TC02618

Appeal number: SC/3012/2008 & SC/3013/2008

Settling of appeals by agreement – s 54, Taxes Management Act 1970 – s 5, Commissioners for Revenue and Customs Act 2005 – preliminary issues 2002/03: whether 2004 settlement agreement precluded issue of closure notices – whether agreement reached on basis of assessment such that liability treated as settled under 2004 settlement agreement – whether certain correspondence amounted to agreement precluding adjustments made by closure notices 2004/05: whether agreement in respect of self assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

RODERICK THOMAS
STUART THOMAS **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
NIGEL COLLARD

Sitting in public at 45, Bedford Square, London on 25 February 2013

Roderick Thomas, Appellant in person and on behalf of Stuart Thomas

Anthony Stewart, HM Revenue and Customs, for the Respondents

DECISION

1. Mr Roderick Thomas and Mr Stuart Thomas are brothers. At the material time they carried on business in the partnership of S & R Thomas ("the partnership"). In tax year 2002/03, on 26 July 2002, the partnership sold goodwill to a company, Spring Salmon & Seafood Limited ("SSSL"), for £2.8 million. SSSL was a UK company, indirectly owned –through an offshore company, Bala Limited - by a Guernsey settlement, the Maclennan Trust. As a consequence, each of Roderick and Stuart Thomas made a tax return for the relevant period showing a chargeable gain of £1.4 million on disposal of a business asset.

2. That treatment of the disposal of goodwill is disputed by HMRC. They opened enquiries into the Thomas tax returns, and as a result issued closure notices in respect of tax year 2002/03 on 31 October 2007, and an adjustment in respect of the respective personal self assessments. In each case the UK dividend income, inclusive of tax credit, was increased by an amount of £1,555,555, representing an income distribution of £1.4 million and the associated tax credit of £155,555. A closure notice in respect of the same tax year was also issued to the partnership on 12 December 2007.

3. An enquiry had also been opened in relation to tax year 2004/05. That enquiry had been brought to a close a little earlier, on 31 July 2007, following a direction by the General Commissioners. The effect of the closure notice was to amend the returns of each of the Thomas brothers so as to bring into assessment (a) income under s 660A of the Income and Corporation Taxes Act 1988 ("ICTA"), (b) income under s 739 ICTA and (c) capital gains under s 86 of the Taxation of Chargeable Gains Act 1994.

4. The closure notices and amendments made to the self assessments were appealed by each of Roderick Thomas and Stuart Thomas.

5. This hearing was concerned with a number of preliminary issues that arise in connection with those appeals. As directed by the Tribunal there were five issues for determination. Of those, as we shall describe, one was conceded by Roderick Thomas (who appeared for himself and on behalf of Stuart Thomas), and another can be dealt with by an agreed determination in respect of the 2004/05 appeal. There are therefore three issues, and of these three two were effectively combined and argued together, thus confining the areas of dispute to two main headings.

6. As Roderick Thomas represented himself and his brother, for ease of reference we shall refer in this decision to Roderick Thomas as "Mr Thomas" and to Stuart Thomas by name.

Effect of partnership closure notice for 2002/03

7. The question raised in this connection was whether the closure notice issued to the partnership on 12 December 2007 in respect of the tax year 2002/03 has the effect

of rendering invalid the individual closure notices issued to Mr Thomas and Stuart Thomas on 23 October 2007 in respect of the value of goodwill disposed of by the partnership.

8. In his opening, Mr Thomas accepted that the partnership closure notice could not of itself restrict HMRC from raising enquiries in relation to the personal tax returns under s 9A of the Taxes Management Act 1970 ("TMA") and issuing a closure notice in those respects under s 28A TMA. Consequently this issue fell away. However, we record the acceptance by Mr Thomas and Stuart Thomas of the position.

Was there an agreement of the personal self assessments for tax year 2004/05?

9. The question for the Tribunal was whether a letter written by HMRC on 30 May 2012 to Mr Thomas (for himself and Stuart Thomas) constituted an agreement of their personal tax assessments for the tax year 2004/05.

