[2018] UKFTT 293 (TC)

TC06523

Appeal number: TC/2014/06810
TC/2014/06849

INCOME AND CORPORATION TAX – connected parties – sale of property below market value – assessments appealed – valuation being the only ground of appeal – matter referred to Lands Tribunal – agreement on valuation before hearing – whether Consent Order on valuation can be characterised as a s 54 TMA agreement; yes – (a) common intention to reach agreement over a particular matter; (b) agreement in relation to the assessments under appeal; (c) agreement competent to fix quantum of assessments and to dispose of substantive matter under appeal – settlement of appeals ensued within the statutory context of 'like consequences' – application to amend grounds of appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

STRATHEDIN PROPERTIES LTD **Appellants**

HUMAYUN REZA

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MR IAN SHEARER

Sitting in public at the Tribunals Centre, George House, 126 George Street, Edinburgh on 21 September 2017

Ms Almira Delibegovic-Broome, Advocate, for the Appellants

Mr Matthew Mason, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This Decision relates to two conjoined appellants who are connected parties. The first appellant is Strathedin Properties Limited ('Strathedin'), and the second appellant, Mr Humayun Reza, was the shareholder director of Strathedin.

2. The hearing was for the purpose of determining two issues as stated by the Directions issued by Judge Cannan on 5 April 2017, namely:

> (1) Whether the appeals have been settled by agreement pursuant to s 54 of the Taxes Management Act 1979 ('TMA'); and if not
>
> (2) Whether the appellants should have permission to amend their grounds of appeal as set out in their letter to the Tribunal dated 10 January 2017.

The relevant statutory provisions

3. Section 54 of TMA, so far as relevant to this case, provides as follows:

> **'54 Settling of appeals by agreement**
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> (2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.
>
> (3) Where an agreement is not in writing—
>
> (a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and
>
> (b) the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.
>
> (4) ....

> (5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal.'

Factual background

The sale of property by Strathedin to Mr Reza

4. On 3 June 2009, HMRC opened an enquiry into Strathedin under para 24(1) of Schedule 18 to the Finance Act 1998 ('Sch 18 FA 1998'). The return in question was for the year to 31 March 2007, which was filed on 12 February 2009. The corporate enquiry centred on the disposal of the property known as Old Conduit House in London by Strathedin for a consideration of £2.5m as returned by the company.

5. The property was sold by Strathedin to Mr Reza on 5 December 2006. Mr Reza is the sole Director of Strathedin, and a shareholder with a controlling holding of 99% of the company. Strathedin is therefore a close company, and the property sale transaction was therefore between connected parties. The tax effects of the transaction have to be calculated with reference to the market value at the time of sale. Any difference between a market valuation higher than the £2.5m sale price returned by Strathedin in the accounts for the year ended 31 March 2007 would give rise to additional tax chargeable, however determined.

Discovery assessment on Mr Reza

6. On 29 March 2011, HMRC used the 'not negotiated' valuation of £4.75m by the District Valuer to issue a protective Discovery assessment against Mr Reza under s 29 TMA for the tax year 2006-07. The transaction was treated as a transfer of an asset to a member in exchange for cash consideration at less than market value, and the shortfall was treated as a distribution under s 209(4) of the Income and Corporation Taxes Act 1988 ('ICTA').

7. The shortfall was calculated as £2.25m, being the difference of the valuation of £4.75m and the returned proceeds of £2.5m. The distribution of £2.25m was grossed up with a notional tax credit at 10% to arrive at a figure of £2.5m, which gave rise to additional tax sought by the Discovery assessment of £556,250.

8. On 26 April 2011, Mr Reza's agent, Knowles & Co. chartered accountants, appealed the Discovery assessment on the grounds that the figures used were estimated and that the final figures were still in the process of being agreed.

Correspondence in 2014 including the closure notices

9. There was a gap of correspondence for about three years in the bundle of documents. The next document on file was a letter by Mr Loudon of Knowles & Co dated 13 May 2014. Referring to HMRC's letter of 19 March 2014 (not included) and

a telephone discussion with Inspector Ornoch on the same day, Mr Loudon stated that he wished to reply as follows:

> '1. There is no supporting documentary evidence to suggest that the transaction of the additional sum should be treated through the Director's Loan account and not as a distribution. The transaction was planned as a sale of the property by Strathedin ... to the Director ... to try to reduce the interest carrying costs of the property in a situation where it could not be sold as it was subject to an enforcement notice by Hamden [sic] Council and the company's bankers were unwilling to continue supporting the existing funding arrangements as the time period kept extending because of additional works required to the property.
>
> The awareness of the distribution only came to light when you challenged the values at which the transaction took place.
>
> 2. As reiterated from our letter of 07 January 2014, the District Valuer placed a value of £3.8 million while Matthews and Goodman LLP Chartered Surveyors places a value of £2.9 million on the property...'

10. We draw two inferences from Mr Loudon's May 2014 letter. First, the excess of the market value (however determined) over actual proceeds that had been treated as a company distribution by HMRC was requested to be treated as a Director's loan by Mr Reza. Secondly, the District Valuer had revised the valuation downward from £4.75m to £3.85m, while Mr Reza had sought a surveyor's valuation of £2.9m.

11. In a four-page letter dated 12 August 2014 to Strathedin (copied to Mr Loudon), Inspector Ornoch stated that he was in a position to finalise his enquiry with a view to issue a closure notice and an amendment to the company's return for the year ended 31 March 2007. The purpose of the letter was to relate the facts and the reasons for the forthcoming closure notice and the amendment, and the introductory paragraph ended with the following invitation:

> 'Before I proceed [to issue the closure notice etc], I am giving you an opportunity to provide any further information or documentation that you believe may alter my view of this matter.'

12. The following facts stated in Inspector Ornoch's 12 August 2014 letter are of relevance to this application:

> (a) Old Conduit House was sold as trading stock of the company.
>
> (b) Mr Reza purchased the property with his personal funds and his director loan account with the company was unaffected by the transaction.
>
> (c) Associated companies have not been declared on the company's returns. Mr Reza controlled Strathedin in 2006-07. He and his wife Ferdousi Reza jointly controlled two other trading companies in 2006-07: (a) Leamington House Ltd (51% control with Mr Reza holding 31% and Mrs Reza 20% of the shares), and (b) Regentdale Ltd (100% control with Mr and Mrs Reza 50% each). This affects the tax calculation for the year ended 31 March 2007 only.

13. In summary, by substituting the value of sale proceeds returned of £2.5m by a market value of £3.85m, the 'trading losses' claimed of £734,915 in the submitted CTSA return for the period 31 March 2007 was completely removed by the additional deemed proceeds of £1.35m. The consequential adjustments were made to reverse the tax effect of claiming the trading losses from period 31 March 2007 in the later years.

14. The second half of the 12 August 2014 letter relates to the penalty imposed on Strethedin under para 20 of Sch 18 to FA 1998 for filing an incorrect return, which was explained in an earlier letter dated 1 October 2013. In detail, Inspector Ornoch set out the penalty assessment under the headings of 'disclosure', 'co-operation', and 'seriousness', and his reason for the penalty was as follows:

> 'I believe that the company has acted negligently in not obtaining a professional valuation of the property prior to the sale to Mr Reza. Savills estate agents had marketed the property for sale at £4.5 million prior to the sale to Mr Reza, but the valuation was estimated by him at a considerably lower figure without any professional advice having been obtained.
>
> He did however engage the services of a Land Tax Stamp Duty specialist who introduced him to a stamp duty avoidance scheme which used a sale figure of £2,000 for stamp duty purposes, resulting in no stamp duty being paid. Additionally, it has been established that three offers of £3.8 million on 6 September 2005, £4 million on 1 December 2005, and £4 million on 24 April 2006 had been made to the company and refused prior to the sale to Mr Reza. That should have alerted Mr Reza to a potentially higher valuation and the need to obtain a professional valuation.'

