the taxpayers had had an opportunity to produce it and failed to do so.*" In other words, even in a case in which sham is specifically alleged, the Revenue may still be able to make their case on sham by reference to gaps in the evidence for which the taxpayer has offered no credible explanation.

119. *Hitch v Stone* is authority for the proposition that where a document implements more than one transaction (as in the case of the agreement of 22 April 1984), so that the document is divisible into separate parts, the intention that the transaction should not take effect according to its tenor and should convey a false impression to third parties need only be common to those parties concerned with the particular part alleged to be a sham. This, therefore, represents an explicit development of Lord Justice Diplock's 'definition' of sham in *Snook*.

120. Mr Gordon drew my attention to Judge Aleksander's views on "sham" in *Schechter and Schechter v HMRC* [2017] UKFTT 189 (TC) (see paragraph 29 above). That case concerned, *inter alia*, the validity of a declaration of trust by a company

over its assets. Notwithstanding Judge Aleksander's recognition of the serious nature of an allegation of *Snook* sham, in that case the sham point was only raised by HMRC in their submissions and had not been pleaded as part of its statement of case. Judge Aleksander noted that HMRC's case did not depend upon the validity or otherwise of the declaration of trust. Nevertheless, he concluded at [147] that on the balance of probabilities the declaration was a sham. He felt able to do so because—

> "… the credibility of the Appellants' evidence as to the validity of the trusts purportedly created by the Declaration of Trust and the Nominee Agreement have always been in issue in this appeal. I am therefore able to draw inferences from the evidence, notwithstanding the absence of any pleadings to this effect.

121. It does not seem, however, that *Snook* (even as extended by *Hitch v Stone*) represents the limits of sham, or at least of the type of transactions or arrangements to which the 'sham' epithet or descriptive language such as 'pretence' or 'façade' may be attached. In *Autoclenz Limited v Belcher* [2011] UKSC 41 at [23] (a case to which HMRC refer in their correspondence), Lord Clarke, having set out Diplock LJ's 'definition', noted:

> "23. I would accept the submission made on behalf of the claimants that, although [*Snook*] is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from *Street v Mountford* [1985] AC 809 and *Antoniades v Villiers* [1990] 1 AC 417, especially per Lord Bridge at p 454, Lord Ackner at p 466, Lord Oliver at p 467 and Lord Jauncey at p 477. See also in the housing context *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 per Arden LJ at paras 42 to 44."

122. *Autoclenz* emphasised that where there is a dispute as to (in that case) the nature of the parties' contractual relationship, the relevant question is, "*what was the true agreement between the parties*" (see at [29]) and that ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be the actual agreement when the contract is concluded (see at [32]). *Autoclenz* concerned an employment relationship and noted that different considerations might enter into an assessment of the parties' relationship in such cases, where the true agreement might have to be gleaned from all the circumstances, of which the written agreement is only part, as compared to the situation of an arm's length commercial contract (see at [33] to [35]).

123. A particular difficulty that *Snook* sham presents in the taxation field is that the parties concerned ordinarily intend to be bound by the terms of their agreements because the particular rights and obligations that the document is intended to create is the foundation of the particular tax outcome that the parties are seeking to achieve. The agreements may be artificial or uncommercial but nevertheless (leaving aside issues of proper contractual construction and the question whether they have correctly

described or characterised those legal rights and obligations) they will reflect the rights and obligations that the parties intended to create. As Arden LJ noted in *Hitch v Stone* (73 TC at 659G):

> "67. … the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship."

124. Thus, the payments under the image rights agreements might be shown to be excessive and the agreements might not be commercial (although the Appellant denies both allegations) but that does not render them a sham. Accordingly, having regard to the Appellant's argument on sham (see paragraph 115 above), the payments remain payments for Mr Gómez's image rights, and not for his footballing services.

125. Certainly, as Neuberger J (as he then was) said in *National Westminster Bank plc v Jones*, there is a strong and natural presumption against holding a provision or a document a sham (see paragraph 35 above). He was considering *Snook* sham and he considered that a finding of sham carried with it a finding of dishonesty. The transactions in issue in that case were highly artificial and directed at circumventing the bank's security but, as he noted, that did not make them a sham. He thought that presenting transactions as not being artificial when in fact they are, could suggest dishonesty but he was clear that there is no dishonesty involved in presenting transactions for what they are, even if artificial and directed towards some unmeritorious end (see [37] and [39]).

126. As Neuberger J noted the nature of particular arrangements, and their lack of commerciality, may nevertheless be factors to be taken into account in considering whether they involve sham or a sham element. In *Brain Disorders Research Limited Partnership v HMRC* [2015] SFTD 1045; [2015] UKFTT 325 (TC), for example, HMRC contended that there were many hopelessly uncommercial features of the scheme, as to which the First-tier Tribunal observed at [84] that:

> "It is not surprising that there were oddities and uncommercial features in this scheme when the main tax hope was based on an absolute fiction, namely that the Partnership had incurred capital expenditure of ***100***, ***99*** or ***96*** on scientific research, when in reality it was appreciated by all that no researchers or scientists were ever to receive contributions to their project of any more than ***6***, this fiction would obviously occasion some unrealistic and uncommercial terms."

In the result, the tribunal concluded (as HMRC had submitted) that a particular provision in the Research Agreement between BDRLP and a company, Numology Limited, under which Numology contracted to undertake medical research in return for 100 paid to it by BDRLP, was a sham. This was because everyone concerned

always knew and intended that Numology would pay a subcontractor (BRC) only 6 for the research. The balance of the money was to be used, essentially, in paying fees and financing 86 of the 100 payment that BDRLP made to Numology.

127. That conclusion has now been upheld on appeal, see *Brain Disorders Research Limited Partnership v HMRC* [2017] STC 1170, [2017] UKUT 176 (TCC)). It had been HMRC's submission before the First-tier Tribunal that the relevant provision of the Research Agreement was a sham. On appeal, the taxpayer submitted that HMRC had set out no proper particulars of the supposed sham in their statement of case and that the FTT had made no adverse findings calling into question the honesty of the taxpayer's witnesses. As regards the first of these, the Upper Tribunal noted that HMRC's statement of case and skeleton argument had both referred to sham expressly and that the point had been put to the relevant witnesses.

128. The Upper Tribunal took the view that a finding of sham is a finding of fact and necessarily requires the fact-finding tribunal to be satisfied that there was an intention to deceive or, at least, to make things appear other than they are (see [24]). This did not, however, necessarily imply a finding of dishonesty. Thus, the fact that the FTT had described the taxpayer's witness as "basically honest", did not preclude a finding of sham. In the Upper Tribunal's view (at [29])—

> "The pretence here was that 96 or 99 might have been spent on research, but the parties did not go further by pretending that it had in fact been spent on research. This was a tax avoidance, or deferral, scheme, and not evasion, and there was no attempt, as there would be in the case of evasion, to conceal what actually happened, however the parties chose to dress it up. One might disapprove of what was done; but we do not consider it could be said to have crossed the threshold into dishonesty."

129. The sham or pretence (and therefore the misleading impression conveyed) must be one that arises from the parties' purported agreement, rather than from their subsequent conduct (for example, in concealing how 100 was actually spent), although how the parties act subsequently may inevitably be indicative of the sham or pretence that their purported agreement involves. In *Brain Disorders* the parties always intended (and contracted) that BDRLP would pay Numology 100. The Tribunal was entitled, however, to disregard a provision of the Research Agreement as to how that 100 would be spent when that provision did not represent the parties' true agreement. The proof of HMRC's allegation in *Brain Disorders* appears to have been embedded in the contemporaneous contractual documents because the banking terms made it impossible for the money in question to be applied in the way provided for in the Research Agreement (see [2015] SFTD 1045 at [76]).

130. In a previous decision involving a significantly similar scheme, the First-tier Tribunal had declined to conclude that the arrangement involved a *Snook* sham notwithstanding HMRC's allegation of sham (see *Vaccine Research Limited Partnership & Another v HMRC* [2013] UKFTT 73 (TC)). Nor was any allegation of sham made in the other case to which I was referred by both parties, and on which

HMRC specifically rely in their correspondence, *Acornwood LLP and Others v HMRC* [2016] UKUT 361 (TCC).

