TC05549

Tribunal ref: TC/2015/03803

INCOME TAX — PAYE — trade union branch secretaries receiving honoraria — whether branch secretaries 'office holders' within ITEPA s 5 — yes — determinations correctly made in principle — observations on amounts determined and on legitimate expectation

FIRST-TIER TRIBUNAL
TAX CHAMBER

COMMUNITY (a trade union) **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 8 September 2016

Mr Keith Gordon, counsel, instructed by H W Fisher & Company, Chartered Accountants, for the appellants

Mr Tony Burke, presenting officer, for the respondents

DECISION

Introduction

1. The appellant, known simply as 'Community' is a trade union. It came into being in 2004 as an amalgamation of small trade unions, representing workers in a disparate variety of industries. It is divided into eight regions, sub-divided into branches, each of which has a branch secretary who is responsible, with other members of the branch committee, for the running of the branch. Although all of the officers of each branch are volunteers, I understand it is the secretaries alone who receive payment, in the form of what Community terms an honorarium (the label applied is of no significance in itself). The honorarium, paid quarterly, is calculated as a percentage of the branch members' contributions, and usually amounts to a relatively modest annual sum. It is common ground that the honoraria represent in part the reimbursement of expenses and in part a 'profit' element. It is also common ground that the honoraria are taxable (with relief for the expenses element). The question which arises in this appeal is whether they fall within the scope of the PAYE provisions, that is the Income Tax (PAYE) Regulations 2003 ('the Regulations'), or are to be dealt with in a different manner.

2. The respondents, HMRC, take the view that they must be treated in accordance with the Regulations, and have issued four determinations, made pursuant to reg 80, and relating to the years 2010-11 to 2013-14 inclusive, by which they seek to recover tax of about £108,000 for which they say Community should have accounted. The essence of HMRC's reasoning is that the branch secretaries are office holders within the meaning of s 5 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') and that, by operation of the legislative provisions with which I deal in more detail below, the honoraria are to be treated as employment income, thus falling within the scope of the Regulations.

3. Community has appealed against each of the determinations. Its primary case is that the branch secretaries are not office holders. In addition, it says, even if the respondents are right in principle, the amounts assessed are excessive. For the reasons I explain below I do not need to deal with this argument, but I shall nevertheless make some comments about it later. Third, Community argues that what HMRC have done, or have purported to do, offends its legitimate expectations, though it recognises that there are difficulties in its path in raising such an argument in this tribunal. Again, I do not need to deal with the argument but will make some observations later.

4. The relevant facts, including the brief outline set out above, are largely undisputed but I had the written and oral evidence of four witnesses: Mr Sailesh Mehta, who is a partner in the firm of chartered accountants representing Community and who undertakes its annual audit; Mr Roy Rickhuss, Community's general secretary; Mr Peter Rees and Mr David Preedy, both branch secretaries; and Mrs Sarah Wold, Community's director of finance. I accept their evidence, which was not materially challenged in cross-examination, and what I say below of their evidence may be taken as my findings of fact.

5. Community was represented before me by Mr Keith Gordon of counsel and HMRC by Mr Tony Burke, a presenting officer.

The facts

6. Mr Rickhuss described Community's structure, and in particular its division into regions each with several branches, run by a branch secretary with support from a committee. The branch secretaries were and are elected by the members of each branch for a term of two years, but as it is difficult to persuade candidates to stand many branch secretaries stand unopposed and serve several two-year terms. For the same reason a significant number of posts are unfilled at any given time. In these cases, the branch is run by the regional office until a new secretary can be found. An honorarium is paid only to elected branch secretaries, and not to others who temporarily perform their functions.

