Income Tax; PAYE Determinations; National Insurance Contributions Decisions; bonus; whether liability excluded by agreement and/or undertaking

[2016] UKUT 313 (TCC)
Appeal no: UT/2014/0083

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

SPRING SALMON & SEAFOOD LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: LORD GLENNIE

Sitting in public at George House, Edinburgh on 1 and 3 December 2015

Michael Upton, Advocate, for the Appellant, instructed by Russell & Aitken, solicitors, Edinburgh

Graham MacIver, Advocate, instructed by the Office of the Advocate General, for the Respondents

DECISION

Introduction

[1] This is an appeal against the decision of the First-tier Tribunal ("FTT") issued on 11 September 2014. That decision is lengthy – it runs to 287 paragraphs – and covered a number of issues requiring an investigation into the history of the appellant ("the Company"), its trading activities over a considerable period, and its tax returns and those of its sole director (Mr Roderick Thomas) and its company secretary (Mr Stuart Thomas, his brother). In this decision, as in that of the FTT, Mr Roderick Thomas is referred to as "Mr Thomas" while his brother, Mr Stuart Thomas, is referred to as "his brother" or "his brother Stuart".

[2] The dispute before the FTT related to the liability of the Company to pay PAYE and NIC in respect of entries in the Company's accounts recording payment of a bonus of £900,000 (to Mr Thomas and his brother) and payment of wages and salaries of £178,230.

[3] One issue raised in the proceedings before the FTT was whether PAYE and NIC were payable on those sums, i.e. whether the underlying determination and decisions were sound in law. Another issue was whether the notices and determinations relating to the liability for PAYE and NIC were time-barred. Those first two issues were determined in favour of the respondents ("HMRC") and there is no appeal from that part of the decision.

[4] A third issue was whether in terms of an alleged agreement made in July 2007 HMRC were barred from pursuing the company for the PAYE and NIC liabilities on the sum of £900,000.

[5] A fourth issue was whether HMRC were barred from pursuing those PAYE and NIC liabilities by reason of an undertaking given by HMRC in proceedings brought by them in 2010 to restore the Company to the register.

[6] There was also an issue ("the fifth issue"), dealt with by the FTT under the heading of "Quantum", to do with PAYE codes or lack of them.

[7] The third, fourth and fifth issues were also decided in favour of HMRC. In this appeal, the Company appeals with leave of the FTT on those issues. However,

in opening the appeal, Mr Upton, who appeared for the Company, made it clear that he did not insist upon his appeal in respect of the fifth issue. In those circumstances, the only issues arising on this appeal relate to the 2007 agreement and the undertaking given by HMRC in 2010.

[8] This case is one of many between the Company and HMRC in recent years. Some of those cases have touched on overlapping issues. But there is no need to look carefully at those other decisions. No issues of revenue law arise on this appeal. The issues here are one-off, turning on the proper construction of an agreement made in 2007 and of the undertaking given in 2010.

Background relevant to both issues

[9] It is not necessary for me to set out in this decision any of the details relating to the Company's trading and its tax affairs. They are set out in the FTT's decision. The background relevant to the issues currently in dispute appears from paras 7-21 of the FTT's decision and can be summarised as follows.

[10] The Company was incorporated in Scotland on 13 March 1998. It carried on business as suppliers, distributors and processors of seafood between 1998 and about 31 January 2005, when it ceased trading. Mr Thomas was the sole director of the Company throughout its life.

[11] Mr Thomas and his brother Stuart also carried on business in partnership under the name S&R Thomas ("the Partnership") as consultants and seafood dealers. Much of the business of the Partnership appears to have been with the Company and also with Thomas Lindh Ltd, another Thomas family company. The Partnership ceased trading in 2002 and sold (or purported to sell) its assets and business to the Company. As I understand it, the Company immediately transferred those assets and that business to another company controlled by the Thomas family (referred to in the FTT decision as Spring Seafoods/Capital). The details do not matter. The fiscal effect of that transaction has been and remains the subject of dispute, but the details of that dispute do not matter for present purposes.

