TC02723

Appeal number: TC/2011/6273

CORPORATION TAX – appeal against amendments made by closure notices – jurisdiction - claim for terminal loss relief – denied in closure notices relating to other years not under appeal - whether jurisdiction to consider in this appeal – no – claim that tax already paid – amended to 'nil' by closure notices under appeal – whether jurisdiction – yes subject to undetermined point on abuse of process

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING SALMON & SEAFOOD LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 13 May 2013

Mr R Thomas for the Appellant

Mr A Stewart, Senior HMRC Officer, for the Respondents

DECISION

1. The Tribunal of its own motion called a hearing to consider its jurisdiction in respect of two of the various issues raised by the appellant in this appeal.

The background

2. The appellant is a company of which Mr Thomas was a director and which he represents in this and a number of other appeals and acted on its behalf at the time of the events at issue in this appeal. The status of his and his brother's interest (if any) in the company may be a matter of dispute and I make no comment on it.

3. The company filed its corporation tax return for the year which ended in 2001. It declared a liability to tax and paid some £69,864 in tax. No enquiry was opened into that tax return. I was not given the exact date on which these events took place but there is no suggestion that the filing of the return or the payment of tax was late.

4. In around March 2003, the company filed its corporation tax return for its accounting year which ended on 31 July 2002 ("the 2002 year end"). At about the same time, the appellant paid £57,000 in tax in respect of its tax liability for 2002 year end, although HMRC automatically repaid £6000 of this. The reason for this was not explained to me and for present purposes does not matter.

5. In early 2004, the company reached a contract settlement with HMRC under which the company paid £525,000 in tax. Exactly which liabilities were covered by that contract settlement is now a matter of dispute. I will refer to this as the 2004 Contract Settlement.

6. Later in 2004, the company filed its corporation tax return for its accounting year which ended on 31 July 2003 and to which I will refer as the 2003 year end. It showed a tax liability of £137,637.38. At the same time, the company filed an amendment to its 2002 return which, as I have said, had already been filed sometime earlier. The amendment showed a tax liability of £272,012.95.

7. Both the 2003 return and the 2002 return as amended claimed relief for amortisation of goodwill arising out an acquisition. Both tax returns also showed the remaining tax liability after the amortisation as "paid".

8. HMRC's response was on 28 October 2004 to open an enquiry into both the 2002 and 2003 returns. HMRC disputed the claim to amortisation of goodwill and disputed whether the tax liability declared by the company had been paid.

9. It seems the tax inspector sought to amend the "tax paid" figure on both returns to nil under the § 16 Schedule 18 FA 1998 as an "obvious error". The company rejected the amendment as it was entitled to do under §16(4).

10. On 3 March 2005, the inspector issued jeopardy amendments altering the tax return to show the tax paid as nil as well as refusing the claim to amortisation of goodwill.

11. Backtracking slightly, the company ceased to trade on or before 31 January 2005 but after 31 July 2004.

12. On 30 August 2006, Mr Thomas wrote to HMRC on behalf of the company. That letter also enclosed tax returns for its accounting years ending on 31 July 2004 and 31 January 2005. I will refer to these as the 2004 tax return and the 2005 tax return respectively for the 2004 year end and the 2005 year end.

13. Mr Thomas considers that this letter made an effective claim to terminal loss relief. This loss relief claim arose (or is said to arise) out of the amortisation of goodwill already mentioned. The letter also enclosed a computation and that computation showed that the appellant considered that it had paid in tax £298,930 in respect of the year ended in 2003 and £221,033 in respect of the year ended 2002.

14. I note that, referring back to paragraph [6], in 2003 when Mr Thomas submitted the 2003 tax return, he considered that the company had paid £137,637.38 in tax for the 2003 tax year but by 2006 he had changed his views and in this computation claimed that the company had paid rather larger figures in respect of its liabilities for 2002 and 2003.

15. In response, HMRC opened enquiries on 4 January 2006 into the "corporation tax self assessment period ended" on 31 July 2004 and 31 January 2005. I will refer to these as the "2004 & 2005 enquiries".

16. Some time after this the appellant was struck off the Register of Companies because it was dormant. HMRC (which still had live enquiries into the company's tax affairs) applied to the Court of Session for the company to be reinstated to the Register. Mr Thomas initially opposed the reinstatement but agreed to withdraw his opposition in return for an undertaking from HMRC. HMRC agreed and the undertaking was signed on 19 May 2010. I will refer to this as the 2010 Undertaking.

17. Closure notices in respect of the 2002 and 2003 year ends were issued on 25 March 2011. I will refer to these as the 2002 & 2003 closure notices. The closure notices refused the claim to amortisation of goodwill and stated that HMRC did not accept that the company had already paid the tax due as it had claimed (apart from the £51,000 in respect of 2002 mentioned in paragraph 4). It also calculated tax liability at a rate of 30% on the basis that the appellant had associated companies.

18. At the same time as issuing these closure notices, HMRC also issued closure notices in respect of its 2004 and 2005 enquiries. These closure notices, amongst other things, denied the appellant's claim to terminal loss relief. I will refer to them as the 2004 & 2005 closure notices.