131. The main question in *Acornwood* was whether expenditure incurred was incurred wholly and exclusively for the purposes of the taxpayer LLP's trade. For the purposes of illustration, the Upper Tribunal posited an amount of 100 contributed to the LLP by its members of which 80 was borrowed money. The LLP expended 5 as an administration and advisory fee and paid 95 to a company, Shamrock Solutions Ltd ("**Shamrock**"), for its services under a principal exploitation agreement. Shamrock then paid 90 to a company for its agreement to produce some creative product (e.g. a music CD or book). As part of that arrangement the production company simultaneously agreed to acquire from Shamrock a share of the revenues from the exploitation of the creative product and paid 80 for doing so. The net effect was that Shamrock paid 10 to the production company and retained 85, of which it used 80 to secure quarterly payments to the LLP to match the interest paid on (and the ultimate repayment of) the members' borrowings which had fund their contributions to the LLP (see the Upper Tribunal at [6]).

132. The FTT had concluded that the 80 was not wholly and exclusively incurred for the purposes of the LLP's trade. In doing so it had followed the decision of Vos J in *Icebreaker 1 LLP v HMRC* [2010] UKUT 477 (TCC). In *Icebreaker 1* Vos J had approached the matter on the basis that the statutory provision in question looked at what the money in question was expended for in relation to the taxpayer's trade rather than looking at the ultimate use to which the money had been put by the person to whom it was paid. That involved construing the relevant agreements under which the money had been paid to identify what it was expressed to be consideration for. Nevertheless, the nature of the question that had to be resolved meant that the tribunal could take into account the commercial realities of the arrangement in deciding whether the disbursement was made wholly and exclusively for the purposes of the taxpayer's trade.

133. HMRC submitted in *Acornwood* that its facts were materially indistinguishable from those of *Icebreaker 1*. The taxpayers argued, however, that there were significant differences in the relevant agreements in each case (see [2014] SFTD 694 at 761, [240]). In particular, it was said that the entirety of the 100 paid to Shamrock was to obtain its services in identifying and exploiting creative product, including the right to assign for its own benefit a share of the total revenue from the product to third parties. It was said that reference to the use to which Shamrock had chosen to put the money (effectively securing a future income stream to the LLP and repayment of the members' loans) was to confuse the use to which the money had ultimately been put with the purpose for which the money was paid (see [248]-[250]). The taxpayers cited Lightman J in *Spectros International plc v Madden* [1997] STC 114 at 136 for the proposition that parties were free to contract as they wished and that their agreement should be respected so long as it was a genuine agreement and not a sham or a fraud on someone (see [254]-[257]).

134. Having outlined the taxpayer's contentions and those of HMRC (at [258]-[263]), the FTT concluded as follows:

"[264] In our judgment the change in the wording of the principal exploitation agreement from that used in the *Icebreaker 1* and *Acornwood* iterations to that used in later cases does not alter the outcome. Each partnership made a large payment to its principal exploitation company. In return it received two things: exploitation services, and a guaranteed income stream. We accept that the principal exploitation agreement in each case led to genuine legal relations and imposed real obligations in return for consideration, and in consequence was not a sham. However, for the reasons we have given elsewhere we have concluded that the arrangement by which the principal exploitation company supposedly made a payment to the production company offset by a payment for a share of the revenues was a pretence, designed, if we may say so rather crudely, to confer some plausibility on the claim that the borrowed money was available for use in the exploitation of intellectual property rights. In our judgment it failed in that objective.

[265] We are equally satisfied, despite the absence of sham, that the description of the right to assign a share of the revenue as the consideration for the guaranteed payments was also a pretence. Although we accept the point made by the appellant partnerships that it is not a relevant factor that the amount paid for goods or services, when viewed objectively and commercially, may be excessive or inadequate, we do not think that proposition compels us to disregard the evidence with which we deal in our discussion, below, of the potential for profit that, if the agreements are to be taken at face value, the guaranteed payments exceeded the true worth of the right to assign a share of revenue, as it might fairly be assessed at the time of assignment, by so large a margin that neither party could realistically have believed that the one was a fair price for the other. This was not a case of one party making a bad bargain; both parties must have known that it was no bargain at all. We also accept HMRCs argument, drawn from *EV Booth v Buckwell*, that it is open to them, and by extension us, to view the agreements for what they are, rather than for what they purport to be. In short, the reality is that part of the payment by each partnership to the principal exploitation company represented the price of the guaranteed income stream notwithstanding its description as something else."

135. In the Upper Tribunal Counsel for HMRC said that this represented the third stage of Vos J's approach in *Icebreaker*, i.e. determining the purpose for which the money was paid by taking account of the commercial realities of the transaction as a whole. He supported that by referring to five particular factors considered by the FTT. Having examined each of these five factors and the criticism that had been made of them by counsel for Acornwood, Nugee J concluded by agreeing with the FTT that, "*the proposition that the exploitation services fee was paid wholly and exclusively for the purposes of exploiting intellectual property rights … requires us to disregard the reality that all those concerned knew and intended that a relatively modest part of the total fees would actually be used in the exploitation of those rights, while the greater part would not.*"

136. The First-tier Tribunal's analysis in *Acornwood* might be thought not to differ significantly from what HMRC had submitted and the tribunal had accepted in *Brain*

Disorders as sham. Nugee J's conclusion also appears little different from that reached in *Brain Disorders* to support the finding in that case that a provision of the Research Agreement could be disregarded as a sham, even though in *Acornwood* sham was not alleged. A possible distinction (leaving aside the choices that are inevitably made in formulating pleadings, based on the agreements in question and the available evidence) is that in *Brain Disorders* it could be demonstrated that it was never part of the parties' true agreement that Numology would conduct research. In *Acornwood*, in contrast, there was no sham involved in the parties' agreement to pay 100 for the services that Shamrock had agreed to render under the principal exploitation agreement. It was just that in determining *the purpose* for which the LLP was agreeing to pay 100, the LLP could not disassociate itself from the expected use that Shamrock was to make of the money (notwithstanding that as a general proposition the use that a payee makes of money does not determine the purpose for which the payer pays it).

137. It is at this point in *Acornwood* that I come to the passage to which Mr Gordon referred me and on which HMRC relied. One of the central points upon which the LLP relied was a supposed concession by HMRC that the fees it had paid (i.e. the 95 it paid to Shamrock) were market value fees for the services Shamrock would render, leaving no scope to suggest that they were paid for anything other than the services that Shamrock had agreed to supply. In the course of reviewing the concessions that HMRC had made, Nugee J said this:

> "59. The second concession was that the arrangements were not a sham. Mr Davey accepted, as HMRC had accepted below, that the transactions were not a sham in the classic sense explained by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. Mr Davey however said that the fact that HMRC accepted that the documents were not shams did not mean that the legal rights and obligations arising from the documents were the same as the actual rights and obligations that the parties expressed them to create. He drew a distinction between the doctrine of sham and the doctrine of mislabelling. Thus for example a document which purports to grant a licence to a person to occupy land may be a sham if the parties intended the document to be a pretence, concealing the true transaction between the parties. However, even if a document is not a sham in that sense, it is commonplace that the labels which the parties use in their contract are not determinative of the true legal effect of what they have done: see the well known example given by Lord Templeman in *Street v Mountford* [1985] AC 809 of the five-pronged implement for digging, which is a fork even if the manufacturer insists that he intended to make and has made a spade; or the less well known but equally vivid example given by Bingham LJ in *Antoniades v Villiers* [1990] 1 AC 417 at 444B: "a cat does not become a dog because the parties have agreed to call it a dog." I accept that the two doctrines, of sham and mislabelling, are different doctrines; and I also accept that in this case HMRC's acceptance that the contractual documents entered into by the parties were not shams or pretences does not preclude them from contending that a statement in a contract that £x is paid in consideration of Y is not reflective of what the consideration truly was for which £x was paid."

