[2018] UKFTT 765 (TC)

TC06899

Appeal number: TC/2011/06756

INCOME TAX – residence- full time work abroad –distinct break in pattern of life – emoluments from employment – founder's fee – restricted shares – share options – principle of territoriality – discovery - staleness

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR JOHN CHARMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
MRS SHAMEEM AKHTAR

Sitting in public at Taylor House, 88 Rosebery Avenue, London from 25 September 2018 to 10 October 2018

Ms Nicola Shaw QC and Mr Michael Jones of Gray's Inn Tax Chambers, instructed by Withers LLP for the Appellant

Mr Akash Nawbatt QC and Mr Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Charman against assessments raised by HMRC for the tax years 2001-2, 2002-3, 2003-4, 2004-5, 2005-6 and 2007-8. The total amount of tax in dispute as stated in Mr Charman's appeal notice of 22 November 2010 is £13,019, 009.60 (thirteen million, nineteen hundred and nine pounds and sixty pence)

2. HMRC have raised their assessments on the basis that Mr Charman was resident in the UK for tax purposes for the tax year 2001-2 and that he became non-UK tax resident on 27 January 2003.

3. The assessments relate to employment income, including bonus payments and expenses, a "founders' fee", share options and restricted shares awarded to Mr Charman.

4. Mr Charman says that he became non-UK tax resident in October 2001 and therefore none of the amounts on which HMRC seek to charge tax are properly chargeable to UK tax and that HMRC's assessments have taxed some amounts twice.

5. HMRC are now arguing that Mr Charman did not cease to be resident in the UK for tax purposes until 21 November 2003.

Background facts

6. Mr Charman was born in and was employed in the UK until 2001. By that date he was a very senior executive in the insurance industry. He had worked at Lloyds of London, was a Lloyds "Name" and had worked in a senior role at a number of insurance companies in the UK. He set up the first corporate syndicate at Lloyds and this was sold to a company called Ace Global Markets Limited ("Ace") in July 1998.

7. By this time Mr Charman was married and had two sons. His family home was at Dell House, Sevenoaks in Kent, which had been acquired as the family home in 1987.

8. Ace was part of a large international insurance business listed in New York and registered in Bermuda. From July 1998 until 17 March 2001 Mr Charman was CEO of Ace, which was based in London. He was asked to move to Bermuda to work for Ace but refused to go because of his wife and sons. His Ace contract required him to travel overseas but he was not required to live outside the UK.

9. In February 2001 Mr Charman was appointed group president and chief executive officer of Ace International Group, making him formally responsible for the international business of the Ace group. This involved significant international travel but Mr Charman again refused to move to Bermuda.

10. Mr Charman was unfairly dismissed by Ace in March 2001. He received a substantial settlement payment which triggered a restrictive covenant in his employment contract which stopped him undertaking any competing insurance

business in the City of London or soliciting business from former contacts until March 2002.

11. Mr Charman became involved with MMC Capital Inc ("MMC"), a US subsidiary of Marsh and McLennan in New York and in April 2001 started to discuss setting up a new insurance entity, Axis Specialty Limited ("Axis Specialty"), which was to be based in Bermuda.

12. Mr Charman's initial role with MMC included working with MMC in New York as a consultant. The events of 9/11 accelerated the establishment of the proposed new Bermuda entity for MMC.

13. On 10 September 2001 Mr Charman was also appointed as chief executive of an insurance company called Newmarket Underwriting Limited ("Newmarket"), a subsidiary of March McLennan in the UK. He had previously acted for them on an informal basis since leaving Ace.

14. After a period of fund raising and preliminary work between 19 September and 20 November 2001, the new Bermudan insurance entity proposed by MMC started trading with Mr Charman as its president and chief executive.

15. A significant part of the funds raised for Axis Specialty were obtained from MMC, MMC's pension fund and some came from Mr Charman's own capital.

16. Mr Charman's employment contract with Axis Specialty entitled him to an annual salary of no less than $1 million, an annual bonus of no less than 75% of his salary and expenses of no less than $15,000 per month to cover his Bermuda living costs.

17. Mr Charman was also given an unconditional option over Axis Specialty shares under a Stock Option Agreement of 20 November 2001 (the "Share Options"). Under a Notice of Stock Option Grant effective 1 October 2001 Mr Charman was awarded options over 253,139 shares and by a similar notice of 12 December 2002 was awarded 25,000 shares.

18. On 19 September 2002 Mr Charman was awarded 50,000 restricted shares in Axis Specialty (the "Restricted Shares").

19. As part of an IPO on 31 December 2002 shares in Axis Specialty were exchanged for shares in Axis Capital Holdings Limited ("Axis Capital").

20. In late 2002 or early 2003 Mr Charman received a founder's fee (the "Founder's Fee") in respect of the Axis Specialty project from MMC of $2.5 million.

21. In March 2003 Mr Charman sent HMRC a form P85 "Leaving the United Kingdom" which stated that he had become non-resident in the UK for tax purposes on 27 January 2003.

22. On 30 June 2003 there was a stock split in respect of Axis Capital shares. This increased the number of Mr Charman's Restricted Shares to 400,000, and the shares over which his Share Options were exercisable became 2,025,112 shares.

23. Mr Charman left his family home in Kent for the final time in November 2003 and did not return there.

24. The restriction on Mr Charman's Axis Specialty shares (which had become Axis Capital shares) was lifted on 19 September 2005. At that time the market value of Mr Charman's Restricted Shares was $11,556,000.

25. On 19 March 2008 Mr Charman exercised and sold some of his Share Options (amounting to options over 1.575 million shares) realising a total of $52,869,540.

The assessments raised

26. The 2001-2 discovery assessment issued on 24 November 2006 for a sum of £842,000 in tax relating to**:**

(1) Salary £350,000

(2) Expenses £30,000

(3) Founder's Fee £1,725,000

27. The 2002-3 closure notice issued on 9 June 2010 amending Mr Charman's tax return increasing the tax payable to £1,440,461, including;

(1) Salary £570,000

(2) Expenses £95,000

(3) Bonus £1,210,000 (bonus for 2002 paid 14 March 2003)

(4) Founder's Fee £1,725,000

28. The 2003-4 discovery assessment issued on 26 March 2010 for total tax of £44,000 relating to:

(1) Bonus apportionment £110,000, (being 26/365ths of a total bonus of $2,250,000 converted into sterling) assuming that the bonus for 2003 was paid in 2003-4 and that Mr Charman ceased to be UK resident on 27 January 2003.

29. The 2004-5 discovery assessment issued on 26 March 2010 for total tax of £44,000 relating to:

(1) Bonus apportionment £110,000 (being 26/365ths of a total bonus of $2,250,000 converted into sterling), assuming that the bonus for 2003 was paid in 2004-5 rather than 2003-4 and that Mr Charman ceased to be UK resident on 27 January 2003.

30. The 2005-6 closure notice issued on 9 June 2010 amending Mr Charman's self-assessment return to a total tax sum due of £2,551,028.80 to include:

(1) Restricted shares value £6,393,00

31. 2006-7 – no amendments or discovery assessments.

32. The 2007-8 discovery assessment issued on 9 June 2010 assessing tax due of £6,613,984.80 including:

(1) Share options profits on sale - £16,545,976.00.

33. As can be seen these assessments resulted in some sums being charged to tax twice and it was accepted between the parties that these elements of Mr Charman's income should only be taxed once, however the year in which they should be treated as taxable is disputed.

34. Mr Charman appealed against these assessments by a Notice of Appeal dated 22 November 2010, stating his grounds of appeal as:

(1) HMRC have failed to take account of all known facts;

(2) HMRC have taxed certain amounts twice as HMRC are uncertain which tax year they fall into; and

(3) the exercise of the share options were taxed as if they were granted when the Appellant was UK resident, which was not the case.

Issues in dispute

35. The issues in dispute between the parties can be summarised as

(1) Did the Appellant cease to be resident in the UK for tax purposes before 20 November 2003 and if so, when did he cease to be resident.

(2) Was the Appellant tax resident in the UK when he received his salary, bonus and expense payments from his employer, Axis Specialty.

(3) Is the Appellant liable to tax on the Founder's Fee paid to him by MMC and if so, is the Founder's Fee chargeable under Schedule E as employment income or Schedule D Case VI.

(4) In respect of the Restricted Shares–

(a) Was the Appellant resident in the UK when he acquired the Restricted Shares on 31 December 2002.

(b) Were the Restricted Shares acquired by the Appellant by reason of his employment.

(c) If the Appellant was not resident at the time when the Restricted Shares became unrestricted, is he chargeable to tax under s 427 ITEPA 2003 (the territoriality question).

(5) In respect of the Share Options acquired by the Appellant

(a) When did the Appellant acquire the Share Options.

(b) Was the Appellant tax resident in the UK when he acquired the Share Options.

(c) If the Appellant was not resident at the time when he exercised the Share Options, is he chargeable to tax within s 476 ITEPA 2003 (the territoriality question).

(d) If the Appellant is taxable on some but not all of the Share Options, which of them should be treated as exercised by the Appellant at the time when they were exercised on 19 and 20 March 2008.

(6) Is the discovery assessment raised on the Appellant for the 2003-4 tax year a valid assessment.

The law

36. The main statutory provisions relevant to the dispute between the parties are:

(1) *Section 334 & 335 Income and Corporation Taxes Act 1988* ("ICTA 1988") these are the statutory rules which determine whether someone should be treated as resident in the UK if they have left the UK to reside or work full time abroad:

"**s 334 Commonwealth citizens and others temporarily abroad**

Every Commonwealth citizen or citizen of the Republic of Ireland –

(a) shall, if his ordinary residence has been in the United Kingdom, be assessed and charged to income tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad and

(b) shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains whether they arise from property in the United Kingdom or elsewhere, or from any allowance, annuity or stipend, or from any trade, profession, employment or vocation in the United Kingdom or elsewhere.

335 Residence of persons working abroad

(1)Where-

(a) a person works full-time in one or more of the following, that is to say, a trade, profession, vocation, office or employment; and

(b) no part of the trade, profession or vocation is carried on in the United Kingdom and all the duties of the office or employment are performed outside the United Kingdom,

the question of whether he is resident in the United Kingdom shall be decided without regard to any place of abode maintained in the United Kingdom for his use.

(2)Where an office or employment is in substance one of which the duties fall in the year of assessment to be performed outside the United Kingdom there shall be treated for the purposes of this section as so performed any duties performed in the United Kingdom the performance of which is merely incidental to the performance of the other duties outside the United Kingdom"

(2) *Section 29 Taxes Management Act 1970* ("TMA 1970")– the "discovery" rules, which form the basis of the assessments raised on Mr Charman for each of the years in dispute other than the 2002-3 and 2005-6 tax years:

"Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax"

(3) *Section 202A and s 202B ICTA 1988* – These are the rules which determine when emoluments, such as the bonus and Founder's Fee paid to Mr Charman, are treated as received and subject to tax for UK tax purposes:

"**202A Assessment on receipts basis**

(1) As regards any particular year of assessment-

(a) Income tax shall be charged under Cases I and II of Schedule E on the full amount of the emoluments received in the year in respect of the office or employment concerned"

"**202B Receipts basis; meaning of receipt**

(1) For the purposes of sections 202A(1)(a) emoluments shall be treated as received at the time found in accordance with the following rules (taking the earlier or earliest time in a case where more than one rule applies)-

(b) the time when payment is made of or on account of the emoluments;

(c) the time when a person becomes entitled to payment of or on account of the emoluments;

(d) in a case where the emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and the sums on account of the emoluments are credited in the

company's accounts or records, the time when the sums on account of the emoluments are so credited;

(e) in a case where the emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the emoluments for a period is determined before the period ends, the time when the period ends;

(f) in a case where the emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the emoluments for a period is not known until the amount is determined after the period has ended, the time when the amount is determined"

(4) For the later tax years, 2003-4 and 2004-5 the relevant equivalent provisions are s 18 ITEPA 2003.

(5) *Section 422 – 428 Income Tax (Earnings and Pensions) Act 2003* ("ITEPA 2003") These provisions are relevant to the tax treatment of the Restricted Securities held by Mr Charman. They apply, in their originally enacted form, to securities acquired before 16 April 2003.

"422 Application of this Chapter

(1)This Chapter applies where –

(a) a person ("the employee") acquires a beneficial interest in shares in a company as a director or employee of that or another company, and

(b) the interest is acquired on terms that make it conditional."

"423 Interests in shares acquired "as a director or employee"

(1) For the purposes of this Chapter a person ("E") acquires shares or interests "as a director or employee" of a company if E acquires the interest in pursuance of –

(a) a right conferred on, or opportunity offered to, E by reason of E's office or employment as a director or employee of a company."

"**s 425 Cases where this Chapter does not apply**

(1) This Chapter does not apply where a person acquires a beneficial interest in shares as a director or employee of a company if the earnings from the office or employment in question were not (or would not have been if there had been any) general earnings to which section 15 or 21 applied (earnings for the year when employee resident and ordinarily resident in the UK)."

"**s 427 Charge on interest in shares ceasing to be only conditional or on disposal**

(1) This section applies if-

(b) the shares cease, without the employee ceasing to have a beneficial interest in them, to be shares in which the employee's interest is only conditional, or

(c) in a case where the shares have not so ceased, the employee sells or otherwise disposes of the employee's interest or any other beneficial interest in the shares"

(6) *Section 471 – 478 ITEPA* These provisions apply to the Share Options granted to Mr Charman.

The meaning of a securities option is provided by s 420 ITEPA:

"**420 Meaning of "securities" etc**

(8)"securities option" means a right to acquire securities"

"**471 Options to which this Chapter applies**

(1) This Chapter applies to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment of that person or any other person"

"**474 Cases where this Chapter does not apply**

(1)This Chapter (apart from sections 473 and 483) does not apply in relation to an employment related securities option if, at the time of the acquisition, the earnings from the employment were not (or would not have been if there had been any) general earnings to which section 15 or 21 applies (earnings for year when employee resident and ordinarily resident in the UK)."

"**476 Charge on occurrence of chargeable event**

(1)If a chargeable event occurs in relation to an employment-related securities option, the taxable amount counts as employment income of the employee for the relevant tax year.

(2) For this purpose –

(a)"chargeable event" has the meaning given by section 477

(b)"the taxable amount" is the amount determined under section 478

(c) "the relevant tax year" is the tax year in which the chargeable event occurs"

The authorities

37. We were referred to the following authorities:

(1) *Ex parte Blain* 12 Ch D 522

(2) *Levene v Commissioners of Inland Revenue* [1928] AC 217

(3) *IRC v Lysaght* [1928] AC 234

(4) *Grey v Tiley* 16 TC 414

(5) *The Commissioners of Inland Revenue v Combe* 17 TC 405

(6) *Brocklesby v Merricks (Inspector of Taxes)* 18 TC 576

(7) *CIR v Whitworth* 38 TC 531

(8) *Abbott v Philbin* [1961] AC 352

(9) *Robson v Dixon (Inspector of Taxes)* 48 TC 527

(10) *Alloway v Phillips* (*Inspector of Taxes*) [1980] 1 WLR 888

(11) *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 WLR 94

(12) *Reed (Inspector of Taxes) v Clark* [1986] Ch 1

(13) *Shilton v Wilmshurst (Inspector of Taxes)* [1991] 2WLR 530

(14) *Wilcock (Inspector of Taxes) v Eve* [1995] STC 18

(15) *Corbally-Stourton v HMRC* [2008] STC (SCD) 907

(16) *HMRC v Grace* [2009] STC 213

(17) *Grace v HMRC* [2011] UKFTT 36 (TC)

(18) *R(oao Gaines-Cooper) v HMRC* [2011] 1 WLR 2625

(19) *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136

(20) *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)

(21) *Maureen Hepburn v HMRC* [2013] UKFTT 445(TC)

(22) *Prest v Petrodel Resources Limited & Others* [2013] UKSC 34

(23) *Charlton v HMRC* [2013] STC 866

(24) *Daniel v HMRC* [2014] UKFTT 173(TC)

(25) *Rogers & another v Hoyle (Secretary of State for Transport & another intervening)* [2015] QB 265

(26) *Pattullo v HMRC* [2016] STC 2043

(27) *Miesegaes v Revenue & Customs Commissioners* [2016] SFTD 719

(28) *RFC 2012 Plc (formerly The Rangers Football Club Plc) v Advocate General for Scotland (Scotland)* [2017] 1 WLR 2767

(29) *NRC Holding Limited v Danilitskiy & others* [2017] EWHC 1431(Ch)

(30) *Kimathi & Others v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB)

(31) *Tooth v HMRC* [2018] STC 824

(32) *Anderson v HMRC* [2018] STC 1210

Evidence

38. Documentary evidence seen:

About the payments made to Mr Charman

Founder's Fee

(1) Transaction Advisory Agreement dated 20 November 2001 between Mr Charman and MMC referring to: "certain advisory services in connection with the formation of Axis".

