TC02714

Appeal number: SC/3017/2003

Income tax – assessments and amendments to self assessments – benefits arising from the payment by an employer of expenses enhancing the taxpayer's land – benefits from the availability of a boat owned by employer -determination of amounts assessable - penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD DENNY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
GILL HUNTER

Sitting in public at Bedford Square WC1B 3DN on 20 and 21 November and 7 December 2012 and 9 and 10 January 2013

Richard Denny for his trustee in bankruptcy, the Appellant

Simon Foxwell for HM Revenue and Customs, the Respondents

DECISION

1. Mr. Denny appeals against assessments and amendments to self assessments for the periods from 1992/93 to 2002/03 and penalties assessed in relation to those years.

2. The investigation into Mr. Denny's affairs by Mr. Petersen of HMRC had given rise to a measure of friction between the two men which was evident at the hearing before us. To a large extent the story of their relationship was irrelevant to the issues before us and we have to that extent put it to one side in this decision.

3. Mr. Denny was declared bankrupt on 4 February 2011 on his own petition. He appeared before us as the agent of his trustee in bankruptcy.

4. In their statement of case HMRC list four issues that are relevant to the determination of the appeals:

> (1) whether Mr. Denny received benefits from Man Management Ltd, of which he was a director, in connection with its payments for building works in the grounds of Foxcote Court where Mr. Denny lived until 2001 (this is the Foxcote Court Issue);
>
> (2) whether Mr. Denny was chargeable to tax under section 740 Taxes Act 1988 because he had received funds from a trust whose assets were abroad (the Trust Issue);
>
> (3) whether Mr. Denny was liable to CGT on the sale of a flat, Palm Beach, in Ibiza (this is the Palm Beach Issue);
>
> (4) whether Mr. Denny received benefits because Man Management Limited made available to him a motorboat (the My Fair Lady Issue).

In addition HMRC's statement of Case addresses the penalties assessed by HMRC.

5. However, the correspondence (over many years) and the assessments included a contention by HMRC that Mr. Denny had had sources of income other than those he had declared (in addition to any amounts arising as a result of the four issues above). This contention arose from Mr. Petersen's consideration of Mr. Denny's lifestyle and certain banking accounts for the years in which he opened enquiries into Mr. Denny's tax returns. In outline, Mr. Petersen added together (1) unexplained receipts in the bank accounts, and (2) expenses in relation to Mr. Denny's boats and Mr and Mrs Denny's flat in Ibiza which did not seem to him to have been met from declared sources, and concluded that Mr. Denny had not returned some £50,000 (Mr Foxwell put it at £45,000) of income in 1997/98. He added that amount to the assessments for the year. He inferred that a similar amount had been not been declared in earlier and later years. This is the Undeclared Income Issue.

6. The Undeclared Income Issue was not clearly set out in HMRC's statement of case, but was raised in correspondence over the assessments. At the start of the hearing Mr. Denny told us that he had come ready to address the four issues raised in HMRC's statement of case but was unprepared to deal with the Undeclared Income Issue.

7. The hearing was initially listed for two days, but it quickly became clear that that would be insufficient. We arranged for a further three days: one, two weeks after the initial two days, and two more a month after that. We said that in any event we would deal with the four issues (and the penalty question) in our decision, and that we would hear argument on the Undeclared Income Issue, giving Mr. Denny the opportunity to address it in the latter days of the hearing after he had had time to prepare; but that we would consider whether, having regard to the principles formulated by the courts in *Tower MCashback* [2011] UKSC 19, HMRC should be permitted to rely on this issue in the appeal. We address this question at the end of our decision under the heading '(7) The extent of the appeal'.

8. Each of the issues raised principally factual questions but also some points of law. We deal with the issues of law separately in our discussion of each of the issues. We start, however, with some findings as to Mr. Denny's life and dealings in the period 1986 to 2009. The evidence from which our findings of fact are drawn is: (1) the oral evidence: of Mr. Denny, of his son Mr. Lyster Denny, and of the administrator of Man Management, Mrs Judith Harker; (2) the oral evidence of Mr. Petersen; and (3) the bundles of documents: four prepared by HMRC before the hearing, two by Mr. Denny before the hearing and two additional volumes prepared by him for sittings on 7 December and 9 January. In addition Mr. Lyster Denny produced certain copy documents to which we shall refer in relation to the Trust Issue.

The onus of proof.

9. In an appeal of this nature the onus of proof in relation to the amounts of taxable income and gains is on the taxpayer. HMRC, on the basis of the information in its hands, came to the conclusion that assessments should be made or amended. The taxpayer is the only person who has first-hand information of his own transactions and circumstances, and it is therefore up to the taxpayer to deploy that information to prove what he says the relevant facts were. If the taxpayer does not produce information, or provides insufficient weighty evidence the tribunal will be unable to conclude that, on balance, his account is correct.

10. This principle is more difficult to apply when the events in question occurred many years ago and recollections are, as a result, less clear; and documentary evidence may have been lost or destroyed or can no longer be found. But nevertheless the principle must guide our steps even in a dark landscape.

Background.

11. Mr. Denny has had a successful and varied career. At the time of the hearing he was 72. He started in agriculture, but by the 1970s had moved into business leadership and sales training. He made films, videos and wrote books. He trained people in management and business techniques. He was a motivational speaker. Throughout the period relevant to this appeal he pursued these activities with success and a measure of acclaim.

12. From at least 1996 onwards his business was conducted principally by two companies which provided his services as a speaker, sold his books and other materials, and provided training. The training business was conducted through a company initially called Richard Denny Organisation Ltd. This changed its name to Better Business Practices Ltd, and changed again in about 2004 to Man Management Services Limited. His services as a speaker were provided through Man Management Limited, which also engaged in other activities relevant to this appeal: horse breeding and the ownership and letting out of a boat named My Fair Lady. Latterly his services have been provided through Man Management Services Limited rather than Man Management limited.

13. In about 1986 Mr. Denny sold a family house and a small farm near Devizes and, with the benefit of a mortgage, bought Coldicote, a house and adjoining land in the Cotswolds. Unfortunately shortly after its purchase economic conditions changed for the worse and Mr. Denny's overall financial position with them. He found himself in considerable debt. He and his wife decided to sell the house at Coldicote and part of the surrounding land, and to build a new house on the remaining land. The south eastern half of Coldicote was sold in 1988/1991 for some £700,000, almost all of which was used to repay outstanding debt.

14. That sale enabled a new start. Mr. and Mrs Denny decided to convert some of the barns on the retained land into a house; and to build an adjoining office and a separate equestrian centre (inter-alia by moving a large barn to a location a little further from the new house).

15. For a period after the sale of the Southeast portion of Coldicote, Mr and Mrs Denny lived in a rented cottage on the land they had sold; while they were there the building work proceeded and in 1994 they appear to have moved into their new house, which they named Foxcote Court.

16. Part of the building work was paid for by Man Management Limited. The Foxcote Court Issue relates to this funding. Mr. Denny says that Man Management paid for the construction of an office which was used for the purposes of its trade, and for the equestrian centre in which it ran the business of breeding horses (largely managed by Mrs Denny). HMRC say that the funding provided by Man Management gave rise to taxable benefits to Mr. Denny.

17. In the early 1980s Mr. and Mrs Denny bought a small two bedroom flat (Palm Beach) in Ibiza. They used it for holidays. During 1998 and 1999 Mr. and Mrs

Denny began to form an intention to move to Ibiza. In late 2000 they identified a property, Can Vingut in Ibiza, which they wished to buy. They had some difficulty in raising funds but Mr. Lyster Denny procured an advance to them of £560,000 which they used in the purchase of that property. Then in 2001 they sold Foxcote Court for £1.55m and repaid much of their borrowings. Other funds were provided, secured on a mortgage over Can Vingut, from Bank Santander. The funds originally advanced by Mr. Lyster Denny gave rise to the Trust Issue: HMRC contended that they had been received from a trust and that section 740 TA 1988 applied so that Mr. Denny was taxable by reference to benefits received under that trust.

18. Some of the funds from the sale of Foxcote Court appeared to have been used to purchase a house at 23 Lingfield Close and to assist in the purchase of a cottage, Tern Cottage, for Mrs Denny's mother.

19. Can Vingut however required substantial work, both on the house and the surrounding land. It seems that in May 2002 Mr. and Mrs Denny sold Palm Beach and used the proceeds to buy other living accommodation in Ibiza: Casa Jardine. The Palm Beach Issue relates to the sale of Palm Beach: HMRC say that a chargeable gain arose on which Mr. Denny was taxable.

20. In 2002 Mr. and Mrs Denny's marriage was getting into difficulty. Divorce papers were served in March 2003 and the marriage dissolved shortly afterwards. In November 2003 the Bristol County Court approved a property division under which (1) Mr. Denny retained 23 Lingfield Close and Tern Cottage; (2) Mrs Denny retained Casa Jardine and would sell it; (3) Mrs Denny retained Can Vingut (after procuring the release of Mr Denny from his obligations under the loans secured on it); and (4) Mrs Denny agreed to pay a sum of money to Mr. Denny. The disposals which arose as a result of that settlement fall outside the years relevant to this appeal.

21. In 2004, with the help of a mortgage of £795,000 from Northern Rock, Mr. Denny bought the Old Rectory which is his current residence. In 2007 he acquired 2 flats in Cyprus, also with the help of a mortgage.

22. Mr. Denny has always enjoyed boats, especially motorboats. He acquired his first boat in about 1977/79; he replaced that by Sea Ray (at a cost of £25,000) in the 1980s, and that was followed in the late 1990s by Portofino (bought for £120k with the proceeds of Sea Ray and a £100k loan). Each of these he owned personally. Sea Ray and Portofino he kept in Ibiza. In late 1998 however Portofino was sold and in 1998/99 Man Management Limited (with the aid of a marine mortgage of something in excess of £100k) bought the newly manufactured motorboat, My Fair Lady, for some £306,000. From time to time, until its sale in 2003 Mr. Denny used My Fair Lady. HMRC say that the availability of My Fair Lady to Mr. Denny was a taxable benefit accorded to him by Man Management. This is the My Fair Lady Issue.

23. HMRC made assessments on Mr Denny in respect of Sch E income for 1992/93 and1993/94 on 29 March 2009 and 16 March 2000. They made amendments to his self assessments in repect of the years 1996/97 to 2003/03 on the closure of their enquiries in those years (the 1998/99 year is decribed as an assessment but is made on the closure of the enquiry). Penalty assessments were also made in resoect of these years. Mr Denny appeals against all of them.