10. Following a case management hearing before Judge Berner on 30 April 2012, which we shall discuss in greater detail later in this decision, Mrs Nicola Parslow of HMRC wrote by email to the inspector dealing with the tax affairs of the Thomas brothers, Mr Stewart (who represented HMRC before us), with a copy to Mr Thomas and to Mr Barry Williams, who had represented HMRC at the case management hearing. Dealing specifically with the tax year 2004/05, Mrs Parslow said:

> "Turning now to the year ended 5 April 2005, having heard our views about the evidential difficulty that will arise on the Settlor issue (s 660A), Messrs Thomas are willing to concede the point. However, it is necessary to strike a valid agreement under s 54 TMA 1970, for us to propose the figures arising.
>
> Would you kindly do this please? Mr Roderick Thomas has asked that you include any Capital Gains in this matter…"

11. Mr Thomas, responding to Mrs Parslow's email, wrote by email to Mr Stewart to confirm that, on the basis that HMRC would not be seeking penalties in respect of liabilities under s 660A ICTA (and s 619 of the Income Tax (Trading and Other Income) Act 2005) and s 86 TCGA, he and Stuart Thomas had agreed that they were the only settlors of the Maclennan Trust. As regards 2004/05, the email goes on to say that the Thomas brothers had agreed that they were liable to tax on the income and gains of the Maclennan Trust and Bala Limited arising in the period 1 January 2005 to 5 April 2005.

12. Mr Williams asked for confirmation of the income and capital gains of the Maclennan Trust. Mr Thomas provided details on 9 May 2012, confirming that there were no capital gains in the relevant period and the total income arising was £98.29, representing taxable income for each of the Thomas brothers of £49.

13. Mr Stewart wrote to Mr Thomas on 30 May 2012. He said:

> "For the period 6 April 2004 to 5 April 2005, based on the information you have provided, I am prepared to accept that there were no capital gains and income of £98.
>
> …
>
> Mr Williams and Mrs Parslow will in due course ask the Tribunal to determine the appeals for years ended 5 April 2005 and 5 April 2006 as indicated above although I am aware that you submit that the discovery conditions are not satisfied for year ended 5 April 2006."

14. In the course of the hearing it became apparent that there was no outstanding issue in relation to tax year 2004/05. Mr Stewart confirmed that the only issues were those of the income of the trust assessable under s 660A ICTA and the capital gains of the trust assessable under s 86 TCGA. In light of that we took the view that there was no purpose in our making any determination whether the letter of 30 May 2012 constituted a s 54 TMA agreement for this purpose. The proper course in our view is that we simply determine the 2004/05 assessment for each of Mr Thomas and Stuart Thomas, in each case with the addition of £49 income assessed under s 660A ICTA. We therefore make that determination.

Effect of settlement agreement dated 24 May 2004

15. Two issues arise in relation to the settlement agreement of 24 May 2004, although the parties dealt with them together, and we shall do the same.

16. The two issues are:

> (a) Whether the settlement agreement of 24 May 2004 has the same effect as a closure notice in respect of the year ended 5 April 2003 and whether or not HMRC had the power to issue further closure notices on 31 October 2007 (those in respect of tax year 2002/03); and
>
> (b) Whether HMRC and Messrs Thomas reached an agreement on 30 April 2012 that any distribution income included in the closure notices for the year ended 5 April 2003 is to be treated as income arising under a settlement (the Maclennan Trust) for the purpose of s 660A ICTA and whether any such actual or potential liability is to be treated as settled under the terms of the settlement agreement dated 24 May 2004.

17. The settlement agreement of 24 May 2004 was an agreement between the Inland Revenue (as one of the precursors of HMRC) and a number of parties, including Mr Thomas and Stuart Thomas, their partnership and Spring Salmon and Seafood Limited. It provided that, in consideration of proceedings not being taken in respect of certain tax, interest and penalties, the taxpayers offered the sum of £525,000. That amount was duly paid. There was no dispute that this was a binding agreement, and that it became such when accepted by the Inland Revenue on 24 May 2004.

18. The agreement was expressed to be final and conclusive only in respect of the liabilities set out in a number of schedules. In respect of the tax year 2002/03, for

each of the Thomas brothers the schedule referred to "Tax arising in respect of Bala Limited or the Maclennan Trust under Section 660A and 739 ICTA 1988 and Section 86 TCGA 1992".

