TC04002

Appeal number: TC/2012/08472

Income Tax; PAYE Determinations; National Insurance Contributions Decisions; bonus; effect of reference in accounts to fish stocks; whether paper transaction; whether contingent liability or accrual; Time Bar; deliberate conduct; whether liability excluded by agreement and/or undertaking; Taxpayer struck off Register of Companies and subsequently restored to the Register; effect of restoration; Income Tax (Pay As You Earn) Regulations 2003, regulations 21, 68, 69 & 80; Social Security Contributions and Benefits Act 1992 section 8, Social Security Contributions (Transfer of Functions etc) Act 1999, s8; Taxes Management Act 1970 ss29, 34, and 36; Companies Act 1985 s 228, 245, 653 Companies Act 2006 s454 1032

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING SALMON & SEAFOOD LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCIArb
DR HEIDI POON CA, CTA, PhD

Sitting in public at George House, Edinburgh on 4, 5 and 6 February, 4, 8, 9 and 28 April and 9 May 2014

Michael Upton, Advocate, for the Appellant, instructed by Russell & Aitken, solicitors, Edinburgh

Iain Artis, Advocate, instructed by the Office of the Advocate General, for the Respondents

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DECISION

Introduction

1. These are three consolidated appeals categorised as complex (TC/2012/08472; TC/2012/09576 and TC/2013/01500). Together, they raise a variety of issues flowing from two Notices of Regulation 80 Determinations dated 8 April and 5 September 2012 (relating to PAYE) and two Notices of Decision (relating to National Insurance Contributions) issued on the same dates.

2. The issues in the appeal raise questions relating to the accounting treatment of certain transactions of the Appellant (the Company) during the tax year 2004/05, the effect of subsequent dealings between the Appellant and the Respondents (HMRC), and the consequent fiscal liability, if any, of the Company arising out of those transactions and dealings. These, in turn, raise a number of public law issues. However, the principal issue relates to the liability, if any, of the Company to pay PAYE and NIC in respect of entries in the Company's accounts recording and reflecting, to put it broadly meantime, a bonus of £900,000 to Mr Thomas and his brother, and wages and salaries of £178,230.

3. The appeal was heard at Edinburgh on 4, 5 and 6 February, 4, 8, 9 and 28 April and 9 May 2014. Michael Upton, Advocate, appeared on behalf of the Company on the instructions of Russell & Aitken, solicitors, Edinburgh. He led the evidence of Roderick Thomas (Mr Thomas), the director of the Company. Iain Artis, Advocate, appeared on behalf of HMRC on the instructions of the Office of the Advocate General. He led the evidence of James Edward Cashmore, a chartered accountant with Special Investigations, a directorate of HMRC, and Anthony Stewart, an experienced tax inspector. The witnesses amplified their written statements and Mr Cashmore spoke to a report dated 14 January 2014 which he had prepared for the purposes of these proceedings.

4. A Statement of Agreed Facts (SOAF) was produced by the parties. In order to retain some sort of logical and chronological sense to this decision we have incorporated the various agreed facts at suitable points in the decision rather than set it out in its entirety. A bundle of documents was also produced and added to from time to time during the Hearing.

5. At the outset of the Hearing, there was an opposed application to allow certain documents to be received late. We heard parties at some length, adjourned and gave our decision later in the morning. The result was that a number of documents were allowed but some were excluded. It is unnecessary to identify them specifically, except to note that of the proposed Inventory of Productions Nos. 139-151, Nos. 140-143, 145 and 147 were excluded and the remainder allowed. Two further documents proposed by the Company were allowed, namely a Report by Michael Taub dated 20 December 2013 and HMRC Code of Practice No 8 (No 153).

Other Procedural Matters

6. By Direction dated 12 December 2012, Judge Mosedale consolidated appeals TC/2012/08472 and TC/2012/09576 and directed that they be referred to under case reference TC/2012/8472 (the 0 seems to have been omitted). The Direction also categorised the consolidated appeal as *complex*. By Direction dated 17 January 2013 the same judge directed at the request of the Company and with the consent of HMRC that the Company's previous intimation of opting out of the complex case cost regime was in effect withdrawn and directed that the Tribunal would have power to make awards of costs under Rule 10(1) *in relation to any costs incurred at any time in respect of this appeal to the same extent as if there had never been an opt out.*

General Background and Issues

Background

7. The background to these appeals and the issues raised are complex. We discuss the necessary detail below. In order to understand the detail, it should be helpful to describe and summarise the essentials. Some of the facts on the basis of which the Company presents its case are accepted by HMRC only for the purposes of these appeals. There are other appeals pending by members of the Thomas family and what might loosely be described as *their* companies and businesses in which different facts are asserted or disputed. Appendix 1, provided by HMRC, summarises the other appeals currently open.

8. The Company was incorporated in Scotland on 13 March 1998 with the name Tunevoice Ltd which it changed to Spring Salmon & Seafood Ltd on 24 April 1998. The share capital in the Company in the period to the conclusion of tax year 2004/05 comprised authorised capital of 1,000,000 ordinary shares of £1, of which 200,000 ordinary shares of £1 were allotted, issued and fully paid up. The Company's issued shares were in the tax year 2004/05 held by Bala Ltd, a company incorporated in the

British Virgin Islands and at that time administered in Guernsey. The Company's financial year ended on 31 July in each year save 2005.[1]

9. The Company carried on business as suppliers, distributors and processors of seafood between 1998 and about 31 January 2005 when it declared that it had ceased trading. Whether it actually stopped trading or continued to operate for some time thereafter is unclear, notwithstanding the agreement between the parties on this point (see paragraph 16 below). Mr Thomas has been a director throughout.

10. Mr Thomas and his brother Stuart also carried on business in partnership under the name S&R Thomas (the Partnership) as consultants and seafood dealers. Much of the business of the Partnership appears to have been with the Company and Thomas Lindh Ltd (formerly known as Spring Salmon Ltd), a Thomas family company.[2] The rationale for the existence of the Partnership and how its business differed from or complemented the business of the Company or Thomas Lindh Ltd was not discussed in evidence or submissions.

11. In 2002, the Partnership apparently ceased trading and sold or purported to sell its business to the Company for £2,835,000 made up of trading stock valued at £35,000 and the goodwill of its business valued at the sum of £2.8m. The fiscal effect of any such transaction has been the subject of dispute. In judicial review proceedings in 2007, HMRC asserted that the trading activities of the Partnership lacked any obvious commercial purpose and that its true purpose was to allow Mr Thomas, his brother and the companies controlled by them to obtain a series of tax advantages.

12. In or about August 2006, the Company, acting through Mr Thomas, resolved, retrospectively, to make a payment of a bonus (described as a fish stock bonus) of £900,000 to Mr Thomas and his brother Stuart Thomas at some unspecified date in the future. This sum was reflected in the Company's cessation accounts which covered the 18 month period between 1 August 2003 and 31 January 2005. No written minute of the Company's proceedings records this decision.

13. Those accounts also made provision for what was described as Staff Costs (wages and salaries) of £178,230.

14. Those accounts were submitted to HMRC on 30 August 2006 along with tax returns for the period 1 August 2003 to 31 July 2004, and 1 August 2004 to 31 January 2005.

15. During the period between 1 August 2003 and 31 January 2005, the Company declared and paid no PAYE and accounted for no national insurance contributions in respect of any director or employee. The payments noted above were not mentioned

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[1] SOAF/2-5

[2] See *HMRC v Gen. Comm. S Thomas, R Thomas and S&R Thomas Partnership* [2007] EWHC 871 (Admin) [judicial review proceedings] paragraphs 3-5

in the personal tax returns of Mr Thomas or Stuart Thomas for the tax years 2003/04 or 2004/05.

16. It is a matter of agreement between the parties that the Company ceased trading on 31 January 2005.[3]

17. On 4 January 2007, HMRC opened enquiries in relation to the Company's accounting periods between 1 August 2003 and 31 January 2005. Those enquiries were closed in March 2011. HMRC also opened enquiries into the 2003/04 personal tax returns of Mr Thomas and his brother Stuart. These enquiries were closed in July 2007.

18. The Company contends that in about July 2007, it entered into a binding agreement with HMRC whereby no PAYE or NIC would be demanded in relation to the payment of the sum of £900,000. The existence and effect of the alleged agreement was one of the grounds of appeal and was the subject of evidence and detailed submissions which we discuss below.

19. On 8 August 2007, the Company was struck off the Register of Companies under s652(5) of the Companies Act 1985 and dissolved by notice in the Edinburgh Gazette dated 17 August 2007.[4] HMRC subsequently applied to the Court of Session for its restoration. Mr Thomas originally opposed the petition but it was eventually granted on 16 March 2011 following a proof in July 2010 and a reclaiming motion.[5] The Company founds on a written undertaking given on behalf of HMRC in 2010 in the course of the restoration proceedings that, the Company contends, disables HMRC from pursuing PAYE and National Insurance contributions in relation to the two sums mentioned above. The effect of this undertaking was also one of the grounds of appeal and although not the subject of any detailed evidence (essentially because the dispute was not about whether it was given, but what it meant) it was the subject of detailed submissions which we discuss below.

20. In 2011, HMRC issued PAYE notices of determination and National Insurance Contributions decisions in respect of these two sums (£900,000 and £178,230). It is these notices and decisions and their confirmation on review, actual or deemed that are the subject of these appeal proceedings.

21. The Company also alleges that the enforcement of the notices and decisions is time-barred.

Issues

22. The principal issues ultimately canvassed before us were (i) whether the sums of £900,000 and/or £178,230 are sums in respect of which PAYE and NIC are payable at all ie whether the underlying determinations and decisions are sound; (ii)

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[3] SOAF/6

[4] SOAF/7

[5] SOAF/8

whether the notices and determinations are otherwise time-barred; (iii) whether an alleged agreement in 2007 bars HMRC from pursuing the PAYE and NIC liabilities specified in the determinations and notices insofar as relating to the sum of £900,000; and (iv) whether an undertaking given in the restoration proceedings in 2010 bars HMRC from pursuing these liabilities.

23. The onus of proof rests on HMRC in relation to time bar in respect of PAYE. They invoke s36 TMA which, applies to PAYE (but not to NIC; see below at paragraphs 242-248). That section enables HMRC to issue notices and determinations within 20 years of the year of assessment in issue where the loss of tax sought to be recovered is brought about deliberately by the taxpayer. A different argument, based on the general law of prescription and limitation, has been presented by the Company in relation to the NIC decisions.

24. The onus of proof on all other issues (should the PAYE time-bar argument be repelled) lies on the Company. There is, however, a dispute between the parties as to whether the onus in relation to time bar requires HMRC to prove a loss of tax, ie to establish the underlying soundness of the determinations and decisions and thus, in effect, place the onus of proof in these appeals entirely on HMRC. It is settled law that the normal rule is that the onus lies on the taxpayer to prove, on a balance of probabilities, that a valid assessment is excessive and what the correct or approximately correct amount should be, otherwise it stands good. No question of best judgment arises here.

Other Proceedings

25. One of the difficulties for this Tribunal has been to identify the detail of the relevant background to the fiscal affairs of the various Spring Salmon companies, Mr Thomas and his brother as individuals and Mr Thomas and his brother in the guise/shape of a partnership known as S&R Thomas Partnership, which we have already mentioned (see paragraph 10 above). There have been many transactions involving one or more of them. Funds, assets, rights and obligations have been (or claim to have been) transferred among them sometimes in a somewhat loose and casual manner. The paperwork produced has been limited and leaves many questions either unanswered or which have to be answered by inference. Had proper records been produced (we cannot say whether they exist) our task might have been less onerous.

26. We should also mention that there have been numerous decisions of the tax tribunals since 2005 if not earlier, in which much of the background to this appeal is set out to a lesser or greater extent. Appendix 2 specifies and summarises all or at least most of the decisions in tax appeals relating to Mr Thomas, his brother, the Partnership and the companies controlled by them. We mention some of these later in this Decision. It would have been in the interests of all if a more comprehensive statement of agreed facts (and there are many which are either indisputable or are not controversial) had been prepared. This would have shortened the length of the proceedings, this Decision and the time it has taken to produce it. However, it is perhaps not surprising that parties are cautious about reaching agreement on some

factual matters. The relationship between HMRC and Mr Thomas, who seems to deal with most of the correspondence and negotiation with HMRC himself, and acts as the advocate in these tribunals from time to time, is probably best described as strained. In short, there has been a war of attrition between certain members of the Thomas family and their various businesses on the one hand, and HMRC on the other hand. The administrative cost to the general taxpayer in the form of HMRC time and effort, and tribunal costs, has been very substantial compared with the relatively small amounts of tax collected over the years. Most adverse decisions by HMRC are appealed by the Thomas family and their various businesses. The same background facts are canvassed but many matters while aired, remain obscure and unresolved.

Statutory Background

PAYE

27. The principal charging provisions are Regulations 69, 80 and 68 of the Income Tax (Pay As You Earn) Regulations 2003. Regulation 69 requires an employer to account to HMRC for PAYE within specified periods. Regulation 80 enables HMRC (that is to say gives them a discretion) to determine to the best of their judgment the amount of unpaid tax payable by an employer under Regulation 68 in a tax year; and entitles them to serve a notice of determination on the employer. Regulation 68 sets out how the amount an employer must pay is to be determined. Regulation 21 requires the amount to be deducted from the payment made to the employee (by reference to the employee's code if he has one). Regulations 7 and 8 specify what is meant by *code*.

28. By Regulation 80(5) the assessment, appeals, collection and recovery provisions of the Taxes Management Act 1970 apply (subject to certain exceptions) as if the determination were an assessment and the amount of tax were income tax charged on the employer.

29. Our jurisdiction to determine whether the Company has been overcharged derives from TMA s31(1)(d) [appeal against any assessment to tax which is not a self-assessment], 49G(2) [appeal after HMRC review] & 49G(4) [tribunal's obligation to determine the matter], 50(6) and 50(8) [power to reduce assessment].

30. ITEPA 2003 chapter 3 Part 1 sets out how tax is charged on employment income. Section 18 sets out rules for determining when general earnings consisting of money are to be treated as received at the earliest of various specified times, eg when the payment is made of or on account of earnings; when a person becomes entitled to payment of or on account of earnings; where an employee is a director of a company, when the sum on account of earnings is credited in the company's accounts or records. By s19, general earnings not consisting of money are to be treated as received when the benefit is provided (subject to exceptions not material for present purposes).

31. As a practical matter, an employer's annual return (known as a P35) requires to be submitted to HMRC by 19 May following the end of the tax year in question. Such

return along with forms required to be submitted with it (P14 and P60), should contain a summary of employees, their address, with details of the total payments made and the tax deducted, together with the employee's code.

National Insurance Contributions (NIC)

32. Sections 6 and 7 of the Social Security Contributions and Benefits Act 1992 make provision for payment by an employer of secondary Class 1 contributions in respect of *earnings paid* to or for the benefit of an *earner* in his employment. By section 3, *earnings* includes any remuneration or profit derived from an employment. *Employed earner* is defined in s2. Section 9 specifies how secondary Class 1 contributions are calculated. Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 enables an officer to decide whether a person is or was liable to pay contributions of any particular class and the amount he is liable to pay. Payment of NIC by an employer is due by the 19th of the month after that in which he made the payment which gave rise to the obligation to pay the NIC. By Regulation 3 of the Social Security Contributions (Decisions and Appeals) Regulations 1999, such a decision is to be made to the best of the officer's information and belief. There is also power to vary a decision (Regulation 5).

33. Our jurisdiction derives from s11 and 12 of the Social Security Contributions (Transfer of Functions etc) Act 1999 [right of appeal to the tribunal], the Social Security Contributions (Decisions and Appeals) Regulations 1999, Regulation 7 and the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009. Power to vary the decisions is given by Regulation 10 of the 1999 Regulations.

Time Bar

34. TMA s34 contains a general provision that an assessment to income tax may be made at any time not more than four years after the year of the assessment to which it relates. That general principle is subject to later provisions in the Act and to any other provisions of the Taxes Acts.

35. Section 36 TMA provides *inter alia* as follows:-

> (1) An assessment on a person in a case involving a loss of income tax … brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax…..
>
> (a) brought about deliberately by the person
>
> ……
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).
>
> (1B) In subsections (1) and (1A) references to a loss brought about by a person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

36. The foregoing provisions apply to liability of an employer for PAYE. However, they do not apply to the liability of an employer to pay NIC. The general law of prescription and limitation applies to NIC liability.

37. English law, in terms of the Limitation Act 1980, appears to restrict the time allowed to enforce payment of a debt by civil proceedings to six years from the date when liability first arose. There are exceptions where fraud or concealment are involved.

38. In Scots law, an obligation to pay NIC is subject to extinction by prescription, ie the passage of time. The short negative prescription under section 6 of the Prescription and Limitation (Scotland) Act 1973 is, broadly, five years from the date on which the obligation became enforceable. Section 6 applies to the obligations specified in Schedule 1 to the 1973 Act. The obligation to pay NIC or any tax is not therein specified.

39. An obligation such as an NIC debt which does not prescribe under s6, will prescribe under s7 after 20 years from the date on which it became enforceable.

40. The parties are in dispute as to whether Scots law or English law should apply to the question of prescription/time bar.

Other Relevant Statutory Provisions

41. TMA s29 (as in force when the 2010 undertaking was given) enables a *discovery* assessment to be made after the statutory period for enquiry into the taxpayer's return has expired or been closed, where there has been an insufficiency of tax brought about carelessly or deliberately by the taxpayer or where the insufficiency could not reasonably have been expected to have been identified in time on the basis of the information provided by the taxpayer in his return or other related documents.

42. Part of the background to this appeal relates to the dissolution of the Company in 2007 and its restoration to the Register of Companies in 2011. Section 653 of the Companies Act 1985 provided that the court may, in certain circumstances, on the application of *inter alios* a creditor, order a company's name (that has been struck off the register under s652) to be restored to the register.

43. S1032 of the Companies Act 2006, which was in force when the restoration provisions were before the court in 2010 and 2011, provides that the general effect of such an order for restoration is that-

> (1) … the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

44. The court may also

> (2) …give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

Company Accounts

45. We heard evidence about accounting practice in relation to the treatment in the Company's accounts of the sum of £900,000 referred to above, and the subsequent alteration of such accounts. The Companies Act 1985 requires, by s228(2), a company to prepare accounts in which the balance sheet gives *a true and fair view of the state of affairs of the company as at the end of its financial year; and the profit and loss account shall give a true and fair view of the profit or loss of the company for the financial year.*

46. Section 245 of the 1985 Act (repealed with effect from 6 April 2008[6]) and s454 of the Companies Act 2006 provide that if it appears to the directors that any annual accounts or any directors' report did not comply with the requirements of the Act, revised accounts or a revised report may be prepared correcting the non-compliance. The effect of revision of defective accounts appears to be retrospective (The Companies (Revision of Defective Accounts and Reports) Regulations 2008, as amended).

47. We discuss the published practice in relation to this topic at paragraph 91 below.

Records

48. It is also worth bearing in mind that there are various statutory obligations in relation to record-keeping. Section 12B TMA provides, in effect, that a taxpayer keep and preserve for a specified number of years, all such records as may be necessary for the purpose of enabling a correct and complete return to be delivered for the year or period in question. Particular types of records required are described in primary and secondary legislation and include records of all amounts received or expended in the course of trade.

Facts[7]

The Company - general history and background

49. Mr Thomas has been the sole director of the Company since its incorporation in 1998. Stuart Thomas was appointed the Company's secretary on 23 May 2004. Neither had a formal service contract with the Company. Both were active participants in the running of its business. Stuart Thomas dealt with sales and the bulk of the purchases. Mr Thomas dealt with accreditation (for supermarket purposes) food hygiene and other matters. He also prepared accounts and tax returns and negotiated with HMRC from time to time on behalf of the Company, on behalf of the partnership, on behalf of his brother and on his own behalf, all on a whole range of

[6] Companies Act 2006 Schedule 16 paragraph 1, subject to certain savings and transitional provisions.

[7] Because of the length of this decision we have found it convenient to include some comments and conclusions on the facts in this section.

issues, including technical tax issues relating to the transactions of the Company and other businesses controlled by the Thomas family. Neither brother received a regular salary from the Company.

50. In proceedings in the Court of Session by the Company against a third party with whom it had done business, Stuart Thomas, who gave evidence (but Mr Thomas did not) was described by the Lord Ordinary, Lord Clarke, in his Opinion dated 29 September 2004, following proof, as the managing director of the Company. Lord Clarke records that *a good deal of* the facts he found were not in dispute and came from correspondence passing between the parties (see paragraphs 2 and 5 of the Opinion). Of Mr Stuart Thomas, Lord Clarke, said that the impression he formed from his evidence as a whole, was that *he was something of an opportunist and while opportunism may to some extent be the life-blood of successful commerce, it is not a quality which sits well with the giving of evidence as to actual circumstances which have occurred in the past* (paragraph 53).

51. According to the evidence of Mr Thomas, which on this point we accept, Stuart Thomas played an active and important role in directing the Company's operations. All others working for the Company did so in an administrative capacity. Stuart Thomas was a director of the Company in all but name.

