TC04484

Appeal number: TC/2013/8129

VAT – whether assessment under s 73(2) VATA to recover an amount of input tax overpaid to appellant valid – whether assessment referred to any prescribed accounting period –yes – whether assessment referred to correct prescribed accounting period – conflicting decisions in* DFS, Croydon Hotels, *and* Laura Ashley *considered* – DFS *applied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE — **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale
MEMBER Gill Hunter

Sitting in public at the Royal Courts of Justice, Strand, London on 22 May 2015

Mr A Rycroft, Solicitor, of KPMG LLP, for the Appellant

Mr C Zwart, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant appeals against an assessment for period "00/00" dated 10 September 2012 in the sum of £1,442, 597 for the recovery of an amount of money paid to it by HMRC which represented VAT which it had incurred.

2. The appellant's case is that the assessment is a nullity because it was stated to be for period "00/00". There is no other dispute: the appellant does not contest any other aspect of the assessment and in particular accepts it would have liability to pay the assessment if it is not a nullity.

Out of time appeal?

3. The appeal was lodged one day late. HMRC did not object to it being admitted late and in these circumstances we admitted the appeal.

The facts

4. The facts were not in dispute. We find as follows.

5. On 26 March 2009 the appellant made a claim for £3,568,360 for (alleged) under-claimed input tax arising in the periods 7/73 to 4/97.

6. On 9 September 2010, after correspondence between the parties, and in particular a letter dated 26 August 2010 in which the appellant reduced its claim to £1,575,544, HMRC confirmed to LSE that it would repay £1,575,544. There was more correspondence between the parties and on 22 October 2010 HMRC wrote to LSE to say that the repayment would only be of £1,442,597 because HMRC considered that £132,947 of the claim had, in fact, already been repaid.

7. The parties agree that between 9 September and 22 October 2010 HMRC actually repaid to LSE £1,442,597.

8. Then, two years later, an HMRC officer wrote to LSE on 4 September 2012 saying:

> "HMRC authorised repayment of £1,575,544 to [LSE] in respect of a submitted Fleming claim. The repayment was authorised on 9 September 2010, copy of the letter is attached. The repayment was later amended to £1,442,597.
>
> HMRC have concerns over the basis of the claim and consider that LSE was not due this repayment. A recovery assessment will be issued for £1,442,597. I apologise that I have been unable to discuss this matter prior to the issue of the assessment but the matter has only just been brought to my attention.
>
> …..

9. The letter was lengthy and went on to consider the basis of the claim, and invited LSE to establish that it was, contrary to the writer's view, entitled to the money it had been repaid. It offered a right of review or appeal to this tribunal.

10. At one point the letter refers to "all years 1973 to 1997" which was clearly a reference to the period for which LSE had originally made the claim for repayment; in the next paragraph it referred to a spreadsheet but it was accepted at the hearing that this was a spreadsheet of repayments to LSE since 1996 and not a spreadsheet, such as that in *House* (a case we mention below) which detailed the assessment at issue in the appeal.

11. The VAT 655 was dated 10 September although not received by LSE until 17 September 2012. (Indeed it appears it was received by LSE's human resources department and did not come to the attention of those within LSE dealing with its VAT position for some time, but that is irrelevant to its validity). The VAT 655 shows the date of the assessment as 4 September 2012 and the amount as £1,442,597. The period of assessment is shown as "00/00".

12. The letter of 9 September 2010, which was referred to in the letter of 4 September 2012, read as follows:

> "…I have completed the necessary paperwork to allow repayment of the revised claim of £1,575,544. Formal notification of this should arrive with the LSE within the next few weeks and payment will be made in the School's bank account for which the department holds details."

13. This letter also referred to, as it was a reply to it, the appellant's letter of 26 August 2010 which made the revised claim for £1,575,544 (as we have said, the original claim made in 2009 was for a much higher figure). No copy of this letter was enclosed with the letter of 4 September 2012. It did comprise a part of the bundle before us and it did include a schedule of the amounts claimed. This schedule was divided between years but not prescribed accounting periods.