15. In terms of the quantum of the penalty, some of the points under the heading of 'co-operation' are as follows:

> (1) The valuation was referred to the District Valuer in August 2010 and an initial informal valuation was not accepted by Mr Reza.
>
> (2) Savills estate agents were appointed by the company in this matter and initial co-operation was good.
>
> (3) Savills were then dis-instructed and the District Valuer corresponded directly with Mr Reza; evidence of delay including in a three-month period, Mr Reza ignored the District Valuer resulting in an unagreed valuation being referred back to the Inspector.
>
> (4) Information powers were required to force information held by Savills as a third party to the enquiry. That information was being withheld by Mr Reza as it detailed the offers made on the property by prospective buyers which would have a material effect on the valuation. The notice was approved by Mr Reza in May 2011 and information provided by Savills in July 2011.
>
> (5) A further issue arose, and the company appointed a new surveyor in April 2012, and a three-month delay in response followed by improved co-operation but no agreed valuation could be reached.

16. The penalty on Strathedin was assessed at 30% of the total loss of tax, after giving an overall mitigation of 70%, being the total of 20% for disclosure (maximum being 30%), 30% for co-operation (maximum 40%), and 20% for seriousness (maximum 40%).

17. On 12 August 2014, Inspector Ornoch also wrote to Mr Reza, (copied to Mr Loudon) advising that he was 'now in a position to state [his] view of the matter and to finalise [his] discovery enquiry'. The view, in summary, was to assess Mr Reza under s 209(4) ICTA on the shortfall arising on the sale of the property based on a market value of £3.85m.

18. In the letter, Inspector Ornoch stated clearly the same invitation 'to provide any further information or documentation that may alter [his] view', before setting out in detail the facts and the reasons for his decision in relation to the quantum of the Discovery assessment. He then addressed the matter of the penalty he intended to impose on Mr Reza under s 95 TMA, and gave reasons for his assessment under the headings of 'disclosure', 'co-operation', and 'seriousness'.

19. For disclosure, 20% (maximum 30%) was given with the following reasons:

(1) There was no spontaneous disclosure without fear of discovery.

(2) The enquiry arose following the review of an associated company controlled by you which dealt with the refurbishment of the property.

(3) Discovery of the transfer to you was made by the acquisition of land registry information showing the transfer at £2,000. This was a marketed avoidance scheme for stamp duty purposes so you were aware that the transaction would have been subject to taxation.

20. Similar to the company, the penalty on Mr Reza was also assessed at 30% of the total loss of tax, after giving an overall mitigation of 70%, being the total of 20% for disclosure (maximum being 30%), 30% for co-operation (maximum 40%), and 20% for seriousness (maximum 40%).

21. On 8 September 2014, Mr Loudon wrote in response, for both Strathedin and Mr Reza. The letter made two points in two long paragraphs:

(1) By Mr Reza's instruction, the valuation of £2.9m by the independent surveyors should be considered, and that at the time of the transaction there was an enforcement notice on the property by Camden Council and English Heritage, which rendered the property 'virtually unmarketable' and this 'materially' affected the valuation at the time of the transaction was instructed in May 2006; that Mr Reza's 'offer of compromise at £3.5 million is more than generous'.

(2) That Mr Reza 'wished [HMRC] to consider treating the assumed gain as a loan from the company', which was subsequently repaid over the succeeding years; that Mr Reza was unable to 'provide any supporting documentation for *a situation that has arisen retrospectively* as a result of your discovery enquiry'; that the purchase was funded by Mr Reza's

> personal funds 'entirely supplied by Lloyds bank' and that was the reason why the Director's Loan was 'unaffected at the time of the transaction'. (emphasis added)

22. In relation to Strathedin, Inspector Ornoch wrote on 22 September 2014 to state that he had now issued a formal enquiry closure notice to the company. Having considered the comments from Mr Loudon's letter of 8 September 2014, Inspector Ornoch stated that he believed his view as detailed in his letter to the company of 12 August 2014 to be correct. On the same day, a penalty determination for Strathedin in the sum of £56,482 was issued.

23. In relation to Mr Reza, Inspector Ornoch wrote on 23 September 2014, advising that he would amend the protective assessment raised on 29 March 2011 to reflect his view on the matter as detailed in his letter of 12 August 2014. On the same day, a penalty determination was issued to Mr Reza for the sum of £99,375.

The assessments and penalty determinations that were appealed

24. On 16 October 2014, in two separate (but otherwise identical) letters on behalf of Strathedin and Mr Reza respectively, Mr Loudon appealed against all assessments and determinations issued on 22 and 23 September 2014 in the following terms:

> 'As instructed by my client, I hereby appeal against the penalty sum due and any amended income tax assessment based on the notice of completion of enquiry assessment issued to Strathedin Properties Ltd showing company trading profits of £615,085, *all* on the grounds that Mr Reza wishes to pursue further his appeal against the revised property value relating to Old Conduit House, Lyndhurst Terrace, Hampstead Village, NW3. Additionally, I request postponement of all tax and penalty sums due pending the outcome of the appeal' (emphasis added).

25. Mr Loudon's letter continued by referring to the valuation of the property at £2.9m as by Mr Reza's property agents, and that Mr Reza had offered to settle at a valuation of £3.5m but that was rejected by HMRC. In conclusion, Mr Loudon related that Mr Reza wished to have:

> '[the] decision reviewed by an HMRC officer not previously involved in the matter and to leave his option to appeal to an independent Tribunal open, subject to the result of the review.'

26. On 23 October 2014, Inspector Ornoch wrote to Strathedin to relate that in his original closure notice, he had asked the company to amend its self-assessment return for the accounting period to 31 March 2013 to reflect the valuation of £3.85m. Since Strathedin had not yet amended the return, Inspector Ornoch had proceeded to amend it before referring the papers to the review officer.

27. In summary, the following assessments and penalty determinations were referred for an independent review:

(1) In relation to Strathedin –

(a) A Revenue amendment under para 32 of Sch 18 for the year ended 31 March 2007;

(b) Four Discovery assessments under para 41 of Sch 18 for the years 31 March 2009, 2011, 2012, and 2013;

(c) A penalty determination under para 20(1)(a) of Sch 18 in respect of the return for the year 31 March 2007.

(2) In relation to Mr Reza –

(a) The protective assessment under s 29 TMA for the year 2006-07;

(b) A penalty determination under s 95(1)(a) TMA in respect of the return for the year 2006-07.

HMRC's review conclusion decisions

28. By letter dated 24 November 2014, Inspector Musgrove issued his review conclusion decision in relation to Mr Reza's assessment and penalty determination. The points at issue which the review decision addressed were stated as follows:

(1) 'Whether or not a charge on you arises in respect of a company distribution in the year ended 5/4/2007?'

(2) 'Whether or not you have incurred a penalty for fraudulently or negligently submitting to HMRC an incorrect return?'

29. In conclusion, the protective assessment was varied from £556,250.17 to £331,250, based on the valuation of £3.85m, and the penalty determination of £99,375 was upheld.

30. In considering whether a s 95 TMA penalty was imposable, Inspector Musgrove addressed the definition of 'neglect' under s 118(1) of TMA (since repealed):

> 'Neglect means negligence or a failure to give any notice, make any return or to produce or furnish any document or other information required by or under the Taxes Act.'

For a definition of 'neglect', the authority from the law of tort in *Baron Alderson in Blyth v Birmingham Waterworks Co* [1856] 11 Ex 781 at p 784 was referred to:

> 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do. The defendants might be liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.'

In contrast to what a reasonable person would have done (giving as examples a list of five things), Inspector Musgrove concluded that he considered Mr Reza had been negligent by failing to make a complete and correct return and to seek professional help when placing a valuation of £2.5m on the property.

31. Under the bold heading of 'What to do next' (page 5 of the review conclusion decision), it was stated that:

> 'If I do not hear from you and you do not appeal to the tribunal within 30 days of this letter I will assume that you agree with my conclusion and the matter will be treated as settled by agreement under Section 54(1) Taxes Management Act 1970. I will then make arrangements for the tax due to be collected.'

