Neutral Citation: [2024] UKFTT 00539 (TC)

Case Number: TC09209

FIRST-TIER TRIBUNAL
TAX CHAMBER

George House, Edinburgh

Appeal reference: TC/2022/01466

Corporation Tax *- discovery assessments relating to amortisation relief for goodwill under Part 8. Corporation Tax Act 2009, Scottish partnerships. Appeal dismissed*

Heard on: 6-7 June 2023
Judgment date: 13 June 2024

Before

JUDGE VIMAL TILAKAPALA
MEMBER: SUSAN STOTT

Between

ARMOUR VETERINARY GROUP LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Sheila Tannock, Stewart Gilmour & Co

For the Respondents: Ms Kirsty Harding litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal in respect of discovery assessments issued on 17 December 2018 in respect of the Appellant's accounting periods ending ("APEs") 26 January 2015 and 26 July 2015 for £40,777.35 and £19,059.09 respectively.

2. The discovery assessments were issued under para. 41, Sched. 18 Finance Act 1998 ("FA 1998") and relate to the disallowance of the Appellant's claim for amortisation of goodwill as a deductible expense for corporation tax under the provisions of the intangible fixed assets rules in Part 8 of the Corporation Tax Act 2009 (the "Intangibles Regime" and "CTA 2009").

3. The central point in this appeal is whether and if so the extent to which the goodwill falls within the provisions of the Intangibles Regime. To the extent that it falls within that regime amortisation relief may be available. To the extent that it falls outside that regime it is accepted that no relief for amortisation will be available.

4. We had a Hearing Bundle of 788 pages and an Authorities Bundle of 177 pages together with skeleton arguments for each party. During the hearing it became apparent that the parties had not considered the potential impact on their arguments of the partnerships involved in the appeal being Scottish partnerships. Further submissions were, therefore, sought from the parties on the implications of the law as it applies to Scottish partnerships. On 31 July 2023 each party provided their written submissions on this point together with, in HMRC's case, an additional Authorities Bundle.

THE BACKGROUND AND RELEVANT FACTS

5. The Appellant, Armour Veterinary Group Ltd. ("AVGL") was incorporated on 27 January 2014. Its directors are Mr Edward Hewitt and Mr Alan Walker each of whom hold 50% of its shares.

6. Shortly after incorporation, AVGL acquired the business of the Armour Veterinary Centre ("AVC"), a business that was being carried on by Mr Hewitt and Mr Walker in partnership.

7. The chronology of AVC's business prior to its acquisition by AVGL is broadly as follows:

(1) The business was established as a veterinary practice sometime in 1978 as DCS Alexander MRCVS ("DCS Alexander") by Mr Alexander.

(2) Mr Hewitt joined the practice in 1997.

(3) On 1 May 2000 Mr Hewitt and Mr Alexander commenced trading in partnership (the "DCS Alexander Partnership").

(4) Mr Alexander retired from the practice on 30 April 2005. Mr Hewitt then purchased Mr Alexander's interest in the partnership and continued to run the practice as a sole trade, renaming it as the Armour Veterinary Centre ("AVC").

(5) Mr Walker commenced work at the practice in 2006

(6) Mr Hewitt and Mr Walker entered into partnership on 1 August 2008 and the partnership continued to trade under the AVC name.

(7) At some time in 2012 AVC purchased the large animal business of a neighbouring veterinary practice (the Dalblair Veterinary Centre). Following that

purchase, goodwill was shown as an acquisition in AVC's partnership accounts in the amount of £165,805.

8. Following AVGL's incorporation, goodwill of £1,875,000 was recognised in its accounts for the 18 month period to 26 July 2015.

9. On 16 October 2015 AVGL filed its corporation tax self-assessment ("CTSA") returns for its APEs 26 January 2015 and 26 July 2015. Amortisation of £56,250 in respect of goodwill acquired on incorporation was charged to the 18 month period to 26 July 2015 (being the period from incorporation to its APE 26 July 2015).

10. None of the amortisation was added back in AVGL's CT computations for APEs ending 26 January 2015 and 26 July 2015 and so the full amount charged to the period was claimed as deductible.

11. On 27 April 2017 AVGL filed its CTSA returns for APEs 26 July 2018 and 31 July 2016. Accompany these returned were revised company accounts and CT computations for the 18 months covering its APEs 26 January 2015 and 26 July 2015. These were not, however, submitted as amended returns.

12. On 20 Sept 2017 HMRC wrote to AVGL and its representative Stewart Gilmour & Co ("SG") notifying them that enquiries had been opened under para. 24(1), Sched 18, FA 1998 into its corporation tax returns for APEs 26 July 2016 and 31 July 2016. It said that HMRC would be looking at the goodwill. HMRC also asked for evidence to show that the goodwill acquired by AVGL from AVC was a "post 2002 asset" for the purpose of the Intangibles Regime given that AVGL's website stated that Mr Hewitt became a partner in the business in 1999. The letter also asked whether the valuation of the goodwill had been agreed with HMRC and if not for AVGL to provide: a full description of the business at the date of the transfer, a copy of any valuation report or computations obtained or who undertook the valuation, and a copy of the business sale agreement.

13. As no reply was received, HMRC issued an information notice under para 1, Sched 36 Finance Act 2008 on 22 November 2017.

14. On 29 Nov 2017 SG replied to HMRC's letter of 20 September 207. In this reply SG stated that:

(1) AVGL had acquired the goodwill from the partners of AVC, Mr Hewitt and Mr Walker.

(2) Mr Hewitt was not a full equity partner in the DCS Alexander Partnership and was entitled only to "a salaried amount of profits" up until 30 April 2005 at which time he acquired the goodwill from Mr Alexander following his retirement. The price he paid for that goodwill was included in his CGT computation when he sold the goodwill to AVGL.

(3) The goodwill sold to AVGL on 31 January 2015 was not therefore a pre-2002 asset.

(4) The valuation of the goodwill was included in the DCS Alexander partners' tax returns in 2014 which had been accepted by HMRC.

(5) The value of the goodwill was calculated "with reference to standard industry figures for calculating practice goodwill".

The letter also included (a) tax returns for 2002- 2005 of the DCS Alexander Partnership which SG said confirmed Mr Hewitt's position as a salaried partner for those years and (b) an incomplete copy of the asset acquisition agreement between AVC and AVGL.

15. On 8 Dec 2017 HMRC wrote to AVGL and SG explaining that the letter and information provided in SG's letter dated 29 November 2017 did not demonstrate that Mr Hewitt was a salaried partner. It said that HMRC regarded the title of 'salaried partner" as a term normally applied to an employee taxed under PAYE – who was not an actual partner but merely had the partner title and who benefitted from employment rights. By contrast Mr Hewitt was taxed on a share of partnership profit indicating that he was a partner prior to April 2002.

16. The letter of 8 December 2017 also clarified that the inclusion of figures in the partners' 2014 returns did not signify any agreement by HMRC of the valuation of the goodwill, making the point also that those returns: (a) did not indicate that the computations included any estimate or valuation, and (b) did not disclose that the disposal of goodwill was to a connected party. HMRC did not, therefore, consider that it had been provided with all the information relevant for them to determine whether a valuation agreement may have been appropriate. The letter said that HMRC valuers would be asked to consider the position. HMRC also pointed out that the acquisition agreement copy that had been provided by SG was incomplete.

17. On 2 March 2018 SG wrote to HMRC refuting the assertion that Mr Hewitt had been an equity partner prior in the DCS Alexander Partnership stating that he had purchased all of the goodwill in the business for £72,982.81 from Mr Alexander on his retirement on 30 April 2005. It also stated (or as the case may be restated) the following:

(1) The arrangements were arms length and up to the date of purchase Mr Hewitt had no interest in the goodwill or the other assets of the business.

(2) It disagreed with HMRC's view of a salaried partner as being an employee – and HMRC's view that receiving a fixed share of profits indicated an entitlement to a share of the assets (including the goodwill).