[12] In or about August 2006, the Company, acting through Mr Thomas, resolved retrospectively to make a payment of a bonus (described as a fish stock bonus) of

£900,000 to Mr Thomas and his brother Stuart at some unspecified date in the future. This sum was reflected in the Company's cessation accounts which covered the 18 month period between 1 August 2003 and 31 January 2005. The cessation accounts also made provision for what was described as Staff Costs (wages and salaries) of £178,230. Those accounts were submitted to HMRC on 30 August 2006 along with tax returns for the periods 1 August 2003 to 31 July 2004 and 1 August 2004 to 31 January 2005.

[13] During the period between 1 August 2003 and 31 January 2005, the Company declared and paid no PAYE and accounted for no National Insurance Contributions in respect of any director or employee. The payments of £900,000 and £178,230 were not mentioned in the personal tax returns of Mr Thomas or Stuart Thomas for the tax years 2003/04 or 2004/05.

[14] In January 2007 HMRC opened enquiries into the Company's accounting periods between 1 August 2003 and 31 January 2005. Those enquiries were closed in March 2011. HMRC also opened enquiries into the 2003/04 personal tax returns of Mr Thomas and his brother Stuart. These enquiries were closed in July 2007. In 2011, HMRC issued PAYE notices of determination and NIC decisions which were the subject of the proceedings before the FTT. As already indicated, the issues before me were more limited in their scope.

[15] I should note here, because it is relevant to the undertaking given by HMRC in 2010, that the Company was struck off the Register and dissolved in 2007 but, on the application of HMRC, was restored to the Register (with retrospective effect) in 2010.

The July 2007 Agreement

[16] The Company contends that in about July 2007, it entered into a binding agreement with HMRC whereby no PAYE or NIC would be demanded from the Company in relation to the bonus payment £900,000.

Background

[17] The relevant facts are set out at paras 119-142 of the FTT's decision. I need not set them out in great detail. In summary, there were proceedings before the

General Commissioners in June 2007 relating to applications by Mr Thomas and his brother for closure notices in respect of the enquiries opened into their personal tax returns for the tax year 2004/05. The hearing was concerned *inter alia* with whether Mr Thomas and his brother were settlors in the Trust that ultimately owned the Company. Minutes of the meeting were prepared by Mr Stewart, an experienced tax inspector who was in charge of HMRC's enquiries into the tax affairs of Mr Thomas, his brother and the various Thomas companies. Those Minutes recorded that, in the course of the proceedings, the sum of £900,000 was mentioned, as was the net increase of nearly £1.5m in the amount owed by the Company to the two brothers standing at credit in the director's current account. Mr Thomas said that neither he nor his brother had ever had the £900,000; there had been no payment; it was simply an accountancy accrual, a paper exercise. The source of Company funds was also discussed. It was agreed that Mr Thomas would provide the bank statements that would evidence the source of the monies going into the Company and credited to the director's current account. However, neither Mr Thomas nor his brother ever disclosed the relevant information. The staff costs of £178,230 were also discussed. Mr Stewart suggested that some of this money may be been credited to Mr Thomas and his brother. Mr Thomas disputed this; he said that the monies had gone to persons who were not liable to tax.

[18] The General Commissioners ordered Mr Thomas and his brother to provide all other relevant documentation to reconcile Company accounts with personal returns. They were also directed to provide evidence of the net sum of about £1.2m of capital paid into the Company's business. Mr Thomas later produced a bank statement from the Company's bankers showing that, on 25 March 2004, the Company's account was credited with the sum of £300,000 paid by the Partnership, and that on 29 October 2004, the Company's account was credited with the sum of £900,000.

[19] Following an exchange of correspondence, Mr Stewart wrote to Mr Thomas on 2 July 2007. The heading of the letter was "RC THOMAS AND SJ THOMAS SECTION 9A ENQUIRIES 2004/2005", suggesting that the primary focus of the letter was the personal tax returns of the Thomas brothers. In the context of clarifying the

source of various sums, however, Mr Stewart asked whether Mr Thomas was prepared to provide details of credits and debits to the director's current account with the Company for the 18 months to 31 January 2005. He stated that he was left to conclude that, despite Mr Thomas' denial, the £900,000 accrued bonuses had in fact been credited to the director's account. Mr Stewart also referred to previous discussions about bonuses. He requested copies of all documentation relating to the payment/crediting of the £900,000 bonus and noted that if the bonus was not subject to PAYE and NIC then that sum would fall to be disallowed in the Company accounts.