(2) Letter from Michael Butt, Chairman of Axis Capital Holdings Limited dated 31 October 2005 explaining "John's role was pivotal in the creation of Axis and, as such, verbal assurances were given by him and the Company to all parties involved in the transaction as to his future commitment to Bermuda, and, naturally, as the CEO of the company, to his relocation there. These were not deemed necessary to be inscribed in his contract for personal reasons but an absolute commitment was made by him and the sum was paid to him after he left the UK in later January 2003".

Employment income and bonus payments

(3) Mr Charman's employment contract with Axis Specialty effective as of 20 November 2001 including the terms relating to his "residence" in Bermuda clause 3:

"The amount of time the Executive spends in Bermuda and Europe shall be such time as is reasonably necessary to perform his responsibilities and services hereunder.... It is understood that the Executive will not redomicile to Bermuda but that he expects to maintain a resident (sic) in Bermuda"

and the payment of expenses for "commuting" between London and Bermuda clause 7:

"Expense reimbursement and fringe benefits - It is understood that the Executive shall be entitled to such air fare for the purpose of commuting between London, England and Bermuda in connection with the performance of his duties under

Section 2(a) above" and "reimbursement or payment of air fare for up to 14 round-trip first class non-business trips per year by the Executive or members of his family between London, England and Bermuda or between Bermuda or London, England and New York..... in addition to any reimbursement or airfare described in section 7(a) above".

(4) Bank statements from Mr Charman's account at Bank of Bermuda showing (i) payment of an amount including Mr Charman's bonus (of $1,750,000) for 2002 on 14 March 2003 (total sum paid being $ 3,168,721.60) and (ii) payment of Mr Charman's bonus for 2003 on 12 February 2004, total sum paid of $2,250,000.

(5) Axis Capital Holdings Notes to Consolidated Financial Statements (undated) including information about gross premiums written in each of Bermuda, Ireland and the USA for years ending 31 December 2001, 2002 and 2003.

Shares and share options

(6) Axis Specialty Limited Long-Term Equity Compensation Plan- effective 1 January 2002 and Notice of Restricted Stock Award under that Plan granted to Mr Charman on 19 September 2002.

(7) Amendment to Axis Specialty Limited Long-Term Equity Compensation Plan effective on "consummation" of share for share exchange on 2 December 2002, stating that the Plan is terminated other than in respect of existing Awards and that "Shares" as defined now means shares in Axis Capital Holdings Limited and confirming that "in all other respects, the Plan and the Company's obligations with respect to the Plan, shall remain intact". (Company for these purposes being Axis Specialty Limited).

(8) Notice of Stock Option Grant effective on 1 October 2001 granting Mr Charman a Nonqualified Stock Option over 253,139 Axis Specialty shares at an exercise price of $100, vesting 1/3 on 1 Oct 2002, 1/3 on 1 October 2003 and 1/3 on 1 October 2004. Signed by Mr Charman and giving his address as Dell House.

(9) Axis Specialty Limited Nonqualified Stock Option Agreement, including at clause 4 – Term and Expiration, that the Options granted will expire 10 years after the Effective Date of Grant and on termination of employment on the earliest of (i) the 10 year expiration period (ii) three months after termination of employment (in ordinary circumstances or one retirement) (iii) a year after the termination of employment by reason of death or disability or (iv) on termination of employment if termination is for "cause", being defined as various types of misconduct.

(10) Share for Share exchange – Axis Specialty Limited Exchange Offer and Notice of Special General Meeting of Shareholders dated 2 December 2002. This is governed by Bermuda law and envisages that the required re-capitalisation will be achieved either through a share exchange – wherein all Axis Specialty shareholders will receive Axis Capital shares in exchange for each outstanding Axis Specialty share or, if less than 100% of all Axis Specialty shares are offered as part of the exchange offer, by way of a merger.

(a) No statements are made in the Offering Memorandum about the cancellation of the Axis Specialty shares if they are the subject of the exchange offer. The Offering Memorandum does state that if the merger takes place the Axis Specialty shares will be cancelled.

(b) We were not provided with any evidence about the Bermuda law as it applies to share exchanges or mergers or told whether the share for share exchange or the merger route were followed in this case.

(11) Agreement of 31 December 2002 between Axis Specialty Limited and Axis Capital Holdings Limited providing that Axis Capital will make shares available to Axis Specialty or directly to Plan participants.

(12) Share ledger of Axis Specialty as of 28 August 2008 showing cancellation of Mr Charman's 50,000 shares on 31 December 2002.

On the discovery question

(13) HMRC letter (Mr Bolton) to Mr Charman dated 24 November 2006 and Notice of Assessment for year 2003-4 charging an amount of £380,179.20 and stating;

"This assessment is raised under the jeopardy provisions. An estimated bonus is included in income from employment".

(14) HMRC letter (Mr Tebbet) to Mr Charman dated 26 March 2010 stating, in respect of 2003-4:

"We issued a Jeopardy Amendment for 2003-4 as well. However, so far as I am aware, no enquiry was opened for this year under s 9A TMA and a jeopardy assessment is not therefore valid for this year..... I have therefore raised an assessment under the discovery provisions of Section 29(1) and (4) TMA on the grounds that income which ought to have been assessed for 2003-4 had not been assessed as a result of neglect by you or a person acting on your behalf".

(15) Schedule 20 Notices issued to Mr Charman on 4 January 2005 and 8 April 2005.

About Mr Charman's residence

(16) P85 dated 7 March 2003 signed by Mr Charman including the statements:

(a) When did you leave the UK – answer 27 January 2003.

(b) Will any work be carried out in the UK – answer yes.

(17) Mr Charman's diary for the 2001 calendar year with manuscript entries which Mr Charman accepted were his.

(18) Copies of Mr Charman's British passport valid from June 2002 to January 2005 and from June 2002 until March 2013.

(19) Agenda for "Project Axis" meetings in New York 25-26 September 2001 and MMC's presentation document for the same meetings.

(20) Mr Charman's Bermuda work permits for the periods 28 March 2002 – 28 March 2003 and 28 March 2003 to 28 March 2004.

(21) Notes of a meeting between Mr Clay and Mr Charman of 7 November 2001:

> "JRC (Mr Charman) confirmed that having regard to tax consequences it was his intention to become non-UK resident from 1 April 2002. He expected to live in Belgium and acknowledged that he could only spend less than 90 days in the UK in any fiscal year"

(22) Email from Teresa Taylor in London to Mr Clay dated 17 July 2002 saying;

> "John (Mr Charman) is not in the office today. He is in Bermuda but is back in the office on Friday....."

(23) 16 May 2001 Compromise Agreement between Mr Charman and Ace, referring to the restrictive covenant in clause 14 of his contract of employment.

(24) Employment Agreement between Mr Charman and Ace London Services Limited dated 9 July 1998 including restrictive covenants at clause 14, restricting him from being engaged in "Managing Agency Business" which competes with any of the Tarquin Syndicates in the City of London to the extent that the services he provides are services of a kind with which he was concerned for 12 months prior to the Termination Date, restricts him from soliciting custom from specified clients of Tarquin and restricts him from procuring any Senior Executive to leave the Ace Group's employment.

(25) Mr Charman's personal tax returns for the 2000-1 tax year (undated) and 2001-2 tax year (dated 6 January 2003) giving his address as Dell House, Kent both stating that he is not claiming to be non-UK resident and signed by Mr Charman.

(26) Mr Charman's personal tax return for the 2002-3 tax year, dated 23 January 2003 giving his address as Bay House, Bermuda and claiming that he is non-UK tax resident for that tax year.

(27) Mr Charman's American Express Credit Card statements for two Centurion credit cards for the periods April 2001 to April 2003 and March 2002 to March 2003.

(28) Bank of Bermuda deposit statements February – April 2003 showing payment in of $2,545,388 on 7 February 2003 and $3,168,721.60 on 14 March 2003.

(29) Bank of Bermuda deposit statement February to March 2004 showing receipt of $2,250,000 on 12 February 2004.

(30) Draft Axis Business Plan, dated 25 September 2001, including the statement that "The Company intends to write a global book of business, with an emphasis on the US, UK and European clients".

(31) Various correspondence between Mr Charman and HMRC including:

(i) HMRC's letter of 10 November 2006 asking for information from Mr Charman and saying

> "The information I hold regarding your connection with AXIS is restricted to what I have been able to glean from the internet and no more. HMRC have asked for you to provide all the relevant documentation, such as contracts and so on, but these have not been forthcoming"

(ii) Mr Charman's letter to HMRC of 3 June 2008 saying

> "With regards the "Founder's Fee" issue, I had a private agreement with the founders of the Company for which I acted as a consultant. I have in previous documentation, indicated to you, that there was an explicit oral agreement that I was to re-domicile to Bermuda as soon as possible"

(31) Various correspondence between Mr Charman, his adviser, Mr Clay and HMRC from September 2004 to November 2011 including:

(i) HMRC's initial enquiry letters and HMRC's requests for information, including the s 19 TMA 1970 requests of 4 January 2005;

(ii) Letter to HMRC from Mr Charman's advisers of 31 August 2005 stating

"My client has explained that since Axis was a start up business, based in Bermuda, 'it is imperative that I as Chief Executive Officer of the Company give the founding Shareholders the strong commitment to domicile myself as soon as possible, to the Holding Company location, i.e Bermuda. I believe that I would not receive those funds (the Founder's Fee) unless I demonstrated not only a "start up" success in delivering infra-structure staff and business but also more importantly, my commitment that I would relocate to Bermuda..... I received payment and banked the cheque once I changed my residency for tax purposes from the UK to Bermuda' ";

(iii) Letter from Mr Elson to Mr Clay dated 6 January 2006 enclosing notes of a meeting of 14 December 2005 recording Mr Clay saying

"When attending to John Charman's tax affairs towards the end of 2002, he was not aware at that time that John Charman would re-locate to Bermuda"

(iv) email of 12 July 2006 in which Mr Elson (HMRC) explains to Mr Clay:

> "I am lacking specific information that allows me to determine when the bonuses were paid or should be regarded as paid. It is not therefore entirely clear to me in what year of assessment the bonuses earned by Mr Charman whilst he was resident in the UK for tax purposes will fall to be assessed";

(v) email of 4 April 2007 in which Mr Clay states to Mr Elson (HMRC):

> "JRC did not wish his ex-wife to understand that he had given a commitment, albeit oral to Axis's Chairman, that he would live and work full time in Bermuda. The extract of the employment contract that you provided to me set out the basic position that JRC would have a residence in Bermuda but it did not correctly reflect the oral agreement that had been made with the Chairman. Axis was accommodating since JRC was still trying to persuade his wife to move to Bermuda and live there on a full time basis. As Beverley subsequently advised JRC that she was not prepared to join him in Bermuda, the marriage ended with JRC leaving the UK on 27 January 2003";

(vi) Letter to HMRC from Mr Charman's advisers of 11 February 2011 saying

> "we confirm that our client ceased to be resident in the UK on 27 January 2003 as per the P85" .

(32) Notes of meetings between Mr Charman's adviser, Mr Clay and HMRC including meetings of:

(i) 29 June 2005, at which Mr Clay said "he was not aware that Mr Charman had received any remuneration from Axis prior to his becoming non-UK resident on 27 January 2003".

(ii) 5 October 2005 at which HMRC requested further documents relating to Mr Charman's income from Axis Specialty, pointing out that requests had been made 12 months earlier and in which Mr Clay is recorded as accepting that Mr Charman was UK resident until 27 January 2003.

(iii) Meeting of 14 December 2005 in which HMRC continue to request copies of Mr Charman's employment contract and Founder's Fee agreement,

(33) Notes of telephone calls between Mr Charman's advisers and HMRC including calls dated:

(i) 11 May 2005 in which HMRC record

> "Clay explained that he is only in email contact with Charman and hasn't been in contact with him for a while. Bose (HMRC) explained that whilst he acknowledged that Charman was a busy person and travelled extensively it is now nearly 8 months since he requested documents and that this is more than sufficient time"

(ii) 10 July 2006 in which Mr Clay informs HMRC that

> "he had clear instructions from his client not to release any information" and 19 July 2006 in which Mr Clays says "He felt that

his client had come round to accepting UK tax liability in respect of remuneration, coming to him in the period up to his taking up permanent residence in Bermuda in January 2003"

(iii) 4 January 2007 in which HMRC record Mr Clay saying

"His client had been extremely irritated by the assessments which JC alleged were inaccurate, misleading and aggressive..... The assessments had been made against the background of Charman instructing JC to cease to cooperate or communicate with HMRC" and

(iii) 5 April 2007 in which HMRC record

"JC (Mr Clay) said that out of the blue he has a somewhat iffy E mail from his client which had explained that up until Christmas 2002 Beverly Charman had not been told that John was not intending to return permanently to the United Kingdom but rather intended to relocate to Bermuda. At Christmas John had told Beverly the true position and shortly thereafter had left the United Kingdom"

(34) Judgments and Court Orders relating to Mr Charman's divorce proceedings including High Court Judgment *Charman v Charman* [2006] EWHC 1879(fam), Court of Appeal judgment *Charman v Charman* [2007] EWCA Civ 503 and High Court judgment of Mr Justice Coleridge *HMRC v (1) John Robert Charman and (2) Beverley Anne Charman* [2012] EWHC 1448 (Fam).

(35) Correspondence between Mr Charman's legal representatives and HMRC from November 2017 to May 2018 including (i) letter of 23 November 2017 - HMRC's request for additional information having reviewed Mr Charman's witness statement and (ii) Mr Charman's lawyer's response of 28 February 2018 explaining why the additional information requested cannot be provided.

Witness evidence

Mr Charman

39. Mr Charman provided a lengthy witness statement (dated 28 September 2017) and gave oral evidence to the Tribunal over the course of three days.

Evidence from divorce proceedings

40. Mr Charman suggested that the evidence which he had prepared for this appeal should be preferred to any evidence from the records of his divorce proceedings. He explained that more investigative work had been done for this appeal including about his relationship with his wife, his intentions towards his marriage and his commitments to the UK.

41. He also suggested that the judge in the divorce proceedings had been determined to find in favour of his wife. In particular, Mr Charman said that he had no recollection

of arguments about the need to save tax being used to try and persuade his wife to move to Bermuda, as suggested during the divorce proceedings. His real motivation at the time was to be in Bermuda because this was where his business was being carried on.

Evidence from his personal diary for 2001

42. Mr Charman suggested that the entries in his 2001 personal diary could not be relied upon for a number of reasons:

(1) It had not been kept up to date; old Ace meetings were still recorded despite the fact that he no longer worked for Ace.

(2) It referred to entries for meetings in London which he could not have been at because he could not have travelled from New York to London in time (such as a London meeting on 1 October 2001).

(3) He did not rely on the diary at the time as an accurate reflection of what his engagements were.

43. His diary included many references to meetings with named individuals in the UK, but Mr Charman said that these were personal not business meetings, although many were with individuals who ultimately moved to work for Axis. The meetings were part of a "vetting procedure" rather than formal interviews.

44. Mr Charman's diary included a reference (in November 2001) to a salary figure for Teresa Taylor at Axis' London representative office. Mr Charman however said that she did not report to him and was not his PA; her role was a general administrative role in London, including arranging his travel plans.

45. Mr Charman accepted that he used the Axis London office from time to time but did not regularly go to the London office when he was in the UK, despite the email from Teresa Taylor of July 2001 suggesting that she was managing his diary and that Axis London was treated as his office. He used the London office for contacts and marketing and to keep up his profile in the London market.

46. Mr Charman's diary supported a pattern of travel which was taking a flight from Gatwick to Bermuda at 3pm to arrive in Bermuda at 6.30pm (local time) on a Monday evening and to return on an 8pm flight from Bermuda on a Thursday, arriving in the UK at 7am on a Friday morning.

47. HMRC pointed out that, by reference to these diary entries, even during the time which Mr Charman described as a "hectic period" of fund raising for Axis (such as the last week of October 2001 and the last week of November 2001), Mr Charman actually spent four days per week in the UK. Mr Charman accepted that he may have been doing Axis work while he was in the UK at this time, including reading and reviewing documents, but pointed out that he was not allowed to undertake underwriting in the UK because of his restrictive covenant with Ace.

