TC03609

Appeal number: SC/3048/2003

CAPITAL GAINS TAX – preliminary issue - whether appeal settled by agreement – s 54, Taxes Management Act 1970

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIAN GEORGE FOULSER **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 14 May 2014

Simon Myerson QC, instructed by Ford Warren, for the Appellant

Michael Gibbon QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

1. The preliminary issue now before me in this case is whether Mr Foulser has settled his appeal against an amendment to his self-assessment to capital gains tax for the tax year 1997/98. If he has, then that will resolve his appeal. If he has not, then his appeal, along with a corresponding appeal by Mrs Foulser, will proceed to the determination of the remaining substantive issue, that of the open market value of certain shares disposed of by Mr and Mrs Foulser in the tax year in question.

2. This case has a long and somewhat controversial history, some of which forms part of the background to the rival arguments in this case. I will first describe that background and the events which have given rise to this preliminary issue, before setting out the law to be applied in a case such as this, and finally applying that law to the material facts.

Background

3. Mr Foulser appealed against the amendment to his self-assessment, claiming that the disposal of the relevant shares had attracted hold-over relief. That appeal was dismissed in February 2005 by the special commissioner (Dr Avery Jones CBE). Appeals to the High Court and the Court of Appeal were also dismissed.

4. The matter therefore reverted to the special commissioner for determination of the gain on the disposal of the shares, which depended on the market value of those shares at the date of their disposal. It was not, however, until September 2010 that the valuation question came before Dr Avery Jones, by which time the appeal had come within the jurisdiction of the First-tier Tribunal.

5. The events that took place around that hearing have themselves been subject to litigation, in this Tribunal and elsewhere. It will, I think, suffice for present purposes simply to set out what I recorded in this respect when I considered the applications of Mr and Mrs Foulser that HMRC be debarred from taking further part in the proceedings on the basis of the alleged conduct of HMRC: see *Foulser and another v Revenue and Customs Commissioners* [2011] UKFTT 642 (TC), at [5] to [8]:

> "**[5]** The first day of the hearing was a reading day. The appellants' case commenced on 28 September 2010, during which certain evidence of fact was given. On the following day the events took place which have given rise to these applications. I set out the following brief description merely to provide context for the discussion of the issues raised on HMRC's application. In the absence of having heard the evidence, nothing in this description amounts to a finding of fact.
>
> **[6]** According to Mr Gittins' witness statement he left the house in Montpelier Street, London, where he had been staying since arriving on the previous Sunday, at around 7.30am. He was due to meet counsel for the appellants in those proceedings at 8am. He was at that stage

> arrested on suspicion of cheating the Revenue and false accounting. He was told that HMRC had a warrant to search the premises.
>
> **[7]** Despite informing the HMRC officers that he was on his way to a conference and then to the tax tribunal for the hearing, Mr Gittins was escorted back into the house and when inside asked to hand over his briefcase. He was then taken to Notting Hill police station where he was processed, spent time in a cell, and was questioned before being released on bail that evening. The Montpelier Street premises and other premises at Cockspur Street were searched under the warrant.
>
> **[8]** In the meantime the tribunal, through the clerk assisting Judge Avery Jones on that day, had been informed of Mr Gittins' arrest. There is some dispute about the circumstances of the calls made, and the instructions given to the clerk with regard to information about the arrest being passed to the judge, but in any event, by agreement between counsel for the appellants and counsel for HMRC, the judge was not informed of this. Instead, counsel met with the judge in chambers and a short adjournment was directed, without any of the detailed reasons having to be disclosed. The judge was subsequently given details of the arrest, and of the appellants' consideration of making an application in respect of abuse of process, and he granted a further stay."

6. Part of Mr and Mrs Foulser's case for a debarring direction was that HMRC had obtained sight of legally privileged and confidential material held by Mr Gittins (the tax adviser of Mr and Mrs Foulser) or companies associated with him which was relevant to the hearing before Judge Avery Jones.