19. On 12 April 2011 the appellant lodged with HMRC an appeal against all four closure notices.

20. On 11 August 2011 the appellant lodged an appeal with the Tribunal against the amendments made in the 2002 & 2003 closure notices. That appeal comprises the proceedings currently before me. It did not lodge an appeal with the Tribunal against the 2004 & 2005 closure notices. I consider this point in more detail below.

21. The appellant's grounds of appeal stated in its notice in summary are that:

(a) It is entitled to the claimed amortisation relief;

(b) It has paid the tax as claimed in any event.

(c) The terminal loss relief claim has the effect of reducing its tax liability.

22. I examine the grounds in more detail.

23. Rate of tax: At the hearing Mr Thomas told me that the company was also appealing the rate of tax of 30% on the basis that, contrary to HMRC's views, there were no associated companies. However, this does not appear in the Notice of Appeal and so the appellant may wish to consider applying to amend its notice of appeal. I express no view on whether such an application is (a) necessary or (b) likely to be successful.

24. Ground 6 in notice of appeal: Secondly, in the notice of appeal there is a ground of appeal relating to a claimed amendment made to the 2003 return. Mr Thomas no longer appears to rely on this as a ground of appeal: if I am mistaken in this, he should clarify this to both the Tribunal and HMRC.

25. Amortisation relief: In respect of the claim to amortisation relief, there is little to be said at present. It arises out of a claim that a business was acquired. HMRC's view appears to be that the transaction was between connected parties and that the market value was nil. The appellant's view appears to be that (a) the transaction was not between connected parties and market value is not relevant; and in any event (b) HMRC are bound by the terms of the closure notice issued to the vendors. The vendors were Mr Thomas and his brother, acting in partnership.

26. Tax already paid: The claim that the tax had already been paid arises out of the 2004 Contract Settlement. The company's position is that this settled all the company's outstanding liabilities at the time, including its tax liabilities for 2002 and 2003 year ends which had not that at point been returned.

27. I consider the claim to terminal loss relief in more detail below.

28. Returning to the time line of events, at some point the appellant took proceedings in the Court of Session against HMRC claiming repayment of tax paid in respect of accounting years ended in 2001, 2002 and 2003 on the basis of its claim to terminal loss relief made in 2006. These proceedings have not yet been heard: the parties are in the process of amending their pleadings and the question of the Court's jurisdiction is yet to be determined.

29. In the proceedings in the tax tribunal, this Tribunal raised of its own motion two questions on jurisdiction:

> (a) Does the Tribunal have any jurisdiction to consider the appellant's claim that it has already paid the tax that is owing?
>
> (b) Can the Tribunal consider the question of whether the appellant's claim to terminal loss relief is final in the sense of being unable to be challenged by HMRC?

30. Logically, the second of these questions comes first. If the claim to terminal loss relief is deemed to be final by legislation, all the other issues between the parties may fall away because the size of the claim may wipe out not only the declared tax liability but the liability that HMRC considers that the appellant should have declared and paid.

31. Both parties agree that if the Tribunal has jurisdiction over the terminal loss relief issue (and they consider it does) then they wish the finality of the terminal loss relief claim to be addressed as a preliminary issue. If the appellant wins, it will (says the appellant) avoid the need for a further hearing, and substantial costs (such as on an expert witness for the valuation of the goodwill) will be saved.

The law related to the terminal loss claim

32. The appellant's case is that it made a claim to terminal loss relief in its August 2006 letter under Schedule 1A to the Taxes Management Act 1970 ("TMA").

33. HMRC appear to accept that a claim to terminal loss relief was made: the dispute between the parties appears to be over whether (a) the claim was made under Sch 1A (HMRC contend it was made under s 393A ICTA 88) and (b) whether it was made or could be made, in the returns for 2004 and 2005.

34. Schedule 1A relates to claims not included in returns. If a Sch 1A claim is made, HMRC have power under §5, if exercised within the specified time limits, to open an enquiry into that claim.

35. The appellant's position is that HMRC failed to open an enquiry under Sch 1A and the time to do so is now expired. If the appellant is right that the claim was made under Sch1A, and HMRC failed to open a Sch1A enquiry into that claim within the applicable time limit, the effect may be that the claim becomes final:

> *Giving effect to claims…*
>
> **4.** (1) …. An officer of the Board…shall, as soon as practicable after a claim ….is made….give effect to the claim…by discharge or repayment of tax.
>
> (2) …

> (3) Where any such claim …. as is mentioned in subparagraph (1) or (2) above is enquired into by an officer of the Board –
>
> (a) that sub-paragraph shall not apply until the day on which …the enquiry is completed….

36. The appellant's beliefs, as outlined above and on the validity of which I express no view, explain its proceedings in the Court of Session against HMRC: it considers that its claim to terminal loss relief has become final and, since it has not been given effect to by HMRC, it considers that HMRC has failed in their statutory duty to give effect to the claim as required by §4(1) of Schedule 1A. It therefore seeks enforcement by the Court of Session of its claim to tax repayment by HMRC. As all proceedings have time limits, the appellant was concerned to lodge the proceedings in Scotland before its (claimed) right to enforcement became time barred.

37. HMRC consider that the claim to terminal loss relief was made in the tax returns for 2004 and 2005. They consider that the letter of 30 August 2006 and the computations enclosed with it which accompanied the tax returns were all part of the tax returns.

