

Case No: CH/2006/APP/0895

**IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London. WC2A 2LL  
12/07/2007

**B e f o r e :**

**THE HONOURABLE MR JUSTICE HENDERSON**

**Between:**

**THE COMMISSIONERS FOR HER  
MAJESTY'S REVENUE AND CUSTOMS**

**Appellants**

**- and -**

**HOUSEHOLD ESTATE AGENTS  
LIMITED**

**Respondent**

**Ms Nicola Shaw** (instructed by **HMRC Solicitor's Office**) for the Appellants  
**Mr Jeremy Woolf** (instructed by **Dickinson Dees**) for the Respondent

**Hearing date: 21 June 2007**

## The Honourable Mr Justice Henderson

### Introduction

1. This is an appeal by way of case stated brought by the Commissioners for Her Majesty's Revenue and Customs ("HMRC" or "the Revenue") against a decision of the General Commissioners for the Division of Bedfordshire dated 3 July 2006 whereby they allowed the appeal of the taxpayer company, Household Estate Agents Ltd ("the Company") against an assessment to corporation tax made on 23 November 2005 ("the Assessment") in respect of the Company's accounting period ended 31 December 1999.
2. The Assessment was a "discovery assessment" made pursuant to paragraph 41 of schedule 18 to the Finance Act 1998, which provides as follows:

"(1) If the Inland Revenue discover as regards an accounting period of a company that -

  - (a) an amount which ought to have been assessed to tax has not been assessed, or
  - (b) an assessment to tax is or has become insufficient, or
  - (c) relief has been given which is or has become excessive,

they may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax."
3. The purpose of the Assessment, briefly stated, was to charge to corporation tax a sum of £60,000 which the Company had contributed in 1999 to an employee benefit trust ("EBT") established by it in the previous year, and which the Company had deducted in computing its trading profits chargeable to tax under Case I of Schedule D for its 1999 accounting period. There is no dispute that the deduction was properly made in accordance with normal accountancy principles, but following the decision of the House of Lords in July 2005 in Macdonald v Dextra Accessories Ltd [2005] UKHL 47, 77TC 146, HMRC took the view that the deduction was disallowed by the provisions of section 43 of the Finance Act 1989 on the basis that the payment of the £60,000 was a payment of "potential emoluments" within the meaning of section 43(11), and no part of that sum had been paid as actual emoluments to beneficiaries of the EBT before the expiry of nine months from the end of the 1999 accounting period.
4. The Company accepts, in the light of the decision of the House of Lords in Macdonald v Dextra, that the Assessment is correct both in principle and in amount. Nevertheless, the Company contended successfully before the General Commissioners that the Assessment was invalid on two separate grounds. Those grounds, again shortly stated, were as follows:

(a) the Assessment was not made in the circumstances specified in paragraph 44 of schedule 18, which applies where, as in the present case, a company has delivered a company tax return, and empowers HMRC to make a discovery assessment if at the time when they ceased to be entitled to give a notice of enquiry into the return (which in the present case is agreed to be 31 December 2001) they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the relevant situation mentioned in paragraph 41(1) (i.e. in the present case that an amount which ought to have been assessed to tax had not been assessed); and

(b) the Assessment was also precluded by paragraph 45 of schedule 18, which provides that no discovery assessment may be made for an accounting period for which a company has delivered a company tax return if the relevant situation in paragraph 41(1) is attributable to a mistake in the return, and the return was in fact made "on the basis or in accordance with the practice generally prevailing at the time when it was made".

5. At the hearing before the General Commissioners HMRC were represented by an officer of Revenue and Customs, Mrs Christine Morris, and the Company was represented by a tax consultant, Mr Andrew Brown. On the appeal to this Court both sides have been represented by counsel, Ms Nicola Shaw for HMRC, and Mr Jeremy Woolf for the Company.
6. The reasons given by the General Commissioners for their conclusions are very short, and in some respects not very clearly expressed. As I shall explain, I consider that they erred in law in relation to each of their conclusions and that HMRC's appeal must therefore be allowed. A further question that then arises is whether the matter should be remitted to the Commissioners for further consideration, or whether I should simply affirm the Assessment. For the reasons I shall give, I am not satisfied that any proper grounds for a remitter have been made out, so I will affirm the Assessment.

### **The Facts**

7. The relevant facts, as found by the General Commissioners, are sparse in the extreme and unsupported by any documents apart from two letters from the Company's accountants, Messrs Whittaker & Company. No witnesses were called, and no attempt appears to have been made to agree a statement of facts before the hearing. On the basis of the very limited material available, the relevant facts appear to me to be as follows.
8. By a deed dated 23 September 1998 the Company established an EBT with nonresident trustees. Unfortunately, the case stated says nothing about the terms of the trust, nor does it incorporate or annex a copy of the deed. I am therefore left entirely in the dark about its contents. Nor are there any findings of fact about the nature and structure of the Company's business, or the names, remuneration and terms or conditions of service of its directors and employees. However, it is reasonable to infer from the Company's name

that it carries on business as an estate agency; and it appears from the two letters from the accountants dated 2 July 2002 and 22 September 2005 which were in evidence that the two principal directors and employees were a Mr Simon Woodhouse and a Mr Peter Norman. It may also be inferred from those letters that, as one would expect, the terms of the EBT gave the trustees a wide discretion as to the form in which benefits could be provided to employees, because particulars are given of payments out of the trust consisting of payments to the Company "re staff bonuses", and of loans made by the trust to Mr Woodhouse and Mr Norman. There are also references to the purchase of a Mercedes car by the trust in January 2000, and the sale of a Mercedes car (presumably the same one) in November 2001.