The critical exchanges in July 2007

[20] Mr Thomas and Mr Stewart had a telephone conversation on 6 July 2007. According to an internal note of that conversation prepared by Mr Stewart, Mr Thomas said that the charging of the £900,000 accrued bonuses in the accounts was not part of an avoidance scheme. It was no more than an accountancy accrual. They had not had the money. Mr Thomas said that he was prepared to agree on a without prejudice basis that s 43 of the Finance Act 1989 applied if Mr Stewart could agree not to seek to apply PAYE and/or NIC to the £900,000. Mr Stewart said that he could agree to the proposal and would write to Mr Thomas confirming his agreement.

[21] Mr Thomas wrote to Mr Stewart later that day recording his understanding of the agreement. The Company agreed that the deduction of the accrued fish stocks (i.e. the bonus payment of £900,000) in the accounts would be disallowed for Corporation Tax purposes; and in return Mr Stewart/HMRC agreed that they would not demand PAYE, NIC or income tax from the Company, Mr Thomas or his brother Stuart in respect of this sum.

[22] Mr Stewart responded by letter of 17 July 2007 addressed to Mr R Thomas (in his capacity of director of the Company). He said this:

> "You have said that the charging of the £900,000 was not part of an avoidance scheme but rather was no more than an accrual for accountancy purposes. Emoluments are normally treated as received when credited in company accounts/records, for example to director's current account; but the true legal nature of these accrued bonuses has not been established and I have agreed

that I would not seek to charge PAYE or NIC if you agree that the amount was not to be allowed in the company accounts in any event in accordance with Section 43 FA 1989. I can confirm that I am prepared to proceed on that basis although I think that the implications or potential implications should be a matter of record.

No part of the £900,000 has actually been paid; it has not been withdrawn from the company bank 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 160 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 incomplete 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 though 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."

[23] On 19 July 2007 Mr Stewart wrote to Mr Thomas personally, also in response to his letter of 6 July. The heading of the letter referred to Closure Notices 2004/2005. Most of the letter related to matters with which I am not concerned. However, on page 4 Mr Stewart said this:-

"2 I agree that the Commissioners directed that you provide evidence of the origin of the some £1.2M capital injected into the business, but they also directed that you provide all other relevant documentation whether specifically requested by me or not. My concern, if you recall, was the £1.2M net increase in the amount outstanding to you and 'related parties'. I referred in my last letter to the £1M withdrawal from the Spring Salmon & Seafood

Limited account to the RC and SJ Thomas account in October 2003 in which case the credits to directors current account were at least £2.2M. I believe that part of the difference relates to the £900,000 accrued bonuses that have been credited to your director's current account. Is this correct?

(a) S & R Thomas partnership bank account apparently remained open after July 2002 when the partnership ceased. You have confirmed that the interest arising has been included in the personal returns for 2004/05.

(b) I see that the RC and SJ Thomas bank account from which the £900,000 was transferred to the company is another account held by yourself and Stuart and that the interest has been included in your personal returns for 2004/05.

(c) I do not know what other transactions have taken place in the director's current account in the 18 month period. The £900,000 accrued bonuses though seem to have been credited as at 31 January 2005 i.e. 2004/05. If this is not the case please let me know. In the meantime I have asked you to explain your previous advice in writing that no emoluments were paid to you in year ended 5 April 2005 despite my earlier clarification that they would be regarded as paid if credited to the director's current account. I asked you to explain because on the face of it I have been misled. You have refused to respond. I believe that there are implications and I reserve the right to come back to this at a later date.

