TC02828

Appeal number: TC/2012/06805 & TC/2012/07092

Corporation tax— preliminary issue - was discovery determination under paragraph 41(2) Schedule 18 FA 1998 made within time limit - no - appeal against information notice under Schedule 36 FA 2008 – were taxpayer's records statutory records – yes – appeal struck out in part – were other information and documents reasonably required for purposes of checking taxpayer's tax position – yes – appeal dismissed and notice confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIJJAR DAIRIES LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
JOHN ROBINSON

Sitting in public in London on 26 June 2013

John Horler, of Horler Tax Limited, for the Appellant

Joanna Bartrup, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns two matters. The first is a preliminary issue of whether a discovery determination under paragraph 41(2) of Schedule 18 to the Finance Act 1998 was validly made. The second matter is an appeal against an information notice issued under Schedule 36 to the Finance Act 2008.

2. The Appellant ("NDL") accepts that the Respondents ("HMRC") raised a discovery determination at the time of their letter of 8 June 2012. Both parties accept that the letter of 8 June 2012 was outside the time limit for making such a determination. HMRC contend that the letter of 8 June 2012 was a notice of the determination but the actual discovery determination was validly made at the time of an earlier letter of 12 December 2011. Both parties agree that if the discovery determination was made at the time of the letter of 12 December 2011 then it was within the relevant time limit. The preliminary issue turns on when the discovery determination was made.

3. The appeal against the information notice turns on whether the documents requested in the information notice are statutory records of NDL as, under paragraph 29 of Schedule 36 to the Finance Act 2008, NDL has no right of appeal against an information notice in so far as it relates to its statutory records. In relation to any information or documents that are not statutory records, the issue is whether they were reasonably required by HMRC for the purpose of checking NDL's tax position.

4. For the reasons set out below, we have decided that:

(1) HMRC did not make a discovery determination at the time of the letter dated 12 December 2011;

(2) NDL's appeal against the requirement in the information notice to provide documents and information is struck out in so far as they form part of the company's statutory records; and

(3) NDL's appeal against the requirement in the information notice to produce documents and information that are not statutory records is dismissed as they were reasonably required by HMRC for the purpose of checking NDL's tax position.

We direct that NDL must comply with the information notice dated 9 December 2011 within 56 days of the date of release of this decision.

Background

5. The Appellant ("NDL") is a wholesale supplier of dairy and related products. In 2005, NDL settled a High Court action brought by Medina Dairies Limited ("MDL") against NDL and its directors by making a payment of £2 million and giving an oral apology. A redacted consent order indicates that the action arose as a result of the acquisition and use of financial information relating to MDL and a

database belonging to MDL containing confidential information about its business and its customers. The oral apology was to be provided by Mr Rajinder Nijjar, a director of NDL, to MDL and its terms were as follows:

> "[Redacted] I apologise on behalf of myself and my sons to you, [redacted] for any distress and damage we may have caused you all arising out of the misappropriation and misuse of [redacted] Confidential Information and our allegations regarding [redacted] solvency."

6. In its accounts and tax return for the year ended 31 December 2005, which were received by HMRC on 3 January 2007, NDL claimed deductions of £2 million described as a "Litigations settlement" and £443,185 legal fees described as "Legal charges for case against Medina Dairies concerning price war". Note 21 to the accounts explained that:

> "In the course of the year the company [NDL] and its offices (sic) were involved in litigation brought by a competitor of the company. The action was ultimately settled, with the company maintaining a denial of liability, on commercial terms for a payment by the company of £2,000,000."

7. The computations stated:

> "A sum of £2,000,000 was paid to [MDL] in respect of an out of court settlement for a claim of unfair competition. NDL settled without admitting liability because fighting the case would have been risky given that [MDL] were seeking damages of £9 million."

8. HMRC became concerned that the settlement payment and legal fees did not qualify for deduction for corporation tax because they were not incurred wholly and exclusively for the purposes of NDL's trade. HMRC considered that the payment was, in fact, related to the claim made against NDL and the company's directors.

9. By letter dated 9 December 2011, HMRC issued a notice under Schedule 36 to the Finance Act 2008 to NDL requesting certain documents and information relating to the settlement and legal fees. That information notice is the subject of the appeal by NDL.