7. It is not necessary to go into the resolution of the applications made by Mr and Mrs Foulser at that time. Suffice to say that these proceedings remain on foot with the full participation of both parties; hence the need to resolve this preliminary issue.

Postponement of tax

8. Notwithstanding an appeal, tax charged by way of an amendment to a self-assessment is due and payable as if there had been no appeal (section 55(2) of the Taxes Management act 1970 ("TMA")). The exception to this is where the tax has been postponed under s 55.

9. At the time of the appeal on the ground that there was no capital gains tax to pay because of the application of hold over relief, HMRC had agreed to postpone all the tax otherwise due, which on the basis of the amendment amounted to £8,499,641.60. That was a determination for the purpose of s 55. Following the conclusion of the appeals in principle on that issue, and once there was no longer any possibility of any onward appeal, the HMRC investigator, Mr David MacDougall, wrote to Mr Foulser on 5 June 2007 requesting him to put forward a revised amount to be postponed, based on a best estimate pending receipt by Mr Foulser of the opinion of an expert valuer. The result of that was a payment by Mr Foulser of £911,061.60, based on an estimated value of the shares in question of £3 million. That was agreed by HMRC as a revised postponement of the remaining balance otherwise due.

10. Mr Foulser then obtained a valuation of the shares. This showed a range of values, the lowest being £6 million. Following his receipt of this valuation, on 22 April 2010, Mr MacDougall wrote to Mr Gittins of Montpelier Tax Planning (Isle of Man) Ltd, who was acting for Mr Foulser, to say that such a valuation would give rise to a CGT liability of £2,113,800, and seeking agreement to a revised postponement application to reflect this position. The letter set out that, after taking account of the amount already paid by Mr Foulser, the amount to be paid would be £1,202,738.40 "pending final resolution of the value of the shares by the Tribunal in September this year".

11. No reply having been received from Mr Gittins or Montpelier, Mr MacDougall sent Mr Foulser a notice of determination of postponed amount, setting out, in tabular form, the amount due on the amendment to the self-assessment of £8,499,641.61, the amount to be postponed of £6,385,841.61 and the amount payable of £2,113,800. Mr MacDougall advised Mr Foulser that he should now pay £1,202,738.40 (taking account of the amount previously paid), and that if he did not agree with the amount to be postponed, he had the right to apply to the Tribunal for a determination. The letter also stated that if Mr Foulser took no action, the amount due would be collected. It further stated that interest would be payable if the postponed amount turned out to be due.

12. It was accepted by HMRC that this letter, and the notice of determination, was an error. As there had been a previous determination of the postponed amount, the only way, absent agreement, that it could be varied was by an application to the Tribunal by the party seeking the variation. That is the effect of s 55(4) TMA. In these circumstances, that party was HMRC, and not Mr Foulser. Without a determination of the Tribunal, therefore, the amount of the postponed tax remained at £7,388,580, and it was not lawful for HMRC to seek to collect the amount of £1,202,738.40.

13. There is no evidence of this mistake having been spotted by anyone concerned in these proceedings up to the time of the preparation for this hearing. I am satisfied that the mistake had not been detected, whether by HMRC of by anyone acting for Mr Foulser, at the material time for the issue before me.

14. Both parties therefore proceeded on the footing that Mr MacDougall's notice of determination was valid. Thus, Mr Gittins wrote to Mr MacDougall on 15 June 2010 to ask for an explanation of the figure in that notice of £2,113,800 in respect of the amount payable (before deduction of the amount already paid). Mr MacDougall replied on 30 June 2010 setting out a calculation based on a value for Mr Foulser's shares of £6 million, and applying deductions for acquisition cost, indexation relief and retirement relief.

15. The matter of collection was passed by Mr MacDougall to HMRC's debt management division, and on 23 July 2010 a Mr J Choudhary wrote to Mr Foulser seeking immediate payment of tax of £1,202,494.44 (that is a marginally different figure to that contained in Mr MacDougall's flawed determination, but the difference is explained by certain credits that were due to Mr Foulser's account). I did not see

Mr Choudhary's letter, but I can infer its contents from the reply to it from Mr Gittins dated 18 August 2010.[1] That letter referred to the imminent Tribunal hearing and suggested that it was premature to make the demand, since the outcome of the case before the Tribunal could not be predicted.