14. The appellant asked for a review of the assessment. The review upheld the assessment and the appellant appealed to this Tribunal.

The Law

15. Section 73(2) of the Value Added Tax Act 1994 ("VATA") provides as follows:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person –

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

An amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly….

(4) Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment….

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following –

(a) two years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

But (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment

(6A) In the case of an assessment under subsection (2), the prescribed accounting period referred to in subsection (6)(a) and in section 77(1)(a) is the prescribed accounting in which the repayment or refund of VAT, or the VAT credit, was paid or credited…..

(9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

What comprises the notification of the assessment?

16. Both parties were agreed, as authorities such as *Bassimeh* [1997] STC 33 at page 39c-e make clear, that the act of assessment is different to the notification of it to the taxpayer. They were also agreed that that distinction made no relevance in this case. The appellant did not suggest that the assessment was invalid: it was its case that the notification of the assessment was invalid.

17. The appellant accepted, as indeed it must from the authorities such as *House (t/a P & J Autos)* [1994] STC 211 (discussed below) at 226j, that notification of an assessment may be set out in a number of related documents, even if those documents do not refer to each other on the face of them, as long as it is clear that they are together intended to comprise the notification of assessment. So in *House*, a schedule that was not referred to in the VAT 655 but which was referred to in a letter received

the same day as the VAT 655, was a part of the assessment. In *Queenspice* [2011] STC 1457 a letter received some weeks after the VAT 655 was held to comprise part of the notification of the assessment as it was sent expressly to explain the assessment.

18. What comprised the notification of the assessment in this case? We find it included the VAT 655 and the letter of 4 September 2012. This was not in dispute. We consider, based on the above authorities, that they were both part of the notification of assessment as the letter clearly referred to the VAT 655. We also find that the assessment included the letter of 9 September 2010 as the letter of 4 September 2012 referred to it on its face and a copy of it was stated to be enclosed.

19. HMRC's position with respect to the appellant's letter of 26 August 2010 seemed ambiguous. This letter was referred to in HMRC's 9 September 2010 which we have found was a part of the assessment. It was not enclosed with the 4 September 2012 letter, although the appellant, as the author of it, must have been well aware of its contents. It included, as we have said, a schedule. Mr Zwart's position was that it was not a part of the assessment yet nevertheless could be referred to in order to elucidate the assessment.

20. Our decision is that the letter of 26 August 2010 and its accompanying schedule did not comprise a part of the notification of the assessment. If it had been intended to be a part of the notification, it should have been included with the 4 September 2012 letter, but it was not. Moreover, if a mere reference to an earlier letter in a notification was found to make that earlier letter a part of the notification, there would be no end to the documents which comprised the notification. The letter of 26 August 2010 itself acknowledged an earlier letter; that even earlier letter presumably acknowledged an even earlier letter, and so on, like a set of Russian dolls. This is the case even though, as was pointed out at the hearing, the 3 documents which were accepted to comprise a part of the notification of assessment all carried a reference number which was also shown on the earlier correspondence relating to the claim. We do not accept that a mere reference to earlier correspondence in a notification makes that earlier correspondence a part of the notification, so we do not accept that the letter of 26 August 2010 was a part of the notification.

21. We did not find the letter of 26 August 2010 to be particularly relevant in any event: §80.

What is the period of assessment and does it matter?

22. The issue at the appeal was whether the notification of the assessment, comprising the above three documents mentioned at §18, was a valid notification. S 73(2) requires an assessment to be for a prescribed accounting period and to be notified to the taxpayer 'accordingly'. But what is the correct prescribed accounting period? The state of authorities on the correct prescribed accounting period for an assessment under s 73(2) was described to us as confused. The appellant's position is that we do not have to take a position on which is the correct period of assessment

because no prescribed accounting period was stated in the documents comprising the notification of assessment taken singly or together.

23. HMRC do not agree. They consider that the correct prescribed accounting period for the assessment was the one in which repayment was made and that that period *was* notified in the documents comprising the notice of assessment.

