[2016] UKUT 0105 (TCC)

Appeal number: FTC/120/2014

Corporation Tax – para 33 Sch 18 FA 98 – application for closure notice – discovery assessment made before enquiry opened – settled by agreement under s 54 Taxes Management Act 1970 – effect of settlement on scope and possible conclusions of enquiry –* Olin v Scorer *considered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EASINGHALL LTD **Appellant**

- and -

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

TRIBUNAL: MRS JUSTICE ROSE, CHAMBER PRESIDENT

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 8 and 9 February 2016

Michael Feng of Feng & Co for the Appellant

Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

1. The Appellant ('Easinghall') appeals against the decision of the First-tier Tribunal (Judge Hellier and Tym Marsh) released on 10 July 2014. In that decision the Tribunal refused to direct the Respondent ('HMRC') to issue a closure notice in respect of its enquiry into Easinghall's 2011/12 tax return.

The relevant legislation

2. The issues in the appeal turn on the relationship between the different kinds of investigation that HMRC can carry out into a taxpayer's affairs, in particular the provisions relating to enquiries into company tax returns in Schedule 18 to the Finance Act 1998 ('Schedule 18') and the provisions in the Taxes Management Act 1970 ('TMA'). There are three strands of legislation that it is useful to describe before turning to the facts of this case.

3. The first is HMRC's power to start an enquiry into a company's tax return. This is dealt with in Part IV of Schedule 18:

(1) Paragraph 24 of Schedule 18 provides that an officer of HMRC may enquire into a company's tax return if he gives the company notice of his intention to do so (a 'notice of enquiry') within the time allowed, which is, broadly speaking one year from the delivery of the return.

(2) Paragraph 25 provides that an enquiry into a company tax return extends to anything contained in the return or required to be contained in the return.

(3) Paragraph 32 provides that an enquiry is completed when an HMRC officer issues a closure notice informing the company that the enquiry is complete and stating his conclusions.

(4) Paragraph 33 provides that the company may apply to the tribunal for a direction that HMRC give a closure notice within a specified period. The tribunal must give such a direction unless it is satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period.

(5) Paragraph 34 provides that where a closure notice is given to a company, the closure notice must either state that in HMRC's opinion, no amendment of the return is needed or make amendments to the return to give effect to the conclusions stated in the notice. Paragraph 34(3) provides that an appeal may be brought against an amendment of a company's return.

4. The second strand is HMRC's power to make a discovery assessment in respect of a company. This is dealt with in Part V of Schedule 18:

(1) Paragraph 41 of Schedule 18 provides that if HMRC discover as regards an accounting period of a company that, amongst other things, an amount which ought to have been assessed to tax has not been assessed, they may make an assessment, called a discovery assessment, in the amount or further amount

which ought in their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Paragraph 42 provides that the power to make a discovery assessment is exercisable only in the circumstances set out in paragraphs 43 or 44.

(3) Paragraph 43 provides that a discovery assessment for an accounting period for which the company has delivered a tax return can be made if the situation described in paragraph 41 was brought about carelessly or deliberately by the company or by a person acting on the company's behalf.

(4) Paragraph 48 provides that an appeal may be brought against any assessment to tax on a company which is not a self-assessment.

5. The third strand of provisions are those which deal with appeals from decisions under the Taxes Acts, which include the Finance Act 1998. The appeal provisions are set out in Part V of the TMA, as amended:

(1) Section 48 of the TMA 1970 provides that Part V applies to any appeal under the Taxes Acts and a reference to a notice of appeal given to HMRC is a reference to a notice of appeal given under any provision of the Taxes Act.

(2) Section 49A applies if a notice of appeal has been given to HMRC. In such a case, the appellant may notify HMRC that the appellant requires HMRC to review the matter in question or HMRC may notify the appellant of an offer to review the matter in question, or the appellant may notify the matter to the tribunal.

(3) Section 49C is the provision relevant in this case – where HMRC offer a review. Where HMRC notify the appellant of an offer to review, HMRC 'must also notify the appellant of HMRC's view of the matter in question' (s 49C(2)). The appellant may either accept the offer of review or notify the appeal to the tribunal.