10. On 12 December 2011, HMRC sent a letter to NDL's accountant disallowing the deductions in relation to the settlement payment to MDL and the legal fees. HMRC accept that the letter of 12 December was not a valid notice of a discovery determination but contend that the determination was validly made at that time. The only question for determination as a preliminary issue is whether HMRC made a discovery determination within paragraph 41(2) of Schedule 18 to the Finance Act 1998 in respect of the accounting period ending 31 December 2005 at the time of HMRC's letter of 12 December 2011.

Evidence

11. There was no real dispute between the parties as to the facts, only as to the interpretation to be placed on those facts. A witness statement was produced on behalf of the NDL by Mr Rizwan Javed FCA, the senior partner in Javed & Co, a firm of chartered accountants who act for NDL and other companies in the group. We also received a witness statement from Mr Jeff Munaf, an officer of HMRC, who dealt with NDL in relation to the matters under appeal. The witness statements of Mr Javed and Mr Munaf stood as evidence in chief and both of them were cross-examined. There was also a bundle of correspondence and other documents to which both parties referred. On the basis of the evidence, we find the material facts to be as set out below.

Facts

12. In a letter dated 9 December 2011 to the company secretary of NDL, Mr Munaf issued an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 formally requesting certain documents and information in relation to the dispute with MDL and the compensation payment that was made by NDL. The documents requested were:

> "1. A copy of the original claim documents detailing the claimant's ([MDL]) claim and whom the claim was against.
>
> 2. Copies of any subsequent claim documents issued by or on behalf of [MDL] prior to the out of court settlement being agreed.
>
> 3. Confirmation of the date that the £2,000,000 was paid by [NDL] and evidence to support the payment, including a copy of the bank statement showing the amount leaving the company's bank account and a copy of the cheque.
>
> 4. Copies of the Druces & Atlee invoices totalling £443,185 shown at D2 of [NDL] tax computation for the year ended 31 December 2005."

13. In a letter of the same date to Mr Javed at Javed & Co, Mr Munaf referred to the information notice issued to NDL on that day. He went on to say that, because certain time limits were due to expire in the near future, he would issue protective assessments on the basis that the £2 million compensation payment and associated legal costs of £443,185 were not allowable costs of the company. The compensation and costs were to be regarded as personal in nature and should be debited to the directors' loan accounts resulting in an overdrawn loan account and a charge under section 419 of the Income and Corporation Taxes Act 1988. Mr Munaf said that the assessments were simply protective assessments in view of the approaching time limits and he invited NDL to appeal the assessments pending resolution of the issue.

14. The appendix to the letter to Javed & Co showed that, in respect of the year ended 31 December 2005, the returned loss of £3,834,186 would become a loss of £1,391,001. The appendix also showed that group relief surrendered would reduce from £1,490,657 to £1,391,001. That reduction would be treated as applying to Nijjar Holding Company Limited and their tax return would be amended. There was also a further adjustment in relation to the year ended 31 December 2006 and the year ended

31 December 2007 to cancel losses that had been brought forward to reduce profits in those years.

15. On 12 December 2011, Mr Munaf sent a letter to Mr R Javed of Javed & Co, NDL's tax adviser. The letter was headed "Nijjar Group" and the text was as follows:

> "I write further to my letter of 9 December 2011.
>
> I explained in my earlier letter that I would be arranging for protective discovery assessments to be issued in respect of [NDL] and Nijjar Holding Company Ltd (Nijjar Holdings Ltd). These referred to assessments have today been made, a copy of each will arrive separately from this letter.
>
> The assessments have been made on the basis that the legal costs of £443,185 and the compensation payment of £2,000,000 claimed by [NDL] in the company's tax return for the year ended 31 December 2005 are not allowable deductions and are private in nature. A summary of the assessments is on the attached appendix 1.
>
> As explained in my earlier letter these are protective assessments and I would invite your clients to appeal these assessments pending resolution of this issue.
>
> If you have any queries or wish to discuss any matters further please do not hesitate to contact me. I am sending a copy of this letter to the company secretary of [NDL]."

16. On the same day Mr Munaf also sent a letter to the company secretary of Nijjar Holdings Limited enclosing a copy of his letter of the same date to Javed & Co.