52. On 28 July 2002, the Company purchased as a going concern the business and certain assets of S&R Thomas Partnership (an English partnership of which Mr Thomas and his brother Stuart were the partners) for the sum of £2,800,000 for the goodwill and £35,000 for the stock. This was paid for by a credit to the director's loan account in the books of the Company. This transaction, recorded in a Minute of Agreement dated 24 July 2002 between S&R Thomas (the Partnership) and the Company has been the subject of much controversy. A similar transaction occurred[8] in 2004 (discussed below). The commercial purpose, if any, of these transactions (other than to secure tax advantages for the Thomas family, and companies and businesses controlled by members of that family) was not discussed before the Tribunal and is therefore unknown.

53. The shares of the Company were owned by Bala Limited, a company incorporated on 27 August 1997 in the British Virgin Islands and administered in Guernsey. Bala Ltd was, in turn, owned by a family trust known as the Maclennan Trust. Its origins, beneficiaries, status and fiscal liabilities, and even its description as a family trust have been the subject of much discussion with HMRC over the years. The Company's accounts for the year ended 31 July 2003 disclose, on page one, that Mr Thomas was a potential beneficiary in a trust which owned the entire issued share capital in the Company's ultimate holding company. This is plainly a reference to the Maclennan Trust and Bala Ltd. In recent email correspondence (produced to the Tribunal) Mr Thomas acknowledged that he and his brother were to be treated as the settlors of the Maclennan trust (email from Mr Thomas to Mr Stewart of HMRC 30/4/12).

[8] HMRC accepted that this transaction occurred, but only for the purposes of the appeal we are considering.

54. Sarah Thomas (wife of Mr Thomas) and Rebecca Thomas (wife of Stuart Thomas) worked in the Company's business until about March in 2004 when they ceased to work for the Company, and began to work for the Company's successor Spring Seafoods Ltd (subsequently renamed Spring Capital Ltd in 2010).

55. HMRC have accepted that they each received non-taxable termination payments of £30,000 and that these sums amounting in total to £60,000 form part of the sum £178,230 mentioned in the Company's accounts, discussed below at paragraphs 157-165.

56. In May 2004 an Agreement was entered into with HMRC to facilitate the break-up of the Maclennan Trust. This is described below at paragraphs 79-81.

57. On 22 September 2004, the assets and business of the Company were transferred to the Partnership. On the same day, those assets and business were transferred to Spring Seafoods Ltd (now known as Spring Capital Ltd; we shall refer to this company as Spring Seafoods/Capital). The value of the goodwill so transferred is the subject of a tax appeal pending before the First-tier Tribunal in London. This transfer of assets is not disclosed in the accounts of the Company discussed below. No documentation in relation to either transfer has been produced. However, for the purposes of this appeal, HMRC accept that the transfers occurred. In the course of the proceedings before us, the Company, on 9 May 2014, produced a letter dated 5 March 2007 to HMRC from Spring Seafoods/Capital to HMRC in relation to its corporation tax returns for the "periods ended 9/3/05 and 30/4/05.[9] In that letter, Mr Stuart Thomas, on behalf of Spring Seafoods/Capital intimated that during the period ended 9 March 2005, it took over and began carrying on the trade previously carried on by the Company and amended its returns so as to claim the terminal losses of the Company whose business it had acquired. Mr Stewart was not aware of this letter at the time and had no reason to be aware of it. The letter was sent to a different tax district in connection with another company. He cannot be deemed to have knowledge of every document sent to HMRC. The earliest date he could have become aware of the transfer was April 2009 when he was in correspondence with Mr Norris (see paragraph 66 below).

58. Following its restoration to the Register of Companies in 2011, the Company does not appear to have traded. As already noted, it is a matter of agreement between the parties that the Company ceased trading on 31 January 2005. This is in spite of the finding by Lord Glennie in the restoration proceedings in the Court of Session that it was admitted that at the time the Company was struck off the Register, it was still in operation (Opinion (undated) amplifying *ex tempore* judgment on 14 July 2010 paragraph 4(14)).

[9] The period ended 9/3/05 seems odd but this is what the letter states and was not fully explained to us.

Other related companies and businesses

59. The Company is the successor to the business of Spring Salmon Ltd. Spring Salmon Ltd was a seafood trading company and dealt mainly in salmon. It was a commodity type trading business. Much of its business was done over the telephone. Various family members worked in the business including Sarah Thomas, who is Mr Thomas's wife and Rebecca Thomas who is Stuart Thomas' wife. Spring Salmon Ltd subsequently changed its name to Thomas Lindh Ltd. The share capital of that company was or is held in trust for the minor children of Mr Thomas and those of his brother, Stuart.

60. Spring Seafoods/Capital was incorporated and began trading in March 2004. It changed its name to Spring Capital Ltd on or about 23 February 2010. Mr Thomas is or was the company secretary and a shareholder. He became a director in 2010. His brother Stuart took the lead role in that company. The reason for this is unknown.

61. Spring Seafoods/Capital's Corporation tax self assessment, accounts and tax computations all for the period ended 30 April 2007 were submitted to HMRC on or about 28 April 2008. The return was signed by Mr Thomas. It disclosed turnover of £2,338,437 and trading losses of £144,835.

62. The accounts of Spring Seafoods/Capital for the year ended 30 April 2007 disclose turnover of £2,338,437. It appears that the business of the Company had been transferred to Spring Seafoods/Capital, together with the liability of the Company for the director's current account amounting to £1,557,991. No documents have ever been produced to support these entries.

63. The acquisition appears to consist of the purchase by Spring Seafoods/Capital of goodwill at the price of £1,557,991. This sum is paid for by crediting the same sum (£1,557,991) to the director's current account with Spring Seafoods/Capital. It is unclear, to say the least, how this figure was arrived at. The Company had already transferred its business (which would include goodwill, whether or not formally identified or valued) to the Partnership in September 2004 who immediately transferred it to Spring Seafoods/Capital. It appears that the intention was to reflect the transfer of business and assets by the Partnership. Spring Seafood/Capital returns and accounts covering 2004, 2005 and January to April 2006 were not produced, although we have noted that Mr Upton made reference to the 2005 and 2006 returns in his closing submissions.

64. We have been provided with some papers relating to Spring Seafoods/Capital conjoined appeals (reference TC/2011/01784). These disclose that the claim relating to the goodwill of the Company's business and its amortisation and consequent claim for relief does not appear until the appeal relating to the return for the period ended 30 April 2007; and not any earlier return.

65. The accounts of Spring Seafoods/Capital for the year ended 30 April 2007 disclose *inter alia* the following:-

65.1 Stuart Thomas was the director throughout the year. Mr Thomas was the secretary from 12 February 2007. The bankers were Nordea Bank Finland plc. The accounts were prepared by D Norris CA, Reading. He was instructed by Spring Seafoods Ltd but did not act for the Company. The accounts were not audited.

65.2 The principal activities of the company are described as the purchase and distribution of seafood and money lending as a trade.

65.3 The turnover of the company was £2,338,437 with an operating profit of £629,864. Note 3 to the accounts shows administrative expenses of £239,937 and director's remuneration of £5,000.

65.4 The balance sheet shows *intangible assets* at £1,335,421. The previous year, 2006, shows no *intangible assets o*f any value. Note 8 to the accounts provides *inter alia* as follows:-

Cost	**Goodwill**	**Total**
	£	**£**
Additions	1,557,991	1,557,991
At 30 April 2007	1,557,991	1,557,991
Depreciation		
For the year	222,570	222,570
At 30 April 2007	222,570	222.570
Net Book Amounts		
At 30 April 2007	£1,335,421	£1,335,421

The Director has elected to write off goodwill over 7 years in equal instalments.

65.5 Under the heading *other creditors* is shown the figure £1,756,484, an increase from the previous year (£187,395) of £1,569,089.

66. In the accounts for the year to 30 April 2007 and the year to 30 April 2008, Mr Norris is identified as Spring Seafoods/Capital's accountant. Accompanying a letter by Mr Norris to Mr Stewart dated 3 April 2009, are two manuscript notes in relation to the 2007 accounts. The first note, headed *Goodwill* states that the trade of the Company was transferred to Spring Seafoods/Capital together with a liability on the director's loan amounting to £1,557,991. The note states that *The goodwill is the balancing entry in the accounts.*

67. The second note is headed *Other Creditors*, and records the following in manuscript:-

> "Director's current account
>
> | | |
> |---|---|
> | Mr S Thomas | 1,741,798.46 |
> | Salaries 2005/06 | 14,685.60 |
> | | 1,756,483.96 |
>
> Includes liability transferred from Spring Salmon & Seafoods (sic) Ltd[10] of £1,557,991 on transfer of the trade to Spring Seafoods (sic) Ltd"

68. The accounts of Spring Seafoods/Capital for the year ended 30 April 2008 (which bear the date 25 February 2009), show *inter alia* a turnover of £2,041,705, an operating profit of £816,827, administrative expenses of £40,631, director's remuneration of £11,000 and *other creditors* at £1,401,664. The previous year's figure for *other creditors* is the sum of £1,756,483.96.

69. We note in passing that as the Company ceased to trade at the end of January 2005, and had already transferred its business to a or the Thomas partnership in September 2004, it is difficult to understand what goodwill it had in 2006 or 2007 to transfer to Spring Seafoods/Capital who already had and presumably were carrying on the business formerly carried on by the Company. According to the evidence of Mr Stewart, which we accept, the accounts of Spring Seafoods/Capital for the year to 30 April 2006, which were not lodged as productions, made no reference to the acquisition of the trade or business of the Company.

70. There do not appear to be any documents vouching the sale of goodwill in 2006 or 2007. This particular transaction is the subject of appeal proceedings under reference TC/2011/01784. If, as Mr Thomas appears to contend in his letter dated 26 May 2011 to Mr Stewart, that the business of the Company, transferred to the partnership in September 2004, was immediately transferred to Spring Seafood/Capital, then one would expect that significant event to be noted in Spring Seafood/Capital's accounts covering September 2004 and not their accounts for 2007 or 2008. No such accounts were produced.

71. Spring Seafoods/Capital have written down or amortised the value of the goodwill (£1,557,991) over seven years claiming a deduction against profits of £222,570 per annum. Moreover, the sum shown in the director's account in the books of Spring Seafoods/Capital has been drawn on although Spring Seafoods/Capital have never declared any PAYE or NIC obligations or made any such payments.

72. Accordingly, what was said to be a £900,000 *paper exercise* in the form of a bonus may have been converted into capital and is being repaid to Mr Thomas and his brother as capital at their discretion. (see paragraphs 119-142 below).

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[10] This is a reference to the Appellant (the Company).

73. The accounts for Spring Seafoods Ltd for the period ended 30 April 2008, submitted to HMRC in April 2009, show that the director had drawn down on the credit balance of £1,757,484 reducing it by £355,820 to £1,401,664. The sum of £900,000 thus appears to have found its way into the director's account of another Thomas family company.

74. The foregoing information about Spring Seafoods/Capital is relevant, at least indirectly to the question whether a liability on the part of the Company to pay PAYE and NIC exists at all.

Fish Stock and Employees - early discussions with HMRC

75. As long ago as 2001, the business affairs of the Thomas family had come under the scrutiny of HMRC (then the Inland Revenue). Mr Thomas along with an accountant represented Spring Salmon Ltd at a meeting with HMRC officials on 28 February 2001. The purpose was to discuss the business of Spring Salmon and the Company. Enquiries had been opened into various returns of these companies as well as the return of the Partnership and the personal returns of various members of the Thomas family. Payments to employees of Spring Salmon by way of transfer to them of fish stocks were discussed. Mr Thomas accepted that this practice was carried out to avoid the burden of operating the PAYE system. The HMRC officials did not believe that the scheme worked. No conclusion or agreement on this was reached, but the Minutes record that *such a scheme did not work with effect from April 2000 due to a change in legislation.* Mr Thomas indicated that the Company would be operating PAYE.

76. A further topic of discussion at that meeting was termination payments of £30,000 paid to employees as compensation. The HMRC official expressed doubt as to whether the exemption could be allowed twice to the same members of the Thomas family where the employers were companies under common control. HMRC also expressed a concern that there *were no proper records.*

77. The Minutes of the meeting were sent in early March 2001 to the accountant who attended the meeting with Mr Thomas. He responded in May 2001 with various comments which are not directly relevant for present purposes although he stated that the Company acquired almost all its stocks from the Partnership. The commercial rationale for such an arrangement was not disclosed.

78. A further meeting took place on 23 October 2002 between HMRC officials and the accountants. There was further discussion about fish stock bonuses and compensation payments. Such bonuses had been credited to the directors' loan accounts in the accounts of Spring Salmon Ltd. At that stage, HMRC were of the view that these were paper transactions between the Thomas family and their companies.

2004 Tax Settlement

79. In May 2004 following extensive investigations, HMRC reached agreement with *inter alios* the Company, a company known as Thomas Lindh Ltd, the S&R

Thomas Partnership, Mr Thomas and his brother Stuart Thomas. These parties offered to make payment of £525,000 in settlement of a wide range of tax liabilities covering the period between 1997 and 2003. Each of these parties acknowledged that tax was unpaid by reason wholly or in part of their default. HMRC accepted the offer and the tax was paid. The purpose of the agreement was to put to an end a long running series of fiscal disputes. The Trust was eventually wound up and the shares in the Company transferred to Mr Thomas and his brother in equal portions in February 2007. However, numerous fiscal disputes have continued to arise and a number are still current.

80. The 2004 Settlement is discussed in *Thomas v HMRC* SC/3012/2008 and SC 3013/2008 by Judge Berner on 6/3/13. That decision concerned preliminary issues in appeals against closure notices and amendments to self-assessment returns of the two brothers in respect of the tax year 2002/03; the amendments related to the sale of goodwill for £2.8m by the Partnership to the Company. One of the questions was whether a letter dated 30 May 2012 from Mr Stewart to Mr Thomas constituted a section 54 agreement of the brothers' personal tax assessments for the tax year 2004/05 as the brothers argued. In the event the tribunal did not need to consider that argument as there was ultimately no outstanding issue in relation to the tax year 2004/05 (paragraph 14). All the other preliminary issues were decided in favour of HMRC. Permission to appeal against the decision has been granted.

81. That same letter was deployed in the Grounds of Appeal in the present proceedings to advance the argument that it constitutes an agreement that no tax of NIC was due. It no longer features in the Answers or the Note of Arguments prepared by counsel for the Company and has now been expressly departed from.

The Company Accounts (Financial Statements) for the 18 months ended 31 January 2005

82. Some of the arguments presented to us discussed the Company's accounts in some detail. It is therefore necessary to make various findings of fact about the Company, its business and accounts.

83. The Company's accounts for the year ended 31 July 2003 show the director's current account at £360,687 as at 31 July 2003 and £1,586,170 as at 31 July 2002. The Company's accounts for the period 1 August 2003 to 31 January 2005 describe its principal activity as seafood suppliers. It is noted that the Company ceased to trade on 31 January 2005. It is recorded that the accounts were not audited.[11] The accounts, signed by Mr Thomas are, in accordance with company law, said to contain a true and fair view of the state of affairs of the company and of the profit and loss of the company for the period in question.

84. These accounts were submitted by Mr Thomas to HMRC under cover of a letter dated 30 August 2006 which also enclosed the Company's tax returns for the period 1/8/2003 to 31/7/04 (dated 30/8/06) showing a turnover of £1,689,231 and a trading

[11] Confirmed in SOAF/9

loss of £686,526; and for the period 1/8/04 to 31/1/05 showing no turnover and trading losses of £2,144,192. The letter discussed some technical aspects of the figures contained in the returns and the accounts. The Company claimed that it was entitled as at the end of the period (31/1/05) to recover corporation tax of £642,835.[12]

85. At the balance sheet date, Bala Ltd, a company registered in the British Virgin Islands, was the beneficial owner of all the issued ordinary share capital of the Company.

86. In the profit and loss account, beside the heading *Administrative Expenses* the sum of £1,181,690 is recorded. This sum includes the sums of £178,230 and £900,000 mentioned below. In the Notes to the Financial Statements, the following is recorded:-

"1 ACCOUNTING POLICIES

……

Goodwill

Goodwill, being the amount paid in connection with the acquisition of a business in 2002, was being written off evenly over the estimated usual life of seven years. In view of the company's cessation of trade on 31 January 2005 the remaining balance has been fully written off.

……..

2	STAFF COSTS	31.1.05
	Wages and salaries	**£178,230**
	Accrued bonuses (180 tonnes of fish stocks)	**£900,000**
		£1,078,230

The average monthly number of employees during the period was as follows:-

	31.1.05	31.7.03
Management & productive	5	7

3 OPERATING PROFIT

The operating profit is stated after charging/ (crediting)	31.1.05
…….	
Goodwill written off	£2,394,521

[12] SOAF/10

Director's emoluments		£9,215
Accrued fish stock bonus to director		£450,000

6 TAXATION

…..

UK corporation tax terminal loss relief		£605,875)

…..

In the opinion of the Director, the amortisation of goodwill is allowable as a deduction against profits for tax purposes. The goodwill was acquired from The S&R Thomas Partnership, which is not connected with the beneficial owners of the company. Accordingly, amortisation of £2,394,521 (2003-£400,000) has been treated as tax deductible in these accounts.

11 CREDITORS: AMOUNT FALLING DUE WITHIN ONE YEAR

	31.1.05	31.7.03
Corporation Tax		£54,492
Director's current accounts (including related parties)	£**1,557,991**	360,687
Accruals and deferred income	-	£255,350

14 RELATED PARTY DISCLOSUERS

During the period the company was under the control of its ultimate parent company Bala Ltd.

At the balance sheet date, the company owed its director, Mr RC Thomas, and his brother Mr SJ Thomas £1,557,991 (31.7.03-£360,687) on a director's loan account. The amount is secured by a floating charge on the assets of the company."[13]

87. The Company neither owned nor possessed stocks of fish on 31 January 2005 or 24 August 2006, when the accounts were signed by Mr Thomas. This is reflected in the Balance Sheet on page 4 of the accounts. The accounts were prepared by Mr Thomas with the assistance of an accountant named Fieldhouse. No adequate explanation for such entry has been disclosed in the voluminous correspondence or in the evidence at the hearing before us.

[13] That is an increase of £1,197,304 from the previous year.

88. There is no minute or other record that it was contemplated by Mr Thomas, his brother, or the shareholders of the Company (Bala Ltd) in 2006 when the accounts were signed that the Company would or even might re-commence trading. Subsequently, Mr Thomas resisted (unsuccessfully) HMRC's petition in 2007 to resurrect the Company.

89. The effect of these entries in the accounts is that the Company is stating that an obligation existed on its part to pay £450,000 to each of Mr Thomas and Stuart Thomas. It is being shown as an expense in the profit and loss account within the accounting period. It is said to be an accrual, and if it had not been paid, it would also appear in the balance sheet as an outstanding liability. It does not so appear. Instead it was credited to the director's current account (including related parties [ie Stuart Thomas]. The revised accounts referred to below at paragraphs 90-93 confirm this analysis.

Revised Accounts and Accounting Practice

90. The Company issued revised accounts on 25 June 2013 (when they were approved by Mr Thomas as director) for the period between 1 August 2003 and 31 January 2005. We refer to paragraphs 188-190 below. These accounts excluded the accrued bonuses of 180t of fish stocks of £900,000 within Staff Costs. The sum stated as Administrative expenses has been reduced by £900,000 from £1,181,690 to £281,690. The balance outstanding on the director's current account (including related parties) was reduced by £900,000 to £657,991 from £1,557,991. Neither the revised nor the original accounts have been audited. Nor have they been lodged at Companies House. No attempt has been made to use these accounts to amend the Company's corporation tax returns covering the period between 31 July 2003 and 31 January 2005.

91. In relation to the revision of accounts, we heard some evidence on this topic from Mr Cashmore under reference to a document entitled *Revision of Defective Accounts IFRS and UK GAAP Factsheet December 2010.* We accept the evidence of Mr Cashmore as reliable. Broadly, the accepted practice having regard to the provisions of the Companies Act 1985 s245, re-enacted in the Companies Act 2006 s 454, is that a voluntary revision is permitted in any case where it appears to the directors that *inter alia* the company accounts or directors' report, or the summary of the financial statement of the company do not comply with the relevant statutory requirements. The Factsheet notes that a company cannot use the legal procedure simply to *change something it decides it does not like or in some way improve the accounts or reports; the original accounts must be in breach of the CA 2006, which includes compliance with accounting standards.*

92. It has not been suggested that the entries in the cessation accounts in relation to the sums of £900,000 and £178,230 are contrary to the requirements of company law. They may now be regarded as ill-advised but that does not justify treating them as varied, where they have been submitted to HMRC and represented as containing a true and fair view of the state of affairs of the Company.

93. The change in the cessation accounts of the Company has not been given effect to elsewhere. In tax appeal proceedings at the instance of Spring Seafoods/Capital, no account appears to have been taken of these revisions.

94. The failure to record the 2004 transfer of business in the cessation accounts was contrary to standard accounting practice. According to Mr Cashmore's evidence, which we accept, it would have been standard accounting to note within the accounts, as a minimum, the 2004 transfer and its effect on the Company's performance. There is no such entry in the cessation accounts. It is difficult to see how in those circumstances the accounts give a *true and fair view.* We find that they do not.

