[2020] UKFTT 0296 (TC)

TC07780

Appeal number: TC/2016/02693
TC/2017/05480

CORPORATION TAX – amortisation of goodwill – whether the "business in question" was a business carried on by a related party before 1 April 2002 – yes – whether a valid discovery had been made – yes – whether the discovery was stale – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARMSTRONG & HAIRE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at London on 20 November 2018

Mr Elliott, Counsel for the Appellant

Ms Browne, Litigator, for the Respondents

DECISION

Introduction

1. These are joined appeals relating to:

(1) a closure notice issued on 15 September 2015 under paragraph 32 to Schedule 18, Finance Act 1998 to disallow a tax deduction of £280,000 for the appellant's accounting period ended 30 November 2013; and

(2) a discovery assessment issued on 23 September 2016 under paragraph 41, Schedule 18, Finance Act 1998 in the amount of £56,000 in relation to the appellant's accounting period ended 30 November 2012.

Background

2. The appellant acquired the assets of two dentistry businesses on 1 December 2010 and began trading as a dental practice on that date. The preceding businesses had been carried on separately since 1996 by two self-employed dentists who operated from the same site and shared certain overhead costs. Each of these businesses ceased trading on 30 November 2010.

3. The two dentists had equal shareholdings in the company following the transfer of the assets and each was a director of the company.

4. The appellant's accounts for the period ended 30 November 2011 recognised goodwill as an intangible fixed asset of the business with a cost of £1.4m, to be written off in equal instalments over a five year period. Amortisation of £280,000 was charged in the profit and loss account for that period. The same amount was charged for the accounting period ended 30 November 2012 and 30 November 2013.

5. On 16 December 2014, HMRC opened an enquiry into the accounting period ended 30 November 2013.

6. On 6 January 2015, the appellant's representative replied to HMRC and advised them to review the ongoing enquires into the shareholders' individual tax returns for the tax year that the businesses were acquired by the appellant, relating to the valuation of the goodwill.

7. On 22 January 2015, Officer Weston replied and noted that the shareholders' tax returns stated that the businesses had been acquired by the shareholders on 1

December 1996. She requested an explanation as to how the amortisation of the goodwill had been treated.

8. In a letter dated 23 March 2015, Officer Weston rejected the appellant's argument that the acquired businesses had been created in 2006 as a result of changes in NHS contracts and stated that she considered that it appeared that the businesses had been in existence since at least 1996, and asks for comments and the basis on which goodwill in respect of private work had been treated.

9. On 17 June 2015, Officer Weston wrote to the appellant's representative and stated that she had not had a response to her letter of 23 March 2015 and that, in the absence of any evidence to the contrary, she "maintained that the goodwill was acquired by the company from a related party that carried on the same business prior to 1 April 2002" such that amortisation deductions were not available.

10. On 15 July 2015, in reply to a letter from the appellant's representative, Officer Weston stated that she had not changed her view on the matter and commented on various points raised by the representative in respect of the goodwill. She set out HMRC's position, that the goodwill related to businesses which had been acquired from related parties who carried on those businesses before 1 April 2002.

11. As no response was received to the letter of 15 July 2015, Officer Weston wrote to the appellant's representative on 3 September 2015 to advise that closure notices would be issued as no evidence had been provided to show that a new trade had commenced.

12. On 16 September 2015, HMRC issued a closure notice for the accounting period ended 30 November 2013, disallowing the deduction for amortisation of goodwill on the basis that the goodwill was acquired from a related party that carried on the same business prior to 1 April 2002.

13. On the same date HMRC made consequential amendments to the appellant's returns for the accounting periods ended 30 November 2011 and 30 November 2012.

14. The appellant appealed to HMRC in October 2015, which was re-sent in December 2015. A view of the matter was issued by HMRC in February 2016. The appellant appealed to this tribunal, and that appeal was acknowledged by the tribunal on 23 May 2016.

15. Following a non-statutory review of the decision, HMRC concluded that the consequential amendments should not have been made and withdrew these on 15 July 2016. HMRC requested and was granted a stay of proceedings in July 2016 in order to deal with the fact that the consequential amendments had been incorrectly issued.