16. In the event, no further action was taken by HMRC until after the September 2010 hearing.

Events subsequent to the September 2010 hearing

17. In describing here the events subsequent to the September 2010 hearing, I will refer only in general terms to certain of the correspondence and documents which are material to the issue to be determined. That correspondence and those documents will need to be analysed in greater detail when I come to determine how, in my judgment, they should be construed.

18. The disruption of the September hearing occupied much of the correspondence and activity in its immediate aftermath. I need not describe that in any detail. It included requests, including requests under the Freedom of Information Act, by Mr Foulser to HMRC for information on the circumstances of Mr Gittins' arrest and on information that might have passed between Mr MacDougall, the Shares Valuation division and the expert valuation witness for HMRC.

19. What is material to the issue before me is the further correspondence that ensued concerning payment of tax by Mr Foulser. On 4 October 2010, a Mrs S Williams of the debt management division wrote to Mr Gittins to say that she had been in contact with Mr MacDougall who had advised that the Tribunal hearing had been postponed but that the balance of tax outstanding of £1,202,494.44 remained correctly due and payable despite the outcome of the Tribunal. That, I find, was a reference back to the Mr Gittins' letter of 18 August 2010, which had suggested awaiting that outcome. A copy of Mrs Williams' letter to Mr Gittins was sent to Mr Foulser, with a covering letter also dated 4 October 2010 which required Mr Foulser to make a payment "in full settlement" within 28 days of the balance of £1,202,494.44, "to avoid insolvency action".

20. I had a number of witness statements of Mr Foulser, and one from Mr MacDougall, each of which exhibited the correspondence to which I have referred in my description of the material facts. Neither Mr Foulser not Mr MacDougall was called for cross-examination. I accept, therefore, Mr Foulser's account of the September 2010 hearing from his perspective, and that he took the view after the conclusion of the first day of the hearing that the evidence had gone very well for him and Mrs Foulser. I also accept that at a meeting between Mr Foulser and his advisers

[1] After the release of this decision, I was informed that a copy of the letter dated 23 July 2010 was indeed included in the bundle of documents. Having reviewed that letter, the inference I had drawn as to its contents is confirmed. It did no more than demand payment of £1,202,494.44 within 28 days of the date of the letter and referred to interest added to tax paid late, the possibility of surcharges and recovery actions used by HMRC.

on 22 October 2010, when the letter of 4 October 2010 from Mrs Williams was discussed, there was a consensus that the letter could be an offer to settle and that Mr Foulser was advised to remove any ambiguity by making it clear that the monies being offered by him were in full and final settlement of all matters related to his tax affairs for 1997/98.

21. Mr Foulser wrote to Mrs Williams on 26 October 2010. The letter referred to Mrs Williams' letter of 4 October 2010, and first explained that it had not been received by Mr Foulser until 12 October 2010. It referred to the terms of Mrs Williams' letter as "your proposal", and said that, in line with that "proposal", Mr Foulser was endeavouring to raise sufficient funds to make the relevant payment before 9 November 2010.

22. Mr Foulser wrote to Mrs Williams again on 10 November 2010 to say that he had difficulty in making the funds available to enable him to meet "your tax demand". He said that he should be in a position to reply formally (to the letter of 4 October 2010) at the beginning of the following week.

23. By cover of a handwritten letter dated 12 November 2010, the contents of which I will consider in detail later, Mr Foulser sent Mrs Williams a cheque for £1,202,494.44. That cheque was banked by HMRC, and on 18 November 2010 HMRC issued Mr Foulser with a receipt stating "I am pleased to confirm we have received your payment of £1,202,494.44". On 19 November 2010 Mr Foulser was sent a SA statement of account showing a nil balance. I will refer to the detailed contents of this statement later.