(3) On valuation it said that the figures included in Mr Hewitt's and Mr Walker's personal tax returns were considered to be fair market value having taken advice from their professional body (The Royal College of Veterinary Surgeons) and so no post valuation check was deemed necessary

18. On 19 April 2018 HMRC wrote to AVGL and SG introducing Mr Hagen as the new HMRC officer responsible for the matter, and pointing out that:

(1) All evidence received to date pointed to Mr Hewitt being a partner in the DCS Alexander Partnership and participating in profits.

(2) Mr Hewitt had returned employment income from DCS Alexander for 1999/2000 but for the years 2000/01 – 2005/06 he had been shown as a partner on both the partnership returns and his personal returns.

(3) No deductions for PAYE or NICs had been made from the amounts shown as shares of profit for Mr Hewitt.

The letter asked again for the material requested to support the valuations.

19. As no reply was received, on 20 July 2018 HMRC issued another information notice under para 1, schedule 36 FA 2008 requesting further information and documents to support the contention that Mr Hewitt was not an equity partner prior to Mr Alexander's retirement In the accompanying letter HMRC also noted that:

(1) In their view all the evidence pointed to Mr Hewitt being a partner in the DCS Alexander Partnership and participating in profits.

(2) Mr Hewitt returning employment income of £27,945 for 1999/2000.

(3) Mr Hewitt had been shown as a partner on both the DCS Alexander Partnership returns and his own personal returns for all years from 2000/01 to cessation of the partnership on 30/04/05.

(4) Mr Hewitt had been shown as receiving a share of the profits for all of these years and had shown his share as partnership profit with no deduction for tax or NICs

(5) The SA1 figures on the partnership return reported employee costs of less than the profit figure paid to Mr Hewitt.

(6) The letter also queried the valuation of £75,982 placed on the goodwill acquired by Mr Hewitt from Mr Alexander noting that it was significantly lower than the DCS Alexander profit figure and partnership net assets and asking why it was so low if Mr Hewitt had no entitlement to any share in the partnership assets.

20. On 3 September 2018 SG responded stating that Mr Hewitt held the responsibility of a partner but was not entitled to an equity share of profits but to what they referred to as a "pre-determined partner's salary". They emphasised that this amount "bore no relationship to overall profit". They also restated the point that on Mr Alexander's retirement Mr Hewitt had purchased the tangible assets of the practice including its goodwill. Finally SG said that no actual purchase agreement had been drawn up between Mr Alexander and Mr Hewitt – but that the calculations and valuations of all assets were agreed "with reference to Open Market Value".

21. On 4 October 2018 HMRC wrote again to SG setting out why it considered Mr Hewitt to be a partner from 1 May 2000 and requesting the calculations and valuations agreed between Mr Hewitt and Mr Alexander in respect of the purchase of the DCS Alexander business assets. In this letter HMRC made (and repeated) several points including the following:

(1) Mr Hewitt was described as a partner in his personal returns and the partnerships tax returns.

(2) His remuneration was paid out of partnership profits and he was not treated as an employee subject to PAYE by the partnership.

(3) He was presented to the outside world as a partner.

(4) The Armour website includes a statement that he had been a partner since joining in 1999.

22. On 2 November 2018 SG responded confirming that although Mr Hewitt has the status of a partner to the outside world and within the practice, as a salaried partner he had no interest in the equity or assets of the business. They enclosed a sheet described as "the workings in respect of the sale of all of the business assets from Mr D Alexander to Mr D Hewitt at 1st May 2005". This consisted of 2 pages of manuscript figures which did not reference goodwill. There was no indication of who drafted it or the context in which it was used or produced.

23. On 22 November 2018 HMRC wrote to SG suggesting that based on the evidence provided it appeared that SG were saying that Mr Hewitt was an employee. They also pointed out that partners needed to satisfy one of three tests to be treated as self-employed and it appeared that 2 of those tests were met by Mr Hewitt. They added that where the facts were not clear cut the wishes and intention of the parties could be a consideration and these were undoubtedly in HMRCs view to treat Mr Hewitt as a partner and as self-employed. (HMRC

during the course of the appeal indicated that this approach was mistaken as they described tests intended to be applied to LLPs).

24. On this basis HMRC said that it appeared that the business had been continuously operated by Mr Hewitt prior to 1 April 2002 and, accordingly, not all of the goodwill would fall within the intangible assets regime (s 884 CTA 09). The letter referred also to the acquisition of the unconnected (Dalblair) practice in AVGL's APE 31/07/12 saying that a portion of the goodwill acquired might qualify for relief and that AVGL might wish to consider making a claim in respect of it.

25. On 3 Dec 2018 SG wrote to HMRC. In this letter they agreed with HMRC that Mr Hewitt was not an employee. They re-confirmed that there was no written partnership agreement or job description or letter of appointment for him and that his role had evolved during his time with Mr Alexander. This they said was typical in the industry. They said that the key point was not whether the AVGL business was being carried out by Mr Hewitt prior to 1 April 2002 but whether he had any equity in the business prior to that date.

26. They went on to say that as Hewitt had to purchase all of the assets of the business on Mr Alexander's retirement in April 2005 including goodwill it was only then that he became an equity owner. As a salaried partner prior to then he was entitled to agreed amounts of profit but not to any equity. The letter also referred to:

(1) the goodwill addition of £165,805 for APE 31 July 2012 relating to acquisition of an unrelated practice which they said was included in the base cost of goodwill on the disposal by AVC of its practice to AVGL; and

(2) goodwill of £75,982 shown on AVGL's balance sheet – this they said was included in Mr Hewitt's sole trader accounts and then the AVC partnership accounts when Mr Walker joined Mr Hewitt's sole trade in 1 August 2008 and was described by SG as the amount agreed by Mr Hewitt and Mr Walker as the open market value of the goodwill of the DCS Alexander practice at the time it was purchased by Mr Hewitt.

27. On 14 December 2018 HMRC issued discovery assessments under para 41 sch 18 FA 98 in respect of APEs 26 Jan 2015 (27/1/14 – 26/1/15) and 26 July 2015 (27/1/15 – 26/7/15) for £40,777.35 and £19,059.09

28. On 21 December 2018 SG notified an appeal by AVGL against the assessments.

29. On 31 January 2019 HMRC wrote to SG setting out reasons why they considered Mr Hewitt was a partner and so continuously carried on the business in partnership prior to 1 April 2002 . They also asked for further representations from the Appellants and stated their intention to issue closure notices for APEs 26 July 2016 and 31 July 2016**.**

30. Nothing further was received from AVGL or SG and so on 3 April 2019 HMRC wrote to them setting out their conclusions and stating that closure notices would be issued. On 8 April 2019 closure notices were issued under para 32, Sch 18 FA 98 disallowing £184,973 and £2,527 for APEs 26 July 2016 and 31 July 2016.

31. On 19 July 2019 HMRC wrote to SG saying that Mr Mee had taken over from Mr Hagen and setting out what they considered to be the position for APEs 26 Jan 2015 to 31 July 2018 inclusive. This letter also summarised the position as at that date and asked *inter alia* whether any further points were going to be made in respect of APEs 26 January 2015 and 26 July 2015, noting that the closure notices for APEs 26 [July] 2016 and 31 July 2016 had not been appealed and that tax was therefore due and payable. It also raised questions in relation to APE 31 July 2017 and asked what AVGL planned to do for APE 31 July 2018.

32. On 15 Nov 2019, SG wrote to HMRC stating their view that all of the amortisation was allowable as it was all created after 1 April 2002. They also set out their view that only Mr Hewitt's share of the goodwill should be in dispute as Mr Walker's share could not have been created prior to 1 April 2002 as he only became a partner in 2008. This letter also included a late appeal against the closure notices issued for APEs 26 July 2016 and 31 July 2016.

33. On 26 Feb 2020 HMRC wrote to SG saying that the goodwill acquired for £165,805 in respect of the purchase of the unconnected (Dalblair) practice on 27 February 2012 would be allowable. It said that the goodwill in relation to AVGL would not be allowed as deductible as it was, as per s 715(4) CTA 2009, treated as created in the course of carrying on the business and not on the acquisition of a business or the recognition of expenditure on such an acquisition. It noted that Armour Veterinary business had been established in 1978 and the goodwill created in the carrying on of the business since then, and not brought into existence when Mr Walker and Mr Hewitt became partners.

