[2018] UKFTT 0244 (TC)

# TC06476

**Appeal number: TC/2017/05175**

***Corporation Tax - returns late - time limit for capital allowances where subsequent enquiry - Schedule 18 FA 1998 paragraph 82 - can a claim that is out of time for 82(1)(a) be in time by virtue of a subsequent enquiry - yes - appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**DUNDAS HERITABLE LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT**

**Sitting in public at Eagle Building, Glasgow on Wednesday 7 February 2018**

**Philip Simpson QC, for the Appellant**

**Iona Stevenson, Solicitor, of the Solicitor's Office of HM Revenue and Customs, for the Respondents**

DECISION

**The appeal**

1. The appellant has appealed two closure notices with amended assessments for the periods ended 31 March 2012 and 31 March 2013 in the sums of £62,881.18 and £78,298 respectively. These were issued on 16 September 2016.

**The issue**

2. The parties are not totally in agreement about the precise issue for determination by the Tribunal.

3. HMRC state that this is a purely technical issue, namely:

> "Whether paragraph 82(1)(b) Schedule 18 Finance Act 1998 applies to extend the time limit for making capital allowances claims as the claims were submitted late under paragraph 82(1)(a)."

4. The appellant agrees that it is a purely technical issue but the question is rather whether:

> "… the claims to capital allowances for the periods ended 31 March 2012 and 31 March 2013 should be allowed on the basis that they have been made timeously by virtue of paragraph 82(1)(b) notwithstanding the claims were not made within the time limit contained in paragraph 82(1)(a)".

5. I take the straightforward view that the Tribunal must find the facts, and those are not in dispute, and then it is a question of the interpretation of paragraph 82 Schedule 18 Finance Act 1998 ("Schedule 18") as applied to those facts.

**Background**

6. The appellant was incorporated on 11 October 1999 and its main activity is the operation of public houses and bars.

7. The appellant's tax return for the period to 31 March 2012 was received by HMRC on 3 February 2015 and included a claim for capital allowances of £317,535 which should have been lodged by 31 March 2014.

8. The appellant's tax return for the period to 31 March 2013 was received by HMRC on 26 November 2015 and included a claim for capital allowances of £369,207 which should have been lodged by 31 March 2015.

9. It is not disputed that at the time the returns were submitted to HMRC they were late and the capital allowances claims were therefore late in terms of paragraph 82(1)(a) Schedule 18.

10. On 12 April 2016, HMRC opened an enquiry, under paragraph 24(1) Schedule 18, into the appellant's tax returns for the periods ended 31 March 2012 and 31 March 2013. It is not disputed that the requisite "notice of enquiry" was timeously

served. The enquiry was restricted to capital allowances only. In compliance with paragraph 79 Schedule 18, those returns had each included a claim for capital allowances. It is agreed that those returns were subsequently amended by HMRC.

11. It is not disputed that, if, or had, the capital allowances claims been lodged timeously then they are justified. The only issue is the question of the time limits and therefore the interpretation of paragraph 82 Schedule 18. Both parties agreed that that paragraph should be construed purposively. Paragraph 82 is in the following terms:

> "82.—(1) A claim for capital allowances may be made, amended or withdrawn at any time up to whichever is the last of the following dates—
>
> (a) the first anniversary of the filing date for the company tax return of the claimant company for the accounting period for which the claim is made;
>
> (b) if notice of enquiry is given into that return, 30 days after the enquiry is completed;
>
> (c) if after such an enquiry the Inland Revenue amend the return under paragraph 34(2), 30 days after notice of the amendment is issued;
>
> (d) if an appeal is brought against such an amendment, 30 days after the date on which the appeal is finally determined.
>
> (2) A claim for capital allowances may be made, amended or withdrawn at a later time if the Inland Revenue allow it.
>
> (3) The time limits otherwise applicable to amendment of a company tax return do not apply to an amendment to the extent that it makes, amends or withdraws a claim for capital allowances within the time allowed by or under this paragraph.
>
> (4) The references in sub-paragraph (1) to an enquiry into a company tax return do not include an enquiry restricted to a previous amendment making, amending or withdrawing a claim for capital allowances.
>
> An enquiry is so restricted if—
>
> (a) the scope of the enquiry is limited as mentioned in paragraph 25(2), and
>
> (b) the amendment giving rise to the enquiry consisted of the making, amending or withdrawing of a claim for capital allowances."

