SCHEDULE E - year of assessment 1988-89 - whether Special Commissioners have jurisdiction to hear appeal against refusal to apply a non-statutory practice - whether the Inland Revenue agreed to assess emoluments on the non-statutory accounts basis instead of the statutory earnings basis - if so, whether the transitional provisions in s 38 FA 1989 overrode the terms of the non-statutory practice - appeal dismissed - ICTA 1988 s 19; FA 1989 s 37 and 38

THE SPECIAL COMMISSIONERS

COLIN MALONE

Appellant

- and -

RALPH QUINN

(HM INSPECTOR OF TAXES)

Respondent

SPECIAL COMMISSIONER : DR NUALA BRICE

Sitting in London on 6 February 2001

Mr M J Hodgson-Barker, of Messrs S G Ripley & Co, Chartered Accountants, for the Appellant

The Respondent in person

DECISION

The appeal

1. Mr Colin Malone (the Appellant) appeals against a schedule E assessment dated 24 March 1995 which assessed his remuneration as a director of two companies for the year 1988-89 in the amount of £80,315.00. The assessment was based on the amount of the emoluments earned by the Appellant in the year 1988-89, namely on the earnings basis. The Appellant appealed on the ground that the emoluments should have been assessed on the amount shown in the accounts of the companies for the year ending in the year of assessment, namely on the accounts basis.

The legislation

2. For years of assessment up to and including 1988-89 the relevant parts of section 19 of the Income and Corporation Taxes Act 1988 (the 1988 Act) provided:

"(1) The Schedule referred to as Schedule E is as follows-

SCHEDULE E

1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one or more of the following Cases-

Case I

Where the person holding the office or employment is resident and ordinarily resident in the United Kingdom, any

emoluments for the chargeable period . ."

3. Section 37 of the Finance Act 1989 (the 1989 Act) inserted two new sections in the 1988 Act. Section 202A provided that, for the year 1989-90 and subsequent years of assessment, emoluments were assessed for the tax year in which they were received (the receipts basis) instead of the year in which they were earned. Section 202B contained rules for determining when certain emoluments were received. Section 38 of the 1989 Act contained transitional provisions for emoluments of years of assessment before 1989-90 which were received after 6 April 1989.

The issues

4. The parties agreed, on the authority of Dracup v Radcliffe 27 TC 188, that the effect of section 19 of the 1988 Act, for years of assessment up to and including 1988-89, was to tax emoluments in the year of assessment in which they were earned (the earnings basis). The parties also agreed that before 1989 the Inland Revenue on occasion agreed with taxpayers that emoluments paid to directors of companies and others could be computed instead on the amount shown in the company's accounts for the year ending in the year of assessment (the accounts basis) and that this amounted to a non-statutory practice.

5. It was argued for the Appellant that his emoluments for the year 1988-89 should have been assessed on the accounts basis and not on the earnings basis in which case the amount of his emoluments would have been £37,625.00. Specifically, it was argued first that the Inland Revenue had agreed to assess the Appellant on the accounts basis as they had acquiesced over a period of time to informal claims made on that basis and had assessed two other persons with similar incomes on the accounts basis and that the Appellant was entitled to similar treatment; and, secondly, that the special provisions applying to the penultimate year of assessment under the accounts basis did not apply to the Appellant as those provisions had been replaced by the transitional provisions in section 38(8) of the 1989 Act.

6. The Respondent argued that the Special Commissioners did not have jurisdiction to hear an appeal about a refusal to apply a non-statutory practice; that there was in fact no agreement that the Appellant could use the accounts basis; and that, even if there had been such an agreement, then it was part of that agreement that the penultimate year should be assessed on the earnings basis.

7. Thus the issues for determination in the appeal were:

(1) whether the Special Commissioners had jurisdiction to hear an appeal about the refusal to apply an non-statutory

practice;

(3) whether the Inland Revenue had in fact agreed to assess the Appellant on the accounts basis instead of the earnings basis and, in this connection, the relevance of the treatment of two other taxpayers; and

(3) whether the non-statutory arrangements for the penultimate year under the accounts basis had been replaced by the transitional provisions in section 38(8) of the 1989 Act.

The evidence

8. A statement of agreed facts was produced and a large agreed bundle of documents was produced. Few of the documents in this bundle were referred to at the hearing. In addition the Appellant put in two more clips of documents and the Respondent put in another separate bundle.