34. Nothing was then heard for some time (this coincided with the pandemic). On 18 May 2021 HMRC chased for a response and on 9 July 2021 issued an information notice to AVGL under para. 1 Schedule 36 FA 2008 seeking further information. A copy was emailed to SG on 8 July 2021.

35. On 15 July 2021 SG wrote to HMRC reiterating its position.

36. On 13 September 2021 HMRC issued its "View of the Matter" letter in response to AVGL's appeals against the discovery assessments for APEs 26 January 2015 and 26 July 2015. In this letter HMRC confirmed its view that the majority of the goodwill did not qualify for amortisation relief. It said that 9% of the amortisation claimed would be allowable – this was the part relating to the Dalblair acquisition in 2012. The letter also offered a statutory review.

37. Also on 13 September 2021 HMRC wrote to SG stating that as no reasonable excuse had been provided in respect of the late appeals against the closure notices for APEs 26 January 2016 and 31 July 2016 the late appeals would not be accepted.

38. On 3 November 2021 SG accepted the offer of a statutory review and on 25 January 2022 HMRC wrote to SG with the review conclusions. The conclusion was that the assessments were upheld in full. The review also concluded that the proportion of the goodwill relating to the acquisition of the neighbouring practice in 2012 was not in fact allowable as there was insufficient evidence to support it.

39. On 24 February 2022 AVGL notified its appeal against the discovery assessments issued for APEs 26 Jan 2015 and 26 July 2015.

Mr Hewitt's evidence

40. The following are the key facts that we found from Mr Hewitt's oral evidence:

(1) There was no written partnership agreement in place between Mr Hewitt and Mr Alexander between 2000 and 2005. There was however a verbal agreement.

(2) Under the verbal agreement Mr Hewitt said that Mr Alexander had confirmed to him that he was "on the pathway" to becoming a 'full partner' at some time in the future.

(3) Mr Hewitt was given the label of partner initially as he and Mr Alexander thought that it would help with marketing the business and it would help with clients when he was required to 'stand in' for Mr Alexander.

(4) Mr Hewitt was involved in the day to day running and management of the business. He said initially that the day to day running of the practice was all done by Mr Alexander and that he had no role in practice administration or dealing with its suppliers. However he conceded subsequently that this was not in fact the case when it was pointed out by Ms Harding that:

(a) SG in its letter to HMRC of 2 November 2018 had said:

> "At no time have I said that Mr Hewitt was an employee in 2005, but that he was a salaried partner. This means that he did indeed have the status of partner both to the outside world (including customers showing them that the other partner Mr D Alexander had confidence in his abilities as a Veterinary Surgeon) but also to other members of staff who were indeed employees allowing him to supervise and instruct them in Mr Alexander's absence whether out on call or on holiday"

(b) SG in its letter to HMRC of 3 Dec 2018 had said:

> "Mr Hewitt was the "Junior" partner but did play an active role in the management of the business during this time carrying out supervision of staff, hiring of staff, with Mr Alexander, dealing with customers and suppliers again with Mr Alexander"

(5) Mr Hewitt accepted that he was in partnership with Mr Alexander but emphasised that he was a "salaried partner" only.

(6) Mr Hewitt knew roughly what remuneration he would be receiving each year. He did not think that it was right to say that the amount was dependent on profit but he accepted that his remuneration was finally determined only after Mr Alexander had considered the results and accounts. It was therefore profit dependent in that sense.

Purchase of the DCS Alexander business

(7) In 2005 Mr Alexander told Mr Hewitt that he was retiring and gave him a fixed number on 'a take it or leave it basis' to buy the business.

(8) Mr Hewitt bought the business from Mr Alexander at the price requested and then operated the practice as a sole trader.

(9) Payment was made one year after the agreement to purchase as it took time to finalise the figures. In the interim Mr Alexander had no involvement in the business.

(10) Mr Hewitt did not obtain a professional valuation of the business. He said that he was aware of other valuations in the market and that he had spoken to 'other people' in the industry. On this basis he was able to conclude that Mr Alexander's price was a market price.

(11) Mr Hewitt did not acquire any of the book debts of the business – these continued to be collected by Mr Alexander.

(12) Once Mr Hewitt had purchased the business: a new bank account was opened in his name, new contracts were signed with suppliers, a new VAT registration was obtained and the practice was renamed as Armour Veterinary Centre.

(13) Mr Hewitt could not recall there being legal documentation entered into for the purchase of the business from Mr Alexander. He accepted that this was inconsistent with his witness statement in which he had said:

> "as I was borrowing funds, the bank had to be satisfied that I was purchasing the whole business so legal documents to that effect were drawn up to this effect and to their satisfaction"

(14) He said that although he could not recall there being any legal documentation – calculations were done for the actual assets and the cash balances and invoices and an amount added for goodwill. This was a reference by him to a 2 page handwritten schedule with the headings "cash situation" and "property" which was included in the bundle. He accepted that it did not actually show the goodwill amount.

(15) He accepted that this was the only documentation that had been provided to HMRC in relation to the acquisition. He said, however, that there was other information but he had not provided it as he did not think that it was needed. We find this hard to accept given HMRC's numerous requests over several years for the provision of additional documentation.

Mr Walker

(16) Mr Walker joined the business as an employee in 2006. Prior to joining he had been working for a neighbouring practice.

(17) Mr Hewitt started discussing the possibility of partnership with Mr Walker after he had been working in the business for approximately 6 months.

(18) Mr Walker eventually became a partner in 2008. From that time onwards his role changed and he became fully involved in the business as a partner. This meant that business decisions became joint decisions and that he started reviewing the accounts.

(19) On becoming a partner Mr Walker made a financial contribution to the business. This took the form of him buying half of the business (including half of the stock and half of the book debt) and from them on he had a 50% interest.

(20) Mr Hewitt said initially that Mr Walker contributed a client base to the business when he joined. This was also said by SG. He subsequently accepted, on questioning from Ms Harding, that Mr Walker did not in fact contribute a client base.

(21) Mr Walker becoming a partner did not result in new contracts being signed with suppliers or any change being made to the VAT registration of the business.

2012 Acquisition of the farm business of Dalblair Veterinary Centre

(22) In 2012 Mr Hewitt and Mr Walker were made aware of a business that was for sale. This was the farm animal business of a neighbouring practice (the Dalblair Veterinary Centre). They were given particulars of the business together with a valuation. The valuation included goodwill and "residual equipment" and the business also came with one employee. (We noted here that Mr Hewitt's witness statement refers only to the goodwill being purchased.)

(23) There was no connection between the seller of the business and either Mr Hewitt or Mr Walker.

(24) A local lawyer was used to deal with the purchase.

(25) Mr Hewitt could not explain why the only evidence available in respect of the acquisition of the Dalblair business was the document referred to as "the Cash Statement" – a one page document simply showing the amount paid and what it was for.

Incorporation of the business

(26) Mr Hewitt took advice "from others in the industry" on the value of the goodwill at the time of incorporation – no professional advice was sought. The amount was determined as a multiple of EBITD.

41. It is not disputed by the parties, that AVGL's business has been a single business, which has grown and developed from the sole trade started by Mr Alexander.

Preliminary Issues

The scope of this appeal

42. A threshold issue in this case is the identification of the assessments which are the subject of the appeal as there was some uncertainty on the part of the Appellants. We noted in this regard a letter from SG to HMRC dated 18 August 2022 in which SG said that they were writing to confirm that they had appealed all HMRC assessments in respect of periods ending 16th July 2015 and 31st July 2015, 31st July, 2016 and then all periods to 31st July 2020.

43. The appeal documents however, and the Respondents statement of case, cover only two periods, the period ending 26 January 2015 and the period ending 26 July 2015 and these are the only periods which are being considered.