7. Mr Rees has been a member of Community, or its predecessor unions, since April 1979, when he began working at what is still his place of employment in South Wales. He became a branch committee member in 1988 and was elected the branch secretary in 1999, a position he still holds. His duties include the representation of 141 Community members, all working on the same site, and he participates in negotiations on pay and working conditions as a member of a joint committee of all the trade unions who have members on the site. Because he is a branch secretary he also serves on various other regional and national committees and, he explained, although he is allowed by his employer to devote part of his working time to union business, he also spends a good deal of what would otherwise be his spare time on Community's or wider trade union affairs. His position does not bring with it any power to bind Community in any way—that can be done only at national level. He can also not make branch-level decisions alone; that may be done only by the committee. In essence, the branch secretary is the conduit between the individual members and the branch committee, and between the branch committee and the regional and national committees. The honorarium is intended to include reimbursement of routine expenses, such as stamps and telephone calls and travelling within the branch's area, but other expenses, such as for travel further afield or hotel bills, are claimed separately; Community has a published scale of claimable expenses. Mr Rees added that he enters the amount of his honorarium on his annual tax return, and his PAYE code is adjusted in such a manner as to ensure that the honorarium is subject to tax. Mr Preedy's evidence was in all material respects the same as Mr Rees's, and I intend him no disrespect by not setting it out. Both Mr Rees and Mr Preedy produced copies of correspondence between themselves and their respective local tax offices showing the process of adjusting their tax codes, including in the years which are the subject of the disputed determinations.

8. Mrs Wold has been working for Community or a predecessor body since 1997. When she joined, there was an understanding with what was then the Inland Revenue about the handling of the honoraria. A few were sufficiently large to attract national insurance contributions, for which special arrangements were put in place, but as far as income tax was concerned there was an agreement that the honoraria should be paid gross and that each branch secretary should himself declare the payment to the Inland Revenue each year. Community was required to, and did, provide an annual list of the branch secretaries and the payments made to them. In 1997, as is common ground, one of Community's predecessor unions and the Inland Revenue agreed on a simple formula for calculating the expenses element on a 'rough and ready' basis, in order to avoid a detailed enquiry into relatively modest amounts. It is also common ground that arrangements such as Mrs Wold described had been in place since at least 1981, and I

saw documentary evidence of the practice over several years. Occasionally Mrs Wold received enquiries from local offices of the Inland Revenue or, later, HMRC about the amounts paid, but there was no suggestion that the branch secretaries should be treated as if they were employees or that their honoraria should be processed through the union's PAYE scheme (which caters for about 70 employees) until 2012, when HMRC raised the subject, without prior warning, at a meeting. Mrs Wold also explained the practical difficulties which Community would face if it was forced to process the honoraria through its PAYE system, but I do not think those difficulties, which I accept would be real, can affect the outcome of this appeal.

9. The main topic of Mr Mehta's evidence was the history of the dispute between Community and HMRC. He too knew that until 2012 there was an established understanding between Community and HMRC that the honoraria need not be accounted for by means of Community's PAYE system, but that it could instead pay them without deduction of tax, and supply to HMRC, at each year end, a list such as Mrs Wold had described. He was unaware of any change of view on HMRC's part before the meeting mentioned by Mrs Wold, a meeting which, because it was assumed to be of a routine nature, Mr Mehta did not attend. He then described somewhat hostile exchanges, in correspondence and at meetings, as well as the issue by HMRC of some information notices which Community had challenged. HMRC's attitude, throughout, he said, had been uncompromising: they were insistent that the branch secretaries were office holders and that their remuneration should have been processed through the PAYE system, even though it had already been taxed by other means, a fact which the determinations did not reflect.

The relevant law

10. It is common ground that the branch secretaries are not Community's employees, and that the validity of the determinations stands or falls by the correctness of HMRC's contention that they are 'office holders', with the consequence that s 5 of ITEPA is engaged. That section is as follows:

> '(1) The provisions of the employment income Parts that are expressed to apply to employments apply equally to offices, unless otherwise indicated.
>
> (2) In those provisions as they apply to an office—
>
> (a) references to being employed are to being the holder of the office;
>
> (b) "employee" means the office-holder;
>
> (c) "employer" means the person under whom the office-holder holds office.
>
> (3) In the employment income Parts "office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders.'