24. Meanwhile, the issues surrounding the arrest of Mr Gittins and the seizure of his briefcase continued to exercise the parties. Perceiving a lack of progress in the making by Mr and Mrs Foulser of an application in that regard, by letter dated 31 December 2010 HMRC sought a further listing of the appeals. A copy of that letter was sent to Keystone Law, at that time representing Mr and Mrs Foulser. On the same day Keystone Law wrote to the Tribunal saying that consideration was still being given to the making of an application.

25. The Tribunal wrote to Montpelier on 18 January 2011 stating that the appeals were ready for listing. Mr Gittins sent a copy of that letter to Mr Foulser. Mr Foulser then wrote to Mr Gittins on 31 January 2011 to express his bewilderment at having received notice of the listing of his appeal as well as that of Mrs Foulser, because, as he put it:

> "... on 15th November 2011 I settled all outstanding matters related to my 1997/98 tax affairs by making a further payment of £1,202,494.44 in full and final settlement. I was responding to a letter from Mrs Williams of the HMRC, dated the 4th October 2010 (5 days after the adjournment) and received on the 12th October 2010 inviting me to make the payment in full settlement.
>
> I received acknowledgement from the HMRC dated 18th November of the receipt of the cheque and consequently the terms under which it was offered. On the 1st December 2010, I received a statement from

HMRC dated the 19th November 2010 noting the payment and showing that no further monies were due."

26. On 1 February 2011 Keystone Law wrote to the Tribunal to say, first, that they had been instructed by both Mr and Mrs Foulser to make an application that the appeal proceedings be stayed on the ground of abuse of process, and secondly, that Mr Foulser's case had been settled by accord and satisfaction. That letter was copied to Mr Denis Harley of HMRC's Solicitor's Office. Mr Harley, by letter dated 14 March 2011, responded to Keystone Law in relation to the "full and final settlement" claim with a reasoned argument why, in HMRC's view, there was no agreement under s 54 TMA.

The issues

27. HMRC say that there was no agreement to settle the whole of the dispute in relation to Mr Foulser's self assessment for 1997/98, and that s 54 TMA has had no effect in relation to his appeal. They say that all that happened was that, following receipt of a valuation report filed on behalf of Mr and Mrs Foulser, HMRC determined (albeit in error) that £1,202,494.44 out of the total liability of £8,499,641.60 should no longer be postponed, and sought payment of that sum as a due amount. Payment of that due amount was received, and it was banked by HMRC as payment of the amount which was no longer postponed. The question of Mr Foulser's actual liability to tax for the tax year in question remains to be determined by the Tribunal.

28. Mr Foulser's case is put in the alternative:

(1) First, it is argued that Mrs Williams' letter to Mr Foulser of 4 October 2010 was an offer to settle, which Mr Foulser accepted.

(2) Secondly, if Mrs Williams' letter of 4 October 2010 was not an offer to settle, it was an offer to avoid insolvency proceedings if Mr Foulser paid a sum of money, to which Mr Foulser responded on 12 November 2010 by making a counter-offer that the sum be accepted in full and final settlement, which HMRC accepted by banking the cheque, issuing the statement of account, and failing to write denying acceptance.

(3) Thirdly, if Mrs Williams' letter of 4 October 2010 was not any kind of offer, Mr Foulser's letter of 12 November 2010 was an offer to settle, which HMRC accepted.

The law

29. Once the Tribunal is seised of an appeal, it becomes a matter for the Tribunal to determine whether, in the case of a self-assessment, the appellant has either been overcharged or undercharged and to reduce or increase the assessment. Otherwise the assessment (as amended by HMRC) stands good. That is the effect of s 50 TMA.

30. To enable appeals to be settled by agreement, s 54 TMA provides as follows:

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.

(3) Where an agreement is not in writing—

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and

(b) the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.

(4) Where—

(a) a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desires not to proceed with the appeal; and

(b) thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,

the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation.

