[2019] UKFTT 0699 (TC)

TC07471

CORPORATION TAX – carry forward of losses under section 343 ICTA 1988 – company reconstruction - quantum of losses available to be carried forward – relevant assets and liabilities test in section 343(4) and 344(5) and (6)ICTA 1988 – identifying the relevant assets and liabilities – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2011/01784

BETWEEN

SPRING CAPITAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at George House, George Street, Edinburgh on 18 and 19 September 2019

Michael Upton and Tim Haddow, Advocates, instructed by Russel & Aitken for the Appellant

Sadiya Choudhury, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 10 February 2015 I released a decision of this Tribunal in respect of this appeal ("**the First Decision**"). The First Decision was concerned mainly with the question whether Spring Capital Limited ("**the appellant**") was entitled to deductions under Schedule 29 to the Finance Act 2002 in respect of the purchase of goodwill. I dismissed the appellant's appeal in relation to this issue ("**the amortisation issue**") but directed that the appeal be adjourned on one outstanding issue. I granted permission to appeal the First Decision on limited grounds and the appellant's appeal was dismissed by the Upper Tribunal in *Spring Capital Ltd v HMRC* [2016] UKUT 264 (TCC) (Judges Sinfield and Greenbank).

2. The outstanding adjourned issue ("**the section 343 issue**") concerned the question whether the appellant was entitled to carry forward losses under section 343 Income and Corporation Taxes Act 1988 ("**ICTA**"). The question of what losses were available to be carried forward by the appellant depended on the outcome of another appeal by a company called Spring Salmon & Seafood Limited ("**SSS**") under reference TC/2011/06273 and, in the First Decision, I adjourned the section 343 issue pending the outcome of that appeal. SSS was the "predecessor" company of the appellant for the purposes of section 343 ICTA, having previously carried on the trade which subsequently came to be carried on by the appellant. The Upper Tribunal, in *Spring Salmon & Seafood Limited v HMRC* [2017] UKUT 2005 (TCC) (Lord Bannatyne), ultimately determined that appeal in favour of HMRC by upholding closure notices issued by HMRC to SSS which were held to have refused claims made by SSS to carry losses in the 12 months to 31 January 2005 back to earlier accounting periods.

3. Once the Upper Tribunal had dismissed the SSS's appeal, it was necessary for this Tribunal to determine the adjourned section 343 issue. That it has taken some time to do so is, in large part, due to the fact that the appellant, having had its appeal to the Upper Tribunal in respect of the amortisation issue dismissed, made a further application for permission to appeal the First Decision, which I refused in a decision released on 21 September 2016. The appellants objected to certain reasons which I gave in refusing that second application for permission to appeal and applied that I should recuse myself from hearing the adjourned section 343 issue. In a decision released on 1 May 2018 I refused that recusal application and refused a subsequent application for permission to appeal that decision. The refusal of that application for permission to appeal the recusal decision was upheld by the Upper Tribunal.

4. At the same time as making the recusal application, the appellant applied for a stay of this appeal in relation to the section 343 issue for reasons which need not detain us. A hearing to consider that application for a stay was arranged for 11 June 2019. At the hearing, the appellant withdrew its application and to avoid further delay I arranged with the parties that a hearing of the outstanding section 343 issue should be held in the week commencing 16 September 2019. That hearing took place on 18 and 19 September 2019 in Edinburgh.

5. In a nutshell, the section 343 issue concerns the quantum of losses which the appellant can carry forward under section 343 from SSS – a question which involves a consideration of the "relevant assets" and "relevant liabilities" restriction contained in sections 343(4) and 344(5) and (6) ICTA 1988. The appellant claims to be able to carry forward losses under section 343 in respect of the accounting periods ended 9 March 2005 and 30 April 2005-2009.

6. For ease of reference, I shall refer to the relevant parties using the same abbreviations as I used in the First Decision. At the hearing in 2014 on the amortisation issue leading to the First Decision ("**the London hearing**"), the appellant was represented by Mr Roderick Thomas. Mr Roderick Thomas was a shareholder and (from 12 February 2007) the company secretary of the appellant. He became a director of the appellant in 2010. He conducted the appellant's

correspondence with HMRC. Mr Roderick Thomas was also the director of SSS at all material times. His brother, Mr Stuart Thomas, was a director of the appellant from its incorporation and in all periods material to these appeals. Mr Stuart Thomas was also the company secretary of SSS from 23 May 2004 onwards. I refer in this decision to Mr Roderick Thomas as "**Mr Thomas**" and to his brother as "**Mr Stuart Thomas**". Where I refer to Mr Thomas and Mr Stuart Thomas jointly I do so as "**Messrs Thomas**."

7. At the hearing on 18 and 19 September 2019 in relation to the section 343 issue ("**the Edinburgh hearing**"), the appellant was represented by Mr Michael Upton and Mr Tim Haddow, Advocates, and HMRC were represented by Ms Sadiya Choudhury, of Counsel.

ACCOUNTING AND OTHER EVIDENCE

8. At the beginning of the Edinburgh hearing, HMRC applied to exclude the accounting evidence of a Mr Fieldhouse, an expert witness put forward by the appellant. HMRC objected to the admission of Mr Fieldhouse's evidence on the basis of relevance and because Mr Fieldhouse was not an independent expert (because he had prepared the accounts of SSS for the year ended 31 January 2003).

9. The parties agreed that Mr Fieldhouse's evidence should be withdrawn and accordingly it was not admitted into evidence.

10. In addition, it was agreed between the parties that the Memorandum and Articles of Association of SSS and its bank statements relating to 1 November 2004 should be admitted.

THE FIRST DECISION

11. As I have mentioned, the First Decision was primarily concerned with the amortisation issue. In particular, the appellant claimed to have purchased goodwill in what I termed a "tripartite" transaction. It is not necessary to go into detail but, essentially, the tripartite transaction was said to have involved Messrs Thomas acquiring the trade of SSS and then transferring it at market value to the appellant on 22 September 2004. I found that that tripartite transaction had not happened and declined to accept the evidence of Mr Thomas that it had.

12. Instead, on the basis of the evidence before me, I found that the trade of SSS had moved across from SSS to the appellant directly. It was not necessary, for the purposes of determining the amortisation issue, to decide on what date the trade transferred from SSS to the appellant or the exact date on which SSS ceased to carry on the trade and the exact date on which the appellant, as SSS's successor, began to carry it on. On the basis of the relatively sparse and evidently incomplete evidence before me, it seemed to me more probable than not that the trade had "migrated" from SSS to the appellant over a period of time. At [118] to [126] of the First Decision I summarised my conclusions as follows:

> "*Invoices and other evidence of a transfer of trade*
>
> 118. RSM Tenon's memorandum of 29 July 2013 also attached a variety of documents which, they submitted, indicated that SSS's trade had been transferred to the appellant.
>
> 119. First, the accounts of SSS for the 18 months ended 31 January 2005 recorded that the company had ceased to trade on 31 January 2005.
>
> 120. Secondly, there were e-mails from Mr Stuart Thomas in December 2004 and January 2005 notifying trading partners of a change in company details and supplying contact details for the appellant. There were also e-mails dated 3 January 2005 to various business partners giving the new details of the appellant (address, telephone and fax numbers, e-mail addresses, company registration number, VAT number and bank account details) which were expressed be "effective 1.1.05."