Thomas Family Personal Tax Returns

95. The Self Assessment tax returns of Mr Thomas and Stuart Thomas for the tax years 2003/04 (signed by Mr Thomas on 31 January 2005) and 2004/05 (signed by Mr Thomas on 27 January 2006) did not disclose any income from the Company. Mr Thomas's 2003/04 return discloses that he was employed by Thomas Lindh Ltd until 31 July 2004. It discloses no income from that employment, but does disclose a termination payment of £30,000. His 2004/05 return discloses the Company as his employer. The income from that employment is disclosed as *nil.*

96. The return of Stuart Thomas for the tax year 2003/04 (signed by him on 27 January 2005) discloses Thomas Lindh Ltd as his employer. No income from that employment is disclosed. A claim for relief of £30,000 is also claimed.

97. Sarah Thomas is married to Mr Thomas.[14] Her tax return for the tax year 2003/04 discloses remuneration from the Company of £4,600 (which would not be taxable) plus a termination payment of £30,000. She received the termination payment in March 2004. The sum of £38,600 was credited to her account with the Nationwide Building Society on 16 March 2004. HMRC appear to accept that the termination payment is included within that sum.

98. Rebecca Thomas is married to Stuart Thomas.[15] Her tax return for the same tax year discloses remuneration from the Company of the same amount. She also received a termination payment of £30,000 in March 2004. The sums of £30,000 and £4,600 were credited to her account with the Nationwide Building Society on 16 March 2004.

99. Mrs Sarah Thomas's tax return for the tax year 2004/05 discloses Spring Seafoods Ltd as her employer. Income from that employment is disclosed as *nil*

Company Returns

100. The Company submitted *nil* P35 forms (Employer's Annual Return) for the tax year 2002/03 in May 2003 and for the tax year 2003/2004 in October 2004. HMRC

[14] SOAF/17

[15] SOAF/17

have accepted that the related P14 forms (which provide details of employees) would also have been submitted. The Company was thus asserting that it had no PAYE or NIC obligations in respect of employees for those two tax years. Page 1 of the 2003 P35, signed by Mr Thomas, and pages 1 and 4 of the 2004 P35 were produced at the hearing. Page 4 was also signed by Mr Thomas. This was said to be a *nil* return disclosing no liability to account for any PAYE. Mr Thomas so described it in an email to HMRC on 11 October 2004. That was prompted by receipt by the Company of a penalty notice issued by HMRC following upon the failure by the Company to submit the employer's annual return by 19 May 2004. There was no evidence of any such returns having been submitted since then in relation to the Company. We infer that none was submitted. The cessation accounts record that during the period between 1 August 2003 and 31 January 2005, the Company had an average of five employees.

101. In their corporation tax returns for the periods ending on 31 July 2004 and 31 January 2005 a claim is made that terminal losses be set off against profits for the purposes of calculating its corporation tax liabilities. The Company's losses at 31/1/05 were said to amount to £2,483,777. These losses are said to have arisen from the writing down of the value of the goodwill acquired by the Company from the Partnership in 2002 (see paragraph 11 above). On 4 January 2007 HMRC opened an enquiry into the Company's return for the period to 31 January 2005. In their closure notices dated 25 March 2011 they concluded that the true losses were £141,515 for the final six months of the 18 month period, and £424,544 for the first 12 months. The Company has appealed against these closure notices (TC/2011/6273). These appeals have been consolidated with the appeals against the closure notices relating to the Company's returns for the years to 31 July 2002 and 31 July 2003 referred to below. All these appeals remain open.

102. Moreover in proceedings, raised in the Court of Session in August 2011, the Company has sued HMRC for what is described as a *refund* of the sum of £642,835. The sum is claimed as a debt owed by HMRC to the Company. The justification for the action is averred to be the protection of the Company's rights against extinction by prescription. The action relates to the effect of the 2004 Agreement which settled or at least purported to settle a number of long running disputes between HMRC and the Thomas family and various family businesses and companies controlled by them. Broadly, the dispute concerns the reach of the 2004 Agreement and whether it covers tax liabilities in respect of periods after 31 July 2001. The sum of £642,835 is averred to comprise corporation tax of £599,855 and interest of £36,960 and a tax credit of £6,020. These sums are averred to relate principally to corporation tax liability of the Company in the tax years 2000/01, 2001/02 and 2002/03. They are said to form part of the tax paid in accordance with the settlement Agreement in April and May 2004. £400,000 was paid to HMRC on 20 April 2004.

103. HMRC in their defence to the Court of Session action, assert that the terms of the 2004 Agreement bar the Company from claiming relief or repayment of any payment made under or referred to in the 2004 Agreement. HMRC say that the 2004 Agreement settled the corporation tax liabilities of the Company for the return periods ending 30 April 1999, 31 July 1999, 31 July 2000 and 31 July 2001. The Agreement

did not cover any later periods. They argue that the claims have no validity because they are based on payments made in April and May 2004 in terms of the 2004 Agreement. They also assert that the court has no jurisdiction to adjudicate upon these claims which, if valid at all, fall to be determined by the statutory appeal process within the tax tribunal system.

104. The object of the claim for terminal loss relief is to eliminate any corporation tax liability on the part of the Company for the tax periods ending 31 July 2002 and 31 July 2003. On 26 October 2004, HMRC opened enquiries into the Company's returns for these periods. On 25 March 2011 (following the restoration of the Company to the Register of Companies) HMRC issued a closure notice for the period ending 31 July 2002 specifying the Company's tax liability at £287,769.30; £50,979.73 of that sum has been paid. On the same date, they issued a closure notice for the period ending 31 July 2003 specifying the Company's tax liability at £288,866.30; no part of that sum has been paid. As noted above, the Company has appealed against these closure notices and the appeals remain open. They all relate to the sale of the goodwill of the Partnership to the Company, and its fiscal effect, if any.

105. Standing back from this bewildering complexity, it appears that the Company and others came to an agreement with HMRC in 2004 and settled various contentious tax liabilities. The settlement (as relating to the Company) covered periods between 1 May 1998 and 31 July 2001. In their corporation tax returns covering the periods ending 31 July 2004 and 31 January 2005, the Company seeks to set off losses of £2,483,777 against profits. This is said to affect the Company's returns for the periods ending 31 July 2002 to 31 July 2003 and would reduce to nil the Company's profits during those periods. In their calculation of the refund of tax of £642,835, which they claim, they have treated the sum of £525,000 paid in terms of the 2004 Agreement or at least £400,000 thereof as tax paid by the Company in the tax years 2001/2 and 2002/3, the reality being that it was the sum or part of the sum paid by or on behalf of the Company and others in settlement of tax liabilities for other (earlier) periods. This, on the face of matters, insofar as relevant to the current proceedings, seems to be a wholly illegitimate exercise.

Enquiries Opened

106. On 26 October 2004 an enquiry was opened into the Company's returns for the periods ending 31 July 2002 and 31 July 2003.

107. On 30 August 2006, Mr Thomas sent to HMRC the Company's accounts for the 18 month period ended 31 January 2005 and the Company's corporation tax self assessment tax returns for the periods 1/8/2003 to 31/8/2004 and 1/8/04 to 31/1/2005.

108. On 4 January 2007, HMRC wrote to the Company intimating that they intended to enquire into the Company's tax returns for the period ended 31 July 2004 and 31 January 2005 submitted by Mr Thomas on or about 30 August 2006.[16] The enquiry

[16] SOAF/11

was to be conducted under *Code of Practice 8.* Code of Practice 8 covers all the taxes and duties for which HMRC are responsible.

109. HMRC's letter raised a variety of matters on which information and documents were requested. In particular, the following was requested:- (i) a copy of the directors' current accounts for the 18 month period, (ii) identification of the employees and the amounts paid which made up the sums of £178,230 and £900,000 referred to in the accounts, and whether PAYE and NIC had been charged in relation to that sum of £900,000 (no details of these directors' accounts were ever produced; the names of the employees were not initially identified); and (iii) confirmation that forms P35 and P14 had been submitted for the year 2004/05. The enquiry was eventually closed on 25 March 2011.

110. The letter dated 4 January 2007 also provided *inter alia* as follows:-

> 4 Note 11 to the accounts indicates that the directors' current accounts (including related parties) were in credit in an amount of £1,557,991 as at the 31 January 2005. Note 14 indicate that debt relates wholly to Mr RC Thomas and his brother Mr SJ Thomas.
>
> (a) Can I have a copy of the directors current accounts (to include those for related parties) for the 18 month period to the 31 January 2005 to show the date and amount of each transaction, debit or credit, where more than £1000 was involved and where are not obvious the name of the payer or payee.
>
> (b) Note 14 states that the amount is secured by a floating charge on the assets of the company. Can you please provide copies of all documents in relation to this floating charge. If not obvious, will you say what assets of the company the liability is secured against?
>
> 5 As regards the analysis of staff costs at note 2 to the accounts
>
> (a) I have had some difficulty in retrieving copies of the forms P35 and P14 submitted for 2004/05 within HMRC. Can you confirm that Form P35 and Forms P14 have been submitted by the Company for that year? If so can you please provide a copy of the P35 and the P14's to identify the names of the employees and amounts paid/charged and leading to the total of £178,230 for wages and salaries?
>
> (b) Will you provide a similar analysis of the £900,000 relating to accrued bonuses to show the names of the employees involved. Can you confirm that PAYE and NIC have been charged in relation to the £900,000. If not can you please explain why not.

111. HMRC opened an enquiry into Spring Seafoods/Capital's return for the period to 9 March 2005. That return included a claim for £326,862. Subsequently, HMRC issued a closure notice on 28 November 2008. Spring Seafoods have appealed against the closure notice and the appeal is open. Enquiries have been opened and appeals taken against consequent closure notices in relation to Spring Seafoods' returns for the period to 30 April 2005, and the years to 30 April 2006, 2007, 2008, 2009 and 2010. All these appeals have been consolidated and remain open (TC/2011/11784). All these appeals raise essentially the same principal issue, namely the fiscal effect of the sum of £1,557,991 for goodwill in the Balance sheet of Spring Seafoods/Capital's accounts for the year to 30 April 2007.

112. HMRC opened enquiries into the 2003/04 personal returns of Mr Thomas and his brother, and closed those enquiries on 10 January 2007 without making any amendments to their returns of employment income or otherwise.[17]

113. By letters dated 10 January 2007, Mr Stewart on behalf of HMRC, opened enquiries under s9A TMA into the personal tax returns of Mr Thomas and Stuart Thomas for the tax year 2004/05. In relation to both brothers, HMRC raised the fact that his return reflected *no emoluments.* At paragraph 3 of his letter to Mr Thomas, Mr Stewart stated.

> 2)…….That term (sc emoluments) is defined as including "all salaries, fees, wages, perquisites and profits whatsoever". Payment would be regarded as made if an amount was, for example, credited to a current or loan account. Can you confirm that no emoluments were paid to you within the meaning described above in year ended 5 April 2005?

114. By letter in reply, dated 27 February 2007, Mr Thomas stated *inter alia*

> 2) No such emoluments were paid to me within the meaning described in your letter in year end 5/4/05

115. The correspondence continued. By letter to Mr Thomas dated 27 March 2007, Mr Stewart expressed his understanding of the letter dated 27 February 2007 to mean *inter alia* that Mr Thomas was asserting that he received no emoluments in the year ended 5 April 2005. By letter to Mr Stewart dated 2 April 2007, Mr Thomas, in relation to the question of emoluments, responded to Mr Stewart's intimation that further research would be carried out and said

> Are you calling me a liar? I have applied to the General Commissioners in Reading for a closure notice direction in respect of this year of enquiry and intend to question you in public as to the basis on which you have called into question the truthfulness of my statement in response to your enquiry. In the interim would you please forward to me by return the evidence you have in your possession to support your view that my statement as regards emoluments in tax year 2004/05 is inaccurate …….

116. A similar reply was sent by Stuart Thomas on the same date. In responses to both brothers dated 27 March 2007, Mr Stewart indicated that he was carrying out some further research on the question of emoluments paid by the Company in the year ended 5 April 2005.

117. Mr Stewart responded by letter dated 20 April 2007. He pointed out that it had been confirmed to him that no P35 return for the tax year 2004/05 had been received from the Company. Yet, the Company accounts included a charge for staff costs of over £1m including £900,000 for something described as *accrued bonuses.* He also noted that the credits to *directors loan account in the period to 31 January 2005 were at least £1,197,304.* He indicated that he was entitled to seek to reconcile those facts and, in particular, ask where the money came from or the nature of the credits into the company. He maintained that there were reasonable grounds for not issuing closure notices (in relation to the personal returns of Mr Thomas and his brother).

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[17] SOAF/13

118. Although Mr Thomas was largely responsible for the Company's financial affairs he replied on 26 April 2007 by stating that it was for the Company to comment on such enquiries.

Proceedings before the General Commissioner 15 June 2007

119. These related to applications by Mr Thomas and his brother for closure notices in respect of the enquiries opened in relation to their personal returns for the tax year 2004/05. In spite of the terms of his letter dated 2 April 2007 to Mr Stewart in which he stated that he intended to question Mr Stewart *in public as to the basis on which you have called into question the truthfulness of my statement in response to your enquiry*, Mr Thomas did not ask Mr Stewart any questions. This typically aggressive, belligerent and wholly unjustified comment and its insinuation has its origin in the enquiry letter dated 10 January 2007 in which Mr Stewart politely sought information about emoluments for the tax year 2004/05. He was, in effect, investigating a taxpayer's bare assertion which did not appear to be reconcilable with other information in his possession. He was plainly entitled to do so.

120. At the hearing before the General Commissioners, Mr Stewart produced a written submission and read it out. It had been intimated to Mr Thomas on or about 8 June 2007 and provided to the clerk to the Commissioners about the same time.

121. The hearing was concerned to a significant extent with income and gains arising within Bala Limited and the Maclennan Trust, and, in particular, whether Mr Thomas and his brother were settlors in the Trust that ultimately owned the Company. Lengthy Minutes of the meeting were prepared by Mr Stewart. We have no reason to doubt their accuracy.

122. The Minutes record *inter alia* that, in the course of the proceedings, the sum of £900,000 was mentioned, as was the net increase of nearly £1.5m in the amount owed by the Company to the brothers, standing at credit in the director's current account. Mr Thomas said that neither he nor his brother had the £900,000. When asked who had been paid this money he said that the £900,000 was *an accountancy accrual; a paper exercise.* The source of Company funds was also discussed. It was agreed that Mr Thomas would provide the bank statements that would evidence the source of the monies going into the Company and credited to the *directors current account.* Neither Mr Thomas nor his brother identified the source. They were ordered to produce evidence of the origin of the sum of £1.2m of capital injected into the business of the Company.

123. The staff costs of £178,230 were also discussed. Mr Stewart expressed the view that some of this money may be been credited to Mr Thomas and his brother. Mr Thomas disputed this and said that the monies had gone to persons who were not liable to tax or to other family members.

124. The conclusion and directions of the General Commissioners appear to have been that Mr Thomas should provide all other relevant documentation to reconcile

company accounts with personal returns. They were also directed to provide evidence of the net sum of about £1.2m of capital paid into the Company's business.

125. The foregoing is reflected in a letter dated 15 June 2007 to Mr Thomas from the clerk to the General Commissioners.

126. Subsequently, Mr Thomas produced a bank statement (with the heading Credit Advice) from the Company's Banker (Nordea Bank Finland plc, who have a branch in London) showing that on 25 March 2004, the Company's account was credited with the sum of £300,000 paid by the Partnership; and that on 29 October 2004, the Company's account was credited with the sum of £900,000. No explanation was ever given as to why these payments were being made by the Partnership to the Company, particularly as the Partnership transferred its business to the Company in 2002 and ceased trading. And, in addition, in September 2004 the assets and business of the Partnership were apparently transferred to the Partnership, and the Partnership immediately transferred them to Spring Seafoods/Capital.

127. Mr Stewart raised various queries in a letter dated 2 July 2007 to Mr Thomas. The heading of the letter was "RC THOMAS AND SJ THOMAS SECTION 9A ENQUIRIES 2004/2005". This suggests that the primary focus was the personal tax returns of the Thomas brothers. However, in the context of clarifying the source of various substantial sums, Mr Stewart, in the letter, asked whether Mr Thomas was prepared to provide details of credits and debits to the director's current account with the Company for the 18 months to 31 January 2005 where more than £10,000 was involved. He stated that he was left to conclude that the £900,000 accrued bonuses had been credited to the director's account, even although Mr Thomas had stated in his letter dated 27 February 2007 that *no such emoluments were paid to me within the meaning described in your letter in year ended 5 April 2005.* The letter being referred to by Mr Thomas was the letter to Mr Thomas dated 10 January 2007 opening an enquiry into his personal tax return for the tax year 2004/05, which we have mentioned above. That letter notes that Mr Thomas's return for that tax year reflected no emoluments. Mr Stewart expressly pointed out that payment would be regarded as made if an amount was credited to a current or loan account. By that stage, Mr Thomas had already signed off the Company's accounts for the period 1 August 2003 to 31 January 2005, which contained the £900,000 fish stock bonus as an accrued bonus under the heading STAFF COSTS. Those accounts had also recorded under the heading wages and salaries the sum of £178,230.

128. In the letter dated 2 July 2007, Mr Stewart also referred to previous discussions about bonuses in 2001. He requested copies of all documentation relating to the payment/crediting of the £900,000 bonuses. He noted that if the bonuses are not subject to PAYE and NIC then the sum would fall to be disallowed in the Company accounts.

Subsequent Discussions July 2007

129. Mr Thomas and Mr Stewart had a telephone conversation on 6 July 2007. In an internal note prepared by Mr Stewart he records that Mr Thomas said that the

charging of the £900,000 accrued bonuses in the accounts was not part of an avoidance scheme; it was no more than an accountancy accrual; and that they had not had the money. Mr Thomas was prepared to agree on a without prejudice basis that section 43 of the Finance Act 1989 (which would disallow the bonus as a deductible expense for Corporation Tax purposes) applied (if HMRC agreed not to apply PAYE or NIC to the £900,000). Mr Stewart recorded that he could agree to the proposal and said that he would write to Mr Thomas confirming his agreement.[18]

130. In a letter to Mr Stewart also dated 6 July 2007, Mr Thomas recorded his understanding of the agreement noting that the Company had agreed that the deduction in the accounts of the accrued fish stocks would be disallowed for Corporation Tax purposes and HMRC agreed that in return they will not impose PAYE, NIC or income tax charges on either the Company, Mr Thomas or his brother Stuart.

131. For his part, Mr Stewart responded to that letter on 17 July 2007 by writing first to the Company (and subsequently to Mr Thomas on 19 July - see below) in *inter alia* the following terms (the letter was addressed to Mr R Thomas, Spring Salmon & Seafood Ltd):-

> You have said that the charging of the £900,000 was not part of an avoidance scheme but rather was no more than an accrual for accountancy purposes. Emoluments are normally treated as received when credited in company accounts/records, for example to director's current account; but the true legal nature of these accrued bonuses has not been established and I have agreed that I would not seek to charge PAYE or NIC if you agree that the amount was not to be allowed in the company accounts in any event in accordance with Section 43 FA 1989. I can confirm that I am prepared to proceed on that basis although I think that the implications or potential implications should be a matter of record.
>
> No part of the £900,000 has actually been paid; it has not been withdrawn from the company back account, in which case, although you have not explicitly said so, the credit for the £900,000 has been to director's current account. The trade ceased on 31 January 2005 in which case this amount will never fall to be allowed against company income. With no assessment there is therefore a debit of £900,000 that has and will have no tax effect, but on the other hand a £900,000 credit to director's current account which may or may not have a tax effect. Whilst the £900,000 is exceeded by the over £1.5 million credit on director's current account reflected in the accounts at 31 January 2005, that account may have been overdrawn for a time and there may have been a Section 60 liability, before the credit of £900,000 on the 29 October 2004 and the further £900,000 for the accrued bonuses at some point after 31 January 2005. You know that I have been seeking an analysis of the director's current account in correspondence elsewhere and that in the absence of that analysis I am having to draw conclusions on the basis of information. I am prepared to agree on a without prejudice basis that I will not be pursuing Section 160 liability on account of the agreement referred to above. I cannot allow a situation though where a debit is disregarded on one hand but where the other side of the bookkeeping, the credit of £900,000 is allowed on the other. The disregarding of the credit has no impact as matters stand at the moment. The credit on director's current account is simply reduced at 31 January 2005. I should make it clear that there could ultimately be a tax effect, liability under Section 419 there is a further need to consider the possible re-writing of the director's current account following the final determination of the question of the nature of the payment/credit of £2.8M on the 26 July 2002.

[18] This reflects SOAF/14

132. It can be seen that the letter records that Mr Stewart had been seeking an analysis of the director's current account. The Company never produced sufficient information to enable a complete analysis to be made.

