Simon's Tax Cases/Simon's Tax Cases 2004/R (on the application of Spring Salmon and Seafood Ltd) v Inland Revenue Commissioners - [2004] STC 444

[2004] STC 444

R (on the application of Spring Salmon and Seafood Ltd) v Inland Revenue Commissioners

OUTER HOUSE OF THE COURT OF SESSION

LADY SMITH

28, 29 JANUARY, 20 FEBRUARY 2004

Return – Self-assessment – Notice of intention to enquire into return – Validity of notice – Company – Whether notice required to be in writing – Whether notice required to be sent to company's registered office – Taxes Management Act 1970, s 115 – Finance Act 1998, Sch 18, para 24(1) – Companies Act 1985, s 725(1) – Income and Corporation Taxes Act 1988, s 832(1).

The petitioner company's registered office was in Edinburgh. It also had a place of business in Reading. Pursuant to para 7[a]Paragraph 7, so far as material, provides: '(1) Every company tax return for an accounting period must include an assessment (a "self-assessment") of the amount of tax which is payable by the company for that period …' of Sch 18 to the Finance Act 1998, the company filed a self-assessment tax form in respect of the tax year 1 August 1999 to 31 July 2000, and paid tax in respect of that return. **The Revenue** did not agree with the assessment and raised questions regarding the return with the company and its agents. **The Revenue** sent a letter to the Reading address, and to the company's agents, giving notice pursuant to para 24(1)[b]Paragraph 24, so far as material, is set out at [3] post of Sch 18 to the 1998 Act of an intention to enquire into the company's tax return for the above tax year. An amended assessment was issued subsequently. The company challenged the validity of the notice by way of judicial review, on the basis that in order to have been valid it was required to be sent to its registered office. An issue arose as to whether the notice of enquiry required to be in writing at all. The company argued that to comply with s 115[c]Section 115, so far as material, is set out at [7] post of the Taxes Management Act 1970, which concerned the service of notices and other documents, and s 832(1)[d]Section 832, so far as material, is set out at [18] post of the Income and Corporation Taxes Act 1988, which, in respect of the 'Tax Acts', defined 'notice' as a notice in writing or other prescribed form, the notice was required to be in writing. Furthermore, the terms of s 115, taken in conjunction with s 725(1)[e]Section 725, so far as material, is set out at [23] post of the Companies Act 1985, which provided that a document 'may be served' on a company at its registered office, meant that the notice of enquiry was required to be sent to the company's registered office, and given that it had not been, was invalid.

Held – (1) A notice of enquiry made under para 24 of Sch 18 to the 1998 Act was not required to be in writing. Had such a requirement been intended, Parliament would have expressly provided for it. There were instances in the tax legislation which expressly required for notices to be in writing, which suggested that it

had not been considered necessary for notices of enquiry to be given in writing. Moreover, s 832 of the 1988 Act did not apply so as to affect the interpretation of the 1970 Act; the 1970 Act was distinct and separate from the group of Acts referred to as the Tax Acts in that provision.

(2) A notice of enquiry made under para 24 of Sch 18 to the 1998 Act was not required to be served at a company's registered office. That conclusion followed from the terms of s 115 of the 1970 Act; a 'person' in s 115(2) included a corporate

person, and it was therefore permissible under sub-s (2)(a) to serve a company at its place of business. To introduce the provisions of s 725 as background to s 115 was wholly unwarranted. In any case, s 725 was permissive, not mandatory, and could not be read as providing that the only way of serving documents to a company was at its registered office. It followed that service of the notice of enquiry had been valid. The petition would, accordingly, be dismissed. *Dept of Agriculture for Scotland v Goodfellow* 1931 SC 556 distinguished.

Notes

For notices of enquiry, see Simon's Direct Tax Service, D2.815.

For the Taxes Management Act 1970, s 115, see Simon's Direct Tax Service, Part G2.

For the Companies Act 1985, s 725(1), see 8 Halsbury's Statutes (1999 reissue) p 88.