121. Thirdly, there was an e-mail dated 18 July 2013 from Mr Thomas to Mr Barnard [Mr Barnard of RSM Tenon acted for the appellant in relation to agreeing a market value of the seafood trade] enclosing "e-mails regarding the advice the changing payment/bank details sent to various customers attesting to the transfer of the trade from [SSS] to [the appellant]." I noted that there was no mention in this e-mail of a transfer from SSS to Messrs Thomas and by Messrs Thomas to the appellant, but this may have been a shorthand way of referring to the tripartite transaction.

122. The e-mail dated 18 July 2013 also enclosed an e-mail from Stuart Thomas dated 4 January 2005 to trading partners enclosing final statements for SSS and new statements for the appellant. The e-mail requested that payments to the appellant should go to the correct bank account.

123. Fourthly, there were a number of invoices from SSS and from the appellant to customers, although it was apparent that I had not been provided with a complete set of invoices for either SSS or the appellant. The last invoice from SSS was dated 29 July 2004 and the first invoice from the appellant was dated 24 September 2004. The invoices were very similar in content and dealt with the supply of different quantities and types of fish. Many of the customers were common to both SSS and the appellant.

124. There was also a letter from HMRC dated 12 January 2005 to the appellant indicating that the business had been recently registered for VAT. In addition, there was a VAT return submitted by the appellant for the three month VAT period ended 04/05 showing total sales of £681,643 which was dated 19 May 2005. Also, there was a letter dated 8 April 2005 from HMRC to the appellant in respect of the first return period ending 31 January 2005 reducing the net amount repayable to the appellant in respect of its first VAT return. The first VAT return for this period (i.e. 01/05) disclosed sales of £836,194.

125. Finally, there were a number of bank statements for SSS and the appellant. The last bank statement for SSS went up to 24 March 2005 and there was activity on the account in January and February 2005. The appellant had a different bank account from SSS. This account appeared to have been active from 24 October 2004 with significant trading activity in November 2004.

126. It seemed to me that these documents indicated that the seafood trade carried on by SSS ceased at some stage between September 2004 and February 2005 and during that period came to be carried on by the appellant. The impression created by the documents was, however, that there was a gradual migration of the trade rather than an outright transfer of the trade at a specific date. I was, however, satisfied that the trade which the appellant began to carry on was the same trade as that previously carried on by SSS."

13. In relation to the section 343 issue, I adjourned consideration of the issue at [283]-[291] as follows:

"*Losses available under section 343 ICTA 1988*

283. HMRC accepted that the appellant had a prima facie entitlement to carry forward losses under section 343 ICTA 1988 (subsequently re-written in the Corporation Tax Act 2010) to the extent that there were losses available for carry- forward in SSS at the date of the cessation of its trade.

284. HMRC accepted that the common ownership test for the purposes of section 343 ICTA 1988 was satisfied. I have to say that it is as well that the parties were agreed on this point because from the deficient way that evidence

was presented it would have been hard to determine this issue one way or the other.

285. Section 343 speaks of a company [SSS] ceasing to carry on a trade and another company [the appellant] beginning to carry it on. Although I have decided that the tripartite transaction did not take place, it seems to me clear from the evidence that SSS ceased to carry on the seafood trade and within two years (in fact a much shorter time, as we have seen earlier) the appellant commenced to carry on the same trade.

286. It therefore seems to me that *prima facie* the appellant is entitled to carry forward losses of SSS under section 343.

287. The question of what losses were available for carry forward at the date of the cessation of SSS's trade is the subject of another appeal to this Tribunal under reference TC/2011/06273.

288. Essentially, that appeal, as I understand it, concerns the effect of certain loss carry-back claims made by SSS on its losses available for carry-forward. In other words, HMRC contend that some or all of the losses which are being claimed under section 343 have already been utilised by SSS when it made carry-back claims.

289. The parties agreed, however, that the issue of the quantum of losses to be carried forward under section 343 should await the outcome of the appeal under reference TC/2011/06273. Any such losses would, of course, only be available to be offset against profits of the same trade.

290. I should make it clear that all matters relating to quantum in respect of any losses carried forward under section 343 are to be reserved for a further hearing. This will include the question whether there is any restriction of the losses, not just in relation to any carry-back of losses by SSS, but also by virtue of section 343 (4) i.e. the "relevant assets" and" relevant liabilities" tests.…

291. Accordingly, I direct that this appeal be adjourned on this point until after the decision in the appeal reference TC/2011/06273 has been finally determined."

14. It will be noted that, from the evidence then before me, I concluded that the appellant had begun to carry on the same trade (a trade of supplying seafood) as SSS and did so within a two-year period, as required by section 343 ICTA. Neither party to this appeal seeks to disturb that conclusion.

15. Moreover, it will also be observed that it was common ground at the London hearing that the common ownership test for the purposes of section 343 ICTA was satisfied. This was also common ground at the Edinburgh hearing.

16. Therefore, it is common ground that section 343 ICTA applied in the circumstances of this appeal.

17. I should add that at the London hearing there was also an issue in relation to the valuation of goodwill but, because of my conclusion in relation to the tripartite transaction, it was not necessary to reach a final decision on this point, although I did express the conclusion that I would have been minded to reach had it been necessary to do so. In earlier submissions on the section 343 issue, the appellant relied on the views I expressed in relation to the valuation of goodwill. However, at the Edinburgh hearing this argument had been abandoned.

18. Before going further into the relevant facts and legal analysis, it is necessary to consider the relevant statutory provisions.

THE RELEVANT STATUTORY PROVISIONS

19. Section 343 ICTA relevantly provides:

> "343 Company reconstructions without a change of ownership
>
> (1) Where, on a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on, and—
>
> (a) on or at any time within two years after that event the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade or such an interest belonged to at some time within a year before that event; and
>
> (b) the trade is not, within the period taken for the comparison under paragraph (a) above, carried on otherwise than by a company which is within the charge to tax in respect of it;
>
> then the Corporation Tax Acts shall have effect subject to subsections (2) to (6) below.
>
> In paragraphs (a) and (b) above references to the trade shall apply also to any other trade of which the activities comprise the activities of the first mentioned trade.
>
> …
>
> (3) … subject to subsection (4) below and to any claim made by the predecessor under section 393A(1) (including a case where section 393B applies), the successor shall be entitled to relief under section 393(1), as for a loss sustained by the successor in carrying on the trade, for any amount for which the predecessor would have been entitled to … relief if it had continued to carry on the trade.
>
> (4) Where the amount of relevant liabilities exceeds the value of relevant assets, the successor shall be entitled to relief by virtue of subsection (3) above only if, and only to the extent that, the amount of that excess is less than the amount mentioned in that subsection."

20. It will be noted that section 343(1) refers to a predecessor company ceasing to carry on a trade and a successor company beginning to carry on that trade, broadly, within a two-year period. It seems to me clear, therefore, that section 343 is not confined to the situation where the predecessor company transfers its trade outright on a particular day to the successor company – for example, in circumstances where the predecessor and successor companies enter into a business sale agreement in the conventional form. Instead, section 343 also applies in circumstances where the trade of the predecessor is wound down and the successor company starts to carry it on. It is, therefore, entirely possible for section 343 to apply in circumstances such as those in the present appeal i.e. where SSS begins to wind down its trade and the appellant starts to carry on that trade over a period of time. This interpretation of section 343(1) ICTA was common ground.