133. On 19 July 2007, Mr Stewart replied to the letter from Mr Thomas dated 6 July 2007 (not the Company). The heading of the letter referred to Closure Notices 2004/2005. Most of the letter related to matters with which we are not concerned but on page four, Mr Stewart said this:-

> 2 I agree that the Commissioners directed that you provide evidence of the origin of the some £1.2 M capital injected into the business, but they also directed that you provide all other relevant documentation whether specifically requested by the or not. My concern, if you recall, was that the £1.2M net increase in the amount outstanding to you and "related parties". I referred in my last letter to the £1M withdrawal from the Spring Salmon & Seafood Limited account to the RC and SJ Thomas account in October 2003 in which case the credits to directors current account with at least £2.2M. I believe that part of the difference relates to the £900,000 accrued bonuses that have been credited to your director's current account. Is this correct?
>
> (a) S & R Thomas partnership bank account apparently remained open after July 2002 when the partnership ceased. You have confirmed that the interest arising has been included in the personal returns for 2004/05.
>
> (b) I see that the RC and SJ Thomas bank account from which the £900,000 was transferred to the company is another account held by yourself and Stuart and that the interest has been included in your personal returns for 2004/05.
>
> (c) I do not know what other transactions had taken place in the director's current account in 18 month period. The £900,000 accrued bonuses though seem to have been credited as at 31 January 2005 ie 2004/05. If this is not the case please let me know. In the meantime I have asked you to explain your previous advice in writing that no emoluments were paid to you in year ended 5 April 2005 despite my earlier clarification that they would be regarded as paid is credited to the director's current account. I asked you to explain because on the face of it I have been misled. You have refused to respond. I believe that there are implications and I reserve the right to come back to this at a later date.
>
> (d) As you say; you have agreed that the £900,000 charged to the company accounts is to be disallowed if I for my part agree that I will not impose PAYE/NIC on the company, Stewart, or yourself on this sum. I have already written to you under separate cover with that confrontation.
>
> (e) I have since my last letter had further research carried out as regards the company PAYE scheme for 2003/04 and 2004/05. Note 2 to the company accounts for the 18 months to 31 January 2005 refers to 5 employees. I asked my PAYE colleague to provide a record of employees advised to her. There is a record of 3 being yourself plus two family members. One of the family members is noted as having commenced 2004 the other in 2007 (after the trade ceased). The charge to wages and salaries for the 18 months is the £178,230 on which no PAYE or NIC has been paid. You received NIL and even if for example the £178,230 is allocated equally between a further 4 individuals that is £44,557 each. Yet there is no tax or NIC? There are tax implications and I will be assessing accordingly. Before I do so can you confirm absolutely that no part of the £178,230 has been credited to your director current account eg for related parties? If not can you say what amount has been credited and why?

> I have been directed by the Commissioners to issue Closure notices by 31 July 2007 and will be doing so. I have no alternative but to issue armaments to the returns to take account of the issues raised above.

134. It can be noted that the letter dated 19 July 2007 confirms the conditional nature of the agreement relating to the sum £900,000. It is clear that it does not relate to the sum of £178,230, in respect of which Mr Stewart states, and we accept, that no PAYE or NIC was paid in respect of that sum.

135. In his letter to Mr Thomas dated 19 July 2007, Mr Stewart noted that the £900,000 bonus seemed to have been credited in the director's current account in the company accounts as at 31 January 2005. He asked Mr Thomas to let him know if that was not the case. Mr Thomas did not do so and we infer that he accepted Mr Stewart's assumption as correct.

136. Mr Stewart also pointed out that he did not know what other transactions had taken place in the director's current account in the 18 month period between 1 August 2003 and 31 January 2005. The Company did not enlighten him with any degree of clarity. No full or complete information was ever produced.

137. By letter dated 19 July 2007, Mr Stewart also wrote to the clerk to the General Commissioners stating that he and Mr Stewart had been able to determine the tax treatment of the £900,000 accrued bonuses. He stated that the charge was to be disallowed.

138. By letter dated 26 July 2007 in reply, Mr Thomas confirmed that no part of the amount of £178,280 shown in those accounts relates to his or his brother's earnings in the relevant period. He also confirmed that no part of that sum had been credited to his director's loan account with the Company. However at no subsequent stage including the proceedings before this Tribunal has the Company provided an explanation as to how the whole (as opposed to part) of the sum of £178,230 was made up.

139. The credit of £1,557,991 on the director's current account was never reduced until 2013, when the revised cessation accounts of the Company, mentioned above, were produced. By that stage it was too late for such accounts to have any effect on the corporation tax returns covering the period 1 August 2003 to 31 January 2005.

140. On 31 July 2007, HMRC issued closure notices in relation to the enquiries opened for the tax year 2004/05 to Mr Thomas and Stuart Thomas in accordance with the directions of the General Commissioner following the hearing before him on 15 June 2007. The letters noted that, as Mr Thomas had previously stated, no part of the sum of £178,230 had been credited to his director's current account with the Company or paid to him, that matter was being left out of account in revising the personal returns. Accordingly, the enquiries were closed without making any amendment to the returns of employment income of Mr Thomas or his brother.

141. However, amendments to the returns, relating to the Maclennan Trust and Bala Limited were issued seeking additional tax. The conclusion was that the Thomas

brothers were liable to tax on the income arising from the trust, and on gains arising from disposals. In the letter to Mr Thomas dated 31 July 2007, Mr Stewart also noted that he had not heard from Mr Thomas on behalf of the Company.

142. By letter dated 23 August 2007, Mr Thomas and his brother appealed against these closure notices (2004/5). The appeal related to their dealings and relationship with the Maclennan Trust and Bala Ltd (see paragraphs 113 and 133).

Source of Funds

143. In 2004 the Company had an account with Nordea Bank Finland, at its London branch. On 24 March 2004, the Company's account was credited with the sum of £300,000. This originates from an order by *S&R Thomas.* On 29 October 2004, the Company's account was credited with the sum of £900,000. This originates from an order from *RC and SJ Thomas.* This is the same amount as the disputed fish stock bonus. Whether it is the same sum is another matter. In spite of being requested to do so on numerous occasions, the Company has never provided complete and comprehensive records relating to the transactions on the director's current account over the period covered by its cessation accounts.

Relationship of tax relief and loss claims of the Company and Spring Seafoods/Capital

144. Following enquiries into Spring Seafoods/Capital's tax returns for periods ended 9 March 2005, 30 April 2005 and 30 April 2006, closure notices were issued rejecting claims for relief for a loss transferred from the Company. The basis of rejection was that the loss reflected in the Company's corporation tax assessment was founded on an invalid claim for loss. No such loss had ever been determined.

145. By letter to Spring Seafoods/Capital dated 8 April 2010, HMRC opened an enquiry into that company's Corporation Tax Self Assessment for the period 1 May 2007 to 30 April 2008. The letter noted that the enquiry would be conducted under Code of Practice 8. It further noted that Spring Seafoods/Capital's accounts for the period ended 30 April 2007 reflected the acquisition of goodwill costing £1,557,991; and that a claim for intangibles relief for writing down part of that goodwill (£222,570) had been made. HMRC dispute the validity of such claims.

146. The enquiry letter also challenged a credit in the directors' current account of £1,756,484 in Spring Seafoods/Capital's 2007 accounts. HMRC took the view that SJ Thomas had withdrawn at least £354,820 from that company which should have been subject to PAYE/NIC.

147. Currently, there are before the First-tier Tribunal appeals by Spring Seafoods/Capital in respect of the return periods ended 9 March 2005 through to the period ended 30 April 2010. They all relate principally, if not exclusively to the alleged loss brought forward from the Company, and intangibles relief claims for goodwill relating to the sum of £1,557,991, the exact amount which stood at credit of the director's account in the Company's cessation accounts. These appeals have all been conjoined and are being case-managed in London. The total amount of tax at

stake appears to be in the order of £1m. The disputes centre on the market value of the goodwill said to have been acquired from the Partnership on 22 September 2004. Spring Seafoods/Capital seek to rely on the May 2010 Undertaking on the basis of some third party right as Spring Seafoods/Capital was not a party to the restoration proceedings and is not mentioned in the Undertaking.

148. HMRC say that the claim for loss relief cannot be fully finalised until the Company's appeals in relation to corporation tax have been decided. Most of the losses claimed have already been claimed by the Company and the maximum balance unrelieved loss (assuming the claim to be good) is £317,851. HMRC say that the maximum relief across both companies is £424,544 and this has already been claimed by the Company by way of terminal loss relief and therefore presumably cannot be claimed again by Spring Seafoods/Capital.

149. HMRC in the Spring Seafoods/Capital appeals say that the claims for intangibles relief are not valid, and some are out of time. More fundamentally, HMRC say that there was no business acquisition in September 2004, and therefore no entitlement to intangibles relief. This is essentially based on the lack of documentation and the fact that the transaction is not properly accounted for in any business accounts and records. Spring Seafoods/Capital at one stage asserted that the goodwill was properly valued at £20m. They have produced a report (from Michael Taub dated 20 December 2013) which places a figure of £6,390,000 on goodwill. On the assumption that there is goodwill to be valued, HMRC's figure is £200,000.

150. Spring Seafoods/Capital are presently claiming a tax loss of £2.4m. Part of that sum appears to be calculated on the basis that it is obtaining relief in respect of the £900,000.

151. It can be seen that the relationship between the various claims and liabilities of the Company and Spring Seafoods/Capital is not straightforward. On the basis of the information provided to us, we regret that we cannot provide any clear explanation. Fortunately a clearer explanation is not required to enable us to make the necessary decisions on the issues raised in the appeals presently before us.

Restoration of the Company to the Register of Companies.

152. The Company was struck off the Register of Companies under section 652(5) of the Companies Act 1985 on 8 August 2007 and was dissolved on 17 August 2007. On 22 July 2008, HMRC presented a petition in the Court of Session for restoration. Mr Thomas lodged Answers.

153. After sundry procedure there was a procedural hearing on 19 May 2010. Mr Thomas withdrew one aspect of his Answers (relating to oppression). On that date HMRC gave an undertaking in the following terms:-[19]

> That upon the restoration of the Company to the Register HMRC will forthwith (that is to say as soon as is practicable within the requirements of the Taxes Acts and applicable regulations and

[19] SOAF/15

procedures) issue closure notices and assessments in respect of the outstanding enquiries into the Company's liabilities. The Revenue will a) make no further demands of the Company's officers or any other person in relation to the said outstanding enquiries, and b) raise no further enquiries into the Company's trade to the date that ceased namely 31 January 2005. The Company may appeal any assessments made on the issue of the said closure notices, if so advised. Apart from assessments made on the closure of the said enquiries the Revenue will have no power to, and will not, raise any assessments on the Company in relation to the said trade to the said date save on the discovery of fraudulent or negligent conduct on the part of the taxpayer within the meaning of s. 29 of the Taxes Management Act 1970, and has no present reason to anticipate making any such discovery or discovery assessment.

154. On 14 July 2010. Lord Glennie ordered that the Company be restored to the Register. In his subsequent (undated) Opinion, Lord Glennie noted *inter alia* that (i) it had been admitted that when the Company was struck off, it was still in operation (paragraph 4(14), 6 and 10); and (ii) Mr Thomas was concerned that if the Company were restored and a liability to tax established, he and other directors would be held accountable (paragraph 9; [the tax under consideration was corporation tax (see paragraphs 4(5), 4(8) and 4(15)]).

155. At some stage during the proceedings in the Outer House, a Minute of Amendment (drafted by the same counsel appearing in these Tribunal proceedings) was presented to the Court. Paragraph 5 of the Minute of Amendment averred that *One of the purposes for which the petitioner seeks to restore the company to the Register is in order for HMRC to assess its liability for employees' PAYE Income Tax…. In the event that following restoration HMRC assess the company as liable to make such payments, payment may be sought personally from the third respondent (sc Mr Thomas). He would consequently be prejudiced.* For reasons which we need not explore, the third respondent's pleadings were not allowed to be amended (see Lord Glennie's Opinion at [2010] CSOH 82 30 June 2010 at paragraphs 19 and 20; his Lordship held that Mr Thomas had neither title nor interest to resist the restoration petition). On 14 July 2010, Lord Glennie granted the prayer of the petition ([2010] CSOH 117) and ordered that the Company name be restored to the Register of Companies in Scotland (paragraphs 10 and 11).

156. Mr Thomas reclaimed and represented himself in the Division. The reclaiming motion was refused on 4 March 2011. The Company was restored to the Register of Companies on 16 March 2011

Staff Costs – Wages and Salaries- the sum of £178,230

157. The Company's cessation accounts contain an entry for *Wages and Salaries £178,230.* In the enquiry notice letters dated 4 January 2007, Mr Stewart requested the Company *inter alia* to identify the names of the employees and amounts paid/charged and leading to the total of £178,230.

158. The Company declared and paid no PAYE in respect of any emoluments paid to a director or employee in the periods ended 31 July 2004 and 31 January 2005. The Company declared and accounted to HMRC for no national insurance contributions in respect of the earnings of any director or employee in the periods ended 31 July 2004

and 31 January 2005.[20] A nil P34 return was submitted by the Company to HMRC in October 2004.

159. In his tax return for the year ended 5 April 2004, dated 31 January 2005, Mr Thomas declared that he was employed by Thomas Lindh Ltd but the only employment income declared was a claimed exempt payment of £30,000. In his tax return for the year ended 5 April 2005, dated 27 January 2006, Mr Thomas declared that he was employed by the Company and declared his income from employment to be *nil*.

160. In Stuart Thomas's tax return for the year ended 5 April 2004, dated 27 January 2005, he declared that he was employed by Thomas Lindh Ltd but the only employment income declared was a claimed exempt payment of £30,000. In his tax return for the year ended 5 April 2005, dated 27 January 2006, he declared that he was employed by the Company and declared his income from employment to be *nil*.

161. At the hearing before the General Commissioners, Mr Thomas stated that the £178,230 had gone to persons who were not liable to tax or to other family members. Further correspondence ensued on this topic. In a letter dated 19 July 2007 to Mr Thomas, Mr Stewart noted that HMRC had records showing that the Company had three employees, namely Mr Thomas plus two family members. He sought confirmation that none of the £178,230 had been credited to the director's current account.

162. In a letter to Mr Stewart dated 26 July 2007, Mr Thomas confirmed that no part of the sum of £178,230 related to any earnings of his or his brother and that no part of it had been credited to the Company director's loan account. He did not, however, provide any explanation as to how the sum of £178,230 had been calculated or who the employees were.

163. As we have already noted, HMRC have accepted that the wives of the Thomas brothers each received non-taxable termination payments of £30,000. This is no doubt because there has been produced in these proceedings a Nationwide Building Society account in the name of Mrs RM Thomas showing a credit entry dated 16 March 2004 for £30,000. Her tax return, dated 27 January 2005, for the year ended 5 April 2004 mentions her employer as being the Company and in manuscript there is reference to a £30,000 termination payment. There is also a Nationwide Building Society statement in the name of Mrs SJ Thomas showing a credit entry of £36,000 on 16 March 2004. Her tax return, dated 27 January 2005, for the same tax year also shows a manuscript reference to *£30,000 Termination.*

164. Accordingly, as HMRC accept, that accounts for £60,000 out of the £178,230. In a letter dated 13 April 2011 to Mr Stewart, Mr Thomas asserted that neither Sarah nor Rebecca Thomas was an employee of the Company during the period 6 April 2004 to 31 January 2005 and did not receive any earnings from the Company during that period. In a further letter dated 13 May 2011, Mr Thomas stated that the

[20] SOAG/12

whole amount of £178,230 was paid in the tax year 2003/04; he asserted that the whole amount was paid to five employees each of whom received payment of £30,000 as compensation for loss of office. In an email dated 1 May 2013 to Mr Stewart, he stated that the Company did not incur any liabilities to PAYE/NIC in respect of any of the payments it made to the *7 employees in 2003/04 and 2004/05.* Neither Mr Thomas nor the Company has ever identified these five (or the seven) employees and never has. Neither he nor the Company has ever vouched these five payments. No contracts of employment were ever exhibited. What these five employees were engaged to do within the Company has never been revealed. No records have been produced.

165. It is plain that any reasonable and honest business man would have readily responded to the reasonable requests of HMRC. It seems to us that Mr Thomas, in this aspect of the appeal has simply strung HMRC along for as long as he could. It is surprising, some might say astonishing that HMRC have regarded the termination payments in favour of the wives of the brothers as genuine. This is particularly so having regard to the apparent generosity on the part of Thomas family companies towards its family member employees over the years, with regard to payment of tax free payments as compensation for loss of office, all as set forth in Mr Stewart's letter to the Company dated 3 June 2011. This letter prompted a very indignant 11 page letter in response by Mr Thomas on behalf of the Company. However, neither in that letter nor anywhere else has he provided the information reasonably requested by HMRC. Any reasonable and honest businessman keeping even the most modest records would have been able to provide and would have provided the information requested.

Notices of Determination and Decisions issued

166. On 25 March 2011, HMRC closed the Company enquiry opened on 4 January 2007.[21] The closure notice letter proceeded on the basis that the Company was entitled to relief for the £900,000 and the sum of £178,230. On that basis, these payments were subject to payment by the Company of PAYE and NIC.

167. On or about 8 April 2011, HMRC served a Regulation 80 Notice of Determination on the Company in the sum of £423,861.86 relating to PAYE for the tax year 2004/05.[22]

168. It referred to *Pay for which tax remains unpaid as follows:-*

Mrs SJ Thomas	£89,115
Mrs RM Thomas	£89,115
Mr RC Thomas	£450,000
Mr SJ Thomas	£450,000

[21] SOAF/11

[22] SoAF/16

The two sums of £89,115 make up the sum of £178,230 referred to in the Company's accounts for the period from 31 July 2003 to 31 January 2005. Likewise, the two sums of £450,000 make up the sum of £900,000 referred to in the same accounts. The resulting tax payable was calculated on these figures.

The Determination, which relates to the tax year 2004/05 was subsequently amended.

169. On the same date, HMRC issued Section 8 NIC Notices of Decision in relation to NIC as follows:-[23]

£64,142.69	(in respect of Rod Thomas),
£14,340.56	(in respect of Rebecca Thomas)
£64,142.69	(in respect of Stuart Thomas) and
£14,340.56	(in respect of Sarah Thomas)

The Decisions, which all relate to the tax year 2004/05 were subsequently varied.

170. The Company appealed the April 2011 determination and decisions on 13 April 2011. Following an internal appeal, appeals were lodged with the Tribunal on 7 September 2012 under reference TC/2012/08472[24] (the first appeal), and 8 October 2012 in relation to the internal review under reference TC/2012/09576 (the second appeal).[25]

171. On 5 September 2012, HMRC served a further Regulation 80 Notice of Determination reducing the 8 April 2011 Notice by £15,861.86 to £408,000.[26] This was achieved by deleting the sums attributable to Mrs SJ Thomas and Mrs RM Thomas, and by increasing the sums attributable to Mr Thomas and his brother, for which tax remained unpaid, from £450,000 to £510,000.

172. On the same date, HMRC issued Notices[27] varying the Notices of Decision dated 8 April 2011 (Section 8 NIC Notices of Decision in relation to NIC) increasing the sums in the Notices dated 8 April 2011

1) in respect of Mr Thomas to £72,422.69

2) in respect of Stuart Thomas to £72,422.69

and reducing the sums in the Notices dated 8 April 2011

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[23] SOAF/18; four Notices were issued, one for each of Mr Thomas, Rebecca Thomas, Stuart Thomas, and Sarah Thomas.

[24] SOAF/21

[25] SOAF/22

[26] SOAF/19

[27] Again, four Notices were issued, one for each of Mr Thomas, Rebecca Thomas, Stuart Thomas and Sarah Thomas.

1) in respect of Rebecca Thomas to Nil

2) in respect of Sarah Thomas to Nil[28]

The total sum payable under the varied Decisions was therefore £144,845.38.

173. These sums were determined partly on the basis that the £900,000 constituted accrued bonus paid to Mr Thomas and Stuart Thomas as they were credited to the current account of the director (and related parties) in the accounts of the Company for the period 31 July 2003 to 31 January 2005 and were available for drawing.

174. With regard to the treatment of the sum of £178,230, Mr Thomas eventually provided further information. In a letter dated 13 May 2011 to HMRC, Mr Thomas stated that the sum of £178,230 was paid to five employees in the year 2003/04. He asserted that £150,000 of that sum was paid as tax exempt compensation for loss of office and so was not subject to PAYE or NIC. He stated that £30,000 had been paid to his wife, Sarah Thomas. He did not at that stage provide the names of the other employees who received similar payments. This was still the position in August 2012 (see for example Mr Stewart's letter dated 9 August 2012 to the Company) and April 2013 (see his letter to the Company dated 5 April 2013).

175. In the absence of any further information about the remaining £120,000 (£150,000 less £30,000), HMRC attributed it equally between Mr Thomas and his brother. This led HMRC to revise upwards the two figures in the Notice of Determination of £450,000 by £60,000 to £510,000 and to delete the figures attributable to Mrs SJ Thomas and Mrs RM Thomas. On the same basis, the NIC payable in respect of Mr Thomas and his brother was increased and the NIC payable in respect of their wives was deleted in the varied Notices of Decision in September 2012.

176. The Company appealed the September 2012 determination and decisions on 14 September 2012. Following an internal appeal, appeals were lodged with the Tribunal on 1 March 2013 under reference TC/2013/01500 (the third appeal).[29]

177. As a result of evidence led on behalf of the Company at the Hearing before this Tribunal, HMRC have further revised their calculations. They have accepted that two non-taxable termination payments of £30,000 fell to be taken into account. HMRC had originally said £150,000 of the £178,230 had to be accounted for. This proceeded on the view that a somewhat generous amount is allowed for the personal allowances of five employees, namely £28,230.