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

31. It will be apparent that s 54 sets out the consequences of there having been an agreement. It does not prescribe the manner in which that agreement may be reached, or provide a framework for determining whether there has been an agreement. There is, however, authority on the nature of an agreement to which s 54 can apply. In *Schuldenfrei v Hilton (Inspector of Taxes)* [1999] STC 821, in the Court of Appeal,

Jonathan Parker J (as he then was) said, at [42] – [43], that the question whether a s 54 agreement had been concluded must be considered in a statutory, not a common law, concept, but that nevertheless common law concepts such as that of offer and acceptance are of assistance in addressing that question. At [44] he said:

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

32. *Schuldenfrei v Hilton* was a case where a statutory appeal had been made, and s 54 was in point. But a similar analysis was adopted in *Inland Revenue Commissioners v Fry* [2001] STC 1715 in a case where no statutory appeal had been made, and the taxpayer, who did not dispute the assessments made on her, argued that her liability to tax had been extinguished by a contract said to have been made between her husband and the Revenue.

33. In that case, after the Revenue had threatened to serve a statutory demand (a prelude to possible bankruptcy) on the taxpayer, there had been some negotiation and offers of payment, up to £10,000, which the Revenue had rejected. Mr Fry made an offer of £5,000 in full and final settlement, and this was rejected, but with an invitation to put forward proposals for settlement of the full amount outstanding, the alternative being that bankruptcy proceedings would be considered. Mr Fry's reply was to say that the Revenue should issue such proceedings or the taxpayer would arrange her own voluntary bankruptcy. He added:

> "Before doing so, you may like to consider accepting the enclosed cheque for £10,000 in full and final settlement of all her outstanding liabilities to you. Should you choose to accept this offer, you may present the enclosed cheque for payment. Should you do so, we will take this as acceptance of our offer in full and final settlement of my wife's debts to you.
>
> I look forward to hearing from you in due course."

34. The cheque was banked by the cashiers in the Revenue's Enforcement Office on receipt and the letter was then sent to the appropriate caseworker. That caseworker was alert, and telephoned Mr Fry to tell him, firstly, that the cheque had been banked, and secondly that his offer was not accepted. Mr Fry was told of the banking and the non-acceptance at the same time.

35. Rejecting the taxpayer's argument that a bargain had been made by the offer, and the banking of the cheque in accordance with the prescribed method of acceptance, Jacob J (as he then was) held that there had been no meeting of minds, the cheque having been banked mindlessly and with no intention to enter into a contract.

He concluded that the authorities led to the same conclusion. He cited in particular *Day v McLea* (1889) 22 QBD 610 as showing that the mere keeping of a cheque tendered in settlement was not conclusive as a matter of law. In that case Bowen LJ said (at p 613):

> "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact."

36. In Fry, Jacob J went on to refer to *Stour Valley Builders v Stuart* (1992) CAT 1281, in the Court of Appeal where Lloyd LJ had summarised the position as follows:

> "Cashing the cheque is always strong evidence of acceptance, especially if it is not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is also strong evidence of acceptance depending on the length of the delay. But neither of these factors are conclusive; and it would, I think, be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or within a few days."

37. The modern approach to the principles by which contractual documents are to be construed is well-known, having been summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society and Others* [1998] 1 WLR 896, at pp 912H – 913F:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
>
> '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

38. Both parties referred me to Foskett, *The Law and Practice of Compromise* (Seventh edition), at paras 3-30 to 3-48, which address the presentation of a cheque in settlement, for further helpful guidance. As might be expected, to a large extent, Foskett summarises certain of the principles to be derived from the authorities I have referred to, but I take from the passage I was referred to the following further principles:

(1) The evidence must show that a definite offer has been made to settle on a "full and final" basis. Without this, no question of an equivalent acceptance on that basis can arise.

(2) An objective construction must be placed on the material events. The presentation for payment of a cheque tendered "in full and final settlement" of a dispute, without demur or qualification, will be taken as an objective manifestation of an intention to accept the offer of settlement thus made.

(3) The manifestation of an intention not to accept the proceeds other than as part payment may negate the inference of acceptance, but a significant delay between the receipt of and/or the payment in of the cheque and the subsequent manifestation of such an intention will give rise to the inference of acceptance.

(4) As noted above, from *Stour Valley Builders*, it would be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or a few days.