(1) **The Foxcote Court Issue.**

The relevant law.

24. Section 131 TA 1988 (which was in force until ITEPA 2003) provided that tax under schedule E should be chargeable on the full amount of emoluments. 'Emoluments' included all salaries, fees, and wages and profits whatsoever. The tax was chargeable, by section 19 on emoluments from an office or employment. There is no doubt that a director holds an "office" in a company. Mr and Mrs Denny were directors of Man Management.

25. Section 145 provided that "where living accommodation is provided for a person by reason of his employment" (which by section 168 included a directorship) he was to be treated as receiving emoluments equal to the annual rental value of the accommodation less any amount made good by the beneficiary.

26. Section 154 provides:

> "(1) Subject to section 163, where in any year a person is employed in employment to which this Chapter applies and -
>
> (a) by reason of his employment there is provided for him, or others being members of his family or household, any benefit to which this section applies; and
>
> (b) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income,
>
> there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent of the benefit.
>
> (2) The benefits to which this section applies are accommodation (other than living accommodation) entertainment, domestic or other services, and other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection), excluding however - [specific benefits not applicable in relation to the issues in this section of this decision]".

27. Section 156 sets out the amount of the benefit to be charged:

> "(1) The cash equivalent of any benefit chargeable to tax under section 154 is an amount equal to the cost of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit.

(2) Subject to the following subsections, the cost of the benefit is the amount of any expense incurred in or in connection with its provision, and (here and in those subsections) includes a proper proportion of any expense relating partly to the benefit and partly to other matters.

...

(5) Where the benefit consists in an asset being placed at the employee's disposal, or at the disposal of others being members of his family or household, for his or their use (without any transfer of the property in the asset), or of its being used wholly or partly for his or their purposes, then the cost of the benefit in any year is deemed to be --

(a) the annual value of the use of the asset ascertained under subsection (6) below; plus

(b) the total of any expense incurred in or in connection with the provision of the benefit excluding [the cost of acquiring or hiring it].

(6) Subject to subsection (7) below [not relevant in the current appeal], the annual value of the use of an asset for the purposes of subsection (5) above-

(a) in the case of land, is its annual value determined in accordance with section 837; and

(b) in any other case 20% of its market value at the time when it was first applied (by those providing the benefit in question) in the provision of any benefit for a person or for members of his family or household, by reason of his employment."

28. We note the difference in subsection (5) between an asset being placed at an employee's disposal, and its being used wholly or partly for his purposes. We shall return to this distinction in the case of the My Fair Lady Issue.

29. Section 168(3) provides that for the purposes of this Chapter -

"all such provision as is mentioned in this chapter which is made for an employee, or for members of his family or household, by his employer…is deemed to be paid or made for him or them by reason of his employment, except any such payment or provision which is made by the employer, being an individual, in the normal course of his domestic, family or personal relationships."

30. As a result of this section the mere provision of a benefit to Mr Denny by Man Management becomes taxable under Sch E because he was a director of the company. There is no requirement that the benefit was provided because he was a director.

31. HMRC argue that Mr. Denny obtained at least one of the following benefits in relation to the payments which Man Management made for building work at Foxcote Court:

(1) the benefit of expenditure by Man Management on the house;

(2) the benefit of meeting costs incurred by Mr. Denny in relation to the conversion of a barn into the house;

(3) the benefit of expenditure by Man Management on building and other works on Mr. Denny's land (other than on the construction of the house);

(4) the benefit of the provision by Man Management of works of enhancement to Mr. Denny's land by the provision of the office and equestrian centre;

(5) the benefit of bearing the cost of the equestrian centre and the office until (possibly) reimbursed in part in 2001;

(6) the effective benefit of a loan of the costs borne by Man Management;

(7) the provision of the equestrian centre for the use by (Mr. and) Mrs Denny as a place to conduct a hobby of horse breeding.

32. Each of these seems in our view to be capable in principle of constituting a "benefit" for the purposes of section 154(2). Clearly if there is an overlap between any applicable categories there cannot be a double charge.

Further Facts

33. The building work at Foxcote Court consisted of the conversion of a stone barn into the main part of a new house, the addition, at right angles to the line of the barn and at one end of it, of a breakfast room and conservatory, the addition at right angles to that, and thus parallel to the original barn, of a wing encompassing a pool room (which together with the conservatory and the old barn enclosed a garden), and the construction of an office and garage which projected from the C shape of the main house: and the movement and development of a further barn to form the equestrian centre which comprised stabling and grooms' accommodation. There were also works to the land, fences and drives surrounding the property.

34. The office area consisted of two offices, a lavatory and a small kitchen; to it a double garage was attached. The garage was the only garage attached to the house and at the property.

35. There was some doubt expressed by HMRC about the times at which the works on the conversion of the house, and that on the provision of the equestrian facilities had been undertaken. This concern made them suspect that amounts paid by Man Management had been paid, not for the office and equestrian facilities, but for the conversion works on the house itself. We therefore turn to the evidence in relation to planning permission.

36. Mr. Petersen told of us of his researches at Cotswold District Council into planning permission for the development at Foxcote Court:

(1) in April 1991 an application for a groom's dwelling and been withdrawn

(2) in May 1991 planning permission was granted for the conversion of farm buildings and the demolition of a steel structured barn (this appears to have been the barn moved to form the equestrian centre). This permission was varied in September 1992

(3) at the same time there was a separate planning permission granted for the construction of a new driveway

(4) in October 1992 permission was given for the erection of a garage/workshop extension

(5) in December 1994 permission was given for the erection of a shelter for broodmares.

37. In 1992 Mr. Petersen's researches indicate that an application for a change from agricultural to equestrian use had been permitted. A document provided by Mr. Denny indicated that this followed a consultation expiring in August 1992, the report on which indicated that the building had been already in place for nine months and that the application related to a change to equestrian use; it indicated that that the conversion of the barn was currently taking place.

38. A letter from Philippa Lewis to the accountants Kinsellas dated 20 April 2010 confirms that she worked as a groom for the horse rearing enterprise of Man Management from 1993 to 1997, and that when she started employment there were "first-class state-of-the-art modern facilities" including a large barn and accommodation.

39. A letter from a Cathryn Noon indicates that the office accommodation at Foxcote Court was used by Man Management and that from 1993 the equestrian facility was operational.

40. A letter and invoices from Robin Muller, the main building contractor on the development work, indicates that he worked on the conversion of the barn and the building of the contiguous buildings and the equestrian centre between 1992 and 1994.

41. We concluded that the work on the creation of the equestrian centre took place broadly contemporaneously with the conversion of the barn into the house and the construction of the contiguous buildings (the office etc) in the period 1992 to 1994.

42. Mr. Denny told us, and a letter from Robin Muller to him confirmed that he had employed a quantity surveyor in connection with the development work. Mr. Denny said that the quantity surveyor was required to split the invoiced costs of the development between those applicable to the equestrian centre and the office, which were to be paid by Man Management, and those applicable to the house which would be paid by Mr. and Mrs Denny. We believe that the surveyor was also engaged to control the amounts charged by the relevant suppliers.

43. Letters from Robin Muller suggested that the total cost of the barn conversion was £350,000, and that of the equestrian centre and the office some £100,000. (These letters however were written some 15 years after the work had completed).

44. A letter of 2011 from a retired partner of Monahans, Mr Denny's accountants at the relevant time, to Mr Denny recounted that his recollection was that a quantity surveyor was engaged, that Mr Denny was particular to ensure a proper division of costs, and that the accountants "were satisfied when preparing business accounts that costs had been allocated correctly".

45. An e-mail of 2012 from BLB Kilminster Beer suggests that in 1993/94 the conversion costs for Foxcote Court would have been £1000-£2500 per square metre. The area of the house (excluding office and garages) was some 450 m². That would suggest a conversion cost of some £450,000-£1,125,000.

46. Man Management's accounts show that it paid a total of £216,000 towards the development costs. There were before us two schedules with supporting invoices showing costs funded by Man Management in the period to 28 February 1993 of £204,136 (excluding VAT).

47. Included among those invoices were the following:

(1) screen of trees £3618

(2) slates £7908

(3) new road £4315

(4) water mains separation £5287

(5) Bath stone flags £2240

(6) barn conversion (Robin Muller number 5) £30,440

(7) barn conversion (Robin Muller number 1) £14,363

(8) joinery and glazing £24,614 in total

(9) intruder alarms £1525.

48. The invoices are variously addressed to Man Management, Mrs Denny, Mr. and Mrs Denny and Mr. Denny.

49. These costs were incurred some 20 years ago. It was quite understandable that Mr. Denny could not tell us precisely what each individual invoice related to.

50. It seems to us that the costs paid by Man Management may be divided into three categories:

(1) those which, from the invoices, may be seen clearly to relate to the equestrian centre or the office only;

(2) those which so appear to relate to matters which benefitted both the equestrian centre or the office and the house; and

(3) those which do not appear to relate to the equestrian centre or the office.

51. We would include in category (3) those costs which relate to the garage attached to the office. This was the only garage on the site and we believe it is highly likely that it would have been used by Mr. and Mrs Denny. They may have used it to garage cars provided by Man Management, but it seemed to us to be more of an enhancement to the house than the addition of a facility for the office or equestrian centre.

52. Such a division is consistent with the comparison which may be made between the £216,000 of expenditure in Man Management's accounts and Robin Muller's letter indicating that the cost of the equestrian centre was £100K. It means that some of the costs borne by Man Management were not or were not solely, for the purposes of the equestrian centre or the office.

53. In a deed dated 15 June 1992 between Man Management and Mr. and Mrs Denny, it was recited that:

"A. [Mr. and Mrs Denny, the "Landowner"] own [the freehold of Foxcote Court] and have agreed to allow the Company the right to use the land at [Foxcote Court] for the purpose of horse breeding and to construct all necessary buildings and facilities required for such activity.

"B. [Mr. and Mrs Denny have] also agreed to allow the Company to build an office block for the purpose of carrying out its trading activities to include without limitation the storage, packaging and distribution of the company's business products and materials….

"C. The Landowner consents to the carrying out of the Works by the Company.

54. The deed contained the following clauses:

"3.1 In consideration of the obligations of the Company in this Deed the Landowner consents to the Company carrying out Works on the terms set out in this Deed

"3.2 Nothing in this Deed will place the Company under an obligation to the Landowner to carry out the Works, but if it does carry them out, it must do so on the terms of this Deed and at its own cost.

"5.1 The Landowner agrees to pay the Company the Value Uplift at the date of termination of this Deed.