Factual position

24. So far as the factual position is concerned, we understand that HMRC take this view on the basis that the letter of 4 September 2012, which both parties accepted was a part of the notification of the assessment, stated the assessment was in respect of the

> 'repayment [which] was authorised on 9 September 2010' (see §8).

25. The date 9 September 2010 was clearly not itself a prescribed accounting period but as a matter of common sense it would be easy to identify the accounting period in which 9 September 2010 fell. It was agreed at the hearing that it fell in the prescribed accounting period for the appellant ending 10/10 (ie August-October 2010).

26. The appellant does not consider that it is enough to state a date in the assessment: s 73(2) requires an assessment to be 'for that period' referring back to the reference to 'prescribed accounting period' at the start of the subsection. The notification of the assessment must be 'accordingly'. So there are two legal issues for us to consider:

(1) what is the correct prescribed accounting period for the purposes of an assessment made under s 73(2)?

(2) Whether specifying in a notification of an assessment a date which falls within a prescribed accounting period, rather than specifying a prescribed accounting period, is sufficient to make the notification of the assessment valid?

What is the 'prescribed accounting period' in s 73(2)?

27. There are three prescribed accounting periods which are contenders to be the prescribed accounting period referred to in s 73(2): it could be the period in which the over-claimed input tax was

(a) incurred;

(b) reclaimed by the taxpayer; or

(c) repaid by HMRC to the taxpayer.

28. We will describe these in order as:

(a) Option A;

(b) Option B;

(c) Option C.

29. It is possible that some or all of these options on certain facts will be the same accounting period. Indeed, the normal situation is where input tax is reclaimed and repaid in the same accounting period (ie Option B = Option C) and the input tax was incurred in the immediately preceding accounting period. But that is not always the case and is not the case here. In this case, the £1,442,597 was:

(a) incurred in a spread of accounting periods from 7/73 to 4/97;

(b) reclaimed by the taxpayer in March 2009 (4/09), and

(c) repaid by HMRC in accounting period 10/10.

30. There are three judicial authorities on this issue to which we were directly or indirectly referred by the parties but neither party chose to make detailed submissions on them. As we have said, the appellant's position was that they were not relevant as (it said) no period at all was mentioned in the notification; HMRC's position was to rely on s 73(6A) to which we refer to below.

Laura Ashley [2003] EWHC 2832 (Ch)

31. This is a decision of the High Court and, save to the extent that the legislation has subsequently been amended by Parliament, or the decision is inconsistent with higher or equivalent authority, is binding on this Tribunal.

32. Like this case, that case concerned whether notification of an assessment made under s 73(2) was formally valid. In that case, the taxpayer had claimed in October 1999 repayment of under-claimed input tax which had been incurred in some periods in 1996 and 1997. It was repaid the sums in March 2000. The taxpayer was assessed to repay these sums in October 2000: the notification of the assessment was stated to be for the period of October 1999 (the period in which the claim was made – option B).

33. HMRC submitted that the 'prescribed accounting period' referred to in subsection (2) is the same as the one referred to in (6)(a) dealing with time limits: such a construction would indeed follow a normal rule of statutory construction that the same phrase has the same meaning throughout the same section. So a finding that the 'prescribed accounting period' was the one in which the original under-reclaim occurred (option A) appeared to have the potential to mean that HMRC might be out of time to assess a mistaken repayment *before* the repayment had even been made.

34. Nevertheless, the High Court ruled that the notification of the assessment was invalid. Its ruling was that the notification ought to have related to the periods in 1996 and 97 in which the input tax had been incurred by the taxpayer (option A).

35. The basis of the decision appears to have been three-fold: see [25]. Firstly, the natural, but not only, reading of s 73(2) was that the 'prescribed accounting period' was the period to which the VAT credit related: [15]. Secondly, the logic of the Court of Appeal in the *Croydon Hotel* case, referred to below, that time limits should be considered in interpretation, was not considered to transfer to the different

circumstances of s 73(2): [24]. Lastly, the problem with time limits outlined in §33 if the prescribed accounting period was Option A was seen by the High Court, for the reasons it gave, as more illusory than real: [21] and [25].