21. Section 344 relevantly provides:

> "(5) For the purposes of section 343(4), relevant assets are—
>
> (a) assets which were vested in the predecessor immediately before it ceased to carry on the trade, which were not transferred to the successor and which, in a case where the predecessor was the predecessor on a previous application of section 343, were not by virtue of subsection (9) of that section apportioned to a trade carried on by the company which was the successor on that application; and

(b) consideration given to the predecessor by the successor in respect of the change of company carrying on the trade;

and for the purposes of paragraph (b) above the assumption by the successor of any liabilities of the predecessor shall not be treated as the giving of consideration to the predecessor by the successor.

(6) For the purposes of section 343(4), relevant liabilities are liabilities which were outstanding and vested in the predecessor immediately before it ceased to carry on the trade, which were not transferred to the successor and which, in a case where the predecessor was the predecessor on a previous application of section 343, were not by virtue of subsection (9) of that section apportioned to a trade carried on by the company which was the successor on that application; but a liability representing the predecessor's share capital, share premium account, reserves or relevant loan stock is not a relevant liability.

(7) For the purposes of section 343(4)—

(a) the value of assets (other than money) shall be taken to be the price which they might reasonably be expected to have fetched on a sale in the open market immediately before the predecessor ceased to carry on the trade; and

(b) the amount of liabilities shall be taken to be their amount at that time."

22. It is worth observing that "relevant assets" and "relevant liabilities" are to be determined "immediately before" the predecessor company (SSS, in the present appeal) ceased to carry on the seafood trade. Strictly speaking, the date on which the successor company commenced its trade is not relevant, except perhaps in so far as it sheds light on the date on which the predecessor company ceased to trade.

23. On a more general note, I should explain that section 343(1) ICTA was intended to be widely drawn. It may be recalled that, in the days before corporation tax, the predecessor of section 343(1) ICTA was an anti-avoidance provision (section 17 and Schedule 3 Finance Act 1954 (as amended by section 15 Finance Act 1964)). In its original form, that provision was intended to prevent the obtaining of income tax advantages that would otherwise have resulted from manipulating the preceding-year basis of assessment by means of a company reconstruction where the ultimate beneficial ownership of a trade was substantially continuous. This provision was deliberately drafted in wide terms as is often the case with anti-avoidance legislation. Upon the introduction of corporation tax in 1965, section 61 Finance Act 1965 replaced section 17 Finance Act 1954 with provisions substantially equivalent to what is now section 343 ICTA 1988. Section 61 Finance Act 1965 effectively provided that there was to be no cessation and no commencement of a trade in relation to capital allowances, losses, terminal losses and certain other matters (e.g. former deductions for annual value of trade premises under the Finance Act 1963 and cessation relief). In other words, as regards the trade in question, there was to be continuity of the trade, rather than a cessation and a commencement of the trade, provided that there was substantial continuity of ownership. In making these provisions, section 61 Finance Act 1965 and, now, section 343 ICTA 1988, effectively became a relieving provision, rather than an anti-avoidance measure, in the case of a company reconstruction by effectively providing for such continuity of tax treatment.[1] Sections 343(4) and 344(5) and (6) ICTA were introduced expressly as restrictions on this reconstruction relief by section 42 and Schedule 10 to the Finance Act 1986. The purpose of these restrictions was to prevent insolvent companies being transferred with their tax losses (in circumstances where there was no major change in the nature or conduct of the underlying trade).

[1] Section 61 Finance Act 1965 became sections 252 and 253 Income and Corporation Taxes Act 1970 which then became section 343 and section 344 ICTA.

SUMMARY OF THE ISSUES

24. As I have explained, the purpose of the Edinburgh hearing was to determine the amount of losses available to the appellant to be carried forward under section 343 ICTA. That therefore involved a consideration of the "relevant assets" and "relevant liabilities" test in section 343 (4). Accordingly, it was important to ascertain what the "relevant" assets and liabilities of SSS were at the date immediately before SSS ceased to carry on its trade.

25. In broad terms, the issues in dispute related to the correct treatment of the following assets and liabilities:

(1) the status of a corporation tax repayment claim totalling £642,835 shown in the accounts of the appellant dated 31 January 2005;

(2) the status of amounts in respect of Messrs Thomas' loan account with SSS;

(3) the status of an interim dividend in the amount of £1 million declared by the appellant on 31 July 2004 and paid on 1 November 2004 (and whether this dividend was paid before or after SSS ceased to trade); and

(4) the treatment of a potential liability to PAYE/NIC of £521,117.

THE EVIDENCE

26. In the Edinburgh hearing Mr Thomas gave evidence by means of a witness statement, in examination in chief and in cross examination.

27. I was supplied with four bundles of documents. These bundles, *inter alia*, contained additional documentary evidence relating to the date on which SSS ceased to trade and the appellant began to carry on the same trade.

THE FACTS

28. I have already set out the relevant facts that were before me in the London hearing and my preliminary conclusions in relation to those facts.

The carried forward tax losses of SSS

29. Subject to the issue of losses arising in respect of the PAYE and NI issue (as to which see further below) and the application of sections 343(4) and 344(5) and (6) ICTA, the starting point is that it was common ground that the appellant was *prima facie* entitled to carry forward losses of SSS in the amount of £424,544 (namely £283,029 for the 12 months to 31 July 2004 and £141,515 for the six months to 31 January 2005).

The balance sheet of SSS at 31January 2005

30. The accounts of SSS for the 18 months ended 31 January 2005 contained a balance sheet at 31 January 2005 as follows:

	£	£
Fixed Assets		
Intangible assets		–
Tangible assets		–
Current Assets		
Stocks	–	
Debtors	642,835	
Cash at bank	30,000	

	672,908	
Creditors: amounts falling due within one year	(1,609,647)	
Net Current (Liabilities):		(936,739)
Total Assets Less Current Liabilities:		(936,739)
Capital and Reserves:		
Called up share capital		200,000
Profit and loss account		(1,136,739)
Shareholders' Funds:		(936,739)

31. Note 10 explained that the amount of £642,835 under "Debtors" represented "Corporation tax recoverable".

32. Both parties used the balance sheet at 31 January 2009 as a convenient starting point in applying the "relevant" assets and liabilities test, although the appellant argued that SSS's trade had ceased on 22 September 2004. Thus, as another starting point, because the relevant liabilities exceeded the relevant assets by £936,739, the appellant would not, without more, be able to carry forward the losses of £424,544 under section 343 ICTA by virtue of section 343(4) ICTA.

Debtors- the withdrawn tax repayment claim

33. As explained above, the accounts of SSS for the 18 months to 31 January 2005 contained an amount of £642,835 representing "corporation tax recoverable". I understand that SSS commenced an action against HMRC for a refund of corporation tax of this amount. This action was dismissed on 4 July 2017 following an application on HMRC's motion, which was not opposed by SSS. At the Edinburgh hearing, Mr Upton accepted (in my view correctly) that this amount of £642,835 did not represent an asset of SSS and, accordingly, should be disregarded in applying the relevant assets and liabilities test in section 343(4) ICTA. Accordingly, it was not in dispute that £642,835 should be added to the total liabilities of £936,739 appearing in SSS's balance sheet at 31 January 2005, resulting in an excess of relevant liabilities over relevant assets of £1,579,574.