(4) Section 49E sets out the nature of the review: see more detail below. The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances. The review may conclude that HMRC's view of the matter is to be upheld or varied or cancelled.

(5) Section 49F deals with the effect of conclusions of review: again, see below for more detail. If HMRC give notice of the conclusions of a review, the conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question unless the appellant notifies the appeal to the tribunal.

(6) Section 49I defines the 'matter in question' as meaning 'the matter to which an appeal relates'.

6. The key provisions here are sections 49E, 49F, 54 and 50(10) of the TMA 1970.

7. Section 49E provides:

“49E— Nature of review etc

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) “relevant day” means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection

(6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached."

8. Section 49F then provides what happens at the conclusion of the review:

"**49F— Effect of conclusions of review**

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G."

9. Section 54(1) and (2) referred to in section 49F provides:

"**54. Settling of appeals by agreement**

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement."

10. As to what the 'like consequences' are of the tribunal determining the appeal, these are set out in section 50(10) which provides:

> "(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive."

This is subject to exceptions in section 50(11) but those are not relevant in this case.

The case law

11. Both parties relied on two cases which discuss the predecessor provisions to the TMA and Schedule 18 to the Finance Act. The first authority is *Cenlon Finance Co Ltd v Ellwood (Inspector of Taxes)* [1961] 1 Ch 634. In that case there was an issue as to whether a dividend was taxable in the hands of H.W. Co. H. W. Co had submitted to the Revenue that the dividend did not have to be brought into account when computing their profits and the inspectors agreed. Later the inspectors reconsidered the facts and decided that the dividend should be brought into account and raised an additional assessment. In addition to addressing whether the dividend was taxable or not, the Court of Appeal considered the submission that section 510 of the Income Taxes Act 1952 (the predecessor provision to section 54(1) TMA) in conjunction with section 50(2) of the Income Taxes Act (the predecessor provision to section 50(10) TMA) precluded the assessment being raised. Upjohn LJ (with whom Donovan and Holroyd Pearce LJJ agreed) described the effect of the provisions at page 649 (adapted to refer to the present day provisions):

> "It is not in doubt that the effect of section [54 TMA] is that if the inspector comes to an agreement with the taxpayer, the effect of such an agreement is the same as if the point at issue between the inspector and the taxpayer had been determined on appeal by the commissioners. In this case, it is conceded by the Crown that in each case the inspectors did come to such an agreement with the company concerned to the effect that for certain years of assessment these tax-free dividends were to be excluded from the assessments in question. The question, therefore, may be posed very shortly: Is the Crown entitled to raise an additional assessment …, notwithstanding either an agreement or an appeal which has been determined by the commissioners?"

12. Upjohn LJ rejected the Crown's contention that no agreement made by an inspector with a taxpayer could prevent the operation of the assessing machinery provided by the Income Taxes Acts. Such an argument would, he said, render what is now section 50(10) TMA 'completely nugatory':

> "It seems to me that section [50(10) TMA] is directed to the case where a particular point has been determined, and when that point is determined it cannot be relitigated; both sides are bound. So with section [54 TMA], when a particular point has been agreed, the parties are bound subject only to a locus penetentiae given to the subject but not to the Crown under subsection (2). If they are bound, both sides must be bound, and it cannot be open to the Crown, under the guise of an additional assessment …, to relitigate the very point, and in this case the only point, that has been agreed between the parties. On that short ground I would agree with the decision of the judge and of the commissioners."

13. The second case is *Scorer (Inspector of Taxes) v Olin Energy Systems Ltd* which was decided by the Court of Appeal reported at [1984] 1 WLR 675 and in the House of Lords at [1985] 1 AC 645. In that case the taxpayer company operated two divisions the 'Shipping Division' and the 'Airbreaker Division' and they were treated as separate trades for tax purposes. In 1961, the company purchased a ship funded by a loan and deducted the interest payments on the loan from its aggregate profits from the two divisions. In 1967 the Shipping Division ceased to trade. The Revenue inspector raised an assessment for tax for the accounting period to November 1968 and the taxpayer appealed contending that its taxable profits were nil. It supported the appeal with computations which were based on setting the interest on the ship loan off against the profits of the Airbreaker Division. The inspector agreed the computation and issued a revised assessment showing the tax liability as nil. Later another inspector concluded that the interest payments ought not to have been set off against profits generated by the Airbreaker Division and raised an additional assessment. The special commissioners allowed the appeal holding that although the interest payments ought not to have been deducted from the profits of the Airbreaker Division, the point in issue had been settled by an agreement and accordingly section 510 of the 1952 Act (now section 54 TMA) precluded an additional assessment.