11. Thus if HMRC are right, the honoraria are to be treated as employment income, in which case, as Mr Gordon accepts, they do fall within the scope of the Regulations and, by virtue of reg 21, Community should have deducted tax from the payments and should have accounted to HMRC for the amount so deducted in accordance with either reg 67G or reg 68. As these propositions are undisputed I shall say no more about those regulations.

12. ITEPA does not offer any guidance about what does and what does not amount to an 'office', beyond the rather brief statement at sub-s (3). There is some case-law, to which I come shortly, but it is necessary to treat it with some caution, in part because (as will be seen) much of it reflects a different age and in part because HMRC argue that s 5 effected a change in the earlier law. That, they say, is apparent from the long title of the Act, which begins 'An Act to restate, with minor changes, certain enactments relating to income tax on employment income …'. The Act came about in the course of the Tax Law Rewrite project, whose remit included the making of minor changes in order to simplify or explain the law. The Explanatory Notes issued with the Act made it clear that it did in fact contain some minor changes to the legislation. In their statement of case HMRC went so far as to say that 'The change in ITEPA was that branch secretaries are specifically now regarded as office-holders and therefore liable to PAYE'. Mr Gordon disputes that interpretation of ITEPA; his position is that, far from amending the law, this provision of the Act was designed to preserve it.

13. It is, therefore, necessary to begin with the law as it was before the coming into force of ITEPA on 6 April 2003. The question in borderline cases, until then, was whether the payment in question fell within Schedule D or Schedule E (for which ss 18 and 19 respectively of the Income and Corporation Taxes Act 1988 ('ICTA') provided); Schedule E earnings did, but Schedule D earnings did not, come within the PAYE regime. Section 833(4) of ICTA (repeating, though not in identical terms, earlier equivalent legislation) provided that 'earned income', that is income within Schedule E, included 'any remuneration from any office or employment'. The statutory guidance was, therefore, even less informative than s 5(3) of ITEPA, and the interpretation of the section was left to the courts. When considering the resulting authorities it is important to bear in mind not only that some pre-date the introduction of the PAYE scheme but also that the boundaries of Schedules D and E have changed significantly over time, with the consequence that the outcome of some of the cases referred to below will seem surprising to modern eyes. They do, however, retain some relevance to the issue in this appeal.

14. The earliest of the authorities in which the question whether a particular position amounted to an 'office' for the purposes of the income tax Acts to which it is necessary to refer is *Great Western Railway Co v Bater (Surveyor of Taxes)* (1922) 8 TC 231. In that case, a Mr Hall had worked for the railway company for many years as a clerk, receiving a salary. At the time the relevant statutory provision, defining what was to be taxed in accordance with Schedule E, was s 146 of the Income Tax Act 1842, which included within the scope of the Schedule 'all public offices and employments of profit … any office or employment of profit held … under any company or society … and every other public office or employment of profit of a public nature'. The Income Tax Act 1860 added that earnings 'in respect of all offices and employments of profit held in or under any railway company' fell within Schedule E, whereas the earnings of those who would nowadays be regarded as ordinary employees came within Schedule D. The focus of the argument was the question whether Mr Hall's position was of a public nature, a question of limited relevance now, though when the case was decided, as the extracts from the legislation I have set out show, it dictated whether earnings came within one Schedule rather than the other. Nevertheless, some of the observations on the meaning of 'office' are helpful.

15. The Special Commissioners decided that the salary came within Schedule E (because they accepted the Crown's argument that Mr Hall's position was of a public nature), a decision upheld, though with misgivings, in the High Court by Rowlatt J. At p 235 he said:

> 'Now it is argued, and to my mind argued most forcibly, that … what those who use the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it ….'

16. Rowlatt J went on to draw a distinction between different classes of worker:

> '… when I say officers I mean people under Schedule E—as opposed to mere labourers or weekly wage earners such as porters, engine drivers, and the like.'