32. The review conclusion decision for Strathedin, also of 24 November 2014 by Inspector Musgrove, upheld the amendment, assessments and the penalty determination. The same paragraph as respects the review conclusion decision being treated as a s 54 TMA agreement was stated on page 6 of the letter.

Appeal to the Tribunal

33. By two separate Notices of Appeal dated 18 December 2014, Mr Reza appealed against the review conclusions for himself and Strathedin. No representatives were named on these notices, but the Notices of Appeal were forwarded to the Tribunals Service by Mr Loudon.

34. The Notice of Appeal for Mr Reza states the following details:

(a) Type of tax: *Income tax*

(b) To the question 'Is the appeal against a penalty or surcharge?': the box for '*No*' is marked with a cross

(c) The amount of tax or penalty or surcharge (if applicable): *£556,250.17*

(d) Date of HMRC notice of conclusion of review: *24/11/2014*

35. The grounds for appeal as stated (in box 7) on the Notice for Mr Reza are:

> '... HMRC instructed the District Valuer to place a value on the property. His initial valuation was £4.75m. ... He then met with ... Matthews and Goodman LLP and reduced the valuation to £3.85m. This valuation is considered high and not accepted. The property has been valued independently ... at £2.9m. The District Valuer cites three verbal offers to Savills between September 2005 and April 2006 of between £3.8m and £4m. None of these offers could proceed as the property was subject to an enforcement notice issued by English Heritage with an indeterminate time to removal. These offers are verbal, did not proceed and are therefore considered of no substance.
>
> Prior to acquisition by Strathedin ... the property was marketed by Savills at £3.5m for a period of five months followed by a two years period at £2.9m with no sale. The property was then sent to auction with a guide price of £2.25m and sold to Strathedin ... for £1.79m.
>
> This property consistently appears to be over-valued.'

36. In box 8 of the Notice of Appeal under the heading of 'Result', which asks: 'Please say below what you think the decision(s) should have been if you do not already make that clear in box 7', the full entry is as follows:

> 'The value should be around £2.9m in line with Matthews and Goodmans opinion. They are a large and well respected firm of Chartered Surveyors who regularly value property in the London area.'

37. The Notice of Appeal for Strathedin states the following details:

> (a) Type of tax: *Corporation tax*
>
> (b) To the question 'Is the appeal against a penalty or surcharge?': the box for '*No*' is marked with a cross
>
> (c) The amount of tax or penalty or surcharge (if applicable): *£276,772.85*
>
> (d) Date of HMRC notice of conclusion of review: *24/11/2014*

38. The entries for grounds for appeal (box 7) and result (box 8) for Strathedin's appeal are identical to those for Mr Reza.

The case before the Upper Tribunal (Lands Chamber)

39. On 4 February 2015, Officer Mason wrote to the Tribunal to request the appeals be 'transferred' to the Lands Tribunal, for the reason that 'both appeals are in respect of the same issue': 'namely the valuation made by District Valuers office in respect of the property known as the Old Conduit House ...'. The letter concluded by stating:

> 'I understand that it is within your remit to transfer this appeal to the Lands Tribunal and I would be obliged if you do so and confirm.'

40. On 21 May 2015, the Tribunals Service of the First-tier Tribunal (Tax Chamber) advised Mr Reza as follows:

> 'HMRC's application dated 4 February 2015 (enclosed) has been referred to the Registrar, and as the matter involves valuation of land, the appropriate jurisdiction lies with the Lands Chamber of the Upper Tribunal in the first instance.
>
> In order to expedite matters we have forwarded the papers to the Lands Chamber and asked them to contact the parties as to the next steps.
>
> The appeal is sisted pending the outcome of the Lands Tribunal's determination.'

41. On 28 May 2015, the Upper Tribunal confirmed receipt of the appeals. On 8 June 2015, the Upper Tribunal issued an Order for HMRC and the appellants to file and exchange their expert value reports.

The Consent Order dated 13 July 2016

42. Prior to the Upper Tribunal's hearing, an agreement to the valuation of the property was reached by the parties, with the Consent Order being issued by the

Upper Tribunal (Lands Chamber), dated 27 May 2016 and signed on 13 July 2016 by HMRC and Bivonas Law LLP, on behalf of Strathedin and Mr Reza. The substance of the Consent Order is stated as:

> 'The property known as Old Conduit House ... London [post code] had a freehold market value of £3.765 million at 5 December 2006.'

43. On 10 August 2016, HMRC applied to the Tribunal (Tax Chamber) for an extension to the Sist in proceedings for a period of 90 days to 7 November 2016, adding: 'The extension will allow for further discussions between the Respondents and the Appellants to be undertaken, the result of which may negate the requirement for further Tribunal involvement.'

44. In August 2016, the appellants appointed Pricewaterhouse Coopers ('PwC') as new representatives, who contacted HMRC to discuss the appeals before the Tribunal.

Correspondence after the Consent Order

45. On 13 September 2016, Inspector Ornoch wrote to Mr Reza as follows:

> 'I have now received a Consent Order from the Upper Tribunal (Lands Chamber) confirming the agreement between HMRC and you and Strathedin Properties Ltd to a valuation of the property known as Old Conduit House [address] of £3.675 million as at 5 December 2006.
>
> I have enclosed a revised tax computation for the year ended 5 April 2007 and a revised tax assessment will follow shortly. The appeal is settled under Section 54 Taxes Management Act 1970 in the amount of £287,500.05 tax.
>
> As the additional tax due has reduced, the penalty determination will need to be amended to reflect this. The penalty was not under appeal and the amendment is as a consequence of the agreed valuation and tax due based on this. The amended penalty determination will follow in due course.'

46. A copy of the letter was sent to both Knowles & Co and PwC.

47. By letter also dated 13 September 2016, Inspector Ornoch wrote to Strathedin in similar terms as to Mr Reza in respect of the agreed valuation by the Consent Order. Inspector Ornoch then referred to the following matters in respect of the company:

> 'I have enclosed revised tax computations and amended the self assessment for the year ended 31 March 2007 and determined the appeal. The penalty is not under appeal but will need amending as a consequence of the reduction in the "tax lost". ...
>
> The appeals against the consequential adjustments for the years ended 31 March 2009, 31 March 2010, 31 March 2011 and 31 March 2012 have also been determined and those years amendments were unaffected by the agreed valuation.'

48. While the amended penalty determination for Mr Reza is not included in the file, that for Strathedin shows the amended penalty determination at £40,732.

49. On 29 September 2016, Officer Mason wrote to Mr Reza inviting the appellants to withdraw the appeals 'as the matter appealed to [the] Tribunal has now been settled by agreement'. He also copied this letter to the Tribunal.

50. On 4 October 2016, the Tribunal wrote to both HMRC and Mr Reza in identical terms: 'Thank you for notifying the Tribunal that this appeal is settled. The file will be closed after 28 days and any hearing dates cancelled.'

51. On 21 October 2016, PwC wrote to HMRC. The timing of the letter would seem to have been prompted by Debt Management, which had contacted the appellants in respect of the amounts charged by the various assessments and determinations. Referring to HMRC's letters of 13 September as 'purport[ing] to determine various appeals under s 54 TMA 1970', Mr Preshaw of PwC contended that:

> (1) such a determination is not possible in the absence of specific agreement from the taxpayer';
>
> (2) the Consent Order determined the value of the property but does not determine the appeals;
>
> (3) the appellants continue to believe that the tax charged in the assessments is incorrect because the basis on which the assessments are made (regardless of the valuation of the property) is incorrect in law (and does not take into account relevant factual information).

52. There would appear to be email exchanges between Mr Preshaw of PwC and Inspector Ornoch which culminated in a telephone conference on 8 November 2016. The note of the conference on file was by HMRC and we make no reference to the substance of the note as regards what HMRC understood as the appellants' position.

Nisbets' representations and application to amend the grounds of appeal

53. On 6 January 2017, on account of the action of Sheriff Officers on behalf of HMRC and authorised by a Summary Warrant, Mr Reza instructed Nisbets Solicitors & Solicitor Advocates ('Nisbets') to act for him in response.