Discussion

39. It is on the basis of these legal principles that I now approach the analysis of the correspondence passing between Mr Foulser and HMRC.

Mrs Williams' letter of 4 October 2010

40. Mrs Williams' letter of 4 October 2010 to Mr Foulser enclosed a copy of her letter of the same date to Mr Gittins. That latter letter referred by implication to the previous correspondence concerning how the amount said by HMRC to be due and payable at that time had arisen, namely by virtue of the notice of determination of the postponed amount. That is background knowledge that the reasonable observer may be taken to have.

41. The letter to Mr Gittins is headed "Self Assessment Tax Outstanding £1,202,494.44". It states:

> "I have been instructed to request you to make payment in full settlement as the liability remains correctly due and payable despite the outcome of the tribunal.
>
> Your payment must be made with (sic) the next 28 days to avoid insolvency action."

42. The first point to note is that this is not worded as an offer of any sort. It is a request for payment, and a request for payment of a liability which (albeit wrongly) had already been expressed as due and payable by virtue of the notice of determination. That is what Mrs Williams must be taken as referring to when she speaks of the liability being one that *remains* correctly due. Mrs Williams was concerned only with the tax that was due and payable because it had not been postponed; there is nothing in the letter that can be taken as an indication that the payment requested was the only amount that could fall due.

43. The letter employs the words "in full settlement", but it does not refer to settlement of Mr Foulser's tax liability generally for the tax year in question. In the context, and having regard to the background, there is in my judgment no basis on which the letter could be construed as an offer of settlement. The use of that phrase refers only to settlement in full of the amount that was considered to be due and payable, as not being postponed.

44. Mr Myerson submitted that, having regard to Mr Foulser's perception of the way the September 2010 hearing had started, Mr Foulser's view that the reference to "despite the outcome of the Tribunal" amounted to a concession on the part of HMRC that things were not going their way, could be regarded as an objective conclusion. I do not agree. Whilst I accept Mr Foulser's evidence that he had indeed perceived that the hearing, in its limited scope, had gone well for him and Mrs Foulser, that is an entirely subjective assessment. Viewed objectively, I have no doubt that the only coherent meaning to be attached to those words in their context is "in spite of the fact that the hearing has been adjourned." Nor can the absence of any evidence from

HMRC as to either Mr MacDougall's subjective intention or that of Mrs Williams lead to any inference that the letter should be interpreted as Mr Foulser suggests.

45. It follows that I find that the letter of 4 October 2010 did not amount to an offer on the part of HMRC to settle the dispute as to the tax to be assessed on Mr Foulser for tax year 1997/98.

46. Nor can the letter be construed as an offer to avoid insolvency proceedings if Mr Foulser paid a sum of money. The only proper construction is that of a demand for payment of an amount considered to be legally due and payable, with the threat of insolvency proceedings if payment is not made within 28 days.

Mr Foulser's letter of 12 November 2010

47. On the basis of my conclusion that Mrs Williams' letter to Mr Foulser dated 4 October 2010 did not amount to an offer of any nature, it follows that Mr Foulser's letter of 12 November 2010 cannot have amounted to an acceptance, nor could it have been in the nature of a counter-offer.

48. The question then is whether the 12 November 2010 letter was an offer to settle in its own right. To answer that question I can first conveniently set out the text of the letter in full:

> "Dear Mrs Williams,
>
> Re: B G Foulser Self Assessment Tax Outstanding £1,202,494.44 Your ref: 352/1815652121K
>
> Thank you for your letter dated 4th October 2010 which I received on the 12th October.
>
> In response to your request that despite the outcome of the Tribunal that I make a payment of £1,202,494.44 in full and final settlement of my self assessment return for 1997/8 I enclose a cheque for the amount due.
>
> I trust that this now concludes the matter.
>
> Yours sincerely
>
> Brian G Foulser"

49. The cheque enclosed was dated 15 November 2010.

50. This letter is couched in terms of an acceptance of what Mr Foulser perceived (wrongly as I have found) to have been an offer to settle contained in Mrs Williams' letter. It sets out Mr Foulser's understanding of that letter, and on the basis that a request had been made by HMRC for a payment to settle the entire outstanding issue, a cheque for that amount is sent, with the expressed hope that this will conclude the matter.