38. They consider that the proper way to challenge the claim was by opening an enquiry under §24 of Schedule 18 of the Finance Act 1998 ("Sch 18"). Their case is that they did this. They closed the enquiry (see paragraph [18] above) on 25 March 2011 under §32 and 34. The closure notice amended the returns by disallowing the claim for terminal loss relief. Although appeals against the closure notices were notified to HMRC, those appeals have not been notified to this Tribunal and HMRC say that the time to do so is now expired.

39. The appellant states that it has a second challenge to the position on terminal loss relief: if and to the extent HMRC's claim that the closure notices issued on 25 March 2011 in respect of the 2004 & 2005 returns correctly refused the claim to terminal loss relief, HMRC were, runs the appellant's case, in breach of its 2010 Undertaking in issuing those closure notices. HMRC do not accept this.

40. But which tribunal or court has the jurisdiction to determine the issue of the validity and effectiveness of the appellant's claim to terminal loss relief? And what is the status of the terminal loss relief claim in any court of tribunal which does not have jurisdiction to consider the rights and wrongs of it?

The Jurisdiction of the First-tier Tribunal

41. Is this issue one over which Parliament gave this tribunal jurisdiction?

42. Both HMRC and the appellant consider that this Tribunal has jurisdiction to consider the issue of the appellant's terminal loss relief claim in these proceedings. Both think that the Court of Session should be asked to stay its proceedings pending a determination by this Tribunal in these proceedings of the rights and wrongs of the terminal loss relief claim.

43. They were, however, somewhat at a loss to explain how proceedings in this tribunal would determine the issue of the terminal loss relief in respect of 2001 as the proceedings in this tribunal relate only to the closure notices in respect of accounting years ended in 2002 and 2003: the proceedings in the Court of Session relate to all three years.

The law on this Tribunal's jurisdiction

44. The Tribunal is a statutory body and a party must be able to point to a statutory provision which gives this tribunal jurisdiction to determine an issue that party wants to be determined by it.

45. The Taxes Act do not always appear at first glance to state to which body an appeal should be made. For instance, §48 of Schedule 18 provides:

> *Appeal against assessment*
>
> **48.** (1) an appeal may be brought against any assessment to tax on a company which is not a self-assessment.
>
> (2) Notice of appeal must be given –
>
> (a) in writing,
>
> (b) within 30 days after the notice of assessment was issued,
>
> (c) to the officer of the Board by whom the notice of assessment was given.

46. Similarly §34 provides:

> *Amendment of return after enquiry*
>
> **34.** (1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must –
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required –
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) ….
>
> (2A) ….
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) or (2A).
>
> (4) Notice of appeal must be given –
>
> (a) in writing
>
> (b) within 30 days after the amendment was notified to the company,
>
> (c) to the officer of the Board by whom the closure notice was given.

47. I don't set it out but the provisions relating to appeal in §9 of Sch 1A are effectively identical.

48. All these provisions (as do other provisions) provide that notice of the appeal is to be given to a particular HMRC officer. But then s 48(1)(a) TMA comes into play as it brings all appeals made under the Taxes Acts within the provisions of s 49 – 49I TMA.

49. These provisions permit appeals notified to HMRC to then be notified to "the tribunal". The definition of "the tribunal" is (see s 118(1) and s 47C TMA) the First-tier Tribunal.

50. (And for completeness, "Taxes Acts" includes the TMA itself and Sch 18. This is because 'Taxes Acts' are defined in the TMA s118(1) as "…this Act and – (a) the Tax Acts…..". The Tax Acts are defined in the Interpretation Act 1978 Schedule 1 as "…the Income Tax Acts and the Corporation Tax Acts." The "Corporation Tax Acts" are defined in the same schedule as:

> "…the enactments relating to the taxation of the income and chargeable gains of companies and company distributions (including provisions relating to income tax)."

Sch 18 clearly relates to corporation tax.)

51. Therefore, these provisions do give the First-tier Tribunal jurisdiction to hear appeals against any closure notices issued by HMRC. As Lord Walker in *Autologic Holdings plc & othrs* [2005] UKHL 54 said of Schedule 18 (in its pre- April 2009 form):

> "[84] … I can discern no parliamentary intention to alter the general principle embodied in tax law before self-assessment, that any dispute with the revenue about an individual's liability to income tax or a company's liability to corporation tax is to be determined in the first instance by the general commissioners or the special commissioners."

52. Of course, since Lord Walker said this, the Inland Revenue and the general and special commissioners have all ceased to exist and, in the case of the former, been replaced by HM Revenue & Customs, and in the case of the latter by the First-tier Tribunal (Tax Chamber). However, apart from substituting the names of the appropriate replacement bodies, what Lord Walker said in 2005 is still applicable to today.

53. So I find that Parliament gave jurisdiction to this tribunal jurisdiction to determine the validity of claims to terminal loss relief and in particular whether a closure notice has validly amended a claim to terminal loss relief. The First-tier Tribunal can determine whether:

> (a) The appellant's claim of 30 August 2006 was made and/or had to be made under Sch 1A and/or s 393 ICTA;

(b) Whether HMRC validly opened enquiries and under the correct provisions;

(c) Whether HMRC's purported amendment of the claim in the 2004 and 2005 closure notices to nil was effective.