The facts

9. From the evidence before me I find the following facts.

The Appellant's Schedule E remuneration

10. On 1 February 1977 the Appellant commenced as a director of Albemarle Graphics Limited (Albemarle). The directorship ceased on 12 December 1989. During those years remuneration was voted to the Appellant on 30 June in each year (except that no remuneration was voted on 30 June 1981). The amount of remuneration voted was:

30 June 1978 £ 1,500.00

30 June 1979 £ 1,500.00

30 June 1980 £ 1,500.00

30 June 1981 Nil

30 June 1982 £ 1,400.00

30 June 1983 £ 1,750.00

30 June 1984 £ 1,750.00

30 June 1985 £ 3,000.00

30 June 1986 £ 3,750.00

30 June 1987 £17,500.00

30 June 1988 £37,500.00

30 June 1989 £94,420.00

31 December 1990 Nil (01.07.89 - 21.12.89)

11. The Appellant was also the director of two other companies, Astbury Graphics Limited (Astbury Graphics) and Astbury Sign Group Limited (Astbury Sign). He was appointed a director of Astbury Graphics on 12 April 1973. In the twelve years ending on 31 December 1989 he was only voted remuneration in four of those years namely on 31 December 1982, 1983, 1984 and 1985. The amount of such remuneration was:

31 December 1982 £1,400.00

31 December 1983 £1,650.00

31 December 1984 £1,750.00

31 December 1985 £1,750.00

12. The Appellant was appointed a director of Astbury Sign on 25 July 1985. He was voted remuneration of £500.00 on each of 30 June 1986, 1987 and 1988 and of nil on 30 June 1989.

The non-statutory practice

13. On 24 June 1981 Tolley's Practical Tax published an Article entitled "Accounts Basis for Schedule E". The Article stated that the legal basis of assessment under Schedule E was the actual income of the year but that this caused practical difficulties in cases (such as directors and employees remunerated by commission related to profit) where the amount of the actual income of the year was not determined until perhaps some years later. The Article went on to state that, in order to overcome these difficulties, the Inland Revenue had begun to adopt the practice of making Schedule E assessments on the accounts basis, namely on the amount of remuneration shown in the employer's accounts for the year which ended in the year of assessment. The Article continued by stating that the practice had been stated by the Inland Revenue Technical Division to be:

"The adoption of the accounts year basis of assessment is invited by the Inspector, in those cases which he thinks suitable, as an alternative to the statutory basis of assessment, the earnings basis. The use of the accounts year basis for a particular source of income is subject to the acceptance by the taxpayer of the following conditions:

(a) The earnings basis must be applied to:

(i) the first year of assessment for which the emoluments were earned;

(ii) the following year of assessment, where the emoluments payable for the accounting period ending in that second year related to a period of less than twelve months; and,

(iii) the year of cessation and the penultimate year.

(b) The position will be subject to a review by the Revenue should the accounting date change or a claim be made by the taxpayer for the earnings basis to apply."

14. On the evidence before me this was the only public pronouncement of the non-statutory practice at issue in the appeal. The Article was produced on behalf of the Appellant from which I conclude that the terms of the non-statutory practice were known to the Appellant's advisers.

The Appellant's returns and assessments

15. Returns were rendered on behalf of the Appellant for the following years of assessment declaring the following earnings in the following way:

Year of Source of income Income declared in the following way

assessment

1980-81 Albemarle Graphics Ltd "Year to 30.06.79 £1,500"

1981-82 Albemarle Graphics Ltd "Year to 30.06.80 To be voted"

1982-83 Albemarle Graphics Ltd "Year to 30.06.81 To be voted"

1883-84 Albemarle Graphics Ltd "Year to 30.06.82 £1,400"

Astbury Graphics Ltd "Year ending 31.12.82 £1,400"

1984-85 Albemarle Graphics Ltd "Year ending 30.06.83 £1,750"

Astbury Graphics Ltd "Year ending 31.12.83 £1,650"

1985-86 Albemarle Graphics Ltd "Year ending 30.06.84 To

be voted"

Astbury Graphics Ltd "Year ending 31.12.84 To be voted"

16. The Appellant's assessments under Schedule E were made on the earnings basis from 1976-77 to 1980-81.

17. On 20 August 1986 the Inspector of Taxes for the Lewisham District wrote to Messrs S G Ripley & Co about the Appellant's income tax for the year 1981-82 in the following terms:

"I enclose a copy of the 1980/81 assessment issued to Mr Malone. This assessment was issued in April 1983, but according to my records no action has been taken to collect the tax due since then.