"8. This Deed shall become effective upon signature by the Parties and shall remain in effect until the parties agree in writing to terminate this Deed or on 14 days written notice by the Landowner to the company."

55. The Value Uplift was defined as "the standalone accrued value of the Works as at the date of termination of this Deed as determined by a Chartered Surveyor

of no less than five years experience. For the avoidance of doubt the valuation is the hypothetical market value of the Works alone (independent of the land on which they are situated) to a hypothetical unconnected party to this Deed".

56. The Works were defined to include the construction of an office block adjoining the house including garages, toilets, bathroom facilities, kitchen and storage and packing areas; the division of the land, hedging and road access; the conversion of a barn (different from the one which was converted into the house) into a modern horse breeding establishment; the laying of concrete, and the provision of sheds and workshops and grooms' accommodation in connection therewith.

57. No other written license or lease was given to Man Management over any of Foxcote Court. No rent was paid by Man Management for the use of the property.

58. Foxcote Court was sold in June 2001 for £1,550,000. From the proceeds (the deposit and later completion monies) we were satisfied that Mr. Denny paid £162,096.98 to Man Management. But an issue arose as to whether the payment made was wholly in satisfaction of Mr. and Mrs Denny's obligations under the deed dated 15 June 1992 or whether part was paid as an accretion to the balance on the loan account indebtedness of the company to Mr Denny.

59. The company's accounts for the year ended 31 March 2002 show a net loss on disposal of fixed assets of £107,730. The fixed asset notes show that at the beginning of the year Investment in Improvements to the property was £180,640 and that in motor vehicles was £14,285. These assets are no longer present at the end of the year. Therefore the book value of the assets sold of that nature was some £194,000. The loss on disposal of £107,000 indicates that the proceeds of disposal were no more than £87,000.

60. The same accounts show an increase in the amount due to Mr. Denny for the year from £16.7k to £23.2k and a reduction in bank overdraft from £109k to nil together with a loss for the year about £40k.

61. In the light of these figures it seems likely to us that only some £90,000 of the payment to Man Management of £162,096 was treated by the company as being in the reimbursement of the Uplift Value in accordance with the deed of covenant. We are unable to conclude as to how the remaining £72,096 was applied.

62. Mr. Denny produced a copy of a letter from that time from him to his solicitors recording that his agents would verify that no potential purchasers had an interest in the stables and promising a valuation from the agents which valued the office at £20,000 and the stables and attendant buildings and £54,000. Mr. Denny told us that he had been told that there was very little market interest in horse stabling at that time.

63. Mr. Denny was not able to say how he arrived at the sum of £162,096.98 which was paid to Man Management. He said however that the valuation obtained was regarded (presumably by him and Mrs Denny) as unacceptably low.

Discussion

64. Mr. and Mrs Denny owned the freehold of Foxcote Court. The deed of 15 June 1992 evinces no intention that Man Management should acquire any interest in that land. No exclusive right of occupation is conferred on the company and no words of transfer are used. We conclude that neither by agreement nor by virtue of the payment of any of the expenses incurred did Man Management acquire any legal or equitable interest in the land nor that Mr and Mrs Denny intended that such should be the case.

65. As a result we also conclude that the buildings became the property of Mr. and Mrs Denny as they were built on their land, and that the company had no legal or equitable interest in them. The fact that the costs appeared in Man Management's accounts as an asset does not persuade us to the contrary.

66. Consequently no charge can arise under section 145 TA 1988 in respect of the provision of living accommodation because Man Management could not provide accommodation at Foxcote Court for Mr and Mrs Denny.

67. The accounts of Man Management indicate that it carried on the horse breeding activity at Foxcote Court; the letter from the groom indicates that she was employed by the company; the evidence of Mrs Harker indicated that the office accommodation was used for the purposes of the business of promoting and selling Mr. Denny's expertise. All these activities required access to Foxcote Court.

68. The recitals in the Deed of 15 June 1992 indicate that Mr. and Mrs Denny had "agreed to allow the company the right to use the land ...for the purposes of horse breeding" and had agreed "to allow the company to build an office block for the purposes of carrying out its trading activities".

69. We conclude that Mr. and Mrs Denny granted a licence to the company to use the equestrian centre and office in the terms of the deed. The deed (and therewith the licence) was terminable on 14 days notice by Mr. and Mrs Denny.

70. It seems to us that the meeting of the expenses of building work at Foxcote Court can properly be considered a "benefit" for the purposes of section 154 TA 1988. To the extent that the company paid for works to the house the benefit is clear; to the extent that the company paid for work such as the construction of a new drive, a benefit accrued both to the company and to Mr. and Mrs Denny. But in our view when the company paid for other works which enhanced the value of Mr. and Mrs Denny's land, Mr. and Mrs Denny also received a 'benefit' for the purpose of section 159/6 notwithstanding that the company obtained the benefit of the use of those works for its own activities for the period of the deed.

71. The ability of Mr. and Mrs Denny to terminate the agreement with the company evidenced by the deed of 15 June 1992 on 14 days notice - indicates to us that the benefit of the enhancement of the land as a result of the works should not be regarded as emasculated by the licence given to the company to use the land. Because that licence could be determined on 14 days notice, the value of the land was enhanced in practice to the same extent as if unencumbered by a licence or a lease.

72. We conclude that:

(1) to the extent that the company paid liabilities incurred by Mr. or Mrs Denny, it provided a direct benefit to them; and

(2) to the extent the company itself incurred liabilities for the building work (whether through the express or implied agency and Mr. or Mrs Denny or otherwise), it provided, through the enhancement of their land, a benefit.

73. These benefits were provided at the time the expenditure was incurred by the company. Once paid no further benefit accrued. This was not a case of a company continuing to make buildings available to Mr. and Mrs Denny since the land and buildings remained in their sole ownership. Thus any benefits accrued in the years 1992/93 and 1993/1994 only.

74. The amount of the benefit is determined by section 156. It is the cost of the benefit (the expense incurred by the company) less any amount "made good" by Mr. or Mrs Denny. That is the case even having regard to the licence granted to the company and the obligation to pay the Value Uplift in the deed of 15 June 1992. That is because the “expense incurred in or in connection with" the provision of the benefit is not reduced by the value of any licence granted (particularly where that licence was terminable by Mr. and Mrs Denny on 14 days notice) and the obligations under the deed fall to be ignored in determining the expense because section 156 (1) distinguishes between the cost and so much as is made good by the employee: "cost" is therefore not to be determined in the first instance after deducting the amount made good. The effect of payment of the Uplift Value obligation in the deed is in our view properly to be considered as the making good of cost even though payable at a later and possibly unascertainable date.

75. The obligation under the Deed to pay the Value Uplift is limited to the value of the office area and of the equestrian facilities. It seems to us therefore that any amount of cost paid by the company which did not relate to those facilities cannot be regarded as having been made good by the Dennys’ payment to the company. On our inspection of the invoices we concluded that £100,000related to (or were not shown not to relate to) works on the house (and garage).

76. That leaves expenditure of £116,000 (=£216,000 - £100,000). From this must be deducted any amount made good by Mr. and Mrs Denny. That for the reasons set out at [61]was £90,000 (whether or not that was the amount contractually due

it was nevertheless clearly "made good" to the company). We conclude that the amount of the benefit arising to Mr. and Mrs Denny in the years 1992/93 and 1993/1994 was £126,000. We allocate this sum £80,000 to 1992/1993 and £46,000 to 1993/1994

77. This benefit arose to both Mr. Denny and Mrs Denny. We accept Mr. Denny's submission that only 50% of the total benefit is properly attributable to him. That seems to us to follow from the words of section 156 (2) which provide that the cost of a benefit "includes a proper proportion of any expense relating partly to the benefit and partly to other matters".

78. HMRC argue that the benefit should be apportioned in accordance with Mr and Mrs Denny's respective shareholding in Man Management, which was in the ratio 80.20. We do not agree. Mr and Mrs Denny received the same benefit. The benefit did not 'relate' to their shareholding but to their separate positions as directors and as owner of the land. A "proper" proportion should not, in these circumstances, be determined by reference to shareholdings.

79. Mr. Denny says that if he received any benefit it would normally have been deducted from his loan account for the company which was in credit. That would have been the making good of any expense incurred by the company and would therefore reduce the taxable benefit to nil.

80. However no such adjustment was made to Mr. Denny's loan account, and it seems to us that no such adjustment was intended. There was no evidence that a benefit of this nature was, under any agreement between Mr. Denny and the company, intended to be reflected by an adjustment to his loan account. Indeed the existence of the Deed of 15 June 1992 suggests to the contrary. We conclude that the benefit was not made good in this way.

81. We should note for completeness that we do not regard the arrangements as giving rise to a loan (from the date of the expenditure was incurred to the date of the sale of Foxcote Court) to Mr or Mrs Denny for the purposes of the beneficial loan provisions of section 160. A loan for those purposes includes any form of credit (see subsection (5)(a)), but "credit" indicates to us an arrangement under which a fixed or determinable sum is to be paid on a set or determinable future date in consideration or a sum or other consideration provided to the creditor where that sum is determined by reference to the monies lent or consideration agreed. In this appeal Man Management did not lend money, nor was the amount payable at the end of the arrangement by reference to the amount expended or a price agreed by the company.

82. Lastly Mr. Denny argues that HMRC were out of time to make the assessments in respect of 1992/93 and 1993/94 since they did not advise him until 4 November 2002 that these years were being looked at.

83. The schedule of assessments [and other things] before us indicates that these assessments were made on 29 March 1999 and 16 March 2000 respectively.

84. These were assessments made under the provisions which applied before the self assessment regime. Section 34 TA 1988 provided in relation to assessments made under provisions before the self-assessment regime came into force of that:

> "(1) Subject to the following provisions of this Act ... an assessment to income tax ... may be made at any time not later than five years after the 31st January next following the year to which it relates."

85. For 1992/93 the relevant 31st January was 31 January 1994; five years after that was 31 January 1999. For 1993/94 the relevant date was 31 January 2000. The dates in the antepenultimate paragraph are after those dates.

86. However section 36 provides that:

> "(1) An assessment on any person ... for the purpose of making good to the Crown a loss of income tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates."

87. There was no suggestion that Mr. Denny had been fraudulent. If, however, in delivering his tax return he (or his agents) were negligent then the 20 year time limit applies. The question is whether by omitting a sum in relation to any taxable benefit any of them were negligent.

88. In our view they were. It may be that he was advised that no benefit arose, but while that may make him personally less culpable, section 36 encompasses the negligence of a person acting on the taxpayer's behalf, and that will in our view include those who advised on and submitted his tax returns.