19. The agreement contained a number of caveats, including (at clause 2):

> "c. The Commissioners shall not be prevented by the agreement from making 'discovery' assessments for any period covered by the agreement if the conditions in Section 29 Taxes Management Act 1970 are satisfied.
>
> d. For the avoidance of doubt, it is acknowledged by the Partnership and by [the Thomas brothers] that there may be further enquiries in connection with the acquisition of the Partnership's business by [SSSL] in the return period to 31 July 2002 and that the Agreement is without prejudice to and does not limit any such enquiries."

20. Shortly prior to the acceptance of the offer, and the making of the agreement, Mr Maggs of the Inland Revenue sent on 21 May 2004 an email to Mr Thomas, in which, referring to clause 2c, he described its amended form as putting the period covered by the agreement in the same position as if a self assessment enquiry had been brought to a close or there had been no enquiry and the time limit for opening one had passed.

21. This agreement has been the subject of some dispute. The General Commissioners, in considering an application by the Thomas brothers for closure notices in respect of the periods 2001/02 and 2002/03, decided in June 2005 that it was not possible for the Revenue to open a further enquiry into the period 2002/03. That decision was challenged by way of judicial review, and the decision of the General Commissioners was quashed in the High Court: *R (on the application of The Commissioners for Her Majesty's Revenue and Customs) v The General Commissioners of Income Tax for the Division of Berkshire and Others* [2007] EWHC 871 (Admin).

22. In the High Court Wyn Williams J decided that the General Commissioners had wrongly interpreted the agreement, and had also been in error in taking into account the email of 21 May 2004 in its interpretation. He concluded that the email of 21 May 2004 could not have led to the conclusion reached by the General Commissioners. As well as quashing the determination of the General Commissioners, the learned judge made a declaration as to the true interpretation of the agreement. So far as it affects the Thomas brothers, the terms of the declaration were that the 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 Limited or the Maclennan Trust".

23. Mr Thomas submitted that the power to make enquiries did not mean that HMRC could issue a new closure notice, and that this was a question for the Tribunal to consider. In our view, the judgment of the High Court is clear. As Wyn Thomas J said (at [44]), there would be no purpose in raising enquiries if, depending on the result of the enquiries, there was no prospect of HMRC recovering additional sums because the agreement itself precluded it. The settlement agreement does not

preclude the issue of closure notices except in relation to those matters that are settled by the agreement.

24. In our judgment we are bound by what the High Court decided in this regard. Even if we were not, we would come to the same conclusion ourselves. In our view the proper construction of the settlement agreement is clear on its terms and, if we may respectfully say so, we agree with the reasoning of Wyn Williams J. Mr Maggs' email cannot have any effect on the interpretation of the agreement. Furthermore, it was clear that the email was simply attempting to explain the carve-out for discovery assessments, and can have had no impact where such assessments were not required because enquiries could still be opened.

25. As Wyn Williams J said, the settlement agreement was only in respect of the liabilities set out in the various schedules. In the case of each of Mr Thomas and Stuart Thomas, those settled liabilities in respect of the tax year 2002/03 were confined to "Tax arising in respect of Bala Limited or the Maclennan Trust under Section 660A and 739 ICTA 1899 and Section 86 TCGA 1992". Clause 2d expressly carved out from those settled liabilities any liability that might arise in relation to the acquisition of the partnership business by SSSL. Those matters could be the subject of further enquiries which would be followed, in the usual course, by a closure notice. As this was a carve-out from the settled liabilities, the enquiries, any closure notice and any liability arising in that respect could be on any basis, including under s 660A and s 739 ICTA and s 86 TCGA.

26. What clause 2c was then doing was preserving an overriding right for the Inland Revenue (and consequently HMRC) to raise discovery assessments in cases where the liabilities were otherwise settled by the settlement agreement and in respect of which enquiries could no longer be opened for any reason, for example whether as settled liabilities under the settlement agreement or because the time for opening an enquiry had passed. Mr Maggs' comments in respect of clause 2c make perfect sense in that context, and could not affect the carve-out from the settled liabilities effected by virtue of clause 2d.

27. The material amendments made to the personal self assessments of Mr Thomas and Stuart Thomas on 31 October 2007, by virtue of which they were each assessed to £1.4 million income in respect of the sale of goodwill to SSSL, rather than to capital gains tax, were on the basis that each brother had received distributions by virtue of s 209(2)(b) or s 209(4) ICTA; that appears from a covering letter from Mr Stewart to Mr Thomas of 31 October 2007. There is no reference in that letter to the assessment being based, primarily or in the alternative, on s 660A ICTA.