Additional witness evidence

44. Ms Tannock sought permission at the start of the hearing to introduce Mr Walker as a witness. Ms Harding objected. We refused permission noting that no advance notice had been given to HMRC or the Tribunal nor had any witness statement been provided. We concluded that it was not, therefore, in the interests of justice to allow the introduction of the witness at such a late stage.

The application of the law to Scottish partnerships

45. It became apparent during the hearing that neither party had addressed the fact that the legal treatment of a Scottish partnerships is not in all respects the same as the treatment of a non Scottish partnership.

46. The parties were asked to provide further submission on this point. Written submissions, together with an additional authorities bundle, were provided by the parties on 31 July 2023. Those submissions addressed the question of whether the parties' arguments were affected by the law as it applies to Scottish partnerships.

47. The submissions did not address the issue of whether the partnerships involved in this appeal were in fact Scottish partnerships. Our approach has therefore been to reach our conclusions on the basis of the parties' initial submissions and to then consider, by reference to the parties further submissions, whether those conclusions would be affected if the partnerships were Scottish partnerships.

Issues for the Tribunal to determine

48. There are two issues for the Tribunal to determine. These are:

(1) Whether the discovery assessments have been validly issued; and

(2) Whether any part of the goodwill can benefit from amortisation relief under the Intangibles Regime.

49. The burden of proof in respect of whether the conditions have been met for the issue of the Discovery Assessments is with HMRC. The burden then shifts to the Appellant to

demonstrate that the deductions for amortisation are allowable such that the quantum of the discovery assessments is excessive.

50. The standard of proof is the ordinary civil standard which is the balance of probabilities.

51. We consider first the validity of the discovery assessments and then go on to consider the substantive question of whether the amortisation relief claimed by AVGL is available for any part of the goodwill.

The discovery assessments

52. The legislation relevant to the issuing of discovery assessments is contained in Paras. 41 to 47, sched. 18 Finance Act 1998 ("FA 1998").

53. The provisions relevant to this appeal are as follows:

54. Para. 41, sched.18 FA 1998 which provides:

> "(1) If [an officer of Revenue and Customs] [discovers] as regards an accounting period of a company that –
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> (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.
>
> [the officer] may make an assessment (a "discovery assessment") in the amount or further amount which ought in [the officer's] opinion to be charged in order to make good to the Crown the loss of tax."

55. Para. 42, sched.18 FA 1998 which provides restrictions on the power to make a discovery assessment as follows:

> "(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."

56. Para.44, Sch. 18 FA 1998 which provides:

> "(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) in a case where a notice of enquiry into the return was given –
>
> (i) issued a partial closure notice as regards a matter to which the situation mentioned in paragraph 41(1) or (2) relates, or
>
> (ii) if no such partial closure notice was issued, issued a final closure notice,
>
> 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 …""

Discussion relating to the discovery assessments

57. In order to be valid the discovery assessments must meet the conditions at paragraphs 41 and 43 and be issued within the time limits specified at para. 46, Sched.18 FA 1998.

Was there a discovery?

58. The condition at para.41, sched. 18 FA 1998 requires an officer of HMRC to "discover" an insufficiency of tax.

59. For there to be a discovery, two tests must be met by the HMRC officer. The first is subjective and the second objective. The tests were helpfully set out by the Upper Tribunal in *Anderson v HMRC* [2018] 4 All ER 338.

60. The subjective test is that:

"The officer must believe that the information available to him points in the direction of there being an insufficient of tax"

That formulation in our judgment acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not." [28]

61. The objective test is satisfied if:

".. the officer's belief is one that a reasonable officer could form." [30]

62. The Upper Tribunal added:

"It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable." [30]

63. There are accordingly two questions to determine: (a) did the HMRC officer believe that the information available indicated an insufficiency of tax, and (b) was that belief one which a reasonable officer could come to. We deal with each question in turn.

64. The discovery assessments were issued by HMRC officer Hagen. His reasons for issuing them are set out clearly in his correspondence with the Appellant leading up to issue of the assessments.

65. Specifically, in his letter dated 4 October 2018 he raised his concern that as Mr Hewitt was a partner in the DCS Alexander Partnership from the beginning of 2001 to mid 2006 it appeared to him that the business had been continuously operated by Mr Hewit prior to 1 April 2002 and so the goodwill in respect of which relief has been claimed was outside the Intangibles Regime.

66. Having received further information from SG, including additional details of Mr Hewitt's role in the business and the handwritten sheets described by SG as the "workings" in respect of Mr Hewitt's purchase of the business from Mr Alexander, Mr Hagen reached an initial conclusion, which he confirmed on 22 November 2018, that there had been a loss of tax. This was because in his view amortisation relief had been claimed incorrectly for the APEs 26 January and 26 July 2015. He decided accordingly to issue protective assessments.

67. We agree with HMRC that this sequence of events shows that Officer Hagen believed that the information available to him indicated that there was an insufficiency of tax for APEs 26 January and 26 July 2015 and that this belief was more than a mere suspicion of an insufficiency.

68. We find that the subjective test is therefore satisfied.

69. Taking into account the information available to Officer Hagen, including the DCS Alexander Partnership returns, Mr Hewitt's income tax returns and other indications such as the business website which indicated that Mr Hewitt was a partner in DCS Alexander prior to April 2002 and the information provided by SG in its responses to his queries, we agree that it was objectively reasonable for Officer Hagan to form the belief that the goodwill in question was outside the Intangibles Regime and so excess relief had been claimed. This was because he considered that Mr Hewitt was "carrying on the business" prior to 1 April 2022.

70. We find that the objective test is therefore satisfied.

71. The requirements of para 41, sched.18 FA 1998 have accordingly been met.

72. Para. 44, sched.18 FA 1998 requires, so far as relevant, HMRC to show that at the time they ceased to be able to give notice of enquiring into a company's 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 giving rise to the excessive relief claim.

73. The returns for 2015 were AVGL's first returns and so those returns and the amended returns for those periods are the only ones relevant for the purpose of para. 44.

74. The amended accounts and tax computations for 2015 were submitted by SG on 27 April 2017. HMRC therefore ceased to be entitled to open enquiries into those amended returns on 30 April 2018.

75. No enquiries were opened into the original or amended returns and so no information other than that contained in those returns was made available to HMRC.

76. HMRC submit that they were only alerted to the issues with the 2015 returns when they received information following their enquiry into AVGL's CT returns for APEs 26 July 2016

and 31 July 2016 and answers to the specific questions they asked about the goodwill as part of that enquiry.

77. We accept HMRC's submission.

78. We find that the requirements of s. 44 sched.18 FA 1998 are therefore satisfied.

Timing

79. The discovery assessments were issued on 14 December 2018. This is within the ordinary time limit of four years from the end of the accounting period to which they relate (as provided for in para. 46, sched.18 FA 1998).

Conclusion on the validity of the discovery assessments

80. We find accordingly that HMRC have satisfied the requirements for the issue of the discovery assessments and that those assessments were validly issued.

The availability of amortisation relief under the Intangibles Regime

81. We turn now to consider whether AVGL can demonstrate that the assessments are incorrect. This is dependent on whether any part of the goodwill can benefit from amortisation relief under the Intangibles Regime.

82. There are in effect three separate "pots" of goodwill at issue in this appeal. These are

(1) The goodwill acquired originally by Mr Hewitt from Mr Alexander when he acquired Mr Alexander's interest in the DCS Alexander partnership on 30 May 2005 (the "DCS Alexander Goodwill")

(2) The goodwill originally acquired by the Armour Veterinary Group partnership when it acquired the farm animal business of the Dalblair Veterinary Practice in 2012 (the "Dalblair Goodwill")

(3) The goodwill introduced when Mr Walker and Mr Hewitt became partners in the Armour Veterinary business on 1 August 2008 ("Mr Walker's Goodwill")

The relevant legislation

83. The key legislative provisions relevant to this appeal are in Part 8 of CTA 2009 which contains a specific corporation tax regime for intangible fixed assets (the Intangibles Regime). We set out below the applicable provisions.