9. On 22 October 1998 the Company paid £61,000 into the EBT. On 15 December 1998 a total of £47,150 was paid out of the trust, consisting of loans of £20,000 each to Mr Woodhouse and Mr Norman and a payment of £7,150 to the Company "re staff bonuses". The Company's corporation tax computation for its year ended 31 December 1998 disclosed in note 4 that £61,000 had been paid into the EBT during the year.
10. On 17 June 1999 the Company paid a further £60,000 into the EBT. This is the payment with which the present appeal is directly concerned. No payments were made out of the trust during 1999. According to paragraph 5(c) of the case stated, note 4 to the Company's tax computation for the year ended 31 December 1999 stated:

"As previously notified to the Inland Revenue, the above named scheme *i.e.* the EBT\ was set up and amounts of £60,000 were paid into it during the accounting period."
11. On 13 January 2000 £9,500 was paid out of the trust to the Company "re staff bonuses", and on 18 January 2000 £53,548 was spent by the trust on the purchase of the Mercedes car. No further sums were paid out of the EBT until 23 January 2002, when a further £6,200 was paid to the Company "re staff bonuses" and further loans of £13,000 each were made to Mr Woodhouse and Mr Norman, thereby increasing their loans to £33,000 each. The full amount of the loans was still outstanding as at 5 April 2002: see the accountants' letter of 2 July 2002.
12. The car owned by the trust was driven by Mr Woodhouse, and the relevant benefit in kind was shown on the returns in form PI ID (expenses and benefits) submitted by the Company to HMRC at the end of each income tax year.
13. The Company's accounts and tax computations for the 1999 accounting period were submitted to the Inspector under cover of a letter dated 21 August 2000. The £60,000 paid into the EBT during the year was shown as a deduction in the accounts, and no adjustment was made in respect of it in the corporation tax computation.

14. I assume that the accounts and tax computation submitted on 21 August 2000 either comprised, or at least formed the main part of, the Company's company tax return for ' the 1999 accounting period. By virtue of paragraph 7(1) of schedule 18 to the Finance Act 1998, the return had to include a self-assessment of the amount of tax payable by the Company for the period on the basis of the information contained in the return. By virtue of paragraph 14(1), the filing date for the return was 12 months from the end of the period for which it was made, that is to say 31 December 2000.
15. Under paragraph 24(1) and (2) of schedule 18, HMRC could give notice of their intention to enquire into the return at any time up to 12 months from the filing date, i.e. at any time up to 31 December 2001. However, no such notice was given before that date.
16. Enquiries were opened into the Company's returns for its two following accounting periods ended 31 December 2000 and 31 December 2001, the latter enquiry being opened on 23 December 2003. It was in the course of that enquiry that HMRC requested details of payments into and out of the EBT, and were supplied with the information set out in the accountants' letter of 22 September 2005. I infer that it was -only upon receipt of this letter that HMRC were first fully informed of the payments out of the trust in 1998, 1999 and 2000. HMRC did of course already know about the payments into the EBT in 1998 and 1999, because those payments had been disclosed in the Company's accounts. They also knew of the benefit in kind provided to Mr Woodhouse by the trust in respect of the Mercedes car, because this was disclosed in the Company's annual P11D returns; but as the car was only purchased in January 2000, no such benefit can have been provided in 1998 or 1999.

**Relevant Legislation: (1) section 43 of the Finance Act 1989**

17. So far as material, and as in force at the relevant time, section 43 provided as follows:

"(1) Subsection (2) below applies where -

- (a) a calculation is made of profits or gains which are to be charged under Schedule D and are for a period of account ending after 5 April 1989,
- (b) relevant emoluments would (apart from that subsection) be deducted in making the calculation, and
- (c) the emoluments are not paid before the end of the period of nine months beginning with the end of that period of account.

(2) The emoluments -

- (a) shall not be deducted in making the calculation mentioned in subsections (1)(a) above, but

- (b) shall be deducted in calculating profits or gains which are to be charged under Schedule D and are for the period of account in which the emoluments are paid.
- (10) For the purposes of this section "relevant emoluments" are emoluments for a period after 5 April 1989 allocated either -
  - (a) in respect of particular offices or employments (or both), or
  - (b) generally in respect of offices or employments (or both).
- (11) This section applies in relation to potential emoluments as it applies in relation to relevant emoluments, and for this purpose -
  - (a) potential emoluments are amounts or benefits reserved in the accounts of an employer, or held by an intermediary, with a view to their becoming relevant emoluments;
  - (b) potential emoluments are paid when they become relevant emoluments which are paid,

18. The background and purpose of section 43 were described by Lord Hoffmann, giving the only reasoned speech in Macdonald v Dextra, as follows:

"2. My Lords, until 1989 the emoluments of an office or employment were taxed under Schedule E as income of the year of assessment in which they were earned. It did not matter when they were paid: see Heasman v Jordan [1954] Ch 744. On the other hand, for the purpose of computing his profits taxable under Schedule D, an employer was entitled to deduct his liability to pay emoluments to employees in the year in which, in accordance with normal accounting principles, that liability accrued.

3. Section 37 of the Finance Act 1989, which inserted new sections 202A and 202B into the Taxes Act 1988, changed the basis of Schedule E assessment from the year in which emoluments were earned to the year in which they were paid. This gave rise to the possibility of a delay in payment causing a substantial timing disparity between the year in which the emoluments were deductible by the employer and the year in which they were taxable in the hands of the employee. Particularly in a case in which employer and employee were closely associated, for example, as a company and its directors, the tax liability of the company could be reduced without creating an immediate personal liability on the part of the directors.

4. Section 43 of the 1989 Act was intended to deal with this situation.

5. The core of this provision is in subsections (1) and (2). The old rule that emoluments may be deducted in the year in which, on ordinary accounting principles, liability to pay them has accrued, is to apply only if they are actually paid during that year or within a grace period of nine months thereafter. Otherwise they may be deducted only in the year in which

they are paid. Thereby the possibility of a substantial timing disparity between deduction by the employer and payment to the employee is avoided.

6. This basic rule of non-deductibility without actual payment applies to "relevant emoluments", defined in subsection (10) as emoluments which have been "allocated" in respect of a particular office or employment or generally in respect of offices or employments. "Allocated" presumably means allocated in drawing up the accounts, as sums for which a liability to pay emoluments is regarded on accounting principles as having accrued.

7. Subsection (11) then extends this rule of non-deductibility to "potential emoluments" as defined. The question in this appeal is whether certain payments made by the taxpayer companies to an employee benefit trust... were potential emoluments within the meaning of section 43(1 l)(a)."