16. On 23 September 2016, HMRC issued a discovery assessment in relation to the accounting period ended 30 November 2012. The appellant also appealed this assessment and the two appeals were joined by a direction made on 2 August 2017.

17. The accounting treatment of the goodwill is not in dispute: the issues between the parties are, firstly, whether the goodwill is within the scope of the corporate intangibles fixed assets regime and secondly, whether the discovery assessment made by HMRC for the accounting period ended 30 November 2012 is valid.

Whether goodwill was within the corporate intangibles fixed asset regime

18. For an amortisation deduction to be available for an intangible fixed asset, that asset must be within the scope of the corporate intangibles fixed asset regime. It should be noted that the accounting periods in this decision pre-date the changes to the corporate intangibles fixed asset regime which removed deductions for amortisation in December 2014 and July 2015.

Appellant's submissions and evidence

19. The appellant argued that the goodwill should be considered to be within the scope of the corporate intangibles fixed asset regime as an asset created by the appellant on or after 1 April 2002, under s881(1)(a) Corporation Tax Act 2009 (CTA 2009). The appellant does not argue that any other parts of s882(1) could apply.

20. The appellant noted the provisions of s884 CTA 2009 as determining the deemed date of creation of the goodwill. It was submitted that s713 CTA 2009 states that "an "intangible fixed asset", in relation to a company, means an intangible asset acquired or created by the company for use on a continuing basis in the course of the company's activities". Accordingly, it was submitted that the 'business in question' referred to in s884 must be the business making use of the asset, and so must be the business carried on by the appellant.

21. It was submitted that this is a different business to the separate businesses previously carried on by the shareholders. The appellant accepts that the shareholders' preceding businesses were similar to the appellant's business but argues that these were separate businesses, compared to the appellant's single business. It was noted that in *George Humphries & Co* ((1934) 19 TC 121) the court considered that the partnership formed between a film processing business and a film development and printing business created a new business rather than a continuation of a business. This decision was confirmed in the High Court.

22. In *C Connelly & Co* ([1992] STC 783) the same principle was noted, in reverse, where an accounting partnership with two offices was dissolved and the two partners each carried on as a sole trader from a single office. The High Court concluded that the division of the trade means that neither sole trader carried on the previous trade.

23. The appellant submitted therefore that, where two businesses of approximately equal size merge, it cannot be said that either business has continued.

24. Mr Armstrong, one of the shareholders, provided a witness statement and gave oral evidence at the hearing. He stated that the scale of the appellant's business was dramatically different to that of the preceding businesses, being approximately double

the size of each of the preceding businesses. He confirmed that the preceding businesses had been acquired in 1996 and that the growth in the businesses had been largely organic. Two small practices had been acquired for approximately £10,000 and £15,000, although he could not recall whether these acquisitions were before 2002. There were also a number of other changes at the time of the amalgamation, including an increase in private work and a more personalised patient-dentist service. The value of the goodwill had been established on the basis of an offer made by a third party.

25. The appellant therefore submitted that, as the ‘business in question’ must be that of the company rather than the preceding businesses, it could not have been carried on before 1 April 2002 and so, under the provisions of s884 the goodwill is to be treated as having been created on or after that date so that it is within the scope of the corporate intangibles fixed asset regime. It was also submitted that, if the “business in question” was intended to refer to a business other than that undertaken by the appellant then clear words would have been required in the legislation.

26. The appellant further submitted that this was supported by the decision of the Upper Tribunal in *Greenbank* ([2011] UKUT 155) which concluded that the provisions apply to both acquired goodwill and internally generated goodwill and therefore s884 applies to all goodwill. The appellant nevertheless submitted that the position here was very different to that in *Greenbank* as the appellant did not carry on the business which had been acquired from the shareholders.

27. Accordingly, the appellant submitted that the ‘business in question’ in s884 is that carried on by the appellant and that that business commenced on 1 December 2010 following the acquisition of the separate preceding businesses of the two shareholders. The appellant submits that the provisions of s884(b) therefore apply to treat the goodwill as created on or after 1 April 2002. The appellant further submitted that the provisions of s715(4) supported this position, as that section deemed the goodwill to have been created in the course of carrying on the business in question. In addition, it was submitted that the amendment of s884 to remove references to “internally generated” goodwill showed that it must be possible for acquired goodwill to be regarded as created on or after 1 April 2002.