And as Lord Walker in effect said, this tribunal's jurisdiction was intended to be exclusive jurisdiction.

54. It is not so clear that the Tribunal would have jurisdiction to determine the appellant's claim in the alternative. This is its claim that, assuming HMRC's position that the 2004 and 2005 closure notices effectively amended the terminal loss claim to 'nil', nevertheless the issue of the closure notices on 25 March 2011 was in breach of the 2010 Undertaking and they should not therefore be enforced.

55. This a question of public law and whether legitimate expectations have been raised. But this tribunal has no inherent, public law jurisdiction. It has no judicial review function. The most that can be said is that it must (or at least may) refuse to permit HMRC to rely on an assessment which arose out of an unlawful act. This is an application of the decision of the House of Lords in *Winder*. This is a difficult and perhaps developing area of law and, other than noting that there is a question of whether such a matter could be considered by this Tribunal, I express no view. I do not need to because of my decision below on this Tribunal's jurisdiction in these proceedings.

56. Before turning to that, I look at the position of the Court of Session in case my comments could be of use to it, as least in so far as I can draw its attention to case law which might be relevant.

The jurisdiction of the courts

57. I can, of course, make no decision whatsoever on the jurisdiction of the Court of Session or any other court. A decision that this Tribunal *does* have jurisdiction in this matter is not a decision that the Court of Session does not also have jurisdiction: the jurisdiction of the Court of Session, I believe, inherent like that of the High Court in England & Wales. Nevertheless, as reflected in the House of Lords' decision in *Autologic*, the Court of Session might regard proceedings as an abuse of process where it is clear Parliament intended a specialist tribunal to have exclusive jurisdiction over the matter in issue.

58. When considering its jurisdiction, it may be relevant for the Court of Session to look at the decision in *Cotter*. In that case HMRC started proceedings in the County Court against the taxpayer Mr Cotter to recover the tax shown as payable in respect of 07/08 in his tax return in respect of the same year. In that tax return (by amendment made later) Mr Cotter claimed that the tax was not due and payable as it was relieved by a terminal loss relief claim made in the 07/08 tax return but in respect of events in 08/09.

59. HMRC opened an enquiry into the claim: as in this case, the taxpayer maintained that the enquiry was not validly initiated. The alleged ground of invalidity of the enquiry on which the taxpayer relied, in contradistinction to this case however, was that it was an enquiry into the claim under Sch 1A and not an enquiry into the return under s 9 TMA.

60. HMRC's view was that, pending the closure of that enquiry, the claim was not final and in the meantime the taxpayer was liable to pay the tax shown on his 07/08 tax return in respect of his income for 07/08.

61. The taxpayer applied to have the County Court proceedings struck out on the basis it did not have jurisdiction to determine whether its claim was valid: the matter was referred to the High Court for determination and the decision is recorded at [2011] EWHC 896.

62. Mr Justice David Williams essentially decided two matters. Firstly, he decided that:

> "[38]. … [the County Court] has jurisdiction to determine in collection proceedings whether a taxpayer is entitled to include in his return a claim for relief and so rely on it as a defence to the claim for immediate payment. I emphasise that this does not enable the court to determine whether the claim is well-founded but only to determine whether it can be included in the return at all or must instead be made in some other way."

63. Secondly, he decided that Mr Cotter was not entitled to make the claim for loss relief in his 07/08 return.

64. The taxpayer appealed this decision. Lady Justice Arden gave the unanimous decision of the Court of Appeal at [2012] EWCA Civ 81. The decision was that the High Court was wrong to consider it had jurisdiction to decide the question of whether the taxpayer was entitled to claim the relief in its tax return.

65. The reason for that conclusion was that the claim was made in the return and the return on its face appeared to permit such a claim to be made. HMRC should therefore have challenged it by raising an enquiry into the return. This would give the taxpayer the right to appeal to the Tribunal the closure notice and allow the First-tier Tribunal to adjudicate on the question of whether the claim was valid and validly made:

> "[32] … I conclude that the judge was wrong on the jurisdiction issue in this case. If the Revenue decides to challenge matters contained in the return in response to the boxes provided, it must use either the s 9A procedure [the procedure for raising an enquiry into a personal tax return] or seek to make a correction to the return under 9ZB [the provisions for correcting a personal tax return for obvious error] (if applicable). This is so even if the Revenue is correct that, under the relevant statutory provisions governing loss relief claims, that claim could not be the subject of relief against liability to tax for the year to

> which the return relates. In that case, it is up to the Revenue, if it wishes to achieve the contrary result, to make sure that the form of the return does not permit such a claim to be made."

66. The Judge declined to comment on the second issue as she considered that the County Court did not have jurisdiction to consider this issue, and therefore, effectively on appeal from that court, neither did the Court of Appeal.

67. In some respects, *Cotter* was the mirror image of this case: HMRC were taking proceedings in the court which required determination of an issue that Parliament intended to be within the exclusive jurisdiction of this Tribunal. The Court of Appeal's view was that it could not do this: it had to follow the process within the Taxes Act of raising an enquiry on the return. The effect of its decision appears to be that HMRC's claim was struck out.