Mr Charman's role with Axis

Full time work abroad

48. Mr Charman said that when he started discussions with MMC about setting up Axis, it was always intended that this entity would be based in Bermuda and that after 9/11 he was "consumed" by this project and its activities, all of which were carried on outside the UK. He spent four to five days a week working in Bermuda or the USA, usually working long days starting early in the morning and finishing after midnight. It was always understood between Mr Charman and those at MMC who were sponsoring Axis that he would be based in Bermuda, it was "non-negotiable" as president and CEO of Axis that he should reside in Bermuda. Axis was only regulated to carry on underwriting activities in Bermuda and Mr Charman was, from its launch until the end of 2002, the only person authorised to carry out those underwriting activities.

49. There was an oral agreement between him, Bob Newhouse (of MMC) and other senior executives including Mr Greenberg, that his entitlement the Founder's Fee was contingent on him being resident in Bermuda.

50. Mr Charman said that he welcomed Axis' requirement for him to live in Bermuda even though he knew that his wife would not join him there. He did not tell his wife that he was intending to move to Bermuda because that would have precipitated a divorce, instead he told her that he was working temporarily in Bermuda; "I created the illusion that I was working abroad temporarily and returning to the family home at the weekends".

51. Mr Charman told us that he spent on average three days a week in Bermuda and two days a week travelling, mainly to the US, meaning that he was spending four to five days outside the UK from October 2001.

Work in the UK

Axis

52. Mr Charman said that his work in the UK for Axis was limited to keeping up contacts and marketing. Although the UK was one of Axis' main markets, Axis had few UK clients. Axis had no UK infra-structure or staff until the middle of 2002. Mr Charman's restrictive covenant with Ace meant that he could not do underwriting business in London until after March 2002.

Newmarket

53. Mr Charman was asked by Marsh McLennan to assist Newmarket in its dispute with Lloyds of London as part of its "run-off". This started on an informal basis and was formalised with the appointment of Mr Charman as CEO on 10 September 2001. The role was unpaid and not onerous. John Murray was in charge of the day to day business of Newmarket. Mr Charman made infrequent visits to Newmarket's office and did not have his own desk there.

JLC

54. Mr Charman told us that JLC was an entity through which he provided advice to a Chinese insurance company. He was a director of that entity but it was run by someone else, a Mr Jeff Lloyd.

Mr Charman's links with the UK

Definite break in pattern of life

55. Mr Charman did not dispute that when he returned to the UK he stayed at the family home, Dell House and that he kept his personal papers and his car there. However, he was clear that in his mind his marriage was over by May 2001 (when he left Ace), despite his later holidays with his wife and children (such as their trip to Venice in October 2001 and her trip to Bermuda in February 2002) and his attempts to persuade his wife to live in Bermuda for six months, which were an attempt to keep the marriage going for the sake of his sons.

56. He explained that the potential purchase of a new home in the UK (Stormont Court) in September 2003 was in order to distract his wife and give her something to think about other than the divorce proceedings. It was never his intention to live there. He explained that he intentionally misled his wife about his intentions until he was ready to end their marriage, but could not explain why (according to Mr Clay's evidence) he was still suggesting in April 2007 that he had tried to persuade his wife to move to Bermuda in September 2001.

57. Mr Charman accepted that no change in his physical habits took place in January and February 2003, his working pattern for Axis did not change before and after 27 January 2003. In fact in January 2003 he spent more time than usual in the UK, but January was the "graveyard month" for underwriting activities.

58. Mr Charman took family holidays with his wife and sons in Barbados (in April 2003) and Italy (July 2003) but told his wife that their marriage was over in November 2003, a few days after which he returned to the UK and removed his personal things from Dell House.

59. Mr Charman accepted that by November 2003 he was in a new relationship with someone who lived in the USA. From that date the time which he spent in the UK decreased.

Mr Charman's links with Bermuda

60. Mr Charman told us that he built a social network in Bermuda, despite the fact that the first 12 to 18 months of his time there was dominated by work. He joined a local golf club and was involved in philanthropic activities.

61. He took a lease on his first residence (Cote D'Azur) for an initial six months, in accordance with usual practice. This was extended for a further six months until he moved to Bay House in November 2002 which he furnished himself and lived there until he bought a property, Ben Barra in 2008.

62. He obtained his first temporary work permit in October 2001 and a permanent annual permit in March 2002 which was renewed annually.

Tax planning

63. Mr Charman said that the move of his children's trusts, which had been set up in 1987, from Jersey to Bermuda in February 2003 was not related to his change in tax residence; the trusts were managed independently and were moved because of problems with the levels of service being provided in Jersey.

64. Mr Charman explained that the Founder's Fee and employment remuneration were all paid in February 2003 because this was when he satisfied the Bermuda residence requirement, as orally agreed with MMC and Bob Newhouse.

65. Mr Charman insisted that his change in residence was not motivated by tax planning, which only played a small part in his decision to abandon his UK residence, his main motivation was to be in Bermuda because this was where his business was. He was always aware of tax issues and kept up to date with what was going on, but he did not seriously consider becoming tax resident in Belgium, despite the suggested implications from his meeting with Mr Clay in April 2002.

66. Mr Charman accepted that he discussed tax residence issues with Mr Clay in November 2001 and that "Mr Clay advised him of the consequences of becoming non-resident but not as to my actual status".

67. Mr Charman referred to his meeting with Mr Clay on 15 January 2003 saying that this meeting reflected his desire to formalise is residence position with HMRC. Mr Charman said he had a follow up meeting with Mr Clay in March 2003 when the P85 form had been prepared, but referred to this as a "general meeting" of which he could not recall the specific details. He said that the 27 January 2003 date had been used in the P85 form because this was the next date on which he had been due to leave the UK; Mr Charman had not understood that the actual date of his departure from the UK for tax residence purposes was the date which should have been provided.

68. Mr Clay knew about Mr Charman's business circumstances, but did not know the private details about Mr Charman's marriage, and gave Mr Charman "high level general advice". He said

> "Mr Clay did not advise me that I needed to take a detailed look at the facts of my life and determine the point at which I left the UK. Nor did Mr Clay inform me that the actual date of departure was in any way material for UK tax purposes"

The Founder's Fee and Mr Charman's employment contract with Axis

69. Mr Charman explained that his role at Axis was based initially on a number of "handshake" agreements with MMC executives in New York, Mr Greenberg, Mr

Newhouse and Mr Davis. That included the amount which he would invest personally in Axis and that fact that payment of the Founder's Fee would be contingent on him being resident in Bermuda, since this was intended to be a reward for him moving to Bermuda. This oral condition was respected despite the fact that it was not referred to in the Transaction Advisory Agreement (which had a "whole agreement" clause).

70. Mr Charman said that to decide whether he had fulfilled this oral condition, there would have been a meeting between those who had been party to the agreement to discuss and agree that the condition had been met. In any event those involved trusted each other to act appropriately. In fact Mr Charman could not recall a formal meeting being held to discuss payment of the Founder's Fee.

71. As to why it had been made a condition of his employment contract that he should "not redomicile to Bermuda, but should maintain a resident (sic) in Bermuda" Mr Charman said that this was due to sensitivities about his marital situation.

Availability of documents

72. Mr Charman accepted that he was aware that HMRC were raising queries about his employment income from Axis from September 2004 but said that this was dealt with mainly by Mr Clay. Mr Charman did not have access to the documents requested by HMRC (his employment contract and share option agreements) because these were held by Axis' chief legal officer.

73. Mr Charman suggested that he was unaware that documents had not been made available to HMRC and no information was deliberately withheld by him. He was never asked to provide the specific information which HMRC are now saying was not provided.

74. Mr Charman also said that meetings with Mr Clay to discuss tax enquiries were a low priority, especially at the time when his divorce was going on and he was running the Axis business.

75. Mr Charman accepted that he was aware that HMRC were requesting documents at the time when appeals against the disputed assessments were made in December 2006 and that he could have obtained some of the requested documents at this time. In reference to Mr Clay's records of telephone conversations with HMRC in which Mr Clay referred to Mr Charman telling him not to co-operate with HMRC, Mr Charman had no recollection of this.

76. In response to questions about diaries other than his 2001 diary, Mr Charman said that he did not keep diaries other than his work diary which was kept for him by someone at MMC. His personal diaries for 2002 and 2003 had disappeared, having been kept at Dell House.

Mr Fischer

77. We also heard oral evidence from Mr William A Fischer who provided a witness statement dated 11 September 2017. Mr Fischer was recruited by Mr Charman to a role at Axis Specialty in November 2001 and is now CEO of another entity, Harrington Re in Bermuda.

78. Mr Fischer told us that his focus was on the re-insurance market at Axis, Mr Charman focussed on the insurance market. He described Mr Charman as a driven character and referred to the intense period of work from 2001 and 2002 when Axis was starting up. He supported Mr Charman's statement that 3 days of work for him was the equivalent of 6 days for anyone else and that his Axis involvement was a "full time role"; Mr Charman would have been dealing with Axis business elsewhere when he was not in Bermuda.

Mr Murray

79. Mr Murray worked as Chief Operation Officer of Axis Specialty, Finance Director of Newmarket and head of operations for Ace. Mr Murray provided a witness statement dated 27 September 2017 and gave oral evidence to the Tribunal.

80. Mr Murray was employed full time for Axis Specialty from November 2002 and was in charge of infra-structure, IT and the finance teams at Axis Specialty. He was involved in interviewing staff for the London and Dublin offices and confirmed that Mr Charman would have signed off all new hires and that he was present at meetings with the regulators in Ireland. He also confirmed that Mr Charman was a "regular" presence in the Axis Specialty Bermuda office saying that it was usual for him to be around on at least three days a week.

81. He confirmed that he knew that Mr Charman had interviewed at least one member of staff in London, a Rory McGregor.

82. Mr Murray referred to Mr Charman's "limited role" at Newmarket, saying that he only attended three board meetings in person from 2001 to 2002 and his role ceased altogether over the course of 2002.

Mr Clay

83. We heard oral evidence from Mr John Clay who provided a witness statement dated 23 July 2018. Mr Clay told us that he had been an adviser to Mr Charman since 1993 and had many years of experience of advising on overseas trusts and tax residence issues.

84. Mr Clay described his working relationship with Mr Charman as a close professional relationship. Mr Clay said he had regular meetings with Mr Charman until

November 2001, after that their face to face meetings were much less regular and Mr Clay relied on email and telephone contact with Mr Charman.

85. Mr Clay said that he used Teresa Taylor in London as his contact for Mr Charman.

86. Mr Clay was keen to stress that, despite various emails which we were shown concerning Mr Charman's family trusts, his role was not to give advice about the trusts, but was an administrative role only. He also had no involvement with the Axis Share Options granted to Mr Charman or with any shares held by the family trusts. He was not aware of the details of Mr Charman's Restricted Shares and Share Options in Axis Specialty until his meetings with HMRC in 2004. Nor did he see details of the Founder's Fee.

87. As for his meeting with Mr Charman on 15 January 2003 during which Mr Charman's UK tax residence was discussed and a P85 was prepared by Mr Clay, Mr Clay could not provide a file note of this meeting although he told us that it was an early morning meeting and was intended to discuss Mr Charman's request to regularise his UK tax status. He told us that he read out the questions on the P85 to Mr Charman about when he intended to leave the UK, which Mr Charman took to be the next time when he was due to fly out of the UK.

88. Mr Clay said that he did have other meetings with Mr Charman's adviser at the law firm Withers during this time, but could not recall what those meetings were about.

89. Mr Clay said that he was not involved with the transfer of Mr Charman's family trusts or the time when share disposals were made by those entities. He was aware that the trusts were being moved to Bermuda because Mr Charman had provided that information. Mr Clay only provided what he described as "normal trust transfer advice". Questions of Mr Charman's own residence were not part of this.

90. Mr Clay said that he was not aware of how Mr Charman was spending his time in 2001 and 2002 until he saw Mr Charman's 2017 witness statement. Had he been aware of these details at the time he may have approached the question of Mr Charman's residence differently.

91. We were also shown notes of other meetings and correspondence between Mr Clay, Mr Charman and Mr Charman's advisers, including;

(1) Notes of a meeting on 7 November 2001 which considered Mr Charman's taking up tax residence in Belgium.

(2) Notes of a telephone conversation of 10 July 2006 and 4 January 2007 concerning Mr Charman's co-operation with HMRC's enquiries in which Mr Clay tells Mr Elson at HMRC that "Mr Charman had told him to cease co-operating and communicating" with HMRC and that Mr Charman had "been extremely irritated by the assessments".

Day count evidence

Mr Culverwell and the Appellant's approach to day count evidence

92. Mr Culverwell provided witness statements dated 28 September 2017 and 7 September 2018 and gave oral evidence to the Tribunal. Mr Culverwell is a senior manager at BDO LLP and a qualified Chartered Tax Adviser. Mr Culverwell was not cross-examined by Mr Nawbatt.

93. Mr Culverwell's day count schedule attempted to assign Mr Charman's whereabouts on a single day basis and made various assumptions in order to fill in gaps where there was no corroborating evidence, including regular flight times, likely patterns of flights (between the UK, USA, Bermuda and Ireland) and other aspects of Mr Charman's known behaviour (such as withdrawing cash on landing at an airport).

94. On Mr Culverwell's analysis Mr Charman spent:

(a) 63 days in the UK from 6 April 2001 to 30 September 2001

(b) 43 days in the UK from 1 October 2001 to 5 April 2002

(c) 60 days in the UK from 6 April 2002 to 27 January 2003

(d) 6 days in the UK from 28 January 2003 to 5 April 2003

(e) 40 days in the UK from 6 April 2003 to 30 November 2003,

in all cases ignoring days of arrival and departure.

Mr Lynch and HMRC's approach to day count schedules.

95. Mr Lynch provided a witness statement dated 12 December 2017 and gave oral evidence to the Tribunal.

96. Mr Lynch had adopted a very different approach to analysing Mr Charman's whereabouts, using the "quarter day" method which asked for each quarter of any given day whether there was corroborating evidence (Mr Charman's diary, flight details, and meeting notes) to establish where Mr Charman was. While Mr Lynch had accepted that where documentary evidence existed, it was reliable, if there was no evidence of where Mr Charman was, Mr Lynch entered that quarter day period as "unknown".

97. Mr Lynch accepted that his schedule had not been subject to a critical high level analysis which may have allowed him to use logic or reliable assumptions to fill in some of the "unknown" quarter day periods. Mr Lynch insisted that he understood the purpose of the schedule which he had produced to be to demonstrate the days (or part days) on which there was positive evidence of Mr Charman's whereabouts.

98. Mr Lynch also explained the basis of some of his other assumptions:

(a) He had assumed that all credit card expenditure made by Mr Charman had been spent by Mr Charman in person at the recorded location. He

accepted that this was not always reliable because of the possibility of remote use of Mr Charman's credit cards.

(b) In some circumstances he had assumed that because Mr Charman was in the UK on one day, he must also be in the UK on the following day, although he had not made the same assumption when Mr Charman was abroad (such as July 2002 in Italy).

(c) Mr Lynch did not always follow the entries in Mr Charman's diary to indicate where he was, accepting that some diary entries could not be a reliable indicator of Mr Charman's whereabouts and also made assumptions on the basis of those entries, such as that a party recorded for a date in the UK was a personal engagement and that Mr Charman was therefore in the UK for the whole of that day. Ms Shaw pointed out that there was no clear logic in Mr Lynch's method for determining whether a day was analysed on the basis of an assumption (if there was no specific evidence) or recorded as "unknown".

(d) Mr Lynch's approach gave rise to very many entries in his schedule being of an "unknown location", with up to 25% of his entries being unknown.

99. On Mr Lynch's analysis from 6 April 2002 to 5 April 2003 Mr Charman spent:

(a) 238 days in the UK

(b) 159 weeks days in the UK during that period and

(c) Made at least 38 separate trips to the UK during this period.

100. From 6 April 2003 until 30 November 2003 Mr Charman spent:

(a) At least 84 days in the UK

(b) At least 43 week day and

(c) Made at least 22 separate trips to the UK.

We also saw witness statements from:

101. Mr Truman, accountant at Menzies LLP who took over looking after Mr Charman's affairs on the retirement of Mr Clay, who provided a witness statement dated 21 September 2017.

102. Mr Elson, an officer of HMRC, who provided a witness statement dated 27 September 2017. Mr Elson described the various meetings which he had with Mr Charman's representatives from October 2005 (when he took over the case) until November 2006, saying that despite many meetings HMRC were not able to obtain the documents which it needed to obtain to fully understand Mr Charman's tax affairs.

103. Mr Tebbet, Inspector of Taxes with the Counter-Avoidance directorate at HMRC, who provided a witness statement dated 28 September 2017.