138. Nugee J went on to conclude that HMRC had not conceded that the LLP had paid market value for Shamrock's services, leaving open the question whether the LLP's payment was made wholly and exclusively for the purposes of its trade. On the question whether a person has paid an appropriate price for goods or services, or whether the price is influenced by other factors, Nugee J records at [65] the point that he put in argument to counsel for HMRC—

> "One way in which the Revenue might choose to, in a particular case, attach a payment as not being wholly and exclusively for X is to show that 95 was paid for X but the real value of X was 15 … [but] … [HMRC] did not plead the real value of X was 15. [HMRC] did not put the value of X directly in issue in that way. But [HMRC] say that that is not the only way in which you can show what the 95 was paid for was not wholly for X. You can show it by showing that the 80 never became available for any other purpose than to repay the 80 that had been borrowed. It was never intended to become available for any other purpose than to repay the 80 that was borrowed. That's not a valuation point. It may logically follow from that that the value of the services were likely to be about 15. But you are not relying on a valuation point to get to that conclusion. You are getting to a conclusion through use of other factual findings."

139. Mr Gordon said that the distinction drawn by Nugee J between sham and mislabelling did not assist HMRC because either way the burden fell on HMRC to prove the matter (see paragraph 34 above). This may, however, turn on what Nugee J meant by 'mislabelling'. *Snook* sham can be contrasted with the wider form of sham, to which Lord Clarke alluded in *Autoclenz* (see paragraph 121 above) by reference to the same two cases to which Nugee J refers, and which in the present context may be illustrated by *Brain Disorders*. Thus, the 'mislabelling' cases to which Nugee J refers have a sham provenance (involving elements that are not part of the parties' true agreement) even though they do not meet the precise criteria laid down for *Snook* sham. The illustrations that Nugee J gives from those cases, however, appear to relate to a different aspect of the matter, which may have nothing to do with sham and everything to do with the legal characterisation of the parties' rights and obligations under their agreement. Thus, the fact that the parties intend to create a licence and not a lease, and accordingly describe their document as a licence, is not determinative of the legal character of the document. It is a separate question, however, as to whether in determining the parties' rights and obligations, by reference to which a document is to be identified as a lease or licence, a particular term of the agreement can be disregarded as not representing the parties' true agreement.

140. The burden in that sense of 'mislabelling' (calling a lease a licence) is on neither party because it relates to the characterisation as a matter of law of the parties' rights and obligations and not to the facts that determine first what those rights and obligations are (see e.g. *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, [2001] UKPC 28 per Lord Millett at [32]). The mislabelling may, however, derive from a provision of the parties' agreement that is to be disregarded as sham (in its wider sense). The question is whether, as Mr Gordon argues, the burden of proof is always on HMRC to establish sham (being the only party likely to allege sham),

whether what they are alleging is *Snook* sham or sham in the wider sense referred to by Lord Clarke in *Autoclenz*.

The Hilden Park Decisions

141. Before answering that question, I shall deal with the two *Hilden Park* decisions, the first of which was relied upon by Mr Gordon (see paragraph 29 above) and the second of which raised not dissimilar issues to the present case (see paragraph 48 above). In *Hilden Park No 1* HMRC alleged that the arrangements represented an attempt to avoid liability for VAT on supplies of sporting services and that they amounted to an abusive practice within the meaning of that concept in EU law. The First-tier Tribunal concluded that the arrangement was abusive, as HMRC had contended. Mr Gordon, who appeared for the Hilden Park Partnership, submitted that HMRC had the burden of proof and should open the case. Counsel for HMRC submitted that the onus was on the taxpayer to show that the assessment was wrong, relying on section 73(9) Value Added Tax Act 1994. That provision refers to the amount assessed being deemed to be an amount of VAT due, "*unless, and to the extent that, the assessment has subsequently been withdrawn or reduced*". HMRC also relied on the decisions in *Tynewydd Labour Working Men's Club and Institute Ltd v Customs & Excise* [1979] STC 570 and *Grunwick Processing Laboratories Ltd v Customs and Excise* [1987] STC 357, both to the effect that the burden fell on the taxpayer to show that the assessment was wrong. In this respect, the VATA 1994 places taxpayers in the same position under an assessment to VAT as does the TMA for direct tax and the 1999 Regulations for NICs.

142. HMRC accepted in *Hilden Park No 1* that it assumed the burden of proof where it alleged fraud, in particular in MTIC fraud cases. HMRC argued, however, that this did not extend to cases in which HMRC alleged *Halifax* abuse. A contention based on *Halifax* abuse might be thought to be similar to one based on a wider (non-*Snook*) concept of sham or pretence (there being no necessary dishonesty or deceit involved) or the more specific tax doctrine represented by the *Ramsay* principle, from which the European Commission's legal service took some comfort in developing the concept of abuse in *Halifax* (see Richard Lyal in de la Feria and Vogenauer, *Prohibition of Abuse of Law* (Hart Publishing, 2011) at page 428). More to the point, in terms of the burden of proof in tax cases, the question arises as to whether an assessment based on an allegation of *Halifax* abuse involves a separate issue, on which the burden falls on HMRC, or whether there is only one issue – whether the assessment should stand good – on which the burden throughout is on the taxpayer.

143. Authority appears to suggest that the burden lies with HMRC in *Halifax* abuse cases. Thus, Mr Gordon in *Hilden Park No 1* relied on the Upper Tribunal decision in *Lower Mill Estate Ltd v HMRC* [2010] UKUT 463 (TCC), [2011] STC 636, in which the Tribunal had stated that, "*the onus is on HMRC to establish that there is an abuse*" (see at [137]). As I noted at the hearing, I am familiar with *LMEL*, having represented HMRC before both the First-tier Tribunal and, on appeal, the Upper Tribunal.

144. Counsel for HMRC in *Hilden Park No 1* submitted that the Upper Tribunal in *LMEL* was not referring to the burden of proving abuse as a matter of evidence but to the burden of establishing a proper comparator as a matter of argument. Alternatively, if the Upper Tribunal did mean that the burden was on HMRC, the decision was *per incuriam* because it did not take account of the Court of Appeal's views in *Grunwick Processing* (see [2015] UKUT 405 at [55]).

145. The Tribunal in *Hilden Park No 1* concluded that nothing turned on the issue but nevertheless went on to set out its views on *LMEL* and the burden in abuse cases. As the Tribunal noted at [60], it is the nature of an abusive arrangement that the taxpayer's appeal would succeed on the purely formal application of the legislation. If abuse were not alleged or, having been alleged, cannot be established, then the taxpayer's appeal must be allowed. In other words, all a taxpayer need do to demonstrate that the assessment is wrong is to point to the formal terms of the legislation as they apply to the transactions in question.

146. The Tribunal in *Hilden Park No 1* accordingly concluded (*obiter*) that the burden of establishing *Halifax* abuse lay with HMRC. The point arose again at the case management hearing in *Hilden Park No 2*. I have previously set out Judge Mosedale's views as to why the issue of the burden of proof required to be decided at that hearing (see paragraph 50 above). I do not fully understand why Counsel for HMRC in *Hilden Park No 2* suggested that HMRC would approach their statement of case (as contrasted with their evidence) differently if they had the burden of proof (see [22]). If it is part of HMRC's case that there is *Halifax* abuse, that should be set out clearly in their statement irrespective of where, evidentially, the burden of proof lies. Once HMRC allege abuse, the question is whether that involves a separate issue for which the burden lies with HMRC rather than with the taxpayer. The answer to that question, however, cannot in my view determine HMRC's choice as to how they state their case.

147. Be that as it may, in *Hilden Park No 2* Counsel for HMRC submitted that the views expressed by the tribunal in *Hilden Park No 1* were *obiter* and wrong and would have been appealed by HMRC had HMRC not succeeded in that case. Judge Mosedale accordingly went on to consider whether she was bound by what the Upper Tribunal had said in *Hilden Park No 1* on the issue in *LMEL*.