We conclude that the 1992/93 and 1993/94 assessments were made in time .**2) The Trust Issue.**

89. Following the evidence of Mr. Lyster Denny and the documentary evidence adduced by him to the tribunal, Mr Foxwell was minded to accept that no benefit within section 740 TA 88 had accrued to Mr. Denny in relation to the payment of £560,000 procured by Mr. Lyster Denny to Mr. Denny in 2000 in connection with the purchase of Can Vingut. For completeness (and to assist with our later discussion of the Undeclared Income Issue) we summarise the relevant evidence that and our conclusions in relation to this issue here.

90. We accept Mr. Lyster Denny's evidence that in the 1990s he and his wife transferred property - we understand this to be their shareholdings in the companies owned and controlled by them - to a non-resident trustee to hold on trust for each of them and their issue. A few years later the shares were sold by the trustee and at about the same time as, or before the sale, Mr. and Mr. Denny and his wife left the UK to sail the world. They were away at sea for many years. (These steps had no doubt the added benefit of mitigating the burden of capital gains tax on the disposal of shares that would have arisen if Mr. Denny and his wife had themselves sold the shares when they were UK resident). Sometime

after the sale of the shares the trustees appointed the substantial majority of the trust assets to Mr. Denny and his wife so that by 2000 the funds held by the trustees amounted only to some £15,000 plus a loan made to Mr Lyster Denny of £100,000. Mr. Lyster Denny and his wife managed investment of those funds appointed them through the offices of Kingston Smith in the Channel Islands and Cheviot Capital.

91. In 2000 Mr. Denny contacted Mr. Lyster Denny to ask for a loan of £560,000 in for the purchase of Can Vingut. This represented some 15% to 20% of the funds which had been derived from the trustees' appointments. Mr. Denny agreed to make the loan and using the phone on the yacht on which he was travelling the world, gave instructions for the transfer to be made from the funds held on his behalf for him by Cheviot Capital.

92. Mr. Lyster Denny said that his initial expectation was that repayment would be made from the sale proceeds of Foxcote Court which he understood Mr. and Mrs Denny were intending to sell. However the sale took place later than planned and he understood that Mr. and Mrs Denny were able to obtain a loan secured on Can Vingut before they sold Foxcote Court, and that the substantial majority of his advance to his father was repaid from that borrowing.

93. The funds were transferred in 2000. Repayment was made:

(1) as to £20,000 in December 2000

(2) as to £499,993 in February 2001;and

(3) as to £40,000 in May 2001, although there was some concern about the date of this last payment.

94. We find that Mr. Denny borrowed £560,000 from his son and repaid it.

95. Section 740 TA 88 provides:

"(1) This section has effect where -

(a) by virtue or in consequence of the transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled outside the United Kingdom; and

(b) an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739 by reference to the transfer receives a benefit provided out of assets which are available for the purpose by virtue or in consequence of the transfer or of any associated operations.

“(2) Subject to the provisions of this section, the amount or value of any such benefit as is mentioned in subsection (1) above, if not otherwise chargeable to income tax in the hands of the recipient shall-

(c) to the extent to which it falls within the amount of the relevant income of the years of assessment up to and including the year of assessment in which the benefit is received, be treated for all the purposes of the Income Tax Acts as the income of the individual for that year;

(d) to the extent to which it is not by virtue of this subsection treated as income for that year and falls within the amount of relevant income in the next following year of assessment, be treated for those purposes at his income for the next following year,

and so on for subsequent years, taking the reference in paragraph (b) to the year in question in paragraph (a) as a reference to that and any other year before the subsequent year in question."

96. We find that section 740 does not have effect because even if the loan to Mr Denny could be considered a "benefit" within s 740(1)(b) it was not provided out of "assets which were available for the purpose", but rather from funds owned by Mr Lyster Denny available for his own purposes. No charge arises under its provisions.

(3) The Palm Beach Issue.

97. Mr. Denny did not dispute that Palm Beach was sold in May 2002. What is less clear is how much it was sold for, and whether Spanish tax was paid on the gain. There was also an argument that, at least for part of the period of ownership, Palm Beach was the principal private residence of Mr. Denny.

The evidence

(A) The Sale Price

98. Mr. Denny told us that the sale of Palm Beach was effected by Mrs Denny who held a power of attorney for that purpose. He told us that his relationship with Mrs Denny was difficult at this time. He had no written record of the sale price but had suggested to HMRC that it was of a sterling value of £58,000.

99. Mr. Petersen told us that in October 2006 he had had a meeting with Mrs Denny. The notes of that meeting (taken by a colleague) record that Mrs Denny said that she thought that the flat was sold for euro120,000.

100. Mr. Petersen produced a partially obscured copy of a document in English which he said was given to him by Mrs Denny. It provided:

"Mr Richard William Geoffrey Denny and Ms Linda May Denny hereby undertake to sell the Property described in the First Clause above for a price of ….(€201,666), to Mr. Cayetano Cornet Artigas and Ms Maria Luisa Soler Rius, who undertake to purchase the said Property.

Mr. Cayetano Cornet Artigas and Ms Maria Luisa Soler Rius deliver in this act to Mr. Richard William Geoffrey Denny and Ms Linda May Denny the amount of ….(€9343) in cash"

Te remainder of the document is mainly obscured by a bank paying in slip showing 8,440 euros paid into an account in the name of Richard William Geoffrey Denny at Santander Central Hispania Evissa (Catalan for Ibiza) on 9 April 2002. A piece of paper attached to the paying in slip shows "9,343 – 8440 = 903" with a handwritten note against it saying 'LD teak cash for Graham'.

At the end it appears that the purchasers have both signed the document ."

101. The copy of the part of the document provided to us does not contain any identification of the "Property". There is a partially obscured reference to "before 11 June" but no other identification of date.

102. Mr Foxwell suggested that in view of this document the amount of Euro 120,000 in the note of the meeting with Mrs Denny was probably a misdescription of £120,000 which was the equivalent of €201,000 at that time, more or less.

103. Mr Denny notes that the document is in terms an undertaking to sell rather than a transfer or an agreement. He also suggests that it might relate to the sale of Casa Jardine rather than Palm Beach. He says that if the sale price was £120,000 then there would have been an incredible increase in value of 800% over 16 years.

104. We conclude that it is likely that this document did record the agreement to sell Palm Beach. Under the divorce settlement of 19 November 2003 between Mr and Mrs Denny, Casa Jardine was to be sold forthwith. Thus it had not been sold by 9 April 2002, the date on the paying in slip.

105. We also find, on balance: that some weight can be given to the reported remarks of Mrs Denny as to the sale price, that the transposition of euro and sterling is not unlikely, and that whilst an 800% increase represents something in excess of a compound annual return of 20%, that is not unbelievable in a heating property market.

(B) Spanish tax

106. In the note of the meeting referred to above, Mrs Denny is recorded as indicating that she thought that Spanish tax of about 17% was paid on the sale of Palm Beach.

107. Mr. Denny provided us with a copy of a letter (in English) from a firm of Spanish lawyers, Ibiza-legal, which said:

"Responding to your request, I can confirm, that a property in Spain can only legally be transferred and inscribed in the Registry of Property, when all taxes had been paid.

"[a 35% tax is payable before 1 January 2007 on a gain. The seller must]withhold 3% of the total purchase price and pay it directly to the Spanish tax agency.

"If the deposit of 5% turned out to be less that (sic) the amount owed by the non-resident (the capital gains being calculated on the difference of the purchase price and the selling price) the seller is required to pay the rest of his tax.

"If the deposit of 5 per cent it is greater than the amount of tax owed by the non-resident, the seller can also claim a refund."

108. That letter was dated 10 October 2012. In an earlier letter to Kinsellas the same firm had said

"I can confirm that in 2002 a non-resident had to pay 5% of the purchase price as a prepayment of Spanish tax for the benefits of selling. Then 35% of the difference of the purchase price and the selling price as Spanish capital gains tax less than 5% prepayment."

109. We conclude that it is likely that 5% of the purchase price was withheld by the seller on the transfer of Palm Beach and accounted for to the Spanish tax authorities. Given Mr Denny's evidence as to the acquisition price (see below) it seems likely that a gain arose in Spain on the sale and that the 5% was not refunded. That 5% would in our view would have been tax on account of the Spanish capital gains tax liability on the sale.

110. We were unable to conclude on the evidence before that any amount of Spanish tax had been paid in excess of the 5% withheld.

111. Articles 13 and 24 of the UK/Spain Double Tax Treaty, which have effect by virtue of section 788 TA 1988, provide that capital gains on the alienation of immoveable property in Spain might be taxed in Spain and that Spanish tax should be allowed as a credit against UK tax on the same gain.Thus the 5% Spanish tax on the gain which we have found to have been paid should be set against UK CGT payable

(c) Principal Private residence

112. Section 222 TCGA 1992 provided:

"(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in-

(a) a dwelling house or part of a dwelling house which is, or has at any time in his period of ownership been, his only or main residence ...

"(5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period -

> (a) the individual may conclude that question by notice to the inspector given within two years from the beginning of that period but subject to a right to vary that notice ...

"(6) In the case of a man and his wife living with him -

> (a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the husband and wife, it must be given by both ...".

113. Section 223 (1) provided:

> "(1)No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling house or part of a dwelling house has been the individual's only or main residence throughout the period of ownership ...
>
> (2) Where subsection (1) does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be:
>
> > (a) of the length of the part or parts of the period of ownership during which the dwelling house, or the part of the dwelling house was the individual's only or main residence, but inclusive of the last 36 months of the period of ownership in any event, divided by
> >
> > (b) the length of the period of ownership".

114. We accept Mr Denny's evidence that from time to time he resided at Palm Beach. It was therefore (one of) his residences. The question which arises is whether at any time it was his main residence. No suggestion was made that a notice had been given under section 222(5), therefore the question is whether it was, as a matter of fact, his main residence at any time.

115. It was clear that while Foxcote Court was owned by Mr and Mrs Denny, that was regarded as their main residence. Thus the only period in which Palm Beach could have been Mr Denny's main residence was from 1 June 2001, when Foxcote Court was sold, to April 2002 when Palm Beach was sold (having been put on the market in October or November 2001).

116. During this period Mr Denny also owned 23 Lingfield Close (which was purchased on 18 May 2001), and Tern Cottage, which was he told us occupied by his mother in law. Mr Denny told us that some of the furniture from Foxcote Court was stored at Lingfield Close.