28. However, in our view the conclusions stated in the closure notice do not matter. As clause 2d of the settlement agreement operated as a carve-out from what were otherwise settled liabilities, the enquiry and the closure notice in respect of the sale of partnership goodwill were subject to no restriction as to the nature of the liabilities that HMRC could determine had arisen. By virtue of clause 2d, HMRC were entitled to allege, were they minded to do so, that liability arose in that respect under any of the provisions that were subject to the carve-out, including s660A ICTA.

29. In our view, the settlement agreement did not preclude the issue of the closure notice of 31 October 2007. That notice closed enquiries into the sale of partnership goodwill, which were fully open to be made by HMRC under clause 2d of the settlement agreement. Any liability arising as a result of those enquiries, including a liability under s 660A ICTA, could not be precluded by the settlement agreement: see Wyn Williams J at [44] of his judgment.

30. It follows that we reject the arguments of Mr Thomas to the broad effect that the settlement agreement has the same effect as the issue of closure notices for the relevant periods, including 2002/03. It has that effect, not generally, but in accordance with its terms and only in respect of the settled liabilities. Those settled liabilities do not include, as we have explained, liabilities arising from the sale of the partnership goodwill. We also reject the argument that the declaration made by Wyn Williams J operates to treat as settled all liabilities arising from the affairs of Bala Limited or the Maclennan Trust. That would ignore the effect of clause 2d of the settlement agreement, which the learned judge himself acknowledged in [44] of his judgment. Liabilities arising from the sale of the partnership assets are left open and are not settled by the agreement, even if they arise from the affairs of Bala Limited or the Maclennan Trust.

31. Accordingly, it cannot avail the Thomas brothers to seek to argue, by reference to a dictionary definition of "affairs" as meaning "business interests", that SSSL was a business interest of Bala Limited and the Maclennan Trust; even if that were to be the case a liability arising from the sale of partnership goodwill would not be treated as settled under the settlement agreement. But in any event an assessment in respect of the sale of partnership goodwill to SSSL cannot, in our judgment, fall within the ambit of "actual or potential liabilities arising from the affairs of Bala Limited or the Maclennan Trust". The mere fact that SSSL was owned directly by Bala Limited and indirectly by the trust could not bring the sale of partnership goodwill to SSSL within that expression.

32. That deals with the first of the issues under this head. We now turn to the second issue. In this respect the submission of Mr Thomas was that he and his brother reached an agreement on 30 April 2012 that any distribution income included in the closure notices for the year 2002/03 was to be treated as income arising under a settlement (the Maclennan Trust) for the purposes of s 660A ICTA. The evident purpose of that submission is so that he can then argue that such a liability has been settled under the settlement agreement of 24 May 2004.

33. We have already decided that, upon a proper construction of the settlement agreement, and in particular clause 2d of that agreement, any liability, including a liability under s 660A ICTA, arising from the sale of the partnership goodwill, continues to be capable of being assessed, and has not been settled by the settlement agreement. This has the effect that, irrespective of whether there was an agreement of the nature put forward by Mr Thomas, that liability has not been settled. It is nevertheless necessary for us to consider if any agreement was reached on 30 April 2012, and if so what were its terms.

34. This question revolves around what happened at the case management hearing on 30 April 2012. We heard oral evidence in that respect from Stuart Thomas and Mr Williams of HMRC. From that evidence and the documents before us we find the following facts.

The facts

35. For the hearing on 30 April 2012 Mr Williams produced a skeleton argument. In that skeleton, Mr Williams made the following relevant points:

> "11. In the instant case the partners each disclosed, in their individual returns, £1.4m as chargeable gains on the disposal of partnership goodwill. The Respondents say that these sums are in fact distributions chargeable to Income Tax."
>
> 16. The individual partner's returns disclose Capital Gains of £1.4m each in respect of disposal of goodwill from the S&R Thomas Partnership accounts. There was no goodwill reflected in the said partnership accounts at any time. The goodwill costing £2.8m was written down to nil at the cessation of the Spring Salmon & Seafood trade on 31 January 2005, the Company having claimed intangibles relief on the whole of the £2.8m.
>
> 17. The Respondents say that the true nature of the sums in question are distributions chargeable to Income Tax. The question to be determined by the Tribunal is whether Mr R C Thomas and Mr S J Thomas are settlors and/or beneficiaries of the MacLennan Trust that is registered in Jersey. The MacLennan Trust did not operate a bank account. It could therefore not receive monies and pay costs itself.