3 (a) As you say, you have agreed that the £900,000 charged to the company accounts is to be disallowed if I for my part agree that I will not impose PAYE/NIC on the company, Stewart, or yourself on this sum. I have already written to you under separate cover with that confirmation.

(b) I have since my last letter had further research carried out as regards the company PAYE scheme for 2003/04 and 2004/05. Note 2 to the company accounts for the 18 months to 31 January 2005 refers to 5 employees. I asked my PAYE colleague to provide a record of employees advised to her. There is a record of 3 being yourself plus two family members. One of the family members is noted as having commenced in 2004 the other in 2007 (after the trade ceased). The charge to wages and salaries for the 18 months is the £178,230 on which no PAYE or NIC has been paid. You received NIL and even if for example the £178,230 is allocated equally between a further 4 individuals that is £44,557 each. Yet there is no tax or NIC? There are tax implications and I will be assessing accordingly. Before I do so can you confirm absolutely that no part of the £178,230 has been credited to your director current account eg for related parties? If not can you say what amount has been credited and why?

> I have been directed by the Commissioners to issue closure notices by 31 July 2007 and will be doing so. I have no alternative but to issue amendments to the returns to take account of the issues raised above."

In that letter Mr Stewart noted that the £900,000 bonus seemed to have been credited in the director's current account in the Company accounts as at 31 January 2005. He asked Mr Thomas to let him know if that was not the case. Mr Thomas did not do so and the FTT, quite reasonably, drew the inference that he accepted Mr Stewart's assumption as correct. Mr Stewart also pointed out in that letter that he did not know what other transactions had taken place in the director's current account in the 18 month period between 1 August 2003 and 31 January 2005. He was not given any satisfactory response to this outstanding question.

[24] On the same day, 19 July 2007, Mr Stewart wrote to the clerk to the General Commissioners stating that he and Mr Stewart had been able to determine the tax treatment of the £900,000 accrued bonuses. The charge was to be disallowed.

Subsequent events

[25] On 31 July 2007 HMRC issued closure notices to Mr Thomas and Stuart Thomas in relation to the enquiries opened for the tax year 2004/05 in accordance with the directions of the General Commissioner following the hearing before him on 15 June 2007. The letters noted that no part of the sum of £178,230 had been credited to his director's current account with the Company or paid to him. That matter was being left out of account in revising the personal returns. The enquiries were closed without making any amendment to the returns in respect of the employment income of Mr Thomas or his brother. However, amendments to certain other returns were issued seeking additional tax. By letter dated 23 August 2007, Mr Thomas and his brother appealed against these closure notices.

Submissions and discussion

[26] It was not disputed that HMRC could enter into a binding contract with a taxpayer governing the taxpayer's statutory liability to tax. On behalf of the Company, Mr Upton submitted that in the telephone conversation of 6 July 2007 and

the subsequent correspondence Mr Stewart on behalf of HMRC and Mr Thomas on behalf of the Company entered into an agreement that, in return for Mr Thomas' agreement that the bonus "payment" of £900,000 would not be claimed as a deduction in the Company's accounts, HMRC would not demand PAYE or NIC from the Company, Mr Thomas or his brother in relation to that bonus "payment". HMRC was not entitled to go back on that agreement. The FTT (at paras 258-270) had rejected that argument on a number of grounds, holding that there was no binding agreement (para 261) and/or that any agreement reached as a result of those exchanges was conditional or qualified (para 270). The condition was, in effect, that the bonus "payment" of £900,000 was not, and was not to be treated as, a real transaction. In other words, it was a paper transaction only. On the basis that that sum was never to be credited to the director's account(s) in the name of Mr Thomas and his brother, and would not be treated as a debit in the books of the Company, HMRC would not seek to impose PAYE or NIC on the basis of it being a real transaction. Mr Upton submitted that both arguments were wrong in law. It was clear that a binding agreement had been reached. That agreement was not conditional, except in the sense that it contained mutual or reciprocal promises, breach of which by one party would entitle the other to withhold performance of his part of the bargain. The FTT were wrong to regard the Company as having been the one to break that agreement. The evidence showed that the Company had only omitted to treat the £900,000 in the manner agreed between Mr Thomas and Mr Stewart after HMRC had gone back on its half of the agreement.