The tax due for 1980/81 was to have been carried forward and included in the 1981/82 assessment. However, I have recently received instructions from Mr Malone's main tax office, Bermondsey Ref: D68495B, that I need not raise any assessment for 1981/82 and that I should instead make arrangements to collect the tax still due for 1980/81.

Can you please let me know whether you can now agree to the collection of this tax?"

18. For the years 1981-82 to 1987-88 no assessments were made.

The tax affairs of Mr W K Blackburn and Mr Hodgson-Barker

19. Mr W K Blackburn is also a director of Albemarle, Astbury Sign and Astbury Graphics A letter written to the Inland Revenue by Messrs S G Ripley & Co on 21 September 1989 contained the following paragraph:

"As the Directors' Remuneration is assessable on an "accounts year" basis, we assume that you are now in a position to issue Schedule 'E' assessments for all relevant years up to and including 1987-88."

20. The Inland Revenue replied on 12 January 1990 and said that "your clients will in fact be assessed on strict apportionment basis rather than accounts year basis". (The strict apportionment basis is the same as the earnings basis).

21. On 18 January 1990 Messrs S G Ripley & Co wrote to the Inspector of Taxes and that letter contained the following paragraph:

"From the year 1979-80 the "accounts year" basis has been stated on the Income Tax Returns submitted by both partners and has been adopted as the basis of assessment

of their Schedule E earnings. We shall be grateful, therefore, if you will confirm that this longstanding concession will not be changed as stated in the last paragraph of your letter of the 12th January."

22 The use of the word "partners" was intended to refer to the Appellant and Mr Blackburn. On 15 April 1994 the Inland Revenue London Provincial 32 District in Scotland agreed that Mr Blackburn's directors' remuneration for the year 1988-89 would be assessed on the accounts basis and this was done.

23. Between February and April 1990 Messrs S G Ripley & Co were in correspondence with the Inspector of Taxes at Lewisham about the tax affairs of Mr Hodgson-Barker. In a letter written on 27 April 1990 the Inland Revenue stated that they agreed to assess Mr Hodgson-Barker's remuneration with a stated company on an accounts basis.

The assessment under appeal and the subsequent correspondence

24. The assessment was raised on 24 March 1995 in the sum of £80,315.00. It assessed the Appellant's remuneration as a director of Albemarle and Astbury Signs on an earnings basis in the following way:

Albemarle 3/12 x £37,500.00 (voted on 30.06.98) = £ 9.375.00

9/12 x £94,420.00 (voted on 30.06.89) = £70,815.00

Astbury Sign 3/12 x £ 500.00 (voted on 30.06.98) = £ 125.00

9/12 x 00 (voted on 30.06.89) = 00

£80,315.00

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25. It is against that assessment that the Appellant appeals.

26. After the issue of the assessment there was voluminous correspondence between Messrs S J Ripley & Co and the Inspector of Taxes. On 7 February 1996 the Inland Revenue wrote as follows:

"Schedule E assessments were issued to your client for the five years to 5 April 1981. No assessments were issued for the following years to 5 April 1988. With the passage of time it is difficult to say why these assessments were not

issued. However, as a review reveals that there has been no overpayment for those years I would propose to take no further action. As no directors' remuneration was paid during the five years to 5 April 1994 no Schedule E assessments are required. This leaves the year ended 5 April 1989 which has been assessed on the statutory basis of assessment i.e. earnings basis.

Your client ceased his directorship with Albemarle Graphics on 12 December 1989. Where the accounts basis of assessment is adopted the earnings basis must be applied for:-

(i) The first year of assessment for which the fluctuating emoluments are earned,

(ii) The second year of assessment where the emoluments for the accounting period ending in that second year relate to a period of less than 12 months, and,

(iii) The year of assessment in which the directorship ceases and the penultimate year."

27. The letter of 7 February 1996 went on to say that Mr Blackburn's directorship with Albemarle Graphics was a continuing source of remuneration and, if that source had ceased at the same time as the Appellant's, then the statutory (earnings) basis of assessment would have applied for the year to 5 April 1989.