The dividend

34. SSS declared an interim dividend of £5 per share on 31 July 2004. The dividend of £1 million was paid on 1 November 2004. Article 103 of the appellant's Articles of Association (Article 103) conferred a power on the directors to pay interim dividends.

The Schedules of sales invoices

35. At the Edinburgh hearing I was shown a schedule of sales invoices issued by SSS covering the period 3 August 2004 to 11 November 2004. The relevance of these invoices was that they related to the date on which SSS ceased to trade – an issue which was only relevant to the dividend.

36. In September 2004 there were 24 invoices which varied in amounts from £60.84 to £40,080. In the latter part of September there were seven invoices as follows:

Date	**Amount £**
23/09/04	5,355.00
23/09/04	2,722.50
24/09/04	83.95

28/09/04	11,550.00
28/09/04	6,600.00
30/09/04	3,955.00
30/09/04	3,825.00

37. In October 2004, SSS issued 19 invoices in amounts ranging from £87.15 to £27,797.25 and what appeared to be three credit notes. The invoices and credit notes were as follows:

Date	**Amount £**
1/10/04	87.15
5/10/04	-40,080.00
5/10/04	-1000.15
5/10/04	-531.50
4/10/04	4,620.00
5/10/04	9,170.00
7/10/04	5,355.00
8/10/04	149.00
8/10/04	2,358.00
12/10/04	8,248.00
12/10/04	2,170.00
13/10/04	2,870.00
14/10/00	5,355.00
15/10/04	2,800.00
19/10/04	8,330.00
19/10/04	6,930.00
21/10/04	5,355.00
22/10/04	4,340.00
25/10/04	85.50
26/10/00	27,797.25
26/10/00	5,984.00
26/10/04	4,081.00

38. In November 2004 SSS issued 10 invoices, in amounts between £1,850 and £10,065, and one credit note. The invoices and credit notes were as follows:

Date	**Amount £**
2/11/04	8,330.00
2/11/04	6,930.00
3/11/04	2,800.00
4/11/04	5,355.00
9/11/04	1,850.00
9/11/04	4,340.00
9/11/04	10,065.00

10/11/04 2,870.00

10/11/04 5,984.00

11/11/04 5,355.00

7/12/04 -5676.30

39. Taking the schedule of sales invoices over the whole period, it was consistent with a gradual winding down of SSS's business. I should add, that as far as I could ascertain, the invoices related to the supply of seafood products and therefore clearly related to the seafood trade of SSS.

40. The equivalent schedule for the appellant started with an invoice on 24 September 2004 and continued until 28 April 2005. It showed two invoices in September 2004, one invoice in October 2004 and 15 invoices in November 2004. As regards the November invoices, the first invoice was dated 10 November and the remaining invoices were dated 16 November and onwards. It seemed to me, therefore, that although the appellant issued sporadic invoices in September, October and early November, its business really only picked up from 10 November onwards.

The purchase orders

41. I was shown five purchase orders from customers of SSS and/or the appellant. I was not shown any pro forma invoices issued in response to the receipt of purchase orders.

42. There was a purchase order dated 10 September 2004 specifying a quantity (possibly 700 kg) of salmon chunks. It was hard to determine from the details on the purchase order and the schedule of invoices but it is possible (but I am by no means sure and make no finding to this effect) that this may have been invoiced by the appellant on 24 November 2004. There was a similar purchase order dated 10 September 2004 which may have corresponded to an invoice from SSS dated 13 October 2004. A third purchase order was dated 8 February 2005 and may have corresponded with an invoice from the appellant dated 2 March 2004. There was a purchase order dated 10 September 2004 in the amount of £495 and which specified delivery date of 13 September 2004. On SSS's schedule of invoices this appeared to correspond with an invoice dated 14 September 2004. Secondly there was a purchase order dated 11 February 2005 in the amount of £134.75, specifying a delivery date of 15 February 2005. It is possible that this corresponded to an invoice issued by the appellant on 15 February 2005. Finally, there was a purchase order dated 2 September 2004 in the amount of £2722.50, specifying a delivery date of 24 September 2004, which corresponded to an invoice from SSS dated 23 September 2004.

Mr Thomas' evidence

43. Mr Thomas' evidence was that the decision to transfer the seafood trade from SSS to the appellant was taken at some time in or around May 2004. Mr Thomas considered that the appellant began to carry on the seafood trade on 24 September 2004. Mr Thomas said that it took time for the trade to be moved across from SSS to the appellant.

44. Mr Thomas accepted that there was no reference in the First Decision to SSS's trade being transferred to the appellant on 22 or 24 September 2004 and that the only relevance of those dates was that 22 September 2004 was the date on which the non-existent tripartite transaction had been alleged to have occurred and 24 September was the date of the issue of the first invoice by the appellant. Mr Thomas also accepted that the ceasing (by SSS) and commencement (by the appellant) of a trade were not "synonymous", by which I understood him to mean that the date of the commencement of a trade by the appellant was not necessarily the same date as the cessation of the same trade by SSS. Mr Thomas also said that although customers continued to address purchase orders to SSS after 24 September 2004, it was not

commercially sensible for SSS or the appellant to send the purchase orders back to the customers on the basis that they had been sent to the wrong address. In this context, I note that in cross-examination Mr Thomas accepted that an invoice would usually be issued at or very shortly after the delivery of the products.

45. Mr Thomas also accepted that the accounts of SSS for the 18 months ended 31 January 2005 stated that the company ceased to trade on 31 January 2005.

46. Mr Thomas, in re-examination, said that a purchase order could typically be placed 6 to 8 weeks before the date of delivery. That did not, in my view, appear to be consistent with the majority of purchase orders (and potentially corresponding invoices) which were in evidence. Although I accept that this may have occurred on occasion, the majority of transactions which documentation was available did not correspond to this timeframe, which appeared to be considerably shorter. I therefore reject Mr Thomas' evidence on this point.

47. Mr Thomas was asked in cross-examination whether he accepted that between 24 September 2004 and 1 November 2004 both SSS and the appellant were trading. Mr Thomas did not accept that proposition. In his opinion SSS was not trading in October and November 2004 but was "engaging in activity" and, although it could be said that SSS was trading, it was in fact it was in the process of ceasing to carry on its trade.

Liabilities in respect of PAYE and NIC

48. By notices of determination dated 8 April 2011 and 5 September 2012, HMRC assessed SSS for PAYE for the tax year 2004-2005. By notices of decision on the same dates, HMRC required SSS to pay NIC for that year.

49. Those notices were appealed by SSS to the First-tier Tribunal ("FTT") (TC/2012/08472) and then to the Upper Tribunal (UTC/2014/0083).

50. The FTT held, in a decision released on 11 September 2014, that the sums due were £380,412 in respect of PAYE and £140 705.38 in respect of NIC (*Spring Salmon & Seafood Limited v HMRC* [214] UKFTT 887 (TC) (Judge Reid QC and Dr Poon) at [287.12]) (the "**PAYE Decision**"). The total potential liability in respect of PAYE and NIC was, therefore, £521,117.38. In the course of its decision the FTT found that the PAYE and NIC in question had not been accounted for or paid by SSS prior to 31 January 2005 ([186] and [198].

51. The relevant determinations and decisions were raised under regulation 80 Income Tax (PAYE) Regulations 2003 (as regards PAYE) and Social Security Contributions (Transfer of Functions etc.) Act 1999 (in respect of NIC).