117. We also accept Mr Denny's evidence that after Foxcote Court was sold he went to Palm Beach from time to time. He said he spent a bit of time in Ibiza

every month in between his work commitments, and after the sale of Palm Beach stayed in Casa Jardine. HMRC say that his residence at Palm Beach for only three to six days a month indicates that Lingfield Close, not Palm Beach, was his principal residence.

118. We take into consideration also the fact that Mr and Mrs Denny's marriage was probably in difficulties at this stage because divorce papers were served in March 2003. Mr Denny told us that thereafter the pattern of his life changed.

119. Mrs Denny is recorded in the meeting notes to have said that after the sale of Foxcote Court she went to live in the flat at Palm Beach. She is recorded as describing Lingfield Close ("Stratford") as having been bought for Mr Denny and as having said that she was not invited there.

120. We conclude that it is unlikely that from June 2001 to the sale of Palm Beach in 2002 that Palm Beach was Mr Denny's main residence.

121. (d) Deductible expenditure

122. Mr Denny told us that the flat had been purchased in about 1987 for £17,800. We accept that evidence. It is likely that the price of a property abroad bought fairly early on in his life would be remembered.

123. He guessed that £4,000 had been spent on improvements over the period of ownership. Expenditure on an asset is allowable by section 38(1) TCGA in the computation of the gain only if it is incurred wholly and exclusively for the purpose of enhancing the value of the asset and is reflected in the state or nature of the asset at the time of disposal. Mr Denny provided no evidence as to the satisfaction of these conditions, but it does seem likely that some such expenditure may have been incurred even on a holiday apartment. We would set it at £2,000.

124. (e) Calculation of taxable gain

125. We conclude that the gain should be calculated on the following basis:

(1) Disposal proceeds, £120,000

(2) Allowable expenditure –

(a) Acquisition cost £17,800;

(b) Agent's and lawyers selling costs, £4,000

(c) Enhancements £2,000

(3) Calculate chargeable gain

(4) Divide by 2

(5) Apply indexation or taper relief

(6) deduct annual exempt amount (2002)

(7) Calculate tax payable

(8) Deduct 5% of 50%(Mr Denny's share) of £120,000 double tax relief .

126. In the calculation of the chargeable gain, deduction should be made for any eligible allowable losses arising from Mr Denny's share dealings (see Issue (5) below).

(4) The My Fair Lady Issue.

127. We have set out at 24-29 above the statutory provisions which applied between 1999 and September 2003 in relation to the charge to tax on benefits supplied to employees and officeholders.

128. The questions which arise under this heading are:

(1) whether Man Management provided any benefit to Mr. Denny by either renting My Fair Lady to him for particular periods or more generally in making the boat available to be used by him;

(2) what was the cost incurred by Man Management in, or in connection with such benefit (because, by section 156(1), the taxable amount is the cost of the benefit); and

(3) how much of any such benefit was made good to Man Management by Mr. Denny (because section 156(1) requires the taxable amount to be determined after the deduction of any amount made good)?

129. Before we launch into the facts, the first two of these questions requires a little amplification.

130. First, when a car is "made available" to an employee for his private use, specific provisions (section 157 and following) determine that charge to tax; but section 168(6) provides a gloss on the concept of availability for private use by providing:

"(6) ... (a) a car made available in any year to an employee ... is deemed to be available in that year for his ... private use unless the terms on which the car is made available prohibit such use and no such use is made of the car in that year;".

131. In the case of the use of a boat there is no such deeming provision, and no specific charge on "availability" for private use. Instead of the question is simply whether Mr Denny received a benefit as defined and what the cost of that benefit was. A benefit may consist of permitting an employee to use an asset or in making it available for his use. If the boat was used by Mr Denny, section 156(5) provides a method of calculating the amount of the benefit attributable to that use. Section 155(6) also applies where the boat was "placed at the employee's disposal". We shall therefore have to consider whether it was placed at Mr Denny's disposal not only for the period in which he rented it from Man

Management but for the whole of each year (or for those parts of the year when it was not rented to others) regardless of whether or not he used it, and whether the amount of the benefit would be different.

132. Section 156(5) provides:

> "(5) Where the benefit consists of an asset being placed at an employee's disposal [or the disposal of his family] for his or their use (without any transfer of the property in the asset), or of its being used wholly or partly for his or their purposes, then the cost of the benefit in any year is deemed to be --
>
> (a) the annual value of the use of the asset ascertained under subsection (6) below; plus
>
> (b) the total of any expense incurred in or in connection with the provision of the benefit excluding --
>
> (a) the expense of acquiring or producing it incurred by the person to whom the asset belongs; and
>
> (b) any rent or hire charge payable for the asset by the person providing the benefit.
>
> "(6) Subject to subsection (7) below [which applies where the employer rents an asset from another and paid a higher rental], the annual value of the use of the asset, for the purposes of subsection (5) above --
>
> (a) in the case of land...
>
> (b) in any other case is 20% of its market value at the time it was first applied ... in the provision of a benefit for any person [or his family] by reason of his employment."

Thus the cost of such a benefit of the boat in any year is deemed to be 20% of the initial market value of the boat plus the expenses incurred in connection with its provision. (If section 156(5) did not apply because the boat was not placed at Mr Denny's disposal or used by him, the cash equivalent of the benefit would be the cost incurred by Man Management in its provision.)

Further facts and evidence

133. In paragraph 23 we explained the background to the purchase of My Fair Lady. It was bought by Man Management, new, in 1998 for £306,000. It was purchased with the aid of a marine loan for which the monthly payment was £3,500.

134. The boat was moored at San Antonio Marina. That was about 2 1/2 miles from Palm Beach. Ibiza is 25 miles across.

Plans for dealing with the boat.

135. A letter from a former senior partner of Monahans confirmed that Mr Denny had consulted him in relation to the purchase of a yacht which was to be chartered out. He advised on the tax ramifications and said that any use by a director or employee must be at current market value.

136. A letter of 2001 from Monahans to Mr Petersen records advice to Mr Denny that the boat should not be generally available to Mr. Denny for his private use, and that if he wished to use it he should book it as any other customer and pay the same rate.

137. In accordance with advice given to him by Monahans Mr. Denny wrote to the employees of Man Management Ltd in 1998. He advised that the boat would not be available for personal or private use without payment of the going rate. In 1998 Man Management's employees were confined to 2 grooms (earning about £15,000 per annum), sales office and a couple of the secretarial staff (earning about £25,000 per annum and Cathy Noon (also on about £25,000 per annum), himself and his wife. Mr. Denny also wrote letters to himself and his wife on 19 June 2001 making the same point.

138. In one letter to his accountants Mr Denny says that his plan was to move to Ibiza but to keep Man Management functioning. One of his plans in that regard was for it to earn money from boat chartering.

139. The advice from his accountants informed Mr Denny's approach. That can be seen in the formal and fairly pointless letters to the employees of the company. We accept that he would have tried to act so as to follow that advice. Thus for example we believe that this advice makes it more likely that Mr Denny would in fact have made the payments under the invoices we describe below.. We also accept that Mr Denny intended Man Management to try to run a boat chartering business. But we believe that he also saw the advantage of being able to use the boat, although he recognised that he would have to pay for it.

Mrs Harker's evidence and marketing the boat

140. Mrs Harker told us, and we accept:

(1) that the boat was acquired in 1998 and became available for use in June 1999;

(2) that a John Malcolm had been engaged to help with the marketing of the boat. John Malcolm had experience in marketing and worked for Man Management for between six and eight months for about two days a week. In addition to other marketing activities he helped with the production of a list of 32 travel or incentive companies to whom the boat might be marketed;

(3) she produced flyers advertising the boat and mailed the flyers and brochures to the potential clients;

(4) to the best of her knowledge Mr. Denny was charged whenever he used the boat and paid through his loan account with Man Management;

(5) the boat would only available for Mr. Denny if it was not booked by someone else;

(6) all bookings were taken by Debbie McNeill in Ibiza. The keys were kept by her. She lived close to the boat. Debbie McNeill helped look after some of the Denny's other affairs;

(7) if after Mr. Denny had booked the boat, a customer had come along the intention would have been that Mr. Denny would have been stood down. She gave no instance of that happening;

(8) initially they had also intended to market the boat by getting local bookings by circulating leaflets to local hotels. But they had missed the 1999 season and only really started marketing in 2000.

(9) Mr. Denny began to lose interest in the project when his marriage got into difficulties in 2002; and

(10) In 2003 the boat was sold for £114,894. There had been some confusion. She had originally been told that it would be sold for some £230,000 and had produced an invoice showing that figure. Then the company had been forced, she understood, to accept a lower figure. She issued a credit note and a new invoice showing the same date. So far as she understood the costs of finance of £3,500 per month under the marine loan meant that the company had to sell.

141. A letter from John Malcolm in May 2003 confirmed that one of his duties was to promote the boat charter business but says that despite his efforts with travel and incentive companies he was unable to secure any bookings

142. We were shown letters advertising My Fair Lady as a corporate hospitality venue. It was advertised as part of what was called the Ultimate Ibiza Experience in 2002.

143. We were also shown letters to incentive operators asking if they would be interested in promoting (on commission) incentive travel. We were shown glossy brochures advertising the Ultimate Ibiza Experience -- a short holiday in Ibiza centred around the use of My Fair Lady during the day.

144. Mr. Denny told us that advertising in Ibiza had been organised by Debbie McNeill who was retained on a commission basis.

145. It seemed to us that the initial idea of marketing locally had been quickly superseded by the idea of marketing to companies organising incentive packages for employees and others. The exercise had a hint of desultory formality about it – as if being done to comply with advice, rather than as a serious bid to make money.

Dealing with the boat.

146. Mr. Denny told us that My Fair Lady was kept in the water apart from times when it was brought out for routine maintenance. The only costs were for mooring fees. We accept this evidence.

Insurance

147. The only written evidence before us in relation to the insurance of the boat was a notice of endorsement to a policy of insurance for the year to 24 January 2004 which shows Man Management Ltd being insured for My Fair Lady:

(1) with a value of £295,000 including a jet ski valued at £5000,

(2) moored at Club Nautico San Antonio,

(3) that it is warranted that

> "owner/owners [sic] skipper on board and in charge at all times",

(4) an endorsement "excluding charter use on jet ski".

148. Mr. Denny said that the exclusion of charter use on jet ski implied that the policy included normal chartering. We accept that but we note that such chartering would be covered only if the owner or the owner's skipper was on board and in charge. Mr. Denny did not suggest that he or Man Management had employed a skipper to be in charge when the boat was being chartered.

149. We think it likely that a similar policy applied for previous years.

Hirings.