104. Mr Tebbet explained in his witness statement that as a result of reviewing information held by HMRC, including Axis Specialty accounts for 2003, and taking account of Mr Elson's issuance of a jeopardy assessment to Mr Charman on 24 November 2006 relating to Mr Charman's bonus for the 2003 year, he concluded that Mr Elson's jeopardy assessment of November 2006 was not valid (because no enquiry had been opened for that year) and therefore issued a discovery assessment in March 2010 in respect of Mr Charman's 2003 bonus.

Appellant's arguments

Approach to the evidence

105. While accepting that the burden of proof is on Mr Charman to demonstrate, on the balance of probabilities, that he ceased to be UK tax resident before November 2003, Ms Shaw stressed that Mr Charman's oral evidence should not be discounted merely because it was not corroborated by contemporaneous documentary evidence.

106. There was ample evidence from Mr Charman himself, the findings of fact from Mr Charman's divorce proceedings and from Mr Fischer and Mr Murray's evidence that Mr Charman spent three days a week in Bermuda during the disputed periods.

107. She also pointed out that it was not the case that there was absolutely no contemporaneous evidence to support Mr Charman's case: there was some supporting evidence, though this was incomplete.

108. Ms Shaw also resisted HMRC's suggestion that Mr Charman and his advisers had failed to comply with information requests from HMRC, suggesting that all the relevant items which had been requested by HMRC had been provided and the two Schedule 20 Notices issued by HMRC on 4 January 2005 and 8 April 2005 were unlawful.

109. The Tribunal should not draw adverse inferences from the non-disclosure of information by the Appellant and Mr Charman could not be criticised for not disclosing documents which were privileged. Ms Shaw relied on the authority of *Edwards-Tubb v Wetherspoon* and the statement of LJ Hughes at [9] "A person cannot be criticised for claiming the privilege and declining to waive it, nor can an adverse inference be drawn against him from his claim". HMRC have no prima facie case to support their conclusion that Mr Charman has failed to provide information requested from him and silence on his part is in these circumstances justified, as stated in *Prest v Petrodel*

> "There must be a reasonable basis for some hypothesis in the evidence or inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it" [44]

110. Ms Shaw suggested that the decision of the High Court and Court of Appeal in Mr Charman's divorce could be relied upon only as evidence of the fact of the judgment and the finding of the court based upon the facts in issue; factual findings by the judges were inadmissible in subsequent civil proceedings, as made clear in *Rogers v Hoyle:*

"the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it" [39]

111. Specifically referring to Mr Charman's evidence Ms Shaw said that non-corroborated oral assertions should not merely be ignored, rather the correct approach was to consider the credibility of the witness and this goes to the weight to be given to oral evidence, in Mr Charman's case:

(1) Reliance is not being placed on Mr Charman's specific memory, but on his usual pattern of work for the relevant period.

(2) Mr Charman's evidence is supported by Mr Fischer and Mr Murray.

(3) Conflicts between documents, other witness evidence and Mr Charman can be explained by Mr Charman's unwillingness to share details of what was happening in his private life with any of his advisers or colleagues.

Working full time abroad

112. The Appellant's case is that Mr Charman can rely on the test of UK tax residence set out at s 335 ICTA 1988, which ignores any ownership of a "place of abode" in the UK, because he was working full time abroad from October 2001:

(1) Mr Charman left the UK by 1 October 2001 when he was engaged full time abroad for Axis.

(2) From November 2001 he was required to devote substantially all of his time to Axis.

(3) He was the only person who was regulated to underwrite for Axis in Bermuda. It was "all hands on deck" and there were only a few other employees at this stage.

(4) He worked very long days for the three days a week he was in Bermuda "three of his days were six of a normal person's days"

(5) His restrictive covenant with Ace stopped him from underwriting in the UK until March 2002.

(6) Any "work" in the UK was

(a) Minimal as far as his employment with Newmarket and JLC were concerned.

(b) Restricted to marketing as far as Axis Specialty was concerned.

(7) He did not use the Axis Specialty London representative office for work; Mr Murray not Mr Charman was responsible for this office and the Irish subsidiary. Mr Charman did not always visit the UK office when he came to the UK.

Common law principles of residence

113. Alternatively, the Appellant argues that by October 2001 Mr Charman had ceased to be UK resident by reference to common law principles: By reference to the case authorities, *Glyn* and *Gaines-Cooper*, Mr Charman has to show a "distinct break in the pattern of his life". The test to establish this is multi-factorial and Mr Charman's intention is relevant if not determinative.

114. Mr Charman had made the necessary distinct break with the UK by October 2001 because:

(1) Mr Charman's decision to work for Axis in Bermuda included a recognition by him that his marriage was over.

(2) He was committed to his work in Bermuda and did not intend to return to the UK.

(3) The profitability of Axis Bermuda in 2001 and 2002 reflects how much underwriting activity Mr Charman undertook.

(4) The level of funds raised in the US for Axis in Bermuda reflected the amount of work Mr Charman did for Axis in October and November 2001.

(5) He kept his house in the UK and made return visits mainly to see his sons and to avoid a difficult divorce while he was busy with setting up Axis. He had decided that his marriage was over long before he told his wife in November 2003.

(6) He got involved with social activities in Bermuda, rented a house there and obtained a work permit in October 2001 indicating that this was where he intended to live.

115. If this "definite break" had not happened by October 2001, it had certainly happened by:

(1) 31 December 2001 – By this date Mr Charman had stopped working for Newmarket and Axis had started trading in Bermuda.

(2) 31 December 2002 – By this date Axis business was booming, an IPO was planned and Mr Charman was "invested" in the Axis business.

(3) 15 January 2003 – By this date Mr Charman recognised that his life was moving away from the UK, as reflected in his meeting with Mr Clay.

The day count basis for determining residence

116. Ms Shaw accepted that the question of how many days are spent in the UK does not provide a definitive answer to the question of Mr Charman's residence, but is a further factor to be taken into account.

117. In her view, the schedule produced by Mr Culverwell while not conclusive was a best estimate on the best available evidence of Mr Charman's whereabouts; 68% of Mr Culverwell's entries were supported by documentary evidence.

118. In contrast, Mr Lynch's "quarter day" method was inaccurate because it relied on detailed evidence which was not available in this case. Mr Lynch did not apply a critical review to his conclusions, his schedules are a table of days linked to evidence, not a critically reviewed analysis of Mr Lynch's whereabouts.

Timing issues – payment of salary, bonus and expenses

119. Ms Shaw explained that Mr Charman's salary was paid monthly in accordance with his employment contract, but because his contract was effective from 20 November 2001, this was the first month by reference to which his salary was payable and is the tax point under s 202B(1)(b) ICTA 1988.

120. Mr Charman's expenses were paid as part of Mr Charman's salary and timing issues are the same. If Mr Charman was non-UK tax resident by October 2001, those amounts are not subject to UK tax.

121. Mr Charman's bonus was paid on 14 March 2003 (2002 bonus) and 12 February 2004 (2003 bonus). If Mr Charman became non-UK resident before 14 March 2003, none of these bonus payments are taxable in accordance with s 202B(1)(b) and s 202B(1)(c) ICTA 1988 (and s 18 ITEPA 2003).

Founder's Fee

122. Ms Shaw argued that the Founder's Fee was not employment income; it was not paid in exchange for services rendered as an employee by reference to the test set out in *Rangers Football Club*;

> "Income tax on emoluments or earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee" [35]

123. The Founder's Fee was payable by MMC under the Transaction Advisory Agreement, in accordance with that agreement, services were being provided to MMC at a time when Mr Charman was not an employee of Axis, from September until November 2001.

124. The Founder's Fee was not remuneration for becoming an employee; unlike in *Shilton v Wilmshurst* there was no element of "inducement".

125. The Founder's Fee is a Schedule D Case VI payment and is only taxable if the recipient is UK resident at the date of receipt or if it has a UK source, see *Grey v Tiley:*

> "In dealing with these casual profits coming under Case VI, you must look at the time when the casual profits come in*"* [423]

126. Mr Charman was non-UK resident in February 2003 when the Founder's Fee was paid and so it is not taxable. Additionally, the Founder's Fee is not UK source income, being paid by US company, under New York law to a bank account in Bermuda.

Restricted Shares

127. Taking the date when the Restricted Shares were acquired as 31 December 2002 (the date of the share for share exchange), with the Restricted Shares being the shares in Axis Capital, the relevant charging provisions are s 140A ICTA 1988 and Chapter 2, Part 7 ITEPA 2003.

128. The Appellant says the relevant shares are the Axis Capital shares (not the original Axis Specialty shares) and these were acquired on 31 December 2002 under the share for share exchange, therefore the relevant legislation is the pre-Finance Act 2003 version of Chapter 2, Part 7 ITEPA 2003.

129. In the Appellant's view the Axis Capital shares were not acquired by reason of Mr Charman's employment as required by s 423 ITEPA 2003 but by reason of his shareholding in Axis Specialty. See *Abbott v Philbin;*

> *"*The advantage which arose by the exercise of the option.... was not a perquisite or profit from the office during the year of assessment; it was an advantage which accrued to the Appellant as the holder of a legal right which he had obtained in an earlier year*"* [125]

130. Since the Restricted Shares were not acquired by reason of Mr Charman's employment with Axis but by reason of the share for share exchange, no charge to tax arose at the time when the restrictions on those shares were lifted in September 2005.

131. Alternatively, if the Restricted Shares can be treated as arising from Mr Charman's employment, Mr Charman was not UK resident at the date when they were acquired (December 2002). Mr Charman is therefore protected from a tax charge by s 425 ITEPA 2003.

132. Finally, in reliance on the general principle of territoriality, according to Ms Shaw, no tax charge arises to Mr Charman if he was non-UK tax resident at the time when the restriction was lifted on the Restricted Shares in accordance with s 427 ITEPA 2003. Those restrictions were lifted in September 2005, by which time HMRC accept that Mr Charman was no longer resident in the UK for tax purposes.

133. No charge can arise under s 427 ITEPA 2003 on the basis of the "territoriality principle" set out in *ex parte Blain* and relied on in *Clark v Oceanic*;

> "English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English Statute, is

applicable only to English subjects or to foreigners who by coming into this country..... have made themselves during that time subject to English jurisdiction" [p 526].

Share Options

134. According to Ms Shaw, the Share Options are not taxable on Mr Charman because he was not resident at the time when they were acquired in accordance with s 474(1) ITEPA 2003.

135. The options were granted under the Notice of Option Grant in respect of Axis Capital shares, which superseded the original grant over Axis Specialty shares on 9 January 2003.

136. On their terms, the vesting of the Share Options is conditional on Mr Charman remaining in employment; at the time when they were granted they do not amount to a "security option" under s 420(8) ITEPA 2003 because of this contingency. Mr Charman has no right to the Share Options, but only a "hope" of receiving them. The right arises only when that contingency is satisfied.

137. The tax point is when the Share Options vest; Mr Charman was not resident at the time when any of these Share Options vested; the first tranche vested on 20 November 2002, the second tranche on 1 October 2003 and final tranche on 1 October 2004.

138. The principle of territoriality applies to protect Mr Charman from a tax charge when these options are exercised in March 2008.

139. If it is necessary to distinguish between a taxable and non-taxable tranche of the options, this should be done on a rateable basis (assuming 1/3 value for each of the tranches).

Discovery assessment for the tax year 2003-4

140. Ms Shaw's position is that the discovery assessment issued on Mr Charman for the 2003-4 tax year is invalid because the discovery on which the assessment is based is "stale"; the relevant information about the payment of Mr Charman's bonus had been obtained by Mr Elson at HMRC in 2006 but the discovery assessment was not raised until November 2010. There was no new "discovery" by Mr Tebbet in 2010.

141. The decisions in *Pattullo* and *Tooth* support the Appellant's position that to be a "discovery" the information which has been discovered must be newly discovered at the time when the assessment is issued. It is not open to HMRC to "sit on their hands" and wait until many years later to issue an assessment, as occurred here.

142. The only thing newly discovered in Mr Charman's case was that HMRC had made a technical error in failing to open an enquiry at the time when the enquiry window was open so that the jeopardy assessment which had previously been issued to Mr Charman was not valid.

HMRC's arguments

Approach to the evidence

143. Mr Nawbatt suggested that Mr Charman had provided very little corroborative evidence for his whereabouts and employment activities during the relevant periods, "relying on broad generalisations and asserted recollections of facts" which had taken place many years earlier. Mr Nawbatt pointed out that Mr Charman had suggested that his recollections of what had happened in 2001 (especially after 9/11), now more than 17 years ago, were more reliable than the evidence which was recorded during his divorce proceedings (in 2006), only five years after the relevant events.

144. Mr Charman's recollections of what occurred at the relevant time were inconsistent, even between his witness statement and the oral evidence which he gave to the Tribunal, such as his recollections of his phone call with his wife in November 2003 when he told her that their marriage was over.

145. Mr Nawbatt referred to authorities which suggested that the Tribunal should not place too much reliance on the witness's recollections and that the proper approach was that set out in *Kimathi,* drawing on a number of authorities to say that*:*

> *"above all it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth"* [96].

146. Documentary evidence is always to be preferred when there is a conflict between recollections and documentary evidence. Mr Nawbatt also referred to the recent First-tier Tribunal decision in *Daniel* which considered the approach to non-corroborated evidence in the context of a residence case in which the Appellant asserted that he had worked full time abroad with no corroborating evidence. The Tribunal said:

> "there are various factors that throw considerable doubt on the proposition that the work was full time and thus much depends on the credibility of the Appellant's evidence, and the task of balancing that evidence against factors that throw doubt on the evidence".[11]

147. As stated in *Gestmin* the best approach of a judge in cases where there is little corroborating evidence is

> "to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and the known or probable facts" [22]

148. Mr Nawbatt suggested that Mr Charman and his advisers had been less than forthcoming with the documents requested by HMRC; for example HMRC had first asked for documents in 2006 related to Mr Charman's employment with Axis, well before his dismissal by that company in 2012, which Mr Charman later said meant he could not access relevant documents.

149. Mr Nawbatt also pointed out that it was not until after 2010 that Mr Charman first started to suggest that he had been non-resident in the UK before January 2003.

150. The statements by the High Court and Court of Appeal in Mr Charman's divorce proceedings form the basis of Mr Culverwell's day count schedule so have effectively been accepted by the Appellant, counter to Ms Shaw's suggestion that these findings cannot be relied up by the Tribunal and Mr Charman's refusal of consent to the transcripts of the divorce proceedings being made available.

151. Mr Nawbatt pointed out that there were numerous examples of Mr Charman's oral evidence conflicting with documentary evidence –

(1) Mr Clay's statements about Mr Charman's circumstances in December 2002 and what Mr Charman now says his position was at that time; that he had already decided to leave the UK for Bermuda.

(2) Mr Charman did not start to claim that he had been non-resident before January 2003 until after 2010.

(3) The evidence from his divorce proceedings suggested that he was still trying to persuade his wife to move to Bermuda in 2003.

(4) Mr Charman's statements about the London office and what he did (or did not do) while he was in London; as evidenced in particular by the Teresa Taylor email of July 2002.

(5) The discrepancies between what Mr Charman originally said about how his diary was being managed; that it was not kept up to date and what he said under cross-examination.

152. Mr Nawbatt stressed that Mr Charman's failure to produce evidence should not put him in a better position than someone who has produced more evidence of their whereabouts.

Working full time abroad

153. According to Mr Nawbatt, in addition to the common law principles governing residence set out in the case authorities, s 334 and 335 ICTA 1988 contain additional hurdles for someone who is arguing that they have left the UK to work abroad.

154. S 334 sets up a two stage test, which means that Mr Charman has to show that he is non-resident and is abroad for more than "occasional" residence. While there is no

statutory definition of "occasional" for these purposes, Mr Nawbatt referred to *Reed v Clark* as authority for the need to take all circumstances into account.

155. In Mr Nawbatt's view, s 335 ICTA 1988 directs that if certain conditions are met, the existence of a taxpayer's abode in the UK can be ignored. To fulfil the conditions of s 335 Mr Charman needs to demonstrate that any professional activities carried out in the UK were "incidental" to the performance of his Bermuda responsibilities. Taking "incidental" as it is defined in *Robson v Dixon*:

> "The expression "merely incidental to" is a striking one, and effect must be given to the natural meaning of these words. The words "merely incidental to" are upon their ordinary use apt to denote an activity (here the performance of duties) which does not serve any independent purpose but is carried out in order to further some other purpose" [p6] Pennycuick V.C

156. Mr Nawbatt pointed out that, leaving aside the continued ownership of his house in the UK Mr Charman had other links to the UK:

(1) Family ties; his sons

(2) Business ties; his work for Newmarket and JLC.