Croydon Hotel & Leisure Co Ltd [1996] STC 1105

36. Is this decision in *Laura Ashley* inconsistent with higher authority? It is, as it acknowledges, inconsistent with the earlier, majority decision of the Court of Appeal in *Croydon Hotel & Leisure Co Ltd* [1996] STC 1105. In that case, Thorpe LJ said in respect of paragraph 4(2) of Sch 7 to the Value Added Tax Act 1983, which was the precursor to s 73(2):

> "For the purposes of para 4(2) it is, in my judgment, the exercise of the right to claim rather than the bare right to repayment that provides the essential commencement for limitation periods. For the purposes of para 4(2) the prescribed accounting period is the period in which the right to claim was duly exercised by inclusion within the total in box two on the issued return. The use of the word 'credited' in the first line of para 4(2) is a clear pointer to that construction. Furthermore I cannot see that the phrase 'for that period' in the penultimate line can be a reference to any period other than that covered by the return in which the tax was reclaimed." (Page 1109)

37. So in this case the Court of Appeal went for Option B. Richards J in *Laura Ashley* rejected this analysis, deciding (for the reasons we explained above) that 'prescribed accounting period' in s 73(2) did refer to the period in which the 'bare right to repayment' arose and not to the period in which it was exercised. He appears to have rejected the Court of Appeal's analysis on the basis he considered it both wrong and obiter: see page 639j where he says HMRC accepted that the analysis in the *Croydon* case was not binding. There is no explanation given of why he considered himself not bound by the Court of Appeal decision but it seems to us that it may have been because the Court of Appeal in *Croydon* only had to rule on the meaning of prescribed accounting period in the forerunner to s 73(6)(a) as the case was one about time limits and not about whether an assessment was in the correct form.

38. Richards J's decision in *Laura Ashley* that the Court of Appeal's ruling on the meaning of 'prescribed accounting period' in (what is now) s 73(2) was obiter, and his decision on the meaning of that phrase, is binding on the Tribunal in absence of later superior or equivalent conflicting authority, or a change to the statute. And that brings us next to the Court of Appeal decision in the case of *DFS Furniture Co plc* [2004] STC 559.

DFS Furniture Co plc [2004] STC 559

39. Like the *Croydon Hotel* case, this was a case on whether an assessment was in time. It was not a case, like *Laura Ashley*, on whether a notification of assessment was in the correct form. The issue in *DFS* is not directly relevant to this appeal.

40. The Court of Appeal preceded on the assumption the 'prescribed accounting period' in s 73(6)(a) had the same meaning as in 73(2): see [52] where this assumption is made without any explanation. This must be because, as we have said, it is a rule of statutory construction, unless a contrary intention appears, that the same expression has the same meaning whereever it is used within a single section of an Act. In 2004 there was no suggestion of a contrary intention.

41. The Court then ruled on the meaning of 'prescribed accounting period' within s 73(2):

> "….The expression 'for any prescribed accounting period' in s 73(2) refers, in our judgment, to the prescribed accounting period current when the (allegedly excessive) repayment was made." [52].

42. The judges were referred to the decision in *Croydon Hotels* but not to the decision in *Laura Ashley.* They considered that their decision was in line with the one in *Croydon Hotels,* overlooking, it seems to us, the possibility that the prescribed accounting period in which a claim is made (option B, the choice of the Court in *Croydon Hotels*) could be a different prescribed accounting period in which a claim is paid (option C, the choice of the Court in *DFS*). What the two Court of Appeal decisions do agree upon is that 'prescribed accounting period' is not the period in which the input tax was incurred (option A, the choice of the Court in *Laura Ashley*).

43. Does the *DFS* decision affect the otherwise binding nature of the High Court decision in *Laura Ashley?* It seems to us that the fact the Court of Appeal was not referred to *Laura Ashley* does not deprive the *DFS* decision of authority (it was not 'per incuriam'): the Court of Appeal is not bound to consider decisions of lower courts. So the question is whether the Court's ruling in *DFS* on the meaning of 'prescribed accounting period' in s 73(2), set out in [52], was a necessary part of its decision ('ratio') or merely a non-binding aside ('obiter').