51. Although not expressed in terms of an offer, that does not prevent Mr Foulser's letter from constituting an offer. What matters is what, objectively, the reasonable

person with all the background knowledge would have understood the meaning to have been. Mr Gibbon argued that such a reasonable observer, understanding as he would that tax was due unless postponed, that the appeal had been running for a number of years and that there had been no prior settlement negotiations, would interpret Mr Foulser's letter as describing nothing more than that a cheque had been paid for the amount due, namely the tax that was no longer postponed, leaving open the question of the remaining postponed tax.

52. I do not agree. In my judgment, it is sufficiently clear from the terms of Mr Foulser's letter that he was tendering a payment in full and final settlement of his tax affairs for the relevant year, and not merely making payment of the balance of what was then regarded as the amount of tax outstanding that had not been postponed. That is, in my view, how the reasonable person would have perceived the position. Such a reasonable observer, although imbued with all the knowledge attributed to him by Mr Gibbon, would have proper regard to the language of "full and final settlement" and of finality of the matter, contained in the letter. The absence of prior negotiation is no bar to a settlement being tendered; settlement offers are often the starting point for negotiations and not the culmination of them. Whilst I accept that Mr Foulser's letter could have been expressed more clearly in terms of an offer, I am satisfied that it was a clear tender of payment in full and final settlement. That, in my judgment, is enough to render Mr Foulser's letter an offer capable of acceptance.

Was there an acceptance by HMRC of Mr Foulser's offer?

53. There having been, on my analysis, an offer on the part of Mr Foulser in full and final settlement, the question then is whether that offer was accepted by HMRC.

54. Mr Myerson did not submit that the mere banking of the cheque by HMRC was sufficient. But he argued that the banking of the cheque and the conduct of HMRC together showed that the payment had been accepted on the terms expressed by Mr Foulser. He referred me to the published practice of HMRC on payments with conditions attached, to be found in the HMRC Manual DMBM 209145, which sets out the action to be taken when a payment is received with conditions attached to its acceptance. The circumstances envisaged in the Manual include the case where the payment is in full and final settlement. The guidance states that the cheque can be banked without regard to the conditions provided that the office with collection responsibility writes immediately to the customer to advise them that the conditions attached to the payment are formally rejected.

55. Mr Myerson submitted that, since Mrs Williams did not take the steps set out in the Manual, of which he said I should infer that she was aware, the only proper conclusion was that the reason she did not do so was because the payment had been accepted in full and final settlement.

56. I do not accept Mr Myerson's submission. The mere fact that Mrs Williams did not follow the procedure set out in the Manual cannot without more lead to the conclusion Mr Myerson invites me to draw. The question must be determined by

reference to all the factors in play, including what HMRC did, as well as what they did not do.

57. What HMRC did was, first, to bank the cheque. It appears from the subsequent statement of account that this was banked on 16 November 2010, which is consistent with the cheque having been dated 15 November 2010. Next, the Accounts Office at Cumbernauld sent Mr Foulser a receipt. That receipt was dated 18 November 2010. It did no more than acknowledge receipt of the payment of £1,202,494.44. As would be expected from an Accounts Office receipt, it did not expressly accept the payment in full and final settlement or expressly reject it. Then Mr Foulser was sent a statement of account, dated and issued on 19 November 2010. That statement included the following lines (which have been annotated in some respects by me):

(1) Enquiry amendment for 97/98: £8,499,641.60

(2) Collection suspended: £6,385,841.61 CR

(3) Amount due after any adjustment etc: £2,113,799.99 (The net amount of (1) less (2))

(4) Certain miscellaneous credits

(5) Credit transferred in 10 July 2007: £911,061.60 CR

(6) From payment made 16 November 2010: £1,202,494.44 CR

(7) Total credits: £2,113,799.99 CR

(8) Balance: 0.00 (The net result of (3) less (7))

(9) Other entries for surcharges and interest netted off to zero

(10) Balance of account at 19 November 2010: 0.00

At the bottom left-hand corner of the statement a note was included: "For Information Only. You may be charged interest, from the due dates shown on this statement, if the amount shown as Suspended becomes payable."