84. S. 715 CTA 2009 provides that unless otherwise indicated the Intangibles Regime applies to goodwill as it applies to an intangible fixed asset. It also provides that for the purpose of the Intangibles Regime goodwill has the meaning given to it for accounting purposes.

85. There is no dispute between the parties as to the accounting recognition or treatment of the goodwill in this appeal.

86. S. 882 CTA 2009 sets out the circumstances in which the Intangibles Regime applies to goodwill. At the time relevant to this appeal it provided as follows:

> 882 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 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 intermerdiary'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.

87. Also relevant is s. 884 CTA 2009 which provides:

884 Goodwill; time of creation

For the purpose of section 882 … 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 …

Discussion relating to amortisation relief

88. Dealing with each pot of goodwill in turn, we start with the DCS Alexander Goodwill.

The DCS Alexander Goodwill

89. S. 882(1)(a) CTA 2009 requires the goodwill to be *created* by a company on or after 1 April 2002.

90. HMRC submit that as AVGL *acquired* the goodwill from Mr Hewitt and Mr Walker in partnership it will not have created it and so section 882(1)(a) cannot apply.

91. We agree with HMRC.

92. S 882(1)(b) CTA 2009 requires the goodwill to be acquired from a party that is not related to the acquiring company.

93. HMRC submit that Mr Hewitt and Mr Walker are each "related" to AVGL for the purpose of the provision.

94. Their submission is on the basis that AVGL is a "close company" as defined in s. 439(2) Corporation Tax Act 2010 ("CTA 2010"), and Mr Hewitt and Mr Walker are "participators" in it, s. 835(5) CTA 2009 providing that participators are related to the company in which they participate.

95. A company is "close" if, so far as relevant, it is under the control of five or fewer participators or of participators who are directors (s. 439(2) CTA 2010). A "participator" for this purpose is a person who has a share or interest in the capital or income of the company (s. 454 CTA 2010).

96. As Mr Hewitt and Mr Walker each hold 50% of the shares in AVGL and are its only directors, AVGL is "close" and they are both participators in it.

97. As the Company acquired the DCS Alexander Goodwill from AVC, the partnership constituted by Mr Hewitt and Mr Walker, we agree with HMRC that s.882(1)(b) cannot apply.

98. The DCS Alexander Goodwill can therefore only be within the Intangibles Regime if s. 882(1)(c) CTA 2009 applies.

99. For it to apply acquisition of the DCS Alexander Goodwill must fall within one of three cases (A-C) set out in ss. 882(3)-(5) CTA 2009.

100. Case A requires the goodwill to be acquired from a company. HMRC submit that it cannot apply here as AVGL acquired the goodwill from AVC, a partnership with two individual partners.

101. We agree with HMRC that Case A cannot be satisfied.

102. Case B requires the goodwill to be acquired from a related party, acting as intermediary, from a third party unrelated to the intermediary or to the acquiring company.

103. Case C requires the goodwill to be created on or after 1 April 2002. In the case of goodwill s. 884 CTA 2009 provides, so far as relevant, that it will be treated as created prior to 1 April 2002 if the business has been "carried on at any time before that date" by a related party.

104. Cases B and C each require evaluation of Mr Hewitt's involvement with the business in the period during which he and Mr Alexander worked together. Case B also requires an evaluation of the circumstances of what Mr Hewitt acquired on Mr Alexander's retirement.

105. HMRC submit that neither Case B or C are satisfied. In summary their position is that (a) Mr Hewitt was "carrying on the business" with Mr Alexander as he was in partnership with Mr Alexander and as this was prior to 1 April 2002, the goodwill cannot fall within Case C. They then contend that as Mr Hewitt and Mr Alexander were in partnership, what was acquired on April 2005 by Mr Hewitt from Mr Alexander was not goodwill but was instead Mr Alexander's interest in partnership property which is not a proprietary interest in goodwill. On this basis they say that Case B cannot be satisfied.

106. We deal with each of these separately. We start with Case C – as our finding there will logically determine our finding for Case B.

Case C

107. Case C cannot be satisfied if Mr Hewitt is regarded as having carried on the business prior to 1 April 2002.

108. HMRC submit that if Mr Hewitt was in partnership with Mr Alexander prior to this date then he should be regarded as having carried on that business with Mr Alexander.

109. We agree with HMRC that if Mr Hewitt was in partnership with Mr Alexander then he ought to be regarded as carrying on the business of the partnership for the purpose of s. 884 CTA 2009.

110. AVGL and SG have accepted that Mr Hewitt was in partnership with Mr Alexander but say that he should not be regarded as carrying on the business as he was only a salaried partner with no entitlement to equity.

111. There is no dispute between the parties that the AVGL business is a continuation of the original business started by Mr Alexander.

Were Mr Hewitt and Mr Alexander in partnership?

112. As no written partnership agreement was in place between Mr Alexander and Mr Hewitt, HMRC relied on the facts available to make their determination as to whether a partnership existed, starting with the statement in s. 1 of the Partnership Act 1890 ("PA 1890");

> (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

113. There is no need for us to rehearse in detail the analysis and fact finding on this point as the existence of a partnership has been accepted by the parties. The only dispute between them is as to whether Mr Hewitt was a salaried partner or an equity partner.

114. We would note, however, that we agree with HMRC's conclusion as to the existence of a partnership and the facts on which this their determination was made which included the following:

(1) Mr Hewitt was clearly held out as a partner to clients of the practice.

(2) Mr Hewitt has acknowledged that he and Mr Alexander regarded themselves as partners, albeit with Mr Hewitt being the "junior partner".

(3) Mr Hewitt was actively involved with the running and management of the practice including the supervision and management of staff.

(4) Mr Hewitt did not receive a salary and instead received a share of the profits of the practice.

(5) The tax returns of the DCS Alexander practice and Mr Hewitt's personal tax returns were consistent with him being a partner in the business.

The consequence of Mr Hewitt being a salaried or equity partner

115. We do not agree with SG's contention that Mr Hewitt's status as a salaried partner or equity partner should have a bearing on whether he can be treated as carrying on the business for the purpose of s. 884 CTA 2009.

116. Leaving aside the question as to the extent of Mr Hewitt's equity interest, the parties agree that he was a partner. It has also been established that he was entitled to a share of the profits of the business and that he actively engaged in its management and operation.

117. It seems clear to us, therefore, that giving the words of s. 884 CTA 2009 their ordinary commercial meaning, taking into account the requirements of s 1(1) PA 1890 and looking also at Mr Hewitt's activities in relation to the business, Mr Hewitt was "carrying on the business" of the DCS Alexander practice together with Mr Alexander.

118. Although the nature of Mr Hewitt's equity interest has some relevance in this appeal (and we examine this later in our decision) we do not consider that it has a bearing on Case C.

119. We find therefore that the DCS Alexander Goodwill was not a pre 1 April 2002 asset and so Case C cannot be satisfied.

Case B

120. HMRC submit that as a matter of law there was no "acquisition of goodwill" by Mr Hewitt. This submission relies on a legal analysis of the nature of a partner's interest in partnership property to determine what was in fact acquired by Mr Hewitt.

121. Ms Harding referred to the commonly accepted proposition that partnership property is not owned by the partners individually but in partnership as "partnership property".

122. She took us to the High Court decision in *Byford v Oliver and Another* [2003] EWHC 295 (Ch), a case which considered goodwill in a partnership context.

123. In *Byford* the parties were members of the 1970s heavy metal band Saxon. Two of the members (Mr Dawson and Mr Oliver) left at different times although the band recruited new members and continued to perform and release records under the Saxon name, with Byford being a continuing member throughout. In effect, each time a member departed the remaining members reformed with replacement musicians and continued to use the name Saxon.

124. The case proceeded on the basis that the original band was a partnership at will, which dissolved when Mr Dawson left. The group that then performed under the Saxon name was a new partnership at will which dissolved when Mr Oliver left (and so on - as other members left and new ones joined).