17. It is quite clear that he considered the distinctions drawn by what was then old legislation were difficult to apply, and in the case before him led to what he regarded as an absurd result (that is, that a clerk should be taxed in a different manner from an engine driver), hence his misgivings, but he nevertheless felt obliged by the earlier authority of *Attorney-General v Lancashire and Yorkshire Railway Company* (1864) 2 H & C 792 to determine that Mr Hall fell within Schedule E. The Special Commissioners' decision was again upheld by the Court of Appeal, but reversed by a majority by the House of Lords. Lord Atkinson cited with approval the first of the passages from the judgment of Rowlatt J which I have set out; and Lord Sumner, at p 251-2, added that

> '[Mr Hall] has been since boyhood a clerk in the service of the Great Western Railway Company. He is about 39 years of age. He receives a "salary" … There is no written agreement, but the employment continues till it is terminated by a month's notice on either side. He receives it equally during limited periods of holidays and sickness as when he is at work. He discharges clerical duties not otherwise specified; and has to do so wherever required … In plain language he is in a situation as a clerk at a modest salary. Nothing is stated as to the total number of other clerks employed, or of those in his grade. We are not told whether their work is uniform or fluctuating, or whether their number is fixed or variable … At present he is in the Divisional Superintendent's Office at Swindon, whatever that involves, and he is called a member of the "permanent" staff, and enjoys such permanency, I suppose, as a month's notice allows. My Lords, to say that Mr Hall holds an "office" seems to me to be an abuse of language, and to say that his employment is one "of profit" is pompous and obscure; but it may be one "of profit" notwithstanding. At any rate I would not on that ground say that he is not within the language of Schedule E.'

18. As I observed above, the case reflects a different age, and nowadays there would be no doubt that a clerk's salary was 'earnings' (see ITEPA s 62) and subject to the Regulations. The important point to emerge from the case is that an 'office' amounts, as Rowlatt J put it and Lord Atkinson echoed, to 'a substantive thing that exist[s] apart from the holder'; and that an ordinary employee, as Mr Hall would undoubtedly be regarded now, is not an office-holder.

19. The focus of the argument in the next relevant case, *McMillan v Guest* [1942] AC 561, was also on whether or not the appointment, as non-executive director of an English company, was of a public character. By this time the relevant legislation was the Income Tax Act 1918, which brought within Schedule E 'every public office or employment of profit'. It was agreed, by reference to what Rowlatt J had said in *GWR v Bater*, that the taxpayer held an office; thus the question was whether it was a 'public office'. That is not a consideration here; but Mr Gordon relies on what Lord Wright said at p 566:

> 'I do not attempt what their Lordships did not attempt in *Bater*'s case, that is, an exact definition of these words [*ie* 'public office or employment of profit']. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office.'

20. More recently the House of Lords considered the point again in *Edwards v Clinch* [1982] AC 845. The taxpayer in that case was a chartered civil engineer who was appointed by what was then the Department of the Environment to conduct public enquiries, for which he received a daily fee. He accounted for the fees in accordance with a more recent, and to the modern reader more familiar, version of Schedule D; but the Inland Revenue considered he should have done so in accordance with Schedule E. The General Commissioners decided in the taxpayer's favour; the High Court reversed their decision but the Court of Appeal restored it, and their conclusion was upheld by the House of Lords, albeit only by a majority. Lord Wilberforce (one of the majority) observed at p 860:

> 'Of course it would be desirable in an ideal world for expressions in tax legislation to bear ordinary meanings, such as the citizen could find out by consulting the *Oxford English Dictionary*. But it is a fact that many words of ordinary meaning acquire a signification coloured over the years by legal construction in a technical context such that return to the pure source of common parlance is no longer possible. I think that "office" is such a word.'

21. While he recognised the continuing worth of what Rowlatt J had said in *GWR v Bater*, at p 861 he cautioned against an excessively literal application of it and made it clear that the appropriate test imported a measure of common sense:

> '… if any meaning is to be given to "office" in this legislation, as distinguished from "employment" or "profession" or "trade" or "vocation" (these are the various words used in order to tax people on their earnings), the word must involve a degree of continuance (not necessarily continuity) and of independent existence: it must connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed.…
>
> Acceptance of the admittedly somewhat indefinite guidelines suggested above does not, of course, solve the instant, or any similar, problem. It is necessary to appraise the characteristics of the appellant's "appointment." There is in this task an element of common sense evaluation of fact ….'