19. Lord Hoffmann went on to hold, in agreement with the Court of Appeal but in disagreement with the Special Commissioners and Neuberger J (as he then was), that sums held by the trustee of an EBT were potential emoluments within the meaning of section 43(1 l)(a) if they were held on terms which allowed "a realistic possibility" that they would become relevant emoluments. It was enough that the sums so held could be used to pay emoluments in accordance with the terms of the EBT construed in the light of any relevant background material. It was not necessary, as the Special Commissioners had thought, that the funds should be held for the sole purpose of paying emoluments, or as Neuberger J had thought, with the principal or dominant intention of paying emoluments. Lord Hoffmann was not deflected from reaching this conclusion by the consideration that, unless the funds were at some point applied in the payment of relevant emoluments by the trustee, they would never become deductible at all in the hands of the employer. As he pointed out in paragraph 20 of his speech, Parliament had not been troubled by this anomaly in enacting certain later provisions which achieved precisely that result. Moreover, it was the result of an arrangement into which the taxpayers had chosen to enter, and any adverse consequences could be avoided by segregating the funds held on trust to pay emoluments from funds held to benefit employees in other ways.
20. In the light of this exposition of the law, it became clear (and is not disputed by the Company) that the sum of £60,000 paid into the EBT in June 1999 was held by the trustees as "potential emoluments" within the meaning of section 43(11), and that the deduction of that sum in the computation of the Company's Schedule D profits for 1999 was prohibited by section 43(2) because the £60,000 was not paid as actual emoluments to employees before the end of September 2000. Accordingly, HMRC were in principle entitled to raise an assessment to recover tax on the sum which the Company had wrongly deducted. The question that the General Commissioners had to consider was whether HMRC were nevertheless precluded from making a discovery assessment pursuant to paragraph 41 of schedule 18 to the Finance Act 1998 by the restrictions on the power to make such assessments contained in paragraphs 42, 44 and 45, to which I will now turn.

**Relevant Legislation: (2) Restrictions on the power to make discovery assessments**

21. It will be convenient to begin by setting out the relevant provisions in paragraphs 42 to 46 of schedule 18 to the Finance Act 1998:

*"Restrictions on power to make discovery assessment or determination*

42(1) The power to make -

(a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or

(b)...

is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below.

(3) Any objection to a discovery assessment ... on the ground that those paragraphs have not been complied with can only be made on an appeal against the assessment... .

*Fraudulent or negligent conduct*

43 A discovery assessment for an accounting period for which the company has delivered a company tax return ... may be made if the situation mentioned in paragraph 41(1) ... is attributable to fraudulent or negligent conduct on the part of-

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time.

*Situation not disclosed by return or related documents etc*

44(1) A discovery assessment for an accounting period for which the company has delivered a company tax return ... may be made if at the time when the Inland Revenue -

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1)... .

(2) For this purpose information is regarded as made available to the Inland Revenue if-

(a) it is contained in a relevant return by the company or in documents accompanying any such return, or,

(b) it is contained in a relevant claim made by the company or in any accounts, statements or documents accompanying any such claim, or

(c) it is contained in any documents, accounts or information produced or provided by the company to the Inland Revenue for the purposes of an enquiry into any such return or claim, or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1)... -

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing to the Inland Revenue by the company or a person acting on its behalf.

(3) In sub-paragraph (2) -

"relevant return" means the company's company tax return for the period in question or either of the two immediately preceding accounting periods ...

*Return made in accordance with prevailing practice*

45 No discovery assessment for an accounting period for which the company has delivered a company tax return ... may be made if -

(a) the situation mentioned in paragraph 41(1) ... is attributable to a mistake in the return as to the basis on which the company's liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

*General time limits for assessments*

46(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than six years after the end of the accounting period to which it relates.

(2) In a case involving fraud or negligence on the part of-

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time,

an assessment may be made up to 21 years after the end of the accounting period to which it relates.

(3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment. "

22. The provisions which I have set out above apply to corporate taxpayers which are liable to corporation tax. The equivalent provisions which apply to individual taxpayers are contained in section 29 of the Taxes Management Act 1970 ("TMA 1970"), in the form in which it was substituted by the Finance Act 1994 with effect from the tax year 1996/7 when self-assessment was introduced. Self-assessment for corporate taxpayers followed some three years later, with the provisions in schedule 18 to the Finance Act 1998 applying in relation to accounting periods ending on or after "the self-assessment appointed day", which was 1 July 1999: see section 117 of the 1998 Act and SI 1998 no. 3173.
23. The relevant provisions as they relate to individual and corporate taxpayers are in substance the same, although there are differences of detail which for present purposes do not matter. Thus section 29(1) broadly corresponds with paragraph 41 of schedule 18, although it does not define the term "discovery assessment"; section 29(2) broadly corresponds with paragraph 45; section 29(3) with paragraph 42; section 29(4) with paragraph 43; section 29(5) to (7) with paragraph 44; and section 29(8) with paragraph 42(3). The equivalents to the general time limits for assessments in paragraph 46 are to be found in TMA 1970 section 34 (the ordinary time limit of six years) and section 36 (the extended time limit of nearly 21 years in cases of fraudulent or negligent conduct).
24. The equivalents for individual taxpayers of paragraphs 41, 42 and 44 in schedule 18 (but not paragraph 45) were considered in some detail by Park J and the Court of Appeal in Langham v Veltema [2002] EWHC 2698 (Ch), [2004] EWCA Civ 193, 76 TC 259. The leading judgment in the Court of Appeal was delivered by Auld LJ, with whose judgment both Chadwick and Arden LJ agreed while adding some valuable observations of their own (although Arden LJ disagreed with one of the additional points made by Chadwick LJ: see further paragraph 33 below). The Court of Appeal allowed the Crown's appeal from Park J, because they took a narrower view than he did of the nature and content of the "objective awareness" test in section 29(5) (the equivalent of paragraph 44). However, they did not, as I read their judgments, disagree with Park J's analysis of the basic scheme of section 29 as it relates to self-assessment, and in view of Park J's unrivalled knowledge and experience of tax law I find it helpful to refer to some passages in his judgment. The relevant discussion begins at paragraph 9, 76TC at 274B, under the heading "The working of the self-assessment system".
25. Before I do so, however, I should first explain what the issue was in Langham v Veltema. The facts are most conveniently set out in the judgment of Auld LJ at paragraphs 12 to 20, 76 TC 287D to 2881. In brief, Mr Veltema was the only director and employee of a farming company that he owned jointly with his wife. In March 1998 he resolved that a house which he occupied, and which was owned by the company, should be transferred to him as a benefit in kind. The house was then duly conveyed to him by the

company for no consideration. Mr Veltema was accordingly liable to income tax under Schedule E for 1997/8 on the market value of the house at the date of transfer. The company had obtained an estimate of the market value from a firm of chartered surveyors as being "nearer to £100,000 than £105,000" at the time of the transfer, the firm having provided a written valuation of £105,000 some 14 months previously.