54. On 10 January 2017, Nisbets wrote to HMRC Debt Management reiterating that Mr Reza 'did not accept that his liability to tax had been agreed in terms of section 54 of the Taxes Management Act 1970', and gave notice that leave was being sought from the Tribunal to amend the grounds of appeal.

Appellants' application to amend grounds of appeal

55. By letter dated 10 January 2017, Nisbets wrote to the Tribunals Service, stating in the main the following:

> (1) '... any assertions that our clients' appeals have been settled in terms of section 54 is without any substantive foundation.'
>
> (2) 'Our clients have a number of grounds remaining to contest the assessment to tax made by HMRC.'

56. The remaining grounds are stated as:

> - 'Whether Dr Reza's conduct was such that penalties for negligently filing incorrect returns are appropriate, and if so, the quantum of those penalties.
> - Whether the amount of the distribution charged ... under s 209(4) ICTA 1988 should be reduced by reference to an amount repaid to the company in consideration of the disposal.
> - Whether additional corporation tax should arise as a result of the under-valuation. In the absence of a specific adjustment under the transfer pricing provisions (to which the company would not be liable as a result of its size), we do not believe there to be any basis for the imputation of further profits. It appears that HMRC have treated the transaction as capital in nature and therefore applied the capital gains tax connected party provisions, which our client's tax advisers do not believe are in point here.'

Minute of agreement dated 18 January 2006

57. At the hearing, counsel for the appellants produced to the Tribunal a copy of the Minute of Agreement between Strathedin ('First Party') and a Mrs Amina Khatun ('Second Party') with the 'subjects' being the premises at the address of the property known as Old Conduit House.

58. The first term of the agreement is to say: 'The First Party hereby agrees and undertakes that on the sale of the subjects the Second Party shall be entitled to repayment of the sum advanced and to receive 48% of the net free proceeds of the sale of the said subjects'; in parenthesis 'the net free proceeds' are defined, which includes *inter alia* 'after deduction of any heritable debts with accrued interest thereon and all legal and Estate Agents' charges in connection with the sale and the said advance' and so on.

Counsel's representations for the appellants

59. Ms Delibegovic-Broome addressed the Tribunal on the two questions directed for determination.

60. On the first question, whether the appeals have been settled by a s 54 agreement, counsel submitted:

> (1) The appeals were not transferred to the Lands Chamber, but were sisted pending the outcome of the Lands Tribunal's determination; that the agreement in relation to the valuation was simply forwarded to the Lands Chamber 'in the first instance' and could not automatically settle the appeals.
>
> (2) The respondents implicitly recognised the appeals have not been settled by letter of 29 September 2016 inviting the appellants to withdraw the appeals before the Tribunal. There would have been no need to for the appellants to withdraw the appeals if an agreement in relation to a matter

dealt with by the Lands Chamber was automatically to determine the appeals in front of the Tribunal.

(3) Rule 34(1) for the Tribunal Rules 2009 provides that the Tribunal may, in certain circumstances, make a consent order 'at the request of the parties', and does not provide for a consent order to be made at the request of just one of the parties.

61. In relation to the appellants' application to amend their grounds of appeal, counsel made the following representations:

(1) The property valuation was at the heart of the tax position of both appellants. However, there are significant financial consequences for the appellants arising from the difference in the way the parties consider the additional proceeds should be treated for tax purposes.

(2) Now that the property valuation has been agreed, the appellants submit that the whole of the taxpayers' financial circumstances should be taken into account to determine the correct tax treatment of the additional proceeds. The key such circumstance is that the Company entered into a Minute of Agreement with Mrs Khatun on 18 January 2006 whereby Mrs Khatun is entitled to 48% of the net free proceeds on the sale of the property in question, which did not seem to have been raised by the appellants' previous advisers.

(3) The appellants have sought to clarify their tax position with the respondents promptly following the agreement of the property valuation in July 2016.

(4) The Tribunal is invited to take into account of the significant prejudicial financial impact on the appellants by a refusal decision to amend the grounds of appeal.

(5) Any penalty amounts can only be discussed in a fully informed manner (both in terms of their appropriateness and quantum) once the tax treatment of the additional proceeds has been determined. (*British-American Tobacco Holdings Ltd v HMRC* [2017] UKFTT 0167 (TC); *Segame SA v France 4837/06* and *Han and another v Customs and Excise Commrs* [2001] 1 WLR 2253 were listed in the skeleton argument but no submissions in relation thereto were made.)

HMRC's grounds for objection

62. In respect of the first question for determination, the Tribunal understands Officer Mason's submissions (more of a chronological account of the proceedings to date) as meaning to say:

(1) The appellants' continued grounds of appeal to HMRC had been in relation to the valuation of the property.

(2) The only additional ground raised was in respect of the treatment of the distribution, with the suggestion that the amount be treated as a Director's loan. Documentary evidence to support such treatment was

sought but Knowles & Co had confirmed that no supporting documentation could be provided for a situation arising retrospectively.

(3) In the appeals to the Tribunal, the only grounds stated related solely to the valuation of the property; HMRC 'requested the case be transferred accordingly' to the Upper Tribunal (Lands Chamber).

(4) With the agreed property valuation, the appellants' *only* ground of appeal was settled. HMRC considered the appeals settled under s 54 TMA and issued revised assessments and penalty determinations.

(5) No appeal has been lodged with the Tribunal against the penalties.

63. In relation to the application to amend the grounds of appeal, the respondents' objections are as follows:

(1) As early as February 2015, the appellants and their representatives were made fully aware of HMRC's opinion that the only matter being put before Tribunals Service was that of the valuation placed on the property.

(2) Neither the appellants nor their representatives provided any amended grounds of appeal to contradict this opinion prior to or following the Consent Order being issued in July 2016.

(3) It was not until 21 October 2016, some 22 months after the original appeal to the Tribunal, did they submit the revised grounds.

(4) In the telephone conference on 8 November 2016, PwC did acknowledge that the valuation was 'final and agreed'.

(5) HMRC would question what reasonable excuse the appellants have in making such a late application to amend their grounds, some 22 months since February 2015.

Discussion

64. The parties' respective submissions and representations are predominantly factual in nature; neither parties made any legal submissions or referred to any case law authorities that may be relevant to the determination of the two issues. The legal analysis falls to be carried out by the Tribunal, and we set out the relevant legal considerations in some detail as part of our full reasons.

Whether appeals as notified to the Tribunal settled under s 54 TMA

65. The burden of proof as regards the first issue rests on HMRC as the party asserting that the appeals have been settled under s 54 TMA. It was for this reason that Mr Mason was asked to address the Tribunal on this matter first at the hearing, and his submissions, in the form of the sequence of events, are summarised earlier.

Settlement of appeals to be distinguished from the agreement

66. Parties are agreed that the Consent Order is an agreement of the valuation of the property at £3.675m, and that the agreement is final and conclusive.

67. The dispute is not so much about whether the valuation agreement was come to, but whether that agreement is the relevant agreement capable of settling the appeals in question as provided under s 54 TMA.

68. The legislative heading to s 54 is 'Settling of appeals by agreement'. While the terms 's 54 agreement' and 's 54 settlement' are often used interchangeably, the two terms are not in fact synonymous. The settlement relates to the appeal in question; the agreement pertains to a specific matter relevant to the appeal.

69. The issue for the Tribunal is whether there is now a *settlement* of the appeals under s 54 TMA by virtue of, or in consequence of, the valuation agreement. If there is a s 54 agreement, the settlement of the appeal in question ensues within the statutory context.

70. The underlying question for determination in relation to the first issue is in fact whether the valuation agreement can be characterised as a s 54 agreement, capable of settling the appeals in question.

Whether the Consent Order can be characterised as a s 54 agreement

71. Whether there is a relevant agreement for settling an appeal has been the focus of some case law authorities on s 54 TMA, wherein common law concepts from the law of contract are applied to construe the parties' intention – the making of an offer, whether acceptance valid, whether the agreement enforceable – to establish if a s 54 agreement exists.