125. It had been held at first instance by the Trade Marks Registry that the effect of this was that the rights in the Saxon name and the associated goodwill that had accrued; (i) were owned by each individual group member, in the case of the founding members from the time the name was first used, and for newer members from the time they joined, and (ii) departing members would, following their departure, retain the rights accrued over their period of membership, unless through action or inaction they somehow severed themselves from those rights (see paragraph [18] of the decision). This view was rejected by Laddie J, who stated that:

> "In my view, Mr Foley's views as to the ownership of the name SAXON and goodwill associated with it are not correct. There is no dispute that the group was a partnership at will in the 1980's. The name and goodwill were assets of the partnership. All the partners have or had an interest in those and all other assets of the partnership, but that does not mean that they owned the assets themselves. Absent a special provision in the partnership agreement, the partners had an interest in the realised value of the partnership assets. On dissolution of the original partnership, which is what happened when Mr Dawson departed in 1985, he and all the other partners were entitled to ask for the partnership assets to be realised and divided between them in accordance with their respective partnership shares. But none of them "owned" the partnership assets. In particular, none of them owned the name SAXON or the goodwill built up under it." [19]

126. Laddie J also rejected the view outlined in the Court of Appeal's decision in *Burchell v Wilde* [1899 B. 5027] that on dissolution of a partnership, the former partners would own the name and goodwill of the partnership as tenants in common. He rejected it on the basis that the partners in that case had entered into an agreement under which the firm's clients were divided between the partners, with nothing being said about continued use of the firm name or the goodwill. This arrangement was interpreted by the court as meaning that the goodwill of the business was not to be sold for the benefit of the partners but was to be divided between them and it was as a consequence of that finding that the court held that the partners had become tenants in common of the asset – each being entitled to enjoy it. Laddie J concluded that:

> "absent the special circumstances in that case, the goodwill and name of the partnership would have had to have been sold so that its value could be realised for distribution among the former partners. None would have owned the goodwill or name." [24]

127. Ms Walker took us to two non-UK cases that had been decided on the grounds that partners did not have title to specific partnership property but had instead a beneficial interest in the entirety of the partnership assets.

128. These were a Privy Council case - *Barry George Hadlee v The Commissioner of Inland Revenue Co (New Zealand)* [1993] UKPC 8 and a decision of the High Court of Australia – *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* [1974] HCA 22.

129. In *Hadlee* the court had to consider the nature of a partner's rights in an accounting firm. Here Lord Jauncey stated that:

> "First of all as a matter of general law, to quote the words of Richardson J., he "does not have title to specific partnership property but has a beneficial interest in the entirety of the partnership assets and in each and every particular asset of the partnership. (Lindley on Partnership 15th Edition, page 516) … . This beneficial interest, expressed in terms of its realisability, is in the nature of a future interest taking effect in possession on (and not before) the determination of the partnership (Lindley and Banks on Partnership, 16th Edition, page 457)."

130. The appeal in *Hadlee* depended in part on whether that partner's rights amounted to a proprietary interest in the partnership assets which was capable of assignment. This was in the context of the New Zealand tax authority contending that all the partner had assigned was a right to income rather than the capital asset which generated that income. The appeal was dismissed on the basis that there had been no assignment of any capital asset as the partner had no proprietary interest in any such asset. Neither the provisions of the partnership agreement nor the relevant provisions of the New Zealand Partnership Act (which were found to correspond so far as relevant to the UK Partnership Act 1890) contradicted what the Privy Council regarded as a matter of general law.

131. We note also that although in relation to foreign law, the persuasive value of this judgment lies in Lord Jauncey's endorsement of the Lindley and Banks on Partnership which is regarded as the authoritative English textbook on partnership.

132. We do not comment specifically on *Canny Gabriel* as it deals with Australian law and does not appear to add much to the general theme of the cases cited.

133. Ms Walker referred us finally to a relatively recent First-tier tax tribunal case – *Beadnall Copley Limited v HMRC* [2022] UKFTT 00183 (TC) the facts of which have more direct relevance to this appeal.

134. *Beadnall* concerned a two partner partnership which ran an estate agency business. On the retirement of one of the partners (Mr Copley), the other partner (Mr Beadnall) continued the business as a sole trader.

135. A deed of retirement between the partners described the "Partnership Property" as being the goodwill and all assets (or rights in them) used by the partnership for the purpose of its business (see para. [9] of the judgment).

136. The deed provided that in consideration for the transfer of the Partnership Property, Mr Beadnall would pay to Mr Copley the sum of £450,000 and that Mr Beadnall would "succeed

to all the interest of [Mr Copley] in the Partnership Property …. [and Mr Copley] shall transfer the legal ownership of any items of Partnership Property" (again see para. [9]).

137. Mr Beadnall continued to run the business as sole trader up to the date on when he incorporated the business, transferring the business to his new company.

138. The company then sought to claim amortisation relief for the goodwill under the Intangibles Regime. As in this appeal, HMRC contended that the goodwill did not fall within the Intangibles Regime.

139. The only substantive issue in that case was whether Mr Beadnall had "acquired the asset" for the purposes of s 882(4) CTA 2009 (i.e. Case B) on or after 1 April 2002 from a third person.

140. As part of the analysis it was necessary, as in this Appeal, to consider (i) who owned the goodwill prior to retirement of the partner (and dissolution of the partnership) and (ii) what was actually transferred between the former partners.

141. HMRC's arguments on those two points in *Beadnall* were materially the same as those raised in the current Appeal. Specifically, they relied on *Byford* as support for the proposition that the goodwill was owned by the partnership and not by the individual partners [22]. The tribunal also had regard to Lord Jauncey's judgment in *Hadlee* and to the decision in *Canny Gabriel*. It also considered the decision in *Burchell*.

142. The tribunal concluded that the individual partners did not own the goodwill prior to the dissolution of the partnership and that:

> "The legal position is that, as was stated in *Byford*, the partners did not own the underlying assets including the goodwill. They both had a beneficial interest in the goodwill but did not own it in whole or in part." [40]

143. The tribunal went on to conclude that at the time of dissolution of the partnership ownership of the goodwill did not vest in the partners. This was on the basis that there was not, as in *Burchell*, any arrangement under which the partners could be regarded as owning the goodwill as tenants in common (see paras. [46]-[47]).

144. The tribunal found accordingly that what was transferred between the former partners was the beneficial interest of the retiring partner in his share of the partnership property. This was distinct from a transfer of the goodwill itself. Consequently relief under the Intangibles Regime was not available.

145. It is clear to us from the cases cited that the partners of a partnership do not own the assets which comprise the partnership property, they have instead a beneficial interest in the realised value of that property.

146. It also seems clear that the goodwill of a business is usually inseparable from the business itself. We note in this regard two comments made in *IRC v Muller & Cos Margarine Ltd* [1901] SVC 25, a House of Lords decision cited by Ms Harding. The first is a comment by Lord MacNaghten:

> "What is goodwill? It is a think very easy to describe, very difficult to define. It is the benefit and advantage of the god name, reputation and connection of a business, It is the attractive force which brings in custom, It is the one thing which distinguishes an old-established business from a new business at its first start … . The goodwill of a business is one whole, and in a case like this it must be dealt with as such" [5]

147. The second is a comment made by Lord Linley:

> "Goodwill regarded as a property has no meaning except in connection with some trade or business, or calling, In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value …"

Our conclusion on what Mr Hewitt acquired

148. We note that we have not seen nor has the Appellant satisfied us that there was any agreement in place between Mr Hewitt and Mr Alexander (as was the case in *Burchell*) to displace the analysis of the goodwill being partnership property.

149. We have considered SG's contention that Mr Hewitt was not intended to have any interest in the "equity of the partnership" as he was a salaried partner only. However, taking into account the burden of proof in this appeal, SG and AVGL have not persuaded us that this was in fact the case. In particular no documentary evidence, or indeed any material evidence other than Mr Hewitt's own evidence (as recounted by him or as passed on to SG), was provided which shows such an agreement. The only written details of what was acquired by Mr Hewitt are set out on two handwritten pages which contain no reference to goodwill. Further no evidence was provided of the basis on which the amount claimed to have been paid for the goodwill was determined and we note that the amount stated is, as pointed out by HMRC, significantly lower than the relevant DCS Alexander profit figures and partnership net asset values at the time. Neither Mr Hewitt nor SG were able to explain why the figure was so low if Mr Hewitt had no entitlement to any interest in the partnership assets (including the goodwill).