26. I can pick up what happened next from the headnote at 76TC 259:

"In his self-assessment tax return, filed on 30 July 1998, V entered "£100,000" in respect of "assets transferred/payments made for you". An accompanying schedule, dealing with income from employment with the company, stated "asset placed at disposal of employee £100,000" in respect of "other benefits in kind and expense allowances". Separately a return was made, by form P11D, on 6 July 1998, of benefits in kind provided by the employer company. That return recorded the transfer of the house from the company to V, valued at £100,000. On 9 September 1998 the Inspector of Taxes notified the accountants that V's tax return had "been processed without any need for correction".

In October 1999, following receipt of the company's corporation tax return, another Inspector of Taxes notified the company that the District Valuer would be consulted about the 1998 valuation. In March 2000 the valuation was agreed at £145,000. V's Inspector then raised a further assessment to income tax for 1997/98. V appealed on the grounds that the assessment had been made out of time. The Inspector contended that the assessment was properly made under section 29 [TMA 1970], on the basis of a discovery, either under 29(4) (negligent conduct by V) or under section 29(5) (he, the Inspector, could not have been reasonably expected, on the basis of the information made available to him when he processed the return, to be aware that the self-assessment was insufficient). The General Commissioners allowed V's appeal. The Crown appealed, but did not pursue the contention that section 29(4) applied."

27. I now revert to the judgment of Park J. In paragraph 10, 76TC at 274D-E, he pointed out that:

"The self-assessment system was a significant change to the tax machinery. It imposed new burdens on taxpayers by requiring them to submit fuller tax returns than had previously been required (not that the earlier forms of returns were by any means short and simple), including in many cases the taxpayer's own calculation of the amount of tax payable by him: his "self-assessment". The new burdens were balanced by new protections for taxpayers who conscientiously complied with the system, in particular by new and tighter time limits on the power of the Revenue to make further tax assessments."

28. Having referred to the relevant time limits within which the Inspector could have opened an enquiry into Mr Veltema's tax return, Park J continued at 2741:

"13. Before the introduction of the self-assessment system the Inspector would still have been entitled until 5 April 2004 (six years after the end of

the tax year in which the house was transferred to Mr Veltema) to make a further assessment if he "discovered" that the taxable income was greater than the amount shown in the tax return: section 29(3) in its original unamended form. The six years' period for an assessment did not depend on there having been some form of fraud or other default by or on behalf of the taxpayer: the Inspector had six years whether the taxpayer was in default or not. The concept of a discovery was widely interpreted by the courts. When the Inspector learnt that the value of the house had been agreed at £145,000 instead of £100,000 (which he did in about March 2000) that would have been a discovery, and if section 29 had not been heavily amended as part of the self-assessment system, he could have made an additional assessment on the extra £45,000 at any time before 6 April 2004.

14. Section 29(1) in the new form of the section still uses the concept of a discovery. If an officer of the Board or the Board "discover" that income which ought to have been assessed has not been assessed, or that an assessment is or has become insufficient, the subsection empowers them to make an assessment in the amount, or the further amount, which in their opinion ought to be charged. However, the ability to make a discovery assessment is now more circumscribed: the Inspector no longer has a free hand for the six years after the end of the tax year concerned.

15. The general rule is that, if the taxpayer has delivered a self-assessment return under section 8 (as Mr Veltema did), the Inspector cannot make a discovery assessment under section 29: see section 29(3). The Inspector's recourse where he is not satisfied with a return is to give notice of opening an enquiry under section 9A, in which case ... no time limit runs against him while the enquiry is still in progress and for 30 days after that. That recourse was not used by the ... Inspector in Mr Veltema's case. However, to the general rule that the Inspector cannot make a discovery assessment under section 29(1) there are two exceptions ... They are contained in section 29(4) and (5)."

29. The important points that emerge from this analysis may in my judgment be summarised as follows:

(a) under the self-assessment regime, the general rule is that the Inspector cannot make a discovery assessment if the taxpayer has delivered a self-assessment return;

(b) to that general rule there are two exceptions, which depend on satisfying the conditions in TMA 1970 subsections 29(4) or (5) respectively; and

(c) although the concept of "discovery" is carried over from the regime which applied before self-assessment, and still has the same wide meaning as before, the circumstances in which a discovery assessment may be made are now much more circumscribed because the conditions in sub-sections 29(4) or (5) have to be satisfied even if the assessment is made during the normal time-limit of six years.

30. The question on which Park J and the Court of Appeal disagreed concerned the interpretation and application of the test in section 29(5). The test is both

an objective and a negative one. The question it poses is whether the Inspector could not have been reasonably expected, on the basis of the information made available to him before the relevant time, to be aware of the relevant situation which justifies the making of the assessment (e.g. that any income which ought to have been assessed has not been assessed, or that any relief which has been given is excessive). Park J considered that in answering this question it was reasonable to assume that the Inspector would make any further investigations that would be prompted if he read the return and accompanying documents with normal care. On that footing, he considered that the Inspector could reasonably be expected to have referred the question of valuation of the house to the District Valuer, just as his colleague did 15 months later when he received the company's return: see paragraph 30 at 281F-I. Park J also considered that, although the return and accompanying documents were obviously the starting-point,

"the Commissioners and courts are not constrained to proceed on the unreal basis that the tax returns and accompanying documents must have been the only items of information which the Inspector had. If as a matter of common sense and normal administrative procedures it is likely that the Inspector would in fact have had other items of information before him the statute does not require the question posed by section 29(5) to be answered on an unrealistic basis."

