TC03764

Appeal number: TC/2010/06254 & TC/2010/06253

PROCEDURE – application that HMRC be debarred from taking part in these proceedings – effect of s 54 TMA agreement in relation to prior tax year – whether HMRC precluded from arguing a particular issue in relation to later year by virtue of a contract with the appellants – whether as a matter of public law HMRC should be so precluded – jurisdiction of the Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) RODERICK THOMAS **Appellants**
(2) STUART THOMAS

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 23 June 2014

Mr Roderick Thomas, in person, for the Appellant

Mr A W Stewart, Inspector of Taxes, HM Revenue and Customs, for the Respondents

DECISION

1. These appeals relate to discovery assessments made by HMRC in respect of 2005/06. An essential issue in the appeals is whether the Appellants, Mr R and Mr S Thomas, were settlors of a trust called the MacLennan Trust ("the settlor issue").

2. This is an application by the Appellants under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that HMRC be barred from taking further part in these proceedings, and that accordingly the appeals should summarily be determined in the Appellants' favour. The ground on which the application is made is that, in the circumstances that have arisen, and which I shall describe in a moment, HMRC are bound by a deemed determination of the Tribunal under s 54 of the Taxes Management Act 1970 ("TMA"), when viewed with other correspondence from HMRC amounting to an agreement or undertaking, in respect of the settlor issue.

3. These proceedings, and others associated with them, have a long and chequered history. Mr Roderick Stewart, who appeared for himself and his brother, Mr Stuart Thomas, was disposed to submit that "enough was enough", and that it was time for the Tribunal to bring an end to these proceeding by acceding to the Appellants' application. As Mr Thomas rightly acknowledged, however, the Tribunal needs to consider the application on its merits, irrespective of the time it has taken to reach this point.

4. This application arises out of an agreement made under s 54 TMA in other proceedings before this Tribunal in respect of the tax year 2002/03. That agreement arose in the following circumstances:

(1) Following a hearing on 7 October 2013 in those proceedings, I made directions aimed principally at crystallising the issues between the parties. Thus, on 6 December 2013, HMRC had been directed to serve a "comprehensive" statement of case, in accordance with the directions.

(2) On 6 December 2013, HMRC wrote to both the Tribunal and to Mr R Thomas on behalf of the Appellants. HMRC sent Mr Thomas a draft of the statement of case, but advised him that HMRC would not be pursuing the submission that certain sums credited to the Appellants in the accounts of a company, Spring Salmon & Seafood Limited ("SSSL"), for the period ended 31 July 2002 were distributions.

(3) The draft statement of case set out HMRC's case on a number of grounds. These included the settlor issue, an issue whether the Appellants were beneficiaries, and an issue whether the Appellants were participators in SSSL, on the basis of which it was alleged that the relevant payments were distributions.

(4) In the letter to Mr Thomas of 6 December 2014, and in the corresponding letter to the Tribunal, HMRC made the point that the questions whether the

Appellants were settlors and/or beneficiaries for years other than 2002/03 remained to be determined.

(5) HMRC wrote a further letter to Mr R Thomas on 10 December 2013, enclosing a letter, also dated 10 December 2013, expressed to be an agreement under s 54(1) TMA. Its terms are expressed by way of a conclusion as follows:

> "I have amended your Self Assessment return to reflect my conclusion.
>
> It previously showed total tax due of £137,575.78
>
> It now shows that the tax due for the year is £9,640.63."

Similar letters were sent to Mr S Thomas.

(6) At the same time the Tribunal was advised by HMRC of the s 54 agreement, and HMRC made the point that the further directions that I had made in October 2013 would accordingly not be required.

(7) Some confusion then arose because of the Tribunal writing to the parties inviting one or other of them to withdraw the appeal, and notifying the Appellants of a right to reinstate. The position was clarified by the Tribunal in a letter to Mr R Thomas and HMRC in which the Tribunal set out the terms of s 54 TMA as regards its effect "… the like consequences shall ensue as would have ensued if, at the time the agreement was come to, the tribunal had determined the appeal …" The Tribunal advised the parties that if no notice had been given under s 54(2) (that is, to repudiate or resile from the agreement), the files would be closed by the Tribunal within 28 days.