[27] I accept that the exchanges in early July 2007 resulted in a binding agreement between HMRC (through Mr Stewart) and the Company (through Mr Thomas). That, so it seems to me, is the clear effect of the telephone discussion on 6 July 2007 as confirmed in the later correspondence. The FTT appears to have been impressed by the fact that at that time Mr Stewart was still awaiting information from Mr Thomas, information which was in fact never provided. It concluded that Mr Stewart was unlikely to be willing to agree to a final settlement of the tax position in relation to the bonus payment of £900,000 while these questions were outstanding. I do not accept that. On the contrary, a final settlement may be regarded as more rather than

less likely if there is uncertainty about the underlying facts – the settlement reflects a decision to put that uncertainty to one side and reach agreement so as to avoid the need for further enquiries. The FTT also appears to have been impressed by the fact that, in the second paragraph of his letter of 17 July 2007, Mr Stewart raised a number of uncertainties as to the consequence of any agreement reached. However, it seems to me that he was doing so against the background of confirming (in the first paragraph of that letter) the agreement that he had made. Accordingly, as a matter of construction, I consider that a binding agreement was entered into and that, in so far as they came to a different conclusion, the FTT erred in law.

[28] However, I do not accept that the FTT erred in law in finding that the agreement reached was conditional in the way in which I have described it. Conditionality, if that is the right term, can be an elusive concept. It can simply reflect the fact that in almost any agreement parties will enter into mutual and reciprocal obligations. A breach by one party of his obligations may, depending on all the circumstances, entitle the other to withhold performance of his. Here it means something rather more. What Mr Stewart was agreeing to was an arrangement whereby if the £900,000 bonus payment shown in the Company's accounts was treated as nugatory, simply a paper transaction which was not to have effect in reducing the Company's profits or increasing its losses, then tax (PAYE and NIC) would not be levied as though it was a real transaction. That condition was, as the FTT point out, broken by the Company and/or Mr Thomas. Spring Seafoods/Capital, who appear to have succeeded to the business of the Company, are presently claiming a tax loss of £2.4m, calculated in part on the basis of obtaining relief in respect of the £900,000. That same claim to relief on the £900,000 is also reflected in a court action brought by the Company in 2011. Mr Upton argued that that occurred after HMRC itself broke the agreement by issuing a closure notice letter in March 2011, which proceeded on the basis that the Company was entitled to relief for the £900,000; and that, on that basis, HMRC were entitled to demand payment by the Company of PAYE and NIC on that sum (FTT para 166). But even if that is right as a matter of chronology, so what? If, taking the appellant's case at its highest, HMRC sought to levy PAYE and/or NIC from the Company in breach of the July 2007

Agreement, the Company could have challenged that action on the basis that HMRC were precluded by the agreement from so doing. What they cannot do is seek to insist upon the agreement when it suits them, as in this Appeal, but ignore it when it is in their interest to do so. That would be to both approbate and reprobate. Accordingly, even on this basis, which, as I say, puts the appellants' case at its highest, I see no reason to hold that HMRC is precluded by the July 2007 Agreement from charging PAYE and NIC in respect of the £900,000 bonus payment.

[29] I should note that, on behalf of the Company, Mr Upton sought to introduce two further items of correspondence which had not been before the FTT. I looked at the material for what it was worth and reserved my decision as to whether the new material should be allowed in. I have decided not to admit it, essentially for four reasons: (a) because an appeal to the UT is an appeal on law, not fact (I accept that this is not an absolute bar to the admission of new material, but it is a relevant consideration); (b) because I was not persuaded that there were any good reasons for that material not having been made available to the FTT before it reached its decision; (c) because, for reasons explained by the FTT when it rejected an application to admit the new material (an application made after it issued its decision), the documents do not in fact advance matters; and (d) because had the documents been available at the hearing, they could and should (if material) have been put to Mr Stewart in the course of his evidence.