52. The decision of the FTT was reversed on appeal by the Upper Tribunal which allowed as SSS's appeal (*Spring Salmon & Seafood Limited v HMRC* [2016] UKUT 0313 (TCC)). The background to the Upper Tribunal's decision was that, in litigation concerning SSS, HMRC had given an undertaking to the Court of Session in Edinburgh on 19 May 2010. That undertaking referred to certain matters which HMRC would not pursue. The Upper Tribunal allowed SSS's appeal at [38] on the basis that HMRC were "precluded by their undertaking from seeking to claim the sums which are the subject of this appeal." The detailed background is set out in the First Decision and the PAYE Decision.

53. The amounts of PAYE and NIC referred to in the above notices of determination and notices of decision were never paid by SSS to HMRC.

The loans to Messrs Thomas

54. As already noted, in the period 2002-2005 the director of SSS was Mr Thomas. Mr Stuart Thomas, his brother, was not a director.

55. The exact story behind the current account of Messrs Thomas with SSS is somewhat difficult to follow because the facts are scanty, but the relevant facts (such as they are) are as follows.

56. SSS's audited balance sheet for the year ended 31 July 2002 stated (under the heading "Creditors: amounts falling due within one year"): "Director's loan £1,586,170." Note 15 to those accounts ("Transactions with directors") stated:

> "On 26 July 2002 the trade was purchased from S & R Thomas for the sum of £2,835,000. This represented £2,800,000 goodwill and £35,000 stock. This was paid by a credit to the directors [sic] loan account.
>
> S & R Thomas is a partnership in which the company's director, Mr RC Thomas, had a 50% interest. The remaining 50% of the partnership is owned by the director's brother, Mr SJ Thomas.
>
> In the opinion of the directors, the above amounts represent the fair value of the goods and services supplied."

57. The balance sheet (under the heading "Fixed Assets") at 31 July 2002 recorded intangible assets of £2,100,000. Note 7 to the accounts stated as follows:

INTANGIBLE FIXED ASSETS

	Goodwill
	£
COST:	
Additions	2,800,000
At 31 July 2002	2,800,000
AMORTISATION:	
Charge for the year	700,000
At 31 July 2002	700,000
NET BOOK VALUE:	
At 31 July 2002	2,100,000

58. Note 7 to the audited accounts for the year ended 31 July 2003 stated as follows:

INTANGIBLE FIXED ASSETS

	Goodwill
	£
COST:	
At 31 July 2002 & at 31 July 2003	2,800,000
AMORTISATION:	
At 1 August 2002	5,479
Charge for the year	400,000
At 31 July 2003	405,479
NET BOOK VALUE:	
At 31 July 2003	2,394521

At 31 July 2002	2,794,521

59. Note 11 to those accounts, under the heading "Creditors: amounts falling due within one year" recorded the "Director's current accounts for 2003 as £360,687 (and showed the corresponding period for 2002 as £1,586,170).

60. Note 17 to the audited accounts of SSS for the year ended 31 July 2003 stated:

> "On the 26 July 2002 the company purchased the trade of the S & R Thomas Partnership for the sum of £2,800,000 goodwill and £35,000 stock. This was paid by a credit to the director's loan account."

61. Note 21 to the audited accounts of SSS for the year ended 31 July 2003 stated:

> "At the balance sheet date, the company owed to its director, Mr RC Thomas and his brother Mr SJ Thomas £360,687 (2002: £1,586,170) on a director's loan account. This amount is secured by a floating charge on the assets of the company."

62. In SSS's unaudited accounts for the eighteen months ended 31 January 2005, Note 11 stated (under the heading "Creditors: amounts falling due within one year") "Director's current accounts (including related parties) £1,557,991". The corresponding amount for the year ended 31 July 2003 was recorded as £360,687. Note 14 to those accounts stated as follows:

> "At the balance sheet date, the company owed to its director, Mr RC Thomas and his brother Mr SJ Thomas £1,557,991 (31.7.03-£360,687) on a director's loan account. This amount is secured by a floating charge on the assets of the company."

63. In the PAYE decision at [90] the FTT touched on the current account in the following terms:

> "The Company [SSS] issued revised accounts on 25 June 2013 (when they were approved by Mr Thomas as director) for the period between 1 August 2003 and 31 January 2005. We refer to paragraphs 188-190 below. These accounts excluded the accrued bonuses of 180t of fish stocks of £900,000 within Staff Costs. The sum stated as Administrative expenses has been reduced by £900,000 from £1,181,690 to £281,690. The balance outstanding on the director's current account (including related parties) was reduced by £900,000 to £657,991 from £1,557,991. Neither the revised nor the original accounts have been audited. Nor have they been lodged at Companies House. No attempt has been made to use these accounts to amend the Company's corporation tax returns covering the period between 31 July 2003 and 31 January 2005."

64. At [131] the FTT quoted a letter from HMRC to Mr Thomas dated 17 July 2007, which was in the evidence before me, and commented on that letter at [132]. The FTT, so far as relevant, said:

> "131. For his part, Mr Stewart [the HMRC officer dealing with SSS and the appellant] responded to that letter on 17 July 2007 by writing first to the Company (and subsequently to Mr Thomas on 19 July - see below) in *inter alia* the following terms (the letter was addressed to Mr R Thomas, Spring Salmon & Seafood Ltd):-
>
> …
>
> 'No part of the £900,000 has actually been paid; it has not been withdrawn from the company back account, in which case, although you have not explicitly said so, the credit for the £900,000 has been to director's current

account. The trade ceased on 31 January 2005 in which case this amount will never fall to be allowed against company income. With no assessment there is therefore a debit of £900,000 that has and will have no tax effect, but on the other hand a £900,000 credit to director's current account which may or may not have a tax effect. Whilst the £900,000 is exceeded by the over £1.5 million credit on director's current account reflected in the accounts at 31 January 2005, that account may have been overdrawn for a time and there may have been a Section 60 liability, before the credit of £900,000 on the 29 October 2004 and the further £900,000 for the accrued bonuses at some point after 31 January 2005. *You know that I have been seeking an analysis of the director's current account in correspondence elsewhere and that in the absence of that analysis I am having to draw conclusions on the basis of information.* I am prepared to agree on a without prejudice basis that I will not be pursuing Section 160 liability on account of the agreement referred to above. I cannot allow a situation though where a debit is disregarded on one hand but where the other side of the bookkeeping, the credit of £900,000 is allowed on the other. The disregarding of the credit has no impact as matters stand at the moment. The credit on director's current account is simply reduced at 31 January 2005. I should make it clear that there could ultimately be a tax effect, liability under Section 419 there is a further need to consider the possible re-writing of the director's current account following the final determination of the question of the nature of the payment/credit of £2.8M on the 26 July 2002.'

132. *It can be seen that the letter records that Mr Stewart had been seeking an analysis of the director's current account. The Company never produced sufficient information to enable a complete analysis to be made.*" (Emphasis added)

65. On 25 March 2011, HMRC issued closure notices to SSS for the periods ending 2002 to 2005. These four closure notices indicated that, in HMRC's view, the £2.8 million had been a distribution of £1.4 million to each of the directors. HMRC's closure notice (in respect of the appellant's corporation tax self-assessment period ended 31 July 2002 and notice of enquiry into amended corporation tax assessment for the return period ended 31 July 2002), as far as relevant, stated as follows:

"The company accounts, Corporation Tax computation and return for period ended 31 July 2002 as originally submitted refer to a claim for relief for goodwill amortisation of £700,000. The claim to relief for the period was however reduced to £5,479 by reason of the amended policy for amortisation referred to in the company letter of 23 July 2005 and note 19 to the company accounts for period ended 31 July 2003. The revised return submitted by the company on 23 July 2004 reflects this amended policy. I conclude that the company is not entitled to relief for goodwill amortisation in any amount and that the relief of £5479 referred to in the Corporation Tax computation of 23 July 2004 is to be disallowed in the calculation of CT profits.