14. The Court of Appeal agreed (Kerr LJ dissenting) with the special commissioners. Lawton LJ addressed the question how does one discover what the inspector must have determined for the purposes of applying what is now section 54 TMA. He referred to the judgments of the Court of Appeal in the earlier case of *Chancery Lane Safe Deposit and Offices Co Ltd v Inland Revenue Commissioners* [1965] 1 WLR 239. In that case, Sachs LJ held that it should prima facie be assumed that each side would have raised in support of their case all points that were reasonably open and arguable and that all such points must thus prima facie be regarded as having been taken into account and settled. Lawton LJ in *Scorer* held that such an approach was out of line with the earlier decision in *Cenlon*. He said at page 683:

> "In my opinion, it would be unrealistic to assume that the taxpayer had raised points which were reasonably open and arguable. In most cases, as in this case, he appeals because he has been late with his return and wants to be assessed on the figures he is putting forward. Save to this extent he does not raise any point. The Inspector, however, has to apply his mind to the figures which have been put forward. He has to ask himself this question: What tax should the taxpayer pay? If the figures show that the taxpayer is alleging that he should pay no tax, because of allowable charges, the taxpayer has put this claim forward by implication; and if the Inspector allows the claim, he can be said to have directed his mind to it. It follows, in my judgment, that it is not necessary for the purposes of section [54 TMA] that the taxpayer should state in terms what he is claiming if he does so by implication and the Inspector must have directed his mind to that claim. The claim, however, must be clearly raised by implication. It must be the kind of claim which an Inspector of average experience, considering the accounts and computations in the ordinary course of his office routine, must have appreciated are being made."

15. Lawton LJ went on to examine the evidence about the taxpayer company's appeal in order to discover what the inspector must have determined. He held that the inspector must have asked himself why the company was contending that it did not have to pay any tax even though the Airbreaker Division had made substantial profits. That could only have been because they deducted the Shipping Division's interest payments from those profits. There had therefore 'been a tacit agreement' about the losses carried forward and the taxpayer was entitled to the protection of section 54.

16. Fox LJ in *Scorer* also referred to the judgments of the Court of Appeal in *Cenlon*. He agreed that the only possible conclusion to be drawn from the inspector's initial acceptance of the company's computation was that he accepted that the loan interest payments could be set off against the Airbreaker Division's profits. Since the availability of the amounts was 'the very matter now in issue between the parties' it could not be reopened by a later assessment. He went on to note:

> "It is true that the actual point of law was never formulated. But I do not think that can be necessary. The section is dealing with agreements as to how an assessment shall be dealt with. It is not dealing with the formulation of points of law. We do not know why the Inspector agreed the computation. He may have made an error of law or he may have misunderstood the facts or he may have failed to think about the matter at all. Subject to the question, which I mention later, as to whether the taxpayer has provided misleading information, I do not see why the circumstances that the Inspector has made a mistake either of law or fact should take the case outside section [54 TMA]. Essentially, the question is not why he agreed but whether he agreed. The purpose of the section must be to protect the taxpayer by producing finality, and Parliament, I would suppose, must have contemplated that the taxpayer would be protected, even though the Inspector made some error in his assessment. That is a likely, if not the most likely, event in which the question of going back on the agreement would ever arise at all."

17. The House of Lords upheld the decision of the Court of Appeal. Lord Keith of Kinkel, with whom the majority of their Lordships agreed, described *Cenlon* and earlier cases as authority for the proposition that:

> "… where an agreement has been arrived at under section [54 TMA] it is not open to the inspector to make an additional "discovery" assessment …. Such an additional assessment is, however, not precluded if it is founded upon a point other than the particular matter which was the subject of the section [54] agreement."