12. The limitation in paragraph 25(2) relates to where a notice of enquiry is given as a result of an amendment by the company of its return and it limits the enquiry to that amendment in certain circumstances. There was no such amendment in this instance.

**HMRC's arguments**

13. Ms Stevenson very fairly intimated that she did not endorse all of the reasoning in the correspondence from HMRC. I note in particular that she stated very clearly that there was no concept of "reasonable excuse" in regard to late filing of a capital allowances claim whereas that is relied upon in HMRC's decision letter of 12 September 2016. In response to Mr Simpson's challenge to wording used by HMRC, she also described as "unfortunate" the reference to "'that' return" which was used, with or without the parenthesis, in that letter and others including the review conclusion letter dated 2 June 2017. The wording was:

> "The provisions at paragraph 82(1)(b)-(d) Schedule 18 to the Finance Act 1998 extend the time limits for making claims in certain circumstances (see the legislation above). My reading of this legislation suggests that (b)-(d) only apply where a return is filed on or before the appropriate filing date for the company tax return and then an enquiry is opened into 'that' return.
>
> For example if the tax return for the period to 31 March 2012 ('that' return) had been filed on or before 31 March 2013 (the filing date for the company tax return), and an enquiry was opened into 'that' return then the extended time limits could apply, …".

She did not wish to rely thereon.

14. HMRC now argue that:

(a) The general deadline for submitting a valid capital allowances claim is the first anniversary of the filing date for the company tax return and therefore for 31 March 2012 the capital allowances claim should have been made by 31 March 2014 but the claim was only filed on 3 February 2015 and was therefore ten months late. For the year ended 31 March 2013 the claim was seven months late.

(b) The key point is whether a claim is valid at the time that it is made and that is decided by reference only to the time limits that are applicable at that point in time. Only one time limit is relevant in relation to a claim.

(c) At the time the claims were made there were no open enquiries so the time limits in paragraph 82(1)(b)-(d) were not applicable. These sub-paragraphs only apply where a return is filed on or before the filing date and then an enquiry is opened.

(d) In order to remove a late claim HMRC must open an enquiry which then allows an amendment. That cannot post-validate a claim that was invalid when made.

(e) The only discretion is that contained in paragraph 82(2) and that is restricted to HMRC alone and not the Tribunal. It has not been exercised.

(f) Paragraph 82(4) is of no application in this appeal.

(g) After the enquiry was opened, it would have been open to the appellant to lodge a new claim that would have been decided on its merits.

(h) A Discovery Assessment makes good the tax loss but does not disallow the effects of the claim.

(i) Schedule 18 should be looked at as a whole and as a framework for the administration of the Capital Allowances regime.

## The appellant's arguments

15. Whilst the appellant does not dispute that the returns were submitted late, it is argued that HMRC has misinterpreted the meaning of paragraph 82(1) and that the strict meaning of the section should be followed, in which case the time limits at paragraph 82(1)(b) *et seq* apply and therefore the capital allowance claims are valid.

16. Paragraph 82(1) as a whole is permissive, in that the crucial word is "may". It specifies a progression of dates and expressly permits a claim to be made, amended or withdrawn before the last of those dates.

17. Since notice of enquiry was given in each case and the appellant had made a claim before 30 days before the enquiry was completed and indeed before 30 days after HMRC amended the returns and 30 days after this appeal concludes there are valid claims.

18. The preamble refers only to a claim and that is not limited in any respect. That therefore ensures that all claims which fall within sub-paragraphs (b)-(d) are valid regardless of whether they would be valid for sub-paragraph (a).

19. Nowhere in the legislation does it say that an enquiry for the purposes of paragraph 82 can only be an enquiry in relation to a return that has been lodged timeously.

20. Although it is agreed that paragraph 82(4) is of no application in this appeal, nevertheless, its very existence indicates that Parliament had in mind the only limitation that applies to an enquiry and to capital allowances as a result; in other words all other enquiries would engage paragraph 82(1)(b), (c) or (d).

21. Claims that have been lodged late can in certain circumstances be allowed. An act when done out of time can be capable of coming into time because of a subsequent event.