5. The effect of a s 54 agreement in respect of an appeal for a particular tax year on further assessments for the same year or assessments for a subsequent year was considered by Lightman J in *Barnett v Brabyn (Inspector of Taxes)* [1996] STC 716. In that case the taxpayer was assessed to tax on the basis that he was self-employed. His appeals for 1988/89, 1989/90 and 1990/91 were compromised under s 54 TMA on that basis. Additional assessments, on the same basis, were then made for the two latter years. It was argued that it was not open to the taxpayer to challenge the new assessments on a ground that had been implicitly decided in favour of the Revenue.

6. It was held that it was open to the taxpayer to do so. After reciting the effect of a s 54 agreement, namely that it had the same effect for res judicata and issue estoppel purposes as a determination on appeal of (at that time) the Commissioners, Lightman J said (at p 723c):

> "Prior to the enactment of the Income Tax Management Act 1964 (the 1964 Act), the function of the tax commissioners was to make assessments and to hear appeals. It was well established during the period of that regime that they were not deciding a 'lis inter partes' and accordingly their decision in respect of one year's assessment could not create any form of res judicata or issue estoppel in respect of a later year's assessment (see *IRC v Sneath* [1932] 2 KB 362, 17 TC 149; *Caffoor and others (Trustees of the Abdul Gaffoor Trust) v Comr of Income Tax, Colombo* [1961] AC 584 at 598–589 and Spencer Bower and Turner *Res Judicata* (2nd edn, 1969) pp 260–266). The 1964 Act

> removed from the commissioners the function of making assessments. I do not think that this changes the position that (for present purposes) their decision on an appeal is not a decision on a 'lis inter partes'. This view accords with that expressed in the text books (see eg *Whiteman on Income Tax* (3rd edn, 1988) para 30.02 and *Phipson on Evidence* (14th edn, 1990) para 33.48). Accordingly a determination of an appeal by the commissioners or a s 54 agreement cannot any more since 1964 than before 1964 afford scope for application of the doctrine of res judicata or issue estoppel in respect of assessments in succeeding years or additional assessments in the same year."

7. It is thus clear that, irrespective of its terms, the s 54 agreement itself cannot operate to preclude an argument by HMRC that the Appellants were settlors of the MacLennan Trust for the purpose of assessments to tax for 2005/06.

8. Neither Mr R Thomas nor Mr Stewart, for HMRC, had been aware of *Barnett v Brabyn* prior to my raising it at the beginning of the hearing. After a short adjournment during which they were each furnished with a copy of the report in Simon's Tax Cases, Mr R Thomas explained to me that the Appellants' case was put rather differently from what had been decided in *Barnett v Brabyn*. In essence what was submitted was that the effect of the s 54 agreement had to be viewed in the context of other correspondence around the 2005/06 appeal which amounted to a contract, or undertaking on the part of HMRC, that the settlor issue in the 2005/06 appeal would be determined by the result of the 2002/03 appeal.

9. In support of this submission Mr Thomas showed me a letter dated 10 September 2010 from HMRC to the Tribunal, a copy of which had been sent to Mr R Thomas. In effect, this letter sought a stay of these appeals pending the hearing of the appeals in respect of 2002/03. In that letter HMRC said:

> "Whilst the Appellants have appealed against the 2005/06 assessments on a number of grounds, the question of whether they are settlors is the determining issue. If in hearing the 2002/03 appeals the First Tier Tribunal determines that the Appellants are not settlors then they are not assessable on Trust income and gains for 2005/06."

10. Mr Thomas argues that this correspondence, copied to him as it was, created an enforceable contract by which, if the Tribunal determined that the Appellants were not settlors for the purpose of 2002/03, the assessments for 2005/06 must fall away. He argues that, by consenting to the stay, the Appellants provided consideration, and that the necessary conditions for the creation of a contract had been met. Alternatively he submitted that, as a matter of public law, HMRC had a duty to behave reasonably, and that HMRC should therefore honour its undertaking not to pursue the settlor issue for 2005/06. The Appellants, argued Mr Thomas, had an expectation that HMRC would behave in this way.