150. Having taken the cases cited and the facts found into account, our conclusion is that the goodwill was partnership property and that what was acquired by Mr Hewitt from Mr Alexander was not an interest in goodwill but instead Mr Alexander's interest in the partnership property which is distinct from a proprietary interest in the goodwill. Consequently Case B cannot be satisfied.

151. Accordingly, we find that the DCS Alexander Goodwill is not within the provisions of the Intangibles Regime and so amortisation relief is not available.

The Dalblair Goodwill

152. The parties do not dispute that the Dalblair Goodwill is capable of falling within the Intangibles Regime and therefore that amortisation relief can be available for it. In this case the transaction ought to satisfy Case B as it is goodwill acquired from a related intermediary but ultimately from an unrelated entity.

153. The issue here is a practical one which is the lack of evidence and detail in relation to the acquisition. HMRC submit that given the lack of evidence it is not possible to determine whether the transaction satisfies the conditions necessary to fall within the Intangibles Regime and on this basis the relief cannot be given.

154. The key documentary evidence provided in relation to the acquisition is what has been referred to as the "Cash Statement", a single page document confirming a sum received from AVC "in connection with PURCHASE of farm business of Dalblair Veterinary Centre" with a reference to "balance of goodwill payment paid to McMillan Kilpatrick Client Account". SG and AVGL have not, despite requests from HMRC, provided any further detail and they have also acknowledged that no formal valuation for the goodwill was obtained. As with the

DCS Alexander Goodwill minimal evidence was provided to us other than Mr Hewitt's own evidence (as recounted by him or as passed on to SG).

155. We agree with HMRC's determination. A fundamental aspect of the self-assessment regime is that taxpayers must ensure that they have and retain (for an appropriate period – which is dependent on the circumstances) records sufficient to support the information provided in their self-assessment returns including evidence to support claims made for relief. In this case a one-page schedule with no supporting information and no external supported valuation, is in our view insufficient to demonstrate that the requirements for relief are satisfied.

156. On this basis we find that AVGL is not entitled to relief for the Dalblair Goodwill.

Mr Walker's Goodwill

157. SG claimed that AVC acquired goodwill from Mr Walker when he became a partner in 2008. However it was acknowledged during the hearing that this was inconsistent with the fact that Mr Walker had been employed by AVC for some time prior to becoming a partner (we understand that he was first employed in 2006) and Mr Hewitt accepted that no goodwill had actually been contributed by Mr Walker. It is also the case that no information has been provided to support the acquisition of goodwill from Mr Walker. We can therefore see no sustainable basis on which a claim for amortisation relief can be made in respect of it.

158. On this basis we find that amortisation relief under the Intangibles Regime is not available for Mr Walker's Goodwill.

Conclusion on the availability of amortisation relief

159. For the reasons set out above we find that amortisation relief claimed by AVGL is not available for any of the goodwill.

The consequences of the partnerships being Scottish partnerships.

160. As we state at the start of this decision we are conscious of the fact that Mr Hewitt, Mr Alexander and Mr Walker are, or at the relevant times were, based in Scotland and that the legal treatment of partnerships in Scotland is not the same in all respects as it is in England.

161. Further, the cases cited by HMRC and which we considered do not take into account the implications of any potential variance. We invited submissions from the parties as to whether the law applicable to Scottish partnerships affects the arguments put forward by them. We then considered on the basis of those submissions whether the conclusions we had reached would be affected if the partnerships involved in this appeal were Scottish partnerships. We adopted this approach as the issue of whether the partnerships would actually be recognised as Scottish partnerships was not raised before us.

The Additional Submissions and the impact of the law as it applies to Scottish partnerships

162. Each party provided submissions on the impact on their arguments of the partnerships involved in this appeal being Scottish partnerships. Both parties started with s. 4(2) of the Partnership Act 1890 which provides that:

> "in Scotland a firm is a legal person distinct from the partners of whom it is composed"

AVGL/SG's submissions

163. SG submitted that legal personality had a bearing on whether the arrangements between Mr Alexander and Mr Hewitt in fact amounted to a partnership, noting again that no written

partnership agreement existed. SG then sought to re-open the question of whether a partnership existed by revisiting the factual position, concluding that no partnership existed and therefore the goodwill was owned directly by Mr Alexander.

164. We do not see how a partnership's legal personality affects the question of whether a partnership has been created in the first place. The Partnership Act provides at 1(1) that

> "partnership is the relation which subsists between persons carrying on a business in common with a view of profit"

165. The issue of legal personality is irrelevant to this determination. We do not therefore accept SG's contention that the question of whether a partnership exists needs to be revisited.

HMRC's submissions

166. HMRC made several points. As well as addressing the issue of legal personality they also noted that a Scottish partnership can hold property in its own name (as per s. 20 PA 1890).

167. They drew to our attention to their own Partnership Manual (para. PM131700 of the version published 02 July 2019) which states

> "Unlike its English, Welsh or Northern Irish Counterpart, a Scottish partnership is a legal person. This has very few consequences for tax purposes, Where the differing legal systems would produce different results as between Scotland and the rest of the UK, specific legislation has been enacted to preserve equality of treatment; for example assessment of partnership profits … capital gains … . Where the tax legislation itself would produce different results, the courts have directed that:
>
> "it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities as between citizens of the two countries"
>
> (Viscount Simons in Rex v General Commissioners of Income tax for the City of London (ex parte Gibbs and Others) [1940] 24TC221).

168. Although there are now of course intended differences in the tax treatment of English and Scottish taxpayers we accept this point in relation to those areas where differences are not specifically intended.

169. HMRC then addressed the key issues on which their analysis is based.

Does the partnership's legal personality impact the analysis?

170. The fact that a partnership might have a legal personality separate from its members gives rise to an argument that it is *the partnership* rather than *the partners* that are carrying on the business.

171. This is relevant for the purposes of s 882(1), (4) and (5) CTA 2009 which require consideration of whether Mr Hewitt was "carrying on the business" in common with Mr Alexander prior to 1 April 2002.

172. HMRC submitted that a partnership's legal personality should not affect the determination of who is carrying on its business. This is because notwithstanding the partnership's legal persona, it is still the *partners* that are in fact carrying on the business. They cited *Major v Brodie* [1988] STC 491 as support for this view and in particular the following conclusion of Park J:

> "Before the Special Commissioners a large element of the Crown's case rested on the special feature of a Scottish partnership whereby it has legal

> personality. Section 4(2) of the Partnership Act 1890 provides that "in Scotland a firm is a legal person distinct from the partners of whom it is composed". The argument, if I have it correctly, was that the trade of farming carried on my W Murdoch & Son was not also carried on by the members of W Murdoch & Son, because W Murdoch & son was a separate legal person distinct from its members and therefore only it could carry on its trade. Expert evidence of Scottish law was called by both sides. Mr Shirley preferred the evidence of Professor Murray QC, who gave evidence on behalf of Mr and Mrs Brodie. I may do less than full justice to Professor Murray's cogent and learned analysis by distilling it down to one sentence. But his critical proposition appears to me to be that, although s 4(2) ascribes separate legal personality to a Scottish partnership, it remains the case that by virtue of ss 1(1) and 4(1) that there are still persons carrying on business in common with a view of profit, and those persons are the partners. The Crown reserves the right to reopen this question in the House of Lords should this case get that far, but before me Mr Shirley's finding that the law of Scotland on this issue was as described by Professor Murray was not challenged." [510]

173. We have not had the benefit of expert Scottish law advice in this appeal and we note that Park J's acceptance of the proposition put before him was qualified as the finding had been accepted at first instance and not subsequently challenged.