150. We were shown the following invoices for lettings of the boat. We were not told that there were any others:

1999

(1) Invoice June 1999 Ann Meyers. [2 x] two weeks. [2 x] £4000.

151. Mrs Meyers' husband was Mr. Denny's best friend. He died in the summer of 1999. A letter from Mrs Myers to HMRC indicates that it was quite possible that her late husband had chartered the boat but she could not be more definite since this was around the time of his death. She assumes that if the invoice was issued it was likely to have been paid by her husband.

152. Mr. Denny told us that he had seen Mr. Meyers when he was seriously ill in hospital. Mr. Meyers had enthused about the boat and agreed that he would be the first customer. This had been arranged and he had given Mr. Denny the money to make sure his wife went on the boat when Mr. Denny got it even if he could not be there himself. We accept Mr Denny's evidence.

(2) Invoice October 1999. Mr. Denny. Three weeks. £6000.

(3) October 1989. Mr. Horridge-Deakin. Three weeks. £3000.

153. Mrs Deakin was a friend of Mr Denny. A letter from Mrs Pamela Deakin to HMRC confirms that she did so charter the boat "having heard about the boat from a leaflet in a hotel I was visiting". This last sentence seemed to us to be over egging the pudding.

2000

(4) Invoice September 2000. Mr Denny. Three weeks. £6000.

(5) Invoice October 2000. Mr. and Mrs Brokenhoff. (two weeks). £2000.

154. Mr. Denny confirmed that Mr. Brokenhoff was known to him and was a competent sailor.

(6) March 2001. Mr. and Mrs Wilson. One week. £2000.

155. Mr. Denny accepted that Mr. Wilson was a fictitious name and that his address was one of Mr. Denny's addresses. He said that it had been a cash transaction in Ibiza and he had made up the name to the invoice. Debbie McNeill in Ibiza would have known the hirer. We could not understand the reason for the fictitious name. The hirer could not have wanted a VAT receipt in someone else's name and Mr Denny had no VAT or tax need to issue one in a particular name.

156. HMRC argue that this was a truly fictitious invoice. They ask whether a £350,000 boat would have been hired to an unnamed unknown person.

2001

(7) September 2001 Mr. Denny. Three weeks. £6000.

2002

(8) June 2002. Pam Deakin. Three days. £1000.

157. This was Mrs Deakin. See (3) above.

(9) September 2002. IIR Spier. Three weeks. £8000

158. We had no further information about Mr. Spier

159. Mrs Denny had told Mr. Petersen on 7 August that Mrs Deakin and Brokenhoff were all known to her and Mr Denny and had their own boats. She cast doubt on Mrs Deakin's ability to handle a boat.

160. We accept that the boat was let out. On balance we accept that the boat was let out to the people to whom these invoices were addressed. We think it likely that Mr Denny paid the invoices addressed to him (Mrs Harker is likely to

have ensured that) and he would have wanted to comply with the formalities advised by his accountants.

Making a profit

161. We were shown a schedule of charter rates which were to be asked for by the company. £1,000 per week in April and May, £3,000 per week in June, £4000 per week in July and August and £2,000 per week in September. If the boat had been hired out at these rates for two weeks in each of these months the annual income would have been £20,000. If one takes the £3,500 per month loan payment to represent interest and depreciation, the annual cost would be some £40,000 per year. That would suggest that the boat had to be hired for every week in the season to break even. HMRC say that the accounts show a loss on the boat for the period of ownership of some £280,000 ie £56,000 per year. But what is clear to us is that in order to make money from the boat very strenuous efforts would have had to have been made to let it out for each week of the season.

162. Mr. Denny told us that they had not made a success of the boat chartering. If he had had time he thought he could have made a success of it. In 2002 marital problems and the continuing cost of a boat made him realise that he had to sell. The decision he said was not linked to no longer having a place to lay his head in Ibiza.(HMRC had implicitly suggested that the boat was sold when he no longer was able to use it because he would no longer be in Ibiza).

163. The boat was sold to Formula Cycles. They bought and sold boats and chartered them. They had taken it into stock. Although Mr. Denny had acquired Can Vingut for £560,000 and 2001 and was spending money restoring it, Man Management was short of funds since the income earned from Mr Denny's speaking engagements had been declining.

164. HMRC queried the connection between a company called Squadron Yachts and Formula Cycles. Squadron Yachts was the holding company of Formula Cycles and had at some earlier stage asked for some management advice after someone there had heard Mr. Denny speak. Between about 2000 and 2001 he had acted as an unofficial umpire/chairman and given advice on leadership and marketing. He thought that after that time he had mentioned to one of the directors of that company that he wished to sell My Fair Lady and that director had also been a director of, or Squadron Yachts had been the holding company of, Formula Cycles, which had bought the boat. It did not seem to us that this connection affected the determination of the benefit Mr Denny derived in relation to the boat.

Our assessment

165. It seems to us that the marketing of the boat was unsuccessful. Whilst we had no doubt that Man Management would have hired the boat to someone who paid enough, it seemed to us that its efforts to hire it out were sporadic and not organised with any urgency. We got the impression that, particularly after the

first year, the attempts to market it almost disappeared. The boat in the end was hired principally by Mr. Denny and his friends. The likelihood that the insurance policy meant that the boat was uninsured when let indicated that chartering may have been limited to those who could be relied on. It seems to us quite possible that his friends hired it as a favour. There was no sense of an enterprise to which the use of the boat for hiring was vital. That conclusion seemed to be stronger in relation to the later years where it seemed as if Mr Denny (and through him Man Management) had given up, but was not weak in relation to the earlier years.

Discussion

166. Section 154 provides for a charge where an employee receives a benefit to which that section applies. Section 154(2) provides that the “benefits” include "benefits and facilities of whatsoever nature".

167. It seems to us that it will not always be the case that the acquisition of an asset from an employer or the provision of services by an employer will be a "benefit" in the ordinary meaning of that word even where the cost of provision exceeds the amount paid by the employee for it. Thus if a supermarket employee acquires from the shelves of a branch of the supermarket at the advertised sale price goods which are being sold at a loss, that is not the provision of such a favour or advantage to the employee which would enable it to be termed a benefit.

168. However section 154 (2) extends the meaning of "benefit" to "facilities". Thus, if what is provided is in the nature of a facility, the section applies.

169. It seems to us that the ability to hire, or the use of, a boat is a "facility", and that in Mr. Denny's case that facility was provided to him by Man Management. We therefore have to determine the emoluments which arise therefrom.

170. Section 156(5) applies where any benefit "consists of an asset being placed at an employee's disposal ... or of it being used wholly or partly for his ... purposes". It is clear that My Fair Lady was "used" for Mr. Denny's purposes on each occasion he hired it. We note in particular the words "used wholly or partly" in the subsection. Even if the boat was not used wholly for Mr. Denny's purposes it was "partly" so used .

171. Section 156(5) determines the amount of "the cost of the benefit *in any year*". By contrast the cash equivalent of the benefit, which forms part of the employee's income, is the "cost of the benefit". Thus, in our view, if the benefit is provided for only part of a year the "cost of the benefit" will be a part of the "cost of the benefit in [the]year". However the basis of apportionment is not specified and in particular it is not required that it should be pro rata temporis.

172. A question arises as to whether the boat was “placed at his disposal” rather then just “used”. My Fair Lady was not in any formal sense placed at Mr Denny’s disposal. But in practice, because of the desultory and unsuccessful

nature of the company's attempts to let it out, it was at his disposal for much of the year. In our view in these circumstances the boat may be treated as having been placed at his disposal when it was available for use.

173. But it seems clear to us that the boat was not provided as a facility for Mr. Denny when it was being used by someone else.

174. In our judgement the lack of dynamic pursuit of chartering the boat and the patterns of hire show that during the sailing season the boat was placed at his disposal when it was not being used by others. He would have had to pay for it but it was still available to him because there was no substantial likelihood that it would be used by someone else.

175. The sailing season was June to September, some 17 weeks. In 1999 it was used by other persons for seven weeks, in 2000, two weeks, in 2001 one week, and in 2002, three weeks. Thus respectively and there were 10, 15, 16 and 14 weeks in which it was available to Mr Denny.

176. The annual value was 20% of the boat's market value acquisition (see section 154(6)). We take that as 20% x £306,000 = £61,000. We accept Mr Denny's evidence that the costs of maintenance and insurance were small. We take them to be £2,000 per annum (acknowledging that Mr Denny paid for the mooring fees himself). Thus the cost for a year was £63,000.

177. The annual cost must be apportioned in some way to determine the "cost of the benefit". In our view it is properly apportioned by reference to the periods when the boat could or would sensibly have been used i.e. the sailing season. From the apportioned sum there must be deducted the amounts made good by Mr. Denny. As a result we arrive at the following figures.

1999:	10/17 x £63,000=	£37,058
	less	£6000
		£31,058
2000:	15/17 x £63,000=	£55,588
	less	£6000
		£49,588
2001:	16/17 x £67,000=	£59,294
	less	£6000
		£53,294
2002 :	14/17 x £67,000=	£51,800

less £nil___

£51,882.

178. If we were wrong and the boat was not placed at Mr Denny's disposal then the apportionment of the annual deemed cost would have to be made on some other basis. It seems to us that it should be on the basis of the period of his hire divided by the aggregate of all periods of hire. Thus for 1999 it would be 3/8 of the annual cost.

179. Lastly we note that Mrs Denny was also a director of the company and that, at least before their marital problems started in 2002 it is likely that she too used and could use the boat. A benefit a thus also arises to her. Indeed the benefit which arises to Mr Denny is deemed to arise directly to her because she is an employee for the purposes of the section and s 156(5) applies to a benefit provided to a member of the employee's family – namely in this case Mr Denny. There is however no double counting. Section 156(2) requires "a proper proportion" of the cost of the benefit to be chargeable if the cost of its provision relates partly to the benefit and partly to other matters. It seems to us that 50% of the cost of the benefit is properly to be treated as the benefit chargeable to tax on Mr Denny.

(5) The Undeclared Income Issue.

180. Mr. Petersen explained that in the year for which he initially opened an enquiry (1998/99) he saw no evidence as to how Mr. Denny paid for his living expenses in Ibiza and the cost of maintaining his boat there. He thought it odd that Mr. Denny had disclosed no Spanish bank account from which such expenses were met. Further when he examined Mr. Denny's disclosed bank accounts for the year to 28 February1998 he noted deposits of some £60,000 which did not appear to derive from payments by his employing companies. He had been satisfied that some £25,000 of that was received on the sale of Mr. Denny's mother-in-law's first home (before its replacement by Tern Cottage), and that some £10,000 came from verifiable other source; but was not given evidence as to the source of the other receipts. Accordingly he concluded that:

> (1) expenses of £25,000 had been met from other sources to cover the expenditure in Ibiza on the flat and for moorings, insurance and running costs for the boat; and
>
> (2) Mr. Denny received other income of £25,000.