This claim arises from the purchase of the business and in particular goodwill costing £2,800,000 referred to at notes 7 and 15 to the company accounts for period ended 31 July 2002. The note advises that the company purchased goodwill for £2,800,000 from the partnership of S & R Thomas. The partners of S & R Thomas are the directors of the company. All of the issued shares in Spring Salmon & Seafood were owned by Bala Ltd that was in turn owned by the MacLennan Trust. The trustees of the MacLennan Trust are participators in Bala and therefore participators in Spring Salmon and Seafood. I conclude that RC Thomas and SJ Thomas our participators in Spring Salmon & seafood within the meaning of Section 417 (1) and (3) ICTA 1988 by reason of being beneficiaries and set laws in the MacLennan Trust. The Third Schedule of the

> trust deed of the MacLennan Trust states that RC Thomas and SJ Thomas are beneficiaries in the trust. I conclude that RC and SJ Thomas made a settlement into the MacLennan Trust and are therefore also settlors within the meaning of section 620 ITTOIA 2005. They are therefore participators in Spring Salmon & Seafood within the meaning of Section 417 (1)(c) and (d).
>
> I conclude that RC and SJ Thomas are therefore connected persons by reason of the control referred to at Section 286 (6) TCGA 1992 in which case market value is to apply to the transfer of any goodwill from the partnership to Spring Salmon & Seafood in accordance with section 18 TCGA 1992. I have previously advised you that the Valuer in Shares and Assets Valuation has said that the background to the S & R Thomas Partnership was such that there are doubts as to the transfer of any business as a going concern. He has said that it is for the parties to establish that a business was transferred and that he has difficulty identifying the business that a third party could acquire. He has said that he would need to see copies of the business bank account, copies of the full business accounts, copies of contracts for suppliers and customers and copies of the details of the tying-in by the transferee company of any key individuals before being able to establish that there was any business and therefore free transferable goodwill in the former partnership. The only evidence submitted to HMRC is the partnership accounts. Having concluded that RC Thomas and SJ Thomas are participators in Spring Salmon and Seafood I have therefore assessed the £1.4m each received by them from the company as distributions by virtue of Section 209 (2) (b) or 209 (4) TA 1988.
>
> You are also aware from previous correspondence that the Head Office specialist dealing with intangibles relief has confirmed that he would support a submission to Solicitors Offers that any transfer of goodwill from RC and SJ Thomas to the company was motivated for tax avoidance arrangements as referred to at paragraph 111 Schedule 29 FA 2002."

66. As far as I am aware, the information required by HMRC's valuer was never supplied by the appellant.

67. However, HMRC subsequently retracted their view (viz that Messrs Thomas had received a distribution) in letters dated 6 December 2013, accepting that the sums of £1.4 million in respect of Mr Thomas and Mr Stuart Thomas were not to be treated as distributions. HMRC's letter of 6 December 2013 to Mr Thomas enclosed their statement of case and stated as follows:

> "I am able to tell you… that recent further advice just received by me means that HMRC will **not** be pursuing the submission that each of the to the appellants in the accounts of Spring Salmon & Seafood for the period ended 31 July 2002 are distributions."

68. The letter continued by asking various questions, including a question in relation to whether "there were meetings at which the payment of the £2 .8m and the over-drawing (of in excess of £1m) referred to at 5 of your submission of 6 August 2013 to the Tribunal were discussed." The letter continued:

> "I have advised my colleague that I have no evidence of any such meetings and do not know whether such meetings took place let alone have the notes of those meetings and the answers to the questions raised. I have though spoken with [the writer's manager] and he has agreed that HMRC cannot delay these appeal proceedings. The decision therefore has been made not to pursue the submission that the 1.4 million each paid to the appellants was distributions.
>
> I refer to the advice at 5 of your submission of 6 August 2013 to the Tribunal that "at the time of the payment of the sum they owed money to the company

> and so were not loan creditors." The directors were apparently overdrawn by a net amount of in excess of £1m immediately before the credit for the £2.8m on 26 July 2002. There are no benefits in kind arising from such over drawing referred to in personal tax returns. I have also been asked by my colleague whether each of the appellants was overdrawn. Your response of 6 August 2013 suggests that it was the case and I have proceeded on that basis; but I should be grateful if you could confirm that both of the appellants for overdrawn immediately before the credit of £1.4m each on 26 July 2002."

69. In a letter of the same date (6 December 2013) to the Tribunal, HMRC referred to and enclosed a copy of their letter of the same date to Mr Thomas and stated:

> "…you will see from my letter that I have been able to advise Mr Thomas that further advice just received by me means that HMRC will not be pursuing the submission that the £1 .4m each credited to the appellants in the accounts of Spring Salmon & Seafood for the period ended 31 July 2002 are distributions assessed for 2002/03. I have explained to Mr Thomas that I have recently been advised that guidance that is in place in relation to a part of HMRC [sic] submissions in these appeals is being reviewed and is to be updated. The previous advice to me is affected. The possibility of obtaining further information and documents has been raised but having considered the matter the decision has been made that HMRC cannot delay and therefore cannot continue these proceedings in so far as the tax treatment of the £1.4m each to the appellants is concerned."

70. In an email, apparently sent shortly after HMRC's letters of 6 December 2013, from Mr Thomas to his accountant, Mr Thomas wrote:

> "I thought you would be pleased to hear that HMRC have dropped the claim against us for 2002/03. Obviously the technical arguments we advanced as regards ss 209 & 418 had to be accepted in the end. As regards his letters to me and his question about a possible benefit in respect of the putative overdrawn loan account in 2002/03, for the avoidance of doubt I have no intention of responding. Moreover, if pushed for a response I will remind him that the 2002/03 enquiries were closed in 31/10/07 and that, in any event, the Undertaking proscribes any further enquiries."

71. In a letter dated 28 March 2017, HMRC wrote to the accountants acting for Messrs Thomas in the following terms:

> "You have made no specific comment in relation to the £1,557,991 credit on Director's current accounts (including related party) in the [SSS] accounts for the period ended 31 January 2005. I advised Mr Rod Thomas way back on 17 July 2007 that it was possible that we would have to rewrite the DCA following the final determination of that question of the nature of the payment of £2,800,000. I repeat that on my analysis Mr Stuart Thomas and Mr Rod Thomas were overdrawn in [SSS] and have remained so since."

72. In a further letter from HMRC to the same accountants dated 25 October 2017 HMRC noted:

> "You have not provided the analysis of the £1,557,991 as between the directors (and related parties), and I will take advice on the basis that it is to be allocated equally between Mr Roderick and Mr Stuart Thomas."