148. *LMEL* concerned an arrangement under which Lower Mill Estate Ltd owned land and granted (standard rated) leases at a premium and at the same time another company, Conservation Builders Ltd ("**CBL**"), agreed to provide (zero-rated) construction services to the lessee, leading to the construction of a holiday home to one of several standard designs. LMEL and CBL were under common ownership. The question was whether the arrangement amounted to, and should be treated for VAT purposes, as the supply to the lessee of a completed holiday home.

149. HMRC advanced a number of different bases to support the assessments they had raised, principally that the arrangement amounted to a single supply of a holiday home (notwithstanding the existence of two suppliers) but, alternatively, that the circumstances of the arrangement amounted to a *Halifax* abusive practice. At first

instance, no issue arose as to the burden of proof and the appeal proceeded on the usual basis that the burden fell on LMEL and CBL to demonstrate that the assessments were wrong. In the event the First-tier Tribunal concluded that there were separate supplies of land and building services (given two suppliers) but accepted that the circumstances of the arrangements amounted to a *Halifax* abusive practice.

150. On appeal to the Upper Tribunal, LMEL launched a substantial attack on the FTT's findings of fact, which it said were unsupported by the evidence or contrary to the 'unchallenged' evidence of LMEL's witnesses (see [76]). A large part of the argument before the Upper Tribunal was therefore concerned with identifying the facts that the FTT had found (as to which see [77]) and considering whether there was evidence to support them (i.e. *Edwards v Bairstow* issues). An aspect of this was whether, in concluding as it had on *Halifax* abuse, the FTT had in effect not accepted certain of LMEL's evidence. A particular issue related to the value placed on the standard-rated supply of the land (see [2009] UKFTT 38 (TC) at [53]). Neither party had produced expert valuation evidence but four valuation reports obtained by LMEL over the relevant period to support bank lending were in evidence (see FTT at [130]). The FTT's conclusion on valuation was at FTT [132] and it was HMRC's submission on appeal that the burden was on LMEL to demonstrate that the land had been sold at market value, as to which it had produced no direct evidence and the FTT had refused to accept the valuations as evidence of the market value.

151. The Upper Tribunal's particular concern, however, was to identify what it was that had led the FTT to conclude that the first limb of *Halifax* abuse was satisfied and that the correct comparator for the LMEL/CBL 'self-build' model was a sale of a completed holiday home. In particular, *Halifax* was clear that it was insufficient just to say that LMEL had established an arrangement that achieved a VAT saving when compared to a sale of a completed holiday home. It had to be shown that LMEL's arrangements were contrary to the principle of fiscal neutrality and the purpose of the VAT Directive or the national legislation implementing it.

152. In this regard, in the Upper Tribunal it was the submission in reply by counsel for LMEL that while the burden fell on the taxpayer to demonstrate that the assessment should be reduced or discharged by reference to ordinary VAT principles, once all that was left to support the assessment was the *Halifax* principle, the burden fell on HMRC to establish that the two limbs of the *Halifax* test were satisfied. This was because HMRC were seeking to upset what would otherwise be the settled VAT treatment.

153. It is not entirely correct, therefore, to say that burden of proof was not an issue in the Upper Tribunal appeal (see *Hilden Park No 2* at [34]). It was not an issue in so far as both parties agreed that the legal burden was on LMEL to displace the assessments. The question was what LMEL had to do to satisfy that burden where abuse was alleged. LMEL had demonstrated that there were two ways in which a purchaser could ordinarily choose to acquire a holiday home: by leasing land for a premium and engaging a builder to build, or by acquiring a completed holiday home from a developer. HMRC's contention had essentially been that the lease and

construction services were so intertwined in LMEL's case that the arrangement amounted to the acquisition of a completed holiday home from a developer. This included the contention that the land was priced at less than market value (any undervalue implicitly being made up in the pricing of other items). This latter point is not mentioned in the Upper Tribunal's decision, which focuses mainly on the ownership structure (see [92]). It is therefore unclear to what extent the issue of market value entered into its thinking.

154. What is clear from the decision, however, is that the Upper Tribunal's comments at [136] and [137] are directed only to the first limb of the *Halifax* test and the need to demonstrate that the arrangements in issue were contrary to the principle of fiscal neutrality and the purpose of the VAT Directive or the national legislation implementing it, so that there was abuse. The Upper Tribunal's consideration of the issue (from [95] onwards), leading to its conclusion, includes an analysis of the FTT's decision and, in particular, a search for the FTT's reasons for deciding, on the evidence, that the correct comparator was that proposed by HMRC rather than that advanced by LMEL.

155. In this respect, the Upper Tribunal considered that the FTT had not adequately explained why it had concluded in favour of HMRC's comparator and that LMEL had sufficiently demonstrated that its self-build model accorded with the ordinary model of leasing land and engaging a builder to build. Having done so, it became incumbent on HMRC to show why LMEL's particular arrangement was nonetheless abusive. The Upper Tribunal's conclusion in *LMEL* can therefore be compared with that in *Wood v Holden* (see paragraph 91 above). HMRC's assessments could be said to have put in issue the question of abuse, to which LMEL was bound to respond if they were not to stand good. LMEL had demonstrated through its evidence that its self-build model did not infringe the first limb of the Halifax test, so that the evidential burden shifted to HMRC. As in *Wood v Holden*, HMRC had adduced no evidence to support its contention. The Upper Tribunal was not (as it seems to me) allowing LMEL's appeal on the basis of a wrong application of the burden of proof rather than by reference to its view of the conclusions that the FTT had drawn from the facts it had found (so far as they could be discerned).

Conclusions on the burden of proof for sham and abuse

156. If HMRC do allege fraud or dishonesty, it is clear that the burden of making good that allegation falls on them. This will ordinarily encompass an allegation of *Snook* sham, given its usual association with dishonesty or deceit. In the absence of such an allegation, however, or of an allegation of some other similarly reprehensible conduct (for which the taxpayer is to be presumed innocent), I do not think it correct that HMRC should be taken to have raised a separate issue in respect of which they have the burden of proof. Although it is not a requirement that HMRC in their statement of case should have used the specific language of fraud or dishonesty or (by extension) *Snook* sham, the relevant question is: what is the essential nature of what they allege in their stated case (see *E-Buyer* and *Citibank*, paragraph 107 above)? This question does not in my view mean that the tribunal should endeavour to find an allegation of fraud or dishonesty or *Snook* sham where HMRC put in issue the

taxpayer's arrangements. An allegation of this nature should be properly pleaded and while it cannot be disguised if, in truth, it is what HMRC are alleging, I do not think that it should be implied just because fraud, dishonesty or *Snook* sham may provide one possible explanation for the case that HMRC are advancing. That would effectively be to use HMRC's statement of case to endorse the taxpayer's contention which the Court of Appeal rejected in *Group Lotus*.

157. Where an assessment is validly made, taxpayers have an unavoidable obligation to demonstrate that the assessment is wrong. The burden is on the taxpayer to establish to the tribunal's satisfaction on the balance of probabilities whatever facts are inherently raised by the assessment and are relevant for the resolution of the issue under appeal. It is therefore in taxpayers' interests that HMRC should state their case clearly and as fully as possible so that taxpayers are appraised of the facts that HMRC believe they must prove. If no fraud, dishonesty or *Snook* sham has not been alleged and, more particularly, without the necessary evidence, the tribunal cannot reach a decision that depends upon such a finding.

158. Even where careful examination of HMRC's case reveals such an allegation, in the general ordering of events in an appeal, the first step will be for the taxpayer to demonstrate that the assessment is wrong, which, if failed, will render any question of fraud, dishonesty or *Snook* sham irrelevant. It may be that in some cases, of which MTIC cases and possibly *Halifax* abuse cases are perhaps obvious illustrations, the taxpayer's ability to satisfy the ordinary burden that falls on him to displace the assessment may be straightforward (and possibly uncontested). The existence of such cases does not, however, seem to me to be a reason in other cases for readily concluding that HMRC have assumed a burden of proof or for easily acceding to the suggestion that it falls on HMRC to make good what they allege before the taxpayer has discharged the burden that is placed on him.