18. The question at issue in the case before their Lordships was whether or not the availability of the losses of the Shipping Division was 'the particular matter' which was the subject of the section 54 agreement arrived at when the inspector accepted the computation of profits as nil. Lord Keith held that the material put before the inspector by the taxpayer company was sufficient to bring home to the mind of an ordinarily competent inspector precisely what they were claiming. In an important passage Lord Keith said (page 658):

> "The situation must be viewed objectively, from the point of view of whether the inspector's agreement to the relevant computation, having regard to the surrounding circumstances including all the material known to be in his possession, was such as to lead a reasonable man to the conclusion that he had decided to admit the claim which had been made. In my opinion that question falls to be answered in the affirmative."

19. Lord Keith also approved the passage from the judgment of Fox LJ in the court below, as I have set out in paragraph 16 above.

The facts

20. The facts of the present case are these. HMRC opened an enquiry into Easinghall's tax return for the year 2010/2011 on 25 June 2012 pursuant to paragraph 24 of Schedule 18. The enquiry was conducted by HMRC's officer, Gavin Laurie. Mr Laurie issued a closure notice under paragraph 32 of Schedule 18 in respect of that enquiry on 18 October 2013. Mr Laurie concluded that the company had understated its profits for the period. He based that conclusion on information he had obtained that the company had not recorded all its purchases but had rather bought some supplies for cash and failed to record in its tax return the onward sales of that equipment. In the closure notice Mr Laurie amended the company's taxable profits and the computation of the corporation tax due.

21. By that time, Easinghall had submitted its tax return for the next year, 2011/12. Mr Laurie considered it was likely that the company had understated its profits and its tax liability for 2011/2012 in the same way. He did not have any direct evidence that this was the case but he relied, as I describe later, on the presumption of continuity.

22. Mr Laurie could have opened an enquiry into the 2011/2012 tax return since he was within the time limit set by Schedule 18 to do so. Instead he issued a discovery assessment under paragraph 41 of Schedule 18, relying on the circumstances in paragraph 43, namely that the company had carelessly or deliberately brought about an underassessment of tax. Mr Laurie also imposed penalties for both years 2010/2011 and 2011/2012.

23. Easinghall appealed against the closure notice and amendment to its 2010/2011 tax return, against the discovery assessment and against the imposition of penalties.

24. On 12 December 2013, Mr Laurie wrote to Easinghall referring to the appeals. In accordance with paragraph 49C(2) of the TMA, Mr Laurie set out his view of the matter in question:

> "My view of the matter remains … that the [company's] return for the period ended 31 March 2011 deliberately understates the business takings."

25. Under that statement Mr Laurie sets out the 'facts and reasons' for his view. He set out the information obtained from Easinghall's supplier about the cash payments. He then said:

"It is considered takings have also been understated for the later period ending 31 March 2012.

The tax cases of Brittain v Gibbs 59 TC 374 and Jonas v Bamford 51 TCC 1 provide clarification on "presumption of continuity". These cases establish that a situation will be presumed to go on until there is a change in the situation. The onus of proof is on the tax payer.

If you consider purchases on invoices with the account code Cash Sales were not used in the period ended 31 March 2012 you should provide documentary evidence from [the supplier] to confirm this."

26. Mr Laurie then set out the net takings that he considered had been omitted for the two years, the tax due for them and the penalties he was imposing. The letter continued:

"**Review**

An HMRC officer who has not previously been involved in the case will carry out a review of my decision. You will have the opportunity to provide any further information or reasons in support of your case. The review officer will write and tell you the outcome of their review. If you opt for a review you can still appeal to the tribunal after the review has finished.

…

If I do not hear from you and you do not notify your appeal to the tribunal, your appeal will be treated as settled by agreement under section 54(1) of the Taxes Management Act 1970 on the basis of my view of the matter as set out above, and the tax chargeable based on my view will be due and payable."