28. In 1996 a complaint was made to the Adjudicator's Office about the Inland Revenue's refusal to assess the Appellant's remuneration for the year 1988-89 on an accounts basis. On 2 August 1996 the Inland Revenue wrote to the Adjudicator's Office and that letter contained the following paragraphs:

"Mr Malone was a director of Albemarle Graphics Limited from 1977 until 12 December 1989. Until 6 April 1989, the statutory basis of assessment under Schedule E was the earnings basis but in practice the majority of cases were dealt with either on the receipts basis or on the accounts year basis, both of which were non-statutory. The accounts year basis was suitable for only certain cases and could only be adopted with the written agreement of the taxpayer to both its adoption and the conditions attaching to it. The conditions specified that the basis of assessment would revert to the earnings basis in the ultimate and penultimate year of assessment.

Mr Malone's file reveals that the Schedule E assessments for the four years to 5 April 1981 were assessed on the earnings basis and that his agent agreed the first three years assessments on 20 July 1981. There were no assessments made for the years 1981/82 to 1987/88 so I cannot say with any certainty what basis was deemed to

have applied in those years. The 1988/89 assessment was issued on 21 March 1995 on the earnings basis and is currently under appeal.

Mr Malone claims that as his annual returns recorded his remuneration on an accounts year basis and, as there were no assessments to reflect an alternative basis, this suggests there was an agreement that the accounts year basis applied.

I can confirm that there is no written agreement to the adoption of the accounts year basis which is a requirement before it can be applied. But even if there had been an agreement, the conditions of agreement require that the assessment for the penultimate year will be based on the earnings basis. So even if it is accepted that there was an implicit rather than an explicit agreement to the adoption of the accounts year basis then I think it is only fair that Mr Malone be treated in exactly the same way as others who have an explicit written agreement.

On the other hand if it is accepted that there was no agreement to the accounts year basis then the earnings basis is the right basis of assessment for all years.

The solicitor's letter to you says that the Inland Revenue has failed to apply an non-statutory practice and that the question of the correct basis of assessment is not therefore a matter for the Commissioners to decide. The agent's letter of 31 March 1995, however, asked that if the Inspector did not accept the accounts basis then the appeal against the 1988/89 assessment should be referred to the Special Commissioners."

29. Following the reference to the Adjudicator the Inland Revenue paid some compensation to the Appellant for the way in which his case had been handled.

Reasons for decision

30. I consider separately each of the issues for consideration in the appeal.

1. - Jurisdiction

31. The first issue is whether the Special Commissioners have jurisdiction to hear an appeal about the refusal to apply an non-statutory practice.

32. This issue was not addressed by the Appellant. The Respondent argued that the use of the accounts basis was outside the statutory code and involved the exercise of the Inland Revenue's powers of care and management given by section 1(1) of the Taxes Management Act 1970. Accordingly, the Special Commissioners had no jurisdiction

to hear the appeal and he cited Regina v H.M.Inspector of Taxes, Reading, ex parte Fulford-Dobson (1987) 60 TC 168 and Regina v H.M. Inspector of Taxes, ex parte Brumfield (1988) 61 TC 589.

33. The authorities cited by the Respondent support the view that judicial review is the appropriate remedy where a taxpayer wishes to appeal against a refusal to apply a non-statutory practice. In addition, the decision in R v Inland Revenue Commissioners, exc parte Unilever Plc [1994] STC 841, which was relied upon by the Appellant in connection with the second issue in the appeal, also supports that view. I have also referred to Aspin v Estill [1987] STC 723 CA where the Court of Appeal confirmed the principle that the function of the appeal Commissioners was to look at the facts and to decide whether the assessment had been made properly in accordance with the law and should confine themselves solely to that question. The question whether, on the facts alleged by the taxpayer, it was an abuse of power by the Inland Revenue to raise an assessment, was a matter for which the only remedy available was by way of judicial review.

34. Applying those principles to the facts of the present appeal I find that, on the facts I have found, the assessment under appeal was properly made in accordance with section 19 of the 1988 Act which at the relevant time required it to be on the earnings basis.