159. In referring in the previous paragraph to *Halifax* abuse as a situation in which a taxpayer may easily be assumed to be able to show that an assessment is wrong (absent abuse), I am not necessarily agreeing that the burden of proof lies on HMRC to demonstrate *Halifax* abuse. I would not so conclude based on *LMEL*, as I have explained, and the Upper Tribunal's views in *Hilden Park No 1* were *obiter*. Considerations of EU law might mean that *Halifax* abuse should be regarded as a separate issue – one that is not inherently raised by the assessment – which must be separately proved apart from the burden that a taxpayer bears to demonstrate that the assessment is wrong. However, I do not need to conclude on that issue here.

160. Be that as it may, an allegation of *Halifax* abuse may be thought to have some relation to the *Ramsay* principle (see paragraph 142 above). I am not aware, however, that it has ever been said that HMRC take upon themselves any burden of proof by alleging an unblinkered approach to the analysis of particular facts or a realistic view in applying particular legislation (purposively construed) to the taxpayer's transactions (*Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKFCA 46, (2004) 6 ITLR 454 per Ribeiro PJ at [35] as approved in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, 76 TC 446 at [36]). As Ribeiro indicated, this modern restatement of the *Ramsay* principle involves an analysis of the

facts, which will usually be for the taxpayer to prove and which the taxpayer will wish to present (and be understood) in a particular way. Where the legislation permits such an approach, the tribunal may not be sufficiently satisfied by the taxpayer's explanation to conclude that the assessment is wrong. HMRC's support of the assessment in such cases cannot, however, ordinarily be interpreted as a specific allegation of dishonesty or sham (*Snook* or otherwise), even if an element of dishonesty or of sham is one possible interpretation of the tribunal's conclusion that the assessment should stand good. The possibility of dishonesty or possible sham (*Snook* or otherwise) may lower the threshold at which HMRC must adduce evidence or raise the scale of evidence needed to support the assessment so as to leave the tribunal in a state of uncertainty as to the taxpayer's case (as in *Wood v Holden*, see paragraph 92 above). That possible state of affairs does not mean, however, that HMRC have alleged dishonesty or sham or cannot call into question the basis and terms on which the taxpayer's agreements or arrangements have been entered into without doing so.

161. In ordinary civil litigation, it may be that the party that asserts that a term of an agreement does not represent the parties' true agreement bears the burden of proof of that contention. In the case of a tax assessment, however, HMRC are entitled to put the taxpayer to proof of those matters on which the assessment depends; not as to the taxpayer's honesty (which may be assumed unless the contrary is shown) but certainly as to the nature of its agreements and the circumstances under which they came to be entered into and whether particular terms represent the parties' true agreement. That may be easily answered given a presumption of honesty but there is no necessary allegation of dishonesty or sham by putting in issue the basis upon which a particular agreement or its terms have been arrived at.

162. In the absence of any evidence of dishonesty or deceit, and without the matter being put to the taxpayer's witnesses, the tribunal may have no basis for ignoring the express terms of an agreement. But this may not always be so. How far contractual terms dictate the outcome on the issues raised by the assessment will depend upon what the legislation requires. In *Ingenious*, the statutory question in respect of which the taxpayer's evidence was required was whether it was conducting its trade or business with a view to profit (see paragraph 110 above). Here it is whether the Appellant's payments to Joniere arose 'from' (in the relevant sense) Mr Gómez's employment with the Appellant (see paragraph 181 below). In this case, therefore, I think that HMRC are entitled to put the Appellant to proof of how the image rights agreements came to be negotiated and agreed with Joniere and their relationship with the negotiation and agreement of Mr Gómez's contract of employment.

163. In saying that I am not deciding that such matters are determinative of the issue in dispute or even necessarily relevant to its determination. HMRC plainly consider that they are and will no doubt expand upon its case to that effect in its skeleton argument. At the opening stage of stating its case, however, what is important is that it should have set out clearly the issues on which it is putting the Appellant to proof. The Appellant may always choose to say little on the matter (although this does not appear to be the Appellant's position – see paragraph 188 below) and rely solely on the concluded agreements, leaving open the possibility that the tribunal may make

adverse inferences on the commercial nature of the agreements and the value of Mr Gómez's image rights and how the Appellant intended to exploit them. It will then be for the tribunal to decide in the light of the proven facts (and whatever inferences it draws from them) whether any part of the payments to Joniere under the image rights agreements can be taxed as Mr Gómez's earnings.

164. If the legislation on which the assessment is based (which HMRC are required to identify in their statement of case) necessitates a broad view of the matter then by definition the taxpayer's agreements alone are unlikely to provide the answer. That apart, there are many situations in which contractual arrangements do not achieve their desired purpose without any suggestion of dishonesty, even though the arrangements have been incorrectly presented as having a particular effect or achieving a particular end. This may be because as a matter of ordinary construction the agreements are 'defective', not giving rise to the expected contractual rights and obligations or legal outcome; alternatively, the rights and obligations to which they do give rise may have been wrongly characterised in some way. The outcome in either case may not be as the parties intended or as they thought they had achieved (and may therefore be inconsistent with the way in which the agreements have been presented) but neither involves any necessary allegation of dishonesty or sham (*Snook* or otherwise).

165. In *Hilden Park No 1*, the Upper Tribunal was clear that,

> "62. Even if the FTT had accepted that HMRC had the burden of proving abuse of law, it is far from clear to us that the FTT would have required HMRC to open the case or that, if it had, a submission that the Appellants had no case to answer would have been either appropriate or successful. Under rules 5 and 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the FTT has wide powers to regulate the conduct of proceedings and the evidence before it. Even if the FTT had concluded that HMRC had the burden of proving that the *Halifax* principle was engaged, it could have required the Appellants to lead evidence about the transactions and the background to them. Further, in considering a submission of no case to answer, the FTT could take account of the documents before it, whether formally produced by witnesses or not, and require witnesses to give evidence about such documents."

166. This particular paragraph was subject to argument in *Hilden Park No 2*. Mr Gordon in that case said that it was "*fundamentally wrong*" while counsel for HMRC "*would not say it was wrong, but just that it was difficult to perceive many circumstances in which it would be right to require the appellants to give evidence where the appellants had applied for the appeal to be allowed on the basis that HMRC had failed to make out a prima facie case*" (see at [40]). Judge Mosedale had no difficulty with what the Upper Tribunal had said save that she found the suggestion that the appellant could be required to lead evidence in favour of HMRC's case (where HMRC had the burden of proof) difficult to understand.

167. I do not think that this is what the Upper Tribunal in *Hilden Park No 1* was suggesting. It said that the appellant could be required to lead evidence about the

transactions and the background to them, even in a case in which the *Halifax* principle is in issue and on the assumption that HMRC bear the burden of proof of that issue. But as *LMEL* illustrated, the legal burden of displacing an assessment is on the appellant throughout and the failure to lead evidence about the transactions and the background to them may therefore be fatal to the appellant's case of persuading the tribunal that the assessment should not stand good.

What do HMRC allege in their statement of case?

168. With those principles in mind, I need to consider what HMRC actually allege in their statement of case. The summary at paragraph 4 asserts that the burden of proof in the appeal is on the Appellant and goes on to note that the Appellant has provided very little contemporaneous documentation other than Mr Gómez's contract of employment and the "image rights" agreements. The statement of HMRC's case in paragraph 34 repeats this in more absolute terms, stating that the Appellant has not provided *any* supporting documentation other than the contractual documentation.

169. I do not know to what extent the lack of documentation of which HMRC complain follows a failure to exercise of their information gathering powers or is notwithstanding the formal exercise of those powers. However, they have made no application to the Tribunal for further disclosure given their view of the paucity of the Appellant's material and notwithstanding having the benefit of the Appellant's statement of case (served on 1 April 2016) and its list of documents (served on 20 April 2016). It appears, therefore, that HMRC are content for the appeal to proceed on the current basis, relying as necessary on the absence of documentary material.