(3) Social ties; the meetings which he described as with business colleagues who were also friends.

157. It is not the case that all of Mr Charman's duties were carried on outside the UK:

(1) His employment contract with Axis Specialty referred to Europe and Bermuda as the places where Mr Charman was expected to spend his time (clause 2)

(2) The main markets for Axis Specialty were stated in MMC's presentation of the Axis Business Plan in September 2001 to be the US, UK and European clients.

(3) He spent at least one and a half to two working days in the UK on most weeks even on Mr Culverwell's day counts.

158. The fact that Mr Charman put six working days into three in Bermuda misses the point. His usual pattern of work was three days in Bermuda, four days in the UK. Even if he did no work in the UK, that still does not amount to full time work abroad.

159. Mr Charman was a workaholic, so it is unrealistic to assume that he would not have worked at all during his time in the UK or that all of the work done would have been "incidental".

160. This is supported especially by the Teresa Taylor email of 17 July 2002 suggesting that she is his PA and that London is an operational office for him and also corroborated by his diary entries, suggesting that he was having business meetings in the UK, with many ex-colleagues who eventually came to work at Axis Specialty.

161. There is no common law test of "full time employment abroad", but in *Combe*, in order to establish full time employment abroad, the taxpayer left the UK for a three year

apprenticeship in the USA, had no home in the UK and did not return to the UK for eleven months after first leaving; a very different pattern of behaviour than Mr Charman's frequent return trips to the UK and his family home.

162. HMRC do not consider that Mr Charman fulfils the conditions at s 335 ICTA 1988 and so cannot be treated as "working full time abroad" for the years in dispute.

The common law test of residence

163. HMRC say that Mr Charman made a distinct break with the UK only in November 2003 because:

(1) This is when he informed his wife that their marriage was over (on 14 November 2003)

(2) He removed his belongings from the family home (on 21 November 2003) and never returned.

(3) Mr Clay told HMRC (by his letter of 6 January 2006) that he was unaware of Mr Charman having any plans to move to Bermuda at the end of 2002.

164. By reference to the authorities including the leading case *Levene*, the retention of a family home is a strong indicator that a taxpayer remains UK resident. Retaining a family home in the UK changes the "quality" of the time spent in the UK as suggested in *Grace* and *Glyn*.

165. In *Glyn* the retention of a family home plus 22 visits per year were enough to connote UK residence for a taxpayer whose wife lived abroad with him; Mr Charman made many more visits to the UK and his wife remained in the UK.

166. The *Gaines-Cooper* decision stresses the need for a "substantial loosening of ties" with the UK. This is reflected by the statements in *Grace* (Lewison J in the High Court), referring to the relevant criteria, including at (xiii):

> "Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have "left" the United Kingdom) unless there has been a definite break in his pattern of life"

167. Mr Charman was an international businessman who was often outside the UK on business and who kept a home, wife and sons in the UK, his work for Axis did not significantly change this.

168. The quantity and quality of Mr Charman's time in Bermuda does not determine whether he is resident in the UK; it is possible to be dual resident. However much time Mr Charman spent in Bermuda, he will not cease to be resident in the UK if there has not been a distinct break with the UK.

169. Nor is it sufficient for these purposes that the process of making a break with the UK has started, the distinct break must have happened by the date when Mr Charman claims to be no longer resident for tax purposes in the UK.

170. It is necessary to take a broad view of the circumstances, not just look at one particular period, such as the "frenetic fund raising period" of September to November 2001 relied on by Mr Charman; see Viscount Sumner in *Levene:*

> "Light may be thrown on the purpose, with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt, which might otherwise be entertained if years were examined in isolation from one another" [226]

171. Mr Nawbatt also referred us to the thirteen indicators set out in the *Grace* case, suggesting in his view that Mr Charman's circumstances did not indicate that he had become non-UK resident by October 2001. His visits to the UK after that date did not demonstrate that Mr Charman was in the UK merely as a "stop-gap".

172. Mr Nawbatt accepted that day count evidence (of the type undertaken by Mr Culverwell and Mr Lynch) is relevant but not decisive. He pointed out that a number of short frequent visits are enough to amount to residence.

173. Taking all of the circumstances into account, HMRC do not consider that Mr Charman became non-resident for UK tax purposes until November 2003, when he left his family home in Kent for the final time.

Timing issues – payment of salary, bonus and expenses

174. HMRC have raised their assessments on Mr Charman on the basis that he is liable to UK tax on his salary (and expenses) under s 19 ICTA 1988 because he was UK tax resident at the dates when salary and expense payments were received (at the end of each month) in the 2001-2 and 2002-3 tax years and similarly under s 9(1) and (2) ITEPA 2003.

175. Mr Charman's bonus was paid on 14 March 2003 (2002 bonus) and 12 February 2004 (2003 bonus). The taxability of the bonus depends on Mr Charman's residence status when it was earned under s 19 ICTA 1988 and s 9 ITEPA 2003, not when it was paid and Mr Charman was resident during all of the 2002-2003 tax year and some of the 2003-2004 tax year.

Founder's Fee

Schedule E

176. According to HMRC the Founder's Fee is an emolument of Mr Charman's employment with Axis Specialty. Although it was agreed with and paid by MMC, it is part of a "whole agreement" between Mr Charman, MMC and Axis Specialty, for the same services, the contracts for which were all signed on the same day.

177. HMRC rely on *Shilton v Wilmshurst* for this conclusion and distinguish *Brocklesby v Merricks*. The Founder's Fee is a payment in consideration of Mr Charman becoming an employee of Axis Specialty, as he had been for some time when the Founder's Fee was paid. It was his reward for establishing that company.

Schedule D Case VI

178. If the Founder's Fee is taxable under Schedule D case VI, Mr Charman will be taxable on it if he was UK resident when he became entitled to the fee, not when it was paid.

179. The Founder's Fee was payable (on its terms) on the closing of the Axis share offering in November 2001 (with interest payable from that date). Despite Mr Charman's contentions, there is no corroborating evidence of the oral condition which allowed Mr Charman to control the date when the Founder's Fee was paid.

180. The *Alloway* decision supports the general principle that Schedule D Case VI income is taxable on an earnings basis:

> "It is a general principle that receipts are to be taken as accruing in the period in which the money is earned, even though it is not paid or received until a later period" Denning at p 891.

Restricted Shares

181. In Mr Nawbatt's view, these are shares arising from Mr Charman's employment. It would be a surprising conclusion that a share for share exchange could break the link between the shares and Mr Charman's employment and give rise to a tax free windfall.

182. The decisions in *Abbott v Philbin* and *Wilcock v Eve* are not relevant because they are about gains arising from the exercise of an option, not gains from shares.

183. A purposive interpretation of s 140A ICTA 1988 leads to the proper conclusion that a share for share exchange does not give rise to a disposal of the original shares, the Axis Specialty shares have been subsumed within the Axis Capital shares.

184. Even if this is wrong, the shares are still taxable under s 140A(1)(a) ICTA 1988. It is necessary to look at all the Axis Specialty and Axis Capital equity plans to understand the full circumstances of the share for share exchange; amendments to the original Plan mean that shares became Axis Capital shares while the rest of the original Plan stayed in place. This is supported by the Information Memorandum of the share for share exchange.

185. Under the provisions at s 425(1) ITEPA 2003 the relevant question is whether Mr Charman was UK resident at the time when his beneficial interest in the Restricted Shares was acquired. In HMRC's view the relevant shares are the shares in Axis Specialty and these were acquired when Mr Charman was UK resident in September 2002. Mr Charman is therefore subject to UK tax when the restriction on the shares was lifted (in September 2005) under s 427 ITEPA 2003.

186. Contrary to Ms Shaw's contentions, the relevant sections do contain territoriality provisions; s 425 ITEPA 2003, which applies to the whole of the Chapter, refers to residence on the date of acquisition; if it had been intended to ignore residence at the date of vesting it would have stated this; but no such statement is made.

187. The broad principle of territoriality referred to by the Appellant is not supported by the authorities; *ex parte Blain* can be distinguished because it applied in circumstances of a bankruptcy petition where there was no UK nexus, Mr Charman has a UK nexus, having been resident in the UK. *Clark v Oceanic* suggests that the principle relied on is one of statutory construction and it is necessary to consider "for whom parliament was intending to legislate".

Share Options

188. Mr Nawbatt argued that the s 420(8) ITEPA 2003 definition of the "right to acquire shares" is broad enough to cover Mr Charman's Share Options at the date of the original grant. The Share Option Agreement defines the options granted and while these are subject to conditions, a right has nevertheless been granted. Mr Charman acquired a right to acquire shares at the time of the option grant.

189. There is no need for any rateable apportionment of the Share Options granted because the relevant time is the time of grant not vesting, so all of the Share Options stand or fall together; Mr Charman was UK resident at the time of the grant of the Share Options and the principle of territoriality does not exclude them from tax at the date of vesting. S 474 ITEPA 2003 applies to bring the Share Options within the charge to UK tax, the charge being on the gain arising on exercise in accordance with s 478 ITEPA 2003.

190. As argued in respect of the Restricted Shares, there is no general principle of territoriality which can protect Mr Charman because he was UK resident at the time when the Share Options were granted.

Discovery assessment for the tax year 2003-4

191. HMRC say that the Appellant's argument that the discovery assessment for 2004-5 is invalid because it was "stale" relies on obiter judgments in Upper Tribunal decisions which are not binding and refer in particular to the recent Upper Tribunal decision in *Anderson* where the Tribunal pointedly decided not to express a view on this matter.

192. HMRC say that there is no requirement in the discovery provisions at s 29 TMA 1970 that an assessment must not be stale and this is supported by the history of the discovery provisions; the only time limit on discovery assessments is the usual six year time limit in s 34 TMA 1970.

193. Any references to "newness" in the authorities refer to the newness of the facts underlying the discovery, not whether once a discovery has been made, an assessment has to be made in a timely fashion, see in particular *Corbally-Stourton;*

> *"*a discovery is something newly arising, not something stale and old. The conclusion that it is probable that there has been an insufficiency must be one which newly arises*"* [44]

and also *Miesegaes;* it is the discovery which must be new, and not the assessment, and the usual time limits in s 34 and 36 TMA 1970 apply to discovery assessments.

Discussion and decision

Findings of fact

194. On the basis of the evidence which we saw and heard we find as a fact that:

(1) Mr Charman was a high flying businessman whose working life entailed significant international travel before he took up his role with Axis Speciality in October 2001.

(2) Mr Charman believed that his marriage was over at the time when he accepted the role with Axis Specialty in October 2001.

(3) Mr Charman's stated intention in November 2001 was to become non-UK resident in April 2002 and take up residence in Belgium.

(4) Mr Charman had a regular pattern of travel during the years in dispute of leaving the UK on a Monday afternoon flight for Bermuda and returning to the UK on a Friday morning on an overnight flight from Bermuda.

(5) Mr Charman signed a six month lease on furnished property in Bermuda on 1 November 2001.

(6) Mr Charman used Axis Specialty's representative office on occasions while he was in London. The activities which he undertook in London on behalf of Axis included interviewing new staff as well as marketing activities.

(7) Mr Charman had meetings in London with existing business colleagues, some of whom became employees of Axis Specialty.

(8) Mr Charman was granted a permanent work visa in Bermuda on 28 March 2002 and became a permanent resident of Bermuda in 2014.

(9) Mr Charman signed his tax returns for the 2001-2 (signed on 31 January 2003) and 2002-3 tax years (undated) on the basis that he was UK resident and gave his address as Dell House, the family home in Kent.

(10) Mr Charman signed his Stock Option Grant in January 2003 and gave his address as Dell House, Kent.

(11) Mr Charman retained his personal effects (documents, clothing and his car) at Dell House until November 2003. Mr Charman removed his belongings from what had been his family home in Kent a few days after telling his wife he wanted a divorce on 14 November 2003 and never returned to that property.

(12) Mr Charman signed a new employment contract with Axis in Bermuda on 15 December 2003 which did not include provision for covering the costs of him commuting back to the UK.

(13) Mr Charman had invested significant sums in trust funds for his children which he moved from Jersey to Bermuda between February 2003 and February 2004.

(14) Mr Charman's bonus for the calendar year 2002 amounting to $1,750,00 was paid to him on 14 March 2003 and his bonus for the calendar year 2003 amounting to $2,250,000 was paid to him on 12 February 2004.

(15) `Mr Elson at HMRC was aware by 24 November 2006 (at the time of the issue of a jeopardy assessment under s9C TMA 1970) that Mr Charman was potentially liable to UK tax on the payment of his bonus in the 2003-4 tax year.

The approach to determining Mr Charman's residence

195. It is clear that the question of whether someone is resident in the UK for tax purposes is a question of fact and although we were taken to many authorities in this area, because each taxpayer's situation is factually different, none of the authorities can provide a definitive answer to whether Mr Charman was resident in the UK for the years in question. This was recognised by Lloyd LJ in the Court of Appeal decision in *Grace*:

> "The issue of residence in the UK only arises in a case in which the person in question spends time outside the UK. The circumstances in which he or she does so, and the pattern of, and reasons for, time being spent outside the UK and elsewhere may be infinitely various. Decided cases illustrate a great variety of examples, and the result of one case cannot normally be used as a guide to how another should be decided, even if the two have some factors in common". [3].

196. There is no statutory definition of what is means to be resident in the UK for tax purposes, but we have taken as the leading statement of the meaning of residence referred to in *Levene* as its Oxford English Dictionary meaning: "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place".[222]

197. The approach to residence entails a multi-factorial enquiry, in which no particular factor is definitive and many different factors can be taken into account. Some of the factors were enumerated in the *Grace* case by Lewison J (in the High Court decision) at [3] and are considered here to the extent that they are relevant:

(a) Physical presence does not amount to residence if it is a "stop gap"

(b) Consider the amount of time spent, the nature of presence in a particular place and his connection with that place.

(c) Residence connotes some degree of permanence, continuity or expectation of continuity.

(d) Short but regular periods of presence may amount to residence.

(e) It is possible to reside in two places at once.

(f) It is wrong to search for a taxpayer's "real home"

(g) Residence must be voluntarily adopted and residence dictated by business will count as voluntary.

(h) If a person has his sole residence in the UK, he is unlikely to have ceased to reside in the UK unless there has been a definite break in his pattern of life.

198. The test is a qualitative more than a quantitative test, whatever method is used, the results arrived at by a day count approach are just another component of the over-all multi-faceted approach: Again from *Levene*

> "The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance" Viscount Cave at p 7.

199. We have applied this multi-factorial approach to the evidence provided to us, bearing in mind points made by the parties about the relative weight and reliability of that evidence.

Our approach to evidence about Mr Charman's residence

200. Our starting point is to bear in mind that the onus of proof to demonstrate his whereabouts in support of his arguments that he was non-UK resident for the periods in question lies with Mr Charman. This means that while there might well be good reasons why evidence is not available to support some of his contentions, either because it is no longer in his possession or because it is privileged, it is ultimately Mr Charman who takes the risk of a failure to produce evidence to support his case.

201. Ms Shaw suggested that no negative inference should be drawn from the failure to produce information which is privileged, neither should Mr Charman be put at an

advantage as a result of documentary evidence not being produced. However, as was said by the Upper Tribunal judge in the *Daniel* decision:

> "the Appellant must have realised that in order to sustain a case that HMRC would be likely to question, it would be prudent to provide as much documentary and corroborative evidence as possible. The Appellant knew that enquiries.... were being mounted from as early a date as 2004, and he has certainly not helped his case by providing no corroborative documentation whatsoever" [152].

202. We have come to the view that Mr Charman and his advisers were less forthcoming than they might have been with the production of information which HMRC asked them for and we have found some of the explanations for why evidence could not be provided rather difficult to understand; such as the failure to produce evidence which was held by and requested from Axis before Mr Charman left his role with that entity.

203. We accept that it is for us as the Tribunal hearing Mr Charman's appeal to find the relevant facts from the evidence presented to us. We take the point made by Ms Shaw that the authorities suggest that it is not open to us to make findings of fact based on the evidence from other court hearings (see *Rogers v Hoyle*)

204. We have therefore taken account of the statements made in the High Court and Court of Appeal decisions in Mr Charman's divorce proceedings only to the extent that they add colour to our findings of fact for which we have relied on Mr Charman's evidence presented to this Tribunal in his witness statement and his oral evidence under cross-examination.