27. Easinghall did opt for a review of all Mr Laurie's decisions. The review was conducted by another HMRC officer, Mr Musgrove. Easinghall made representations to Mr Musgrove.

28. On 7 February 2014 Mr Musgrove wrote to Easinghall setting out the results of his review. He set out Mr Laurie's decisions on the 2010/2011 tax situation (amendment and penalty) and the 2011/2012 tax situation (assessment and penalty) and then said:

"**Review conclusion**
It is my conclusion that the above decisions(s) should be

1. Varied, [reduced] in respect of the 2011 Corporation Tax decision
2. Varied, [reduced] in respect of the 2011 penalty assessment
3. Cancelled in respect of the 2012 Corporation Tax decision
4. Cancelled in respect of the 2012 Penalty assessment"

I will set out the reasons for arriving at this conclusion in the body of this letter"

29. Mr Musgrove then set out a brief description of the relevant statutory provisions and a chronology of events. The letter continued:

> "**What I have considered in my Review**
> **Amendment/Assessment**
> I have considered whether the business takings of the company have been understated in respect of the years ended 31/3/2011 and 31/3/2012?"

30. He then goes into some detail as to the evidence that shows that not all the purchases of stock for sale made by the company in the year 2010/2011 have been correctly recorded. He concludes that there is sufficient evidence to arrive at an opinion that the sales of the company in respect of the year ended 31/3/2011 have been understated and that an adjustment is required to be made in respect of these additional sales. He then corrects a computation error made by Mr Laurie which results in a reduction of the tax due for the year 2010/2011.

31. Mr Musgrove then states:

> "**Year ended 31/3/2012**
> I consider there is insufficient evidence to support the amount assessed in this year.
>
> I consider that the decision for this year should be cancelled."

32. There is then a section in Mr Musgrove's letter dealing with penalties. He sets out the evidence about whether the understatement of tax in the year 2010/2011 was careless or deliberate and concludes that Easinghall's behaviour in this case was 'deliberate and concealed'. However he varies the amount of the penalty to reflect the reduction in the tax to be collected. He then simply states as regards the year to 31/3/2012 that since he has cancelled the assessment for this year, the penalty decision for that year must also be cancelled.

33. Mr Musgrove then sets out the evidence he has seen including all the correspondence and documents that arose during the course of HMRC's enquiry. At paragraph 7 he states:

> "I have given consideration to the basis of the presumption of continuity when arriving at my conclusion in respect of the year ended 31/3/2012'

34. At the end of the letter he states:

> "**My conclusion**
> It is my conclusion that the decisions that I have listed above should be varied to the following figures:

Year	**Corporation Tax**	**Penalty**
31/3/2011	£7051.17	£6522.33

31/3/2012	£0	£0

35. Finally Mr Musgrove informs Easinghall about their right to ask the tribunal 'to decide the matter under appeal'. He concludes:

> "If I do not hear from you and you do not appeal to the tribunal within 30 days of this letter I will assume that you agree with my conclusion and the matter will be treated as settled by agreement under Section 54(1) Taxes Management Act 1970. I will then make arrangements for the tax due to be collected"

36. Easinghall appealed to the Tribunal in respect of Mr Musgrove's decision about the year 2010/2011 but did not appeal against his decision in respect of 2011/2012. That matter is therefore to be regarded as settled by agreement under section 54(1) TMA.

37. On 15 February 2014, a week after Mr Musgrove had issued his review letter, Mr Laurie opened an enquiry into Easinghall's 2011/2012 tax return pursuant to paragraph 24(1) of Schedule 18. Mr Laurie then sent a formal notice to Easinghall on 24 March 2014 requiring documents and information to be provided. On 26 March 2014, Easinghall made an application to the First-tier Tribunal for a direction that HMRC close the enquiry. It was that application that the Tribunal dismissed by the decision which is challenged in this appeal.

38. The Tribunal heard evidence from Mr Laurie who accepted that the focus of his enquiry was the under-reporting of Easinghall's sales, purchases and profits. It was accepted by HMRC that the enquiry is therefore intended to cover the same ground as was covered by the discovery assessment that was cancelled by Mr Musgrove.