170. HMRC's case notes that no documentation has been provided evidencing Joniere's relationship or association with Mr Gómez or evidencing any transfer of Mr Gómez's "image rights" to Joniere. If it turned out that Joniere was not in fact "The Owner" who "is authorised and licensed to grant licences relating to the Player's name, image, signature, other characteristics and personal appearances throughout the Territory", as the preamble to the Image Agreement of 3 November 2008 evidently states (and which must be the contractual basis upon which payments are made), that fact might raise the issue of sham. A conclusion that the image rights agreements were a sham on this basis would, however, appear to require a finding that all concerned (including the Appellant) were aware of the fact that Joniere was not the Owner, so that there was a common intention that the agreement was not to create the legal rights and obligations which it gave the appearance of creating. No unexpressed intentions of Joniere to deceive the Appellant in this respect (even with Mr Gómez's knowledge and connivance) could affect the Appellant's rights as an innocent party. On the assumption that the contract is governed by English law, the lack of any vested rights in favour of Joniere may just mean that there has been a failure of consideration or failure in basis, which might then entitle the Appellant to recover the money it had paid.

171. The simple statement by HMRC that the Appellant has produced no documentation to evidence the transfer of Mr Gómez's image rights to Joniere does not in my view amount to an allegation that the image rights agreements are a *Snook*

sham and could not found a submission to that effect. If HMRC wished to assert that the Appellant was a party to a sham document in the *Snook* sense, I think that it would have to be stated in clearer terms than that. Furthermore, HMRC explicitly deny any allegation of sham and this is not a case, such as *E Buyer* or *Citibank*, where the terms of HMRC's stated case can only be understood as advancing a particular allegation – in those cases of knowledge and association with fraud and in this case of *Snook* sham – notwithstanding their denial. HMRC are nevertheless entitled in my view to reserve their position, as they have explicitly done in correspondence, to submit otherwise to the tribunal if, by cross-examination or otherwise, the evidence adduced at the hearing were to support such a submission and the matter had been appropriately put to the Appellant's witnesses. It will be for the tribunal hearing the appeal to decide whether such a submission can properly be made (given the absence of any pleaded case of *Snook* sham) and, if so, whether the evidence (circumstantial or otherwise) leads to such a conclusion.

172. HMRC's summary of the facts refers to a number of provisions in the employment and image rights agreements, suggesting that an issue in the appeal will be an analysis of those agreements, necessitating some conclusion on the rights and obligations that they create. It will be for the Tribunal to determine precisely what legal rights and obligations the image rights agreements involved, having regard to the nature of such rights, the terms in which the agreements purport to licence them and any relevant provisions of Mr Gómez's employment contract. Thus, HMRC's assertion at paragraph 38 of their Statement of Case, that the Appellant was already entitled to exploit Mr Gómez's image under the terms of his employment contract, so that the image rights agreements confer no additional rights meriting the payments made under them, does not appear to me to involve an allegation of sham (*Snook* or otherwise). If in fact as a matter of contractual analysis Mr Gómez had already granted the Appellant the right to exploit his image worldwide, that would beg various questions: for example, what (if any) further rights the Appellant secured through its agreement with Joniere; what the Appellant's payments were made for, and why. It seems to me that HMRC are perfectly entitled to make this point without being taken to allege sham. It is largely a matter of contractual analysis which, if leading to an unfavourable conclusion (from the Appellant's perspective), would then be a matter for the Appellant to explain.

173. This last point seems to me to deal (at least in part) with one of the issues that the Appellant has raised regarding HMRC's case. Thus, in their letter of 19 December 2016 to the Appellants, and repeated in their letter to the Tribunal of 9 January 2017 (see paragraphs 21 and 25 above), HMRC say that they, "*question whether it was ever the intention or understanding of the parties that [the Appellant] would act in accordance with the rights conferred by the license agreement.*" If, as a matter of contractual analysis, the image rights agreements gave the Appellants no additional rights to the rights that they had already secured under Mr Gómez's employment contract or possibly conferred only limited additional rights (having regard to the employment contract) of no apparent value to the Appellant, such a finding might call for some explanation.

174. I do not know to what extent the image rights agreements envisaged that the Appellant would "*act in accordance with*" the licensed rights. HMRC refer to and rely upon the lack of any contemporaneous material to demonstrate that there was a plan to exploit Mr Gómez's image rights. This does not appear to me, however, to correspond to the allegation in *Brain Disorders*, where the contract provided for money to be spent by the contracting party on research but it was readily apparent that this could not be done. In the Appellant's case, the failure to exploit Mr Gómez's image rights carries no necessary implication that the agreement granting them is a sham or that the consideration given exceeds the value of the rights granted. I may buy a piece of equipment for its market value having no idea how to use it, or the ability to do so, but that does not make the acquisition agreement a sham. Accordingly, I do not think that HMRC's assertion in this respect amounts to an allegation of sham. Its relevance to the issue under appeal will depend upon what the legislation requires.

175. On the basis, however, that the image rights agreements are not (and are not alleged to be) *Snook* shams and are the sole source of the Appellant's right to exploit Mr Gómez's image, how should other elements of HMRC's stated case (to the effect that the payments are Mr Gómez's earnings) be viewed? In this respect, HMRC draw attention to the absence of any contemporaneous material relating to the negotiation of Mr Gómez's employment contract and remuneration package, and the absence of any valuation of his image rights. Their Statement of Case includes a number of assertions, for example, that Mr Gómez's image "*was of no real commercial value*", that the image rights payments were used "*to inflate Mr Gómez's net salary to a figure close to what he had received at his previous club*"; that Mr Gómez would not have been considered in the elite group of recognisable sportspeople. Ultimately, in HMRC's words, the Appellant "*has failed to provide any contemporaneous evidence of any such valuation, plan or strategy to support the assertion that this was a genuine commercial transaction or that it had any intention of exploiting the "Image Rights"*."

176. HMRC's correspondence elaborates on this aspect of its case. Thus, they state that:

> (1) the Appellant's payments under the image rights agreements, "*are too excessive to be commercial*" (letter of 14 December 2016, see paragraph 19 above);
>
> (2) "*the consideration agreed is uncommercial*" and the consideration that the Appellant was "legally required to pay" was remuneration that Mr Gómez, "*directed should be paid to Joniere*" (letter of 19 December 2016, see paragraph 21 above); and
>
> (3) "*the agreement is not a genuine commercial agreement*", "*the amounts paid in respect of "image rights" constitute disguised employment income*" and, the terms of the image rights agreement "*can be disregarded if, as the evidence suggests, they do not truly reflect what the consideration was paid for*" (letter to the Tribunal of 9 January 2017, see paragraph 25 above, emphasis added).

177. Given that HMRC's case emphasises that the Appellant had at that stage produced little more than the contracts, it is unclear what "the evidence suggests", beyond what HMRC assert in their case. Possibly the author should have referred to what HMRC assert the absence of evidence suggests. It is noteworthy, however, that those assertions involve some matters that may not necessarily be within the Appellant's knowledge or ability to produce any evidence: for example,

(1) whether Mr Gómez did or did not have an image rights agreement with his previous club and, if not, whether the reason for its absence was that his image was considered (presumably by his previous club) to be of no commercial value; and

(2) what remuneration Mr Gómez in fact received at his previous club?

178. In addition, HMRC also assert that Mr Gómez, "*was not in the elite group of recognisable sports people*" and, implicitly, that his image rights therefore did not command a value reflecting what the Appellant agreed to pay for them. Given the positive manner in which these are stated, they are assertions that HMRC might be expected to support in some way, by evidence if necessary. HMRC have, however, made no application to introduce expert valuation evidence or otherwise to respond to the inclusion in the Appellant's list of documents to two valuations of Mr Gómez's image rights. It may be that they consider that critical review of these documents and cross-examination of the Appellant's witnesses will suffice for their purposes. Finally, HMRC allude to an image rights agreement entered into between the Appellant and another player and make various assertions regarding that agreement. Given that this relates to another taxpayer, I am unclear on what basis these assertions are made, their relevance to Mr Gómez's case or by what evidence HMRC propose to support their assertions.