44. We conclude that the Court of Appeal's decision on the meaning of 'prescribed accounting period' in s 73(2) was seen by the Court as a necessary part of the judgment they delivered and not simply a comment made in passing. We say this because the Court of Appeal's decision was on the meaning of 'evidence of facts' in s 78A(2). It reached its decision on this based on four reasons. The third reason given is at [52-55]. That reason was that 'prescribed accounting period' in s 73 refers to the period in which the repayment in issue was made. In other words, the meaning of that phrase in s 73(2) was a building block on which the Court relied in making their judgment on s 78A(2).

45. Moreover, in [57-59] the Court applied its decision on time limits to the facts of the case before it, concluding that the assessments were out of time under s 73(6)(a) as well as under s 78A(2). They applied the meaning of 'prescribed accounting period' they had given in s 73(2) to s 73(6)(a) ([54] and [58]). So again, in making their judgment on s 73(6)(a), the meaning of that phrase in s 73(2) was a building block on which they relied. The decision that the prescribed accounting period referred to in s 73(2) was Option C was seen by the court as a necessary part of their

decision on both the issues (s 78A(2) and s 73(6)(a)) on which they ruled: it was not obiter.

Statutory amendment

46. As we have said, there are theoretically three possibilities for the meaning of 'prescribed accounting period' for an assessment under s 73(2) where HMRC seek to recoup by assessment a repayment made to a taxpayer which they consider should not have been made. We have described them as option A, option B and option C.

47. The case law on which is the correct option was described to us as confused and we were not referred to it in detail. But in summary, the High Court in *Laura Ashley* ruled in favour of option A; the Court of Appeal in *Croydon Hotel* made a ruling in favour of option B (although *Laura Ashley* ruled this was merely obiter); and in *DFS* it made a ruling in favour of option C. We have concluded that that the *DFS* ruling was not merely obiter but binding. Effectively, it seems to us, *Laura Ashley* has been overruled.

48. But that is not the end of the story. Parliament has since amended s 73 by inserting new section s 73(6A). The amendment (effective from 19 March 2008 and therefore in force so far as this appeal is concerned) states:

> **S 73(6A)**
>
> In the case of an assessment under subsection (2), the prescribed accounting period referred to in subsection (6)(a) and in section 77(1)(a) is the prescribed accounting period in which the repayment or refund of VAT, or the VAT credit, was paid or credited.

49. Subsection (6)(a) is the subsection which gives the two year time limit for assessments: the effect of s 73(6A) is therefore that the two year time limit for a s 73(2) assessment runs from the date of repayment by HMRC. Section 77(1)(a) is the four year time limit. So, in other words, Parliament acted to make it clear that the time limits run from the date of repayment (option C). Curiously, Parliament, so far as s 73 was concerned, limited this definition to subsection (6)(a) and took no action to define what prescribed accounting period meant in 73(2).

50. The appellant's case is that it cannot be assumed that prescribed accounting period in 73(6)(a) necessarily has the same meaning as it has in 73(2) as Parliament had the opportunity to give it the same meaning but clearly chose not do so. The appellant's presumed position must be that Parliament had now indicated a 'contrary intention', in other words, this amendment indicated that Parliament no longer intended the same phrase to have the same meaning throughout the same section.

51. The appellant's position on this is flawed. The logic of the appellant's position must be that the original, pre s 73(6A), meaning of 'prescribed accounting period' in s 73 was Option A; so that the effect of s 73(6A) was to change, from 2008, its meaning from Option A to Option C in so far as s 73(6)(a) was concerned. Yet that position is demonstrably wrong: in 2004, long before (6A) become the law, it was already clear from *DFS* that Option C was the meaning to be attributed to that phrase in s 73(6)(a).

So that phrase in (6)(a) never had the Option A meaning. So new sub-section (6A) did not alter the meaning of the phrase for (6)(a).

52. HMRC's case is that it must be assumed that 'prescribed accounting period' in 73(2) is the same as in 73(6)(a) as to do otherwise makes no sense.