Mr Charman's uncorroborated evidence

205. We were referred by Mr Nawbatt to the warnings issued by Leggatt J in the *Gestmin* decision against over-reliance on the recollections of witnesses:

> "the best approach for a judge to adopt in the trial of a commercial case, is in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and the known or probable facts" [22]

206. In circumstances where there is a conflict between the documentary evidence and Mr Charman's evidence, we have relied on the documentary evidence other than in circumstances where we have concluded that there is a reasonable explanation for the discrepancies (such as in the case of some of the entries in Mr Charman's diary which were obviously out of date).

207. It is worth pointing out that overall the Tribunal did not feel that Mr Charman's oral evidence added much of any real value to the documentary evidence which had already been provided. On many matters, as may be expected after such an interval of time, he could not remember the details of his specific whereabouts or what he was doing in particular places at particular times.

208. This was especially evident in his comments on Mr Culverwell's day count schedules, from which Mr Charman distanced himself by consistently saying that he could not recall the details of his whereabouts as set out in Mr Culverwell's schedules.

209. In other instances Mr Charman's oral evidence was not consistent with his own witness statement or other documentary evidence, such as his suggestion that he had decided to become resident in Bermuda from October 2001, in contrast to the intention, recorded by Mr Clay in November 2001, that he was to become non-UK resident from April 2002 and become resident in Belgium.

The approach to the day count test

210. The approaches adopted by Mr Lynch (on behalf of HMRC) and Mr Culverwell (on behalf of the Appellant) to analysing the number of days which Mr Charman spent in the UK started from different assumptions and not surprisingly, produced different results.

211. While we preferred to approach of Mr Culverwell to the "day count" test because in our view he had applied more realistic criteria to determining Mr Charman's whereabouts, we did not find either of the day count analysis especially convincing.

212. Mr Charman himself cast doubt on the likely reliability of the day count schedule provided by Mr Culverwell in his oral testimony at the Tribunal and if Mr Lynch's analysis demonstrated anything, it demonstrated that there were a significant number of days on which there was simply no evidence of where Mr Charman actually was.

213. While in our analysis we have used Mr Culverwell's day count numbers as our "base case", we are treating them as estimates, based on limited information and have therefore accorded them relatively little weight in the "multi-factorial" analysis which we are carrying out.

214. Our only "bright line" as far as Mr Charman's whereabouts are concerned comes from his own evidence, supported by the findings of the Court of Appeal in his divorce proceedings, that Mr Charman spent on average three days a week in Bermuda and that his usual pattern of travel was to come back to the UK for a long weekend, arriving early on a Friday and departing on Monday afternoon. This is supported by other witness evidence, including Mr Murray.

215. We were presented with the day count evidence in a number of ways; counting only week days, counting all days, excluding days which were known to be holidays and counting only known days in the UK.

216. The periods for comparison which the parties used were the same;

(a) The 187 day period from 1 October 2001 to 5 April 2002.

(b) The 365 day period from 6 April 2002 to 5 April 2003.

(c) The 239 day period from 6 April 2003 to 30 November 2003.

217. The Appellant also provided information about the period from 6 April 2001 until the time in October 2001 when Mr Charman says he became non-UK resident, to indicate how much time he spent outside the UK before the periods in dispute, suggesting that for this 128 day period Mr Charman spent 47% of his time in the UK.

218. From his evidence we do know that Mr Charman spent time on international travel as part of his role with Ace when he was promoted to oversee that entities international insurance business. We also know that he spent time in the US in September 2001 which he described as entailing "extensive international travel"; we know that he was in New York for meetings on 16 September 2001 and 25 and 26 September 2001 discussing setting up Axis.

219. The day count evidence was provided to us on a number of days per period basis; but because the number of days in the three periods is different, the only real way to compare the numbers is to express days spent inside and outside the UK as a percentage for those periods. On that basis Mr Charman spent:

(a) Between 23% and 53% of his time in the UK for the periods 1 October 2001 to 5 April 2002.

(b) Between 19% and 65% of his time in the UK for the period from 6 April 2002 until 5 April 2003 and

(c) 17 % of his time in the UK for the period from 6 April 2003 until 30 November 2003.

220. From a statistical perspective the data set here is small. It is noticeable that the range of values is widest for the longest period, suggesting that the different assumptions used are exacerbated as the data set increases.

221. The real question here is less one of absolute numbers than of comparisons between the years and the rate of change between the periods. On the Appellant's figures the yearly differential is a 4 % decrease in time spent in the UK from the first period to the second and a further 2 % decrease from the second to the third period. The differential in HMRC's figures is quite different, showing an increase in time spent in the UK from the first period to the second.

222. In our view the relative changes of no more than 10% per period do not indicate a "definite" break with the UK or a significant change in Mr Charman's life pattern from one year to the next, either on a year on year or a cumulative basis.

223. We do not have the day count information to confirm whether, compared with the early part of 2001 or the whole of the previous year, Mr Charman's days outside the UK increased sufficiently significantly to amount to a definite break.

224. It is also worth noting that, for each of the three years for which we have day count information, the location where Mr Charman spent most of his time outside the UK was not in Bermuda, but in the USA, which must cast some doubt on where the real focus of Mr Charman's activities was during this period.

225. Taking this evidence and considering it in the context of both the statutory and common law tests of residence for tax purposes:

"Full time employment" abroad –s 335 ICTA 1988

226. The Appellant's primary case is that from the time when Mr Charman started his employment with Axis Specialty in Bermuda, he should be treated as "working full time abroad" so that the statutory test of residence at s 335 is relevant and, significantly, the retention by Mr Charman of a property as an abode in the UK can be ignored in determining whether he can be treated as UK resident or not.

227. If Mr Charman did any work in the UK, that work was "merely incidental", in substance Mr Charman's work was carried on outside the UK and Mr Charman can rely on the provisions of s 335(2), so that these "incidental duties" should also be treated as carried on outside the UK.

S 335(1) Full time work in Bermuda

228. For the Appellant, Ms Shaw stressed how hard Mr Charman worked, especially during the initial Axis Specialty set up period after 9/11 and that his working patterns were not like those of a normal nine to five employee. We do not dispute the amount of hours which Mr Charman committed to this new project or that, like many senior executives, he worked while travelling and in the evenings and even into the night.

229. The question of what constitutes "working" for senior executives like Mr Charman is less straightforward than for an employee who is working regular hours. It is notable that Mr Charman was careful to distinguish between the client events which he attended in the UK, which he described as building contacts, marketing and catching up with friends, (or in some cases being unclear which of these three a particular meeting was for) but there was no suggestion that this was true of his time in Bermuda or the USA.

230. We would expect there to be a blurring of the distinction between work time and social time for someone in Mr Charman's position, with "client events" which may well fulfil an important marketing role, being both a business opportunity as well as an opportunity to meet up with long existing colleagues who were also friends.

231. We find it inherently unlikely that it was not the case that in each of the UK, Bermuda and the US Mr Charman's social events were effectively a mixture of work and pleasure. We also note that Mr Charman's P85 stated that he would attend meetings in London and we think it is reasonable to assume that those meetings were of a similar character to the meetings which he attended in New York.

232. Even if we accept that none of the social events or other activities which Mr Charman undertook while he was in the UK had any element of "work", we still find it difficult to accept that Mr Charman fulfils the required definition at s 335(1) that he worked full time abroad.

233. We have looked at the question of whether Mr Charman worked "full time" in Bermuda from both a quantitative and qualitative perspective:

Quantitative test

234. How much time did Mr Charman spend in Bermuda? We know that, aside from the times when he was on holiday, Mr Charman usually spent three days a week in Bermuda and the remainder of the time either (i) in transit (ii) in the US or (iii) in the UK. Looked at purely from the perspective of presence in Bermuda, it cannot be said that Mr Charman worked full time, in the sense of spending all five of the days of the five day working week in Bermuda. For example as HMRC pointed out, we know that for certain weeks he spent more than his usual three days in the UK according even to Mr Culverwell's schedule (such as the week starting 5 November 2001).

Qualitative test

235. What did Mr Charman do in Bermuda? The Appellant's answer to this is to suggest that in substance Mr Charman did do five days work in the three days in which he was in Bermuda; "three days of Mr Charman's time was six days of an ordinary person's time" according to Mr Fischer.

236. We accept that Mr Charman was the only person who could undertake underwriting activities for Axis Specialty until April or May 2002, that there were few other employees in the Bermuda office (only seven) and that only Mr Charman could check and sign off in underwriting risks. Although when we asked Mr Charman to explain the full details of how the underwriting process worked, it became clear that others did the preliminary work including preparing the lengthy underwriting documents, which Mr Charman then signed.

237. We do not think that even accepting that Mr Charman did almost everything which was required in order to generate the $793,759 of gross premiums written by Axis in 2002 necessarily leads to the conclusion that he was working full time for Axis in Bermuda the sense required by s 335 ICTA 1988.

238. We agree with Mr Nawbatt that this is no answer to the test in s 335 which is quantitative, in our view "*working full time*" connotes having no other working time elsewhere and this not true of Mr Charman.

239. In fact we know that Mr Charman had other professional obligations;

(1) For MMC, in consideration of which the Founder's Fee was paid: MMC are based in NY

(2) For Newmarket and JLC in London; Mr Charman attended three Newmarket board meetings from September 2001, when he started formally working for Newmarket to the end of 2002 and started working for JLC in September 2001.

240. As a matter of logic it cannot be the case that Mr Charman spent his "full time" working for Axis in Bermuda or for Axis outside the UK.

S 335(2) ICTA 1988 "merely incidental" duties in the UK

241. The Appellant also suggests that, if Mr Charman did do any work in the UK, all of his real work was done abroad, with only ancillary or preliminary work being done in the UK, meaning that Mr Charman could rely on the exception at s 335(2).

242. We know that Mr Charman regularly spent time in the UK and his employment contract specifically contemplated that he would travel between Bermuda and the UK for work purposes as well as for family purposes; although Mr Charman attempted to convince us that the work which he did in the UK was incidental and not core to his business, the evidence which we saw suggested to us that this was not entirely true.

243. Leaving aside the issue raised above about the difficulty of determining what actually constituted work as opposed to socialising for someone in Mr Charman's position, we think it would be a surprising conclusion that someone in a role like Mr Charman's, being paid the salary which he was being paid, would have been allowed to spend two out of every five business days carrying on activities which were only "incidental" to his role. In our view at least some element of Mr Charman's London based "social" activities can reasonably be viewed as marketing activities which were more than incidental to his role at Axis Specialty.

244. We accept that Mr Charman's London activities were limited by the restrictive covenant which he had signed and that London sourced profits were always a small percentage of Axis' business, nevertheless, we agree with Mr Nawbatt that the evidence suggests that Mr Charman viewed the London office as his home office while he was there and that he was more involved than he suggested in the decisions which were made there, for example:

(a) The London office was set up (in Lloyds) from November 2001 with staff known to Mr Charman from Ace.

(b) Mr Charman interviewed for London staff in London in November 2001 and according to Mr Murray signed off all new hires for Axis Specialty.

(c) Mr Charman had conversations with the FSA in London at the end of 2001 or the start of 2002 about setting up the Axis business in London.

245. In our view the activities at (b) and (c) cannot be considered to be "incidental" as that term is defined in the *Robson v Dixon* decision as "duties which do not serve any independent purpose but are carried out in order to further some other purpose". Finding staff and managing regulatory authorisations which determine where a business can be carried on are fundamental aspects of the business.

246. For these reasons we have concluded that Mr Charman was not working "full time abroad" in any of 2001-2, 2002-3 or 2003-4 as required by s 335(1) and that the duties which he carried out in the UK were not "merely incidental" to the performance of his duties for Axis outside the UK as required for s 335(2) ICTA 1988.

The common law tests of residence

247. On the basis that Mr Charman has not demonstrated that he fulfils the conditions at s 335 ICTA 1988, we are going on to consider when he should be treated as becoming non-UK resident for tax purposes by reference to the tests set out in the case authorities, including his retention of a home in the UK and whether the evidence supports Mr Charman's contention that he became non-UK tax resident in October 2001.

248. The documentary evidence with which we were provided to support Mr Charman's contentions about the quality and quantity of where he was spending his time and what he was doing between October 2001 and November 2003 was sparse. We saw:

(1) Mr Charman's personal diary for the 2001 calendar year, but we have already accepted that some of the entries in this diary were unreliable and Mr Charman suggested that it should not be taken as anything like a comprehensive record of his whereabouts.

(2) We saw evidence from Mr Clay of a meeting with Mr Charman discussing becoming Mr Charman becoming Belgian tax resident in November 2001, suggesting that Mr Charman did not consider himself to be resident in Bermuda at that time.

(3) We know that Mr Charman signed his personal tax returns for the tax years 2000-1 and 2001-2 on the basis that he was UK resident and signed other documents, including his Notice of Restricted Stock Award signed on 14 October 2002 and Notice of Stock Option Grant signed on 9 January 2003 giving his address as Dell House in Kent.

(4) We know that at a meeting with Mr Clay January 2003 Mr Charman discussed becoming non-UK resident that the he took some financial decisions shortly after that which would be consistent with him having ceased to be UK tax resident, such as a decision to move his Children's trusts from Jersey to Bermuda from February 2003 and a decision to trigger the payment of the Founder's Fee in February 2003.

249. On the basis of this limited documentary evidence there is nothing to suggest that Mr Charman was, or believed that he was, non-UK resident before January 2003 at the earliest. On the contrary, Mr Charman was suggesting to Mr Clay in November 2001 that he would take up tax residence in Belgium from April 2002.

250. The other evidence with which we were provided concerned Mr Charman's intentions rather than his actions. Mr Charman was clear that he had made a decision that his marriage was over and that his future lay in Bermuda from October 2001, but the other evidence which we heard about this suggest a slightly less clear picture.

251. Leaving aside the evidence from Mr Charman's divorce proceedings, other evidence suggests that, whatever Mr Charman's own mental state was, his outward

behaviour was not that of someone who had absolutely decided that his marriage and life in the UK was over:

(1) We find the suggestion that Mr Charman would have allowed his wife to believe that they might buy a large new house in the UK in September 2003, despite believing himself that their marriage was over rather difficult to accept even for a man as wealthy as Mr Charman.

(2) Mr Clay's evidence also pointed to Mr Charman trying to persuade his wife to move to Bermuda in late autumn 2001, (as evidenced by Mr Clay's email of 4 April 2007).

(3) Mr Charman continued to take holidays with his wife and children in Italy in July 2003 and his wife visited Bermuda on some occasions when Mr Charman spent the weekend in Bermuda, including in February 2002.

252. All of this evidence is more consistent with the findings of the Court of Appeal, which suggests that Mr Charman was trying to persuade his wife to come out to Bermuda as late as May to October 2003, than with Mr Charman's evidence of his belief that his marriage was over and intention to leave his wife and the UK as early as October 2001.

253. If Mr Charman had indeed decided to leave his wife and family home as early as October 2001, there are no external indicators if this. The only real evidence of this is the assertions made by Mr Charman at the Tribunal.

254. We have other reservations about Mr Charman's explanation for his behaviour from October 2001 until November 2003:

255. Firstly, Mr Charman's wife was not his only emotional tie to the UK, he stressed that one reason for not wanting to start divorce proceedings was the desire to be able to see his sons at their home in the UK.

256. Second, it seems obvious to us that, despite what Mr Charman now believes was his intention in October 2001, he could not have decided to commit to living and working in Bermuda at least until it was clear that Axis would be a success, that is to say after the fundraising in the US (up to November 2001) and after the start of successful underwriting; at the end of the 2002 financial year for Axis. Mr Charman told us that the whole insurance market was in disarray after 9/11 and it seems reasonable to assume that it would have taken some time, in these uncertain times, to be confident that the Axis business would be sufficiently successful to warrant Mr Charman giving up any other options and committing himself to that company in Bermuda.

257. We have set out above our view on the day count methodologies adopted by the parties. We have concluded that neither provides a convincing answer to the question of Mr Charman's whereabouts during the relevant periods. Even on the Appellant's day count schedule, rather than decreasing the amount of time Mr Charman spent in the UK from 2001 to 2002, on a calendar year basis, Mr Charman's days in the UK actually increased from 2001 to 2002.

258. In this context we have also taken account of the conclusion from *Lysaght* that short but frequent visits of the sort which Mr Charman made to the UK can amount to residence.

259. We also take from the authorities the requirement for there to be a "distinct" or "definite" break in a taxpayer's existing pattern of life in order to demonstrate that ties with the UK have been sufficiently loosened to result in the taxpayer becoming non-resident, on a par with the circumstances considered in *IRC v Combe* in which a taxpayer left the UK for a three year apprenticeship in the United States.