179. In their correspondence HMRC rely explicitly on the Supreme Court in *Autoclenz v Belcher* and the Upper Tribunal in *Acornwood* as their basis for saying that the court may disregard provisions of documents which do not represent the reality of the transactions. It is not immediately clear, however, that either is relevant to the present case. In particular, leaving aside the issue to which I referred in paragraph 173 above, I do not understand HMRC to assert that there is some term of the agreement that can be disregarded as not being a part of the true agreement between the parties. The essential point is whether the amount agreed to be paid for the rights conferred under the image rights agreements was influenced by the amount that the Appellant's had agreed to pay to employ him (or *vice versa*). Furthermore, the Supreme Court emphasised in *Autoclenz* the limited circumstances in which it will be appropriate to go behind what the parties have agreed (see paragraph 122 above), a point emphasised by Arden LJ in *Hitch v Stone* (see paragraph 123 above) and by Neuberger J in *National Westminster Bank* (see paragraph 156 above). That does not mean, however, that HMRC cannot put the Appellant's agreements or their terms in issue to demonstrate the basis upon which they were reached or otherwise to put them in a broader context where the legislation in question permits or demands a more expansive view of the matter.

180. In the present context, HMRC assert that payments made under a contract with a third party (Joniere) in respect of Mr Gómez's image rights constitute Mr Gómez's earnings for income tax and national insurance purposes, where the statutory question is whether the payments can be said to arise "from" a taxpayer's employment. Thus, in the leading case of *Hochstrasser v Mayes* [1960] AC 376 the House of Lords concluded that payments received by the employee under agreements entered into as part of his employer's housing scheme did not arise from his employment in the relevant sense. More recently, in *P A Holdings v HMRC* [2012] STC 582, the Court of Appeal concluded that this question could be answered by reference to the reality of the arrangements and accordingly payments taking the form of dividends routed to employees as part of a scheme using an employment benefit trust and company shares were nevertheless taxable as earnings from the employment. In both cases, however, the payments were ultimately received by the employee rather than by a third party in respect of separately granted rights.

181. Leaving that consideration aside, the question whether particular payments that take account of a reduced salary can themselves count as earnings might be thought to have been answered by *IRC v Duke of Westminster* [1936] AC 1, 19 TC 490. There the House of Lords concluded that payments made to employees under separate deeds of covenant could not be said to be salary or wages notwithstanding the employees' forbearance in not drawing their full wages, so that the aggregate of the annuity payments and wages actually drawn equated to the wages paid prior to the implementation of the annuity arrangements. As Lord Templeman explained in *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655 at 669-670:

> "In the *Westminster* case there were two rival explanations of the transactions between the Duke and his gardener. The first explanation is that the gardener voluntarily worked full time for the Duke for half wages and enjoyed the annuity given to him by the Duke. This explanation was accepted by the majority. … The second explanation of the facts in the *Westminster* case is that the gardener worked full-time for full wages and volunteered or agreed that he would not take his annuity until he had retired. Lord Atkin thought that this was the true effect in law on the facts. I agree with Lord Atkin, gardeners do not work for Dukes on half-wages.
>
> If, however, as the majority of the House concluded, the gardener voluntarily declined to accept half his wages but accepted the whole of his annuity, the financial consequences to the Duke were that he paid the annuity and the taxation consequences were that he was entitled to deduct the amount paid in computing his liability to income tax and surtax. The dictum of Lord Tomlin, applied to the obligations of the Duke, is not inconsistent with later authority. But if the dictum of Lord Tomlin implied that any tax avoidance scheme which was not a sham and not unlawful must be allowed to succeed subsequent authorities have determined otherwise. The Westminster case does not assist the Appellant in the present case. In the Westminster case the fiscal consequences claimed by the Duke corresponded to the legal consequences of the transaction as construed by the majority of this House. In the present case the fiscal

consequences claimed by the Appellant do not correspond to the legal consequences of the scheme documents read and construed as a whole."

182. The *Westminster* case was also concerned with payments that were made to the employees. The Supreme Court, however, has recently concluded in *RFC 2012 plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 that it is not necessary that employees themselves should receive, or at least be entitled to receive, the payments that are said to be taxable earnings (see [36]-[37]). The issue was whether money paid to trustees of an employee benefit trust, to which the employees in question had no prior entitlement, should nevertheless be treated as part of the employees' remuneration. None of the transactions in the Rangers' scheme were shams and ultimately under the arrangement the employees received (via a sub-trust) only a loan of the moneys in question (albeit a loan that might subsequently be discharged without being repaid).

183. In delivering the judgment of the Supreme Court, Lord Hodge noted that there was no dispute that what is taxable is the remuneration or reward for services. The issue was whether it was necessary for the employee to receive or be entitled to receive the remuneration for it to be taxable emoluments. On this he concluded at [39]:

> "I see nothing in the wider purpose of the legislation, which taxes remuneration from employment, which excludes from the tax charge or the PAYE regime remuneration which the employee is entitled to have paid to a third party. Thus, if an employee enters into a contract or contracts with an employer which provide that he will receive a salary of £X and that as part of his remuneration the employer will also pay £Y to the employee's spouse or aunt Agatha, I can ascertain no statutory purpose for taxing the former but not the latter. The breadth of the wording of the tax charge and the absence of any restrictive wording in the primary legislation, do not give any support for inferring an intention to exclude from the tax charge such a payment to a third party which the employer and employee have agreed as part of the employee's entitlement. Both sums involve the payment of remuneration for the employee's work as an employee."

184. The penultimate sentence of this paragraph suggests that the payment to the third party should be a matter of agreement between the employer and employee (as reflected also in the first two sentences of the paragraph and again at [41]). As Lord Hodge records in summarising the facts, the terms of the footballer's engagement were recorded in two separate contractual documents: a contract of employment and a side letter relating to the payment to the employee benefit trust (see [22]). It may be that agreement is to be implied from the particular circumstances or, as Lord Hodge appears to suggest in [58] and [59], that something less than actual or implied agreement – "acquiescence" – may suffice. Certainly, it appears that 'voluntary' payments (such as discretionary bonuses) remain taxable – presumably by reference to the familiar tests – irrespective of whether they are paid to the employee or a third party (see paragraphs [31] and [66]).

185. I am not called upon here to resolve these or other issues raised by these cases, on which I have naturally heard no argument and on which I have reached no conclusion. Nothing in Lord Hodge's judgment in the *Rangers'* case, however, appears to address the question of whether contractual payments to a third party that are express as consideration for something other than employment services – in this case the employee's image rights – can be treated as taxable earnings either because the contract in question was related in some way to his employment or because the quantum of the remuneration in some way takes account of the contractual payments for image rights (or *vice versa*).

The appropriate directions in the Appellant's case

186. I imagine that the scope of the Supreme Court's decision and its application to the circumstances of the present case will be a matter for considerable argument in the course of the hearing of the Appellant's appeal. The issue that I have to resolve is whether I should direct that HMRC serve their evidence and their skeleton argument first having regard to the case that they have stated. In doing so, I am bound to have regard not just to the ordinary legal and evidential burden of proof that I have outlined but also to the overriding objective under the Rules of dealing with cases fairly and justly. In this respect, I need to consider how this case may most efficiently proceed from this point in time in preparing for the hearing (having regard to the steps that have already been taken).

187. For the reasons that I have given, the legal burden of proof in this appeal remains on the Appellant to displace the assessment (see paragraph 82 above). HMRC have expressly denied that they are alleging sham in the *Snook* sense and I have concluded that HMRC's various assertions regarding Joniere's entitlement to license Mr Gómez's image rights or the use that the Appellant may or may not have intended to make of those rights do not amount to an allegation of *Snook* sham (see paragraphs 171 and 174 above). The Appellant does not seek further and better particulars of HMRC's stated case. Its complaint, essentially, is that HMRC have not adequately explained how, in the absence of an allegation of *Snook* sham, contractual payments to a third party in consideration of the licensing of Mr Gómez's image rights can be taxed as Mr Gómez's earnings. That final point is, however, a matter for the tribunal that eventually hears the appeal, in the light of the proven facts and following legal argument on the matter. The question is how should the evidence be dealt with that will enable that tribunal to determine whatever facts require to be found by reference to which the characterisation of the payments for tax purposes will be determined.