68. This decision is under appeal and may be heard in the Supreme Court later this year. In the meantime I am bound by the decision of the Court of Appeal. Although this is no more than my opinion without any weight, if the Court of Session follows the Court of Appeal in *Cotter,* it is likely to conclude that it does not have jurisdiction to consider the validity of the terminal loss relief claim in respect of any of the three years before it.

Jurisdiction in these proceedings

69. Deciding that this Tribunal does have jurisdiction in principle to hear the matter at issue is not the end of the matter. While this Tribunal does have jurisdiction to hear, and was intended by Parliament to have exclusive jurisdiction to hear, matters such as those outlined in the previous paragraph, it does not mean that the appellant's claim to terminal loss relief is something that this Tribunal can determine in the course of *these proceedings.*

70. The Tribunal only has jurisdiction over matters raised in the Notice of Appeal. The appellant must state in its Notice of Appeal the details of the decision against which it is appealing (Rule 20(2)). Its notice of appeal states as follows:

> "This is an appeal against HMRC's decisions to amend the company's CT self assessments for P/E 31/7/02 and 31/7/03."

71. It then goes on to state the grounds of appeal and I have summarised these above. One ground is the claim is, as stated, that the terminal loss relief claim made in August 2006 is now final and wipes out any tax liability for 2002 and 2003.

72. Enclosed with the notice of appeal were, as required by this Tribunal's rules, the decisions appealed against. The only decisions enclosed were the 2002 and 2003 closure notices of 25 March 2011, the two letters dated 12 May 2011 in respect of the 2002 and 2003 year ends which state HMRC's view of the matter following the company's appeal and which offer a review, and finally the HMRC review decision letter dated 15 July 2011 which again relates only to the 2002 and 2003 year ends.

73. I was not shown HMRC's reply (if any) to the appellant's appeal dated 12 April 2011 to the closure notices for 2004 and 2005. It seems that there may have been one and, from what was said to me at the hearing, the appellant may have decided not to apply for a review of it or to lodge an appeal with the Tribunal against it, on the grounds the appellant considered the closure notices invalid. As I was not presented with the facts I make no decision about this.

74. What is clear is that the proceedings before me relate solely to the 2002 and 2003 closure notices. While the terminal loss relief claim is stated to be one of the *grounds* of appeal, the 2004 and 2005 closure notices are not the *subject* of the appeal. Both parties seemed entirely agreed on this: as I understand it Mr Thomas' position is that the 2004 and 2005 closure notices are ineffective and invalid and do not need to be appealed. He considers them, in effect, void.

75. Whatever the appellant's reasons for not challenging the 2004 and 2005 closure notices by lodging with this tribunal an appeal against them, it is clear that (as long as the correct procedure and time limits were followed) an appeal could have been lodged. The validity or otherwise of a closure notice is something that is within the jurisdiction of this tribunal to determine.

Is an invalidly opened enquiry and/or invalidly issued closure notice void?

76. The appellant's case is that this Tribunal or the Court of Session is bound to find in its favour that its terminal loss relief claim is valid because the enquiry into it was invalid. What Mr Thomas appears to be saying is that the closure notices disallowing the terminal loss relief claim were void: the situation was as if those closure notices did not exist or at least did not have any effect.

77. I do not consider that this is right. At best, closure notices may be "voidable". This is because it is clear that Parliament provided a route for challenging closure notices and (as set out above) intended this Tribunal to have exclusive jurisdiction on tax liability matters. Consistent with that intention, closure notices must be seen as valid unless successfully challenged in this Tribunal under the statutory procedure Parliament has provided. Even if wrong and/or invalidly issued, closure notices are not void.

78. The decision of Lady Justice Arden in *Cotter* provides support for this view: at the passage from [32] cited above she said HMRC ought to have opened an enquiry into the personal tax return even if they are right that the claim should not have been included in the personal tax return.

79. Again, although only considering the question of whether the courts had concurrent jurisdiction with the tribunal, the majority House of Lords' view in *Autologic* as expressed by Lord Nicholls, strongly suggest that an assessment is not void because, if so, it would not be necessary to challenge it:

> "[12] Clearly the purpose intended to be achieved by this elaborate, long-established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is

> dissatisfied and adopt eh expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
>
> [13 I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must us the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, *In re Vandervell's Trusts* [1971] AC 912 and, more widely *Barraclough v Brown* [1897] AC 615."

80. If closure notices could be void, then the courts (rather than tribunals) would be forever required to determine the validity of them in enforcement actions: it would not be enough for HMRC to show that the assessment had not been appealed or if appealed, the appeal had been unsuccessful. It would also have to show that the closure notice or assessment was not void from the start. This was clearly not the intention of Parliament.

81. Mr Thomas *may* be right (I express no view) that the enquiry should have been opened under Sch 1A: but if he is right, that does not make the 2004 and 2005 closure notices void. Parliament gave him a procedure to challenge them which the appellant has elected not to use: it cannot challenge them in proceedings related to closure notices issued in respect of earlier tax years.

82. Adopting the words of Lord Nicholls, the appellant's attempt to get judgment in the Court of Session against HMRC and to bring the issue of the terminal loss relief claim into its appeals against the 2002 and 2003 closure notices, are both indirect ways of seeking to achieve the same result as it would have been open to the appellant to achieve directly by appealing the 2004 and 2005 closure notices to this tribunal. While I cannot speak for the Court of Session, I am clear that the appellant cannot do this so far as these proceedings are concerned: it should have used the remedies provided by the tax legislation. That remedy was to appeal the 2004 and 2005 closure notices to this Tribunal.