72. The common law concept of intention to create a legal relation is pivotal to the formation of an enforceable contract. It is no difference to a s 54 agreement, in that there must be a bilateral intention that underpins the formation of the agreement.

73. First, to discern how a common intention is to apply to form a s 54 agreement, we turn to the Court of Appeal decision in *Schuldenfrei v Hilton* [1999] STC 821 ('*Schuldenfrei*'), where Parker J (as he then was) in his leading judgment at [44] explicated the meaning of 'when the agreement was come to' as follows:

> 'To my mind, the notion of parties having "come to" an agreement plainly implies not merely that they are of the same mind in relation to a particular matter, but also that their minds have met so as to form a mutual consensus; and that that meeting of minds, that mutual consensus, has resulted from a process in which each party has to some extent participated. On that footing it is, in my judgment, both legitimate and helpful ... to approach the question whether the Revenue and the taxpayer have made a s 54 agreement in the instant case by applying common law principles of offer and acceptance.'

74. It is not sufficient to discern that there is a common intention; that intention must be in relation to a *specific* matter. In *Skinner (Inspector of Taxes) v Berry Head Lands Ltd* [1971] 1 ALL ER 222 ('*Berry Head Lands*'), the Chancery Division found that there was no agreement to settle the appeal as the court could not find that the question 'against the inclusion of the market value' of the relevant land transaction

between the company and its parent company was ever 'canvassed between the parties or agreed to be settled' (at p 232).

75. In contrast to the facts in *Berry Head Lands*, over the particular matter of the market value of Old Conduit House at the date of the transaction, there has never been any ambiguity that it was the particular issue canvassed between the parties.

76. We find as a fact therefore that there had been a common intention between the appellants and HMRC to establish a mutually acceptable market value of Old Conduit House at the date of the transaction. The matter of valuation was raised from the start of the corporate enquiry in June 2009. That common intention to reach a consensus over the particular matter is evidenced by the protracted course of correspondence and the ongoing negotiation between the parties, involving the District Valuer, Savills the estate agents, and at least two chartered surveyors from either side. The ongoing negotiation culminated in the agreement by way of the Consent Order signed by the parties on 13 July 2016.

77. The Consent Order signifies that HMRC and the appellants 'are of the same mind in relation to a particular matter'. That matter is to fix the market value of Old Conduit House at 5 December 2006 at £3.675m. The Consent Order represents a mutual consensus that has resulted from a process in which each party has to some extent participated.

78. Secondly, for a s 54 agreement to be 'enforceable' within the statutory context, the agreement must relate to the assessments under appeal. In *Cash and Carry v Inspector of Taxes* [1998] STC (SCD) 46, it was found that 'the alleged agreement did not relate to either of the assessments under appeal'. The Special Commissioner concluded (at p51) that for 'an agreement to be enforceable between the taxpayer and the Revenue it must be in accordance with the provisions of s 54', which provide:

> '... where ... the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in particular manner or as discharged or cancelled ...'

79. In the present case, the market value of Old Conduit House is at the heart of all the assessments under appeal for both appellants. The amendment to Strathedin's CTSA return for the year to 31 March 2007 was to increase the returnable profits based on the agreed market value, which resulted in assessable profits for the year instead of trading losses. Consequently, no losses were available for offset against profits for the subsequent years ended 31 March 2009, 2011, 2012, and 2013, and the adjustments to remove losses claimed led to the discovery assessments for the said years. As for Mr Reza, the discovery assessment under s 29 TMA was in consequence of the agreed market value being higher than the actual proceeds of £2.5m; and the excess was assessed to tax as a distribution from the company to him as a director.

80. In so far as the substance of the valuation agreement is concerned, we find therefore that it is an agreement in relation to all the assessments under appeal.

81. Thirdly, apart from being in relation to the assessments under appeal, the agreement in question also needs to meet competence criteria. In the words of Stamp LJ in the Court of Appeal decision *Delbourgo v Field (Inspector of Taxes)* [1979] STC 234 ('*Delbourgo*') at p238:

> '[s 54] contemplates a situation in which an appeal from an assessment is pending for determination by the appropriate commissioners [now the Tribunal] and it contemplates an agreement which is intended to deal with the appeal and take the place of a decision of the [tribunal].'

82. Lord Justice Stamps continued by characterising such an agreement which can deal with the appeal and take the place of a decision of the tribunal as follows:

> 'That appears to me to contemplate a situation in which it is unnecessary to pursue the appeal, the agreement having got rid of that necessity. This can only be if the agreement is one which either is an agreement fixing the figure to be assessed or stating a mathematical formula for ascertaining that amount which will leave no room for any further argument as to the amount which falls to be substituted for the amount which has been assessed.'

83. In other words, an agreement can only be competent to deal with the appeal and take the place of a decision of the tribunal if it can fix the *quantum* of the assessment, and can dispose of the *substance* of the appeal as to 'leave no room for any further argument as to the amount to be substituted'.

84. Is the Consent Order an agreement that can be so characterised? It is clear from Lord Justice Stamps' formulation, that the agreement is not the assessment itself, or equate to the assessment. The competence test for quantum is whether the agreement is capable of 'fixing the figure to be assessed' or 'stating a mathematical formula for ascertaining that amount'.

85. The formulaic option is indicative that it is *not* necessary for a s 54 agreement to state the exact tax charge as £X as part of the agreement. It only needs to contain what is needed to fix the figure to be assessed. A s 54 agreement can be one, for example, wherein HMRC and the taxpayer agree that £X of property improvement costs are 'revenue' deductions, which will enable the figure for tax assessment to be fixed accordingly. In relation to the quantum aspect, the valuation agreement of the property at £3.65m, whilst not of itself the figure for the amount of tax assessed, is the figure that fixed the quantum of all the tax assessments in dispute as outlined at §79.

86. As regards the disposal of the substantive issue in dispute, since the *only* ground of appeal stated for both appeals pertains to the property valuation, the substance of the Consent Order has fully disposed of the substantive matter under appeal.

87. Within the statutory context of s 54, we find therefore that the Consent Order containing the property valuation agreement meets the competence tests in fixing the quantum of assessments under appeal, and in disposing of the substantive matter for both appeals as notified to the Tribunal.

88. Fourthly, sub-s 54(2) provides for a period of 'thirty days from the date when the agreement was come to' for the appellant to give notice to repudiate or resile from the agreement. The agreement in question is the Consent Order and the thirty-day period is to be reckoned from the date of the Consent Order of 13 July 2016. The appellants did not resile from the terms of the agreement contained in the Consent Order in the cooling-off period which ended on 12 August 2016. The Respondents were quite proper in taking no action during the cooling-off period; the revised assessments were issued in September 2016.

89. The appellants repudiated that the appeals have been settled in October 2016 and January 2017 through PwC and Nisbets respectively. Those instances of repudiation were not repudiation that fall under the provision of sub-s 54(2), which applies only to the agreement in question, namely, the Consent Order of 13 July 2016.

90. Fifthly, whilst the Consent Order was not signed by the appellants, sub-s 54(5) provides that references to 'an agreement being come to with an appellant' include an agreement being come to with 'a person acting on behalf of the appellant in relation to the appeal'. The appellants do not dispute that Bivonas Law LLP, as their representatives, had the authority to sign the Consent Order on their behalf.

91. For all these reasons, we find that the Consent Order signed on 13 July 2016 can be characterised as a s 54 agreement for meeting the following criteria:

(1) It is reached by the parties' common intention over a specific matter, namely to arrive at a mutually acceptable value of the property at the date of the transaction;

(2) It is enforceable within the statutory context of s 54 because it relates to the assessments under appeal;

(3) It is competent in dealing with the appeals by both fixing the quantum of the assessments under appeal, and by disposing of the substantive matter in dispute.

Settlement of appeals as 'like consequences'

92. The Consent Order is the s 54 agreement, but is not itself the settlement of the appeals: the settlement is part of the like consequences ensuing from a 54 agreement as provided by sub-s 54(1):

> '... the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.'