53. Our view, having considered the authorities in detail, despite the lack of submissions on them, is that *DFS* in 2004 had defined in a judgment binding on this Tribunal, that 'prescribed accounting period' in s 73(2) and 73(6)(a) meant the period in which the tax was repaid by HMRC (option C). New section 73(6A) did not more than confirm this meaning for s 73(6)(a). There is therefore no 'contrary intention' and 'prescribed accounting period' has and always has had the same meaning wherever it appears in s 73 and that meaning is Option C.

Conclusion

54. We consider *DFS* binding and therefore must conclude that 'prescribed accounting period' in s 73(2) refers to the prescribed accounting period in which repayment took place (Option C).

55. We note in passing that we consider the state of the authorities unsatisfactory and a ruling from a higher judicial authority on the subject is likely to be helpful to HMRC and taxpayers alike in resolving the confusion: although it seems to us that – assuming our analysis is right – *DFS* makes the matter plain. We understand that HMRC's guidance, in order to pre-empt technical challenges without merit to assessments, advises officers to issue three assessments in the alternative specifying respectively Option A, Option B and Option C as the relevant accounting period in respect of which the assessment is made.

56. This appeal is made because the assessing officer did not follow that guidance: we were given to understand that this may have been because the officer issued the assessment in a hurry presumably due to concerns about time limits.

57. We consider that common sense should be used in interpreting these provisions. This has been stated by the Court of Appeal in both the *House* and *Bassimeh* cases:

> "Moreover, there is some authority that even the VAT legislation may be interpreted from a commonsense point of view: in *House (t/a P & J Autos…)* Sir John Balcombe said 'is there any reason why we should not let common sense apply and say that the taxpayer was here given proper and adequate notification of the basis upon which he had been assessed?....There should not be any requirement to carry out, or to notify, any calculations which would be simply otiose." Per Evans LJ at page 41e of *Bassimeh.*

58. In the case of *Bassimeh* a single 'global' or 'total' assessment was made covering a number of years comprising many accounting periods. There was no attempt to allocate the total assessment between the various accounting periods. The assessment was upheld as valid despite the reference in the relevant Act to amounts being due 'in respect of the prescribed accounting period'.

59. In *House,* the taxpayer was held to have adequate notice of the basis of the assessment because a schedule showed the amounts assessed per period and the VAT 655 showed the total. Using a calculator would have established that the total of the schedule equalled the amount shown on the VAT 655: page 161g.

60. Applying common sense, it seems to us that Parliament did not intend an assessment to be unenforceable for a minor technical defect in dating which has misled no one. We take the view that Parliament intended notification of an assessment to inform a taxpayer why and for what he has been assessed. That necessarily assumes that for a s 73(2) assessment the taxpayer is informed which repayment is being recovered by assessment. If we were not bound by precedent we would say that as the taxpayer would be able to identify the repayment assessed from any one of the relevant three prescribed accounting periods (Option A, or B or C), it follows that specifying *any* of these periods in a notification of an assessment is sufficient to identify it and sufficient for s 73(2). So our preferred view would have been that *any* of these periods is a sufficient 'prescribed accounting period' for s 73(2). So our preferred view would have been that *DFS* and *Croydon Hotel* were both right, and while *Laura Ashley* was wrong to reject Option B it was right to accept Option A and that as long as an assessment mentions any one of these three options, it is not formally deficient for failing to notify the period of assessment.

61. Indeed, we have already noted that *DFS* considered *Croydon Hotel* correct on the point, overlooking that Option B is not always the same prescribed accounting period as Option C. So one way of looking at the authorities is that Court of Appeal has already accepted that specifying *either* Option B or C would be sufficient for an assessment to be valid (assuming it is not deficient in any other respect). And, ignoring that *Laura Ashley* has been impliedly over-ruled, there is nothing in *Laura Ashley* that precluded Option C. Option C was not considered or even mentioned in *Laura Ashley*.

62. Be that as it may, it is clear from *DFS* that the prescribed accounting period in which the date of repayment falls is a correct one for a s 73(2) assessment.