22. Lord Salmon, also in the majority, undertook a review of the earlier authorities before remarking at p 865 that:

> 'The highly respected authorities to which I have referred have all agreed as to the meaning of the word "office" in Schedule E, namely, "a subsisting, permanent, substantive position which has an existence independent of the person who fills it." Accordingly, if that meaning is missing, as it is in the present case, the person concerned could not be taxed under Schedule E as an office holder.'

23. The last case with which I need to deal is *McMenamin v Diggles* [1991] STC 419. The taxpayer in that case was the senior clerk of a set of barristers' chambers. Until 1985, as was common ground, he was an employee assessable in accordance with Schedule E, but in that year he entered into new arrangements by which each of the members of the chambers paid to him a percentage of his gross earnings, in return for which the taxpayer agreed to provide a full clerking service, himself bearing the cost of doing so; he was not obliged to act as clerk himself, but in fact did so. The Inland Revenue took the view that he remained assessable in accordance with Schedule E and assessed him to income tax on that basis for the three years following the change of arrangements. The Special Commissioners determined that the taxpayer was neither an employee nor an office holder, a determination which was upheld by Scott J in the High Court. At p 429 he referred to a rule in the *Code of Professional Conduct for the Bar of England and Wales* to the effect that a barrister must have the services of a clerk, and at p 430 he observed that:

> 'It is implicit in that rule that every chambers is expected to have a clerk; otherwise, barristers could not comply with [the] rule …. It was thus argued by counsel for the Crown that the structure of the profession of barrister envisaged that each barrister should have the services of a person occupying the office of clerk of chambers, and in a sense that is so. But it does not follow that a clerk in barristers' chambers holds an "office"….'

24. He then added:

> 'Another feature of possible importance is the manner in which the individual came to hold the alleged office. Appointment to many offices is made in a formal manner … Some appointments are made by formal documents referring to the post to be filled and defining it. Formality of appointment is a feature which may be associated with most offices falling within Sch E. But again it probably would be going too far to say that without some formal appointment there could not be an "office" falling within Sch E.'

25. That, it seems, was for Scott J the decisive factor because of what he said at p 431:

> 'The taxpayer's duties as clerk … were in no sense public duties. His assumption of the role of senior clerk was not under any formal appointment. He was not so appointed by the written agreement of 7 October 1985 itself. His assumption of the role of senior clerk was the result of his own decision to fill that role. That was the means most convenient to him for the discharge of the contractual obligations he owed the individual barristers under the agreement. I find it very difficult to regard the position filled by the taxpayer as a consequence of his decision thus to discharge his contractual obligations as an "office". I, like counsel for the Crown, can picture an elephant but if I try to picture a Sch E "office" I do not bring to mind a barristers' senior clerkship. I think that the taxpayer's senior clerkship was more of a job description than the holding of a Sch E "office".'

Community's arguments

26. Mr Gordon draws from the authorities the propositions that the statutory meaning of the term 'office' is autonomous and cannot be derived from a dictionary definition, and that Parliament must be taken to have been aware that it had an autonomous meaning when it continued to adopt it in ITEPA without re-definition. It is not sufficient to identify a role with a title, or a position of responsibility or authority; what must be identified is a 'substantive position' (to adopt Rowlatt J's words), and the process of identification requires the application of common sense.

27. Here, Mr Gordon says, the evidence shows that a branch secretary is merely one of several members of the branch committee, and has no more substantial role; he performs an administrative function, such as record-keeping, even if he does represent members of the branch from time to time in negotiations; he might bind an individual member if mandated to do so but has no authority to bind the union; rather, he acts as a conduit between the union and its members. It is also important to bear in mind, he says, that the branch secretary's functions can be undertaken by others if the position is vacant, suggesting that the position is not an office in the statutory sense, but has no more than a functional role.