17. Mr Munaf stated that this was the only discovery determination that he had ever issued. He said that he had looked at the guidance on discovery determinations in the manuals on the HMRC intranet and discussed it with a colleague, although there was no formal record of the discussion. Unsurprisingly after such a long time, Mr Munaf could not recall exactly what the manuals said. From what we were shown, it appears that there is very little guidance in the HMRC manuals about how discovery determinations are actually made, as opposed to when it is appropriate to make one. Guidance at COM23080 states:

> "If you discover that an amount is incorrectly stated in a company's return and it affects the tax payable for another AP of the company, or the tax liability of another company -
>
> > make a Discovery Determination on the company by writing to it, setting out the amount which in your opinion ought to have been stated in the return."

18. Mr Munaf frankly admitted in his evidence that his failure to state the discovery determinations in the letter was an error and that it would have been better to have used the word "determination" or refer to paragraph 41 of Schedule 18 to the Finance Act 1998 in the letter. He maintained that the information in the appendix to the letter clearly showed the revised loss position for the different accounting periods.

19. NDL appointed Deloitte LLP to advise them in relation to the HMRC investigation. On 6 January 2012, Mr Horler, then of Deloitte LLP, wrote a letter to Mr Munaf. The letter was headed "Nijjar Dairies Limited - assessment for the accounting period to 31 December 2005". The text of the letter was as follows:

> "Thank you for your assessment dated 13 December 2011. Please accept this letter as an appeal against the assessment on the following grounds:
>
> 1. No discovery has been made, the assessment has been raised to keep the time limit open and enable HMRC to obtain information;
>
> 2. There is no evidence that there are any transactions that should have been reflected in the loan account that were not, Consequently the liability under section 419 (as was) does not arise;
>
> 3. No conduct amounting to careless or deliberate behaviour has been demonstrated as having taken place by the company or anyone acting on its behalf, consequently the assessment is out of time."

20. Mr Horler also wrote two almost identical letters in relation to the assessments for the accounting periods to 31 December 2006 and 31 December 2007. Those letters contained a different paragraph in relation to ground two of the appeal , namely:

> "2. No discovery determination under paragraph 41(2), schedule 18, FA1998 has been made in respect of the losses arising in the 2005 accounting period. Consequently the losses carried forward from that accounting period are still available to carry forward in line with paragraph 88, schedule 18, FA 1998;"

The reference to a discovery determination in the two letters concerning the years ending 2006 and 2007 was the first mention of a discovery determination in the correspondence.

21. On 8 June 2012, Mr Munaf sent a letter to the company secretary of NDL. The letter was headed "Notice of determination" and stated as follows:

> "For the year ended 31 December 2005 the company returned losses of £3,834,186. These losses have now been reduced to £1,391,001 on the basis that claimed expenses of £2,443,185 are not allowable deductions of the company.
>
> As a result of this the losses surrendered as group relief will drop from £1,490,657 to £1,391,001 and there will be no losses available to be carried forward to the year ended 31 December, 2006."

22. The letter then set out the procedure for appealing the determination. Mr Munaf told us that he issued the letter of 8 June 2012 because he had been advised that the letter of 12 December 2011 was not a valid notice of determination as it was not addressed to the taxpayer.

Discovery determination

Legislation

23. Paragraph 41(2) of Schedule 18 to the Finance Act 1998, as amended, is as follows:

> "If an officer of Revenue and Customs discovers that a company tax return delivered by a company for an accounting period incorrectly states -
>
> (a) an amount that affects, or may affect, the tax payable by that company for another accounting period, or
>
> (b) an amount that affects, or may affect, the tax liability of another company,
>
> they may make a determination (a "discovery determination") of the amount which in their opinion ought to have been stated in the return."

24. Paragraph 42(1) provides that a discovery determination can only be made in the circumstances specified in paragraphs 43 or 44 of the Schedule. The relevant parts of paragraph 43 provide that a discovery determination can only be made if the situation mentioned in paragraph 41(2) was brought about carelessly or deliberately by the company or a person acting on behalf of the company. Paragraph 44(1) states that a discovery determination may be made if an officer of HMRC could not have been reasonably expected, on the basis of information made available to them before that time, to be aware of the aware of the situation mentioned in paragraph 41(2) at the time when the officer ceased to be entitled to give notice of enquiry into the return.