260. The definite break relied on by Mr Charman was his change of intention towards his married life in the UK in the autumn of 2001 when he accepted the role with Axis. In our view there are a number of problems with accepting this as a "definite break":

(1) The change relied on by Mr Charman is a change of intention; while intention is a factor to be taken account of, it is not determinative of the question, as stated in the *Gaines-Cooper* decision:

> "The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does or does not do to alter his life's pattern. His intention is of course relevant to the inquiry. But it is not determinative" [63] Lord Hope.

(2) Mr Charman's change of intention at this time is not supported by any other, tangible changes in his pattern of living, indeed on the contrary he told us that he purposely made no such changes, partly because he did not want to trigger a messy divorce, but also because he wanted to keep seeing his sons. In our view "definite" in this context must mean something which is clearly apparent. Other than to Mr Charman himself, there was no definite change in his lifestyle at this time; in particular he retained his home, his personal belongings and his Aston Martin at his house in Kent.

(3) We also think that a "definite break" connotes taking some steps which make it difficult to change your mind, or reverse the direction of travel. Since, Mr Charman's "definite break" was entirely dependent on his own mental state, we have to accept that it would have been perfectly possible for him to have changed his mind (as indeed some of the evidence from Mr Charman's own witness statement, if not also the divorce proceedings, suggests that he might have) and retain his links with the UK without any real difficulties.

(4) Again, the authorities indicate that the retention of a home is not decisive in determining residence, although it is clearly a factor which weighs relatively heavily towards an assumption of residence. Mr Charman did not attempt to argue that he did not treat the family house in Kent as a home when he was in the UK, but suggested that his intention towards his marriage overrode the implications of retaining this house.

(5) We have some misgivings with these arguments; other evidence which we heard and saw contradicts this change of intention and while some may be explained by Mr Charman's desire not to be honest to his wife about his real

plans, some of it cannot be so easily explained, such as the plan to buy a large new house in the UK in 2003.

261. Affairs of the heart are difficult to pin down and perhaps not the best material for decisions of this Tribunal, but in our view the evidence indicates a less decisive break between Mr Charman and his wife during this period than Mr Charman now suggests was the case, which we also consider to be a more common pattern of how a marriage of more than 25 years would deteriorate.

262. Mr Charman's approach was tantamount to suggesting that he was in some senses "forced" to spend time in the UK in order to prop up a marriage which would otherwise have toppled into a nasty and time consuming divorce. However the authorities suggest that a taxpayer will be treated as in the UK of their own volition if, for example they have chosen a job which forces them to work in the UK (as in *Grace* or *Lysacht)*. We do not think that Mr Charman's presence in the UK to support his failing marriage can be viewed as anything other than voluntary as that term is used in this context.

263. For these reasons we have concluded that Mr Charman did not make a sufficiently decisive break with the UK in October 2001 to cause him to be treated as non-UK resident from that date.

264. The Appellant suggested alternative dates by which Mr Charman had become non-UK resident for tax purposes, including by the end of December 2001, the end of December 2002 or by 19 January 2003. For the reasons set out above we have concluded that Mr Charman has not demonstrated that he had made a definite break with his pattern of life in the UK at any date before the end of 2002 sufficient to support a conclusion that he had become non- resident in the UK by that date.

Did Mr Charman become non-UK resident in January 2003?

265. We do accept that by 19 January 2003 Mr Charman had recognised that his life pattern had altered and was taking positive steps to notify HMRC that he was no longer resident in the UK, evidenced by his meeting with Mr Clay.

266. There is no doubt that by this stage Mr Charman had made a decision to become non-UK resident, but the question for this Tribunal is whether that plan and Mr Charman's notification of HMRC of that intention (by submitting the P85 in March 2003) is enough either to (i) constitute a distinct break in itself or (ii) be seen as a sufficient culmination of activities over the previous two years to amount to a distinct break; the Judge in *Grace* accepted that it may be possible to envisage a set of circumstances in which a person gradually runs down their connections with the UK so that they eventually become non-resident without there ever being a distinct break with the UK (see *Grace* at [39]).

267. The question of whether Mr Charman has become non-resident by this time is primarily a question of fact not a question of belief. This was made clear in *Shah v Barnet London Borough Council* [1983] 1 AER 226

> "There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, residence must be voluntarily adopted; and second, there must be a degree of settled purpose" [344]

and also in the more recent *Gaines-Cooper* decision quoted above. The question for this Tribunal is whether Mr Charman can demonstrate that his pattern of life by the end of January 2003 supports his belief that he was non-UK resident.

268. We do not consider that notifying HMRC and taking advice about becoming non-resident or arranging one's tax affairs on the basis that one is about to become non-resident can in itself amount to a distinct break with the UK. To conclude that it did would be to confuse cause and effect

Time spent in the UK

269. Looking at Mr Charman's pattern of travel and other activities between January 2003 and November 2003 there is no decisive change as compared to the two previous periods. Mr Charman himself accepted when giving evidence at the Tribunal that there was no sudden change in his pattern of behaviour from January to February 2003.

270. The day count evidence of Mr Culverwell does, on first reading, indicate a sharp drop in the time Mr Charman spent in the UK from 28 January to 5 April 2003, amounting to only six days, (plus eight arrival and departure days) but these figures are significantly skewed by a very high percentage of "unknown overseas days" for this period. (23 of the 68 days in this period are recorded as overseas unknown by Mr Culverwell, more than a third of the total days.)

271. Mr Lynch's schedule show a less significant decline in time spent in the UK in February, March and early April 2003, giving a total of 19 full days in the UK and 24 part days. This discrepancy is mainly explained by HMRC's assumption that credit card spending in the UK is Mr Charman's own expenditure in the UK, an assumption which Mr Culverwell did not accept.

272. The details from Mr Charman's two American Express cards for the period 28 January 2003 to 4 April 2003 show that UK expenditure is mainly on restaurants in the City of London plus a smaller number of transactions at upmarket London department stores (Harrods and Selfridges). For example the week of Thursday 13 February 2003 to Thursday 20 February 2003, recorded by Mr Culverwell as "unknown overseas days", includes credit card expenditure on Mr Charman's credit card at five restaurants in the City of London.

273. Mr Charman told us that his credit cards could be used by his wife and could be used for remote transactions, but this seems an unlikely method of payment for dinner in the City. If, as Mr Charman suggested, the expenditure for other business colleagues entertaining clients of Axis Specialty, it is difficult to understand why they could not have used their own corporate credit cards rather than Mr Charman's. The London office of Axis was well established by this stage and it seems strange that those in London would still have been relying on Mr Charman's credit card to pay for client meals.

274. We do not consider that Mr Charman has provided a reasonable explanation for why expenditure of this type should have been incurred in his absence. It seems most likely to us that the expenditure on City restaurants was Mr Charman's own expenditure while in London himself during this period.

275. For these reasons we prefer HMRC's analysis of the evidence and their conclusions of the time spent by Mr Charman in London for this period and do not accept Mr Culverwell's conclusions that Mr Charman spent only a very small number of days in the UK from 28 January 2003 to 5 April 2003.

Other UK ties

276. Mr Charman did not suggest that by this stage he was no longer staying at the family home, Dell House, when he was in the UK or following his usual pattern of flying to the UK regularly from Bermuda and spending four days there each week.

277. On the contrary, we know that he considered buying a different, larger property (Stormont Court) with his wife as late as September 2003. While we accept that this may have been part of a complex charade with his wife as part of their impending divorce proceedings, we have some reservations about accepting that someone who truly considered that his family ties with the UK were firmly broken would have considered such a step.

278. We do know that by this time Mr Charman's professional obligations with Newmarket in London had ended (he describes these as running out during 2002) and his restrictive covenant with Ace had also ended.

Ties to Bermuda

279. We accept that by the end of 2002 and the start of 2003 Mr Charman's Axis business in Bermuda was well established and profitable and Axis Capital had been floated on the NYSE. Mr Charman had moved into a larger property in Bermuda (Bay House) which he had furnished himself, but which he rented and did not own.

280. At this stage Mr Charman was still subject to his original contract with Axis Specialty, which contemplated him commuting back to the UK.

281. However committed Mr Charman had become to Bermuda, it is perfectly possible for him to be resident in both Bermuda and the UK.

282. In our view while Mr Charman had become embedded with his professional and personal life in Bermuda by January 2003, we do not consider that this can be taken to indicate that he had become non-resident in the UK.

Financial planning

283. We know that Mr Charman met with Mr Clay in January 2003 and talked about confirming to HMRC that he had become non-UK resident.

284. Mr Charman had also arranged for payment of his salary and bonus for 2003 in February 2003. The Founder's Fee was also paid in February 2003. Mr Charman said that payments were made at this time in order to clear up accounting issues prior to the IPO (in July 2003).

285. A programme of disposals of the Ace shares held by his children's trust (the Dragon Holdings Trust) in Jersey started in 2003 and the trusts were moved from Jersey to Bermuda.

286. In our view, while Mr Charman may well have undertaken this financial planning on the understanding that he was no longer resident in the UK for tax purposes, these actions merely reflect that belief and cannot be treated as facts supporting his non-residence status.

287. For these reasons we have concluded that, whatever Mr Charman believed about his UK residence by January 2003, the factual circumstances of his life pattern do not suggest that a clear break had been made with any aspects of his UK life other than his financial planning, by January 2003.

Cumulative change amounting to a break with the UK

288. As to the second possibility, that in combination with other events over the two years previous to this, this final action, of notifying HMRC that he was no longer UK resident, could be seen to crystallise Mr Charman's long-term intention to become non-UK resident, in our view there is not sufficient evidence of a series concrete steps being taken by Mr Charman to loosen the "adhesive" UK residence before this date.

289. We have concluded that any gradual move towards greater professional and social involvement with Bermuda is outweighed by Mr Charman's continuing pattern of returning to his family home in the UK on a regular basis. While Mr Charman's pattern of life might have changed in Bermuda (and the USA) over the period from October 2001 until January 2003, his pattern of life in the UK had not changed very much, at least in part because of the need to convince his wife that their marriage was still working.

290. While the day count analysis provided by Mr Culverwell did demonstrate a gradual decline in the time spent by Mr Charman in the UK, in our view the rate of change over this three year period is not sufficient to result in a break with the UK by the end of that period.

291. In our view the closest analogy from the decided cases to Mr Charman's situation over this three year period is the master mariner in *re Young* (1875) 1 TC 57; which was referred to in *Levene;* a master mariner who had his home in Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea. Similarly Mr Charman was a person whose job required significant travel away from his home but who regularly came back to the same place; in this case the family home in Kent, when he was not working,

292. As was said in *re Young* :

> "These..... are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that, at least until January 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom" [p222].

Conclusion

293. Mr Charman did not decide to make a decisive break with the UK until January 2003 (evidenced by his meeting with Mr Clay, the Founder's Fee payment and the movement of the children's trusts) and took no physical action to cut his ties with the UK until November 2003. A "definite break" means more than a change of intent, or a decision to change, it connotes some tangible action which a third party would recognise as change in pattern of behaviour and some action which makes it difficult to return to one's previous situation. In our view this did not occur until Mr Charman left the family home in the UK on 21 November 2003, never to return.

Salary and Bonus payments – timing issues

294. There was no real dispute between the parties about when Mr Charman received his salary and expenses; at the end of each month for which he was employed by Axis Specialty in accordance with his contract of employment. The only dispute related to whether the first payments should be treated as received only when the contract was stated to be effective (the date when it was signed in November 2001) in accordance with s 202B(1)(b) and whether Mr Charman was non-resident at that date.

295. S 202A and 202B ICTA 1988 set out a statutory code for when emoluments such as Mr Charman's bonus and salary are treated as received and therefore liable to tax.

296. Given our conclusion that Mr Charman remained UK tax resident for the whole of the 2001-2 tax year, the question of exactly when his salary payments should be treated as received for tax purposes during that tax year is academic.

297. We have found as a fact that Mr Charman's bonus for 2002 was paid to him in March 2003 and his bonus for 2003 was paid to him in February 2004.

298. HMRC suggest that Mr Charman's bonuses for 2002 and 2003 were paid in respect of services rendered for tax years while he was resident in the UK and that they are therefore taxable under s 19 ICTA 1988 (or s 15 ITEPA 2003).

299. The Appellant argues that the tax point for Mr Charman's 2002 and 2003 bonus arises when they were paid, because that it the earliest date which it is possible to identify under s 202B(1) ICTA 1988, (or, for the 2003-4 tax year, under s 18 ITEPA 2003)

300. We agree with the Appellant that the more specific rules at s 202A and 202B ICTA 1988 and s 18 ITEPA 2003 are relevant in determining when Mr Charman's bonuses should be treated as received for tax purposes and therefore whether they are taxable under s 19 ICTA 1988 or s 15 ITEPA 2003.

301. We have concluded that Mr Charman was UK tax resident for the whole of the tax year in which he received the 2002 bonus (March 2003) and therefore this amount is subject to UK tax for the 2002-3 tax year.

302. We have concluded that Mr Charman became non-UK tax resident before the date when he received his 2003 bonus (in February 2004). However our conclusions in respect of the tax treatment of this payment are subject to our conclusions about the validity of HMRC's discovery assessment for the 2003-4 tax year, which are considered in detail later in this decision.

Founder's Fee

303. In our view this payment does not fall to be taxed as an emolument. We were referred to the decision in *Shilton v Wilmshurst* as support for HMRC's position that the payment of the Founder's Fee to Mr Charman by MMC should be taxed as an emolument of his employment with Axis Speciality.

304. We do not agree with HMRC's arguments on this point because

(1) Unlike *Shilton*, this is not a case of a payment being made from one employer to a future employer as part of a commercial agreement between them, where it is a condition of the transfer of employment from one employer to another.

(2) We accept that a payment can be an emolument if it is made by a third party (*Clark v Oceanic*) but the real test, as set out in *Shilton* is whether the Founder's Fee was paid for Mr Charman's employment with Axis Specialty or for some other reason. In our view it was paid for some other reason. As stated In *Shilton* by Templeman LJ:

> "If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services, but is paid for some other reason, then the emolument is not received "from the employment" and "I prefer the simpler view that an emolument arises from employment if it is provided as a reward or inducement for the employee to remain or become and employee and not for something else" [p 8]

305. In our view Mr Charman's position is closer to the position of the taxpayer in *Pritchard v Arundale* ([47] TC 680) referred to in the *Shilton* case, in which a senior partner of an accounting firm received shares from a shareholder in the company which was to employ him as part of the terms of giving up his existing role and becoming an employee of that company. The aware of those shares was held not to be an emolument.

306. The terms of the agreement under which the Founder's Fee was paid, (the Transaction Advisory Agreement of 20 November 2001) do not support HMRC's

analysis, despite the fact that it was entered into on the same day as Mr Charman's contract of employment with Axis Specialty because:

(1) The third party, MMC, did not have a direct interest in Mr Charman's performance of his contract of employment, although they did have a financial stake in Axis Specialty.

(2) On its terms the Founder's Fee was payable in consideration of "the services rendered by Charman" being "certain advisory services" which had been rendered by Mr Charman to MMC at the time when the agreement was signed, detailed as "the development and preparation of a business plan for Axis and the assessment of the market environment of the insurance and re-insurance markets"

(3) The only reference to Axis Specialty is in clause 6 of the Transaction Advisory Agreement which states: "It is also understood that in connection with Charman's engagement, Charman may also be engaged to act for Axis, and that the terms of any such additional engagement may be embodied in one or more separate written agreements".

(4) It is not sufficient to bring the Founder's Fee into charge as an emolument that it would not have been paid "but for" Mr Charman being or becoming an employee of Axis Specialty, or that there are other commercial links between Mr Charman's role for MMC and his role at Axis.

307. If this payment is not taxable as an emolument, the parties are agreed that it should be taxable under Schedule D Case VI. The dispute between the parties is when that tax charge arises.

308. In our view, the authorities support a conclusion that the Founder's Fee is taxable on paid basis, bringing it into the charge to tax when it was paid some time after the Transaction Advisory Agreement was entered into, on 7 February 2003.

309. We have concluded this by reference to:

(1) The provision in the Transaction Advisory Agreement which allowed the parties to agree that the Founder's Fee should be paid at a later date and that interest should therefore accrue on it (clause 2) and the oral condition referred to by Mr Charman which allowed him to determine when the fee was paid.

(2) The *Alloway* decision relied on by HMRC. While this suggests that Schedule D Case VI income is subject to the general principle that receipts are taken as accruing in the period in which the money is earned does not seem to us to go directly to the question of timing, being more concerned with the characterisation of a payment as either revenue or capital and differs slightly in its facts with Mr Charman's position; in the *Alloway* decision money was paid over to a third party firm of solicitors at the time but only later transferred from them to the taxpayer. There is no intermediate receipt in the case of the Founder's Fee here.

