TC02461

Appeal number: TC/2012/4103

CORPORATION TAX –whether notice opening enquiry simultaneously closed the enquiry – no – appeal struck out for lack of jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 17 October 2012

Mr R Thomas, Director of the Appellant, for the Appellant

Mr A Stewart, Officer of HMRC, for the Respondents

DECISION

1. HMRC applied on 13 April 2012 to strike out the appeal lodged on behalf of the appellant on 14 March 2012 on the grounds that the Tribunal has no jurisdiction to hear it because there was no decision by HMRC which could be appealed.

Background

2. The appellant filed its tax return in respect of its accounting period ending on 30 April 2010 on 28 April 2011. The documents comprising this tax return reported a claim that, although the company had an operating profit for the year of over £1m, no tax was due because of a claim of £2m for amortisation of goodwill.

3. On 24 February 2012, within the 12 months allowed, Mr Stewart of HMRC wrote a letter to Mr Thomas on behalf of the appellant. This letter was headed:

> "Notice of Enquiry Corporation Tax Self Assessment Return Period ended 30 April 2010."

It went on to say:

> "I am writing to tell you that I am enquiring into the company tax return for the period ended 30 April 2010. The enquiry will be conducted under Code of Practice 8, a copy of which is enclosed."

This was followed by 10 numbered paragraphs each detailing a separate matter in respect of the tax return where HMRC was not satisfied. This application centred on the last two of these, which were in respect of the claim for intangibles relief (paragraph 9) and amortisation of goodwill (paragraph 10).

4. In respect of paragraphs 9 & 10, it seems these claims had been made in the previous years' tax returns and had been denied. In respect of paragraph 9, Mr Stewart set out the background and concluded:

> "In the meantime, I advise the company that it is not accepted that there is a valid claim to intangibles relief for the period ended to 30 April 2010 by reason of the transfer of the balance on the director's current accounts."

5. In respect of paragraph 10, Mr Stewart's letter outlined the background and concluded:

> "I have explained in previous letters why I cannot accept the claim to relief of £2,000,000 in earlier periods; and advise you that I cannot accept the claim for period ended 30 April 2010."

6. On 14 March 2012, Mr Thomas on behalf of the appellant appealed to the Tribunal. The Notice of Appeal stated that the date of HMRC's decision as 24 February 2012. Both parties were agreed that this referred to the letter of that date referred to above headed "Notice of Enquiry".

7. On 29 March 2012, Mr Stewart sent to Mr Thomas on behalf of the appellant an Information Notice under paragraph 1 of Schedule 36 to the Finance Act 2008. It referred to the enquiry notice of 24 February 2012 and requested information and documents in respect of the 10 numbered items referred to above, including specified documents in relation to the claim for amortisation of goodwill. Both parties appeared agreed at the hearing before me that, as at the date of the hearing, this Information Notice had not been complied with.

8. On 30 March 2012, Mr Thomas on behalf of the appellant lodged an appeal with HMRC against the Information Notice. The appellant's grounds of appeal were stated as:

> "We are treating the decision stated in your letter of 24/2/12 as a closure notice. Accordingly we appeal against your information notice dated 29/3/2012 on the grounds that you have already stated your conclusions and thus completed your enquiry for p/e 30/4/2010."

9. That appeal has not yet been lodged with the Tribunal and the hearing before me did not relate to it. I merely note in passing that both parties appeared to be labouring under the misapprehension that an Information Notice under Schedule 36 could not be served after the service of a Closure Notice. There is no such restriction in Schedule 36 Finance Act 2008.

The submissions

10. Mr Stewart's case was that the letter of 24 February 2012 was a notice of enquiry and not a closure notice. There is no right of appeal against a notice of enquiry or any matter stated in it. The Tribunal therefore had no jurisdiction. Or put another way, the letter of 24 February did not effect an amendment to the appellant's tax return and there was therefore nothing to appeal.

11. Mr Stewart's case was, in addition, that in any event that the Tribunal had no jurisdiction to entertain the appeal because contrary to section 49D TMA 1970 the company had not first notified its appeal to HMRC.

12. Mr Thomas' case is that the letter of 24 February was simultaneously a notice of enquiry and a closure notice. This was because (at least in respect of matters at paragraphs 9 & 10) the letter raised no enquiries but merely stated that the company was not entitled to the claimed relief. This was a conclusion and the company ought to have the right to appeal against it.

13. Secondly, Mr Thomas argued that if the letter of 24 February was not a Closure Notice, it was nevertheless an amendment or assessment and that paragraph 48 of Schedule 18 to the Finance Act 1998 gave the appellant the right to appeal it.

14. Mr Thomas also argued that he did not need to show that the letter was a closure notice or an assessment: he only had to show that there was an arguable case that the letter was a closure notice or an assessment. He relied on the case of *Clark* TC1164 for this proposition.