35. That means that I have to dismiss the appeal.

36. However, as I heard argument and evidence on the other issues, I will express a view on them in case that is helpful to the parties. In particular, it may be helpful if I express views on the question whether the Appellant has satisfied the tribunal that he falls within the scope of the non-statutory practice, that is if there was an agreement that he could use the accounts basis.

(2) Was there an agreement for the accounts basis?

37. The second issue is whether the Inland Revenue in fact agreed to assess the Appellant on the accounts basis instead of the earnings basis.

38. For the Appellant Mr Hodgson-Barker accepted that there was no express agreement by the Inland Revenue but argued that there was an implied agreement. He argued that the way in which the income had been declared on the returns and the letter of 20 August 1986 supported the view that the Inland Revenue had agreed to assess the Appellant on the accounts basis. If the earnings basis had applied for 1981/82 then an assessment for £1,400 would have been raised. That would have been in respect of £1,050 for Albemarle, being three-quarters of the remuneration of £1,400 voted on 30 June 1982, and £350

in respect of Astbury Graphics being one quarter of the remuneration of £1,400 voted on 31 December 1982. However, under the accounts basis of assessment a nil assessment would have been issued because no remuneration was voted by Albemarle on 30 June 1981 and no remuneration was voted by Astbury Graphics on 31 December 1981. He cited Unilever as authority for the view that the Inland Revenue's course of conduct and acquiescence over a period of time to informal claims amounted to a representation that such claims would be accepted and rendered it unfair and an abuse of power to insist on the strict legal position. Secondly, Mr Hodgson-Barker argued that in 1990 the Inland Revenue had agreed that he personally should be assessed on the accounts basis and later had agreed to assess Mr Blackburn on the accounts basis. He argued that the case of the Appellant was identical to that of Mr Blackburn and he relied upon the taxpayers' charter which stated "You will be treated in the same way as other taxpayers in similar circumstances."

39. The Respondent argued that there was no right to claim the accounts basis and it could only be allowed with the express agreement of the Inland Revenue. There had been no such agreement that the Appellant could use the accounts basis. The mere inclusion of remuneration on a return could not amount to an agreement as an agreement could not be "claimed". He referred to some Inland Revenue Internal Notes, paragraphs 4530 and 4531 of which described the procedure for the accounts year basis. The notes indicated that that basis was not suitable in all cases and that, where a case was suitable, a letter of explanation had to be sent to the taxpayer and his written agreement obtained. In the present appeal none of the ingredients of an agreement existed; no offer was made; there was no intention to create legal relations; there was no indication that the parties were ever of the same mind; there was no evidence of acceptance by the Inland Revenue; and mere silence did not constitute agreement. He cited Schuldenfrei v Hilton CA [1999] STC 821. He distinguished the decision in Unilever which was a decision on a statutory claim and not on a non-statutory claim. Also, every assessment made on the Appellant had been on the earnings basis. He argued that a mistake had been made in the case of Mr Blackburn but that "two wrongs did not make a right".

40. In considering the arguments of the parties it is relevant that the non-statutory practice at issue in this appeal was not a published extra-statutory concession but an Inland Revenue practice. The terms of the practice, upon which the Appellant relied, were set out in Tolley's Practical Tax which stated that the adoption of the accounts year basis of assessment would be invited by the Inspector, in those cases which he thought suitable, and that the use of the accounts year basis for a particular source of income was subject to the acceptance by the taxpayer of stated conditions. There was no evidence before me that the

adoption of the accounts year basis of assessment had been invited by the Inspector in the case of the Appellant, nor that the Inspector thought that the Appellant's case was suitable, nor was there any evidence that the Appellant had accepted the stated conditions.

41. Mr Hodgson-Barker relied upon the way in which the income had been declared on the returns as evidence of an agreement and he cited Unilever in this connection. In my view the mere inclusion of a source of income in a particular way on an income tax return cannot constitute an agreement with the Inland Revenue that the income will be taxed in that way. Matters may have been different if the Appellant had in fact been assessed on the accounts basis for any of the years of assessment of those returns. But the fact is that all the assessments which were made were made on the earnings basis. Schuldenfrei (1999) is authority for the view that an agreement plainly implies, not merely that the parties are of the same mind in relation to a particular matter, but also that their minds had met so as to form a mutual consensus and that that meeting of minds had resulted from a process in which each party had to some extent participated. Here there is no evidence that the Appellant and the Inland Revenue were ever of the same mind about the application of the accounts basis, nor that their minds had ever met to form a consensus, nor that there was a process in which each party participated.