36. Until 30 April 2012 Mr Thomas and Stuart Thomas had contended that they were not settlors of the Maclennan Trust. They contended that their brother-in-law, Mr Lindh, was the sole settlor.

37. The events at the core of the dispute between the parties took place before the preliminary hearing commenced. According to the Thomas brothers, and confirmed in evidence by Stuart Thomas, before the hearing commenced Mr Thomas sought confirmation from Mr Williams that HMRC's position was as expressed in HMRC's skeleton argument. Mr Williams confirmed that it was. There was then a discussion about the "settlor" issue and the problems the Thomas brothers anticipated in getting Mr Lindh, the original settlor of the Maclennan Trust, to give evidence.

38. Thus far there is little dispute on these basic facts. The dispute centres on the extent, if any, that the discussion included reference to s 660A ICTA. Stuart Thomas' evidence was that Mr Williams had said that the onus was firmly on the Thomas brothers to prove that they were not the settlors, failing which they would each be liable to income tax on the distribution of £1.4 million by virtue of the provisions of s 660A. Mr Thomas had agreed with Mr Williams that if any part of the £1.4 million was treated as income rather than a capital gain, the liability arose under s 660A.

39. Stuart Thomas went on to say that his brother had said to Mr Williams that the Thomas brothers would agree that they were to be treated as the settlors of the Maclennan Trust and that an income tax liability arose on any distribution paid by SSSL by virtue of s 660A, so long as Mr Williams would confirm that HMRC would not seek to impose any penalties on the brothers for any year in respect of any income or gains arising in respect of the trust. Mr Williams said that he would need to speak to the inspector and telephoned Mr Stewart from the court room. Mr Stewart, according to Stuart Thomas, agreed these terms.

40. In his witness statement, Mr Williams accepted that he discussed the settlor issue with Mr Thomas and said that the onus was on the Thomas brothers to prove that they were not settlors. He said, on the other hand, that he did not say that the brothers would be liable to income tax on the distribution of £1.4 million each by virtue of s 660A. In cross-examination Mr Williams was at pains to emphasise that his focus was on the settlor issue and attempting to "de-clutter" the proceedings by obtaining a concession on this point from the Thomas brothers. He emphasised in his oral evidence that this was not intended to be binding, and that the Thomas brothers could resile from it at any time. He said that he had raised the question of penalties; that was the only matter discussed over the telephone with Mr Stewart.

41. On the question of discussion of s 660A, Mr Williams could not recall having had any such discussion. He could recall only confirming that the skeleton argument was in its final form.

42. Where the witness evidence does not diverge is in the confirmation provided to Judge Berner at the outset of the hearing on 30 April 2012. Both witnesses confirmed that the judge was informed only that the parties had agreed that the Thomas brothers were to be treated as settlors of the Maclennan Trust.

43. Following the hearing, Mrs Parslow sent an email on 30 April 2012 to Mr Stewart to report on the hearing. That email was copied to Mr Williams and Mr Thomas. We have referred to that email in the context of 2004/05, but in relation to 2002/03 Mrs Parslow merely said:

> "At the appeal hearing this morning Judge Berner accepted our application that the matter should be dealt with by way of Directions. These will focus primarily on the year ended 5 April 2003 and will be separated into the three discreet [sic] issues that Messrs Thomas wish to raise. We anticipate having a meeting with Messrs Thomas to clarify the points."

44. As we have earlier described, Mr Thomas wrote the same day to Mr Stewart by email, with copies to Mr Williams and Mrs Parslow as well as to Stuart Thomas. In that email he said:

> "On the basis that you will not be seeking to impose penalties in respect of liabilities under s 660A ICTA (and s 619 ITTOIA) and s 86 TCGA 1992 we have agreed that Stuart and I are the only settlors of the Maclennan Trust; we have also agreed with Mr Williams that income arising in respect of settlements on the trust, including any

> amounts treated as distributions made by Spring Salmon & Seafood Ltd, are assessable on us by virtue of s 660A"

45. Although, as we have discussed, there was further correspondence regarding the position for 2004/05, there was no response from HMRC to the assertion by Mr Thomas that agreement had been reached on the application of s 660A to the matters he described.