(see paragraph 34 of the judgment at 283A-B).

31. The Court of Appeal disagreed, no doubt mindful of the burden that Park J's approach would in practice impose on Inspectors dealing routinely with tax returns. In paragraph 30 of his judgment at 293H-I Auld LJ identified the issues as being:

(a) whether awareness or inference of actual insufficiency (of tax) is required to negative the condition, or whether awareness that it was questionable would suffice;

(b) whether account should be taken of enquiries the Inspector could reasonably have been expected to undertake, and the likely result of such enquiries; and

(c) whether the relevant information before the Inspector is simply that emanating from the taxpayer, and any inference that could reasonably be expected to be drawn from it, or whether it may also include other information before the Inspector, such as a form PI ID.

32. Auld LJ went on to hold that a restrictive or negative answer should be given to each of the above questions. Thus:

(a) he held in paragraphs 34 and 35 (294H-295C) that the subject matter of the objective awareness with which section 29(5) is concerned is "actual insufficiency", and the words "on the basis of (with reference to the specified information) do not denote "an objective awareness of something less than insufficiency";

(b) accordingly, account should not be taken of what enquiries the Inspector could reasonably have been expected to undertake from the information supplied to him under section 29(6) and of what he could have reasonably learned from such enquiries (paragraph 35); and

(c) the Inspector is to be shut out from making a discovery assessment

"only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question."

(paragraph 36 at 295D-E). So, for example, even if the form P11D had added anything material to the information provided by Mr Veltema in his return and the accompanying documents, it would have been irrelevant to the question of awareness of actual insufficiency posed by section 29(5): see paragraph 37 at 295H-I. Auld LJ described the passage which I have quoted in this paragraph as "the key to the scheme", and derived support for it from the fact that the only categories of information expressly identified in section 29(6) emanate from the taxpayer.

33. As I have already said, Chadwick and Arden LJJ both agreed with the judgment of Auld LJ, but there was one additional point on which they disagreed. Chadwick LJ expressed the view in paragraph 48 (at 2971) that the Inspector could reasonably have been expected to be aware of what he would have discovered if he had called for the information as to the value of the asset which then existed. However, Arden LJ disagreed and emphasised in paragraph 51 (at 298H-I) that section 29(6)(d)(i) (the corporate equivalent of which is paragraph 44(2)(d)(i) ) does not attribute to the Inspector information which is not reasonably to be inferred from information within section 29(6)(a) to (c), i.e. the return and accompanying documents supplied by the taxpayer. She continued:

"The matters set out in those paragraphs are all categories of information actually supplied by the taxpayer. The valuation was not so produced. Moreover, in circumstances such as this the valuation might not in fact support the figure in the taxpayer's tax return. In that event, in my judgment on the true construction of section 29(6)(d)(i) the Inspector is not to have attributed to him the further information that he would actually have obtained if he had asked for that valuation, unless and until it is produced to him."

On this point I respectfully prefer the approach of Arden LJ, which seems to me to be more in accord with the wording of the subsection and the restrictive approach to its interpretation favoured by all three members of the Court of Appeal.

### **The Decision of the General Commissioners**

34. After setting out the rival contentions for the Company and HMRC at some length, and recording the authorities which were cited to them (including Macdonald v Dextra and Langham v Veltema), the Commissioners

expressed their "conclusions of law" in paragraph 9 of the case stated as follows:

"1. We do not accept that HMRC are entitled to make a discovery as both the existence of the EBT and the payment into it were clearly notified to them and the Inspector could have been reasonably expected to be aware of what was claimed to be the HMRC view.

2. Given HMRC's claim that it was always their view (published or not) that such payments would not be deductible except in circumstances which would negate the purpose of the EBT, it was at best naive of them not to make enquiries within normal time limits.

3. Alternatively HMRC did not satisfy us that the return was not in accordance with a generally prevailing practice so that paragraph 45 did not apply. The assessment was therefore discharged."

**Discussion: (1) paragraph 44**

35. Paragraphs 1 and 2 of the Commissioners' conclusions are very compressed, but as I understand it what they are saying is that the objective awareness test (or, more accurately, the objective non-awareness test) in paragraph 44(1) of schedule 18 was not satisfied, because at the end of the enquiry window period (which is agreed to have been 31 December 2001) the Inspector knew of the existence of the EBT and the payment into it of £60,000 in July 1999, and on any reasonable view he ought to have opened an enquiry within the window period given HMRC's view that payments into an EBT are not deductible "except in circumstances which would negate the purpose of the EBT".

36. The reference in paragraph 1 of the conclusions to "what was claimed to be the HMRC view" is presumably meant to refer to the following submission by Mrs Morris recorded in paragraph 7(6) of the case:

"Prior to litigation relating to EBTs, there was no prevailing practice such that HMRC and the accountancy profession were in agreement. HMRC thought that section 43 FA 1989 applied to payments into EBTs and some in the accountancy profession did not. Ultimately the Courts agreed with the view of HMRC but neither HMRC nor the accountancy profession knew the answer until the House of Lords gave its decision in the case of Macdonald v Dextra."

37. The reference in paragraph 2 of the conclusions to "circumstances which would negate the purpose of the EBT" is harder to elucidate, not least because the Commissioners have made no findings of fact about the purposes for which this particular EBT was established by the Company. Nor is there anything in the record of the parties' submissions which throws any light on the question, with the possible exception of the Inspector's submission in paragraph 7(11) that

"An EBT is a trust set up with a view to providing incentives for employees. EBTs have been widely used as part of tax avoidance schemes."

What I think the Commissioners probably had in mind is that an EBT is normally set up to provide a variety of incentives and benefits to employees, by no means all of which will involve the payment of actual emoluments; and if section 43 of the Finance Act 1989 applies on the footing that the funds held by the trustees of the EBT are "potential emoluments", which the Inspector had submitted was always HMRC's view, it must follow that sums paid into the trust by the employer are deductible only if they are then used to pay actual emoluments before the end of the nine month grace period, which would be contrary to the (assumed) normal and much wider purpose of the trust. Accordingly, the Inspector should have realised, as a matter of practical common sense, that the £60,000 paid by the Company into the EBT in June 1999 cannot have been properly deductible in computing the Company's profits for that year.