28. The appellant explained that arguments which had been raised previously as to whether a new business had commenced as a result of changes to NHS contracts in 2006 were no longer being pursued and so these arguments, and HMRC’s response, are not discussed in detail further in this decision.

HMRC submissions and evidence

29. HMRC submitted the goodwill acquired did not fall within the corporate intangibles fixed assets regime and so the accounts amortisation of that goodwill was not an allowable deduction for the purposes of corporation tax.

30. HMRC stated that an asset would fall within the corporate intangibles fixed asset regime only if met the requirements of s822(1) CTA 2010. HMRC submitted

that s882(1)(a) could not apply, as the goodwill had not been created by the company on or after 1 April 2002. s882(1)(b) also did not apply, as the asset was acquired from a related party. Finally, none of conditions A, B, or C in s882(1)(c) applied to the asset.

31. HMRC submitted that the appellant and the shareholders were "related parties" for the purposes of s835(5) CTA 2009 as the appellant was a close company (as defined in s439(2) CTA 2010) and each of the shareholders was a participator in the appellant (following the provisions of s841(1) CTA 2009 and s454 CTA 2010).

32. HMRC submitted that the goodwill was purchased by the appellant from these related parties and that those related parties acquired their businesses and the goodwill associated with those business before 1 April 2002, as they had carried on the businesses since 1996.

33. HMRC argued that s884 could not be interpreted to mean that the goodwill was created after 1 April 2002 and so fall within s882(1)(a), as they submitted that the relevant test is not whether the appellant carries on a different business from the preceding businesses but, instead, whether the business acquired to which the goodwill relates was carried on by the appellant or a related party on 1 April 2002. Further, HMRC submitted that, if the "business in question" was intended to be the business carried on by the company making the claim, s884 would not refer to the possibility of the business being carried on by a related party.

34. Regardless of whether or not the business had changed when carried on by the appellant, HMRC submitted that the goodwill shown as an asset in the appellant's balance sheet, written down over a five year period, was the acquired goodwill associated with the preceding businesses. There was no dispute that those preceding businesses had been acquired in 1996, nor that the shareholders' personal tax returns for the year ended 5 April 2011 each showed a gain on disposal of goodwill at the date of transfer to the appellant.

35. HMRC submitted that the appellant had not argued that, and had not provided any evidence to indicate that, the preceding businesses had changed in any sudden or dramatic manner that could indicate that the original businesses had ceased and new businesses had commenced. Any evolutionary or organic change, as might be expected to occur over time, would not change the nature of the businesses between their acquisition in 1996 and their disposal to the appellant in 2010.

36. HMRC submitted that, accordingly, the goodwill amortised by the appellant was goodwill of a business which was carried on by a related party before 1 April 2002 and so could not fall within the provisions of the corporate intangible fixed assets regime and so no amount could be claimed as a deduction for amortisation for corporation tax purposes.

Discovery assessment

37. For a discovery assessment to be raised, an officer of HMRC must have made a subjective discovery that an assessment to tax was insufficient in accordance with para 41, Schedule 18, Finance Act 1998. It was submitted that a discovery assessment must also be made expeditiously.

Appellant's submissions and evidence

Whether statutory requirements for a discovery are met

38. The appellant submitted that, if no deduction was available for the amortisation of the goodwill, that the statutory requirements for a discovery assessment had not been met because the information made available and deemed to have been made available to a hypothetical officer of HMRC was sufficient to have informed them that the goodwill was created before 1 April 2002 and the assessment was not issued whilst that discovery was still "new".

39. The appellant submitted that the information that had actually been made available to HMRC on the appellant's tax returns included the following:

(1) that the appellant had claimed a deduction for the amortisation of goodwill; and

(2) that the appellant had purchased the preceding businesses from its two shareholders

40. The appellant also submitted that the date of commencement of the acquired businesses had been stated in the individual tax returns of the shareholders for the tax year in which the businesses were acquired by the appellant.