58. Despite the best efforts of Mr Myerson to persuade me that this statement can be construed as an acceptance of Mr Foulser's tendered cheque in full and final settlement, it is clear to me that it has precisely the opposite effect. It is clear on the face of the document that the only reason the balance of the account is stated to be zero is that the amount due does not include tax in respect of which collection is suspended. That amount was, as was known to all parties, the amount of the tax which HMRC considered (wrongly, as I have explained) was postponed; it was the identical amount to that stated to be postponed in the notice of determination dated 20 May 2010. That the suspended or postponed tax had not been written off is apparent from both its description in the statement and the reference to possible interest being charged if the amount becomes payable.

59. What, in my judgment, the statement evidences is that HMRC had not accepted that the issue over the amendment to Mr Foulser's self-assessment for 1997/98 had been settled by the payment of £1,202,494.44. The statement is consistent only with HMRC treating the payment in accordance with all prior relevant correspondence as

payment of the amount of tax which HMRC considered had ceased to be postponed. That would be the conclusion of the reasonable observer with knowledge of the relevant background.

60. I find, therefore, that the statement of account was not an acceptance of Mr Foulser's payment in full and final settlement. It was, by contrast, a clear manifestation of a refusal by HMRC to accept the payment on those terms. There was no, or certainly no significant, delay in Mr Foulser being sent the statement of account, and accordingly this case does not cross the threshold in that respect as described by Lloyd LJ in *Stour Valley Builders*.

61. No assistance can be derived from evidence of the views adopted by HMRC officers not directly concerned in the events in question. The fact that Mr MacDougall, in his witness statement, explained that his own practice would have been to return the cheque to Mr Foulser with a covering letter telling him that the terms of the payment were unacceptable, and that, having first received a copy of Mr Foulser's letter of 12 November 2010 in February 2011, he considered it was too late to write such a letter, is nothing to the point. By that time either there would have been an agreement to settle, in which event such a letter could have had no effect; or there would have been no such agreement, in which case such a letter would have been otiose.

62. I conclude therefore that there was no acceptance by HMRC of the offer made by Mr Foulser in his letter of 12 November 2010. It is clear to me, as I find it would be to a reasonable observer, that there was no meeting of minds between Mr Foulser and HMRC regarding a settlement of Mr Foulser's tax affairs. There was no accord, and consequently there could be no accord and satisfaction. The payment was accepted by HMRC as only meeting what HMRC regarded as Mr Foulser's then present liability to that element of his assessed tax liability that had not been postponed. The statement of account negated any possible inference from the banking of the cheque that there had been a settlement. The assessment remains to be determined by the Tribunal.

Section 54 TMA

63. I heard argument on the construction to be given to the expression "other proper officer of the Crown" as a person who might come to an agreement with the appellant within s 54. In an appropriate case such a question might be material, but in view of my finding that the parties did not come to any agreement at all, it is unnecessary for me to determine that issue, and it is not appropriate for me to do so in this case.

Agreement outside s 54 TMA

64. For the same reason, although Mr Myerson at a late stage in his submissions submitted that even if an agreement is outwith s 54, it should still have effect to settle matters between an appellant and HMRC, and that in those circumstances the proper course would be for me to stay the proceedings in Mr Foulser's appeal, it would not be right for me to offer any observations. The matter having been raised only at the

hearing, there was no full argument, and my finding that there was no agreement in any event makes it unnecessary for the issue to be addressed.

Decision

65. On the preliminary issue, therefore, my decision is that there has been no settlement of Mr Foulser's appeal in respect of the amendment to his self-assessment for the tax year 1997/98.

Application for permission to appeal

66. This document contains full findings of fact and reasons for the decision on the preliminary issue. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 23 May 2014