28. HMRC accept that the branch secretaries were not office-holders before ITEPA came into force and it necessarily follows, if their argument is to succeed, that s 5(3) must have effected a change in the law. Though it is true that some provisions of ITEPA made changes to the law, there is no indication in the Act itself, or in the Explanatory Notes published with it, that s 5(3) was intended to do so. The Explanatory Note set out, in Annex 1, details of the changes it made; s 5(3) does not feature in that Annex. At Annex 2 the Explanatory Note included some notes on interpretation, observing that they 'concentrate on points where it may not be immediately apparent that the Act preserves the effect of the existing law.' The note to s 5 is as follows:

> '**Section 5: Application to offices and office-holders**
>
> 38. This section sets out that the employment income Parts apply to offices and office-holders in the same way as they apply to employments and employees.
>
> 39. *Subsection (3)* provides a non-exhaustive definition of the term "office". It is based on guidelines derived from case law. This change in approach is explained in detail in *Note 1* in Annex 2.' [original italics]

29. Note 1 in Annex 2, entitled 'Explanations of "employment" and "office": sections 4 and 5' is lengthy, and much of it (relating to the 'employment' provisions of s 4) is irrelevant for present purposes. Those parts on which Mr Gordon relies are as follows:

> 'This deals with the introduction of partial explanations of "employment" and "office". These are intended to provide a measure of statutory guidance as to the meaning of these expressions by identifying certain arrangements which seem to be clearly covered by them, but without seeking to alter their scope.
>
> Tax is charged under cases I to III of Schedule E "in respect of any office or employment on emoluments therefrom": see section 19(1) of ICTA. There is nothing in current tax legislation that defines either "office" or "employment"….
>
> (B) The concept of an "office" is one that has also been considered by the courts: see in particular *Great Western Railway Company v Bater* (1922) 8 TC 231 and *Edwards v Clinch* (1981) 56 TC 367. But in this case it does seem possible to

> construct a definition based on the guidelines established by the courts. However, since these are only guidelines, any explanation can, again, only be non-exhaustive.
>
> Section 5(3) of the Act contains such an explanation. It states that "office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders. Section 5(2) is another new (but rather less significant) interpretation provision relating to offices: it simply spells out how provisions worded in terms of employments are to apply to offices.'

30. There is, says Mr Gordon, a complete absence from those observations too of any indication that ITEPA was intended to change the judicially determined meaning of 'office'. If the branch secretaries were not office holders before 2003 they had not been made office-holders by ITEPA s 5(3). The determinations proceeded, therefore, from a false premise.

HMRC's arguments

31. Mr Burke relies mainly upon HMRC's own guidance and practice. An HMRC publication entitled 'Employer Further Guide to PAYE and NICs', effective for the 2009-10 year, for example, clearly states that honoraria are subject to the PAYE scheme for both tax and national insurance contributions. That interpretation, Mr Burke argues, is consistent with the concept of 'subsisting, permanent, substantive position' with 'an existence independent from the person who filled it, which went on and was filled in succession by successive holders' to which Rowlatt J referred in *GWR v Bater*, and it is consistent too with the common sense approach endorsed by Lord Wilberforce in *Edwards v Clinch.*

32. It is significant, Mr Burke says, that Community itself appears to regard its branch secretaries as office-holders, or at least as 'officers', the term used throughout its rule-book. In the September 2011 version of the rules (still in force at the date of the hearing before me), for example, the holders of national and regional positions within the union are all described throughout as 'officers', and rule 10d provides for a regional forum including 'at least one elected officer of each branch within the region'—it being HMRC's understanding that the officer in question was usually the branch secretary.

33. Moreover, Mr Burke asks rhetorically, if the branch secretaries are not office-holders, what other description can be applied to them? None of the witnesses had offered an alternative description, but one has to be found. If (as is common ground) they are not employees it is difficult to see what description other than office-holder is apposite. It is significant too that the branch secretaries are elected; they are elected to a position and the only apt description for that position is an office. It is one which has a continuing existence independent of its holder for the time being, and remains an office notwithstanding it might be vacant at any particular time.