41. The appellant submitted that the case of *Charlton* ([2013] STC 866 at §58 and §65 made it clear that the hypothetical officer in this test "must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided … the test should not be contained by referent to any perceived lack of specialist knowledge in any section of HMRC officers".

42. Further, it was submitted that *Charlton* (at §78) had made it clear that the hypothetical officer should be regarded as having any relevant information which can be reasonably inferred to exist from the information actually available. It was submitted that the date on which the preceding businesses had started was information which a hypothetical officer would know was in existence.

43. It was submitted, therefore, that a hypothetical officer of HMRC could have been reasonably expected on the basis of the information made available to them on the appellant's tax return for the period 30 November 2012 to be aware that there was an insufficiency of tax in those self-assessments.

44. The appellant therefore submitted that the statutory requirements for discovery were not met and so HMRC were not entitled to raise a discovery assessment for those periods.

Whether assessment made expeditiously

45. In the alternative, it was submitted that, in order to issue an assessment, HMRC must not only have made a discovery but also must act expeditiously in issuing an assessment, as set out in *Tooth* [2018] STC 824 at §79.

46. It was submitted that, if HMRC could not have been reasonably aware that there was an insufficiency of tax on the basis of the information in the returns then the discovery was actually made in January 2015 as a letter from HMRC on that date confirms that HMRC had looked at the correspondence in respect of the shareholders and acknowledged that the "disposal details show their interests were acquired on 1 December 1996".

47. It was therefore submitted that in January 2015 HMRC had sufficient information to be aware that there was an insufficiency of tax in the returns for the period ended 30 November 2012.

48. In the further alternative, the appellant submitted that the insufficiency of tax was discovered, at the latest, in September 2015 when the closure notice was issued and the consequential amendments were made.

49. It was submitted that the case of *Beagles* ([2018] UKUT 380) had established that a discovery assessment could be invalid if it became "stale" as a result of delays, even though the assessment had been made within the statutory time limit. It was submitted that the case of *Charlton* had determined that a delay of three months could render a discovery assessment invalid, and in *Pattullo (*[2016] STC 2043), a delay of eighteen months had made a discovery assessment invalid.

50. The assessment in respect of these periods was not issued until September 2016 and so the appellant submitted that, as it has been established in case law that the same discovery cannot be made twice even if the second occasion is by a second officer of HMRC, the assessment for these periods was issued over a year after the latest date on which the discovery could have considered to have been made and so was not issued when the discovery was still "new". It was submitted that HMRC's explanation that the delay was due to a "processing error" was not sufficient to maintain the "freshness" of the discovery.

HMRC's submissions and evidence

Whether the statutory requirements for discovery were met

51. HMRC submitted that the appellant's corporation tax return for the period 30 November 2013 includes no information as to how the goodwill was acquired, although the company accounts for the periods ended 30 November 2011 and 30

November 2012 both mention that the businesses of the shareholders were transferred into the company.

52. HMRC submitted that, nevertheless, this was not sufficient information for them to be aware of the under-assessment of tax. Further, it was submitted that the information in the shareholders' income tax returns was not information whose existence an HMRC officer could reasonably be expected to have inferred. In *Charlton*, the court noted that such "inference can be drawn only from the return etc provided by the taxpayer … inference is not a substitute for disclosure" and cautioned against construing the statutory provision as to inference too widely.

53. Officer Chaffer provided a witness statement and gave oral evidence at the hearing as follows:

(1) he had made a discovery when he reviewed the file in August 2016 that the withdrawal of the consequential amendment for the accounting period ended 30 November 2012 would lead to an insufficiency of tax for that period

(2) the information which an officer would need to know to conclude that goodwill amortisation was not deductible would be that goodwill had been acquired, that the goodwill had been acquired from a related party, and the date on which that related party had acquired or created that goodwill

(3) he also agreed in cross-examination that the view had been established by 22 January 2015, as Officer Weston's letter of that date shows that she knew that the businesses had been acquired in 1996. He took the view that no assessment was made in January 2015 because Officer Weston would have needed to make sure that all questions were dealt with properly.