22. An enquiry is not the only mechanism to amend or correct a return. A discovery assessment would be one such example. Further if a discovery assessment were made, a taxpayer would be entitled to the benefit of any relevant reliefs such as capital allowances.

**Discussion**

23. There is no doubt that sub paragraph (a) is not engaged. If there had been no enquiries into the returns then the claims were out of time.

24. I was referred to no authorities, Mr Simpson having intimated that he no longer relied on *R (on the application of Higgs) v HMRC*[1].

25. Normal rules of statutory interpretation apply. Words should be given their literal meaning insofar as consistent with Parliament's discernible intent. The recent case of *UBS AG v HMRC*[2] makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically. In this instance, of course, there is no transaction but rather the set of circumstances as outlined above but the same principle holds good.

[1] 2015 UKUT 0092 (TC)

[2] 2016 UKSC 13

26. Firstly, I was not referred to the case but I agree with Judge Gammie at paragraphs 63 and 64 in *Bloomsbury Verlag GmBH v HMRC*[3] ("Bloomsbury") where at paragraph 63 he cites with approval Lord Dunedin in *Whitney v HMRC*[4]:

> "63. … A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

27. At paragraph 64 Judge Gammie goes on to observe-

> "64. … In this respect Schedule 18 must plainly be read and construed as a coherent and largely self-contained system of administration within the context of the scheme of corporation tax as a whole. Nevertheless, the relevant provisions of Schedule 18 still take their place as the second stage in Lord Dunedin's three stages."

28. Therefore, I agree with HMRC that Schedule 18 should be looked at as a whole and as a framework for the administration of the Capital Allowances regime but subject to the caveat that Schedule 18 deals with company tax returns, assessments and related matters and not just capital allowances.

29. Ms Stevenson pointed out that the general time limit for making claims is to be found at paragraph 55 of Schedule 18 and reads:

> "55 Subject to any provision prescribing a longer or shorter period, a claim for relief under any provision of the Corporation Tax Acts must be made within [4 years] from the end of the accounting period to which it relates."

Her oral argument was that the time limits for capital allowances are different and deliberately more restrictive simply because there is a shorter time limit and paragraph 82 should be read in that context. Specifically, she argued that giving a wider scope using paragraph 82(1)(b) should be resisted.

30. I agree with Mr Simpson that the time limit for capital allowances is simply different to the general time limit and that nothing falls to be read into that.

31. The parties referred only to capital allowances but the same reasoning applies to group relief claims. I say that not least because, although it was not drawn to my attention by the parties, paragraph 74 of Schedule 18, which relates to group relief claims, is framed in the same terms as paragraph 82. Capital allowances are therefore not an exception.

32. Of course it is not binding, but what is HMRC's published view of Schedule 18? In the correspondence between HMRC and the appellant, HMRC referred to Statement of Practice ("SP") 5/01 which refers to HMRC's powers under Schedule

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[3] 2015 UKFTT 0660 (TC)

[4] 1926 AC 37 at paragraph 52

18, and also section 393A(10) ICTA 1988, and links late claims for losses in terms of the latter and claims for capital allowances and group relief in terms of the former. It states clearly at paragraph 3 that:

> "Claims to capital allowances under Corporation Tax Self-Assessment (CTSA) can be made, amended or withdrawn up to the latest of:-
>
> - the first anniversary of the claimant company's filing date
> - if HMRC issues a notice of enquiry into the claimant company's return, 30 days after the enquiry is completed
> - if the claimant company's return is amended by HMRC following an enquiry (under paragraph 34(2) schedule 18 FA 1998), 30 days after notice of the amendment is issued
> - if the claimant company appeals against the HMRC amendment, 30 days after the date on which the appeal is finally determined".

It certainly does not say that a claim that is considered in the course of an enquiry must first have been filed before the first anniversary.

33. Paragraph 4, which refers to group relief claims, is framed in the same terms.

34. I observe that although the guidance largely replicates the wording of paragraph 82 the words that I consider to be of particular relevance in the legislation are "at any time" after "withdrawn" and they are not included. Those words support Mr Simpson's assertion that the paragraph is permissive.