25. Paragraph 49 of Schedule 18 to the Finance Act 1998 provides that the rules as to time limits, procedure and appeals for assessments in paragraphs 46 to 48 also apply to discovery determinations. Paragraph 46(1) provides that no assessment (and, therefore, no discovery determination) may be made more than four years after the end of the accounting period to which it relates. Paragraph 46(2) extends the time limit to six years where the tax loss is brought about carelessly by the company or a related person, including a person acting on behalf of the company. HMRC contend that the tax loss was brought about carelessly by NDL or a person acting on its behalf but that is not part of the preliminary issue that we have to decide.

26. Paragraph 47 provides as follows:

> "Notice of an assessment to tax on a company must be served on the company stating -
>
> (a) the date on which the notice is issued, and
>
> (b) the time within which any appeal against the assessment may be made."

27. Section 114 of the Taxes Management Act 1970 provides as follows:

"(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected-

(a) by reason of a mistake therein as to -

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination."

Submissions

28. Mr Horler, who appeared for NDL, submitted that the process of raising a discovery determination was exactly the same as the process for raising a discovery assessment and consisted of three steps, namely :

(1) the decision to make the discovery determination;

(2) the raising of the discovery determination; and

(3) the notification of the discovery determination.

29. Mr Horler submitted that HMRC had failed to follow the three steps in relation to the discovery determination in December 2011. Mr Horler accepted that Mr Munaf had decided to raise assessments for 2005 and later years as detailed in his letters of 9 and 12 December 2011 to Mr Javed at Javed & Co. Mr Horler pointed out that those letters did not mention any determination or refer to paragraph 41(2) of Schedule 18. The assessments were issued separately but the first communication from HMRC that referred to the discovery determination was Mr Munaf's letter of 8 June 2012. Mr Horler stated that the letter of 8 June was a notification of the determination because it was addressed to the company, referred to a determination and set out how NDL could appeal. Mr Horler observed that these elements were absent from the letter of 12 December 2011.

30. Mr Horler also put forward an argument based on HMRC's practice in relation to VAT assessments. Mr Horler referred to VAT Notice 915 Assessments and time limits: Statement of Practice which states that HMRC apply the time limit rules to the date when the assessment is notified rather than the earlier date when it is made. Mr Horler contended that it made no sense to have different practices for different taxes administered by the same department where the legislation was so similar.

31. Mr Horler also submitted that, if the letter of 12 December 2011 was a discovery the determination, then it was rendered invalid by the discrepancies between it and the letter of 8 June 2012 and the discovery determination was not saved by section 114 TMA.

32. Miss Bartrup, who represented HMRC, submitted that there are only two steps in making a discovery determination, namely:

(1) the decision to amend a tax return; and

(2) the recording of that determination in some documentary form.

33. Miss Bartrup accepted that a notice of the discovery determination was not issued to NDL until 8 June 2012 but submitted that the time limit applied to the making of the discovery determination and not to the notification of the determination to the taxpayer. There was no prescribed form for a discovery determination. Miss Bartrup submitted that the documentary record of the determination was the file copy of the letter dated 12 December 2011. The letter was evidence of HMRC's decision to make the discovery determination, which was within the relevant time limit. Miss Bartrup contended that the fact that the letter did not mention a discovery determination, but referred to protective assessments, did not invalidate the determination or mean that the letter was not a documentary record of the determination. The letter referred to specific items and amounts claimed by NDL in its tax return for the year ended 31 December 2005 which HMRC considered were not allowable deductions because they were private in nature.

34. Miss Bartrup referred us to *Vickerman v Mason's Personal Representatives* [1984] STC 231 where an inspector mistakenly referred to the wrong section of the Taxes Management Act in correspondence before making an assessment. Scott J in the High Court held that the validity of the assessment, once made, was a matter of law and it was irrelevant that the inspector had erroneously relied on the wrong statutory provision in a letter before issuing the assessment.