The 2010 Undertaking

[30] On 8 August 2007 the Company was struck off the Register of Companies under s 652(5) of the Companies Act 1985. It was dissolved by notice in the Edinburgh Gazette dated 17 August 2007. HMRC subsequently applied to the Court of Session for its restoration. Mr Thomas originally opposed HMRC's petition but, following a proof, it was granted (by me, sitting as a judge of the Court of Session). Following an unsuccessful reclaiming motion (appeal) against my decision, the Company was restored to the Register on 16 March 2011.

[31] On 19 May 2010, at a time when Mr Thomas was opposing the petition for restoration on the grounds *inter alia* that if the Company was restored to the register

he would personally be prejudiced by actions taken by HMRC against the Company for arears of tax alleged to be outstanding, the following undertaking was given by HMRC and recorded in the Minutes of Proceedings:

> "*(1)* That upon the restoration of the Company to the Register HMRC will forthwith (that is to say as soon as is practicable within the requirements of the Taxes Acts and applicable regulations and procedures) issue closure notices and assessments in respect of the *outstanding enquiries* into the Company's liabilities. *(2)* The Revenue will a) make no further demands of the Company's officers or any other person in relation to the said *outstanding enquiries*, and b) raise no further enquiries into the Company's *trade* to the date that ceased namely 31 January 2005. *(3)* The Company may appeal any assessments made on the issue of the said closure notices, if so advised. *(4)* Apart from assessments made on the closure of the said enquiries the Revenue will have no power to, and will not, raise *any assessments* on the Company in relation to the said *trade* to the said date save on the discovery of fraudulent or negligent conduct on the part of the taxpayer within the meaning of s. 29 of the Taxes Management Act 1970, and has no present reason to anticipate making any such discovery or discovery assessment."

I have numbered the sentences for ease of reference and italicised key words referred to in argument. More details of the circumstances in which this undertaking was given appear from para 8 of my unreported Opinion issued on 30 June 2010: [2010] CSOH 82.

Principal arguments before, and decision of, the FTT

[32] Before the FTT Mr Upton argued that this undertaking prevented HMRC making any claim against the Company for PAYE and NIC. The undertaking was binding on HMRC and enforceable against them. The key to its construction was the phrase "outstanding enquiries" repeated in the first and second sentences. That meant enquiries into the Company's tax affairs which had been begun and notified and were outstanding as at 17 August 2007, when the Company was dissolved. The enquiries then on foot were those notified in a letter from HMRC to the company dated 4 January 2007. After referring to the Company's accounts for the 18 month period ended 31 January 2005 and the Tax Returns for the period ended 31 July 2004 and 31 January 2005, that letter stated:

> "I am writing to tell you that I intend to enquire into these Returns"

That meant the Tax Returns for the Company. The letter went on to say:

> "To enable me to carry out my enquiries would you please forward the following information, documents and explanations: …"

and identified seven categories of information, documents and explanations sought by HMRC. Item 5 referred to an analysis of staff costs at note 2 to the accounts, and sought (a) copies of the P35 and P14 forms submitted by the company in 2004/5, to identify the names of the employees paid a total of £178,230 for wages and salaries; and (b) details of the employees who were paid the bonuses of £900,000, as well as confirmation that PAYE and NIC had been charged in relation to that sum, and if not why not. Mr Upton pointed out that the enquiry was into the Company's returns, which made no mention of and were not required to mention PAYE and NIC. The questions about PAYE and NIC were in the context of assessing the Company's liability to corporation tax. There was no outstanding enquiry into PAYE or NIC and HMRC were therefore not now entitled to pursue this claim.

[33] For HMRC it was submitted that the undertaking was given to the Court, not the Company, and could not be relied on by the Company. This argument was rejected, and rightly so, by the FTT and I say no more about it. As to the meaning of the undertaking, it was accepted that the "outstanding enquiries" were those relating to corporation tax. PAYE did not require an enquiry and the undertaking had nothing to say about PAYE. The reference to "trade" in the second and fourth sentences did not relate to PAYE. Where there was a legitimate corporation tax enquiry, HMRC could use what they learned in that enquiry in relation to other taxes. PAYE was not in contemplation when the Undertaking was being discussed. 273; nor was NIC.