73. In his evidence, Mr Thomas, whilst supplying no further details of the alleged transfer of the business to SSS by the S & R Thomas Partnership, said that he was "guided by the approach of the HMRC" in the first two paragraphs of the closure notice quoted above. Mr Thomas stated that:

> "The Revenue [sic] conclusion is that there was no acquisition of goodwill of any significant value and that the £2.8 million cannot be treated as consideration given for the acquisition of such an asset. The analysis of the tax inspector in the Closure Notice was that the £2.8 million required to be treated as distributions to myself and my brother."

74. From the above correspondence, I have concluded that HMRC, despite repeated requests, did not receive any detailed information in respect of or an analysis of the current accounts of Messrs Thomas shown in SSS's various accounts or in respect of the purchase of goodwill by SSS. The suggested tax treatment (i.e. the distribution analysis) put forward by HMRC appears to have been advanced in an information vacuum. It is evident that the appellant has either refused to or has not supplied the necessary information to HMRC. In the light of the email from Mr Thomas to his accountants quoted in paragraph 70 above, I suspect that it is more likely than not that the appellant has simply refused to supply the information requested.

SUBMISSIONS AND DISCUSSION

Date of the cessation of SSS's trade and the £1 million dividend

75. Mr Upton, appearing with Mr Haddow for the appellant, acknowledged that the significance of the date on which SSS ceased to carry on its trade (strictly, the time immediately before that event) was relevant only to the payment of the £1 million dividend. This was because the dividend was an interim dividend and was paid on 1 November 2004. The fact that the dividend had been declared on 31 July 2004 did not create a liability of SSS on 22 September 2004. The dividend was an interim dividend declared under Article 103 of SSS's Articles of Association (in the same form as the corresponding Article in the Table A). Mr Upton submitted that it was well-established that the declaration of an interim dividend in the terms of Article 103 did not create an enforceable obligation in the hands of a shareholder or a debt owed by the company: *Potel v Inland Revenue Commissioners* [1971] 2 All ER 504 at 513 (Brightman J); *Doherty v Jaymarke Developments (Prospecthill) Ltd* 2001 SLT (Sh Ct) 75.

76. Mr Upton submitted that SSS ceased to carry on its trade or about 22 September 2004 and that it was immaterial whether it did so on 22, 23 or 24 September 2004. Mr Upton further submitted that SSS did not cease to carry on its trade on a single day. Similarly, the appellant did not carry on all of the trade with immediate effect from 22 September. There was, he submitted, a "run-off" period of a few weeks until 11 November or until 7 December 2004.

77. Mr Upton argued that this situation, where the trade of one company was wound down and the same trade was begun to be carried on over a period of time by a successor company, was a commonplace in business and was contemplated by section 343 ICTA. On a reasonable application of the test in section 344(5) and (6) ICTA the point in time immediately before SSS ceased to carry on the trade was *immediately before* the appellant began to carry it on. That date, he argued, was 22 or 24 September 2004.

78. There were three reasons which Mr Upton identified that supported the conclusion that the date immediately before the cessation of SSS's trade for the purposes of section 344(5) and (6) ICTA was the beginning of the transition period (i.e. 22-24 September 2004) rather than the end of the period (11 November or 7 December 2004).

79. First, the cessation of a trade was something which did not always happen overnight. Of course, if the parties executed a standard form business sale agreement there could be a clear cut-off date. However, in the present circumstances the cessation of the trade of SSS and the commencement of the carrying on of the same trade by the appellant was what Mr Upton described as "a process". Secondly, HMRC's approach, in Mr Upton's submission, created a problem. At the end of "the process" the predecessor company will have divested itself of assets and liabilities. If the test was to be applied at the end of the period then it was possible to skew assets and liabilities – an outcome which was contrary to the policy of section 343 which was

to prevent transmission of tax losses by insolvent companies. Finally, Mr Upton contended that HMRC's approach lost sight of the fact that it was necessary to apply the law retrospectively. In order to work out the tax consequences of a "migration" of the business it was necessary to know where the parties stood. On HMRC's approach it would be necessary to forecast how the predecessor's solvency would look.

80. I accept Mr Upton's submission, for the reasons he gave, that the declaration of an interim dividend by SSS did not create a debt owed by SSS prior to the payment of the dividend on 1 November 2004. The declaration of an interim dividend in the terms of Article 103 creates no enforceable right on the part of a shareholder and no liability for the company – the declaration of a dividend and its payment being separate matters.

73. I do not, however, accept Mr Upton's submission that SSS's trade ceased on or around 22-24 September 2004. I accept his submission that the appellant's trade may have begun on or around that date (albeit falteringly and that its business did not really pick up until 10 November onwards), but section 344(5) and (6) ICTA focus on the date of cessation of the predecessor company (i.e. SSS) not on the date of the commencement of the successor company's (i.e. the appellant's) trade.

81. I see no merit in the three reasons put forward by Mr Upton why the beginning of the period of "winding down" a trade should be taken as the date of cessation rather than the end of that, as he put it, "process". I accept that the gradual closing down of a trade can be a "process" rather than an overnight event, but the legislation (section 344(5) and (6) ICTA) requires me to identify a point in time immediately before the cessation of the trade and it seems to me more logical to take the end of that process rather than its beginning i.e. when the trade actually ceased rather than than when it started to wind down. The fact that a company begins to reduce its trading activity with a view to ceasing to trade does not mean that it thereupon ceases to trade. Its trade continues, albeit at a reduced level, until it its activities become so diminished that it can fairly be said that the trade has ceased. The date on which the cessation of a trade occurs must, in my view, always be a question of fact and degree to be assessed in the light of all the circumstances.

82. Similarly, the date on which the successor company begins to trade does not mean that the predecessor company ceases to carry on its trade on that date. In this case, as in many others, there is a period of overlap in which both the predecessor and the successor companies are trading – the trade of the successor increasing and the trade of the predecessor diminishing.

83. Secondly, it is true that by the time the trade ceases, in a case where the trade is gradually wound down, the assets (and liabilities) of a company may in some cases be depleted but that does not necessarily need to be the case. I do not accept that applying the test at the end of the winding down period rather than its beginning allows parties to "skew" the "relevant" assets and liabilities test in section 344(5) and (6) ICTA.

84. Finally, I am unpersuaded by Mr Upton's argument that difficulties would be caused, particularly for the successor company, by having to look back in order to work out the solvency of the predecessor company. That is precisely what the statute requires.

85. In his reply, Mr Upton made a further point. Mr Upton drew attention to the fact that section 343(1) stated:

> "Where, on a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on…"

86. Mr Upton submitted that section 343(1) ICTA – part of the statutory context against which sections 343(4) and 344(5) and (6) ICTA must be construed – linked the cessation of the trade by the predecessor to the commencement of the trade by the successor. This was, he said,

another reason why the beginning of the trade carried on by the successor should be taken as the date of the cessation of the trade by the predecessor.

87. I accept, of course, that section 343(1) ICTA is part of the statutory context against which sections 343(4) and 344(5) and (6) ICTA must be interpreted. I do not, however, draw the same meaning from these provisions as Mr Upton.