35. Miss Bartrup also referred us to *Hankinson v HMRC* [2010] UKUT 361 (TCC), [2010] STC 2640, where the Upper Tribunal, at [21], rejected a submission on behalf of the taxpayer as follows:

> "There was also no substance in Mr Mathew's argument that the assessment was described as a protective assessment; that was not a term of art, either before or after self-assessment was introduced, and the use of the phrase was no more than an indication that the assessment was made in order that the overall six-year time limit was not breached. The only pre-condition for the making of an assessment was that the officer had discovered an insufficiency. There was no dispute in this case that a discovery had been made."

36. Miss Bartrup submitted that the evidence, principally the correspondence in December 2011, showed that HMRC had decided to raise a discovery determination at that time.

Discussion

37. A discovery determination is a determination of an amount shown on a return. It can only be issued where a return has already been delivered and the time limit for opening an enquiry into the return has expired or the enquiry has already been completed. Where HMRC believe that losses have been overstated by a company in its tax return and they wish to amend the return, they may issue a determination to adjust the losses.

38. The preliminary issue is whether HMRC'S letter of 12 December 2011 was a discovery determination within the meaning of paragraph 41(2) of Schedule 18 to the Finance Act 1998. There was no dispute that the letter of 12 December 2011 was sent to Javed & Co and copied to NDL. Both parties also accepted that HMRC issued a formal notice of the discovery determination on 8 June 2012. If we find that a discovery determination was made on or around 12 December 2011 then it will have been made within the extended time limit. As that is only a preliminary issue, there will need to be a further hearing to determine whether the tax loss was brought about carelessly. If we conclude that the determination was not made at the time of the HMRC letter of 8 June 2012 notifying the determination then the determination was not made within the time limit and cannot be maintained.

39. There is no case law on discovery determinations but Mr Horler and Miss Bartrup both accepted that the case law on discovery assessments applies to discovery determinations.

40. In *Honig v Sarsfeld* [1981] STC 247, notices of assessment were issued to the administrators of a deceased's estate on 16 March 1970 but did not reach the administrators until after 7 April 1970. The time limit for making the assessments expired on 6 April 1970. In the Court of Appeal, Fox LJ, with whom Mustill and Stocker LJJ agreed, said:

> "The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provision which makes the validity of the assessment in any way conditional on the notice."

41. Later, Fox LJ concluded that:

> "… the time limit imposed by the statute relates only to the making of assessments, and not to the service of assessments; and the statute draws a very clear distinction between the making of assessments and the giving of notices for the making of those assessments. Mr Honig referred to the possible dangers of giving notice of assessment long after the assessment itself was made. No such situation arises here."

42. In *Burford v Durkin* [1991] STC 7, the issue was whether an assessment had been validly made, for the purposes of regulation 12(1) of the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1982, in circumstances where the inspector of taxes, on whom the relevant statutory discretion had been conferred, had duly completed the assessment form but another inspector of taxes had signed the certificate that the assessments had been entered in the assessment book; or whether

the signing of the certificate by another inspector of taxes was an unlawful delegation of discretion. In the Court of Appeal, Nicholls LJ referred, in the course of his judgment, to counsel for the Crown's account of the Revenue's normal practice in making an assessment under regulation 12(1), in which step (a) was the decision to make an assessment in a particular amount and step (b) was the making of an appropriate documentary record of that decision, with the intention that it should take effect as an assessment. Nicholls LJ continued (at pages 16e-17b):

> "He told us that step (b) involves the preparation of a document, either in typed or manuscript form, which records the prescribed essential ingredients of the assessment to which step (a) relates: the taxpayer, the amount of the assessment and so forth. That document, with similar documents relating to other proposed assessments, is then inserted and bound into a folder known as the assessment book. These sheets, or cards, form another volume of that book. However, the completion of the physical process of inserting these sheets or cards into the binder, so as thereby to form the book, does not of itself complete the assessing procedure. That procedure is complete, and an assessment is regarded by the Revenue as having been made when, and only when, an accompanying certificate in the assessment book is signed. …. The signature and dating of the certificate are intended to make operative as assessments the details recorded in the assessment book to which the certificate relates."

43. In *Corbally-Stourton v HMRC* [2008] UKSPC SPC00692, the Special Commissioner referred to *Burford* and considered how it applied in the light of current HMRC practice when making an assessment. At [91]-[93], the decision records

> "[An HMRC officer] told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the Appellant. Once keyed into the computer the amount appears in a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the Appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the Appellant was notified that she would be assessed.
>
> [The Appellant's representative] put the Respondents to proof that the Appellant had been assessed.
>
> It seems to me that [the HMRC officer] made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."