38. In my view it is unnecessary to decide exactly what it was that the Commissioners had in mind, or to remit the case stated to them for clarification, because it is in my judgment clear that their conclusion on paragraph 44 cannot be supported in the light of the decision of the Court of Appeal in Langham v Veltema.
39. The crucial point is that section 43 of the Finance Act 1989 does not automatically disqualify from deduction all potential emoluments held by the trustees of an EBT, but only emoluments which are not actually paid to employees before the end of the specified period: see section 43(1)(c), which states this as one of the conditions which have to be satisfied if subsection (2), which prohibits the deduction in year one, is to apply. There is no suggestion that the terms of the EBT in the present case were such that it would have been impossible for the £60,000 to be applied in the payment of actual emoluments within the specified period, i.e. before the end of September 2000. Accordingly, however unlikely it may have been as a matter of practical common sense, it was a course of action legitimately open to the trustees, and there were therefore circumstances in which the Company could properly have deducted the £60,000 in computing its Schedule D profits. Since the Company computed its profits on the basis that the £60,000 was deductible, and since no relevant adjustment was made to reverse that deduction in the tax computation submitted to the Inspector, he was entitled to proceed on the basis that the Company's self-assessment was correct. There was nothing in the Company's tax returns for 1999 or the two immediately preceding accounting periods (being the "relevant returns" for the purposes of paragraph 44), or in the documents accompanying those returns, which should have clearly alerted the Inspector to the insufficiency of the Company's self-assessment. It is conceded that he was also in possession of the forms P11D submitted by the Company for the income tax years 1998/9 and 1999/2000, which would have disclosed the use of the Mercedes car by Mr Woodhouse after its purchase in January 2000; but for the purposes of paragraph 44 those forms were irrelevant, because they were not documents that fell within section 29(6)(a) to (c).
40. Nor can it be said, in my judgment, that the Inspector could reasonably be expected to have inferred, from the mere existence of the EBT and the

payment into it of £60,000, that the money had not in fact been paid as actual emoluments to employees before the end of September 2000. The only reasonable inference that the Inspector could have drawn from the relevant information supplied to him by the Company was that the money had been so paid, because that was the only basis upon which the self-assessment could be correct. Had he applied his mind to the question, his experience of other EBTs, and indeed common sense, might well have led him to doubt the correctness of the self-assessment and to open an enquiry; but that is a very different thing from saying that he should be regarded as knowing, or as having inferred, what such an enquiry would probably have revealed. That was effectively the approach of Park J in Langham v Veltema, which the Court of Appeal unanimously held to be mistaken. To paraphrase the words of Arden LJ at the end of her judgment, the Inspector is not to have attributed to him the further information that he would actually have obtained if he had opened an enquiry and asked for details of payments out of the EBT, unless and until such information is produced to him. Or as Chadwick LJ said in paragraph 49 of his judgment, 76 TC at 298D-E, the question is not (my -emphasis) whether the Inspector could reasonably have been expected, on the basis of information which was not available to him (within the extended meaning of that concept in section 29(6)), to have become aware of the understatement in the return "if he had made enquiries which it would have been reasonable for him to make".

41. Accordingly, HMRC were not precluded from making a discovery assessment in the present case merely because it would have been reasonable for the Inspector, had he thought about it, to initiate an enquiry into the Company's 1999 return which could have been expected to reveal the true facts. The position would be no different even if, as the Commissioners evidently thought, the failure to initiate an enquiry was "at best naive". I should say, however, that in my judgment there was no material before the Commissioners to justify stigmatising the Inspector's inactivity in these terms. There are many other possible, and in my view far more likely, explanations, such as shortages of staff or the adoption of routine procedures for processing returns which were not self-evidently defective.
42. For the Company, Mr Woolf submitted that the structure of section 43 of the Finance Act 1989 is such that the Inspector was required to proceed on the footing that the £60,000 was not deductible unless the Company provided evidence of the payment of actual emoluments within the requisite period. I do not agree. As I have already pointed out, it was possible (if unlikely) that the trustees had in fact used the £60,000 to pay actual emoluments before the date when the Company's return for 1999 was submitted, and in submitting the return as it did the Company was in effect representing that this was indeed what had occurred. The Inspector was in my view clearly entitled to accept this representation at face value, in the absence of anything in the documents supplied with the return to show that it was wrong.

**Discussion: (2) paragraph 45**

43. The Commissioners decided this issue by reference to the burden of proof, holding in paragraph 3 of their conclusions that paragraph 45 did not apply

because HMRC had not satisfied them that the return was not made in accordance with a generally prevailing practice. In other words, I take them to have held that the burden was on HMRC to satisfy them that the return was *not*, in the words of paragraph 45, "in fact made on the basis of or in accordance with the practice generally prevailing at the time when it was made"; and that since HMRC had adduced no evidence to discharge that burden, it was not open to them to make a discovery assessment.

44. In my view the Commissioners plainly fell into error in adopting this approach to paragraph 45. It is necessary to begin by examining the relationship of paragraph 45 to paragraphs 42, 43 and 44. By virtue of paragraph 42(1), the power to make a discovery assessment for an accounting period for which the company has delivered a company tax return

"is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below."

It follows, as I have already explained, that in cases where the company has delivered a return a discovery assessment may be made only if the conditions of paragraph 43 or paragraph 44 are satisfied. If either or both of those paragraphs are satisfied, there is power to make the assessment; but the power is also "subject to paragraph 45", which prohibits the making of an assessment if, put shortly, the insufficiency of tax is attributable to a mistake in the return and the return was in fact made in accordance with the generally prevailing practice at the time.