Discussion

34. As I have mentioned, the parties were in agreement that before 2003 the branch secretaries were not office-holders, though I did not detect that they had agreed on what other description might be applied to them. That 'office-holder' was, before 2003, not an appropriate description was an essential ingredient of Mr Gordon's argument that, since ITEPA s 5(3) effected no change to the law, 'office-holder' could not be an appropriate description in the years following the coming into force of the Act. I should

mention for completeness that although it was implicit in Mr Burke's argument that such an amendment must have been effected, he did not develop the point. I agree, however, with Mr Gordon that s 5(3) did not and, as the extracts from the Explanatory Note which I have set out clearly show, was not intended to effect any change. Where I part company with both Mr Gordon and HMRC is in my view that the branch secretaries were office-holders before 2003, and remain so.

35. I should make it clear before going further that I see no warrant for the assertion in the statement of case, to which I referred at para 12 above, that ITEPA s 5 showed that 'branch secretaries are specifically now regarded as office-holders'. In my judgment that proposition significantly overstates the position: there is nothing in ITEPA itself, or in the Explanatory Note, which supports such a bold statement. Thus although I am satisfied that 'office-holder' is the correct description, it is not for this reason.

36. I have already made the point that the earlier authorities to which I have referred above must be treated with care because they relate to historic legislation, and to a quite different taxonomy of taxpayers from that in operation in the years leading up to the abolition of the Schedules. One cannot, therefore, draw very much from the conclusions which the judges reached on the application of the Schedules to the facts of those cases, but I agree that their observations on the meaning of 'office-holder' are of assistance. Nevertheless, despite that observation, and after heeding the word of caution that 'office-holder' has, for tax purposes, an autonomous meaning which may deviate materially from the dictionary definition, it is in my view clear beyond any real argument that the only suitable description of a position to which one is elected and which has the characteristics I am about to describe is 'office' and that it necessarily follows that the holder of it at any time must be an 'office-holder'.

37. The first characteristic is that the office continues irrespective of the identity of the holder for the time being, and irrespective of the fact that at any given time it may be vacant: that is apparent from all of the authorities examined above. It is also why the clerk in *McMenamin v Diggles* was found not to hold an office; although there was continuity in the sense that the barristers needed a clerk, the arrangement with the clerk in that case was personal to him, and could not simply pass to a successor when he retired or resigned from his position. However, the requirement of continuity, by itself, is not sufficient. One might be elected as, for example, the BBC Sports Personality of the Year, a position which is normally held for a year until someone else is elected to it. Thus the position passes from one holder to the next, but it would be unrealistic to describe it as office; a more apt description is 'title'.

38. The second characteristic of significance is that the position carries with it some responsibility and, in the context of tax, some remuneration. This characteristic was not mentioned in the earlier authorities because it was undisputed in each case that the individual had responsibilities and was remunerated—indeed, the cases would not have reached the courts but for the remuneration. It is, nevertheless, clear from the statutory context that what is under consideration is a relationship between payer and payee which, though not of employment, has much in common with it, in particular the obligation on the one to work and on the other to pay.

39. If that analysis is correct it seems to me clear that the only reasonable conclusion must be that the branch secretaries were and are office-holders. They were elected to a

position which, irrespective of the identity of the holder for the time being, had a continuing existence which did not cease upon a temporary vacancy, and carried with it a number of duties, undertaken in return for reward. I acknowledge the force of Mr Burke's argument that if the branch secretaries were not employees (and I should add for completeness that it seems clear to me that they were not) it is difficult to see what description, other than office-holder, could properly be applied to them. That is not, by itself, a reason for concluding that 'office-holder' is the correct label, but it is, I think, a useful way of checking that the conclusion reached is not undermined by the existence of some other appropriate term.