178. £60,000 of that £150,000 was therefore accounted for because HMRC now accept that there were two non-taxable termination payments of £30,000 ie £60,000 in total. This left £90,000 out of the £150,000 to be accounted for. Dividing that equally between the Thomas brothers adds £45,000 to each of the sums of £450,000

[28] SOAF/20

[29] SOAF/23

specified in the April 2011 Notice of Determination. Putting it another way, this reduced the revised figures of £510,000 by £15,000 (£30,000/2) in the September 2012 Determination to £495,000 and the tax payable to £380,412. This constitutes a reduction of £27,588 from the sum of £408,000 and restricts the amount claimed to £380,412.

179. The varied Notices of Decision have also, for the same reason been restricted by £4,140 from £144,845.38 to £140,705.38.

Further Correspondence

180. A closure notice was issued to the Company on 25 March 2011. It proceeded on the basis that the Company was entitled to relief for the £900,000 and the sum of £178,230 (as deductible expenses from income). Parties continued to exchange views and arguments following the issue of the Notices of Determination and Decisions.

181. In a letter dated 13 May 2011 to Mr Stewart, Mr Thomas stated that as regards the amount of £178,230 included as staff costs in the accounts for the period ended 31 January 2005. *None of this amount was paid to anyone in the tax year 2004/05. The whole amount was paid in 2003/04 to five employees each of whom received a tax exempt payment of £30,000 as compensation for loss of office. No charge to PAYE or NIC arose in relation to any amount paid out to any employee and the company made an accurate and complete Employer's Return for the year 2003/2004.*

182. In his letter to Mr Stewart dated 26 May 2011, Mr Thomas states *The £1,557,991 is not "after credit of £900,000 in respect of 180 tonnes of salmon fillet accrued fish stock bonuses. As you well know the fish stock bonuses were never transferred to us. If you review your records you may also recall that we provided evidence, pursuant to the General Commissioners' directions in June 2007, proving that we had injected a further £1.2m in the relevant period ended 31/1/2005. We provided bank statements showing two receipts of £300,000, and £900,000 respectively, originating from our own personal bank account. You wrote to the General Commissioners on 19/7/07 confirming that we had complied with the directions.*

183. By letter to the Company dated 3 June 2011, Mr Stewart repeated the proposal contained in his letter dated 17 July 2007 to the effect that the £900,000 credit on the director's current account was to be disregarded and the balance on that account reduced accordingly; and the Company's corporation tax profits for the period ended 31 January 2005 were to be increased by £900,000 (ie there was to be *no* relief in relation to the sum of £900,000; it was not to be a deductible expense from income.

184. In his letter dated 3 June 2011, Mr Stewart also drew attention to the statements made by Mr Thomas in his letters dated 13 and 26 May to the effect that the sum at credit in the director's current account (£1,557,991) was not *after* credit for the £900,000. He pointed out that if that were so then the corresponding entry would be *bank* ie the Company actually paid the sum of £900,000. The Company did not respond to this observation in any meaningful way which provided an understandable

explanation of the accounting treatment of the sum £900,000 which identified a corresponding credit entry for the debit entry which deducted the sum from trading income as an item of expense.

185. In an email to Mr Stewart dated 1 May 2013, Mr Thomas repeated his position that there *has been no credit to any loan account and no payment in respect of the fish stock accrual.* He added that *I confirm, once again, that no part of the £178,230 was paid to Messrs RC and SJ Thomas and that the company did not incur any liabilities to PAYE/NIC in respect of any of the payments it made to the 7 employees in 2003/04 and 2004/05. The company has fulfilled all of its obligations under the relevant PAYE/NIC regulations. You have provided no evidence to the contrary. …. A company that sets out deliberately to conceal a liability to PAYE/NIC does not prepare and send accounts to HMRC that give express details of wages and salaries of £178,230 and bonus accruals valued at £900,000… I could not have been more open in my approach to this matter.*

186. We note in passing that the Company has never given *express details of wages and salaries.* It has never given express details of bonus accruals. The calculation of £178,230 is largely shrouded in mystery. Moreover, it is perfectly conceivable that conduct may be open and yet deliberate. It is abundantly plain on the evidence of Mr Thomas and a reading of the correspondence in the joint bundles that the Company made the deliberate choice of refraining from accounting for PAYE and NIC on either the sum of £178,230 or the sum of £900,000. Perhaps buoyed with confidence from what they regarded as victories over HMRC (or their statutory predecessor) or favourable settlements in the past, they thought they could simply outwit HMRC and elide liability for PAYE and NIC. To some extent they have succeeded because HMRC have acknowledged on what appears to be the flimsiest of evidence that a substantial part of the sum of £178,230 is not subject to PAYE or NIC. Had we been asked to determine those aspects which HMRC have conceded in favour of the Company, we would not have determined those aspects in favour of the Company having regard to the oral evidence of Mr Thomas and the minimal documentary evidence produced by the Company. We would not have accepted the bare assertions of Mr Thomas. The documentary evidence was largely non-existent. We formed the view that Mr Thomas was devious in his dealings with HMRC. He knew what to say to raise doubts and ambiguities. He wrote many lengthy letters picking up and making the most of a whole series of relatively minor matters. He skirted around the basic issues and never provided any satisfactory evidence about the two sums of £178,230 and £900,000. We found him to be generally unreliable, particularly in relation to his evidence about these two sums.

187. Describing a bonus as a fish stock bonus some eighteen months after the Company ceased trading is of itself quite extraordinary and calls for an explanation. Nothing sensible has ever been provided.

188. Somewhat surprisingly, by email dated 27 June 2013 to Mr Stewart, Mr Thomas informed him that:-

> We refer back to Roderick Thomas's letter of 6 July 2007, your letters to us of 17 July 2007 and 3 June 2011, and your letter to the General Commissioners of 19 July 2007 have now taken advice and it now seems clear to us that the accounts as prepared did not properly reflect the true position. The credit for £900,000 should not have been to the director's account but shown as an accrual. We had not fully understood the relevant principles of accounting. In implement of that correspondence, we attach amended accounts for the company for the period to 31 January 2005 to the effect of removing the £900,000 of accrued bonuses previously credited to the director's account, at note 2 "Staff costs"). We shall be grateful for an acknowledgement this allows matters to proceed in terms of your letters.

189. These accounts were produced. We shall refer to them as the "2013 Accounts." They bear to have been signed by Mr Thomas on 25 June 2013. We refer to paragraphs 90-94 above). They are not audited and do not disclose that they were prepared by an accountant. The email dated 27 June 2013 refers to the £900,000 being shown as an *accrual.* However, it is not shown as an accrual in the 2013 Accounts. Note 2 has removed the entries for Wages and Salaries of £178,230 and Accrued bonuses of £900,000. Note 3 has removed the entry for accrued fish bonus to director of £450,000. Note 11 shows Creditors (amounts falling due within one year) as including Director's accounts (including related parties) £657,991. This reduces the equivalent figure in the accounts submitted with the Company's returns in August 2006 by £900,000 to £657,991. Note 14 discloses that at the balance sheet date the Company owed its director, Mr Thomas, and his brother, £657,991.

190. Lest it be lost sight of, the 2013 Accounts are wholly inconsistent with the accounts of Spring Seafoods/Capital for the year to 30 April 2007. These 2007 accounts disclose or at least infer that liability for the director's current account in the sum of £1,557,991 was taken over by Spring Seafoods/Capital when it acquired the goodwill of the business of the Company. The difference between the two sums of £1,557,991 and £657,991 is £900,000. It will be remembered that Spring Seafoods/Capital has been and is under the control and management of Mr Thomas and his brother. It will be remembered, too, that Spring Seafoods/Capital is relying on *inter alia* their accounts for the year to 30 April 2007 in relation to an appeal currently before another First-tier tax tribunal.

191. It will also be recalled that in his letter dated 26 May 2011 Mr Thomas made it clear that the sum of £1,557,991 did not include the bonus of £900,000. It was asserted that £900,000 came from sums provided by him and his brother, which were vouched. This, too is wholly inconsistent with 2013 Accounts. It raises serious questions about the source and destination of the two sums of £300,000 and £900,000. Mr Thomas has been adamant in correspondence that it was these two sums that were part of the £1,557,991 set forth in the accounts submitted in August 2006. Reference may also be made to his email dated 1 May 2013 referred to above. In evidence by contrast, Mr Thomas said that the reason for the bonus was that neither he nor his brother had taken any significant remuneration from the Company since its inception. We do not have to reconcile the conflicting evidence.

192. In a subsequent letter dated 19 July 2013 in response, Mr Stewart pointed out correctly that Mr Thomas had long maintained that cash had been injected into the Company (£900,000 on 29 October 2004; and £300,000 on 24 March 2004) making

up £1.2m which it was said formed part of the £1,557,991); and that now the credit balance reflected in the 2013 Accounts was only £657,991.

Submissions

193. Counsel amplified and refined their written Notes of Argument and made submissions on the following topics, namely Time Bar PAYE, liability for PAYE and NIC (merits), the 2007 "Agreement", the 2010 Undertaking, Time Bar NIC. Within these topics are various sub-topics. Mr Upton produced a very lengthy written submission, which he revised and re-submitted to take account of HMRC submissions. We shall summarise the main thrust of parties' arguments in our discussion of these topics below.

Discussion

General Overview

194. Mr Thomas is and has been an experienced businessman for many years. He has corresponded with HMRC on many technical tax matters. He has represented himself, the Partnership and his brother from time to time in the tax tribunals advancing technical arguments. He prepared many of the Company's tax returns. He prepared the accounts of the Company for the period from 1 August 2003 to 31 January 2005 with only limited assistance from an accountant. He has engaged in lengthy and technical correspondence with HMRC over the years, some of which we have referred to above.

195. We conclude, and there really is no doubt that he, as director, was responsible for the insertion of the various entries in the accounts, in particular the entries relating to administrative costs of £178,230 and the bonus of £900,000. He signed accounts as director. They were not audited and no accountant put their name to them.

196. Mr Thomas is also familiar with the PAYE and NIC systems. He was aware of and participated in discussions with the Inland Revenue as far back as 2001 when the tax treatment of fish stock bonuses arose. Mr Thomas was aware of the Inland Revenue view that PAYE should be operated on fish stock bonuses. The Minutes of the meeting record that he accepted that schemes to pay employees in fish stocks to avoid the operation of PAYE no longer worked from April 2000 due to changes in legislation. Whatever doubts there may have been in 2001, HMRC's hand was strengthened by legislative changes. The definition of *readily convertible assets* in s203F ICTA 1988 was extended by s696 ITEPA.

197. With his experience and practical knowledge of tax, any decision by him not to account for PAYE on declared fish stock bonuses, can only be regarded as deliberate. Any decision not to operate a PAYE (including NIC) system over the period 1 August 2003 to 31 January 2005, must have been deliberate with a view to the Company not having to pay PAYE and NIC which ought normally to have been deducted from wages, salaries and bonuses paid to administrative staff and directors.

198. At no stage after August 2006, when the accounts were signed and submitted to HMRC with the Company's corporate tax returns for the periods 1/8/2003 to 31/7/2004 and 1/08/2004 to 31/1/2005 did he submit any employer returns accounting for PAYE on any part of the wages and salaries recorded in the accounts or on any part of the £900,000 which may have been credited to the account of the director and related parties (ie Stuart Thomas) or actually paid to them. No explanation has been given for such conduct in relation to the whole of the sum of £178,230 although at one stage it was suggested that it comprised in large measure, several tax free termination payments of £30,000 paid to members of the Thomas family. In the event, this has accounted for £60,000 out of £178,230. Of the balance of £118,230, HMRC have acknowledged that some £28,230 is attributable to personal allowances (which spanned two tax periods), leaving a residual sum of £90,000. There is no satisfactory explanation why PAYE was not operated in respect of that sum. Mr Thomas knew his way around accounts and many of the practical aspects of tax, including PAYE and NIC. He was not slow to arrange, what we regard as questionable tax free termination payments for family members. We consider that he knew full well what he was doing and what the consequences of the entries in the accounts for administration expenses were.

199. We conclude that the omission to account properly for PAYE and NIC was deliberate. There was nothing careless about his conduct. He was principally responsible for the handling of the tax affairs of the Company. He ultimately chose to rely on tax free termination payments. HMRC have accepted this to some extent but this only partly accounts for the staff salaries and wages. No basis for not operating PAYE on the balance has been established.

200. Section 36 TMA refers to loss of tax brought about deliberately. Any conduct bringing about a loss of tax deliberately, does not have to be concealed or clandestine. If we are wrong in that, it can readily be inferred that, by wrongly asserting that the whole of the sum of £150,000 could be accounted for by reference to five tax free termination payments, Mr Thomas, on behalf of the Company, was deliberately concealing the true position.

201. Observing Mr Thomas give evidence and having considered and reviewed that evidence and the lengthy correspondence between him (either on behalf of the Company, himself, his brother and/or the Partnership) and HMRC, our assessment of him is that he has been devious, aggressive, and (as his brother was described in commercial litigation in which he appears to have described himself as managing director; see paragraph 50 above) opportunistic. He persistently declined to provide basic information about the Company's business and administration which any reasonable, prudent and honest taxpayer with nothing to hide (although perhaps not obliged to provide it) would readily have provided. We refer to paragraph 165 above. Instead, he criticised the conduct of HMRC in relation to a number of minor matters which, in the overall scheme of things, were not of any great significance. By contrast, Mr Stewart was a model of restraint and reasonableness. With hindsight, he may consider that a firmer approach might have been preferable. In summary, we consider that the evidence of Mr Thomas and the documents produced at the hearing do not provide credible or reliable explanations of the sums of £900,000 and £178,230

specified in the cessation accounts which would justify the notices and decisions being discharged.

202. As a result of his deliberate conduct on behalf of the Company, tax has been lost. That lost tax is, in part, the subject of the Notices of Determination and the Notices of Decisions dated 8 April 2011 and 5 September 2012. That lost tax relates to the sum of £178,230 (the entry in the accounts for wages and salaries) for which at least £90,000 remains unaccounted for in the sense that no justification has been established for failing to operate PAYE thereon.

203. On this relatively straightforward basis, the Notices of Determination (original and amended) are not time-barred. The onus therefore lies on the Company to show that HMRC are precluded in some way from enforcing the Notices or to attack successfully their underlying soundness by establishing, on a balance of probabilities, that no sum was due or some lesser amount was due. The Company has failed successfully to attack the underlying soundness of the Notices although some restriction on the amount has been achieved. The appeal against the amended Notices of Determination therefore fails unless the Company establishes some other basis for discharging the amended Notices.

204. Finally, in this general section, we record that it is unnecessary to make detailed findings about the origins of the Spring Salmon companies. The ultimate owner of the Company was at least at one stage the trustees acting under a trust which according to Mr Thomas was set up by his brother-in-law, a Mr Lindh. This was not vouched and we decline to make any findings of fact about it on the basis of Mr Thomas's evidence. It is unnecessary for us to do so for the purposes of this decision.

Onus

205. Mr Upton submitted that, with the exception of NIC, the burden of proof lies on HMRC in respect of both the preliminary issue of time bar and the substantive question of the merits of their determinations.

206. We do not accept this argument. Insofar as it is necessary to prove *loss of tax* for the purpose of eliding the time bar provisions of s36 TMA, HMRC have done so. We refer to the previous section, and to the following section of this decision entitled *Payment*.

207. However, we do not consider that proof of *loss of tax* is the same as proof of the underlying soundness of the PAYE determinations which are deemed to be assessments for certain purposes. If that were so, then *deliberate* conduct (under earlier legislation the extended period referred to loss of tax *attributable to fraudulent…. conduct*) would have the beneficial effect of transferring the onus of proof on the merits of the assessment from the taxpayer to HMRC, a benefit attributable to or brought about by fraudulent or deliberate conduct, or allegations of such conduct. Such a result makes no sense and cannot have been the intention of Parliament.

Payment

208. The Company now accepts that if payment was made (in the appropriate sense) within the period between 31 July 2003 and 31 January 2005 then payment falls to be treated as having been made in the tax year 2004/05.

209. Mr Upton advanced an elaborate argument to show that HMRC had failed to establish that payment of the sum of £900,000 was made to Mr Thomas and his brother, or that the sum was at their disposal. There was therefore no loss of tax. No loss of tax having been demonstrated, so the argument runs, the provisions of TMA 36 on which HMRC rely, do not apply and the determinations are therefore time-barred.

Decision on Payment

210. The short answer to this argument is to refer to two incontrovertible facts. The first is the terms of the cessation accounts which make reference to the accrued bonus of £900,000. It was credited to the director's current account which included related parties ie it was unreservedly at the disposal of Mr Thomas and his brother. The Company would have no answer to a claim for payment by either brother. If there is an answer, no one has suggested what it might be. PAYE is deductible on such a bonus. The Company was not insolvent. There was, in any event, no satisfactory evidence before us to demonstrate that it was insolvent.

211. These accounts were prepared largely by Mr Thomas. He had some assistance from an accountant but the accountant did not put his name to them. They have not been audited. They have not been lodged with the Registrar of Companies. They were signed by Mr Thomas and are supposed to contain a true and fair view of the state of affairs of the Company and of the profit or loss of the Company for the period to which they relate. It can also be noted in passing that by signing the accounts Mr Thomas acknowledged that it was his responsibility as the director for keeping proper accounting records which disclose with reasonable accuracy at any time the financial position of the Company.

212. The analysis of the accounts is confirmed by the Company's extraordinary attempt in 2013 to correct them. The corrections assume (contrary to previous assertions by the Company) that the £900,000 bonus was indeed credited to the director's current account and formed part of the credit balance of £1,557,991. It is now too late to amend the returns submitted in August 2006 which were based on the cessation accounts (FA 1998 schedule 18 paragraph 15(4)).

213. Even if it is accepted that the sum at credit of the director's account in the cessation accounts does not include the sum of £900,000, it is a reasonable inference (if not the only conclusion which can be reached) that the money has been paid out by the Company to Mr Thomas and his brother despite the former's protestations to the contrary. There has to be, in accounting terms, a corresponding credit to the deduction (as an expense) in the accounts under the heading STAFF COSTS. That credit would be a credit entry in the Company's bank account; the bank becomes a

creditor of the Company to the extent of an additional £900,000. The Company's overdraft is increased or its bank balance is reduced. Although requested to do so, the Company persistently failed to provide a complete record of the transactions on its director's account.

214. The second incontrovertible fact is that during the period to which these cessation accounts relate, the Company did not account to HMRC for any PAYE or NIC in respect of the bonus of £900,000, or for a significant part of the wages and salaries of £178,230 mentioned in the cessation accounts.

215. On the basis of these two facts it is quite plain that for the purposes of the time bar provisions of s36 TMA, payment has been made and a loss of tax has been established. Leaving aside the arguments about the alleged 2007 agreement the 2010 Undertaking and the NIC time bar argument as to all which the onus rests on the Company, the onus shifts to the Company to challenge the underlying soundness of the determinations and decisions by demonstrating that nothing is due or that what is claimed is excessive. They have not done so and essentially rest their appeal on a series of highly technical arguments, one of which they must establish to succeed.

216. Mr Upton advanced a further argument based on *HMRC v Forde & McHugh Ltd* [2014] UKSC 14 on the basis that the sums at issue were only at the employees' (Mr Thomas and his brother) disposal on condition that the Company came by the means to transfer value. The question was whether *earnings* were *paid* (to use the language of the NIC legislation) or whether *relevant payments* were *made* (to use the language of the PAYE legislation). This occurred when the right comes to be discharged by a transfer of liquid funds to the employees. As we understood it, the argument was that the condition or contingency was not fulfilled so there could be no payment or earnings or a relevant payment having been made and therefore no liability for PAYE or NIC.

217. We cannot accept this argument. No such contingency existed. The Company was not in liquidation, receivership or in administration. The accounts cannot be relied upon to determine solvency as they make no mention of the transfer of its business in September 2004. Over the 18 month period of the cessation accounts the Company had a turnover of £2,533,848 and a gross profit of £804,533. It apparently sold its business to the Thomas partnership for a substantial sum. Spring Seafoods/Capital was solvent and for aught yet seen remains solvent. The so-called contingency has simply been created to fit an argument based on *Forde & McHugh.* While we are bound by the ratio of *Forde,* it does not appear to have any application here.

218. In any event, we do not consider that the application of the *Garforth* test as explained and amplified in *Aberdeen Asset* (see below) depends upon the financial soundness of the employer from time to time.

219. Mr Upton argued that the measure of what, if anything had been paid, was to be found in Regulations 69 and 21 of the 2003 Regulations. The issue, he submitted, was whether payment had been made to an employee. He accepted the applicability

and indeed founded upon certain *dicta* in *Aberdeen Asset Management plc v HMRC* 2014 SLT 54. He submitted that the funds had to be available in the sense that the Company had to be solvent and have the wherewithal to make payment.

220. That case concerned appeals against notices of determination (PAYE) and decisions (NIC) relating to a tax avoidance scheme which failed. The scheme involved a series of linked transactions based on an offshore employee benefit trust (EBT). The object of the scheme was to pay senior employees and directors of the appellants large sums of money tax free. The money passed from the appellants to the EBT and thence to various companies (referred to as money box companies), incorporated offshore for each of the beneficiaries, who held either initially or eventually, all the shares in these cash rich companies, but were not directors. The benefits received by the employees were expressly provided to them as part of their overall remuneration. At the stage when the money was passed to the employee, the assets of the company were effectively at the disposal of the company. It was ultimately accepted by the appellants on appeal that the sums paid to the employees were taxable. The dispute in the Inner House was whether the liability to account for the tax fell on the appellants or the benefitted employees individually. In resolving that dispute in favour of HMRC, the court considered at some length whether a transfer of the shares to an employee was a *payment* within the meaning of the fiscal legislation relating to PAYE.