42. The letter of 21 September 1989 was the first express reference to the accounts basis made by the Appellant's representatives. The Inland Revenue replied on 12 January 1990 to repudiate any suggestion of an agreement that the accounts basis would apply. This was followed by the letter of 18 January asking for confirmation that what was referred to as "a longstanding concession" would not be changed. In reply the Inland Revenue confirmed that Mr Blackburn would be assessed on the accounts basis but there was no agreement that the Appellant would be too.

43. In Unilever (1994) the taxpayer over the course of more than 20 years adopted a procedure, with the consent of the Inland Revenue, of estimating its total profits (after deducting trading losses) and paying tax on the estimated amounts after which finalised computations would be prepared and loss relief formally claimed, even though such claims were was made more than two years after the end of the accounting periods to which they related. However, for three years the claims for loss relief were refused on the ground that they were not made within the statutory time limit. Macpherson of Cluny J held that, although no formal applications for loss relief had been made in time, the Inland Revenue's conduct and acquiescence over a long period exceeding twenty years amounted to a representation that informal claims would be accepted and, as they had not objected to the informal claims for twenty years, it was unreasonable of them to have refused to

exercise their discretion to allow late claims in the taxpayer's favour.

44. The facts of this appeal are very different from those in Unilever. Here there is no evidence that the Inland Revenue acquiesced in the use of the accounts basis by the Appellant. All the assessments which were made were made on the earnings basis.

45. Mr Hodgson-Barker relied upon the Inland Revenue's letter of 20 August 1986 as evidence of an agreement that the Appellant could adopt the accounts basis in 1981/82. However, that is not what the letter says. All it says is that the writer had received instructions "that I need not raise any assessment for 1981/82". The reason for those instructions is not given. In my view that letter is not sufficient evidence of an agreement by the Inland Revenue that the Appellant could adopt the accounts basis for his income from Albemarle and Astbury Sign for all future years.

46. Mr Hodgson-Barker finally argued that in 1990 the Inland Revenue had agreed that he personally should be assessed on the accounts basis and later had agreed to assess Mr Blackburn on the accounts basis and that all three should be treated similarly. However, the fact is that both in the case of Mr Hodgson-Barker and in the case of Mr Blackburn there was evidence of a specific agreement by the Inland Revenue that the accounts basis could be used by them and such a specific agreement was lacking in the case of the Appellant.

47. In this appeal the burden of proof is on the Appellant to satisfy the tribunal of the facts and matters upon which he seeks to rely and the standard of proof is the balance of probabilities. On the evidence before me I am not satisfied that the Inland Revenue did agree that the Appellant could use the accounts basis of assessment for his remuneration from Albemarle and Astbury Sign.

48. I conclude that the Inland Revenue did not agree to assess the Appellant on the accounts basis instead of the earnings basis.

49. That conclusion means that I do not have to consider the third issue in the appeal (which would only be relevant if there were an agreement) but as I heard argument I very briefly express my views.

(3) In the penultimate year did the statutory or the non-statutory provisions apply?

50. The third issue in the appeal is whether the extra-statutory arrangements for the penultimate year under the

accounts basis were abrogated by the transitional provisions in section 38(8) of the 1989 Act.

51. For the Appellant Mr Hodgson-Barker argued that section 38(7) and (8) of the 1989 Act made it clear that, if a taxpayer had been assessed on the accounts basis in 1987-88, then that continued for 1988-89 unless revoked. If the Appellant had been on the accounts basis since 1981/82 he remained on that basis in 1988-89 because he had not revoked that basis. He referred to Simon's Taxes at paragraph E4.106; to a Guidance Note issued by the Institute of Chartered Accountants in England and Wales in October 1990 (TR 817); and to paragraph 247 of Taxation of Directors and Employees - The Law under Schedule E published by Chartac Books. Mr Hodgson-Barker accepted that the non-statutory practice provided that the accounts basis did not apply to the year of assessment in which the directorship ceased and to the penultimate year but he argued that the statutory provisions in section 38 over-rode the non-statutory provisions. When the Appellant resigned on 12 December 1989 the accounts year basis had ceased but at 5 April 1989 the Appellant was on the accounts year basis. Also, there could be no penultimate year without an ultimate year and the ultimate year was 1989/90 which was assessable on the receipts basis.