11. I can deal with the alternative argument very shortly. The Tribunal has no power in a case of this nature to consider questions of legitimate expectation or any other public law argument (see *Revenue and Customs Commissioners v Noor* [2013]

STC 998; *Southern Cross Employment Agency Limited v Revenue and Customs Commissioners* [2014] UKFTT 088 (TC)).

12. I agree with Mr Thomas, however, that HMRC were bound by their statement in the letter of 10 September 2010 to treat a determination by the Tribunal of the settlor issue in relation to 2002/03 as binding in respect of 2005/06. There was no other proper basis for seeking a stay of the 2005/06 appeal behind that for 2002/03.

13. The question then is whether there was a determination by the Tribunal that the Appellants are not settlors of the MacLennan Trust. In my view there was clearly not such a determination. That conclusion follows from a construction of the s 54 agreement itself, from which follows what is treated, by s 54(1), as having been determined by the Tribunal. The following are the material points:

(1) The terms of the agreement itself make reference only to the calculation of the self assessments, and do not refer to any particular issue as having been agreed or conceded.

(2) The letters of 6 December 2013 make clear, first, by reference to the statement of case, that the issue whether the amounts credited to the Appellants' accounts with SSSL constituted distributions was discrete from the settlor issue, secondly that what HMRC was conceding was the distributions issue, and finally that the settlor issue for years other than 2002/03 remained to be determined.

(3) The letters of 10 December 2013 reiterated that the assessments for 2002/03 were not being pursued because HMRC had abandoned the distributions argument.

14. Section 54 requires the parties to have "come to an agreement". As succinctly described by Jonathan Parker J in *Schuldenfrei v Hilton (Inspector of Taxes)* [1999] STC 821, at [44], this implies not merely that the parties 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. The consensus that it is necessary for Mr Thomas to show, namely that the settlor issue was agreed as part of the s 54 agreement, and so could be regarded as determined by the Tribunal, is entirely absent. Not only is there no express agreement of the settlor issue, the very basis of the s 54 agreement was that the settlor issue remained to be determined by the Tribunal in respect of other years under appeal, including 2005/06.

15. Mr Thomas' contract argument must therefore fail. If this Tribunal had had jurisdiction with regard to his public law argument, that too would have failed on the basis that the conditions for HMRC to be held to have acted unreasonably had not been shown to be present.

16. I should finally make reference to Mr Thomas' reliance on *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] STC 1143. He submitted that it was for the Tribunal, and not for HMRC, to identify the subject matter of the appeal. It was, he argued, not open to HMRC to determine for itself the basis on which the appeal had been settled. In this case the Tribunal (and before it,

the Special Commissioners) had set out in successive directions the issues in the 2002/03 appeal, including the settlor issue.

17. This argument is misconceived. The relevant issue in *Tower MCashback* was whether the terms of a closure notice restricted the issues HMRC could raise on an appeal. It was held that it was for the Tribunal to determine the subject matter of the enquiry. But that has nothing to do with the basis on which an appeal may be settled under s 54. It does not follow that because a Tribunal has set out in directions what the issues are for its determination any agreement under s 54 must be taken to encompass agreement on all those issues. It is all a question of construction of the particular agreement. In this case that construction clearly militates against the conclusion Mr Thomas invites me to reach.

18. For all these reasons, I dismiss the Appellants' application that HMRC be barred from taking further part in these proceedings.

Directions

19. There appear to be no directions currently in force in relation to these appeals. Progress now needs to be made. I therefore make the following directions:

(1) Not later than 4 weeks from the date of issue of this decision the Appellants shall serve on the Respondents and file with the Tribunal further and better particulars of their grounds of appeal.

(2) Not later than 4 weeks after compliance with Direction (1) the Respondents shall serve on the Appellants and file with the Tribunal a statement of case.

(3) Liberty to apply.

Application for permission to appeal

20. 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: 27 June 2014