93. Subsection 54(1) therefore provides that if the agreement is a s 54 agreement, (and hence, competent to settle the appeals), the like consequences shall ensue from the competent agreement 'for *all* purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal'.

94. The like consequences of a s 54 agreement were considered in the Court of Appeal decision in *Inland Revenue Commrs v Aken* [1990] STC 497 ('*IRC v Aken*'). The case concerned a taxpayer who had substantial undeclared earnings from prostitution; this came to the attention of the Crown in around 1980 partly through a television programme in which she spoke of her earnings. In the leading judgment by Fox LJ, the effect of a s 54 agreement was stated as follows (at p501):

> 'The agreement was an agreement within s 54(1) of the Taxes Management Act 1970; the same consequences therefore ensue as would have ensued if, at the time of the agreement, the commissioners had determined the appeals by varying or otherwise dealing with the assessments in the manner agreed.

95. In this case, the valuation agreement at £3.675m takes the places of a Tribunal decision (as referred to the Lands Chamber), and the same consequences ensue from that agreed valuation – as if the Tribunal has determined the appeal. In this case, the like consequences ensuing from the agreement include the varying of the assessments to base on the agreed market value of the property at 5 December 2006.

96. Lord Justice Fox continued by qualifying the like consequences in respect of appeal rights following a s 54 agreement:

> 'It is true that, strictly, the agreement cannot have all the same consequences as would have ensued from a determination by the commissioners, because the taxpayer could not (having agreed under s 54) ask for a case to be stated for the decision of the High Court. However, I find it difficult to believe that Parliament did not intend, so far as practicable and bearing in mind that the appeal is not being proceeded with, that the agreement would not have the full force and effect of a determination in like terms by the commissioners. In my view the provisions of s 54(1) do not make sense on any other basis. The section must be given a sensible meaning in the context in which it is operating.'

97. Whilst a determination by the tribunal can be appealed, a settlement of appeals under s 54 will not give rise to any right of appeal. This is a significant qualification to 'like consequences shall ensue for all purposes'; no right of appeal can ensue from a s 54 agreement since the appeal has not in fact been heard by the Tribunal. In this sense, a s 54 agreement confers finality to litigation by way of 'settlement' in a way that does not apply to a decision from the Tribunal which carries the right of appeal.

98. Furthermore, this settlement is reached within the statutory context provided by s 54, and is not a bilateral contractual settlement signed up to by both parties.

99. In *Schuldenfrei*, Parker J considered (at [42]) the context in which a s 54 agreement is to be given its legal effect, by drawing a distinction between 'contractual' (at common law) and 'statutory':

> 'I find it difficult to envisage a situation in which an agreement which is effective under s 54(1) (a s 54 agreement) would not also be enforceable as a binding contract at common law; .... The question which arises under s 54(1) is whether the Revenue and the taxpayer

> have 'come to an agreement' in relation to the assessment under appeal. If they have, then the subsection itself prescribes the consequences which are to follow from that agreement. Thus, the question whether a s 54 agreement has been concluded has to be considered in a statutory, not in a common law, context.'

100. The distinction between 'contractual' and 'statutory' is given further articulation in *Schuldenfrei* by Lord Justice Evans' judgment at [1] and [2]:

> '... if the parties "come to an agreement" whilst the appeal is pending, then what they agree takes effect as the determination of the appeal ...
>
> In this context, therefore, an agreement has statutory consequences. It does not make the taxpayer's liability to pay contractual, but the agreement defines the amount of the statutory debt.'

101. A s 54 agreement has *statutory* consequences; the settlement is in the form of defining the statutory debt. Applying the law to the facts of the case, we are satisfied that the valuation agreement by way of the Consent Order defines the amount of the statutory debt by varying the amounts of the assessments.

102. Furthermore, we find as a fact that the timing of the settlement of the appeals was 'at the time when the agreement was come to', namely on 13 July 2016, for all purposes in terms of the like consequences that should ensue upon the statutory debts having been defined for both appellants.

Appellants' contention as to no agreement on liability

103. On 21 October 2016, over three months after the Consent Order agreement, and probably prompted by actions by Debt Management, PwC contended on the appellants' behalf that they 'do not believe such a determination is possible in the absence of specific agreement from the taxpayer', and that the Consent Order while determined the value of the property, does not determine the appeals.

104. In like manner, Nisbets wrote on behalf of Mr Reza to Debt Management in January 2017 asserting that there 'has been no written or oral agreement between our client (or any person acting on his behalf) and HMRC as to his liability to tax'.

105. Counsel for the appellants in her Skeleton Argument similarly stated that Rule 34(1) of the Tribunal Rules do not provide for a consent order to be made 'at the request of the *parties*' (italics original), not just one of the parties.

106. Viewed together, the appellants and their representatives seem to be asserting that there can be no settlement of the tax liabilities *unilaterally*. We address these contentions by drawing two distinctions.

107. First, a distinction must be drawn between the tax liability in question and the matter in issue under appeal.

108. Secondly, settlement in the sense of a payment to settle the tax liability is to be distinguished from settlement in the sense of agreeing on the matter in issue under appeal, and thereby defining the tax liability.

109. The matter in issue under appeal is the market value of Old Conduit House at the date of the transaction. The tax liabilities are the statutory debts that have been defined based on the agreed figure of £3.67m as the market value.

110. Section 54 does not make the taxpayer's liability to pay *contractual*. There is no bilateral agreement to that effect emanating from the statutory provisions. The absence of such a bilateral agreement to pay the tax liability is what, in our view, the very substance of the appellants' contentions.

111. The settlement of the appeals takes the form of defining the quantum of the statutory debts within the statutory context – not the common law context of contract. While the s 54 agreement needs to be bilateral to settle the matter in issue under appeal, there is no need for the tax liability so defined within the statutory provisions to be underpinned by a bilateral agreement.

112. In the hypothetical scenario wherein the Consent Order stated the valuation at £2.9m (the figure for box 8 under 'Result' on the appeal notices), and HMRC resisted varying the assessments to base them on £2.9m, would the appellants expect that a further bilateral agreement was required for HMRC to vary the assessments? We think not. In all likelihood, the appellants would seek to enforce the £2.9m as the agreed valuation for all assessments to be reduced.

113. In our judgment, there is no need for a further bilateral agreement, that is, one in *addition* to the s 54 agreement in question, to define the tax liability. As Evans LJ described the s 54 provisions in *Schuldenfrei*, 'the Parliamentary intention, easily inferred, [is] to create an efficient procedure for determining the amount which the taxpayer is liable to pay.'

114. The necessity for a separate agreement to dispose of the appeals is dispensed with by virtue of the statutory provisions under s 54 TMA. The settlement of the present appeals is effected within the statutory context: it is not effected within a contractual context under common law that requires a bilateral agreement.

Settlement of appeals under s 54 is final and conclusive

115. The timing of these contentions coincided with the enforcement proceedings in October 2016 and again in January 2017. The appellants contended the determination of the assessments was not final and conclusive as regards matters of law, and proposed to raise new grounds of appeal.

116. In *IRC v Aken*, the taxpayer likewise challenged the determination of the assessments during the enforcement proceedings, following a s 54 agreement. Ms Aken brought a judicial review claim against the Crown as having acted *ultra vires* in raising the assessments, on the ground that, as a matter of law, prostitution was not a

trade that carried the normal badges of trade, and the profits derived therefrom could not therefore be taxed as trading income.

117. At the Court of Appeal, Lord Justice Fox's comment in relation to the legal consequences of a s 54 agreement is as follows:

> 'The commissioners had not considered the matter, and are therefore not in a position to state a case. In the result, it appears to me that it is final and conclusive and cannot be challenged in any proceedings at all.'

118. As to the judicial review claim brought by Ms Aken, Lord Justice Fox concluded the basis was 'wholly untenable':

> 'The attempt to escape from that position on the ground that if the point of law raised is a good one the assessments on the taxpayer were ultra vires, I find is wholly untenable. The question whether certain profits or gains fall within or without a particular case is the very question which Parliament, subject to the appeal procedure, has committed to the commissioners ... the only route by which the question which the inspector or commissioners were right or wrong can be pursed, is the route specified by the 1970 Act.'