174. However, the interpretation of the interaction between ss 4(2), 1(1) and 4(1) PA 1890 as summarised by Park J seem sensible and entirely logical to us and was not challenged before us. We do not see why the legal characterisation of the business vehicle should alter the fact that the business itself is carried on by the partners (as required by s. 1(1)) nor can we identify support for that proposition in the wording of the legislation as a matter of statutory construction. We note also in this regard Park J's observation (at p. 510) that focussing on the legal entity:

> "… ignores the true legal nature of a partnership, and the relationship of a partnership and its members. Leaving aside for the moment the special feature that a Scottish partnership had a legal personality of its own (see 4(2) of the Partnership Act 1890), a trade carried on by a partnership is a trade carried on by its members and by each of them. As Mr Shirley correctly and pertinently points out, s 1(1) of the 1890 Act provides; 'Partnership is the relation which subsists between persons carrying on business in common with a view of profit'. He also quotes s 4(1), which provides that 'persons who have entered into partnership with one another are for the purposes of the Act called collectively a firm'."

175. If this interpretation is incorrect we consider that the concept of carrying on a business for the purpose of s.882 CTA 2009 should be sufficiently broad as a matter of construction to capture the partners of a partnership with legal personality. Here we also take into account Viscount Simon's remarks in *Rex* quoted above, noting that the Intangibles Regime might otherwise have a different effect in relation to Scottish and non-Scottish partnerships, with amortisation relief being available potentially for goodwill acquired from one but not the other.

176. We agree, therefore, with HMRC's contention that potential legal personality of the DCS Alexander Partnership should not prevent Mr Hewitt from being regarded as carrying on the business of the DCS Alexander partnership for the purpose of the Intangible Assets Regime.

Does the fact that a Scottish partnership can own property in its own name affect HMRCs argument?

177. A central part of HMRC's analysis relies on the fact that the DCS Alexander Goodwill was partnership property and what Mr Hewitt acquired from Mr Alexander in 2005 was a beneficial interest in that partnership property rather than the goodwill itself.

178. Having identified that a Scottish partnership can hold property in its own name (as reflected in s.20 PA 1890) HMRC went on to consider how this might affect the determination of goodwill being partnership property.

179. They referred to the Stair Memorial Encyclopaedia ("*Stair Memorial*") – Partnership (Reissue) – (2) Partnership under the Partnership Act 1890 – (9) Partnership Property and Accounts) which states the following (at paragraph 35) in relation to the identification of partnership property:

> "Often the firm's partnership agreement will contain provisions which specify what is, or on acquisition is to become the property of the firm, In certain cases, particularly heritable property and incorporeal movable property where there is written proof of title, the fact that title to the property is in the name of the firm or of trustees for the firm constitutes prima facie evidence that it is the property of the partnership in whose name it is held. Otherwise, whether a particular item of property is in fact 'partnership property' to which section 20(1) applies will be determined by the whole circumstances surrounding its acquisition and whether this was 'for the purpose and in the course of the partnership business'. The fact that title to an asset is in the name of a single partner does not prevent it from being an asset of the firm if the evidence shows that the beneficial owner was the firm."

180. Paragraph 36 of *Stair Memorial* recognises that as goodwill does not usually have a registerable title it will not be held in the name of the partnership. It states the following in relation to determining whether goodwill is or is not a partnership asset:

> "[Goodwill] will constitute an asset of a partnership carrying on the business to which it is attached unless, exceptionally, the partners have agreed to share in the profits of the firm but not its assets."

181. The principle outlined in the material provided by HMRC seems to us to be that assets held in the name of a partnership are in effect presumed to be partnership property unless that presumption is rebutted, and for other assets it is a case of evaluating the circumstances to see whether they are or are not partnership property.

182. For property not held in the partnership's name this does not appear to be a special rule applicable to Scottish partnerships.

183. The exceptional circumstances mentioned in Paragraph 36 of *Stair Memorial* in which goodwill does not constitute an asset of the business contain a link to the case of *Stekel v Ellice* [1973] 1 All ER 465.

184. That case, so far as relevant, involved a fixed term partnership between two accountants, Mr Stekel and Mr Ellice. The terms of the partnership agreement provided for all of the capital (except for Mr Stekel's furniture) to be provided by Mr Ellice and for all profits (and risk of losses) to belong solely to Mr Ellice, and for Mr Stekel to receive a fixed salary. On expiration of the partnership it provided for all of the capital (save for Mr Stekel's furniture) and for all clients other than those introduced by Mr Stekel to belong to Mr Ellice. The agreement expired but the partnership continued ceasing ultimately as the relationship between the partners broke down. It then became necessary to consider the entitlements of

the partners. It was held by Megarry J that following expiration of the partnership agreement, the partnership continued on the same terms. There was insufficient evidence to show that there was any change in the conduct or intentions of the partners. It was acknowledged that there was no specific reference to goodwill in the agreement – but Megarry J considered that the intention of the earlier agreement was to exclude Mr Stekel from having any proprietary interest in the partnership [para. (g) p.77]. Accordingly Mr Stekel was found to have interest in those assets including the goodwill (in other words the goodwill was not partnership property).

185. HMRC submit that *Stekel v Ellice* does not cut across their argument in relation to the ownership of the DCS Alexander Goodwill.

186. We agree with that conclusion. In our view the case is an example of a circumstance in which a partnership asset can be allocated to one partner and not another as a consequence of an agreement between the partners. This does not, as we have mentioned already, appear to be a specific principle applicable to Scottish partnerships.

187. We find support for this view in two other decisions cited by HMRC. The first of these is the decision of the Outer House in *Finlayson v Turnbull (No.1)* [1977] SLT 613 another Scottish partnership case which proceeded on the basis that partners leaving a partnership had damaged the goodwill of the partnership which was regarded as an asset owned by the partnership that they had left. The second is the much earlier Scottish case of *Reid v Reid* [1938] SLT 415 in which Lord Keith acknowledged that it was not disputed that on dissolution of a Scottish partnership following the death of one of the partners, the realisable goodwill in the business fell to be accounted for as an asset of the partnership.

188. As we have outlined earlier in our decision AVGL have not demonstrated that there was any agreement between Mr Alexander and Mr Hewitt under which ownership of the goodwill was not to be partnership property.

189. We agree therefore with HMRC that if the DCS Alexander partnership was a Scottish partnership their submissions in respect of the goodwill being partnership property rather than the property of Mr Alexander would not be materially affected.

What is the nature of a partner's interest in a Scottish partnership's partnership property?

190. Another central aspect of HMRC's case is that what Mr Hewitt acquired from Mr Alexander was his interest in the realised value of the partnership assets rather than a proprietary right in the goodwill itself. This was based on the principles shown in *Byford v Dawson* and other authorities. Those authorities did not, however, consider partnerships with legal personality and the nature of a partner's interest in the property of such a partnership.

191. In this regard HMRC cited paragraph 37 of *Stair Memorial* which summarises the position as follows:

> "As is clear from section 20(1) of the Partnership Act 1890, discussed above, and the separate legal personality of a partnership in Scots law, the property of a partnership is, in Scots law, of the nature of a "trust fund" to be held for the purposes of the partnership and the partners stand in the relationship of "beneficiaries" of that trust, having rights defined by the law of partnership. Those rights are, in law, 'incorporeal moveable property'. An individual partner has no direct right of ownership in the property of a Scottish partnership."

192. This point was not been challenged before us. We agree that if it is the case then HMRC's analysis as to Mr Alexander having no proprietary interest in the DCS Alexander Goodwill would still be correct – albeit that the nature of that interest might be characterised

as a form of beneficial interest in a trust (presumably non bare) rather than a *sui generis* interest in the partnership property.

193. On this basis we conclude that if the DCS Alexander Partnership was a Scottish partnership, our conclusion in respect of the treatment of the goodwill would remain the same.

194. Our determinations therefore stand.

CONCLUSION

195. For the reasons given we find that the discovery assessments against AVGL for the accounting periods ending 26 January 2015 and 26 July 2015 were validly issued.

196. We also find that AVGL had no entitlement to amortisation relief for goodwill for those periods and AVGL has not satisfied us that those assessments are incorrect.

197. The appeals are therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

198. 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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 13th JUNE 2024