39. Since the Tribunal did not issue a direction, the enquiry continued and has now been concluded. A closure notice was ultimately issued amending Easinghall's profits in accordance with the conclusions drawn by Mr Laurie. Easinghall has appealed against that closure notice and the appeal is pending. However, HMRC accepted that if I allow the present appeal and find that the Tribunal should have directed HMRC to close the enquiry because of Mr Musgrove's review, then that will effectively dispose of the appeal against the amendment.

The First-tier Tribunal's decision

40. The Tribunal identified the consequences of the legislative provisions and case law as being:

> "32. As a result, if: (1) the subject matter of the 2011/12 enquiry into the company's return were limited to the suppression of purchases and the consequent re-estimation of the gross profits of the company; (2) there were an agreement between the company and HMRC which resulted from and followed the discovery assessment; and (3) the subject matter of that agreement between Mr Musgrove and the company were the accuracy of the figures for purchases, sales and gross profits in the 2011/12 return, then it would not be open to … Mr

Laurie to close the enquiry on any basis other than that of that agreement. That in turn would mean that there would be nothing which could result from the enquiry other than the making of no amendment. In those circumstances it would, we agree, not … be reasonable for the revenue to continue the enquiry."

41. They held that the first condition was satisfied because Mr Laurie had accepted that his concern in the enquiry was the suppression of purchases, the consequent suppression of sales and the resultant understating of profits. They also held that Mr Musgrove's letter gave rise to an agreement between the company and HMRC as regards the subject matter of the summary assessment. They then expressed their conclusion on the key point at issue:

> "36. What then was the point in question which was determined by that agreement? What was the scope of the agreement?
>
> 37. In our view it was that a presumption of continuity did not justify the additional assessment. It was not the wider agreement that the company's profits were precisely those shown on the return or that profits had not been suppressed. That to our mind is evident from Mr Musgrave's statements that there was insufficient evidence for the assessment and that he had taken into account the issue over the presumption of continuity. Those statements together lead us to conclude that a reasonable man would not conclude that Mr Musgrove had agreed that the company's profit was correctly reported and that the agreement of Mr Musgrove was limited to agreeing that one could not presume continuity.
>
> 38. Therefore the conclusion at [32] above does not apply, and it would be open to HMRC, if they had, and on the basis of, appropriate evidence, to conclude at the end of the enquiry that the profits of the company exceeded those on the return and that an amendment to the return should be made. There is therefore a point in the enquiry.
>
> 39. It seems to us reasonable that HMRC should seek to determine whether there is any understatement of those profits. Its ability with any accuracy to do so it depends upon the receipt of information. Until they receive that information, or know that they will not, or that they are sufficiently unlikely not to, receive it, it is unreasonable to expect them to conclude the enquiry within a particular time."

Discussion

42. I have come to a different conclusion from the First-tier Tribunal on the question of what was the 'particular matter' which was the subject of the agreement concluded when Easinghall accepted Mr Musgrove's conclusion in respect of the 2011/2012 accounting period. In my judgment the Tribunal erred in not considering the wording of Mr Musgrove's letter in the context of the statutory provisions which set out the procedure Easinghall and Mr Musgrove were following. I also agree with Mr Feng's submission that they paid insufficient heed to Fox LJ's statement in

Scorer, approved by the House of Lords, that the question is not why Mr Musgrove arrived at the conclusion he did but rather what that conclusion was.

43. An analysis of the statutory provisions engaged along the path that Mr Musgrove and Easinghall took demonstrates that the 'matter in question' between the parties was properly expressed as "Was Easinghall's profit for 2011/2012 understated because they suppressed cash purchases of stock and their corresponding sales?" and not "Is there enough evidence before me to establish whether Easinghall's profit for 2011/2012 was so suppressed?".

44. The starting point is the making of the discovery assessment pursuant to paragraph 41 of Schedule 18. The assessment is as to the amount of money which ought in the inspector's opinion to be charged in order to make good the loss to the Crown arising from the fact that an amount that ought to have been assessed to tax has not been assessed: see paragraph 41(1). This focuses the enquiry on the numbers included in the return and the explanation for those numbers. The taxpayer's appeal is against the assessment and not against the reasons behind the assessment: see paragraph 48(1).