44. On the basis of the cases cited above, we agree with Miss Bartrup that the making of the determination is separate from its notification. The making of the discovery determination is a two-stage process. The first stage is the decision by an officer of HMRC to amend a tax return. The second stage is the creation of an appropriate record of that decision. The notification of the determination is not part

of the process of making the determination but is entirely separate. The time limits in paragraph 46 of Schedule 18 to the Finance Act 1998 apply to the making of the determination and not to its notification.

45. That does not resolve the issue in this case as we must decide whether the determination was made at the time of the letter of 12 December 2011. In our view, the letters dated 9 and 12 December 2011 clearly establish that Mr Munaf had decided to disallow the deductions claimed by NDL in its tax return for the period ending 31 December 2005 and adjust the losses claimed by NDL for that period and subsequent years. On the basis of the letters and Mr Munaf's evidence, we find that Mr Munaf had decided to adjust NDL's tax returns around the time of the letters in December 2011.

46. The cases show, however, that simply making a decision is not sufficient: a discovery determination, like an assessment, is not made until the decision has been properly recorded. As the Special Commissioner in *Corbally-Stourton* acknowledged, the appropriate record is no longer necessarily in documentary form. In that case, it was accepted that information held on a computer and capable of being printed out could be an appropriate record. Although, there is no prescribed form for a discovery determination, we consider that the appropriate record, whether in electronic or physical form, must state expressly and clearly that a discovery determination has been made on a taxpayer and in what amount.

47. In this case, HMRC relied on the file copy of the letter dated 12 December 2011 as the appropriate record and there was no evidence that HMRC held any other record of the decision to adjust NDL's tax return. We do not rule out the possibility that an electronic copy of a letter sent to a taxpayer stored on HMRC's computer system could be an appropriate record in some cases. However, we do not accept that the file copy of the letter of 12 December 2011 addressed to NDL's accountant was an appropriate record in this case. While the letter made clear that HMRC did not accept that NDL was entitled to the losses claimed, it referred only to protective assessments and did not mention a discovery determination or paragraph 41(2) of Schedule 18 to the Finance Act 1998. The letter did not clearly state that HMRC had decided to make a discovery determination but left that to be inferred. The letter did not suggest that there was an appealable determination but referred to assessments that were to be sent separately and invited NDL to appeal them pending resolution of the issue. In our view, the letter did not have the appearance of an official record of a decision to make a determination in relation to a taxpayer but appeared to be part of the ongoing correspondence between HMRC and the NDL's accountant in relation to the tax dispute. The only decision that the letter clearly recorded was the decision to issue protective assessments.

48. For the reasons set out in the preceding paragraph, our conclusion is that the letter of 12 December 2011 was not an appropriate record and, accordingly, HMRC did not make a discovery determination at that time.

49. Although it is not strictly necessary for deciding the preliminary issue, we consider that the letter dated 8 June 2012 was capable of being an appropriate record

of the decision to make a discovery determination. Notwithstanding our view, we recommend that HMRC consider establishing a procedure for recording decisions to make discovery determinations (as there is for assessments) in order to avoid issues such as this from arising in the future.

50. We do not accept that the discovery determination is saved by section 114 TMA. That section assumes that a determination has been made and provides that it is not to be invalidated by reason of certain errors in the determination or any differences between it and the notification. In this case, we have held that no discovery determination was made at the time of the letter of 12 December 2011. It follows that no question of any want of form, mistake, defect or omission in the determination arises because there was no determination. Similarly, there was no question of any variance between the notice and the determination because there was no determination.

51. In the circumstances, it is not necessary for us to consider Mr Horler's submissions on the practice of HMRC in relation to the notification of assessments for VAT. It is enough, perhaps, to indicate that, notwithstanding the merger of the different branches of the Revenue in 2005, we do not consider that the VAT legislation and practice have any application to this area of direct tax.

Information notice

52. NDL appeals against the information notice issued by HMRC, under paragraph 1 of Schedule 36 to the Finance Act 2008, on 9 December 2011 which is described at [12] above.