Is a date sufficient to identify a prescribed accounting period?

63. We move on to the second question. As we have said, the appellant contends that the proper reading of s 73(2) is that an assessment made under it must be stated to be for one or more prescribed accounting periods. Its case is that the assessment in the appeal did not identify any period of the assessment.

64. HMRC accepts that the VAT 655 referred to the prescribed accounting period as "00/00" but considers (and the appellant accepts and we find) that the letter of 4 September 2012 also comprised a part of the notification of assessment. That stated the assessment was in respect of the

> 'repayment [which] was authorised on 9 September 2010' (see §8).

65. HMRC's position is that this was sufficient to notify the LSE that the prescribed accounting period was 10/10 as that was the period in which that date fell.

The formal requirements for an assessment

66. It is worth reconsidering what s 72(3) actually requires:

> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person –
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> An amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly….

67. The appellant also relies on the case of *House (t/a P & J Autos)* for the proposition that to be an assessment at all, the 'assessment' must contain at least the following information:

(a) the amount of the assessment;

(b) name of the taxpayer;

(c) the reasons for the assessment; and

(d) the periods of the assessment.

68. May J at [1994] STC 357on appeal from the VAT Tribunal in that case appeared at page 226j to agree with counsel's submission at page 223h that to be valid an assessment must contain the above four matters. On further appeal, the Court of Appeal at [1996] STC 154 did not specifically deal with what an assessment must comprise in order to be an assessment: it just stated that the taxpayer must be given

> 'proper and adequate notification of the basis upon which he had been assessed.' (page 161h).

69. Sir John Balcombe also approved Woolf J's statement in *International Language Centres* [1983] STC 394 at 398 that:

> "…the taxpayer is entitled to be informed in reasonably clear terms of the effect of the assessment…'

We have already referred to the basis of the Court of Appeal's decision in *Bassimeh* [1997] STC 33.

70. The Upper Tribunal has dealt with a similar issue where it had to consider whether an assessment under s 73(1) for period 00/00 was valid: *Queenspice* [2011] STC 1457. In that case, Lord Pentland said, relying on the HC and CA in *House:*

> "[25]…(iii) in judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates.

71. He referred with approval at [26] to a passage from *De Voil's Indirect Tax Service* which stated it was enough if

> "the assessment period can be readily deduced despite the absence of a clear statement setting out the beginning and end of the period…"

72. The issue in *Queenspice* was rather different: while the VAT 655, like the one in this case, referred to period 00/00, a later letter written by HMRC explained that the 00/00 was a reference to periods 05/02 to 11/05. That letter was found to be a part of the notification of the assessment: the notification therefore complied with the formal requirements mentioned at [25] and the appeal was dismissed.

73. In LSE's appeal, we find that there was no clear statement in any of the documents comprising the assessment that the period of assessment began on 1 August 2010 and ended on 31 October 2010. Nevertheless, that period could be readily deduced from the statement that HMRC was assessing to recover the payment authorised on 9 September 2010, as that date fell within that period. So we find that the notification of the assessment did contain, in relatively clear terms, the period of time to which the assessment related. And we consider that that is sufficient to satisfy s 73(2) as set out above.

Implied period of assessment?

74. The appellant's position is that such a view amounts to fixing the appellant with constructive knowledge: the notice of assessment did not actually refer to a prescribed accounting period. It is just that the appellant actually did know exactly which sum it was being assessed in respect of. We agree that the fact that the appellant was not misled is, as the appellant says, quite irrelevant. The question is whether the notification of the assessment was formally valid: if it was technically deficient it is not a notification even if the appellant knew exactly to what the 'assessment' related.

75. But while that is true, when deciding whether an assessment is technically deficient, s 73(2) must be interpreted with common sense and in line with what Parliament must be supposed to have intended. If the prescribed accounting period to which the notification of assessment relates could be readily deduced from the information stated, we consider that the notification of assessment is not void even thought the start date and end date of the prescribed accounting period are not explicitly stated. The prescribed accounting period *is* notified to the appellant if it is tolerably clear from the notice of assessment. In our view, in this case, because the date 9 September 2010 was specified, the prescribed accounting period was reasonably clear. The notification was valid.