Discussion

46. Mr Thomas submitted that his email of 30 April 2012 satisfied the requirement of s 54(3)(a) TMA to confirm the oral agreement which he says was reached with Mr Williams. It confirms in writing both the fact of the agreement and the terms agreed. Mr Thomas referred us to the decision of the First-tier Tribunal in *Curran v Revenue and Customs Commissioners* [2012] UKFTT 517 (TC), at [256] to the effect that there is no specified form of such a notice. Mr Thomas also argued that, in any event, and irrespective of s 54, there was an agreement entered into under HMRC's care and management powers under s 5 of the Commissioners for Revenue and Customs Act 2005 ("CRCA").

47. We accept that Mr Thomas' email of 30 April 2012 would satisfy the requirements of s 54(3), but it can have no effect unless there has been an oral agreement capable of being so confirmed. Likewise, the recourse to s 5 CRCA depends on there being an agreement.

48. We have concluded that there was no such agreement reached between Mr Williams and the Thomas brothers at the hearing on 30 April 2012. Mr Williams was acting in his capacity as advocate, and we accept his evidence that he was solely attempting to obtain a concession from the Thomas brothers on an issue where he considered the evidential burden on them was considerable. We also accept that such a concession was not intended by Mr Williams to be binding (although any subsequent agreement settling an assessment on such a basis would be).

49. We are satisfied that Mr Williams directed his mind only to that concession, and to the question of penalties, and did not direct his mind to the basis of the assessment for that purpose, nor address specifically in this connection the application of s 660A ICTA to the question of the sale of partnership goodwill in the tax year 2002/03. It is the case that his skeleton argument conflated the distributions issue with the settlor question, but we find that the reference at the hearing to the skeleton argument in this respect was confined to Mr Williams confirming that it was in its final form. Whilst we accept that reference may have been made to s 660A in the course of the discussions between Mr Thomas and Mr Williams, we are satisfied that, although Mr Thomas no doubt appreciated the significance of such references to the tax position obtaining for 2002/03, Mr Williams was not on the same wavelength. He was neither seeking nor making any concession or agreement on the application of s 660A.

50. That this is the case is, we think, confirmed by the fact that Mr Williams addressed the judge only on the matter of the settlor issue, and did not couple that with any remarks as to the basis of the assessment having been agreed. It is also

confirmed by the subsequent email from Mrs Parslow, which speaks of the settlor issue only in the context of tax year 2004/05.

51. For there to be an agreement, there must be both an intention to agree, and a mutual understanding of what is being agreed. In our judgment, neither was present in this case. Mr Williams did not intend that his seeking of a concession on the part of the Thomas brothers in relation to the settlor issue should be by way of a binding agreement, and there was no meeting of minds on the application of s 660A ICTA to the sale of partnership goodwill.

52. Nor do we consider that the fact that HMRC did not respond to Mr Thomas' email of 30 April 2012 can give rise to, or demonstrate acceptance of the fact of, any agreement. Although Mr Thomas referred us to *Schuldenfrei v Hilton* [1999] STC 821 in the Court of Appeal, and to the judgment of Evans LJ commencing at page 832, we fail to see how that can assist his argument. Mr Thomas submitted that what was fatal there to the taxpayer's case – that a s 54 TMA agreement had arisen – was that the taxpayer had remained silent. Mr Thomas argued that, by parity of reasoning as he put it, if HMRC were in any doubt about what had been said in his email of 30 April 2012, then it was encumbent upon them to say so.

53. That argument cannot be accepted. In the *Schuldenfrei* case it was held, by the majority at least, that the Revenue's letter to the taxpayer had not been capable of constituting an offer; there could in any event have been no acceptance of it by the taxpayer. As regards acceptance, Jonathan Parker LJ said (at p 831):

> "As to 'acceptance', the fact that following receipt of the May 1993 notice the taxpayer was (albeit not surprisingly, given the nature of the professional advice which he had received) entirely silent and passive, making no response at all until he thought it was too late for the Revenue to correct their error, is in my judgment the clearest indication that the Revenue and the taxpayer did not 'come to an agreement' that the original assessment be reduced to nil."