54. HMRC submitted that the statutory provisions allowing a deduction for amortisation are more complex than simply disallowing any amortisation of goodwill associated with the business acquired from the shareholders and therefore the reference to the transfer of the business alone was not sufficient for an officer to be reasonably expected to be aware of an insufficiency in the appellant's self-assessment.

55. Further in the alternative, HMRC submitted that the relevant discovery was that made by Officer Chaffer on reviewing the file, which was that the consequential amendment for 2012 was incorrect and that therefore an amount which ought to have been assessed to tax had not been assessed, such that a discovery assessment could be made under paragraph 41(1) of Schedule 18.

56. HMRC submitted, therefore, that the statutory criteria for a discovery were met and that, as the time limit for making an assessment is four years after the end of the year of assessment under paragraph 46 of Schedule 18, and the assessment was made within four years of 30 November 2012, the assessment was made within a reasonable time frame.

Whether the assessment was made expeditiously

57. HMRC submitted that the case was being actively worked prior to the assessment being issued as correspondence continued throughout 2016; the matter had not been "parked" for an assessment to be made later, and therefore the discovery had not become stale.

Relevant law (as at the relevant dates)

58. **CTA 2009**

> s715
>
> (4) For the purposes of this Part, goodwill is treated as created in the course of carrying on the business in question.
>
> s882 Application of this Part to assets created or acquired on or after 1 April 2002
>
> (1) The general rule is that this Part applies only to intangible fixed assets of a company ("the company") that—
>
> (a) are created by the company on or after 1 April 2002,
>
> (b) are acquired by the company on or after that date from a person who at the time of the acquisition is not a related party in relation to the company, or
>
> (c) are acquired by the company on or after that date in case A, B or C from a person who at the time of the acquisition is a related party in relation to the company.
>
> (2) For provisions explaining when assets are treated as created or acquired, see sections 883 to 889.
>
> (3) Case A is where the asset is acquired from a company in relation to which the asset was a chargeable intangible asset immediately before the acquisition.
>
> (4) Case B is where the asset is acquired from a person ("the intermediary") who acquired the asset on or after 1 April 2002 from a third person—
>
> (a) who was not at the time of the intermediary's acquisition a related party in relation—
>
> (i) to the intermediary, or
>
> (ii) if the intermediary was not a company, to a company in relation to which the intermediary was a related party, and
>
> (b) who is not, at the time of the acquisition by the company, a related party in relation to the company.
>
> (5) Case C is where the asset was created on or after 1 April 2002 by the person from whom it is acquired or any other person.

…

s884 goodwill: time of creation

For the purposes of section 882 (application of this Part to assets created or acquired on or after 1 April 2002) goodwill is treated as created —

(a) before (and not on or after) 1 April 2002 in a case in which the business in question was carried on at any time before that date by the company or a related party, and

(b) on or after 1 April 2002 in any other case.

59. **Finance Act 1998, Schedule 18**

Notice of enquiry

Para 24—

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

(2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the day on which the return was delivered …

Assessment where loss of tax discovered or determination of amount discovered to be incorrect

Para 41—

(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that—

(a) an amount which ought to have been assessed to tax has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given which is or has become excessive,

they may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax.

Restrictions on power to make discovery assessment or determination

Para 42—

(1) The power to make—

(a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or

(b) a discovery determination,

is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below.

…

Situation not disclosed by return or related documents etc

Para 44—

(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to an officer of Revenue and Customs if—

(a) it is contained in a relevant return by the company or in documents accompanying any such return, or

(b) it is contained in a relevant claim made by the company or in any accounts, statements or documents accompanying any such claim, or

(c) it is contained in any documents, accounts or information produced or provided by the company to an officer of Revenue and Customs for the purposes of an enquiry into any such return or claim, or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1) or (2)—

(i) could reasonably be expected to be inferred by an officer of Revenue and Customs from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing to an officer of Revenue and Customs by the company or a person acting on its behalf.

(3) In sub-paragraph (2)—

"relevant return" means the company's company tax return for the period in question or either of the two immediately preceding accounting periods, and

"relevant claim" means a claim made by or on behalf of the company as regards the period in question or an application under section 751A of the Taxes Act 1988 made by or on behalf of the company which affects the company's tax return for the period in question.