88. Earlier in this decision, I have set out the statutory history of sections 343 and 344 ICTA. The relief afforded by section 343 ICTA was always intended to be widely drawn and was intended to apply in cases of a cessation of a trade by one company and the commencement of that trade by another company within a specified period of time where there was a substantial identity of ownership. The wording of section 343(1), in my view, provides no support for Mr Upton's argument. All that the introductory wording of section 343 (1) ICTA does is to provide that there has to be a cessation of a trade and another company beginning to carry it on – the remainder of the provision provides for the relevant time limit and the three-fourths continuous ownership requirements. Mr Upton's argument, in my view, places far too much weight on the word "on" – a weight which it was never intended to bear. Moreover, I do not think that the explicit wording of section 344(5) and (6) ICTA ("immediately before it ceased to carry on the trade") can be distorted to require that, in some way, the time of the cessation of the trade by the predecessor must be treated as or deemed to be the commencement of the trade of the successor. The words of section 344(5) and (6) ICTA simply do not bear that meaning either when read alone or in the context of section 343(1) ICTA.

89. In my judgment, taking account of all the circumstances, including those identified in the First Decision at [118]-[126], the trade of SSS ceased on 11 November 2004. This was the date of the last invoice issued by SSS to its customers. I recognise that there were receipts in SSS's bank account after this date but in my view these were effectively post-cessation receipts. When a company ceases to deliver goods and issue invoices[2] its stream of income ceases, albeit that payment in respect of those invoices may be made at a later date. The cessation of those activities – particularly the issuing of invoices – in my view marks the date on which SSS ceased to trade. In any event, until 10 November 2004 onwards the volume of invoices issued by SSS significantly exceeded the number issued by the appellant.

90. Accordingly, the cash comprising the £1 million interim dividend, which was paid on 1 November 2004, cannot be counted as a "relevant asset" of the appellant. The dividend was paid before the trade of SSS ceased.

The loans to Messrs Thomas

91. Mr Upton's argument was, essentially, that although SSS's audited balance sheet for the year ended 31 July 2002 showed a credit to the loan accounts with the appellant of Messrs Thomas of £2.8 million (£1.4 million each), HMRC had disputed whether the goodwill attaching to the business by SSS from the S & R Thomas Partnership was worth £2.8 million (or anything at all) or that any goodwill could be transferred. Accordingly, notwithstanding its appearance in the audited accounts, the loan account showing Messrs Thomas as creditors did not exist. It followed, according to Mr Upton, that the amount of £2.8 million previously owed to Messrs Thomas was now, instead, an amount of £2.8 million owed by Messrs Thomas to the appellant. Therefore, so the argument ran, the £2.8 million now counted as a "relevant asset" of the appellant for the purposes of section 344 (5) ICTA. Mr Upton, with the assistance of Mr Haddow, took me through a detailed analysis of how the loan accounts should have appeared in the various accounts of the appellant.[3]

[2] And the evidence was that invoices were issued at the same time or very shortly after delivery

[3] That analysis showed that at 31 January 2005 the "corrected" loan account of Messrs Thomas was an asset of the appellant in the amount of £1,242,009.

92. It seems to me that this argument is entirely hopeless because it is simply not supported by the evidence.

93. It is an elementary proposition that, except in certain specified instances (e.g. penalty proceedings and, for example MTIC fraud appeals), the burden of proof in a tax appeal lies upon the taxpayer to displace an assessment (section 50(6) Taxes Management Act 1970 and see, for example, *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 630 9h-j and 642c). There is a good reason for this rule. In most cases, the facts relevant to a liability to tax or an entitlement to a relief will be within the knowledge of the taxpayer or, at least, the taxpayer will be better placed to produce evidence of the underlying facts (e.g. documents, witnesses etc.). I accept, of course, that if a taxpayer produces *prima facie* evidence to support its case then, at some point, the evidential burden shifts to HMRC.

94. The appellant must, therefore, prove that the relevant assets of SSS immediately before its cessation of trade exceeded its relevant liabilities in order for losses to be carried forward under section 343 ICTA without restriction. It follows that the appellant must prove that SSS, at that date, had relevant assets for the purposes of section 344(5) and (6) ICTA and must prove the amount of those relevant assets.

95. In this case, the disputed sum of £2.8 million was originally shown in the appellant's July 2002. It appears that no (or certainly no sufficient) evidence substantiating this valuation was provided by the appellant to HMRC. Certainly, I was shown no such evidence. It is clear from the correspondence that HMRC repeatedly requested information in respect of the loan accounts but no such information was provided by the appellant. Initially, in the absence of information, HMRC sought to treat the amount of £2.8 million as a distribution for tax purposes, but later withdrew from that position for the reasons set out in correspondence.

96. At no stage in these proceedings has the appellant established whether or not the total amount of £2.8 million credited to the loan accounts of Messrs Thomas reflected the value of the goodwill purchased by the appellant from the S & R Thomas Partnership. No valuation evidence has been produced has been produced to demonstrate that the goodwill was worth: (1) £2.8 million, (2) nothing or (3) some other amount. The fact that HMRC, in the absence of information provided by the appellant, took the position that the crediting of £2.8 million to the loan accounts of Messrs Thomas constituted a distribution of that amount does not, in my judgment, constitute any kind of evidence that the payment of this amount to Messrs Thomas resulted in them becoming debtors of the appellant. As I have said, it is for the appellant to prove that the goodwill acquired by SSS from the S & R Thomas Partnership was worthless (or worth less than £2.8 million) and that, therefore, the entry in the 31 July 2002 balance sheet was incorrect. It would then be for the appellant to prove that Messrs Thomas were, therefore, debtors of the appellant. The appellant has simply not done this. To be clear, the appellant has come nowhere near putting forward sufficient or, indeed, any evidence to shift the evidential burden to HMRC.

97. In my view, therefore, the amount of £2.8 million[4] has not been shown to be a "relevant asset" of the appellant.

Liabilities in respect of PAYE and NIC

98. In the light of my conclusions in respect of the £1 million dividend and the loans to Messrs Thomas, it is unnecessary for me to express a conclusion in relation to the alleged liabilities regarding PAYE and NIC.

[4] Or £1,242,009.

CONCLUSION

99. The net relevant liabilities shown in the balance sheet of the appellant at 31 January 2005 liabilities were £936,739. The removal of the "asset" in respect of the tax repayment claim of £642,835 results in total net relevant liabilities, for the purposes of section 344(6) ICTA, of £1,579,574. This was common ground. I have concluded that the loan accounts of Messrs Thomas cannot be regarded as "relevant assets". Similarly, I have concluded that no account can be taken of the £1 million dividend as a "relevant asset" because the dividend was paid on 1 November 2004 i.e. before the appellant ceased to trade on 11 November 2004.

100. Therefore, because the "relevant liabilities" of the appellant exceeded its relevant assets by £1,579,574 and thus exceeded the losses which could potentially be carried forward (£424,544), no losses of the predecessor company (SSS) can be carried forward under section 343 ICTA to the successor company (the appellant).

101. I should add that even if the appellant had succeeded on the issue of the date of cessation of SSS's trade, so that the trade ceased before the payment of the £1 million dividend on 1 November 2004 (even adding a deduction of £521,117 in respect of PAYE/NIC), the consequence of my conclusion in respect of Messrs Thomas' loan accounts means that the result of this appeal would, I think, still be the same.

102. Accordingly, this appeal – which has lasted more than five years – is finally dismissed.

COSTS

103. At the Edinburgh hearing, both parties made brief submissions in respect of costs. At this stage, I make no order in respect of costs. If any application is to be made in respect of costs, then I think it must be made under Rule 10 of the Tribunal Rules in the manner prescribed – this appeal being designated as a standard rather than a complex appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 18 NOVEMBER 2019