52. The Respondent argued that, if there had been an agreement to use the accounts basis, then the agreement would have been that the earnings basis applied in the last year and the penultimate year of the directorship; here the last year of the Appellant's directorship with Albemarle was 1989-90 so the penultimate year was 1988-89 and so the earnings basis would have applied.

53. In order to consider the effect of section 38(8) it is necessary to place it within the context of the relevant parts of the whole section which provided:

"(1) This section applies to emoluments of an office or employment if-

(a) they are emoluments for a year of assessment (a relevant year) before 1989-90, .

(c) they have not been paid before 6 April 1989, and

(d) they have been received on or after 6 April 1989 and before 6 April 1991 . ."

(2) The emoluments shall be charged to income tax only by reference to the year of assessment in which they are received. .

1. This section shall not apply unless-

(a) written notice that it is to apply is given to the inspector before 6 April 1991;

(b) the notice is given by or on behalf of the person who holds or held the office or employment concerned, and

(c) the notice states the amount of the emoluments falling within subsection (1) above.

(7) Subsection (8) below applies where emoluments of an office or employment have been or fall to be computed by reference to the accounts basis as regards the year 1987-88 or years of assessment including that year.

(8) In deciding for the purposes of subsection (1)(a) above whether emoluments are emoluments for a particular year, the emoluments of the office or employment for the year or (as the case may be) years mentioned in subsection (7) above, and for the year 1988-89, shall be computed by reference to that basis.

(9) In deciding whether subsection (8) above applies in a particular case, any request to revoke the application of the accounts basis shall be ignored if-

(a) it is made after 5 April 1989, or

(b) it is made before 6 April 1989 otherwise than in writing.
.

(14) In this section "the accounts basis" means the basis commonly so called (under which the emoluments for a year of assessment are computed by reference to the emoluments for a period other than the year of assessment)."

54. Thus section 38 provided transitional relief to prevent income earned before 6 April 1989 being taxed twice, once when it was earned before 6 April 1989 and again when it was received after that date. The effect of the section 38(2) was to take the earnings out of assessment for the year in which they were earned and to tax them only in the year in which they were received. Subsection (6) provided that claims for the relief had to be made before 6 April 1991. In order to prevent a taxpayer who had been assessed on the accounts basis from obtaining extra transitional relief by claiming to be assessed on an earnings basis for 1988-89, section 38(8) provided that the transitional relief given by the section was limited to the amount that would have been due if the accounts basis had been used for all years up to and including 1988-89, unless a written request to revoke the accounts basis had been received before 6 April 1989.

55. There was no evidence before me that a claim for

transitional relief had been made by, or on behalf of, the Appellant and so it follows from the provisions of section 38(6) that none of the provisions of the section would have applied to him. However, if a notice had been served, then his emoluments would have been assessed on a receipts basis under subsection (2). If the Appellant had been on an accounts basis for 1987-88, the effect of subsection (8) would be to limit the transitional relief which could be claimed.

56. As section 38 only applied where there was a claim, which there was not in this case, the provisions of section 38(8) would not have applied to the Appellant and so the normal provisions would have applied. The accounts basis would have ceased after 1988-89 and would have been replaced by the receipts basis. However, remuneration for 1988-89 would still have been assessed on the accounts basis. 1988-89 was the penultimate year of the Appellant's directorship with Albemarle and so the earnings basis would have applied under the agreement for the operation of the accounts basis.

Decision

57. My decisions on the issues for determination in the appeal are:

(1) that the Special Commissioners do not have jurisdiction to hear an appeal about the refusal to apply an non-statutory practice; the assessment was properly made in accordance with the statutory provisions and for that reason the appeal has to be dismissed; however, my views on the other two issues are:

(2) that the Inland Revenue did not agree to assess the Appellant on the accounts basis instead of the earnings basis; and

(3) that, as far as the Appellant is concerned, the non-statutory arrangements for the penultimate year under the accounts basis were not replaced by the transitional provisions in section 38(8) of the 1989 Act.

58. The appeal is, therefore dismissed and the assessment is confirmed.

NUALA BRICE

SPECIAL COMMISSIONER

SC 3083/99