83. The validity of the 2004 and 2005 closure notices cannot be challenged in these proceedings because these proceedings solely concern the 2002 and 2003 closure notices.

The status of the terminal loss claim

84. It follows from this that my view is that, unless and until the 2004 and 2005 closure notices, which denied the claim to terminal loss relief are successfully challenged by the mechanism provided by Parliament (ie an appeal against the 2004 and 2005 closure notices to this Tribunal) those closure notices are effective to deny the relief.

85. This makes no judgment at all on whether the appellant or Mr Thomas is in the right of it with regards whether the enquiry was validly opened and/or validly closed: the simple point is that closure notices are effective to make the amendments they purport to make to returns and claims to tax reliefs unless and until they are successfully challenged.

86. The appellant can only challenge the 2004 and 2005 closure notices in this Tribunal in an appeal against those particular closure notices. I have already expressed the view (of no authority, I admit) that the Court of Session is likely to come to the same conclusion. In other proceedings, such as these proceedings which are appeals against the 2002 and 2003 closure notices, the terminal loss relief claim has to be treated as effectively denied because the closure notices which denied the claim have not been appealed.

87. It seems to me, although I have not got jurisdiction to decide this, that the Court of Session is likely to come to the same conclusion: the 2004 and 2005 closure notices may have been voidable but they were not void. As the procedure for challenging them set out by Parliament has not been followed, they are effective (for the time being) to deny the claim for terminal loss relief made in 2001-2003.

88. And I comment that had I come to any other conclusion, it would permit the appellant to circumvent the rules clearly laid down by Parliament. Parliament requires appeals to be properly lodged within certain time limits. The appellant cannot avoid these by raising the issue in a different appeal or different proceedings in a different jurisdiction.

89. My understanding is that it was the appellant's deliberate choice *not* to appeal the 2004 and 2005 closure notices. It was not that the notice of appeal accidentally failed to mention them as the subject matter of the appeal nor include a copy of them. It was a deliberate choice, even if misguided.

90. That is not to say that the appellant could not now seek to challenge the 2004 & 2005 closure notices: it appears to be out of time to do so but it might wish to consider an application for permission to appeal out of time. I express no view on the likely outcome of such an application although no doubt the Tribunal would take into account that HMRC has been aware of the appellant's case that the closure notices

were invalid since 12 April 2011. If the appellant chooses to make such an application for permission, it should ensure that its application bears a cross reference to the reference number of these proceedings. If the appellant follows this course, it might be appropriate to request a stay of these proceedings and proceedings in the Court of Session, but I express no view on the likely outcome of such a request.

91. In these proceedings, which relate to the 2002 and 2003 closure notices, as matters currently stand, the invalidity or otherwise of the 2004 and 2005 closure notices is not a matter which this Tribunal can determine. And indeed in so far as relevant to proceedings, it must take the 2004 and 2005 closure notices to be effective to deny terminal loss relief as they have not been challenged.

Tax has been paid

92. I have decided that the terminal loss relief claim will form no part of these proceedings. Even if the appellant successfully (a) gets permission to appeal the 2004 and 2005 closure notices and (b) succeeds in that appeal, then it would still form no part of these proceedings although it might lead to repayment of tax that might otherwise be payable as a result of these proceedings.

93. In so far as these appeals raise issues on (a) entitlement to claim for amortisation of goodwill and (b) applicable rate of tax, this tribunal clearly has jurisdiction and these issues can be the subject of a substantive hearing in this tribunal. But what about the appellant's claim that it has paid the tax?

94. HMRC's case is that a question of whether tax has been actually paid is entirely in the jurisdiction of the applicable Court (whether Scottish or English & Welsh) and *not* within the jurisdiction of the tax tribunal. The tax tribunal has no jurisdiction to enforce liability to pay tax so, says HMRC, it must follow it has no jurisdiction to determine whether or not tax has actually been paid.

95. Mr Stewart considers that his predecessor's jeopardy amendment mentioned at paragraph [10] above should not have been issued as tax returns and enquiries into them are to establish liability to tax rather than how much tax has actually already been paid.

96. The appellant's case is that the tax return required it to state whether it has paid the tax, an enquiry was opened partly in response to its answer to this question, and a jeopardy amendment issued to challenge and amend its answer. The Tribunal, says the appellant, has jurisdiction over anything that arises on the tax return and/or in respect of which HMRC can open enquiries.

The Box 75 point

97. Box 75 is the box on the corporation tax return that required companies to state how much tax had been paid. This is the box which the appellant completed to show tax paid as set out in paragraph [7]. The 2002 and 2003 closure notices amended the box 75 figure to approximately £51,000 in respect of 2002 and nil in respect of 2003.

98. As I have said the source of the Tribunal's jurisdiction in respect of amendments to corporation tax returns is stated in §35 of Sch 18:

> *Amendment of return after enquiry*
>
> **35.** (1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (5) The closure notice must –
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required –
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) ….
>
> (2A) ….
>
> (6) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) or (2A).
>
> (7) Notice of appeal must be given –
>
> (a) in writing
>
> (b) within 30 days after the amendment was notified to the company,
>
> (c) to the officer of the Board by whom the closure notice was given.