40. It follows that the determinations were, in principle, correct and that this part of the appeal must be dismissed.

The amounts determined

41. I do not need to address this part of the appeal in any depth because of the assurance offered by Mr Burke during the course of the hearing that HMRC will be willing to review the amounts determined and adjust those amounts if it can be shown that the honoraria have in fact been taxed by other means. I shall have a little more to say about HMRC's approach to this case shortly, but in this context I merely remark that I am surprised that the concession was not made earlier when, as I have explained, for more than 30 years, including some of those the subject of the determinations, and in accordance with an established agreement, HMRC have been receiving details of the amounts paid to the branch secretaries and have been adjusting their respective PAYE codes in order that the tax due is, or was, collected by deduction through their employers' payroll systems. What is said by way of justification in Mr Burke's skeleton argument is that the number of branch secretaries is too great to enable HMRC to check whether they have all declared their honoraria on their returns. Even if that is true it is difficult to understand why HMRC did not direct a change for the future while leaving untouched the past outcome of an arrangement in which they not only acquiesced but also actively participated.

42. I was not taken to the detail of the determinations but had Mr Mehta's evidence, which was unchallenged, that they allowed no credit for any tax on the honoraria which had in fact been paid by the branch secretaries in the manner I have described. The explanation offered in the statement of case, and repeated in Mr Burke's skeleton argument, is that no details had been supplied by Community. I find that, to put it at its lowest, a surprising assertion in the face of the annual provision by Community of the lists I have described, and the copious evidence that the branch secretaries were indeed declaring their honoraria and that their PAYE codes were adjusted in consequence. HMRC could have undertaken a sample check by an examination of their own records, but there was nothing before me to suggest that this course had even been considered. HMRC's task is to assess tax which is due, not to put up the maximum possible figure and leave the taxpayer to knock it down. I hope that the parties can agree upon the extent of the credit which should be allowed without further intervention from the tribunal, but if not I give permission to either party to seek to have the hearing continued for that purpose.

Legitimate expectation

43. Mr Gordon accepted that this tribunal has no jurisdiction, in the context of a case of this kind, to consider arguments of legitimate expectation: see *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998. He raised the argument merely to preserve it should the case go further. I shall therefore not deal with it, but I do think it appropriate to make some comments.

44. In *Edwards v Clinch*, at p 863, Lord Salmon said this:

> 'Prior to 1973, the Inland Revenue clearly considered (and I think rightly) that Mr Clinch and others like him who did the kind of work to which I have referred were earning their income arising or accruing from their profession or vocation, and were therefore taxable only under Case II of Schedule D … and this was the way in which Mr Clinch always had been taxed prior to 1973.
>
> It seems never to have occurred to the Inland Revenue prior to that year that Mr Clinch or anyone of his profession doing his kind of work could be regarded as holding "an office"; and therefore it was concluded that they could not be taxed under Case I of Schedule E … During 1973, however, the Inland Revenue appears to have changed its mind. It assessed Mr Clinch, and those like him, for tax under Case I of Schedule E without giving the taxpayers any warning. Walton J states [1979] 1 WLR 338, 342 that the Inland Revenue had behaved in "an extremely insensitive manner, and are to be censured accordingly." I agree, and might have been tempted to use even stronger language.'

45. In my judgment the circumstances of this case are strikingly similar. At the risk of repetition, Community and its predecessors, with the full knowledge and acquiescence of HMRC and before it the Inland Revenue, had been paying the honoraria gross for at least 30 years. Without warning (and, as Mr Gordon pointed out, nine years after the supposed amendment to the law on which they rely) HMRC insisted on a change in the practice, not merely for the future but for the past, and they have demanded tax which there is every reason to think the branch secretaries have already paid. The correspondence to which I was taken revealed an uncompromising attitude on HMRC's part based on an overarching presumption, which I regret to say spilled over into Mr Burke's submissions, that if HMRC say so, then it is so. That attitude was reflected in the recitation in the statement of case of HMRC's interpretation of the law rather than of the law itself, as if HMRC's interpretation was unquestionably correct, and in HMRC's overt reliance on s 50(6) of the Taxes Management Act 1970, a provision which makes it clear that an assessment is to stand unless the taxpayer shows that it is excessive. It is plain, however, by its own terms that the provision is directed at monetary amounts, but not at underlying issues of law. Thus although I have determined the main issue in the appeal in HMRC's favour, I find much in their approach to deprecate.

46. 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.

COLIN BISHOPP

TRIBUNAL JUDGE

RELEASE DATE 8 DECEMBER 2016