Alternative case - dates mentioned in letters

76. As the appellant no longer challenges the assessment on any other ground, other than the validity of the notification of the assessment, that concludes the appeal against the appellant.

77. We note in passing that HMRC's case in the alternative was that, if Option A was the prescribed accounting period for the purposes of an assessment under s 73(2), then there was a reference to the Option A prescribed accounting periods in the notice of assessment too. This was because, as we have said at §10 above, the letter of 4 September 2012 referred to

> "all years 1973 to 1997"

This was clearly a reference to the period for which LSE had originally made the claim for repayment, and therefore, we find, a reference to the period for which the assessment was made.

78. We consider this legally irrelevant due to our view of the effect of the *DFS* case. Option C is what matters: not Option A. But if it were relevant, our view is as stated above. The question is whether the assessment period can be readily deduced despite the absence of a clear statement setting out the beginning and end of the period. It was clear from the amount assessed and the reference to 1973-1997 and the August 2010 letter that HMRC were assessing the entire amount repaid for the entire period of the claim: the appellant accepts that global assessments can be made and that (if Option A applies) this was a global assessment. Its complaint is that no start date nor end date are specified. Specifically the repayment was in fact for periods 7/73 to 4/97 but this was not specified in any of the three documents comprising the notification of assessment.

79. If it was Option A which mattered, then our view would be that the only way the recipient of the notification of assessment could have known the start and end periods of the assessment would be if they were familiar with the claim (as LSE, as taxpayer, clearly was). From what we have said at §75 above a taxpayer is effectively assumed to know its own periods of return: must a taxpayer be taken to know the claims that it makes?

80. HMRC considered LSE was at least fixed with knowledge of the contents of the letter dated 26 August 2010 which did include a schedule of the claim. Factually, even if this proposition is right, it makes no difference as the schedule to that letter was vague, making the claim divided up by years and not by reference to accounting periods. It did not include a start and end date for the claim; just a start and end year. In any event, legally, as we have found, it was not a part of the notification of the assessment.

81. However, common sense is that a taxpayer does not look at a notification of an assessment in isolation. It must know something about its own VAT affairs, and certainly about claims for repayment which it has made. We consider that, because the combination of the years stated and the amount assessed in the documents clearly indicated that HMRC were assessing the entire amount repaid for the entire period of the claim, and as the appellant knew the periods of the claim, the prescribed accounting period could be readily deduced. And that would be enough to make the assessment valid were Option A the period which mattered.

Alternative assessments

82. In 2013, the appellant raised its concerns with HMRC over the validity of the 4 September 2012 assessment. HMRC's response was to issue in 2014 two assessments in the alternative specifying respectively the prescribed accounting periods as per Options B and C. The appellant appealed both these new assessments and that appeal was consolidated with this appeal.

83. HMRC now accepts that both these assessments were out of time and does not seek to maintain them. The appeal against them is allowed. In the event this does not matter as we have upheld the original assessment issued two years earlier.

84. It was a fall back position for HMRC that these subsequent assessments clarified the prescribed accounting period for the 2012 assessment at issue in this appeal and should, therefore, be treated as putting right any formal failure to identify the prescribed accounting period in that earlier notification of assessment.

85. It is true that in *Queenspice* Lord Pentland held that a letter issued after the original Notice of Assessment could make good defects in that assessment: [34-37]. However, no issue on timing arose in that case as the later letter followed the VAT 655 within some 6 weeks. In this case, however, the subsequent assessments were out of time; if they are to be viewed as clarifying the earlier assessment, they would have to form a part of it. If they do 'complete' that assessment, then the assessment was not completed until the new assessments were issued: they were out of time, and that would make the entire assessment out of time. So we would find against HMRC on this point had we had to consider it.

86. But in the event the point does not arise as we have decided that the notification of the assessment of 4 September 2012, comprising the VAT 655, the letter of that date and the enclosed letter of 9 September 2010, was complete and effective within s 73(2).

Right of appeal

87. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 17 June 2015