54. There was no agreement made orally between HMRC and the Thomas brothers, and the failure of HMRC to respond to the relevant part of Mr Thomas' email cannot result in an agreement. Indeed the judgment of Jonathan Parker LJ provides authority for the need for a meeting of minds; he said (also at p 831):

> "To my mind, the notion of parties having 'come to' an agreement plainly implies not merely that they are of the same mind in relation to a particular matter, but also that their minds have met so as to form a mutual consensus; and that that meeting of minds, that mutual consensus, has resulted from a process in which each party has to some extent participated."

55. In our judgment there was no such consensus in this case, and there can be no inference of such a consensus from the failure of HMRC to respond relevantly to Mr Thomas' email of 30 April 2012.

56. Mr Thomas referred us also to a letter from Mr Stewart to him dated 16 November 2012 in which, in relation to the tax year 2006/07, Mr Stewart refers to the fact that "[y]ou had earlier agreed on 30 April 2012 that you and Mr S J Thomas are the only settlors in the Maclennan Trust". Mr Thomas submitted that this demonstrated that HMRC had adopted the agreement. We do not agree. All that Mr Stewart was doing in his letter was recording the concession made by the Thomas brothers on the settlor issue, and the effect of that concession on 2006/07. It said nothing about the application of s 660A ICTA in relation to 2002/03. The use of the word "agreement" does not in this context connote an agreement of the nature posited by Mr Thomas; it merely refers to the Mr Thomas and Stuart Thomas having agreed with the contention of HMRC that they were settlors of the Maclennan T rust.

57. In our view, what this series of events amounted to was an opportunistic attempt by Mr Thomas to obtain what he perceived might be an advantage from having read Mr Williams' skeleton argument. Our understanding is that Mr Thomas took the view that if Mr Williams could confirm what he had said in his skeleton argument, that could be claimed by the Thomas brothers to be an acceptance on the part of HMRC that any liability in respect of the distributions said to arise on the sale of the partnership goodwill would be under s 660A. That in turn would be argued to be a liability that should be regarded as having been settled under the settlement agreement of 24 May 2004. It was in that context that the concession of the settlor issue was made.

58. In the event, Mr Thomas' argument as to the effect of the settlement agreement would not have been successful, for the reasons we have explained, even if he had been able to persuade us that an agreement of the nature he submitted had been made on 30 April 2012. But in any event we find that there was no such agreement, and so the Thomas brothers' arguments fail in both respects.

Effect of covering letter to partnership closure notice and Mr Thomas' letter of 27 November 2007

59. Mr Thomas submits that the effect of a letter from Mr Stewart dated 12 December 2007, which was in reply to his letter of 27 November 2012 and which accompanied a closure notice in respect of HMRC's enquiry into the partnership tax return for 2002/03, is that an agreement for the purposes of s 54 TMA has been made in respect of the self assessments of himself and Stuart Thomas for that tax year and so precludes the adjustments made by the closure notices of 31 October 2007.

60. The background to this is in the partnership tax return for the tax year 2002/03. That return made no return in respect of disposals of chargeable assets. The relevant question at Q4 was not answered. However, in the return of trading and professional income a figure for depreciation and profit (as a credit item) was stated as £(2799417); this included the sale of the partnership goodwill to SSSL. That amount (with others) was then excluded in calculating the net business profit of £187,565, which was allocated to the partners as to Mr Thomas £93,782 and Stuart Thomas £93,783. The same position is taken in the income tax computation appended to the return. That shows the profit of £2.8 million being excluded from the profit disclosed

in the partnership's financial statements to leave the adjusted profit of £187,565. The profit on the disposal of partnership goodwill was included in the capital gains computations in the personal tax assessments of each of Mr Thomas and Stuart Thomas.

61. Mr Stewart told us that he was concerned that a provision for £500,000 had not been taken into account. In his letter of 18 October 2007, Mr Stewart said this in relation to the partnership:

> "I will be issuing closure notices as regards the 2002/03 enquiries shortly and will not be able to accept the returns as submitted. I will be taxing the £2.8M received by you and Stuart from the company on an alternative basis. I will be disallowing the £500,000 provision that was in the partnership accounts at the cessation of trade and on which tax relief has been given previously."

62. This is referred to in a letter from Mr Thomas to Mr Stewart dated 22 October 2007 in which Mr Thomas describes the provision as having been in earlier partnership accounts and as having been disallowed previously.