181. Mr. Petersen then assumed, the contrary not having been shown, that the same position obtained in the years 1993 to 1997 and 1998 to 2003. In this he relied upon what HMRC term the "presumption of continuity" for which they rely upon *Jonas v Bamford* 51 TC 1.

182. Mr Denny's broad response to this is that he had always lived beyond his means and had borrowed from banks and on credit cards to finance his lifestyle, repaying when he sold houses which had increased in value.

183. But both in relation to this statement and in relation to any detail, the onus is on Mr. Denny to show that he had declared all his income, or that the expenses of living were met from declared sources and that the unexplained deposits to his bank account came from declared income or non-income sources. The way in which Mr. Denny could seek to do this was up to him. We suggested that he might prepare the schedule of assets and liabilities showing for each relevant year movements in his net assets, so that a decrease in the assets could be taken as the use of capital (or more borrowings) to fund his living costs in excess of any declared income paid to him, and thus to show that there was no hidden source of income. We made the suggestion that this may be done between the end of the hearing on 7 December and its resumption on 9 January 2013. However, on 9 January 2013 Mr. Denny told us that he had been unable to complete that exercise. Instead he offered us evidence in relation to particular expenses.

184. We note that Mr. Denny assented to the proposition that the sale of part of Coldicote enabled a new start. At this time it seems that in addition to the remaining part of Coldicote he owned Tern Cottage (subject to a mortgage), he owned (together with Mrs Denny) Palm Beach, had some £334,000 owing to him by Man Management and may have had life policies of some substantial value.

185. Turning to the detail, HMRC make the following points:

(1) Mr. Denny's disclosed bank accounts showed no expenditure for the Dennys' establishment in Ibiza - the maintenance of the boat and flat - costs which Mr. Petersen estimated that £25,000 per annum. Mr. Petersen suggested that this might be funded from undeclared income paid into an undisclosed bank account in Spain or Ibiza.

(2) Mr. Denny's disclosed bank accounts for the year to 28 February 1998 showed unexplained deposits of some £27,000.

(3) During 1995 and 1996 Mr. Denny incurred the following expenses in addition to the Ibiza expenditure:

(a) £32,828 on Tern Cottage for his mother-in-law

(b) £27,000 on shares

(c) £9000 on a car for Mrs Denny; and

(d) The expenses of living at Coldicote

but his declared income was limited to that from Man Management and his available cash to his drawings from his Man Management loan account (and any credit cards and other loans). In 1994/95 his declared salary had been nil but he had withdrawn £60,000 from his loan account, and in 1995/96 his declared salary was nil but some £70,000 had been withdrawn from his loan account. In

the round, Mr Denny lived an expensive lifestyle and his declared sources of income seemed insufficient.

186. Mr Denny's reply

(1) Unexplained Deposits.

187. Mr. Petersen had concluded that out of deposits of some £60,000 to Mr. Denny's bank account in the year to 28 February 1998, some £27,000 had been unexplained. Mr. Denny produced to us an analysis of the deposits Mr. Petersen had queried. His explanation included evidence in relation to the major deposits including £25,035 received from the sale of his mother-in-law's bungalow (and used in the purchase of Tern Cottage) and payments of £2.7k and £2.2k evidenced as moving from Man Management's bank account. He explained to our satisfaction the receipt of some £5,000 from the sale of shares, and £7,000 from his son Stephen. He was unable to account for deposits totalling some £4,500, and conceded that a payment of £1,655 (which at a much earlier stage he had erroneously (corrected some years before the hearing) classified as from a non-taxable source) was a royalty payment which should have been declared as taxable income. Mr Petersen's figure of £60k included amounts deposited in Mrs Denny's accounts. It seemed to us that if any of these were income, it was likely that they were the income of Mrs Denny rather than Mr Denny.

188. We were therefore satisfied that Mr. Denny had shown that the major items which Mr Petersen had queried did not represent undeclared income. We infer that it is likely that at least part of the unaccounted for £4,500 does not represent undeclared income (although given the earlier inaccuracies in Mr. Denny's description of the £1,655 of royalties, it was not completely clear that only items comprised in the £4,500 represented undeclared income receipts). Bearing in mind that the onus is on Mr. Denny to disprove HMRC's conclusion, we conclude that he has done so save to the extent of about £3,000 of the £4,500 and the royalty fees of £1655. We therefore conclude that the deposits to the account evidence additional undeclared income in that period of about £4700.

189. (2) Boat and Palm Beach costs in Ibiza.

190. Mr. Petersen argued that the obvious costs of maintaining Portofino and, after 1999, My Fair Lady, and the maintenance of the flat in Ibiza did not appear to be met from Mr. Denny's bank accounts or from drawing from his Man Management loan account. Mr. Petersen inferred that Mr. Denny had undeclared sources of income from which he met these expenses. He estimated that the costs of running the boat were £10,000 per annum, and that the maintenance of the boat and the flat would cost £15,000 pa. Mr. Petersen assumed that these would have been met in Ibiza from an undisclosed Spanish bank account.

191. Mr. Denny provided copies of e-mail correspondence with Ibiza Property Shop from 2009 indicating that running costs of the flat would have been £700-£800 per annum in 1998. The costs comprise rates and taxes, water, refuse and

electricity charges. He estimated electricity on the basis of four weeks' use a year (which was broadly supported by his diary entries). We suspect that there might have been additional costs – repairs, replacements and suchlike; but we accept that the running costs of Palm Beach in this period were probably no more than £1500 pa.

192. Mr. Denny told us, and we accept, that Sea Ray and Portofino were not kept in the water. They were moored only when Mr. and Mrs Denny were in Ibiza on holiday. Otherwise they were stored. They used the San Antonio Club Moorings where Mr. Denny was a member. The boats were stored for the remainder of the year. Insurance costs were in the order of £500 for Portofino: he showed us an invoice. He estimated the overall costs for Sea Ray as £630 pa and those of Portofino at £1353 pa.

193. My Fair Lady (from 1999) was kept in the water all year long. Mr. Denny said that he paid mooring fees himself even though the boat was owned by Man Management because the club membership was in his name and club rates are cheaper. He estimated mooring costs of £3,640 per annum.

194. We accept that the annual cost of mooring Sea Ray was likely to have been in the order of £1k pa, for Portofino £2,000 pa, and the mooring fees for My Fair Lady £4k pa..

195. Thus the total annual cost of the Dennys' Ibiza establishment would, in our view, have been:

(1) between 1992 and 1998 (Sea Ray), £3k

(2) between 1998 and 1999 (Portofino) £3.5k

(3) between 1999 and 2003 My Fair £5.5k (plus the rental of the boat from Management.

196. Mr. Denny said that he paid for these expenses with cash drawn in the UK before departure and by credit card in Ibiza. He says that he had a bank account in Ibiza at the time but it had limited funds. He was not able to provide bank statements for that account in the relevant periods. He showed us entries in his UK bank statements on 29 July 1997 and 13 August 1997 showing the withdrawal of respectively £3K and £1K which he said financed their holiday that year in Ibiza. HMRC question how this was done: the relevant dates his diary entries show that he was in Ibiza. Mr. Denny said he would have cashed a cheque in Ibiza in Sterling and converted it into local currency. We accept his evidence in this regard.

197. (3) Other Expenses

(a) Tern cottage

Mr. Denny's bank statement showed £6,750 being paid on 18 September and £28,078 being received from Man Management on 31 October and then being paid out straightaway. These sums make up the £32,828

balance of the cost of Tern Cottage after the mortgage. We concluded that these monies did not come from an undisclosed source.

(b) Share Purchases.

Mr. Denny's bank statements show payments of £7,400 to Schroders and £19,917 to Barclay's in the autumn of 1995 each supported by receipts from those institutions. A further receipt of £14,417 by Barclays in 1996 was not specifically linked to a bank statement by Mr. Denny. We accept that the share investments were not made from undisclosed sources of funds.

(c) other expenses of living

The details we were shown of Mr. Denny's loan account with Man Management show their debts. At 28 February 1993 Man Management owed Mr. Denny £430k, and that this balance declined steadily over the next 8 years until it was £16,710 at 31 March 2002 and went into debit in March 2003. (Although if certain expenses incurred by Man Management were treated as properly taken as reducing the loan account the debit balance would have occurred by 31 March 2001).

The analysis of movements on that loan account for the period to 28 February 1994, 1995 and 1996 show many living expenses (mortgage, life insurance payments, being met through the drawings in the loan account, together, in 1995 and 1986 with substantial loan repayments and transfers to Mr. Denny's private account.

(d) The car

Mr. Denny did not address the provenance of the funds for the purchase of the car for Mrs Denny in 1995. This expenditure was not in the enquiry year and we were not shown bank accounts for the relevant year, nor had Mr Petersen queried the expense by reference to such accounts. We believe that it is likely that the cost was met from funds from Mr Denny's Man Management loan account.

198. We conclude that:

(i) in relation to the enquiry year the figure for undisclosed income should be reduced to £4,700;

(ii) Mr and Mrs Denny's living expenses and the items of expenditure listed above were likely to have been met from disclosed sources of funds and income. Thus no further addition should be made to that figure.

The Presumption of Continuity

199. Having concluded that Mr Denny's income was understated in the enquiry year Mr Petersen then applied the "presumption of continuity " to conclude that it had also been understated in other years.

200. HMRC rely upon a statement made in *Jonas v Bamford* 51 TC 1 by Walton J. In that case Walton J was dealing with assessments in relation to 7 different years. The assessments were upheld for some of those years and, at the end of his judgement, Walton J said:

> "It is convenient at this stage to notice that Mr. Jonas said a fortiori in connection with the three financial years ... (being the years in relation to which Mr. Jonas has, on advice, refused to give the Inspector of Taxes any information) there was (a) no discovery by the Inspector and (b) no evidence of any unexplained intake of monies by Mr. Jonas. But so far as the discovery point is concerned, once the inspector comes to the conclusion that, on the facts he has discovered, Mr. Jonas has additional income beyond that which he has so far declared to the inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

201. We do not regard this statement as establishing any legal principle. The issue is one of onus of proof and evidence. Clearly if all other things are equal, and in year X there is an under declaration of £100 from a particular source, then a tribunal may find that it is likely that there would be a similar declaration in the X +1 and in year X-1. But if there is evidence that the factual circumstances are different, the question will be one of judgement on the basis of the evidence. Thus the omission of an income profit arising on the sale of an asset in one year may well not suggest that a similar profit arose in other years. Whilst in making an assessment an officer of HMRC may, because he has no other information, conclude that it is likely that an error in one year was replicated in another, that conclusion is not binding on the tribunal.