Decision

Threshold for striking out

15. In the *Clark* case, the chairman stated that appeals could only be struck out under Rule 8(2) where it was "plain and obvious" that they would not succeed (see paragraphs 5 & 6). The issues in that case were whether the document the taxpayer had received from HMRC was an assessment, and if it was, whether the appellant could rely on an extra statutory concession as his sole grounds for appeal.

16. The Tribunal in that case concluded at paragraph 94 that there was an arguable case that the document in issue was an assessment and that therefore the appeal would not be struck out.

17. If it was not an assessment, however, the Tribunal would have had no jurisdiction to entertain the appeal, because the Tribunal is a statutory body and its jurisdiction only extends to matters given to it by statute. It would only have jurisdiction if it was an assessment as (so far as that matter was concerned) the tribunal was only given jurisdiction on an appeal against an assessment.

18. Rule 8(2) provides:

> "The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them…."

19. It is therefore apparent that I must, with respect, diverge from the opinion expressed by the Presiding Chair in that case in paragraph 6. An appeal where this Tribunal has no jurisdiction must be struck out. It is not open to the Tribunal, having concluded that there is an arguable case on jurisdiction, to refuse to strike out the appeal: it must resolve the issue. It must decide whether there is jurisdiction or not and, in the latter case, the appeal must be struck out.

20. The Presiding Chair referred to the decisions in *Lawrence v Lord Norreys* (1890) and of the House of Lords in *Three Rivers District Council and others v Governor and Company of the Bank of England* [2001] UKHL 16 as establishing (or at least confirming) that the test for striking out is that it is only to be used in plain and obvious cases. That is of course the position where the application for striking out is on the grounds that the appeal has no reasonable prospect of success (this Tribunal's Rule 8(3)(c) or in the High Court on the basis it was an abuse of process as it had no realistic prospect of success. And my understanding is that those cases involved such applications.

21. Here and in the *Clark* case, however, the question was whether the Tribunal had jurisdiction. That is entirely a matter of law and it is one that a Tribunal faced with an appeal must determine. It must strike out an appeal where it has no jurisdiction: it cannot allow an appeal to continue to a substantive hearing on the merits where the Tribunal has no jurisdiction.

22. However, it may simply be that the Presiding Chair meant no more than she did not consider that it was appropriate to decide the question of jurisdiction on the papers and wished to defer it to an oral hearing. But if at that subsequent hearing the Tribunal decided that the document did not amount to an assessment, it ought to have struck out the appeal. I note that that is what happened in a similar fact position in the case of *Prince and others* [2012] UKFTT 157. The Tribunal concluded that the document was not an assessment and struck out the appeal.

23. Mr Thomas is therefore wrong that it is only necessary for me to be satisfied that there is an arguable case that Mr Stewart's letter of 24 February was a Closure Notice or an assessment in order to refuse Mr Stewart's application to strike out. I have to decide the matter because if I am satisfied that the letter was neither a Closure Notice nor an assessment, I must strike out the appeal.

A Closure notice?

24. I agree with Mr Stewart that his letter of 24 February 2012 opened the enquiry under paragraph 24 but did not simultaneously close it under paragraph 32.

25. Schedule 18 of the Finance Act 1998 provides at paragraph 24:

> "24(1) An officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.
>
> ….

And provides at paragraph 32 and 34:

> "32(1) An enquiry is completed when an officer of Revenue and Customs by notice (a "closure notice") informs the company that they have completed their enquiry and state their conclusions.
>
> ….
>
> 34(1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must –
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required –
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) …..
>
> ….
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) …"

26. The legislation assumes that opening an enquiry under paragraph 24 will not occur at the same time as closing it under paragraph 32. While Mr Stewart's

statements at paragraphs 9 & 10 were worded conclusively rather than enquiringly, because he said the taxpayer was not entitled to the claimed relief rather than that it might not be entitled to the claimed relief, nevertheless this did not convert an opening of an enquiry into a closing of an enquiry.

27. It is clear that a Closure Notice should deal with all matters raised in the enquiry because otherwise it would be impossible, as required by paragraph 34, to state a conclusion on the final amount of tax liability. Yet Mr Thomas did not suggest (and, having read the letter, there are no grounds on which he could suggest) that conclusive statements were made in respect of the other 8 matters which Mr Stewart had stated he was enquiring into. So although Mr Steward had expressed a concluded view on one matter, he had yet to express a concluded view on the other matters. So even had this concluded view on the goodwill amortisation been given separately in a later letter to the letter of 24 February, that statement would not make the letter it was contained in a closure notice.

28. Further, paragraph 34 requires a closure notice to amend the tax return (unless HMRC believed no amendments were necessary which is not the case here). Yet the letter of 24 February made no amendments to the company's tax return: in particular Mr Stewart did not state an amount of tax which HMRC considered was due in substitution to the Company's figure of nil.