[34] The FTT found in favour of HMRC on this point, though they did not follow the reasoning advanced by HMRC. They held that, if it was correct to give the word "enquiries" what they called a technical meaning, as submitted on behalf of the Company, then it seemed appropriate also to give the phrase "any assessments" in the fourth sentence a technical meaning. Liability on the part of the Company for

PAYE flowed from the issue of Notices of Determination. Liability on the part of the Company for NIC flowed from the issue of Notices of Decisions. Neither was an "assessment" strictly so called, although the Notices of Determination were deemed to be assessments for certain purposes. Neither flowed from the closure of a statutory enquiry. They related to the remuneration by the Company to its employees. On that basis, the liability for PAYE and NIC was simply not dealt with by the undertaking. Accordingly, issuing the Notices of Determination and Decisions did not breach the undertaking. If, on the other hand, the phrase "outstanding enquiries" was given a broader meaning – which could be justified by the words "into the Company's liabilities" which followed those words in the first sentence of the undertaking – then that phrase was apt to cover the queries already raised in the letter of 4 January 2007 about PAYE and NIC.

[35] Certain other matters were discussed in argument and in the decision but I do not think they add materially to the substance of the argument.

Submissions and discussion

[36] The submissions before me did not differ materially from those before the FTT. However I have come to a different decision from that reached by the FTT. I can state my reasons briefly.

[37] The undertaking was an undertaking given to the Court. It should be construed in the same way as any legal document, adhering as far as possible to the plain meaning of the words used in the way in which they would have been understood by the interested parties. In circumstances such as prevailed at the time the undertaking was given, it cannot have been intended or understood in an unduly technical sense, containing traps for the unwary. It seems obvious that the reference to "outstanding enquiries" was intended to be a reference to the enquiries into the Company's corporation tax liabilities initiated by the letter of 4 January 2007. That was, I think, common ground between the parties and was the view taken by the FTT. HMRC was allowed to conclude those outstanding enquiries by issuing closure notices and assessments in respect of those outstanding enquiries. All well and good thus far. But I differ from the FTT on what follows from that. As I have said, the

outstanding enquiries relate to the Company' corporation tax liabilities. The second sentence of the undertaking contains an undertaking on the part of HMRC to make no further demands of the company or its officers in relation to those enquiries and to raise no further enquiries into the company's trade to that date. So that enquiry into the Company's corporation tax liabilities for those periods, of which notice was given in the letter of 4 January 2007, is to be brought to a conclusion without any further demands or enquiries. The final sentence is critical. Apart from any assessments (i.e. assessments to corporation tax) made on the closure of that enquiry, HMRC will not raise any other assessments in relation to the Company's trade save on the discovery of fraud or negligence – it is not suggested that this exception is relevant. The FTT's argument that "assessments" in this final sentence does not cover a Notice of Determination (for PAYE) or a Notice of Decision (for NIC) smacks of over-literalism. I cannot accept that the undertaking was intended to draw such fine semantic distinctions. It is not a distinction which HMRC themselves made with any consistency in their dealings with the Company or Mr Thomas – I note, for example, that their letter to the Company of 25 March 2011 uses the term assessments in the context both of PAYE and NIC (see para 8 of that letter). The clear intention of the undertaking was that the outstanding enquiry could be brought to a conclusion and then that would be that.

[38] On that basis HMRC are precluded by their undertaking from seeking to claim the sums which are the subject of this appeal.

Disposal

[39] For the reasons set out above, the appeal is allowed on the point concerning the 2010 undertaking.

[40] Parties were not agreed about the consequences of such a decision. HMRC contended, in effect, that the 2010 undertaking point only affected the £900,000 PAYE. I do not agree. I accept the argument for the Company that it also affects the sum claimed in respect of NIC. I hold, therefore, that the appeal succeeds in its entirety. The PAYE determination and the NIC decision under appeal are both reduced to nil.

[41] As requested, I shall reserve all questions of expenses.

LORD GLENNIE

RELEASE DATE: 05 JULY 2016