202. We have found that in the enquiry year it was likely that Mr Denny did not declare £4700 of taxable income.

203. There was no evidence to show that the circumstances had been different in earlier or later years. We conclude that it is not shown that it is unlikely that the same amount was not declared in those years.

(5A) Section 160 – the loan account

204. Section 160 TA 1988 provides that if in the case of an employee "there is outstanding for the whole or part of a year a loan…of which the benefit is obtained by reason of his employment and (a) no interest is paid on that loan…an amount equivalent to whatever is the cash equivalent of the benefit of the loan shall….be treated as emoluments". The cash equivalent is defined to be a statutory interest rate applied to the amount outstanding.

205. The assessment amounts, as they were explained to us by Mr Foxwell included, for some years, an amount of notional interest under section 160 TA in respect of the balance on Mr Denny's loan account with the company.

206. We recall that Mr Denny's loan account with the company stood, at the beginning of 2003, some £430k in his favour. In periods in which the company owed Mr Denny money, no charge arises under section 160. In the company's accounts the amount outstanding in Mr Denny's favour reduces until 2003 when the account shows money owed by Mr Denny to the company.

207. We noted that for the period from 28 Feb 1996 to 31 March 2004, HMRC had treated various expenses incurred by Man Management for the benefit of Mr Denny which they did not regard as deductible as adjusting the loan account so as to reduce the balance owed to Mr Denny. The result is that HMRC treat Mr Denny as owing money to the company at an earlier date than the accounts of the company do. HMRC then calculate the section 160 charge on that basis.

208. This seems to us to be wrong in principle. If an expense has been incurred by a company in the nature of the provision of a benefit for an employee and the employee has not been charged for it by the company, then a taxable benefit will generally arise equal to the cost of the provision of the benefit. It is the company and the employee who decide through their operation of any loan account whether the cost of the benefit is made good to the company. That is their decision and not that of HMRC. Thus even if the cost of the benefit could have been deducted from amounts owed to the employee by the employer, the cost will be potentially a taxable benefit, unless the cost was actually deducted by the company or, possibly, should, pursuant to any contract between the company and the employee, have been deducted.

209. As a result it seemed to us that the loan account should be regarded as standing at its accounts amount for the purposes of the section 160 charge, and if the benefits identified were taxable, they should be taxed in the year of receipt. We thus conclude that in this respect the assessments should be reduced.

(6) Penalties

Statutory provisions.

210. Section 95 TMA makes a person who delivers an incorrect return liable to a penalty not exceeding the difference between the correct amount of tax and that flowing from the incorrect return. Section 102 provides that HMRC may mitigate a penalty. Section 100B gives the tribunal the jurisdiction in the case of such a penalty to cancel, reduce or increase any such penalty.

211. To the extent that the amount of unpaid tax is to be adjusted in accordance with this decision the amount of the maximum penalty must correspondingly reduce.

212. HMRC had assessed penalties at 50% of the assessed tax (thus applying mitigation of 50%. Mr. Petersen considered that: large amounts of undeclared tax had been at stake, Mr. Denny had not been cooperative and information had been provided piecemeal and late. That he considered merited a reduction of only 50% from the maximum penalty.

213. It seems to us that the issues considered by HMRC in setting the level of a penalty (or the mitigation therefrom) are relevant also to our consideration. The object of Parliament in permitting the mitigation or adjustment of a penalty must include recognising that some non-declarations may be more serious than others by reason of size or culpability, and encouraging the swift completion of the determination of the tax properly payable.

Discussion.

214. This has been a long story. It seems to us that there have been misunderstandings on both sides. But in our view, the question of whether we should set the penalty at an amount below the maximum must be judged by reference to the behaviour of the taxpayer in initially making his return and in later disclosure and cooperation, and although the extent of cooperation must be judged against the reasonableness of requests made by HMRC, the bald questions as to whether HMRC acted reasonably in their enquiry or assessments are not in our view relevant to the percentage mitigation which should be applied to a penalty.

215. What is clear to us is that problems started with the contributions Man Management made at Foxcote Court. As we have explained, in our view taxable benefits arose in relation to that work. If Mr Denny was advised otherwise that is unfortunate but it does not affect the fact that considerable benefits were not declared. We believe that the 50% mitigation applied by HMRC should not be disturbed in relation to the 1992/93 and 1993/94 years where the amount assessable related principally to that matter.

216. In relation to the capital gain arising on the sale of Palm Beach, it seems to us that a number of circumstances mitigate in Mr Denny's favour: the sale was handled by his wife and marital relations were strained making the obtaining of information difficult; Mr Denny had a justified belief that if Spanish tax had been charged it would be creditable. We would set the mitigation on this part of the penalty at 65%.

217. In relation to My Fair Lady, a large part of the problem seems to have been the failure to drive the possible business forward, and to rely on tax advice received which assumed an active business. That provides some excuse for the initial lack of disclosure and we set mitigation at 55%.

218. So far as concerns the other issues including the undisclosed income issue we see no reason to change the mitigation set by HMRC.

(7) The extent of the appeal

219. We have noted Mr. Denny's protest that HMRC's statement of case did not refer to the Undisclosed Income Issue.

220. HMRC opened its enquiry into Mr. Denny's 1998/1999 tax return in 1999/2000. The result of the enquiry was communicated to Mr. Denny on 6 August 2002 in the form of a notice of assessment for that year. The attached calculation shows additionally assessed income from employment and directorships of £60,000.

221. For 2001/02 and 2002/03 HMRC wrote to Mr. Denny on 13 July 2005 making amendments to his tax returns following the completion of enquiries in relation to those years.

222. It appears in the schedule supplied by Mr. Foxwell that enquiries had also been opened into Mr. Denny's tax returns for 1996/1997, 1997/1998, 1999/2000 and 2000/2001 all of which had been closed on 18 July 2002 by an amendment to his self-assessment.

223. The same schedule showed schedule E assessments for the years 1992/93 to 1995/1996 made between 1999 and 2001.

224. The meeting notes and correspondence between HMRC and Mr. Denny or his agents prior to the closure of the 1998/99 enquiry indicate that Mr. Petersen expressed concerns about whether Mr. Denny's expenditure was covered by his drawings from Man Management and credits to Mr. and Denny's bank account in 1997 and 1988. The Undisclosed income issue is then raised in letters of 2 August 2007, 15 July 2008,19 August 2009, and in meeting notes of 7 July 1999 and 17 June 2004.

225. We conclude that the issue of undisclosed sources of income was part of the subject matter of the enquiries which led to the amendments to the self assessments for the relevant years. As a result, it was eligible to be debated before us so long as it was procedurally fair to do so.

226. *HMRC v Tower MCashback [*2011] UKSC 19 related to the self assessment provisions rather than the old regime, but the general points made by the Supreme Court are equally relevant: in an appeal against a closure notice the tribunal:

> "must be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side or may be introduced by the [tribunal] of their own initiative."

227. The tribunal is enjoined by its rules to avoid formality and to be flexible. It would be wrong for us to regard ourselves as constrained by pleadings (that is to say a statement of case) as may be other courts. It seemed to us that by giving additional time to Mr. Denny to consider the Undisclosed Income Issues raised in the papers which were before us no unfairness would arise. We therefore determined this issue as well.

(8) The 'agreed' issues.

228. When the parties submitted their written submissions it appeared that there was disagreement about matters which appeared to have been agreed at an earlier date. HMRC said that certain benefits in respect of a car, car fuel, cleaner, phone and water bills had been agreed with HMRC's Mrs Dannatt as part of her enquiry into Man Management's affairs. Mr Denny reposted in his submissions that this was not an agreed matter. He had made it clear that he had come prepared to deal with matters in the Statement of Case only, and this was not in the statement of case.

229. In the course of the hearing Mr Hellier had asked Mr Foxwell about figures described as "Bik Not Declared" in a schedule which described the assessments.. Mr Foxwell had replied that these were findings from Mrs Dannett's enquiry and had been agreed with Monahan's (who had been Mr Denny's accountants). Mr Foxwell said that this was not in HMRC's statement of case since it was understood to have been agreed.

230. This raises an issue of fairness. Fairness to the taxpayer in a case like this requires that he is give good notice of what case he has to meet. That can be done formally, through a statement of case, or through witness statements or well indexed bundles of documents depending on the circumstances. Fairness to HMRC requires that if they make clear that they think there is agreement about particular figures, and the appellant disputes them, the appellant should say so straight away. The appellant is appealing the assessment; the onus is on him to provide the information to show what it ought to be; there is some obligation on him to make clear, where a figure is shown in a schedule as part of the income HMRC wishes to tax to make plain that it is disputed, if it is.

231. These figures were about £2000 pa. They are not substantial in the context of this appeal. We direct that if Mr Denny wishes to dispute them he must deliver to the tribunal his evidence in relation thereto within 14 days of the release of this decision. Otherwise we shall find that they form a proper part of the assessment.

Disposal

232. The assessments shall be amended so that:

(1) Subject to paragraph [231], items hitherto agreed shall remain as part of the assessments;

(2) Mr Denny shall be treated as having received in the years 1992/93 and 1993/94 taxable benefits in the amounts set out in section "(1) The Foxcote Court Issue" above in relation to the Foxcote Court works;

(3) Mr Denny shall be treated as being liable to CGT in respect of the sale of Palm Beach in the amount determined according to paragraph [125] above;

(4) In the years 1999 to 2003 Mr Denny shall be treated as receiving a benefit from Man Management in respect of My Fair Lady in the amounts determined by paragraphs [177] above;

(5) A charge under section 160 shall arise on the amount of the overdrawn loan account for those years in which it is shown as overdrawn in the company's accounts (ie 31 March 2003 only);

(6) In each of the relevant years the amount of undeclared income shall be reduced from £25,000 to £4,500.

(7) No amount should be included as arising by virtue of section 740 and Mr Lyster Denny's loan.

(8) Penalties shall be determined by reference to the tax so calculated as payable, and, save as noted above, the 50% mitigation shall remain.

233. We now adjourn the appeal for the parties now to agree the precise figures. If they cannot do so within 3 months they are directed to apply for the resumption of the appeal.

234. **Rights of appeal.**

235. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 14 May 2013