29. Mr Thomas' view is that it was not necessary for HMRC to quantify the tax liability as it could be worked out from the tax calculation submitted with the tax return. I disagree. Paragraph 34 requires HMRC to state the amendment. This Tribunal would not accept that HMRC had issued a proper closure notice if all the officer did was issue a letter saying relief was denied but without amending the tax return: the fact that the amendment could be easily calculated is irrelevant.

30. Mr Thomas also argued, relying on the case of *Cottar* [2012] EWCA Civ 81 that the courts would look at substance over form and the substance (in Mr Thomas' view) of the 24 February letter was that it was a closure notice. While it might be true that that case could be analysed as one of substance over form in that a claim to loss relief was treated as an amendment to a self assessment return, it is of no help to the appellant. Neither the form nor the substance of the letter of 24 February was that of a closure notice. In particular, it did not require payment of a specified amount of tax and its heading and second paragraph referred to it being the opening of enquiries.

31. Therefore, the letter of 24 February 2012 was not a closure notice. It was what it purported to be, a notice opening an enquiry.

32. There is no right of appeal against a notice opening an enquiry. This is not surprising as one is not needed: the notice of enquiry is nothing more than an opening of enquiries to check the correctness of the return. However categoric were Mr Stewart's statements denying relief in his letter of 24 February or in later letters, unless and until the enquiry was closed and an amendment stated, HMRC could not take enforcement action against the company in respect of any tax unpaid because of this claim to relief.

33. The opening of an enquiry does not create any liability on the taxpayer to pay any tax. What it does do is create uncertainty in his tax affairs, and his position in this respect is protected by the right to apply for a closure notice in paragraph 33:

> "33(1) the company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a closure notice within a specified period.
>
> …
>
> (3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a closure notice within a specified period."

34. It is open to the appellant to make an application under this paragraph. Indeed, I note that Mr Thomas complained in his submissions to me that HMRC raise enquiries into the appellant's tax returns every year and in his view HMRC only did this to be vexatious. If Mr Thomas really believes this, then his remedy is to apply for a Closure Notice. I express no view on its likely success, but note that a Tribunal is unlikely to order closure where it is satisfied that the taxpayer has not yet provided answers to relevant questions about its tax affairs under enquiry.

35. In any event, the appellant's notice of appeal the subject of this hearing was not and did not purport to be an application under paragraph 33 for a Closure Notice.

An assessment?

36. Mr Thomas' second submission was that if not a Closure Notice the letter opening the enquiry was an assessment under paragraph 41 Schedule 18 Finance Act 1998. This provides:

> "(1) If the Inland Revenue discover as regards an accounting period of a company that –
>
> ….
>
> (c) relief has been given which is or has become excessive,
>
> they may make an assessment (a 'discovery assessment') in the amount or further amount which ought in their opinion be charged in order to make good to the Crown the loss of tax."

37. As the letter claimed to be a discovery assessment was also a letter which opened an enquiry, clearly the pre-condition in paragraph 44 that the enquiry is completed was not met. Discovery assessments can also be made where the taxpayer has brought about tax loss carelessly or deliberately (paragraph 43), but putting aside this issue, on which I had no evidence, this matter is simply resolved because the letter of 24 February was not an assessment. It did not meet the requirements of paragraph 41(1) because it did not specify an amount of tax to be charged to the appellant to make good the (alleged) loss of tax. While it did say the relief claimed in a particular sum was denied, it did not specify the amount of tax that the company should pay. And while Mr Thomas says that that is easily calculated from the

company's return, that is not the point. The point is that this did not specify an amount of tax and was therefore not an assessment.

38. Further, the letter of 24 February did not meet the requirements of paragraph 47 and in particular it did not specify the time in which an appeal must be made as required by paragraph 47(1)(b).

39. As it was not an assessment, HMRC could not take enforcement action in respect of it and the taxpayer does not have and does not need a right of appeal.

40. Mr Thomas also drew my attention to paragraphs 57 & 58 of Schedule 18 but these are irrelevant: howsoever the claim for relief is made, HMRC would need to issue a closure notice or assessment in order to deny it. At the date of the hearing in front of me they had done neither.

41. Mr Thomas submits that the letter ought to be treated as an assessment because otherwise the company would be deprived of the right to appeal it. I cannot agree. HMRC can only enforce payment of assessments (assuming they are not appealed): where there is no assessment, there is no liability. The appellant has nothing to appeal so it is not deprived of its right to appeal.

42. Therefore, I agree with HMRC that I have no jurisdiction to hear an appeal against what was an opening of enquiry under paragraph 24 and indeed there is nothing in that letter that could be the subject of an appeal.

43. I strike out this appeal under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 rule 8(2) for lack of jurisdiction.

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 28 December 2012