> General time limits for assessments
>
> Para 46—
>
> (1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.
>
> …
>
> (3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment.

Discussion

Whether the goodwill is within the IFA regime

60. The key question to be considered is which business is the "business in question" in s884 CTA 2009.

61. The appellant submits that this must be the business carried on by the company making use of the acquired goodwill, and that this is a different business to the business in which the goodwill was generated. HMRC submits that the "business in question" is the business which has been acquired, to which the goodwill relates.

62. In my view, the "business in question" must be the acquired business: goodwill cannot be acquired independently from the business in which it was created, as confirmed by the Upper Tribunal in *Greenbank* (§10), and the appellant accepts that goodwill is inseparable from the business in which it is created. Accordingly, the 'business in question' must be the business in which the goodwill is created as it cannot be detached from that business. That is the business acquired by the company. Whether the company carries on that same business is not relevant.

63. Similarly, in my view, as goodwill cannot be separated from the business in which it is created, s715(4) CTA 2009 does not mean that 'business in question' must refer to the business carried on by the company rather than the businesses acquired by the company in this case. To interpret s715(4) as referring to the business carried on by the company would mean that goodwill could be regarded as created by whichever business is carried by the company, rather than the company in which it was in fact created.

64. I consider that such an interpretation would require very clear wording as it contradicts the fact accepted by the appellant that goodwill cannot be separated from the business in which it is actually created. I note that the explanatory notes to s70(3)(b) Finance Act 2009, which introduced s715(4) into CTA 2009, also do not suggest that it should be treated as a deeming provision as the explanatory note states that the wording "confirms, for example, that no goodwill is created by the acquisition of a business or by the accounting recognition/capitalisation of goodwill".

65. Similarly, I consider that it would require very clear words in s884 for "the business in question" to be any business other than that in which the goodwill was

created. There is nothing in the wording of s884 which means that “the business in question” should be interpreted as being anything other than the business in which the goodwill was in fact created. The amendment of s884 by Finance Act 2009 to remove references to “internally generated goodwill” is not inconsistent with this; acquired goodwill may be treated as created on or after 1 April 2002 asset where either the business to which it relates in fact commenced on or after 1 April 2002, or where the business to which it relates was acquired after that date and was not carried on by the company or a related party before 1 April 2002.

66. Accordingly, as I consider that the “business in question” refers to each of the acquired businesses and not the business carried on by the company (if that is different) it follows that the goodwill is that of a business which was carried on by a related party before 1 April 2002 and is therefore outside the scope of the corporate intangibles fixed regime and no amortisation deduction is available in respect of that goodwill for the period in question.

67. On that basis, I have not considered whether the business carried on by the company should be regarded as a new business or a continuation of the two businesses acquired as the nature of the business carried on by the company after acquisition of the two businesses is not relevant to the question of whether any amortisation deduction in respect of the goodwill of those businesses is available for the period in question.

Discovery assessment for the period ended 30 November 2012

Whether the statutory requirements for a discovery assessment have been met

68. The appellant submitted that the necessary information was available and deemed to have been made available to a hypothetical officer of HMRC in the appellant’s tax returns, so that the statutory requirements were not met. In particular, it was submitted that the date on which the acquired businesses commenced was relevant information which a hypothetical officer could reasonably have been able to infer existed as the accounts for the preceding two accounting periods had included the information that businesses had been acquired from the shareholders and that, therefore, the date on which those businesses commenced should be regarded as information made available to an officer of HMRC.

69. HMRC submitted that the returns did not contain sufficient information for them to be aware of the under-assessment of tax as the company’s corporation tax return for the relevant period did not contained any information as to how the goodwill was acquired and that further relevant information could not be reasonably expected to have been inferred from the information in the return.

70. HMRC also submitted (in effect) that there had been two discoveries. Firstly, by Officer Weston in 2015, that there had been an insufficiency of tax in the returns for the periods ended 30 November 2012 and 30 November 2013 because the acquired businesses had each been owned by a related party before 1 April 2002. Secondly, in respect of the period ended 30 November 2012, in August 2016 by Officer Chaffer

and that the discovery was that the “withdrawal of an incorrectly raised consequential amendment would mean that there was an insufficiency of tax in the self-assessment.”