221. The court considered that the correct approach was, in effect, to ask whether the relevant statutory provisions, construed purposively, were intended to apply to the transactions, viewed realistically (paragraph 25 especially at 60L; paragraph 43 at 65B-C). The court noted that the intention of Parliament was clearly that Schedule E tax should be payable on the whole of the financial benefits earned by the employee as a result of his employment (paragraph 26 at 61B-C; paragraph 27 at 61F), the primary meaning being that an emolument is received when payment is made or a person becomes entitled to payment, whichever comes first (paragraph 26 at 61D). The court concluded (agreeing with the First-tier Tribunal) that the transfer of shares in a money box company to an employee was a *payment* within the relevant legislation (paragraph 35 at 62J). The Court quoted from *Garforth v Newsmith Stainless Ltd* [1979] 1 WLR 409, with apparent approval and concluded that *the fact that the employee has practical control over the disposal of the funds is sufficient to constitute a payment for the purposes of the legislation* (paragraph 34 t 63C; see also paragraph 36 at 63F).

222. The Court in *Aberdeen Asset* also considered whether the funds transferred to the money box companies were placed unreservedly at the disposal of the employees, and concluded that they were (paragraph 37 at 63H, paragraph 38 at 64A-B). The Court eschewed a concentration on strict legal form rather than the substance of the transaction (paragraph 38 at 63 I-J); they viewed the transaction *realistically* (paragraph 38 at 63J-K); and approved the test in *Garforth* by observing that *the focus is on the power that the employee has to make use of the money as a medium of exchange* (paragraph 43 at 65B). Lord Glennie, in particular, observed that *it was clear from the authorities to which (the court was) referred that for the purposes of*

PAYE and national insurance contributions "payment" can include the crediting of a bonus to a director's current account with the company (paragraph 65 at 69 I).

223. In *Garforth,* the issue was whether the crediting of the accounts of two controlling directors in the company's books, of bonuses was the equivalent of *payment* within the meaning of the PAYE legislation rendering the company liable for income tax as employer (410F; 411E). The bonuses had been allowed against the company's corporation tax assessment. Walton J had no hesitation in concluding that *when money is placed unreservedly at the disposal of directors by a company, that is equivalent to payment.* (414A-B). That, according to him, was the simple point in the case (415G) He quoted from an earlier case decided by an experienced revenue judge that this was equivalent to putting the bonus to the credit of what is equivalent to a banking account (414G-415A). Walton J rejected the notion that whether there was payment or its equivalent depended on the solvency of the company. Where the director left his money was his choice. It made no difference whether the money was left standing at credit in the company's books and the company goes into liquidation, or whether it was deposited in a bank which goes into liquidation (415B-D). What mattered was that there was a clear legal right to payment (415H).

224. Neither counsel submitted to us that there was any feature in the legislation considered in *Aberdeen Assset* which distinguished the case or made its approach inapplicable to the legislation and facts before us. We take the same view. Moreover, no distinction was drawn between PAYE and NIC in the court's analysis. Mr Upton accepted that whether payment was made falls to be tested in the same way.

225. On the face of matters the bonus of £900,000 falls four square within *Garforth,* which has been approved by the Inner House in *Aberdeen Asset.* According to the Company's accounts for the period 1 August 2003 to 31 January 2005, a bonus was credited to the director's account. It is clear from the evidence of Mr Thomas that the bonus was to be divided equally between him and his brother. Stuart, at the material time, was either an employee or a *de facto* director. We have concluded that he was a director in all but name. These accounts were prepared by Mr Thomas and signed by him (and not by any accountant) and bear to represent a true and fair view of the state of affairs of the Company as at 31 January 2005 and a true and fair view of the profit and loss of the Company for that period. As in *Garforth,* the bonus payment was claimed as an allowance against profits.

226. It does not matter whether the Company was solvent or insolvent as at 31 January 2005 or at any stage during the period to which the accounts relate. Mr Thomas and his brother chose to have the director's account credited, rather than receive payment or the transfer of fish stock (if it ever existed). Mr Thomas, at 31 January 2005, would, by reference to the accounts, have had a clear right to payment. His brother would also have had a clear right to payment as an employee of the Company. Even if it could be said that the enforcement of his right to payment might have been less straightforward, it is unnecessary to dwell upon the precise exposition of those rights. As Lord Drummond Young put it in *Aberdeen Asset, it is not appropriate to deconstruct the nature of the employee's rights, drawing fine*

distinctions according to the methods that he must adopt in order to use the funds for his benefit. (2014 SLT at paragraph 34 at 63B-C).

227. The 2013 Accounts assume that the bonus of £900,000 was indeed credited to the Director's account in the cessation accounts. As we have explained, even if it were to be accepted that that is incorrect and the credit balance in the director's account is attributable not to the bonus of £900,000 but to some other payments, the only conclusion to reach is that the sum of £900,000 was actually paid. That could, or at least might, have been refuted by production of complete and accurate details, suitably vouched, of the operation of the Director's account. Such details and similar information were requested in January 2007 when HMRC opened enquiries into the Company's returns (see paragraphs 108-110 above), but were never produced. A taxpayer cannot be allowed to produce two materially different sets of accounts (for the same period) some seven years apart, and rely on one or other of them depending on which way the wind is blowing. That is simply opportunistic. This is particularly so here where the Company has purported to give fiscal effect to the first set through the transfer of trade, the figures in respect of which (£1,557,991) contain the £900,000. We refer here to the entries in Spring Seafood/Capital's accounts for 2007. The Company is also pursuing claims for terminal losses which assume the accuracy of the first set of accounts (see paragraphs 101 and 105).

228. We should also add that we are by no means satisfied that the Company did not have the means or could not acquire the means to make payment of the bonus, whether in cash or on fish stock. It was apparent to us that the inflow of funds to the Company and the outflow of funds from it were shrouded in mystery. Some of the Company's records were incomplete particularly and crucially on this aspect bank statements and the dealings on the director's current account. Although the cessation accounts naturally record that the Company ceased trading on 31 January 2005, yet in the restoration proceedings, it was a matter of admission that the Company was still *in operation* when it was struck off some two and a half years later (see the Opinion of Lord Glennie paragraph 4(14)).

229. In his reply to the submissions of Mr Artis, Mr Upton submitted that the Notices of Determination (the PAYE) notices were invalid because there was no relevant code and so liability could not be quantified. No codes appear to have been issued. HMRC have not said what codes applied. He relied, in particular, on regulations 21, 7, 8, and 58 of the PAYE Regulations, although he recognised that the regulations made provision for emergency and basic rate codes (Regulations 48-50). He also criticised a revised (reduced) calculation produced by HMRC on or about 22 April 2014 (between the penultimate and final hearings), based on the assertion that basic rate code (22%) should be applied. This would reduce further the Company's PAYE liability to £217,000.

230. It seems to us that, at best for the Company, the argument about PAYE codes relates to quantum, which we consider below, and not to the validity of Notices of determination.

231. Finally, it was submitted that, if the appeals are refused, the Company would be entitled to relief in respect of the PAYE and NIC for which it is liable. This point had been raised in correspondence and Mr Stewart (in a letter to the Company dated 20 July 2011), indicated that this would be so once the PAYE and NIC have been paid. Any dispute about this is for another day in another appeal.

Time Bar PAYE

Submissions

232. The Company argues that the lawfulness of the PAYE determinations (but not the decisions relating to NIC) depends upon s36 of TMA. The onus of proof is demanding. Reference is made to *Easow* at paragraphs 79 and 127. HMRC must show that the Company deliberately brought about a loss of tax. That, in turn, means that they must show that there were payments that gave rise to a tax liability. The onus lies on HMRC to prove the underlying soundness of the PAYE determinations. It is doubtful whether deliberately causing a loss of tax involves a different criterion to that of fraud. Here, it is said, that the Company has frankly and candidly disclosed the relevant financial statements and have not issued any deliberately inaccurate return or other document. They have not concealed anything. As for the sum of £178,230, termination payments were referred to in each of the returns of Mrs Sarah Thomas and Mrs Rebecca Thomas for the tax year 2003/04. They each received these payments. No enquiries were made into these returns.

233. As for the £900,000 it was disclosed in the Company's accounts submitted on or about 30 August 2006. It was submitted that Mr Thomas' statements to the General Commissioners that the entries relating to the sum of £900,000 were correct.

234. For HMRC it was submitted that ss34 and 36 TMA were engaged and not s29 (*Weight Watchers UK Ltd v HMRC* [2012] STC 265). While the burden of proof is on HMRC it may be discharged by pointing to unexplained discrepancies (*Hurley v Taylor* [1999] STC 1). Reliance was placed on the Company's knowledge from previous dealings with HMRC that PAYE should be operated on fish stock bonuses, the nil return P35 submitted in October 2004, the actings of Mr Thomas in prolonging the restoration proceedings and thus deliberately prevented the recovery of tax within the ordinary time limit.

Decision (Time Bar PAYE)

235. In our view, the facts as we have found them to be, show that there has been a loss of tax deliberately brought about by the Company.[30] As soon as the accounts were signed and submitted to HMRC (both deliberate acts) they reflected what the Company regarded as its financial transactions during the period to which they relate. The submission of the nil return and the consequent failure to lodge PAYE returns accounting for tax and NIC on the sum of £900,000 were deliberate acts. If PAYE is

[30] There is considerable overlap between the Company's arguments on payment and time bar (see generally paragraphs 195-215 above).

due at all, its non-payment has been brought about by the deliberate conduct of the Company acting through the medium of Mr Thomas.

236. Mr Upton argues that if *payment* was disclosed in the accounts, then there was no deliberate concealment, as the relevant figures have been in those accounts since their submission in August 2006 and bore the same interpretation then as they do now.

237. While that is correct in one sense that there was no deliberate concealment, it does not provide an answer to the contention that the loss of tax was brought about by deliberate conduct on part of the Company acting through the medium of Mr Thomas. It is plain that between 1 August 2003 and 31 January 2005, the Company did not pay PAYE or NIC on the sums of £900,000 or £178,230. The Company has not at any stage paid PAYE or NIC on the sum of £900,000. The Company eventually accounted for part of £178,230 by two exempt termination payments of £30,000 to members of the Thomas family who were employees of the Company. This proceeded on what seemed to us to be the flimsiest of evidence which HMRC surprisingly accepted.

238. In relation to the sum of £900,000, payment of that sum may not have been in contemplation during the period between 31 July 2003 and 31 January 2005. It is not therefore surprising that PAYE and NIC were not accounted for during that period. It appears that at some point between 31 January 2005 and 26 August 2006 the Company decided to award the bonus. However, no steps were ever taken to account for PAYE or NIC. In fact a nil return was submitted in October 20004 for the tax year 2003/2004. No such return was submitted for the tax year 2004/2005.

239. As we have explained, £90,000 of the £178,230 for wages and salaries remains unaccounted for, through what can only be described as the deliberate conduct of the Company. That, of itself, is sufficient to render the Notices of Determination timeous in terms of section 36 TMA. Such tax remains *lost* and is part of the subject matter of the Notices of Determination and Notices of Decision referred to above. The obligation on the part of the Company to make payment in terms of the Notices relating to PAYE has not been extinguished and the Notice of Determination dated 5 September 2012 is therefore enforceable.

240. However, there is further deliberate conduct that is relevant. At the meeting before the General Commissioners, Mr Thomas asserted that the entry in the cessation accounts relating to the sum of £900,000 was a paper exercise. While it is not clear on what precise basis that statement was made, it has turned out to be incorrect. The Company and Spring Seafoods/Capital appear to have treated it as a real transaction with significant fiscal effect.

241. Finally, even if HMRC had been able competently to issue notices between 2006 and 2011 (when the Company had been struck off the Register) in anticipation that such notices would have been retrospectively validated by the effect of s1032(1) of the Companies Act 2006 or by a specific order under s1032(2) (see *Joddrell v Peaktone Ltd* [2012] EWCA Civ 1035 at paragraphs 46-48, *Rloans v Reg of Cos*

]2012] EWHC B33 (Comm) paragraph 52), that does not prevent them from adopting nor does it invalidate the course of action they actually pursued.

Time-Bar and NIC

242. It was common ground that s36 did not apply to decisions relating to liability for NICs. This is because the legislation and regulations governing these decisions do not deem them to be assessments to which the relevant parts of the TMA apply, unlike the PAYE regulations.

Submissions

243. Mr Upton submitted that the liability to pay NIC is a debt to which the English limitation period of six years applies and has expired. The NIC claim is thus time-barred.the English Limitation Act 1980 applied a six year period which had elapsed and so the decisions could no longer be enforced. Mr Artis submitted that Scots law applied, and under the Prescription and Limitation (Scotland) Act 1973, a prescriptive period of 20 years applied; liability for payment in terms of these decision therefore subsisted.

Decision (Time Bar and NIC)

244. In our view, the obligation on the part of the Company to make payment in terms of the decisions relating to NIC has not been extinguished and is therefore enforceable. Although we are a United Kingdom tribunal, we are sitting in Scotland. An appeal from our decision will normally be heard by an Upper Tribunal consisting of a Senator of the College of Justice, usually sitting alone, or with one or two others one of whom is qualified in Scots law. In our view, therefore, questions of the substantive law of prescription (extinction of rights and obligations) and the procedural law of limitation of actions would normally be determined by Scots law. In many cases, the application of the fiscal legislation will be the same whether Scots law or English law is applied. Reports of decisions in tax cases from English tax tribunals and courts are cited daily in Scotland and are usually followed. There may of course be circumstances where foreign law (whether English law or some other foreign law) is the applicable law of a contract material to the fiscal dispute. In those circumstances, it is necessary to have expert evidence of the foreign law. In the absence of such evidence, the general rule is that the foreign law is deemed to be the same as Scots law.

245. There is some difference of view as to whether that general rule applies to English law where the tribunal (here the First-tier Tribunal (Tax Chamber)) has a UK wide jurisdiction. Whether it does or does not, we do not consider that we were adequately addressed by either counsel on what the position is under the Limitation Act 1980. Although a general period of six years applies, there are exceptions (see for example s32 [postponement of limitation period in case of fraud or mistake]; s37(2) [disapplication of the Act to proceedings by the Crown for recovery of *any tax or duty*; *tax* does not appear to be defined]).

246. We consider that the appropriate course here is to apply Scots law, either because Scots law is the applicable law or because English law in the absence of any sufficient evidence or submissions about it, is deemed to be the same as Scots Law.

247. Section 6 of the Prescription & Limitation (Scotland) Act 1973 does not apply because the statutory obligation to pay tax in any shape or form is not one of the obligations specified in Schedule 1 of the 1973 Act. That schedule identifies the obligations to which the short negative prescription of five years applies. Schedule 2 expressly excludes certain obligations from the application of the short negative prescription, for example the obligation to recognise or obtemper an order of a tribunal. The 1973 Act binds the Crown (s24).

248. Section 7 of the 1973 Act (which relates to obligations of *any kind*, subject to exceptions which are not material) therefore applies and provides for a prescriptive period of 20 years. This conclusion is consistent with two cases to which we were referred by Mr Artis. In the first (*LA v Hepburn* 1990 SLT 530), Lord Dervaird, in an action for payment for tax due under an assessment, held that the obligation did not prescribe under s6 of the 1973 Act (page 532J). In the second (*Lord Advocate v Butt* 1991 SLT 248 (Lord Prosser) and 1992 SC 140 (Second Division)), the action was for payment of tax and NIC and interest on the unpaid tax. The Lord Ordinary held that s6 applied to interest. The Inner House disagreed, holding that under the TMA interest fell to be treated as tax and could not be interest within the meaning of s6 and Schedule 1 to the 1973 Act (143-144; 146, 147).

The July 2007 Agreement

Submissions

249. Mr Upton, on behalf of the Company, submitted that (i) HMRC could enter into a binding contract with a taxpayer which governed the taxpayer's statutory liability to tax - under reference to *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC); (ii) an agreement was entered into between Mr Stewart on behalf of HMRC and Mr Thomas on behalf of the Company; reliance was placed on Mr Stewart's note of a telephone conversation with Mr Thomas on 6 July 2007, the letter of the same date from Mr Thomas to Mr Stewart, and Mr Stewart's letter to the Company dated 17 July 2007; (iii) the HMRC assertion in their Statement of Case that the agreement was *without prejudice* is a legal nonsense, (iv) HMRC have failed to establish, the onus being on them, that the agreement was vitiated by misrepresentation or otherwise; in particular, there was no duty on Mr Thomas to disclose any plans to transfer the liability for the bonus to Spring Seafoods/Capital, (v) even if there were some material misrepresentation which induced HMRC to enter into the July 2007 agreement, HMRC's remedy is reduction; the contract is not automatically a nullity; it would be voidable (*Gloag & Henderson Introduction to the Law of Scotland 13th ed* paragraphs 7.02, 7.03 and 7.33); (vi) insofar as relevant the Company did not act inconsistently with the agreement; (vii) reliance on the observation of the Lord Ordinary in the restoration proceedings that at the time of the Company's dissolution in August 2007, it had been claiming a tax credit on the basis of charging the £900,000 to their profit and loss account, was unjustified; it was not

clear to what evidence the judge was referring; the evidence before the Tribunal should be preferred, (viii) HMRC do not assert that the agreement has been rescinded or repudiated (and the repudiation accepted) so it remains binding, whatever parties' beliefs, intentions or communings *inter se*; (ix) the 2013 accounts reflect the agreement; if there was no agreement they are simply academic.

250. Mr Artis for HMRC submitted that (i) there was no binding agreement or undertaking by HMRC; *Southern Cross* was distinguishable, as, there, the agreement had been performed and the money paid; (ii) the context of the discussion on 6 July 2007 and correspondence later that month were critical; that context was the personal returns of Mr Thomas (and his brother) not the corporate tax return of the Company (the letter dated 17 July 2007 contained a conditional offer which was never accepted by the Company; those conditions are set out in the letter), (iii) the letter dated 19 July 2007 is the reply to Mr Thomas's letter dated 6 July 2007; (iv) the Company is not asserting an enforceable agreement but challenging HMRC's management of tax and its future tax treatment of the Company, which is a challenge which can be made by judicial review but not before these tribunals (*Hok Ltd* [2012] UKUT 363 (TCC)*;* HMRC have no power to agree in advance whether tax should be assessed or determined; (v) that the statements made by Mr Thomas before the General Commissioners on 15 June 2007 that the £900,000 was no more than a paper exercise, induced Mr Stewart to agree on behalf of HMRC that the £900,000 would be disallowed as a deduction in the computation of the Company' profits and would be ignored for PAYE and NIC purposes; it also induced the General Commissioner to direct the issue of closure notices in relation to the enquiries opened into the personal returns of Mr Thomas and Stuart Thomas for the tax years 2004/05; (vi) in spite of the agreement, the Company has maintained in other proceedings that it is entitled to deduct that same £900,000; the Company currently claims a tax credit of £642,885; that claim derives in part from the loss of £2,858,130 shown in the Company's accounts for the period between 31 July 2003 and 31 January 2005; that loss is calculated by *inter alia* making a deduction from profits of the £900,000, which according to the agreement reached in July 2007, would be ignored. It was also submitted that there was further evidence that the £900,000 entry was not a paper transaction by reference to the accounts of Spring Seafoods/Capital.

251. Mr Artis drew attention to the fact that as at 31 January 2005, the director's current account amounted to £1,557,991 (ie the sum owed by the Company to Mr Thomas and his brother). That sum had grown by £1,197,304 from the figure at which the account stood on 31 July 2003 (£360,687). Mr Thomas and Stuart Thomas held a floating charge as security.

252. Mr Artis further submitted that Spring Seafoods/Capital's accounts for the year to 30 April 2007 show additional goodwill valued at £1,557,991, which is a balancing entry for Spring Seafoods/Capital having assumed the liability of the Company to meet the sums due on the Company director's current account.

253. Spring Seafoods/Capital have written down or amortised the value of the goodwill (£1,557,991) over seven years claiming tax relief therefor. Moreover, the

sum shown in the director's account in the books of Spring Seafoods has been drawn on although Spring Seafoods have never declared any PAYE or NIC obligations or made any such payments. Accordingly, what was said to be a £900,000 paper exercise in the form of a bonus has been converted into capital and is being repaid to Mr Thomas and his brother as capital at their discretion.

254. In all these circumstances it is suggested that Mr Thomas misrepresented the true position and thus HMRC are not bound by any agreement entered into in July 2007. The accounts misrepresented the true position by omitting the transfer of business; the assertion that the £900,000 bonus was a paper exercise was incorrect; and the assertion that Mr Thomas and his brother did not have the benefit of the sum of £900,000 was also incorrect. If there was an agreement in 2007, HMRC were induced to enter it by reason of these material misrepresentations. These misrepresentations vitiated any true consent as to the nature of the entries in the accounts of the Company (*Gloag & Henderson* paragraph 7.21, 7.26, 7.31; *Morrison v Roberston* [1908] SC 332; *Earl of Wemyss v Campbell* (1858) 20 D 1090. These misrepresentations amount to deliberate conduct. The Company took no steps to implement the agreement but continued to insist on the deduction of £900,000 in their profit and loss account. In the restoration proceedings, Mr Thomas continued to insist on the deduction. There was no assertion that agreement had been reached (see the Opinion of Lord Glennie where there is no mention of it). No such agreement was founded on.