119. Lord Justice Fox's analysis is to say that it is wholly untenable to challenge the basis of a tax assessment during enforcement proceedings, when the substantive matter that could only be considered by the commissioners had been settled by a s 54 agreement. In our judgment, the Consent Order (the s 54 agreement) is likewise final and conclusive; the assessments ensuing therefrom cannot be challenged in any proceedings at all. The assessments cannot be re-litigated.

Procedural aspects on settlement of appeals under s 54

120. The involvement of the Upper Tribunal (Lands Chamber) is a main cause of contention between the parties as to the extent that the Consent Order that emanated from those proceedings at the Upper Tribunal can be construed as a s 54 agreement to settle the appeals brought within the jurisdiction of the First-tier Tribunal.

121. For the respondents, Mr Mason has used the term 'transfer' to describe the nature of the involvement by the Lands Chamber. For the appellants, Ms Delibegovic-Broome has averred that the appeals were not transferred to the Lands Chamber but were sisted pending the outcome of the Lands Chamber's determination.

122. We agree with counsel for the appellants that the appeals have been sisted, and not transferred from the FTT to the Lands Chamber. The specific matter of the property valuation was merely 'referred' to the Lands Chamber, which does not amount to a transfer of the appeals to the jurisdiction of the Upper Tribunal. The same is stated on Consent Order from the Lands Chamber, namely: 'Upon the referral of the First-tier Tribunal (Tax Chamber) dated 21 May 2015 of the Appellants' Notice of Appeal dated 18 December 2014.'

123. That the substantive matter of the appeal was 'referred' to the Upper Tribunal (Lands Chamber) does not detract from our finding that the Consent Order from the Upper Tribunal remains a competent agreement for the purposes of s 54 to settle both appeals. We dismiss Ms Delibegovic-Broome's submission in this respect.

124. An analogy can be drawn with the commonly known 'Article 267 TFEU Procedure' whereby the domestic courts of a member state can refer a technical matter on the interpretation of EU law to the Court of Justice of the European Union ('the CJEU') for a ruling. The Article 267 reference procedure does not transfer an appeal from the domestic jurisdiction of the referring court, but the CJEU ruling will have an impact on the appeal proceedings brought in front of the domestic court.

125. As to counsel's second submission that HMRC had invited the appellants to withdraw the appeals as indicative that that the Consent Order from the Lands Chamber did not automatically determine the appeals in front of the Tribunal, nothing turns on this observation to displace the legal effect of the like consequences ensuing for all purposes under s 54 as if the tribunal had determined the appeals.

126. The proceedings governing the appeals and the s 54 procedure governing the settlement of the appeals by agreement run separately and independently of each other. We agree that the Consent Order did not automatically 'determine' the appeals, but we are of the view that there is no further substantive issue for the Tribunal's determination following the Consent Order.

127. Procedurally, the appeals remain sisted, notwithstanding the settlement of the appeals under s 54. A formal closure of the appeal proceedings is required by the action of either party. It is simpler (and more cost-effective for the Tribunal and the parties) for the appellants to withdraw the appeals under Rule 17 of the Tribunal Procedural Rules.

128. If the appellants are not minded to withdraw the appeals, then the respondents would have to apply for the appeals to be struck out under Rule 8.

129. In our judgment, a strike-out application will have to be granted. In the first instance, the matters in issue under appeal, following a s 54 settlement, are 'matters over which the Tribunal no longer had any jurisdiction because of the agreement' (see *F Perera v HMRC* [2011] UKFTT 451 (TC) at [14] in relation to a strike-out application). On this basis, the Tribunal must strike out the proceedings under Rule 8(1). In the alternative, the appeals have no reasonable prospect of succeeding, since no further grounds of appeal have ever been advanced, and a strike-out under Rule 8(3)(c) would be applicable.

Whether s 54 settlement for the penalty determinations

130. The penalty determinations are not notified to the Tribunal, and are not matters in front of us. However, counsel's submissions for the appellants addressed the penalty issue, and the appellants' applications to amend grounds of appeal also

included the matter of the penalties. For completeness, we address the legal status of the penalty determinations as they now stand.

131. The penalty determinations for both appellants were appealed to HMRC by Mr Loudon's letter of 16 October 2014, at the same time as all the other assessments, and 'all on the ground of the property valuation being too high'.

132. The appeal to HMRC then led to the offer of review, and the review conclusions by letters dated 24 November 2014 were the appealable decisions to the Tribunal under s 49G TMA.

133. Inspector Musgrove's review conclusions covered the penalty determinations, and the legal effect in the event that no appeal was notified to the Tribunal within 30 days of the review conclusions was clearly stated on page 5 and 6 of the respective letters: 'the matter will be treated as settled by agreement under s 54(1)'.

134. In that respect, Inspector Musgrove was referring to the statutory provisions under s 49F TMA which confer the legal effect of a s 54(1) settlement in the absence of an appeal being notified to the Tribunal:

> '**49F Effect of conclusions of review**
>
> (1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).
>
> (2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.
>
> (3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.
>
> (4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.'

135. The Notice of Appeal filed for each of appellants dated 18 December 2014 does not include the penalty determination. The time limit for notifying an appeal against the penalty determinations was 23 December 2014. It is not disputed that the penalty determinations have never been notified to the Tribunal under s 49G TMA.

136. In these circumstances, the statutory provision under sub-s 49F (2) takes effect: the review conclusions in relation to the penalty determinations are to be treated 'as if they were an agreement in writing under section 54(1) for the settlement of the matter in question'. We find therefore that the penalty determinations are settled under s 54.

137. Subsection 49F(3) is emphatic that no notice can be given to resile from the s 54 agreement under sub-s 49F(2) if no appeal is notified under s 49G to the Tribunal.

138. In the absence of a timely appeal under s 49G, sub-s 49G(3) confers the Tribunal with the discretion to admit an appeal notified after the end of 'the post-review period', which was 23 December 2014 in this case. The appellants'

representatives indicated the intention to apply for an appeal out of time. Given that the post-review period expired over three years ago, there can be no conceivable basis that any appeal, so significantly out of time, would be admitted.

Whether permission to amend the grounds of appeal

139. Even if we were wrong on the first issue, permission to amend the grounds of appeal would be refused in this case. Our reasons for refusal are stated under the legal principles relevant to our consideration.

The length of delay and any good reasons?

140. In October 2016, PwC stated that the appellants believe that the basis of the assessments is 'incorrect in law' and 'does not take into account relevant factual information'. Nisbets in January 2016 raised new grounds of appeal to reduce the amount of distribution by an amount 'repaid to the company in consideration of the disposal'. Counsel in September 2017 submitted a minute of agreement of Mrs Khatun's entitlement to a percentage of the 'free proceeds' on the sale of the property.

141. In terms of timing of the application in January 2017, it was more than two years after the lodgement of the appeals in December 2014. The application has to be considered as 'late', and the Tribunal considers the lateness in this case as serious and significant.

142. The appellants were professionally advised at all times. Mr Reza would seem to be an astute businessman and taxpayer who knows the potential tax liabilities at issue for the transaction, for example, in seeking professional advice to enter a stamp duty avoidance scheme using a sale figure of £2,000 for stamp duty purposes. It is reasonable to expect more timely engagement with the substance of the appeals from a taxpayer such as Mr Reza, who can be fairly described as a sophisticated taxpayer and a businessman with extensive experience in high-value transactions, and in control of a group of companies engaged in various trades associated with properties.

143. The protracted history of the enquiry has offered the appellants many opportunities to advance alternative grounds against HMRC's assessments. The application for amendments would seem to be brought on by the enforcement proceedings. No reasons have been offered to explain the length of delay in bringing the new grounds of appeal.

Is there an arguable point?

144. At the hearing, we asked counsel for the appellants the exact amended grounds of appeal that the Tribunal was to consider, and the facts in relation to the amended grounds on which reliance would be placed. As we understand from counsel, the exact amended grounds would be furnished upon a positive outcome from the Tribunal to give leave. We take therefore the letter of 10 January 2017 from Nisbets as the proposed amended grounds of appeal, see §56.