71. In *Charlton*, it was noted as follows:

> §37 (approved by the Upper Tribunal in *Tooth* at §79): for a discovery to be made, “All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself.”
>
> §74: the discovery provisions should be construed in a manner consistent with the purpose of the overall scheme. The Upper Tribunal agreed with the decision in *Langham v Veltema* ([2004] EWCA Civ 193) that the “key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return … have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question”.
>
> §75: a wide interpretation of the provisions would have the ”clearly unintended consequence of enabling any document that could reasonably be assumed to exist effectively to be treated as if it were before the hypothetical officer”.
>
> §79: “Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness”
>
> §80: “There would have to be something in the return or other relevant documents provided by the taxpayer that would reasonably lead the hypothetical inspector to infer that the … documents were relevant to an insufficiency of tax”.

Whether Officer Weston made a discovery

72. Considering the decision in *Charlton* and the facts in this case, I do not consider that there is anything in the relevant return and accompanying documents that would reasonably lead a hypothetical inspector to infer that the date on which the acquired businesses commenced was relevant to an insufficiency of tax. I consider that, as indicated in §80 of *Charlton,* there would need to be some other information in the return that suggested that there was an insufficiency of tax to reasonably lead the hypothetical inspector to infer that the date on which the acquired businesses commenced was relevant to an insufficiency of tax.

73. It was not submitted that there was any other information in the returns and accompanying documents which would have suggested that there was an insufficiency of tax. Having reviewed the returns and accounts for the relevant period and the preceding two periods, I consider that there is no other information that

suggests that there is an insufficiency of tax and, as such, that the commencement date of the acquired businesses is not information which should be reasonably considered to be information which is regarded as made available to a hypothetical HMRC officer.

74. I consider that the inclusion of the date of commencement of the businesses in the shareholders' tax returns is not information which has been provided to a hypothetical officer of HMRC as it is not information within para 44(2)(a)-(c) and, on the same basis as above, is not information which should be reasonably considered to be information which is regarded as made available to a hypothetical HMRC officer.

75. Considering the correspondence between the parties during 2015: in the correspondence in January 2015 Officer Weston is seeking information as to why the amortisation deduction has been claimed and so has not finalised her view of the position and made a discovery. The fact that the businesses had been acquired in 1996 would not necessarily be absolutely conclusive evidence that the amortisation deduction was not available.

76. Similarly in March 2015 I consider that there is ongoing discussion as to whether new businesses had been formed after 1 April 2002 as a result of the changes in the NHS contracts. Although Officer Weston did not agree with the contentions she was still asking for an explanation and, again, I consider that it is not clear that has actually finalised a view at that time, as she continued to check whether there is another explanation for the goodwill amortisation that has not yet been provided.

77. Accordingly, I consider that a subjective discovery of the under-assessment was validly made by Officer Weston in June 2015 when she concluded that no evidence had been provided to show that the amortisation claimed was deductible and that there had been an under-assessment of tax for the relevant periods.

Whether Officer Chaffer made a subjective discovery

78. Officer Chaffer's evidence was that he discovered in August 2016 that a withdrawal of the consequential amendment for the period ended 30 November 2012 would lead to an insufficiency of tax for that period.

79. Considering the case law, particularly as summarised in *Charlton*, it has been established that a discovery may be made where ”no new fact has come to light but the revenue authorities have formed the opinion that upon a mistaken view of the law the taxpayer has been undercharged in his original assessment” and “I do not think it is stretching the word "discovers" to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment” (§30). However, ”an assessment is not precluded if it is founded upon a point other than the particular subject matter which was the subject of agreement or determination” (§39).

80. HMRC argued that Officer Chaffer made a separate, different, discovery to that made by Officer Weston. Specifically, that there was an insufficiency of tax as a result of the withdrawal of the consequential amendment.