255. Mr Artis also submitted that the accounts were misleading and did not represent a true and fair view. They failed to disclose the asserted transfer of the business to the Thomas Partnership in September 2004. In appeals by Spring Seafoods/Capital Mr Taub's expert report dated 20 December 2013 describes the acquisition of the business of the Company by Spring Seafoods Ltd/Capital, notes (at paragraphs 4.7 and 4.8) that the gross profit percentage varied during the 18 month period of the accounts and records Mr Thomas's explanation, namely that for the last few months the Company purchased supplies and sold them on to Spring Seafoods/Capital at no profit; this was another matter that should have been mentioned in the accounts

256. It was further submitted by Mr Artis that if HMRC were in repudiatory breach, that breach was accepted by the Company by raising the action for payment of £642,835 in 2011. Finally, it was submitted that the Company's argument did not apply to the £178,230 deducted from staff costs. This, we understand, was not disputed.

257. We should also note that if HMRC resist this aspect of the current appeal and the result is that that £900,000 is treated as remuneration and therefore subject to PAYE and NIC, then the Company is or at least may be justified in taking into account the £900,000 in the calculation of the tax credit claim of £642,835. HMRC seem to recognise this.

Decision (July 2007 Agreement)

258. This chapter of the appeal relates to the sum of £900,000 but not to the sum of £178,230. If, in theory, there were an unqualified agreement between the parties, the effect of which was that HMRC would not levy PAYE or NIC on the sum of £900,000, such an agreement would be valid and binding on both parties in 2007. The Company would be able to rely on it to resist an assessment to recover PAYE and NIC. We accept the Company's argument, relying on *Southern Cross* that such an agreement would relate to an existing liability, although the precise amount of that liability had not, when the agreement was entered into, been determined. Such an agreement would not relate to future liability or constrain the future management of tax collection. By virtue of regulation 68 of the 2003 PAYE Regulations, the obligation to pay arises in the tax year in question, here, agreed to be (if liability arises at all) 2004/05. Similarly, the obligation (if there is one) to pay NIC is agreed to arise in the same tax year. The result is that the Company relies on the equivalent of a *back duty* agreement. We therefore reject the HMRC argument that the agreement concerned the future treatment of the Company's tax liabilities. As a matter of fact, if there was such an agreement, it was not regulating future liability but past liability. The public law arguments that any such agreement would be void or *ultra vires,* advanced by Mr Artis and the cases cited by him such as *Fayed v AG for Scotland* [2004] STC 1703 need not be considered although we note that the court in *Fayed* made no adverse comment on a back tax agreement where the taxpayer has already incurred the tax liability but its amount has not been determined.

259. The question is, therefore, whether there was an agreement, conditional or unconditional and if so, whether its terms enable the Company to resist liability for PAYE and NIC. We propose to examine (a) the relevant facts and circumstances in order to determine the terms and conditions of the *agreement,* (b) whether these conditions were fulfilled and (c) whether the agreement was implemented, ie whether the entries in the cessation accounts relating to the sum of £900,000 were treated as having no fiscal effect or as having real fiscal effect.

260. The entries in the Company's accounts for the period 31 July 2003 to 31 January 2005 are the starting point. These accounts were submitted to HMRC on or about 30 August 2006. These were submitted late. At the outset of his evidence Mr Thomas was at pains to point out that the decision to award a bonus was made shortly before the accounts were signed by him. That may be so but as an experienced business man he must be taken to know that the bonus referred to in the accounts would be treated as having been made during the period to which those accounts relate and that the Company cannot suggest otherwise. The same applies to the administration expenses of £178,230 (wages and salaries).

261. We have set out the correspondence above. Our assessment of the correspondence, the note of the telephone conversation on 6 July 2007 and the oral evidence we heard about these matters, is that no binding agreement was entered into between the company and HMRC which disables HMRC from pursuing PAYE and NIC in relation to the sum of £900,000.

262. It can be noted that the agreement not to seek to charge PAYE or NIC was conditional on the Company agreeing that the amount was not to be allowed in the Company accounts as a deduction from profits. It can be noted, too, that the giving of that agreement by HMRC proceeded on the basis that (i) no part of the £900,000 had actually been paid, (ii) as the Company had ceased to trade, that sum would never fall to be allowed against income of the Company, (iii) the £900,000 was credited to the director's current account at some point after 31 January 2005. That basis was derived from information provided by the Company through Mr Thomas. It was also derived from the fact that at the General Commissioners' meeting in 2007 and subsequently until about May 2011 (see paragraphs 182-192 above), the Company did not dispute that the bonus had been credited to the director's current account. Such conduct can only be described as deliberate. If it had been established that the bonus had not been credited to the director's account the only conclusion would have been that it had been paid as there had to be a corresponding credit entry in the accounts, the only one being *bank* ie the money had been withdrawn from the Company's bank account thus making the bank a larger creditor; thus *bank* is credited. We also refer to paragraph 213 above.

263. On the first or superficial reading of Mr Stewart's letter to the Company dated 17 July 2007, it might appear that HMRC had irrevocably agreed that no PAYE or NIC would be levied on the sum of £900,000. However, it seems to us that whatever agreement may have been given, it was given in guarded and qualified terms. It is clear that Mr Stewart was uneasy about the accuracy and completeness of the information being provided by Mr Thomas. Mr Thomas, of course, was privy to the whole affairs of the Company and had access to all the detail of the operations on the director's current account.

264. In his letter dated 17 July 2007, Mr Stewart points out that he has been seeking an analysis of the director's current account and has had to draw conclusions on the basis of incomplete information. His letter concludes with the statement that he could not allow a situation where a debit is disregarded on the one hand and a credit (£900,000) is allowed on the other hand. He proceeded on the basis that the director's current account was simply to be reduced by £900,000. That seems to us to impose a significant qualification or condition to the agreement which might otherwise have thought to have been entered into.

265. There does not appear to be any reply by or on behalf of the Company to the letter dated 17 July 2007. Mr Thomas has subsequently denied, on behalf of the Company, that the sum of £900,000 was ever credited to the director's account. This, of course, is entirely at odds with what the Company attempted to do when purporting to revise its accounts in 2013, and with the assertion earlier in 2007 that the accounts submitted with the tax returns in August 2006 reflected a paper transaction with no fiscal consequence.

266. Thus, in the event, what Mr Stewart was at pains to avoid, occurred. The credit entry in the Company, although said to be a *paper exercise*, was a real transaction. Instead of disregarding the bonus of £900,000, it has continued to be treated in the Company's accounts as a liability of the Company owed to the Thomas brothers and

reflected in the director's current account. Moreover, it continued to be shown as a deductible expense from the Company's profits. The Court of Session action, whatever its merit or purpose, raised by the Company in August 2011 against HMRC for repayment of allegedly undue tax, relies on the sum of £900,000 being a valid deduction from expenses in calculating the Company's profits and losses. We refer to paragraphs 101-105 above). on In addition, the liability of the Company for the amount at credit of the director's account appears to have been transferred to Spring Seafoods/Capital. That company, in turn, has deployed that liability in an attempt to reduce its fiscal obligations to HMRC. We refer to paragraphs 65-74 above.

267. There is no letter from Mr Thomas, on behalf of the Company accepting the conditions. The Company did not remove the deduction of £900,000 from its accounts by reducing the amount standing in the director's current account by £900,000 and by removing that sum as a deductible expense against income. It did not write to HMRC accepting the condition. (Mr Stewart in his letter dated 31 July 2007 (referred to below) notes that he had not heard from Mr Thomas on behalf of the Company). There was sufficient time before the Company was struck off for it to write accepting the conditions proposed. It was not apparently trading. Its director, Mr Thomas, was in the habit of responding to Mr Stewart's letters speedily and often with detailed explanation. The conditions could have been accepted after the Company had been restored to the Register in 2010 or following the refusal of the Reclaiming Motion on 4 March 2011. An offer to that effect was made by Mr Stewart by letter dated 3 June 2011. The offer was not accepted.

268. Either the Company breached the agreement and, so on the common law principle of mutuality of contract cannot enforce it or rely on it, or the conditional or qualified nature of the agreement was never purified and so the *agreement* cannot be relied upon because no binding rights or obligations were created. Either way, the Company has failed to establish that the *2007 agreement* provides a sound ground of appeal in the present proceedings.

269. Notwithstanding the line being pursued by Mr Thomas on behalf of the Company in 2007 that the entry in the accounts (£900,000) was a paper exercise; and that it would not be paid or otherwise drawn down, it appears that by the end of April 2007 (if the 2007 Spring Seafoods/Capital accounts are accepted as being accurate) the sum at credit of the Director's account in the Company cessation accounts had been transferred to the director's account with Spring Seafoods/Capital although the fact that the business of the Company had been or had purported to have been transferred to Spring Seafoods/Capital had not been disclosed to Mr Stewart until at least 2009. It was thus available to be drawn down and was in fact being drawn down to some extent without any PAYE or NIC being accounted for thereon.

270. The onus lay on the Company to demonstrate that the appeals fell to be allowed on the basis of the *2007 Agreement.* The Company has failed to discharge that onus. Any *agreement* was conditional or qualified. The conditions were not all purified. Accordingly, it does not bind HMRC. It did not preclude them from issuing the Notices of Determination and the Notices of Decisions. It is therefore unnecessary to consider submissions on the effect of misrepresentation, or the remedy of reduction in

relation to voidable contracts. Nor is it necessary to consider the submissions on the effect of post July 2007 conduct of the Company. Overall, we find it difficult to conclude that the Company's conduct has been consistent. It seems to us that the Company has simply adopted from time to time whatever stance might yield the best fiscal advantage. We rest our decision on the view that any agreement was conditional, the conditions were not purified and so there was no enforceable agreement which the Company could deploy as a shield against liability for the sums specified in the Notices insofar as relating to the sum of £900,000. Moreover, any such *agreement* was not implemented. The Company has treated the entries as having real fiscal effect in their dealings with HMRC and with Spring Seafoods/Capital.

The 2010 Undertaking

Submissions

271. While Mr Upton originally restricted his arguments to the alleged payment of the sum of £900,000 he now extends it to the sum of £178,230. He submits that the Company is entitled to enforce the Undertaking. It was binding on HMRC (*Southern Cross* above). It was truly addressed to the Company even although it was not then in existence but subsequently was deemed to have been in existence. It was intended to benefit the Company on the assumption that it was restored. The real question was what was meant by *outstanding enquiries* tested as at 19 May 2010. He submitted that the phrase covered enquiries which had been drawn to the attention of Mr Thomas and were formally afoot and notified as such. The enquiry into the Company's corporation tax return opened by letter dated 4 January 2007 was the only outstanding enquiry. The scope of such an enquiry did not extend to PAYE or NIC but was restricted to corporation tax (Finance Act 1998 Schedule 18 paragraphs 18, 24, and 25). The Company's returns made no mention of (and were not required to mention) PAYE or NIC. The fact that the letter dated 4 January 2007 asked questions about PAYE was in the context of liability for corporation tax. The statutory limit of formal enquiries was important. A taxpayer was entitled to know what the Revenue's object was so that he could react appropriately eg by instructing suitable experts. Reference was made to *Funnell on HMRC Investigations & Enquiries* paragraph 1.52. Finally, the apprehension of Mr Thomas, expressed in proposed pleadings in the Court of Session restoration proceedings was irrelevant.

272. Mr Artis submitted that the Undertaking was given to the Court and not to the Company. The Company was not a party to the Undertaking and was not a beneficiary. The *outstanding enquiries* were those relating to corporation tax. PAYE does not require an enquiry. The reference to *trade* does not relate to PAYE. The Undertaking has nothing to say about PAYE. Where there is a legitimate corporation tax enquiry, HMRC can use what they learn in relation to other taxes. The reference to Code of Practice 8 in the letter opening the enquiry gives the company fair notice. PAYE was not in contemplation when the Undertaking was being discussed.

273. Both counsel originally submitted that nothing turned on the reference in the Undertaking to s29 of TMA. In his reply to the submissions of Mr Artis, Mr Upton

submitted that as s29 applied to non-corporation tax issues, the Undertaking covered more than corporation tax and thus extended to PAYE and NIC.

Decision (The 2010 Undertaking)

274. The Undertaking is set out above in the context of the restoration proceedings (paragraphs 152-156). As now presented, Mr Upton's argument, if sound, applies to both the PAYE determinations and the NIC decisions. We consider that the Company plainly has title and interest to rely on and enforce the 2010 Undertaking. It was obviously intended to confer a benefit on the Company in the sense of restricting the scope of its liabilities and providing some degree of immunity from the fruits of further investigation. S1032 of the Companies Act 2006 deems the Company always to have been in existence. That cures any difficulty that might have arisen because the Company had not been restored to the Register when the Undertaking was given.

275. If it is correct to give the word *enquiries* a technical meaning, as submitted, in effect, by Mr Upton, then it seems appropriate to give the phrase *any assessments* (in the fifth last line of the document as produced) a technical meaning too. The liability on the part of the Company for PAYE flows from the issue of Notices of Determination. The liability on the part of the Company for NIC flows from the issue of Notices of Decisions. Neither is an assessment, although the Notices of Determination are deemed to be assessments for certain purposes. Neither flows from the closure of a statutory enquiry. They relate to the remuneration by the Company to its employees. On that basis, the liability for PAYE and NIC is simply not dealt with by the Undertaking. Accordingly, issuing the Notices of Determination and Decisions does not breach the Undertaking as they are not *assessments*. The reference to s29 actually confirms that the Undertaking does not cover PAYE or NIC. S29 is not concerned with such liability (see *Weight Watchers* at paragraphs 16 and 17). The suggestion that the reference to s29 extends the Undertaking to PAYE and NIC is the very opposite of what can be taken from that reference.

276. If, on the other hand, the phrase *outstanding enquiries* is given a broader meaning, then it is apt to cover the queries already raised about PAYE and NIC. A broader meaning can be justified because the phrase *outstanding enquiries* refers to the *Company's liabilities* which is general and is not and does not need to be restricted to corporation tax liability.

277. Mr Thomas was plainly concerned about this aspect (PAYE and NIC liability of the Company and, as a consequence, his own possible personal liability) as he mentioned it in a pleading document in the restoration proceedings. The document, drafted by or at least running in the name of the counsel representing Mr Thomas, uses the word *assess* in connection with the Company's liability for PAYE. The fact that the document did not ultimately form part of his formal pleadings does not matter. It was intimated and lodged in Court. This forms part of the surrounding circumstances (known to all concerned) and forms the context for ascertaining what a reasonable person would understand was meant by the words used in the composition of the Undertaking.

278. However, that approach does not necessarily change the interpretation of *any assessments* referred to above. On that basis, the issuing of the Notices of Determination and the Notices of Decision still do not amount to the raising of *any assessments* within the meaning of the Undertaking. HMRC are, on that basis, entitled on conclusion of outstanding enquiries to issue notices of determination and decisions in relation to the Company's outstanding liabilities for PAYE and NIC which had been the subject of earlier enquiry.

279. Even if the phrase *any assessments* is construed in a non-technical sense, this does not assist the Company. The phrase would then cover PAYE and NIC liability. The *assessments*, in the form of a notice of determination and notices of decision were raised in respect of outstanding enquiries into the Company's liabilities. They were issued or raised forthwith upon the restoration of the Company to the Register (the Company was restored to the Register on 4 March 2011 when the reclaiming motion against Lord Glennie's interlocutor was refused). The notices were issued on 8 April 2011; they were thus issued on (ie following shortly on) the issue of the closure notice on 25 March 2011. In doing so, they raised no further enquiries into the Company's trade.

280. Standing back, it seems to us to be obvious that the purpose of the restoration petition was to enable HMRC to force the Company to implement its fiscal obligations, of whatever nature to HMRC. It also seems surprising that, given the fact that the liability of the Company for PAYE and NIC had been expressly raised in the course of the proceedings, an Undertaking should be construed as excluding entirely, for no apparent reason, that liability. The language of the Undertaking does not compel us to do so. Rather, it points to the conclusion we have reached. Finally if one views the Undertaking as a clause limiting liability, construing it strictly, as one might well do (if the meaning is doubtful or ambiguous by construing it against the party relying on it - here the Company), does not assist the Company.

281. If our view is sound, it is unnecessary to consider the submission on the statutory limit of formal enquiries. The Notice of Enquiry letter dated 4 January 2007, intimated that HMRC intended to enquire into the Company's Tax Returns for the period ended 31 July 2004 and 31 January 2005. The letter made express reference to Code of Practice 8.

282. Code of Practice 8 covers all the taxes and duties for which HMRC are responsible where they believe there may have been a serious loss of tax. The Code notes that it is issued because the enquiry is being directed and co-ordinated by Specialist Investigations, usually as part of a larger project. It also notes that it can become necessary to enquire into issues other than those identified at the outset.

283. The letter (4 January 2007) itself raised questions about PAYE. It could therefore come as no surprise to the Company that the enquiries might ultimately lead to the conclusion that PAYE and NIC was outstanding as well as additional corporation tax. HMRC have general powers of administration, management and collection of tax. It may simply be expedient in cases of this nature (complex, dearth of documentation, inconsistencies, and business arrangements which have

questionable commercial rationale, and an underlying suspicion of serial and serious tax abuse) for HMRC to intimate the commencement of wider enquiries in parallel with the express statutory enquiries under the corporation tax regime. If the argument is one of fair notice, as it seemed to be, then it is plain that fair notice was given that the enquiry might range beyond the extent of liability for corporation tax.

Quantum

284. As we have explained, HMRC have restricted the sums being claimed. They produced a revised calculation. We refer to paragraphs 166-179.

285. In a short document, lodged at the hearing on 9 May 2014, the Company asserts that HMRC have used different PAYE codes. The Company says it requested details of the Codes applied but HMRC have not responded. The Company contends that basic rate (BR) code should be applied. This is the default code applied by Regulation 49 of the 2003 Regulations. This requires a deduction of 22%. 22% of £495,000 is £108,900. The total liability is therefore 2x£108,900 ie £217,800.

286. We are not entirely sure what HMRC's position on this is. However, the grounds of appeal in each of the appeals before us make no mention whatsoever of *best judgement* or quantum. No application to amend the grounds of appeal has been made. We therefore do not consider that the Company should be allowed to develop this particular argument on quantum. On the first day of the Hearing, Mr Upton intimated that the only issue on quantum related to the two termination payments to Rebecca and Sarah Thomas. Evidence was led on this aspect without objection. The fact that, in the course of the Hearing, HMRC have restricted the sums claimed in the Notices, does not open up the appeals so as to enable the Company to present additional arguments on separate aspects of quantum, particularly ones that could have been raised at the outset or at least at a much earlier stage than the final day of the hearing.

287. We therefore do not propose to consider the question of Codes further or call for further evidence or submissions. The effect of the HMRC calculations is that the sum specified in the Notice of Determination dated 5 September 2012 is further varied by reducing it to the sum of **£380,412**. The Notices of Decision dated 5 September 2012 in respect of the earnings of Mr Thomas and Stuart Thomas are further varied by reducing the sum specified in each Notice to **£70,352.69 (ie a total of £140,705.38)**.

Summary

1 In terms of the cessation accounts, the accrued bonus of £900,000. was unreservedly at the disposal of Mr Thomas and his brother (paragraph 210).

2 Even if it is accepted that the sum at credit of the director's account in the cessation accounts does not include the sum of £900,000, it is a reasonable inference (if not the only conclusion which can be reached) that the money has been paid out by the Company to Mr Thomas and his brother despite the former's protestations to the contrary. There

has to be, in accounting terms, a corresponding credit to the deduction (as an expense) in the accounts under the heading STAFF COSTS. That credit would be a credit entry in the Company's bank account; the bank becomes a creditor of the Company to the extent of an additional £900,000. The Company's overdraft is increased or its bank balance is reduced. Although requested to do so, the Company persistently failed to provide a complete record of the transactions on its director's account (paragraph 213).

3 Any decision not to operate a PAYE (including NIC) system over the period 1 August 2003 to 31 January 2005, must have been deliberate with a view to the Company not having to pay PAYE and NIC which ought normally to have been deducted from wages, salaries and bonuses paid to administrative staff and directors (paragraph 197).

4 During the period to which the cessation accounts relate, the Company did not account to HMRC for any PAYE or NIC in respect of the bonus of £900,000, or for a significant part of the wages and salaries of £178,230 mentioned in the cessation accounts (paragraph 214).

5 The submission of the nil return and the consequent failure to lodge PAYE returns accounting for tax and NIC on the sum of £900,000 were deliberate acts. If PAYE is due at all its non-payment has been brought about by the deliberate conduct of the Company (paragraphs 237 & 238).

6 £90,000 of the £178,230 for wages and salaries remains unaccounted for through what can only be described as the deliberate conduct of the Company. Such tax remains *lost* and is part of the subject matter of the Notices of Determination and Notices of Decision referred to above. That, of itself, is sufficient to render the Notices of Determination timeous in terms of section 36 TMA. (paragraphs 197, 214 & 239).

7 The obligation on the part of the Company to make payment in terms of the Notices relating to PAYE has not been extinguished and the Notice of Decision dated 5 September 2012 is therefore enforceable (paragraph 239).

8 The obligation on the part of the Company to make payment in terms of the decisions relating to NIC has not been extinguished and is therefore enforceable (paragraph 244).