Legislation

53. Paragraph 1 of Schedule 36 provides that:

> "(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

54. Paragraph 21(2) of Schedule 36 provides that where a company has made a tax return, HMRC may not issue a notice for the purpose of checking the company's corporation tax position in relation to the period covered by the return unless one of four conditions is met. In this case, HMRC relied on Condition B set out in paragraph 21(6) as follows:

> "Condition B is that an officer of Revenue and Customs has reason to suspect that -
>
> (a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive."

55. Paragraph 29 of Schedule 36 provides that:

"(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records."

56. Paragraph 62 of Schedule 36 defines statutory records as follows:

"(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of-

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

…

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired."

57. The effect of paragraphs 29(2) and 62(3) of Schedule 36 is that information and documents are statutory records if and for as long as NDL is required by the Taxes Acts to preserve them and NDL has no right of appeal against an information notice in respect of them.

58. Paragraph 21(1) of Schedule 18 to the Finance Act 1998 provides that any company that may be required to deliver a tax return for any period must keep such records as may be needed to enable it to deliver a correct and complete return for the period. Paragraph 21(2) provides that the company must preserve the records for six years from the end of the period. Paragraph 21(5) states that the records that the company must keep and preserve include records of all receipts and expenses in the course of the company's activities. Paragraph 21(6) extends the duty to preserve records to all supporting documents which includes accounts, books, deeds, contracts, vouchers and receipts.

Submissions

59. Miss Bartrup submitted that all the documents requested in the information notice are statutory records which NDL was required to preserve under the legislation set out above. The effect of paragraph 29 of Schedule 36 is that NDL has no right of

appeal against an information notice in so far as it relates to its statutory records. If any of the documents were not held to be statutory records, Miss Bartrup submitted that they were, in any event, reasonably required by HMRC for the purpose of checking NDL's tax position and there were no reasons why they should not be produced.

60. Mr Horler accepted that if we found that the discovery determination had been made within the time limit then NDL's objections to the information notice would fall away. If we were to find that the discovery determination had not been made at the time of the letter of 12 December 2011, Mr Horler contended that the material requested could not be relevant as there was no evidence that any loss of tax, which was denied, had been brought about deliberately by NDL or a person acting on its behalf. Mr Horler submitted that HMRC should look at the documents which had been provided, including Counsel's opinions, in deciding whether to issue an information notice. Mr Horler accepted, in closing submissions before us, that NDL's bank statements and invoices are statutory records. Essentially, Mr Horler's submissions were that the documents that were not statutory records were not reasonably required.

Discussion

61. Insofar as the documents are statutory records, paragraph 29 makes it clear that NDL has no right of appeal. NDL accepts that the bank statements and invoices are statutory records. That covers items 3 and 4 of the information notice. Accordingly, NDL's appeal in relation to those items must be struck out.

62. We do not consider that the litigation documents at items 1 and 2 of the information notice are statutory records or supporting documents but that does not conclude matters. We find that those litigation documents are properly the subject of the information notice in that they are reasonably required by HMRC and are relevant for checking NDL's tax position which includes the accuracy of the section 419 assessments relating to expenditure made on behalf of the directors.

Decisions

Decision on preliminary issue – discovery determination

63. We find that the discovery determination was not made by HMRC at the time of the letter dated 12 December 2011. In the absence of any other record of the determination, we conclude that the discovery determination was made by HMRC at the time of the letter dated 8 June 2012.

Decision on appeal – information notice

64. We hold that NDL has no right of appeal against the requirement in the information notice dated 9 December 2011 to provide documents and information that form part of NDL's statutory records. Accordingly, NDL's appeal in relation to such matters is struck out. We dismiss NDL's appeal in relation to the other documents

and information requested in the information notice for the reasons given above. We direct that NDL comply with the information notice within 56 days of the date of release of this decision.

Rights of appeal

65. This document contains full findings of fact and reasons for the preliminary issue and the final decision in relation to the information notice. Any party dissatisfied with the decisions 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.

66. Either party may apply for the 56 days in respect of the preliminary issue to run from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible and, in any event, no later than 56 days from the date of release of this decision.

GREG SINFIELD

TRIBUNAL JUDGE

RELEASE DATE: 14 August 2013