188. In this respect only the Appellant can explain the basis upon which it negotiated the employment contract and image rights agreements with Mr Gómez and Joniere. To the extent that HMRC allege that the image rights agreements were uncommercial it is open to the Appellant to produce evidence that tends to demonstrate otherwise. Indeed, in its statement of case the Appellant says that it will rely on the following matters:

(1) witness evidence as to the background and commercial justification for entering into the image rights agreements;

(2) a valuation of Mr Gómez's image rights by an independent valuer as at the relevant dates;

(3) evidence as to the reasons why the Appellant failed properly to exploit the image rights;

(4) witness evidence to support its contention that this was a genuine commercial agreement and its efforts to exploit the image rights;

(5) evidence to demonstrate that Mr Gómez was in the elite group of recognisable people; and

(6) evidence, if necessary, to show what other services Mr Gómez rendered beyond those required pursuant to his employment contract.

189. Ultimately the Appellant's case (as I understand it) is that HMRC cannot go behind the contracts and, if that is correct, evidence of these various matters may be irrelevant. If, however, the commercial nature of the contracts or the surrounding circumstances under which they were negotiated is relevant to the issue raised (as HMRC assert), the Appellant is in my view entitled to know in the circumstances of its case on what (if any) evidence HMRC intend to rely to support the assertions that they make in their Statement of Case. If HMRC are intending to rely solely on cross-examination or are merely proposing to invite the Tribunal to draw certain conclusions from the inadequacy of evidence produced by the Appellant or its absence, it seems to me that they lose nothing by making this clear in advance. On the other hand, if they are intending to produce documentary or witness evidence (beyond what appears in their list of documents) to support their assertions, there seems no reason why they should not reveal their hand at this stage rather than leave the Appellant to formulate its evidence in ignorance of whatever evidence HMRC are intending to produce to support the assessment. It would be unfortunate if once that is revealed it resulted in an application by the Appellant to adduce further evidence in reply. In this respect it is not unusual in bespoke directions for complex cases for each party to disclose the identity of their witnesses together with a summary of what their evidence will concern in advance of either party actually serving their witness statements.

190. The Appellant has set out in some detail in its statement of case the evidence that it proposes to adduce at the hearing and has listed its documents. HMRC should therefore have a good idea of the nature of the Appellant's evidence with which it will have to deal at the hearing. As I have noted, this has not been the catalyst for any application by HMRC for further disclosure or for permission to adduce expert evidence. For their part, HMRC have listed the documents on which they intend to rely but have offered no indication as to what (if any) witness evidence *of fact* they intend to produce to make good the various assertions in their statement of case. The burden of proof may not lie on HMRC in respect of those assertions but that does not necessarily allow them to play their cards close to their chest. Mr Nawbatt's objections to HMRC being directed to serve their factual witness evidence first seemed to be based essentially on a desire not to depart from the standard approach to

the production of witness evidence rather than on any principled objection that had regard to the particular circumstances of the Appellant's case.

191. HMRC have made a number of assertions but without any indication as to how they propose to support them if needs be, in particular where they appear to relate to matters that may not be within the Appellant's knowledge or ability to produce evidence (see paragraph 177 above). In my view it is appropriate that HMRC should now clarify their approach so that the Appellant can take this into account (as appropriate or necessary) in preparing its witness evidence. I shall accordingly direct that HMRC should serve the evidence of their witnesses of fact (if any) first.

192. The reasons for so directing do not, however, extend to the question of which party should serve their skeleton argument first. In former times, it would be quite usual for parties to exchange skeleton arguments simultaneously. The more normal procedure now is for the taxpayer (on whom the burden of proof ordinarily rests, as I have explained) to serve their skeleton argument first, followed shortly by HMRC. I see no reason to depart from that order of events in the Appellant's case, save that I shall adjust the timing of service relative to the commencement of the hearing so that the Appellant has the opportunity, if so advised, to serve a supplemental skeleton in reply.

193. Finally, the Appellant asked that I direct that HMRC should prepare the appeal bundles given the inexperience of the Appellant's representative in these matters. Again, however, I see no reason to depart from the usual practice in this tribunal. The Appellant was represented at this case management hearing by learned counsel whom I am sure has a wealth of experience on which the Appellant's representative can draw if he requires any guidance in these matters.

Conclusion

194. In summary, I have concluded in the Appellant's case as follows:

(1) The validity of the Directions and Decisions under appeal does not depend upon any matter in respect of which the burden of proof to demonstrate validity falls on HMRC;

(2) The Directions and Decisions under appeal do not depend upon any precursor action or preconditions in respect of which the burden falls on HMRC to demonstrate that they are satisfied;

(3) No burden falls upon HMRC to justify the Directions or Decisions under appeal other than, if necessary, to show that they are, respectively, in an amount decided by "best judgment" and made "to the best of the officer's information and belief", neither of which is disputed;

(4) The legal burden of proof falls on the Appellant to demonstrate that the Directions and Decisions under appeal should not stand good and this burden remains on the Appellant throughout the appeal;

(5) That burden requires the Appellant to establish to the satisfaction of the tribunal hearing the appeal on the balance of probabilities the facts relevant to the resolution of the issues raised by the Directions and Decisions;

(6) The Directions and Decisions under appeal (and HMRC's statement of case) put in issue the factual basis upon which the image rights agreements and the contracts of employment were entered into and their terms negotiated, on which (to the extent that such facts are shown to be relevant to the issue raised by the Directions and Decisions) the burden of proof lies with the Appellant;

(7) HMRC has not assumed the burden of proof in respect of those facts by calling them into question (and therefore putting the Appellant to proof of) the basis and terms of the Appellant's arrangements with Mr Gómez and Joniere;

(8) If, properly understood, HMRC's case actually alleges dishonesty or *Snook* sham, the burden of making good that allegation falls on HMRC; the Appellant, however, must still be able to demonstrate that the Directions and Decisions should be displaced absent any dishonesty or *Snook* sham;

(9) An allegation of dishonesty or *Snook* sham should not be implied merely because HMRC have called into question the basis of the Appellant's arrangements with Mr Gómez and Joniere or because it could be said that a conclusion that the Directions and Decisions should stand good suggests the possibility of dishonesty or *Snook* sham; it should be possible to identify such an allegation from HMRC's stated case based on what they say;

(10) In the present case HMRC deny that they are alleging *Snook* sham and their statement of case cannot be read as if they were making that allegation;

(11) HMRC nevertheless remain free to submit that dishonesty or *Snook* sham is involved if the evidence suggests that and the issue has been put to the relevant witnesses;

(12) Notwithstanding that HMRC does not have the burden of proof, in the circumstances of the case, having regard to both parties' statements of case, lists of documents, the statement of agreed facts and issues and the overriding objective of the Rules, it is appropriate that the next step should be for HMRC to serve their factual witness evidence (if any) so that the Appellant can take it into account in finalising its factual evidence in support of its case.

195. I have dealt with the matters raised before me at greater length than I initially anticipated because they seem to me to raise important issues of principle, some of which may be raised again at the hearing of the appeal. My decision is nevertheless a case management decision and I imagine that the issues, so far as they do remain in dispute and relevant both to the conduct of the appeal and its determination, will be subject to further legal argument at the hearing. They will be for the final decision of the tribunal on that occasion (subject to any further appeal). More importantly, I wish it to be clear that my decision to direct HMRC to serve their evidence first has been arrived at by reference to the circumstances of this case, taking account of where matters stand and how each party has pleaded its case. As my summary conclusion indicates, I do not accept that the burden of proof in this case lies with HMRC as the

Appellant contended or that there is a general obligation on HMRC to serve their witness evidence first.

196. This document contains full findings of fact and reasons for my 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.

MALCOLM GAMMIE
TRIBUNAL JUDGE

RELEASE DATE: 14 AUGUST 2017