99. So by implication the Tribunal has jurisdiction to consider any amendment made by a closure notice. HMRC's case in effect is that the Tribunal does not have jurisdiction to consider an amendment which shouldn't have been made by HMRC in the sense that it was an enquiry into a matter (whether tax has been paid) that could not be the subject of an enquiry.

100. What can be the subject of an enquiry? Sch 18 §25 provides, as does the equivalent provision for personal tax returns as cited by Lady Justice Arden in *Cotter*, that:

> "**Scope of Enquiry**
>
> **25.** (1) An enquiry into a company tax return extends to anything contained in the return, or required to be contained in the return…"

101. Mr Thomas' position is that the appellant's statement of tax paid in box 75 was not only *contained* in the return but *required to be contained in* the return in that the notes to the return said it was compulsory to complete it.

102. Required to be contained: But was Box 75 legally part of the return? What is a "return"? By §3(1)(a) a "return" is of "such information, accounts, statements and reports – relevant to the tax liability of the company…." The return must include a self-assessment "of the amount of tax which is payable by the company for that period…." (§7(1) Sch 18). §8(2) provides:

> "Except as otherwise provided, references in this Schedule to the amount of tax payable by a company for an accounting period are to the amount shown in the company's self-assessment as the amount payable."

103. So a return is anything which shows the amount of tax *payable*. What does "payable" mean in this context? Is it the gross amount payable in respect of that year's profits, or the net amount payable after payments already made to HMRC have been taken into account?

104. §8(1) sets out how the "amount of tax payable" is calculated. *Step 1* is to calculate the corporation tax on the company's profit for the period; *Step 2* is to give effect to reliefs and set-offs as specified; *step 3* is to add on amounts assessable as if they were corporation tax; *Step 4* is to "deduct any amounts to be set off against the company's overall tax liability for that period". But the next two sub-paragraphs, following the overall scheme of §8 make it clear that the set off is limited to income tax borne by deduction and certain ACT credits.

105. It seems to me that this is meant to mirror (with the exception of the ACT point which could only apply to corporation tax) the provisions for personal tax. In s 9(1) TMA a self-assessment return is required to include "an assessment of the amount payable" by the taxpayer. It defines that as "the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which [certain sections] applies.

106. So the amount payable is the amount payable after deduction of certain specified payments of tax. It does not include deduction of sums paid other than by way of deduction at source and ACT. Therefore, box 75 (other than in respect of deduction at source/ACT) was *not required* to be part of the tax return.

107. Contained in tax return: Nevertheless, it was clearly *contained* in the document that was the return. An enquiry can be into anything contained in a return, whether or not it was required to be there. Therefore, this Tribunal would have jurisdiction over HMRC's amendments.

108. Lady Justice Arden's view is binding on this Tribunal if directly on point and persuasive in a comparable position. Her view, in respect of the claim made on the taxpayer's return for terminal loss relief was, repeating the citation above:

> "[32] … I conclude that the judge was wrong on the jurisdiction issue in this case. If the Revenue decides to challenge matters contained in the return in response to the boxes provided, it must use either the s 9A procedure [the procedure for raising an enquiry into a personal tax return] or seek to make a correction to the return under 9ZB [the provisions for correcting a personal tax return for obvious error] (if applicable). This is so even if the Revenue is correct that, under the relevant statutory provisions governing loss relief claims, that claim could not be the subject of relief against liability to tax for the year to which the return relates. In that case, it is up to the Revenue, if it

> wishes to achieve the contrary result, to make sure that the form of the return does not permit such a claim to be made."

109. In other words, although it was arguable that the claim should not have been made on the tax return, nevertheless it was made in the tax return, so the proper way of challenging it was for HMRC to open an enquiry into that return.

110. It seems to me that the same must be true here. Whether or not HMRC are correct to require taxpayers to state the tax paid on the tax return, the return does so require this and the appellant in this case made the claim in box 75 of its return that it had paid an amount in tax. The way to challenge that was by enquiry into that tax return. HMRC did this. The appellant has appealed the resulting closure notice. And the effect is that the tribunal has jurisdiction to consider the matter. And this is the case even though it seems to me that it would not have jurisdiction had the information not been included (as it did not have to be) on the tax return.

Concurrent jurisdiction with courts?

111. This conclusion is at first glance at odds with the general understanding that the courts have jurisdiction to enforce payment of tax (or tax refunds) while the tribunal has jurisdiction to determine liability to pay tax (or be paid tax refunds).

112. The significant point it seems to me is that the tribunal does not have any general jurisdiction to decide whether tax has been paid and certainly no jurisdiction to enforce payment of unpaid taxes or refunds: but it does have jurisdiction to decide whether an amendment to box 75 by closure notice was correct or not and thereby implicitly to decide the validity of the taxpayer's claim to have paid the tax due.

113. (I note in passing that there are other circumstances in which the tribunal would decide whether tax had been paid: for instance where a penalty was imposed for non-payment of tax, the tribunal would of necessity have to make a finding of fact of whether the tax had been paid.)