145. The first amendment relates to the penalty determinations. Since penalties are not matters that have ever been included in the appeals that were lodged in December 2014, there is no procedural basis for any issues relating to the penalty determinations to be introduced as amended grounds.

146. We refuse leave to admit this ground of appeal because the Tribunal has no jurisdiction over this matter. As indicated earlier in this decision, the penalty determinations, as they now stand in law, have been settled under s 54 TMA by virtue of s 49F(2) TMA. The Tribunal has no jurisdiction over the penalty matters, then as now, and the first amendment must be refused.

147. The second amendment relates to the excess proceeds (ie agreed market value less actual payment made of £2.5m) being treated as distribution to Mr Reza. HMRC have clearly stated in correspondence that the Director's Loan account was unaffected by the property transaction. The legislation provides for the undervalued sale to be taxed as distribution under s 209(4) TCTA 1988, and the tax treatment was in accordance with the arrangements between Strathedin and Mr Reza at the time of the transaction. The proposed amendment is to argue that the tax treatment should give retrospective effect to the 'loan' arrangements post-transaction as if the arrangements were in place at the time of the transaction.

148. This would seem to be the same proposal that had been made prior to the issue of the closure notices by letter from Mr Louden of 8 September 2014, for a reduction in the amount assessed as 'distribution' on Mr Reza by monies he paid into the company as 'retrospective' consideration. Mr Louden had confirmed at the time that Mr Reza was unable to 'provide any supporting documentation for a situation that has arisen retrospectively as a result of [the] discovery enquiry'. It was not a valid ground in 2014 due to the absence of contemporaneous evidence, and nothing has changed to affect its status of being an invalid ground, then as now.

149. As to the third amended ground on transfer pricing, it is to say that HMRC were mistaken by treating 'the transaction as capital in nature and therefore applied the capital gains tax connected party provisions'. Contrary to what the contention seems to suggest, it seems to us there is in fact agreement over this between the parties, in that HMRC have applied the correct tax treatment in taxing the transaction on the company as 'trading profits' – not under capital gains.

150. It has been consistently and prominently noted in the enquiry conclusions and the review decisions by HMRC that one of the key facts being taken into account was that Old Conduit House was sold as 'trading stock' by Strathedin. The tax treatments on the company are not capital in nature: (a) the sale of the property based on the market value was treated as giving rise to trading profits for the period to 31 March 2007; (b) the trading losses claimed in the CTSA return were reversed; (c) the consequential adjustments in later years removed the claims of brought-forward trading losses. The third amendment does not appear to us to be arguable either.

151. As to the Minute of Agreement between Strathedin and Mrs Khatun dated 18 January 2006, which was within a year of the property transaction at 5 December

2006, Mr Reza as Strathedin's sole director and the purchaser would have been aware of the existence of the agreement at the time of the transaction. The agreement appears to us to apply to a sale of the property on open market delivering 'free proceeds' to the company. If the transaction at 5 December 2006 fell within the terms of the agreement to trigger 'free proceeds' being payable to Mrs Khatun, and had made a financial impact on either appellant's financial circumstances, it would seem extremely peculiar that the agreement was not produced at any stage of the enquiry, and was only first produced at the hearing. The appellants have failed to give any explanation for its late production, or to make any submission as to its relevance.

152. In summary, there does not appear to be an arguable point of merit from any of the proposed grounds of appeal because: (1) the Tribunal has no jurisdiction over the penalty determinations; (2) it has been conceded during the enquiry that there was no contemporaneous documentation to support the loan treatment, and that the proposal has been admitted to be retrospective for the purpose of lowering the tax liabilities; (3) HMRC have not treated the transaction as capital in nature in determining its tax consequences; (4) relevance of the 2006 Minute to the transaction unsubstantiated.

Overriding objective of fairness and justice

153. Even if there were to be an arguable point from the proposed amendments, permission to amend will still be refused, having regard to the overriding objective.

154. As already noted, the delay in bringing the amended grounds is significant and serious, even if the delay is reckoned as 24 months, from the lodgement of the notice of appeal in December 2014, to the date of the application to amend in January 2017. We also have regard to the fact that the period between the enquiry into Strathedin being opened on 3 June 2009, and the Consent Order being signed on 13 July 2016, was seven years long.

155. The respondents are prejudiced, if any new grounds, whose relevance and merits remain to be tested, on facts and evidence which are yet to be adduced, were given leave to be advanced. In *Virginia Goode v Hugh Martin* [2000] WL 33281351 (a decision from the High Court, Queen's Bench Division Admiralty Court), the claimant was severely injured and rendered unconscious while on board a yacht sailed by the defendant. Her original statement of claim was made reliant on eye witnesses' accounts of the accident; she herself being unconscious. In response to the statement of defence served, the claimant applied to amend her pleadings. Mr Justice Colman refused the application, his reasoning took account of the prejudice on the defendant in terms of evidence gathering after the passage of time:

> 'Whether one factual basis is "substantially the same" as another factual basis obvious involves a value judgement, but the relevant criteria must clearly have regard to the main purpose for which this qualification to the power to give permission to amend is introduced. That purpose is to avoid placing the defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts

> which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.'

156. Admittedly, the criteria of 'substantially the same' (in relation to the factual matrix), and of the limitation period (s 35 of the Limitation Act 1980), are specific to an action in tort. But the reasoning as regards the prejudice on the other party if an amendment is to be granted after a significant passage of time is no different.

157. In this respect, the Tribunal's overriding objective is to deal with cases fairly and justly, not only the appellants', but also the respondents'. The overriding objective has been substantially recast in the light of the *Jackson* reforms, whereby the Tribunal's consideration of justice should also encompass a public interest dimension as respects the access to justice.

158. Master McCloud's dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) ('*Mitchell*'), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

> 'Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18th Lecture ...
>
> > "*The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgment that the achievement of justice means something different now*."'

159. Following the approach in *Mitchell*, the guidance from the Upper Tribunal (Tax Chamber) in *HMRC v McCarthy & Stone (Developments) Limited* [2014] UKUT 0196 (TCC) makes it clear that this tribunal likewise should adopt a 'tougher and more robust' approach in considering applications to extend time.

160. This is not an application to extend time, but the dictum from *Mitchell* is not limited to cases of breach of the rules, practice directions or orders. As is seen in *Hague Plant Ltd v Hague & Ors* [2014] EWHC 2663(Ch) where the judge refused leave for late amendments to the pleadings, part of his reasoning at [49] is a reference to the approach the court should adopt after the *Jackson* reforms:

> '... it is .. a question of striking a balance but the court is and should be less ready to allow a very late amendment than it used to in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it ...'

161. For the reasons stated, the appellants have failed to meet 'the heavy onus' in justifying any amendments to the grounds of appeal.

162. On the other hand, the prejudice to the respondents is severe in our judgment. These appeals have been pursued with a singularity of purpose and ground. From the

inception of the enquiry in June 2009, to the closure notices in September 2014, from the review conclusion decisions in November 2014, to the lodgement of the Notices of Appeal in December 2014, the appellants had been singularly consistent in pursuing one ground of appeal, namely the market value of Old Conduit House at the time of the transaction at 5 December 2006.

163. From 3 June 2009 when the corporate enquiry was opened to 13 July 2016 when the Consent Order was signed, the appellants had raised only one alternative ground in relation to the tax treatment by way of distribution. That ground was not further pursued on failure to produce contemporaneous evidence. In all these circumstances, the respondents are fully entitled to consider that the only remaining matter in dispute was the valuation of the property. Even if the appeals had not been settled under s 54 TMA as we have found, there can be no justifiable basis for any amendments to be made to the grounds of appeal at this late stage.

Disposal

164. For the reasons stated, the appeals have been settled by agreement under the statutory provisions of section 54 of the Taxes Management Act 1970.

165. Accordingly, the application to amend the grounds of appeal is refused.

166. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 5 JUNE 2018