81. In my view, this is not a viable interpretation of the discovery provisions in statute or case law: in this case, the insufficiency of tax arises as a result of the incorrect position in the tax return and not as a result of the withdrawal of the consequential amendment. The effect of the withdrawal may be that the insufficiency is not longer corrected but I do not consider that it can give rise to a new discovery that an amount has not been assessed, or has become insufficient within the meaning of para 41(1).

82. Although case law refers to discovery including the finding and correcting of an error in law by an additional assessment, I do not consider that this extends to enabling discovery to encompass the making of a third assessment where there has been an error in procedure in the second assessment as well an error in law in the original assessment, as the assessment is still founded on the original error in the original assessment, which has already been discovered and case law has established cannot be discovered again.

83. Accordingly, I do not consider that Officer Chaffer made a subjective discovery within para 41(1) of Schedule 18.

Staleness

84. It has been established by the Upper Tribunal in *Tooth* (and others) that a discovery assessment must not only make a discovery but also act expeditiously in issuing an assessment in respect of that discovery.

85. The appellant submitted that, if there was a subjective discovery, it was made in January 2015 when Officer Weston acknowledged in correspondence that the shareholders had acquired the businesses in 1996. In the alternative, the appellant submitted that the discovery was made at the latest in September 2015 when the closure notices were issued.

86. The appellant submitted that the decision of *Charlton* showed that a delay of three months could render a discovery assessment invalid; the decision in *Pattullo* had concluded that a delay of eighteen months could make a discovery assessment invalid. As the appellant submitted that the relevant discovery had been made at the latest in September 2015, it was submitted that the delay of a year in making the assessment meant that the discovery could not be regarded as having been made whilst it was still "new" and that HMRC's explanation of a processing error could not be regarded as maintaining the "freshness" of the discovery.

87. HMRC submitted that the case was being actively worked prior to the assessment being issued and so could not be regarded as stale.

88. As I have set out above, I consider that the relevant discovery was made by Officer Weston in June 2015. The discovery assessment was made in September 2016, some fifteen months later. The question is whether the discovery had, by then, become stale.

89. Considering the case law in this area, it is clear in the decision of *Pattullo* that a discovery would only lose "newness" in exceptional circumstances, due to inaction on the part of HMRC (§53). In *Beagles,* the Upper Tribunal stated that "it was incumbent upon HMRC to take further steps in order to preserve [the quality of "newness"] in the period between the making of the discovery and the issue of the assessment" (§87). In that case, the delay was approximately two and a half years.

90. The decision in *Charlton* notes that if "for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment" (§37). The tribunal concluded (albeit obiter) that the actual delay in *Charlton* pending a determination of another relevant appeal "did not deprive [the officer's] conclusions of their essential newness".

91. Essentially, therefore, the concept of "staleness" in respect of a discovery is one which is intended to protect a taxpayer against inaction by HMRC - that is, where a discovery is made and HMRC "sit on it and do nothing for a number of years" (*Pattullo,* §52 and *Beagles* as above), and that it would only be in the most exceptional circumstances that a discovery would be come stale.

92. Considering the facts in this case, I do not consider that HMRC "sat on" on the discovery and did nothing: the consequential amendment was issued in September 2015, within three months of the discovery being made (and during which time HMRC was still seeking comments from the appellant's representative). The matter continued to be actively worked by HMRC and the appellant during the following year. The fact that it was found on review in July 2016 that this was procedurally incorrect and the consequential amendment was replaced by a discovery assessment in September 2016 does not, in my view, mean that these are the type of exceptional circumstances which would mean the discovery had become "stale".

Conclusion

93. For the reasons set out above, therefore, I conclude that no deduction is available for amortisation of goodwill as the "business in question" in s884 CTA 2009 is each of the businesses acquired by the appellant, being the businesses in which the goodwill was generated and each of which had been carried on by a related party before 1 April 2002. Whether the appellant continued to carry on these businesses or commenced a new business following their acquisition is immaterial.

94. I also conclude that a subjective discovery within the meaning of para 41(1) Schedule 18 Finance Act 1998 was validly made by Officer Weston in June 2015 and that this discovery had not become "stale" when the discovery assessment in respect of the period ended 30 November 2012 was issued.

95. The appeal is therefore dismissed.

96. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 17 JULY 2020