114. Does this lead to concurrent jurisdiction with the courts? It seems to me, following the logic, so to speak, of *Autologic*, that a court might decide that since the Tribunal does have jurisdiction to decide the claim to have paid the tax in a case where the claim to have paid the tax was made on a tax return, it would regard it as an abuse of process for the issue to be raised in the courts. The matter should only be litigated once.

Can the Tribunal adjudicate upon the meaning of the 2004 Contract Settlement?

115. While it was Mr Stewart's position that the Tribunal did not have jurisdiction to determine this aspect of the appellant's claim, and Mr Thomas' that it did, rather ironically Mr Stewart put the *Spring Salmon & Seafood Ltd* SPC 503 case to me which suggests that I do have jurisdiction, while Mr Thomas opined that the Tribunal would not be able to rule on the interpretation of the 2004 Contract Settlement as that was a matter of Scottish law.

116. This Tribunal most certainly does have jurisdiction, unless there is an abuse of process (to which I revert below) to determine any point of contract law which arises in the course of proceedings to determine tax liability. If the 2004 Contract Settlement involved a point of Scottish law then this should be drawn to the attention of the Tribunal before the hearing of the substantive appeal so that a Judge qualified as a lawyer in Scotland can be appointed to hear the case.

117. Therefore I consider that the Special Commissioner in that case was right to consider that he had jurisdiction to decide the meaning of the 2004 Contract Settlement. And I note that the particular Special Commissioner who decided those proceedings, now Judge J Ghosh, is qualified as a lawyer in Scotland (§ 47 of his decision). (But I also note in passing that he considered that the 2004 Contract Settlement was probably governed by English law although he did not determine the issue:

> [45] … [the 2004 Contract Settlement] is most likely governed by English law, certainly on the evidence to hand, since the agreement was signed in Reading. There is no governing law clause….So far, other than the place of incorporation of the Appellant and the governing clause of [a different agreement], no other substantive matter (the place of trading of the Appellant, the residence of the directors) have been demonstrated to have any Scots connection…..")

118. Of much greater significance is that the Special Commissioner did determine the question of whether the appellant's tax liabilities for the years 2002 and 2003 were within the scope of the 2004 Contract Settlement. His decision was:

> " [48] As noted above, on 24th May 2004 the Appellant, among others, entered into a Tax Agreement with the Revenue which recorded a final agreement between HMRC and the Appellant on certain of its tax affairs. However the Tax Agreement does not extend to the period ended 31st July 2002, or the period ended 31st July 2003. …."

119. As I have determined that this Tribunal does have jurisdiction to consider whether tax has already been paid, the scope of the 2004 Contract Settlement is a question which will arise again in these proceedings. While the doctrine of *res judicata*, which prevents parties re-litigating issues which have already been decided in proceedings between them, may not apply to Tribunal proceedings, raising the issue of the scope of the 2004 Contract Settlement *may* nevertheless be an abuse of process by the appellant.

120. I note that this issue of abuse will have to considered in the substantive hearing in this appeal. I do not decide it in this hearing. The relevant authorities include *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 105, *Society of Medical Officers of Health v Hope* [1960] AC 551 HL, *Cafoor v Colombo Income Tax Commissioners* [1961] AC 584 PC, *Bennett v C&E Comms No 2* [2001] STC 137 and *Durwin Banks* (2008 VTR 20695).

Conclusion

121. In so far as the terminal loss relief claim is concerned, this Tribunal, in the context of these proceedings, has no jurisdiction to determine the validity of it and it is struck out as a ground of appeal; further unless and until the 2004 and 2005 notices are successfully appealed, it will (in so far as relevant) treat the terminal loss relief claim as validly denied by HMRC.

122. So far as the proceedings in the Court of Session are concerned, I have no jurisdiction and my opinion can carry no weight; nevertheless I express the view that in the light of authorities the Court may come to the same conclusion: which is that it has no jurisdiction to determine the validity of the terminal loss relief claim and in any event unless and until the 2004 and 2005 closure notices are successfully appealed, it must treat the terminal loss relief as validly denied by HMRC.

123. So far as these proceedings are concerned, this Tribunal does have jurisdiction to consider as a general matter the appellant's claim that it had already paid its tax liabilities for the 2002 and 2003 year ends. That issue will proceed to a hearing in this Tribunal together with the other grounds of appeal (other than the one I have struck out above and with the possible exception of Ground 6 which the appellant needs to clarify whether it is pursuing).

124. One of the issues that the substantive hearing in this appeal will have to decide, as I make no decision on it at this point, is whether the tribunal has jurisdiction to consider whether the 2004 contract settlement included the appellant's tax liabilities for the 2002 and 2003 year end or whether, because it appears that this has already been litigated and decided by the Special Commissioner in proceedings between the same parties, it would be an abuse of process for it to be raised again and the Tribunal must therefore treat the matter as finally determined by the Special Commissioner in 2005.

125. There is therefore no need for a preliminary hearing to consider the question of the terminal loss relief claim. Either party might wish to consider whether it wants the "tax has been paid" ground of appeal heard as a preliminary issue as that is a discrete issue which, if determined in favour of the appellant, should avoid the need to litigate the question of the amortisation relief claim which might involve the expense of expert evidence. If either party does wish it to be decided as a preliminary issue, it should make an application. If no such application is made within 14 days, I will issue directions for this appeal to proceed to hearing in its entirety.

126. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 24 May 2013