(3) We prefer the decisions in *CIR v Whitworth* (a decision of the House of Lords) and the First-tier Tribunal decision in *Maureen Hepburn* on this issue

because in *Whitworth* a clear distinction is made between traders and non-traders and a proper explanation is given for the reasoning; pg 46 of *Whitworth* by Viscount Simonds:

> "I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought into assessment to Income Tax. There are two quite different cases. Traders pay tax on the balance of profits or gains and bring money owed to them into account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money because until then it is not part of their income"

The First-tier Tribunal in *Maureen Hepburn* was considering a receipt of a type similar to the Founder's Fee (consultancy services paid in respect of services to a newly formed company). Its decision on the timing point was strictly obiter, but it did suggest that *Whitworth* and *Grey* provided the correct general principles to follow in the case of miscellaneous income, with tax arising only at the point of receipt.

Conclusion

310. We have concluded that the Founder's Fee should be treated as chargeable to UK tax at the date when it was paid to Mr Charman, in February 2003 and on the basis that Mr Charman was UK tax resident on that date.

Restricted Shares

311. We have concluded that Mr Charman was resident for tax purposes in the UK until November 2003 and we have considered his tax liabilities in respect of the Restricted Shares on that basis.

312. We do not agree with the Appellant that the share for share exchange changed the source of the income arising to Mr Charman for tax purposes. Despite the fact that Mr Charman ended up holding shares in Axis Capital, in our view that holding arose from his employment through the original shares in Axis Specialty and s 140A (1) ICTA 1988 applies to the Restricted Shares.

313. The Appellant relied on the *Abbot v Philbin* and *Wilcock v Eve* cases but we consider that these cases can easily be distinguished because:

(1) They consider tax arising on the exercise of share options, which, for common law purposes, is accepted as having a source other than employment; being the extraneous factors which have impacted the value of the shares underlying the option.

(2) We accept that these cases suggest the need for a relatively tight nexus between the sum received and the employment which gave rise to that sum, but this is in part because the question asked in those cases is whether the value which

is giving rise to the tax (the gain on the exercise of the option) derives from the employment, to which the answer is no. That is not the case for the shares which Mr Charman received as part of the share for share exchange which merely represent a change in form of an existing asset (the Axis Specialty shares) into another asset (the Axis Capital shares) of the same economic value.

(3) It is accepted that "borderline cases" are likely to be difficult because there is more than one operative cause of the taxable income; that is the case here, but in our view the ultimate cause (or source) is Mr Charman's employment with Axis Specialty.

314. To suggest that a share for share exchange can break the nexus between shares which are emoluments and turn them into shares which are derived from a different source seems to us an overly mechanistic approach to the law, and to result in a rather surprising conclusion which provides a very ready loophole for anyone wishing to avoid tax on their employee shares.

315. The point was succinctly put in *Wilcock v Eve* referring back to the judgment of Neill LJ

> "The question is, was the payment an emolument from the employment? In other words, was the employment the source of the emolument" [p14]

In our view the only realistic response to this question in respect of the Axis Capital shares in yes.

316. Our approach is supported by the Offering Memorandum and the amendments to the Share Scheme Plans which were consequent on the re-capitalisation. The share for share exchange was carried out under Bermuda law and envisaged, in the Offering Memorandum, that it could be achieved either by way of exchange or by way of merger. Ms Shaw pointed to the provisions in the Offering Memorandum which said that the Axis Specialty shares were cancelled to support her position, but we note that this was only stated to be the case in respect of the merger, there is no equivalent statement in respect of a share exchange.

317. We considered whether we should ask for a more detailed analysis of how the re-capitalisation had taken place by reference to Bermuda law but concluded that this was not necessary. We did see the copy share ledger of Axis Speciality stating that Mr Charman's shares in Axis Specialty had been cancelled on 31 December 2002. Despite the fact that the Axis Specialty shares were cancelled on or immediately after the exchange or merger, that does not in our view mean that Mr Charman has divested himself of his rights as an employee to shares; those rights were represented initially in the form of the Axis Specialty shares and as a result of the re-capitalisation have changed form to become rights to the Axis Capital shares, but only in a very formalistic sense have Mr Charman's rights been altered. In our view the essential purpose of a merger or share for share exchange is to ensure that existing shareholder rights are changed in form but not in substance, as reflected by the usual UK tax treatment of such transactions (which as Mr Nawbatt pointed out, is referred to in the Offering Memorandum).

318. If further support for this is needed, the documents which reflect the changes in the existing Share Option Plans support this, the Agreement of 31 December 2002 between Axis Specialty and Axis Capital transfers the obligation to issue shares under the Plan from Axis Specialty to Axis Capital and the amendments made to the Axis Speciality Long-Term Equity Plan reflect this.

319. On the basis that the shares acquired by Mr Charman in Axis Capital under the share for share exchange are shares arising from his employment with Axis Specialty, they were acquired before April 2003 (on the share for share exchange on 31 December 2002) and therefore, they are taxable under s 423 ITEPA 2003 as originally enacted.

320. The restrictions on those shares were lifted in September 2005, by which stage Mr Charman was no longer UK tax resident, but we agree with HMRC that a tax charge arises under s 427 ITEPA 2003 for the year in which the restrictions were lifted, because Mr Charman was a UK resident at the time when he obtained his beneficial interest in the shares (December 2002) and the shares do not fall within the exclusion at s 425(1) ITEPA 2003.

321. We also agree with HMRC that Mr Charman cannot rely on a general principle of territoriality, (considered in more detail below) to protect him from this charge in circumstances in which the relevant legislation makes specific provision for residents and non-residents (s 425 ITEPA 2003) and in circumstances in which he has some nexus with the UK, being his residence until November 2003.

Conclusion

322. A tax charge arises on Mr Charman in respect of the gains made on the release of the restriction on the Restricted Securities in September 2005. Mr Charman's appeal against HMRC's Closure Notice for the 2005-6 year including tax on the gains relating to the Restricted Securities is not allowed.

Share Options

323. We were referred to the meaning of "securities option" for these purposes set out at s 420(8) ITEPA 2003: ""securities option" means a right to acquire securities..."

324. As we have already said about the Restricted Shares in Axis Specialty, we do not consider that the change in the form of the shares over which Mr Charman was granted options as a result of the share for share exchange has any impact on whether those Share Options arose from his employment.

325. Ms Shaw made one additional point in respect of timing as regards the Share Options which was not relevant to the Restricted Shares; namely that the existence of a contingency (that Mr Charman should remain an employee of Axis Specialty or Capital) as a precondition of the vesting of the Share Options meant that these should be treated as acquired not on the date of the original grant (effective from October 2001), but from the vesting dates.

326. The Share Options which were granted to Mr Charman on 20 November 2001 were due to vest in three tranches and were subject to the related Stock Option Agreement. Ms Shaw suggested that it was a condition of the grant of these options that Mr Charman was employed by Axis Specialty at the date when they vested and his rights were to that extent contingent and so not "rights over shares" for s 420(8) ITEPA 2003 purposes.

327. This is borne out by the Stock Option Agreement, which recognises that options can only be exercised on termination of employment (and subject to various time limits) if they have vested prior to the termination of employment, (unless the termination of employment is due to retirement, when they automatically vest on termination).

328. On this basis we agree that it is accurate to describe the Share Options as contingent on remaining in employment in the sense suggested by Ms Shaw such that no "right to acquire securities" at all arose to Mr Charman until it was clear that he was employed at the date when those rights vested.

329. We have concluded that Mr Charman acquired the rights represented by the Share Options as defined by s 420(8) ITEPA 2003 on the dates when they vested: 1 October 2002, 1 October 2003 and 1 October 2004. Mr Charman's tax residence at each of these vesting dates is therefore relevant by reference to s 474(1) ITEPA 2003; The parties accept that Mr Charman was non-UK resident by 1 October 2004 and we have concluded that Mr Charman was UK tax resident until 21 November 2003.

330. Mr Charman was resident in the UK for tax purposes at the date when the first two tranches of Share Options vested. They therefore do not fall within the scope of the exclusion at s 474(1) because they are employment related securities acquired at the time when Mr Charman was resident in the UK.

331. Section 476 therefore applies to give rise to a charge to UK tax on any gains arising when those options were exercised (in 2008), subject to any conclusions on the general principle of territoriality discussed below.

Conclusion

332. Mr Charman acquired securities options in three tranches on the vesting dates as set out in his Share Option Grant agreement. Mr Charman was UK tax resident on the first two of these dates. A tax charge therefore arises in respect of any gain on these options at the time when they were exercised in 2008, not at the time when they were granted as assumed by HMRC.

333. Ms Shaw suggested that since it was not possible to ascertain which of the options granted to Mr Charman were exercised on which date, any gain should be split rateably between the options, assuming that 1/3 of the gain arose in respect of each of the three option tranches.

334. On this basis, HMRC's discovery assessment for the 2007-8 tax year should be amended to charge to tax only 2/3rds of the gain on the exercise of the Share Options.

The principle of territoriality

335. In respect of Mr Charman's exercise of the Share Options and his acquisition of the Restricted Shares, Ms Shaw suggested that Mr Charman should not be liable to tax if he was not UK resident at the relevant time by reference to the general principle of territoriality as set out in *ex parte Blain.*

336. We agree that general principle of territoriality is potentially applicable to tax cases but we do not agree that it applies to Mr Charman in respect of either the Share Options or the Restricted Shares. The facts in *ex parte Blain* were very different than Mr Charman's position, considering whether someone who had never been in the UK and had no other nexus with the UK came within the remit of the UK Bankruptcy courts. The limitation of the principle of territoriality was recognised in this case:

> "Of course it is not necessary that a person to be subject to an English Act should be domiciled here. If he is here temporarily and does an act which comes within the intent and purview of a statute, he, as regards that statute..... submits himself to the law". Cotton LJ at p6-7

337. We have concluded that Mr Charman was UK resident at the time when he acquired 2/3rds of his Share Options and therefore the question of territoriality does not arise. In our view it is clear on the face of the legislation that if at the time when the options are acquired an employee is subject to UK tax on his earned income, that brings him within the charge to tax whatever his situation might be when the chargeable event occurs and we cannot see how any general principle of territoriality can override these very specific provisions in s 474 ITEPA 2003,

338. The argument is in our view the same in respect of the Restricted Shares, since we have concluded that Mr Charman was UK resident at the time when the Restricted Shares were acquired in September 2002.

339. In this respect we agree with Mr Nawbatt that the refinement of the principle of territoriality as set out in *Clark v Oceanic* is the most apposite in this case given that there is specific reference to the need for a UK nexus in s 474 ITEPA 2003:

> "That principle, which is really a rule of construction of statutes expressed in general terms ..... requires and enquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating" Scarman LJ at p 13.

Conclusion

340. Any general principle of territoriality does not override the specific charging provisions at s 425 and 474 ITEPA 2003 and cannot be relied upon by Mr Charman to alter our conclusions about the UK tax chargeable on the Restricted Shares and Share Options.

Was the discovery assessment for 2003-4 a valid assessment?

341. On this point we agree with the Appellant that the discovery assessment issued on 26 March 2010 was not a valid discovery assessment.

342. The onus is on HMRC to demonstrate that the relevant conditions in s 29 TMA 1970 were fulfilled at the time when the Discovery assessment was issued. We have found as a fact that HMRC (Mr Elson) had "discovered" by 10 November 2006 that Mr Charman's bonus was potentially liable to tax during the 2003-4 tax year. Any later action by Mr Tebbet, could not be a "new" discovery of a potential under assessment, but only confirmation of the "discovery" made by Mr Elson. The authorities are agreed that it is not possible for the same "discovery" to be made twice: "In our judgment as a matter of ordinary English, a discovery can only be made once" *Tooth* [79].

343. The more difficult question is whether Mr Tebbet's much later assessment, based on Mr Elson's earlier discovery can no longer be treated as a "discovery" assessment due to the passage of time.

344. It is clear that what has to be "new" for these purposes is the conclusion (that there has been an under assessment of tax) not the reasons for the conclusion: (as made clear in *Charlton*) and we did not understand this to be in issue between the parties.

345. The point at issue between the parties, and one on which it is fair to say that the authorities do not give definitive guidance, is the extent to which HMRC are obliged to act in a timely fashion to issue an assessment after a discovery has been made: Lord Glennie in *Pattullo* said

> "The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort contemplated by s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period" [52]

but also went on to say:

> "I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its essential newness by the time that assessment was made".[53]

346. Is this situation one of those exceptional circumstances? In our view it is. We have concluded this for three reasons:

(1) The length of time between the "discovery" by Mr Elson and the issuing of the assessment by Mr Tebbet is lengthy on any basis, four years.

(2) The reason why the assessment was not made in a more timely fashion and why the discovery rules were relied on was as the result of an error by HMRC; Mr Elson's failure to open an enquiry for the 2003-4 tax year at the time. Unlike, for example, the reason for the delay in *Charlton*, *Pattullo* or *Tooth*.

(3) Mr Nawbatt is correct to point out that there is no specific provision in s 29 which applies anything other than the usual time limits for the making of an assessment which arises by reason of a discovery, but in our view it is implicit in the provisions of s 29 that the discovery and the assessment are composite not discrete aspects of HMRC's decision making process such that one should follow the other in a timely fashion unless there is a good reason for any delay. This is the point made by Lord Glennie in *Pattullo;*

> "the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of 29(1) itself".[52]

We do not consider that HMRC's failure to issue an assessment in 2006 when they first became aware of the potential under-assessment is a good reason for this delay.

347. Mr Nawbatt referred us to the 2016 First-tier Tribunal decision in *Miesegaes* and its comments on the Upper Tribunal conclusions about "stale" discovery assessments in *Charlton*, which it held to be obiter. We note that as a First-tier decision this is not binding on us and precedes the Upper Tribunal decision in *Tooth*.

348. We accept, as the First-tier Tribunal suggested in *Miesegaes*, that there is no specific time limit in s 29 which overrides the usual time limits (in s 34 and 36 of Taxes Management Act 1970), but that decision focussed on the more usual question of whether there had been a discovery at all and there was no question of the discovery having been made before the enquiry window had closed. The Judge did however suggest that

> "It seems to us that a discovery assessment could take place at any time, even before the enquiry window closed. The only time limitation is on the assessment which must comply with the applicable time limits in s 34 and s 36 TMA. On this view it is quite possible for a discovery assessment to be made even if the discovery occurred before the enquiry window closed..... inadequate disclosure puts the taxpayer at risk of a discovery assessment at any time until the s 34 and s 36 time limits cut in" [144]

349. Nevertheless we are left wondering whether it can really be correct that, in situation such as Mr Charman's, in which HMRC had the information to make an assessment during the usual enquiry window, but failed to even open an enquiry, they should effectively get a second bite at the cherry by turning to the discovery provisions.

350. Our caution about accepting this has been informed in part by the comments made in *Pattullo* about the need for finality as part of the self-assessment system and the resultant strict statutory control of the circumstances in which HMRC can impose additional tax liabilities by way of amendments to a tax return, (referring to Moses LJ

in *Tower MCashback*) and by Lord Glennie's approach to the discovery rules and the implicit requirement for HMRC to issue an assessment in a timely manner.

351. We have concluded that in these circumstances, when a lengthy delay in issuing an assessment has been occasioned by an error on behalf of HMRC, HMRC should not be allowed to rely on the draconian rules in s 29 to correct their error.

Conclusion

352. The discovery assessment for 2003-4 is not a valid assessment and Mr Charman's appeal against the tax charge on his 2003 bonus for that tax year is allowed.

353. **Summary of conclusions by reference to each disputed assessment:**

(1) 2001-2: Mr Charman was resident in the UK for tax purposes for the whole of this year and is taxable on his salary and expenses for this year but not the Founder's Fee.

(2) 2002-3: Mr Charman was resident in the UK for tax purposes for the whole of this year and is taxable on his salary, expenses and bonus (for 2002, which was paid on 14 March 2003) and the Founder's Fee.

(3) 2003-4: There is no valid assessment for this year. HMRC's discovery assessment on part of Mr Charman's bonus for 2003 (which was paid on 12 February 2004) is not valid.

(4) 2004-5: Mr Charman is not UK tax resident for any part of this year. Any assessment on Mr Charman's bonus for 2003 in this year is not valid; that bonus was paid on 14 February 2004.

(5) 2005-6: Mr Charman is taxable on the removal of the restriction on his Restricted Shares during this tax year.

(6) 2007-8: Mr Charman is taxable on 2/3rds only of the gain on the Share Options which were exercised in this year.

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

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 20 DECEMBER 2018