45. The fact that the appeal focuses on the assessment follows through into the provisions dealing with the review which is conducted as an alternative to an appeal to the tribunal. Three possible outcomes of the review are set out in section 49E(5), namely that HMRC's view of the matter is upheld, varied or cancelled; all words that are apt to apply to the making of an assessment rather than to an evaluation of evidence. The reference to 'HMRC's view of the matter' refers back to section 49C(2) which requires HMRC, when offering a review, to state their view of the matter in question. In Mr Laurie's letter of 12 December 2013 he states that his view of the matter, as regards the 2010/2011 year, is that Easinghall's return 'deliberately understates the business takings'. Similarly his view of the matter as regards the 2011/2012 period is that 'takings have also been understated'.

46. The description of the three possible outcomes for the review in section 49E(5) is also carried through to section 54(1) dealing with the agreement that the parties may reach. That agreement to which section 54(1) applies is described in that sub-section as being "an agreement … that the assessment … should be upheld without variation, or as varied in a particular manner or as discharged or cancelled". What is 'the assessment' here in relation to the accounting period ending 31 March 2012? According to Mr Laurie's letter of 12 December 2013 it is that Easinghall must pay an additional £8,544.20 of culpable tax. That is the matter in question which Mr Musgrove was tasked with reviewing in order to decide whether it should be upheld, varied or cancelled. Such an analysis also accords with the effect of section 54(1) which is to treat the agreement like a determination of the tribunal to cancel the assessment. The wording focuses on the result of the deemed tribunal determination and not on its reasoning.

47. In his letter of 7 February 2014 notifying Easinghall of the conclusions of his review, Mr Musgrove was very clear as to the "Point at Issue" which is a restatement of HMRC's view of the matter and as to his conclusions. His conclusions are stated to

be that the 2011/2012 tax decision and penalty assessment are cancelled. This wording is entirely consistent with his obligations under section 49E(5) TMA.

48. An objective observer would conclude from the wording of the letter, read in the context of the statutory process in which the parties were knowingly engaging, that:

(1) the conclusions of the review for the purposes of section 49E(5) TMA were that HMRC's view that there had been a deliberate understating by Easinghall of the business takings for the year 2011/2012 should be cancelled;

(2) that conclusion is treated as if the parties had agreed in writing to cancel the culpable tax assessed in Mr Laurie's discovery assessment: section 49F(2) TMA;

(3) that agreement is treated as if the tribunal had determined that the discovery assessment had been cancelled: section 54(1) TMA; and

(4) the determination cancelling the discovery assessment is final and conclusive: section 50(10) TMA.

49. The case law I have described circumscribes the protection that is afforded by what is now section 54. If some other element in Easinghall's 2011/2012 tax return had been queried by HMRC, Easinghall could not rely on section 54 to argue that HMRC was deemed to have agreed the correctness of everything in that return. But HMRC are, in my judgment, bound by Mr Musgrove's cancellation of the discovery assessment not now to assert again that Easinghall has understated its business takings in respect of the year ended 31 March 2012. That was the particular matter or point at issue that was agreed between the parties and HMRC cannot amend the return as a result of an enquiry into the same matter in the light of that settlement.

50. It is true that the reason why Mr Musgrove came to that conclusion was because there was insufficient evidence put forward by HMRC to support the discovery assessment. In fact, no evidence was put forward for that year and HMRC relied on the presumption of continuity. Mr Musgrove rejected reliance on that presumption but it is not right to describe the matter in question as 'whether there was enough evidence to show that there had been an understatement of business takings in the period 2011/2012'. That confuses the process of arriving at a determination with the determination itself.

51. I therefore allow the appeal and hold that the First-tier Tribunal should have directed HMRC to close the enquiry into Easinghall's 2011/2012 tax return because the parties are treated as having agreed that there has been no understatement of business takings by Easinghall for that year.

MRS JUSTICE ROSE
CHAMBER PRESIDENT
RELEASE DATE: 1 March 2016