63. The issue was next raised in Mr Thomas' letter to Mr Stewart of 27 November 2007. In that letter Mr Thomas addresses a number of issues in relation to the appeals in respect of 2002/03 (which were the appeals against the closure notices of 31 October 2007), including the proposal to tax as income the £2.8 million profit on disposal of the partnership goodwill and the disallowance of the £500,000 provision. The penultimate paragraph of that letter reads:

> "If you proceed with this appeal I think it is clear that you will fail on all counts. It will be an unacceptable waste of my time and taxpayers' money. In my view the appropriate course of action now is for you to agree under Section 54 TMA 1970 that our self-assessments for 2002/03 will be in accordance with our original returns. Those amounts are: R C Thomas £135,619; S J Thomas £125,648."

64. Mr Stewart replied on 12 December 2007. In that letter he said the following:

> "I can though accept what is said in the penultimate paragraph of your letter. I said in September that I would close the enquiries by 31 October and you withdrew the applications for closure notices on that basis. I apologise for not issuing the partnership notice on 31 October. I cannot now, as you have said, complain that I do not have sufficient information. I have also on reflection concluded that to accept your submission on this point will pave the way for all of us and the Special Commissioners in particular to focus on the central issue where personal liabilities are concerned; the tax implications of your interest in the Maclennan Trust. I therefore enclose a closure notice for the partnership for 2002/03 that accepts the partnership profits as returned."

65. Our initial reaction on reading this correspondence was that Mr Stewart's reference in his letter of 12 December 2007 to the penultimate paragraph of Mr

Thomas' letter of 27 November 2007 was a simple mistake. His reply is far more apt in relation to the pre-penultimate paragraph, which read:

> "I would remind you that in agreeing to close your enquiries you accepted that you had all the information you required to close all three enquiries on an informed basis. You cannot now complain that you did not have sufficient information."

However, Mr Stewart did not put his argument in that way. We proceed therefore to consider the position, incongruous as it may seem, that Mr Stewart was indeed replying to the penultimate paragraph of Mr Thomas' letter.

66. The question is whether by saying "I accept what is said in the penultimate letter", Mr Stewart can be taken as having entered into a s 54 agreement in relation to the personal self assessments of Mr Thomas and Stuart Thomas for the tax year 2002/03. In our view that cannot be the case. It is evident that Mr Stewart is referring only to the partnership enquiry and his failure, despite an earlier indication, to issue a partnership closure notice on 31 October 2007 (that is, alongside the personal closure notices issued on that date). He makes reference to that failure earlier in the letter, and to his view that he could no longer ask questions in that regard. He refers to a proposal – opposed by Mr Thomas – that proceedings for 2002/03 and 2004/05 be heard by the Special Commissioners at the same time, and to his view that the question of "settlor" is central to the determination of both appeals. The letter goes on to refer in some detail to the sale of goodwill transaction, and in particular to the assertion by Mr Thomas that overwhelming evidence would be presented that the disposal was at arm's length.

67. It is apparent from considering the letter as a whole that the passage in which the material paragraph appears is related solely to the partnership. The appeals in relation to the personal self assessments are discussed separately, and it is quite clear that those are to remain ongoing. There was in our view, on a proper analysis of Mr Stewart's letter as a whole, no intention on his part to agree to the determination of the 2002/03 appeals, except in one respect. That related to certain "fish stock bonuses" accrued for Mr Thomas and Stuart Thomas in the accounts of a company, Thomas Lindh Limited (formerly Spring Salmon Limited). Those amounts had been included in the personal closure notices. But Mr Stewart says in this regard: "... I have decided to accept your submission for the reason given above. It will hopefully allow us to focus on the central issues in the case."

68. We do not consider that on any fair reading of this correspondence it could be reasonably taken as an agreement of the personal self assessments of Mr Thomas and Stuart Thomas. We find accordingly that the correspondence does not constitute a s 54 TMA agreement in those respects and that the adjustments by way of the closure notices of 31 October 2007 are not thereby precluded.

Case management

69. Subject to any application for permission to appeal, the parties are invited to agree directions for the progression of these appeals to a substantive hearing. If agreement cannot be reached, the Tribunal will list a further hearing for directions.

Application for permission to appeal

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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 6 March 2013