35. The preamble does indeed refer only to a claim and that is not limited in any way. The only limitation in respect of capital allowances is paragraph 82(4) and that is not engaged in this case. I agree with Mr Simpson's submission that the fact that that sub-paragraph exists suggests that that is the only limitation that was intended. Indeed the fact that paragraph 82(2) gives HMRC more liberal powers to extend the time limits points to an intention to give scope for less strict time limits.

36. Looking at Lord Dunedin's three stages in the context of the facts of this case, the first stage, which is the declaration of liability, was the filing of the returns. Those included what were the then invalid claims for capital allowances.

37. The second stage was assessment. We are here dealing with self-assessment. Judge Gammie in *Bloomsbury* went on to say at paragraph 109 that "We do not consider, therefore, that a return can be distinguished from the self-assessment that it contains." I agree. I also agree with Judge Gammie (see paragraph 27 above) that Schedule 18 is of relevance in relation to the assessment in that it particularises the sum for which a taxpayer is ultimately liable. That is why, as HMRC say, they believed that they had to open an enquiry in order to amend the return. It is there that Schedule 18 comes into play again.

38. HMRC opens an enquiry in order to fulfil its statutory duty to collect the correct amount of tax. In doing so it is well established that the taxpayer should have the ability to then make the relevant claims for such reliefs as may then be available.

39. It is for that reason that, in the context of discovery assessments generally, Section 36 of the Taxes Management Act 1970 makes provision for precisely that. That is reflected in Schedule 18 at paragraph 65. For example, paragraph 65(2), provides that in a case involving a loss of tax brought about carelessly or deliberately, where an assessment is made on a company

> "… If the company so requires, effect shall be given in determining the amount of the tax charged by the assessment to any relief or allowance to which the company would have been entitled for [the relevant] accounting period on a claim or application made within the time allowed by the Taxes Acts".

40. In other words, even in a case where a discovery assessment is made in respect of careless or deliberate inaccuracies by a taxpayer company, that taxpayer company is entitled to the benefit of any reliefs which are subject to a claim being made, which claims are deemed, to have been made in time.[5]

41. We are not here dealing with discovery assessments but rather enquiries but it is logical that the same principle holds good. Parliament clearly wished a taxpayer who is subject to an enquiry to be entitled to the benefit of such reliefs in the context of capital allowances; hence sub-paragraphs (b)-(d). The same holds good for group relief claims.

42. Why then was sub-paragraph (a) included in the same paragraph if, as HMRC argue, it fixes a date before which a claim must be filed even if an enquiry is subsequently opened?

43. I take the view that logically, Parliament would not have said in the preamble that a "claim…may be made …at any time" up to the last of the dates if it was intended that only a claim that had been validly made in the first instance could be subsequently amended.

44. It would not have made sub-paragraph (a) the first of a sequence of dates for claims that can be made "at any time" before the latest of them.

45. The fact is that HMRC chose to give a notice of enquiry into these returns. HMRC argue that sub-paragraph (b) would only have been engaged had a new claim been lodged after the notice of enquiry was served. I do not doubt that if a new claim were lodged after the enquiry was opened then it would have to be considered on its merits but that did not happen.

46. In my view the language of the paragraph is clear. There are four possible dates and a claim will be timeous if lodged "at any time" before the last of them.

47. Sub-paragraph (b) would therefore be engaged since the claims were undoubtedly lodged long before 30 days after the enquiries were completed on 12 April and 16 October 2016 respectively.

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[5] See *Adams v HMRC* 2009 UKFTT 80 (TC) at paragraph 43, for confirmation of this approach by the FTT.

48. Since HMRC did amend the returns then sub-paragraph (c) could also therefore be engaged on that basis.

49. This is an appeal against those amendments so sub-paragraph (d) could also therefore be engaged and obviously that would be the last of these dates.

50. Theoretically, it would still be open to the appellant to make new claims since the time limit in sub paragraph (d) is not yet engaged.

51. The appeal is allowed. I therefore find that the claims to capital allowances for the periods ended 31 March 2012 and 31 March 2013 should be allowed on the basis that they have been made timeously by virtue of paragraph 82(1)(b) notwithstanding the claims were not made within the time limit contained in paragraph 82(1)(a).

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE SCOTT**
**TRIBUNAL JUDGE**

**RELEASE DATE: 30 APRIL 2018**