45. It can thus be seen that it is only necessary to consider paragraph 45 in a case where the conditions of either paragraph 43 or paragraph 44 are satisfied, and it operates as a further restriction on the power of HMRC to make a discovery assessment. However, it seems clear to me as a matter of general principle that the burden of proof must rest on the party who asserts that there has been an operative mistake in the return, and that the return was in fact made in accordance with the generally prevailing practice. That party will inevitably be the taxpayer, not HMRC. In other words, the burden lies on the taxpayer to establish that paragraph 45 applies, not on HMRC to establish that it does not apply.
46. I base this conclusion on the structure and wording of paragraphs 42 to 45, and on the general principle that the legal or persuasive burden of proof "lies upon the party who substantially asserts the affirmative of the issue": see Phipson on Evidence, 16<sup>th</sup> edition, para 6-06. The matter can usually be tested by asking which party would -succeed if no evidence were adduced on the issue: see, for example, in a tax context, the illuminating judgment of Slade J in IRC v Garvin (1979) 55 TC 24 at 51F-57E, to which I was helpfully referred by Mr Woolf, especially at 54I-55A. In the context of paragraph 45, if no evidence were adduced as to the existence of an operative mistake in the return or as to the existence of the generally prevailing practice, there would be no basis upon which the Commissioners could conclude that paragraph 45 applied, and accordingly nothing to restrict

the power of HMRC to make a discovery assessment if the conditions of paragraph 43 or paragraph 44 were satisfied.

- 47 I find further support for my conclusion in considerations of policy and common sense. Although the general policy of paragraph 42, as Park J explained in Langham v Veltema, was to place restrictions on the previously unfettered right of an Inspector to make a discovery assessment within normal time limits, I cannot believe that Parliament intended to place upon HMRC, in every case where paragraph 43 or paragraph 44 was satisfied, the additional burden of establishing the negative proposition that there had been no operative mistake in the return, and that the return had not been made in accordance with the generally prevailing practice. Quite apart from the difficulties involved in establishing a negative, the question whether a mistake was made is likely to depend on matters within the exclusive knowledge of the taxpayer, and the question of the existence of a settled practice will depend on the evidence of taxpayers and their professional advisers at least as much as on the practice of HMRC.
48. By contrast, it seems to me that the burden of establishing that paragraphs 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (paragraph 43), or of material to satisfy the test of objective non-awareness (paragraph 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made. I would add, however, that in relation to paragraph 44 the question is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have been submitted to HMRC should always be available. So cases where there is no evidence, or where the Commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent. With regard to paragraph 43, placing the burden upon HMRC would accord with the long-established general rule, before self-assessment, that the Revenue had to establish fraud or wilful default in order to make an assessment outside the normal six year time limit: see for example Hudson v Humbles (1965) 42 TC 380 at 384 and Brady v Group Lotus Car Companies Plc (1987) 60 TC 359 at 386H per Dillon LJ.
49. In her submissions to me Counsel for HMRC relied on paragraph 42(3), which provides that any objection to a discovery assessment on the ground that paragraphs 43, 44 or 45 have not been complied with can only be made on an appeal against the assessment. She submitted that this provision has to be read with section 50(6) of TMA 1970, which provides that if, on an appeal, it appears to the Commissioners that the appellant is overcharged the assessment shall be reduced accordingly, "but otherwise the assessment... shall stand good". Section 50(6) in its present and earlier incarnations has always been the principal justification for holding that the burden lies on the taxpayer to displace an assessment made within normal time limits: see, for example, Brady v Group Lotus at 387A-D. However, I do not think it can safely be inferred from the mere fact that an objection to a discovery assessment has to be made in an appeal against the assessment that the

burden is on the taxpayer to establish that paragraphs 43 or 44 do not apply. After all, there is a similar provision in TMA 1970 section 34(2), but neither that provision nor section 50(6) have deterred the courts from holding that the onus is on HMRC to establish fraud or negligence outside normal time limits. The true proposition, I think, is that if an assessment is validly "made the onus is then on the taxpayer to displace it, in the absence of specific provision to the contrary. If, however, an issue arises as to whether an assessment has been validly made in the first place, section 50(6) provides no assistance in answering the question where the burden of proof lies in relation to the alleged invalidity. The direction that the point must be taken, if at all, in an appeal against the assessment is best explained as a purely procedural requirement, not as an indication that the burden of proof necessarily lies on the taxpayer.

50. For his part, Mr Woolf for the Company sought to persuade me that the Commissioners were indeed right to hold that the burden of proof in relation to paragraph 45 rests on HMRC. He accepted in his oral submissions that this proposition is at first sight a surprising one, and for the reasons I have given I am unable to accept it. In short, I agree with him that in relation to paragraphs 43 and 44 the burden does rest on HMRC, but in my judgment the position under paragraph 45 is entirely different and the legal burden of establishing that the paragraph applies rests on the taxpayer. Nor am I attracted by a half-way house solution which Mr Woolf sought to support by reference to the decision of the Court of Appeal in a patent case, Re Dunlop Holdings Ltd's Application [1979] RPC 523, under which the legal burden would rest on HMRC throughout but they would in practice be taken to have discharged it unless paragraph 45 was put in issue by the taxpayer. It seems to me that the wording of paragraph 45 and its relationship to paragraph 42 are such that Parliament must have intended to place the burden squarely on the taxpayer to establish the necessary operative mistake and prevailing practice. That does not mean, of course, that the evidential burden on the issue may not shift during the hearing; but the legal or persuasive burden cannot shift, and in my judgment rests on the taxpayer throughout.

### **Discussion: (3) Relief**

51. Since the Commissioners held that the burden of proof in relation to paragraph 45 lay on HMRC, they did not consider (or at any rate did not state their conclusions on) the questions of operative mistake and generally prevailing practice posed by the paragraph. They did, however, find, as recorded in paragraph 5(h) of the case stated, that "There was no published view (*sic*) of HMRC's view on contributions to an EBT". This finding was presumably based on the submission for the Company, recorded in paragraph 6(8) of the case, that no published view of HMRC on the application of section 43 of the Finance Act 1989 to contributions to an EBT had been found or drawn to the Company's attention. As I have already said (see paragraph 36 above), Mrs Morris had submitted that prior to the litigation in Macdonald v Dextra there was no prevailing practice such that HMRC and the accountancy profession were in agreement. She evidently

did not dispute the Company's submission that HMRC had no published view on the question.