9 The onus lay on the Company to demonstrate that the appeals fell to be allowed on the basis of the 2007 Agreement. The Company has failed to discharge that onus. Any agreement was conditional. The conditions were not all purified. Accordingly, it does not bind

HMRC. It did not preclude them from issuing the Notices of Determination and the Notices of Decisions (paragraph 261).

10 Either the Company breached the *2007 agreement* and so, on the common law principle of mutuality of contract, cannot enforce it or rely on it, or the conditional or qualified nature of the agreement was never purified and so the agreement cannot be relied upon because no binding rights or obligations were created. Moreover, any such agreement was not implemented. Either way, the Company has failed to establish that the 2007 *agreement* provides a sound ground of appeal in the present proceedings (paragraphs 268 and 270).

11 The issuing the Notices of Determination and Decisions does not breach the 2010 Undertaking (paragraphs 274 – 279)

12 The sum specified in the Notice of Determination dated 5 September 2012 is further varied by reducing it to the sum of £380,412. The Notices of Decision dated 5 September 2012 in respect of the earnings of Mr Thomas and Stuart Thomas are further varied by reducing the sum specified in each Notice to £70,352.69 (i.e. a total of £140,705.38) (paragraph 287).

Result

288. The sum specified in the Notice of Determination dated 5 September 2012 is further varied by reducing it to the sum of **£380,412**. The Notices of Decision dated 5 September 2012 in respect of the earnings of Mr Thomas and Stuart Thomas are further varied by reducing the sum specified in each Notice to **£70,352.69 (ie a total of £140,705.38)**.

289. All questions of expenses are meantime reserved.

290. 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.

J GORDON REID QC FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 11 September 2014

APPENDIX 1 (see paragraph 7)

Appellant	Tribunal Reference	Year/Period	Issues	Open/Closed	Present	Position
Spring Salmon & Seafood Ltd	TC/2012/8472	2004/05	Regulation 80 and Section 8 NIC on £900,000 accrued bonuses and part of wages charge.	open		
Spring Salmon & Seafood Ltd	TC/2011/6273	31/07/2002	Intangibles relief claims.	open	Procedure delayed by continuation of hearings in PAYE/ NIC. Appellant seeking strike out of HMRC defence. Hearings not expected until latter part of 2014.	
	appeals consolidated	31/07/2003	ditto	open	ditto	
	above reference.	31/07/2004	ditto and Schedule 1A TMA 1970 submission by the Appellant.	open	ditto	
		31/01/2005	ditto	open	ditto	
Spring Salmon & Seafood Ltd	FTC/109/2013	31/07/2004	Appeals to UT against FTT decision of 24/5/2013.	open	Hearing dates fixed	03/10/2014
		31/01/2005	ditto	open	Hearing dates fixed	03/10/2014
Spring Capital Ltd	TC/2011/1784	09/03/2005	Section 343 ICTA loss brought forward from SSSL. Intangibles relif claims on expenditure of £1,557,991 then on expenditure of £20M.	open	Hearing dates fixed	19 - 22 May 2014
	appeals consolidated	30/04/2005	ditto	open	Hearing dates fixed	19 - 22 May 2014
	above reference.	30/04/2006	Ditto. Plus pension contributions APE30/4/2006	open	Hearing dates fixed	19 - 22 May 2014
		30/04/2007	ditto	open	Hearing dates fixed	19 - 22 May 2014

Appellant	Tribunal Reference	Year/Period	Issues	Open/Closed	Present	Position
		30/04/2008	ditto	open	Hearing dates fixed	19 - 22 May 2014
		30/04/2009	ditto	open	Hearing dates fixed	19 - 22 May 2014
	TC/2012/4103	30/04/2010	ditto. Although appellant also appeals against FTT decision that enquiry notice was not a closure notice as submitted by Appellant.	open	Awaiting dates for hearing	
Mr Roderick Thomas	SC/3012/2008	2002/03	Whether participators in SSSL.HMRC accepted 6/12/2013 that not participtors.	closed		
Mr Stuart Thomas	SC/3013/2008	2002/03	ditto	closed		
Mr Roderick Thomas	SC/3012/2008	2004/05	Whether settlors in Trust that controlled SSSL. Appellants accepted that settlors on 30/4/2012.	closed		
Mr Stuart Thomas	SC/3013/2008	2004/05	ditto	closed		
Mr Roderick Thomas	TC/2010/6253	2005/06	Whether settlors in Trust that controllled SSSL. Apellants appeal on basis that not settlors. Resile from earlier agreement.	open	Awaiting dates for hearing	
Mr Stuart Thomas	TC/2010/6254	2005/06	ditto	open	Awaiting dates for hearing	
Mr Roderick Thomas	TC/2011/4648	2006/07	Appellant accepts that settlor. Appeal determined.	closed		
Mr Stuart Thomas	TC/2013/01515	2006/07	Appellant accepts that settlor but benefit issue arising.	open	Awaiting dates for hearing	

Appellant	Tribunal Reference	Year/Period	Issues	Open/Closed	Present	Position
Mr Roderick Thomas	TC/2010/7244	2007/08	CGT loss claim £3.5M submitted 21/5/2010	open	Stayed behind 2005/06 appeal	
Mr Stuart Thomas	TC/2010/7697	2007/08	CGT loss claim £3.5M submitted 21/5/2010			
Mr Roderick Thomas	TC/2013/4284	2008/09	Discovery assessment on basis that settlor in the Trust that controlled SSSL.	open	Stayed behind 2005/06 appeal	
Mr Stuart Thomas	TC/2013/4283	2008/09	Discovery assessment on basis that settlor in the Trust that controlled SSSL.	open	Stayed behind 2005/06 appeal	
Mrs Rebecca Thomas	TC/2011/2616	2007/08	Claim to CGT loss relief £100,000 against income on basis that further shares in SSSL issued 15/3/2007 and income tax repayment claim arising.	open	To be heard June/ July 2014	
Mrs Rebecca Thomas	TC/2012/5052	2007/08	Appeal against penalty determination.	open	To be heard June/ July 2014	
Mrs Sarah Thomas	TC/2011/2618	2007/08	Claim to CGT loss relief £100,000 against income on basis that further shares in SSSL issued 15/3/2007 and income tax repayment claim arising	open	To be heard June/ July 2014	
Mrs Sarah Thomas	TC/2012/5039	2007/08	Appeal against penalty determination.	open	To be heard June/ July 2014	
Mrs Rebecca Thomas	TC/2012/10379	2008/09	Claim to income tax repayment. Penalty determination.	open	Awaiting dates for hearing	

Appellant	Tribunal Reference	Year/Period	Issues	Open/Closed	Present	Position
Mrs Sarah Thomas	TC/2012/10669	2008/09	Claim to CGT loss relief of £100,000 re shares in unconnected company. Discovery assessment issued. Evidence of share subscription provided following appeal to Tribunal. Appeal settled.	closed		

APPENDIX 2 (see paragraph 26)

Roderick and Stuart Thomas SC/3012/2008; SC/3013/2008 Judge Berner 2013

1. This appeal relates to the tax returns of Mr Thomas and his brother for the tax year 2002/03. These tax returns showed a chargeable gain of £1.4m. This related to the sale of the goodwill of its business to the Company on 26 July 2002 for £2.8m. HMRC say that these sums are in fact distributions chargeable to income tax. Closure notices were issued on 31 October 2007. A closure notice in respect of the partnership was also issued on 12 December 2007.

2. Enquiries had also been opened into the brothers' tax returns for the tax year 2004/05. A closure notice was issued on 31 July 2007 (see above at paragraph 140).

3. This case discussed the preliminary issue whether a letter written by HMRC dated 30 May 2012 constituted an agreement of their personal tax assessments for the tax year 2004/05 (this is the same letter referred to in the Grounds of Appeal in the appeals before us. That ground has been abandoned). In the course of the hearing that issue was resolved. There were no other outstanding issues for the tax year 2004/05. However, an issue arose in relation to the effect of the settlement agreement of 24 May 2004. In particular, in relation to the tax year 2002/03, the Tribunal considered whether it had the same effect as a closure notice for the year ended 5 April 2003, and whether HMRC had power to issue further closure notices on 31 October 2007 in respect of the tax year 2002/03.

4. The Tribunal noted various provisions of the settlement agreement and the resolution of disputes about its interpretation. The General Commissioner's decision in relation to applications for closure notices in respect of the periods 2001/02 and 2002/03 was that HMRC were not entitled to open a further enquiry into the 2002/03 period. That decision was quashed after an application for judicial review was made to the High Court *HMRC v Gen Comm* [2007] EWHC 871 (Admin). The Court declared that the 2004 settlement agreement did not in any way prevent enquiries in respect of the tax year 2002/03 except only "actual or potential liabilities arising from the affairs of Bala Ltd or the Maclennan Trust". The First-tier Tribunal regarded itself as bound by the decision of the High Court. It noted that the settlement agreement expressly carved out from those settled liabilities any liability that might arise in relation to the acquisition of the partnership business by the Company (paragraphs 25, 29. 31, 33).

5. It was also argued by Mr Thomas that a binding agreement had been reached with HMRC at a case management hearing that any distribution income included in the closure notices for the year 2002/03 was to be treated as income arising under the Maclennan Trust. If so, it would then be argued that such a liability had been settled under the settlement agreement of 24 May 2004. The First-tier Tribunal rejected the

assertion that such an agreement had been reached at the case management hearing. Permission to appeal was granted. Mr Thomas represented the Appellants and Mr Stewart represented HMRC

6. According to information provided by HMRC, these appeals are now closed.

Petition of the Company for Judicial Review, Lady Smith 20/2/04

7. This petition sought to set aside the enquiry notice issued in relation to the Company's tax return for the period 1 August 1999 to 31 July 2000, lodged on 31 July 2001. The argument was the notice ought to have been, but was not served at the Company's registered office. Having found that the notice did not even require to be in writing, Lady Smith had no hesitation in concluding that the notice did not require to be served on the Company's registered office (paragraph 27 and 33). She also rejected an argument that sending a copy of the notice to the Company's agents was not valid service. She also found that the Company had agreed at an earlier meeting with the Revenue that sending the notice to their agents would suffice (paragraph 38). The Court also accepted the Revenue's personal bar argument, that Mr Thomas was aware of the arguments advanced at the outset but simply waited for the 12 month period to expire before raising it, with a view to preventing a second (valid) notice being issued timeously, and in the meantime instructed his agents to correspond with the Revenue giving the impression that the notice was being treated as valid (paragraph 39).

8. This case seems to us to be typical of how the Company conducts its fiscal affairs.

The Company v HMRC **[2005] STC (SCD) 830**

9. This case related to appeals against enquiry notices in relation to the Company's returns for the years to 31 July 2002 and 2003. The background was that the returns and accompanying accounts disclosed that by a Minute of Agreement dated 24 July 2002 the Company purchased the entire business and assets including goodwill of the S&R Thomas Partnership for £2,835,000, being £2,800,000 for goodwill and £35,000 for the stock. The partnership was said to have ceased trading after the sale. Each partner declared a capital gain of £1,400,000 for the year of assessment ended 5 April 2003. They sought business taper relief. The Company in its returns for the accounting periods ended 31 July 2002 and 2003 treated the goodwill acquired as an intangible asset for which relief was available.

10. The Revenue were challenging the Company's entitlement to relief on the basis that relief may not be available for the goodwill; the transaction was not at arm's length and the goodwill was overvalued; the sale was part of a tax avoidance scheme; the overvaluation represented disguised remuneration paid by the Company to the brothers Thomas which attracted PAYE and NIC; alternatively the overvaluation paid was a distribution for which no relief was available.

11. The Company raised various grounds of appeal and sought closure notices. The Decision itself is primarily concerned with the nature and extent of the documents which were discoverable. However, the Judge (J Ghosh QC) records information provided by the Revenue to the effect that the partnership's accounts disclosed that 97.1% of the partnership's purchase were from Thomas Lindh Ltd (previously Spring Salmon Ltd), a company owned by the Thomas family and 86.4% of the partnership's sales were to the Company. The enquiry notices were upheld subject to some modification.

12. It is of some interest to note that the Special Commissioner observed that for a hearing that would have been heard by the General Commissioners in Scotland an appeal is conducted before the Special Commissioners on the *prima facie* basis that submissions on Scots law are made as legal submissions and submissions on English law are made as submissions of fact (paragraphs 40 and 42).

R v Gen Comms and Mr Thomas, SJ Thomas, and the Partnership **[2007] EWHC 871 (Admin)**

13. The Revenue sought judicial review of decisions by the General Commissioners. These related to s19A TMA notices served on Mr Thomas and his brother requiring the production of documents. These related to their returns for the tax year ended 5 April 2003. Enquiries had been opened in relation to the tax returns of the brothers and the partnership for that tax year. These notices were resisted on the basis that that tax period was covered by the Agreement/Settlement dated May 2004. The General Commissioners agreed and closed the enquiries (paragraph 2).

14. The Judge considered the interpretation of the May 2004 Agreement. He construed the 2004 Agreement as meaning that for the tax year 2002/2003, the liability of the brothers covered by the Agreement was restricted to the actual or its potential liabilities arising from the affairs of Bala Ltd or the Maclennan Trust (paragraph 45). The liability of the partnership for the tax year 2002/2003 was also not covered by the 2004 Agreement. The General Commissioners erred in law and their decisions were quashed (paragraphs 46, 50 and 51).

The Brothers v HMRC **[2011] UKFTT 82 (TC)**

15. This was an application for a closure notice and related to the tax year ended 5 April 2007. The brothers appeared in person. Mr Stewart appeared for HMRC. The background was the activities of the Maclennan Trust and the brothers' interest in it. In relation to certain gains on share disposals by the Trust, HMRC considered that the brothers were the settlors of the Trust and liable for tax on the gain. Assessments were raised charging the full amount of the gain (£393,984) in the tax year ended 5 April 2006 (paragraph 18).

16. The enquiry notices for the tax year ended 5 April 2007 requested details of disposals and acquisitions of the Trust together with its financial statements. At the hearing the brothers provided some information. HMRC's dilemma was that it was

not clear whether gains assessed arose wholly in the tax year 2005/06 or partly in that year and partly in the following tax year (paragraph 22). The brothers made various allegations of delay on the part of HMRC in having the question whether the brothers were settlors of the Trust, an issue which arose in respect of appeals relating to the 2003/04 tax year.

17. The Tribunal refused the application for a closure notice (paragraphs 30 and 31). The brothers had not provided sufficient information relating to disposals and capital gains and other matters

18. The appeals to which this decision relates (TC/2010/07697 and TC/2010/7244) are still open. These relate to a CGT loss claim of £3.5m and are stayed behind appeals TC/2010/6253 and TC/2010/6254 which relates to the tax year 2005/06 and the question whether the brothers are settlors of the Maclennan Trust. Those latter two appeals are still open and hearings have yet to take place.

***Spring Capital Ltd v HMRC* [2013] SFTD 570**

19. This appeal (TC/2012/4103) related to Spring Capital's tax return for the accounting period ending 30 April 2010 (it will be remembered that Spring Seafoods Ltd changed its name to Spring Capital). The return claimed £2m for amortisation of goodwill, and intangibles relief. HMRC opened an enquiry. Spring Capital appealed to the Tribunal on the basis that the HMRC notice was also a closure notice and if not, it was an amendment or assessment. In considering HMRC's application to strike out the appeal on the ground of no jurisdiction, Judge Mosedale held that the notice was not a closure notice; nor was it an amendment to the tax return or an assessment. The Tribunal therefore had no jurisdiction to hear the appeal which was struck out. It was also noted that an information Notice served under para 1 of Schedule 3 to the Finance Act 2008 relating to the amortisation and the goodwill had not been complied with. Once again Mr Thomas appeared for the appellant and Mr Stewart for HMRC. We have been informed that this decision is under appeal but no hearing has yet taken place before the Upper Tribunal

***Company v HMRC* 24/5/13 (TC/2011/6273) Judge Mosedale**

20. The proceedings under consideration were an appeal against amendments in closure notices relating to enquiries opened on 28 October 2004 into the Companies returns for the accounting years ended 31 July 2002 and 31 July 2003. Both returns had claimed relief for amortisation of goodwill. It was also noted that in August 2006 returns for the accounting years ending 31 July 2004 and 31 January 2005 were also submitted. Enquiries were opened into these returns on 4 January 2007.

21. Closure notices were issued in respect of the 2002 and 2003 returns on 25 March 2011. These closure notices refused the claim to amortisation of goodwill and stated that HMRC did not accept that the Company had paid the tax it claimed to have paid. This argument relates to the effect of the 2004 Settlement (see paragraphs 101-105 above). At the same time closure notices were issued in relation to the enquiries

opened into the 2004 and 2005 returns. These closure notices denied the Company's claim to terminal loss relief made in those returns which had been said to arise out of the amortisation of the goodwill. On 12 April, the Company appealed against all four closure notices. It lodged an appeal to the tribunal in respect of the closure notices relating to 2002 and 2003 returns but not in respect of the closure notices relating to the 2004 and 2005 returns.

22. The tribunal raised two questions of jurisdiction. The first was whether the tribunal had jurisdiction to consider the Company's claim that it had already paid the tax owing. The second was whether the tribunal could consider the question whether the Company's claim to terminal loss relief was final.

23. The Company's argument was that it made its terminal loss relief claim not in its returns but by separate letter. HMRC had power to open an enquiry into that claim but did not do so. The claim was therefore final. On that basis, as the claim had not been met, the Company raised proceedings to preserve their rights of recovery against the possibility of prescription. HMRC assert that the claim was made in the returns which include the accompanying documents and enquiries were duly opened and closed by disallowing the claim for terminal loss relief. The Company advanced an alternative argument that in refusing the claim to terminal loss relief, HMRC were in breach of the 2010 Undertaking (see paragraphs 274-283 above). They also said the tax had already been paid as part of the settlement agreement in 2004.

24. After reviewing various statutory provisions and authority on jurisdiction, Judge Mosedale concluded that the First-tier Tribunal had jurisdiction to determine the validity of claims to terminal loss relief (paragraphs 51-53, 121). She raised a doubt whether the tribunal had jurisdiction to determine the question whether there had been a breach of the 2010 Undertaking on public law grounds but expressed no concluded view (paragraphs 54 and 55).

25. Judge Mosedale noted that the validity of the 2004 and 2005 closure notices had not been challenged by appeal to the tribunal. She rejected the argument that they were void. Rather, they were voidable (paragraphs 77 and 81, and 83, 85, 87, 91). As the procedure for challenging them (through the tribunals) has not been followed they stand effective to deny the terminal loss relief claim. The terminal loss relief claim could not therefore form part of the proceedings before her. The Court of Session would, she thought, come to the same conclusion (paragraphs 86, 88, 122).

26. Judge Mosedale also concluded that the tribunal had jurisdiction to determine whether the tax claimed to have been paid, had been paid; and as the tribunal had such jurisdiction, the courts did not (paragraphs 110-113, 123). She also noted that as Judge Ghosh had already decided that the 2004 Agreement did not extend to the periods ended 31 July 2002 and 31 July 2003, raising the issue of the scope of the 2004 Agreement, while not precluded by the doctrine of *res judicata*, may nevertheless be an abuse of process (paragraphs 119, 124).

27. A further hearing is expected to take place later this year.

***Brothers v HMRC* 2014 UKFTT 273 (TC), TC/2013/04284 and TC/2013/04283**

28. This appeal relates to discovery assessments issued in April 2013 in relation to the tax year 2008/09. The brothers applied to have HMRC barred from taking further part in the proceedings on the grounds that they had no reasonable prospects of success. The assessments related to the gains of the Maclennan Trust. Judge Kempster refused the application.

29. Judge Kempster noted that HMRC had conceded defeat in relation to appeals against closure notices for 2002/03; that the tribunal had determined that there were no gains in respect of the tax year 2004/05 and income tax had been *de minimis*; appeals against assessments for 2005/06 were stayed pending determination of the settlor issue in relation to 2002/03. In relation to 2006/07, after a very long enquiry, HMRC accepted there was no net liability to tax. In relation to 2007/08 HMRC opened enquiries out of time.

***Brothers v HMRC* 2014 UKFTT TC/2010/06254 & TC/2010/06253 (Judge Berner)**

30. These appeals relating to discovery assessments issued in relation to the Tax Year 2005/06. The appellants (represented by Mr Thomas) sought to have HMRC barred from taking further part in these proceedings. The application arose out of a section 54 agreement made in respect of Tribunal proceedings in relation to the tax year 2002/03. The general background was whether the brothers were settlors of the MacLennan Trust. HMRC had agreed that they would treat a determination by the Tribunal of the settlor issue in relation to 2002/03 as binding in respect of the 2005/06 appeal. Subsequently HMRC chose not to pursue further the appeal assessments in relation to 2002/03. A section 54 agreement was entered into.

31. The argument for the appellants appears to have been that as the 2002/03 appeal, which included the settlor issue, and been resolved, HMRC were bound by that settlement and could not argue the settlor issue in relation to the tax years 2005/06. However, Judge Berner concluded, as a matter of construction of the section 54 agreement, that it contained no express agreement of the settlor issue; indeed the very basis of the section 54 agreement was that the settlor issue remained to be determined by the tribunal in respect of other years under appeal including 2005/06 (paragraph 14).

32. The application that HMRC be barred from taking further part in the proceedings therefore failed.