52. Unfortunately, neither side appears to have been aware that in December 1995 HMRC had published some guidance in paragraph 1049 of the Inspector's Manual, Schedule D under the heading "Trade deductions: relevant/potential emoluments". The relevant part of this guidance stated that

"... payments made by a company to the trustees of an [EBT] to provide benefits in the form of cash or shares to employees of the company will often not constitute potential emoluments. But any case in which it appears that such a trust is being used by a company largely to channel emoluments to employees so as to obtain a deduction for the payments when charged whilst deferring the receipt of the emoluments in the hands of the employee should be submitted to Business Profits Division (Schedule D)."

In October 2003 this guidance was replaced, in materially identical terms, by paragraph 47135 of the Business Income Manual, but it is the 1995 version which was in force at the relevant time, i.e. when the Company submitted its return in August 2000.

53. I observe at once that this guidance was at best inconclusive. It says only that payments made by a company to the trustees of an EBT to provide benefits to employees in the form of cash or shares will "often" not constitute potential emoluments, which implies that section 43 will not apply in such cases. However, it does not disclose the relevant criterion for distinguishing those cases from ones where section 43 will apply. The guidance then goes on to say that cases where EBTs are used largely to "channel" emoluments so as to obtain a timing disparity between deduction and receipt of the emoluments should be submitted to Business Profits Division, but again no clear criterion is stated for identifying such cases, and all that can safely be deduced is that the Revenue thought they needed to be carefully scrutinised because of the potential for tax avoidance.
54. On the appeal to this court, the Company seeks to rely on a witness statement of Mr Brown (who represented the Company before the Commissioners) dated 12 June 2007, in which he says that before the hearing below he looked at the Revenue manuals to see whether he could discover anything about HMRC's former practice on this issue, but his attempts were unsuccessful. He goes on to say that he has now discovered, with the assistance of Mr Woolf, that guidance did in fact exist in the shape of paragraph 1049 of the Inspector's Manual, and accuses HMRC's officer, Mrs Morris, of having misrepresented the Revenue's former practice to the Commissioners. He points out that on page 2 of her written brief for the hearing, which he exhibits, she said that HMRC "always considered" that section 43 of the Finance Act 1989 applied to contributions to EBTs, and that this was why they took the Dextra case to the House of Lords.
55. I do not for a moment suppose that Mrs Morris deliberately intended to mislead the Commissioners. I expect the true position is that, like Mr Brown, she simply failed to find the one relevant paragraph in the voluminous

Revenue manuals. However, it is regrettable that, for whatever reason, the Commissioners were not presented with the full picture, and were led to suppose that no published Revenue guidance on the question existed.

56. The question that now arises, however, is what the court should do, in the light of my conclusions on paragraphs 44 and 45 of schedule 18. Should I remit the matter to the Commissioners, for them to reconsider the application of paragraph 45 on the basis that the burden of proof lies on the Company? Or should I simply allow the appeal and affirm the Assessment? Mr Woolf urged me to take the former course, and submitted that I should allow the parties to adduce further evidence at the remitted hearing because Mrs Morris had misrepresented the Revenue's practice to the Commissioners. He relied on Brady v Group Lotus as authority for the proposition that fresh evidence may be admitted on a remitter in exceptional circumstances, and reminded me of the Revenue's duty to "act fairly and in accordance with the highest public standards" (see R v IRC, ex parte Unilever Plc [1996] STC 681 at 690f per Sir Thomas Bingham MR, and 695f per Simon Brown LJ).
57. I do not doubt that the court has power, in a suitable case, to do what Mr Woolf -suggests. However, I do not regard the present case as falling into that category, for the following reasons.
58. In the first place, if one leaves aside the alleged misrepresentation, the position is in my view straightforward. If the Company wished to rely on paragraph 45 at the hearing before the Commissioners, the burden was on the Company to establish both an operative mistake in the return and the practice generally prevailing in August 2000. The Company failed to adduce evidence on either of those questions, and relied only on the submissions recorded in paragraph 6 of the case stated. Those submissions refer to what was alleged to be "the profession's view" that section 43 of the Finance Act 1989 did not apply to contributions to EBTs. However, without any evidence to support that assertion, and without any evidence that the Revenue took the same view, there was no material before the Commissioners which could support a conclusion that a settled practice existed, let alone a settled practice which could properly be described as "the practice generally prevailing at the time". Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike: compare the decision of the Special Commissioners (Dr A N Brice and Mr John Walters QC) in Rafferty v HMRC [2005] STC (SCD) 484 at paragraph 114. Accordingly, on the basis of the material before them, and on the assumption that they had directed themselves correctly on the burden of proof, the Commissioners could only have concluded that paragraph 45 did not apply. There would therefore be no point in remitting the matter to them for reconsideration.
59. The next question is whether the alleged misrepresentation makes any difference to the above analysis. In my judgment it does not. Even if the Commissioners had been informed of the relevant passage in the manual, its

terms are far too vague and inconclusive to support the inference that the Company made its return in accordance with the generally prevailing practice. I consider that the same is true of a short, anonymous article in the Law Society Gazette of 4 October 1989, upon which Mr Woolf also relied, which gave a brief indication of the Revenue's reported views on the application of section 43 to payments into non-statutory share ownership trusts. Thus the position would have been no different if this material had in fact been before the Commissioners, and again there would be no point in remitting the matter to them for further consideration.

60. It was in recognition of this fact, I think, that Mr Woolf argued for a remitter with permission to adduce fresh evidence generally on the paragraph 45 issue. However, such an order should only be made in exceptional circumstances, and I can see no good reason in the present case why the Company should be given a second chance to adduce evidence which it could and should have adduced at the first hearing. HMRC cannot in any way be blamed for the Company's failure to come to the hearing armed with such evidence. All that would be needed to remedy any prejudice to the Company caused by Mrs Morris' failure to disclose the relevant extract from the manual would be for it to be looked at and taken into account; but as I have already said there would be no point in doing this, because it could not make any difference to the result.
61. Accordingly, for the reasons I have given, I consider that the right course for me to take is to allow the appeal and affirm the Assessment.