For the Income and Corporation Taxes Act 1988, s 832(1), see Simon's Direct Tax Service, Part G1.

For the Finance Act 1998, Sch 18, para 24(1), see Simon's Direct Tax Service, Part H1.

Cases referred to in opinion

Allison (*Kenneth*) ***Ltd*** *v A E Limehouse & Co* (*a firm*) [1992] 2 AC 105, [1991] 4 All ER 500, HL.

Blackfriars (*Scotland*) ***Ltd*** *v John Laurie* 2001 SLT 315.

Debtor (*No 1240/SD/91*), *Re a, ex p the debtor v IRC* [1992] **STC** 771.

Dept of Agriculture for Scotland v Goodfellow 1931 SC 556.

EAE (*R T*) ***Ltd*** *v EAE Property* ***Ltd*** 1994 SLT 627.

Hastie & Jenkerson (*a firm*) *v McMahon* [1990] 1 WLR 1575, [1991] 1 All ER 255, CA.

Molins plc v G D SpA [2000] 1 WLR 1741, CA.

R v General Comrs of Income Tax for Tavistock, ex p Adams (1969) 46 TC 154.

Sharpley v Manby [1942] 1 KB 217, CA.

Petition

The petitioner, **Spring Salmon** and **Seafood Ltd**, applied for judicial review, challenging the validity of a notice of enquiry, given under para 24(1) of Sch 18 to the Finance Act 1998 by the respondent, the **Inland Revenue Commissioners**, on 27 March 2003. The facts and grounds of the application are set out in the opinion.

Jonathan J Mitchell QC and *Robert Hayhow* (instructed by *Tods Murray WS,* Edinburgh) for the petitioner.

Patrick Hodge QC and *Jane Paterson* (instructed by the *Solicitor of* ***Inland Revenue***) for the Crown.

The court made avizandum.

20 February 2004. The following opinion was delivered.

LADY SMITH.

Introduction

[1] This petition for judicial review concerns the validity of a notice that was served on the petitioners by **the Revenue**. The petitioners are a company which carried on business as suppliers of **seafood**. Their registered office is at 5 Albyn

Place, Edinburgh. They have a place of business at **Spring** Woods, Caversham Heights, Reading, which is the address of the mother of one of its directors. She allows a room of her house at that address to be used for the running of the petitioners' business and that of other associated family businesses. The respondents' interest is as representing **the Revenue**.

[2] Companies are required to submit tax returns and in terms of para 7 of Sch 18 to the Finance Act 1998 (FA 1998), they must include in such tax returns an assessment of the amount of tax payable by the company for the accounting period covered by the return. These returns are known as 'self-assessment tax returns'. Prior to 31 July 2001, the petitioners completed a self-assessment tax return for the accounting period 1 August 1999 to 31 July 2000 and lodged it timeously with **the Revenue**, on 31 July 2001. They paid the tax due in terms of that return. **The Revenue** do not, however, agree with the petitioners' self-assessment in various respects that go beyond mere arithmetic. They have raised questions regarding the return with the petitioners and their agents.

Statutory framework

[3] The relevant legislation makes specific provision to cover the event of **the Revenue** questioning a company's self-assessment tax return in circumstances such as those in the present case. They had, in terms of para 24 of Sch 18 to FA 1998, the power to enquire into that return provided they gave notice to the company of their intention to do so (a 'notice of enquiry') within 12 months. That paragraph provides:

> '(1) The **Inland Revenue** may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.
>
> (2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the filing date.'

[4] The 'filing date' in the present case was 31 July 2001. Accordingly, the power of **the Revenue** to enquire into the petitioners' tax return was dependent on them having given a valid notice to the company of their intention to do so prior to 31 July 2002.

[5] An enquiry may, it seems, proceed by way of informal requests for information following the issuing of a notice of enquiry. **The Revenue** also has the power to require a company to produce documents or information within a specific time scale, in which case the company is at risk of being penalised if it fails to comply (see FA 1998, Sch 18, paras 27–29).

[6] If notice of enquiry into a self-assessment tax return has been given then **the Revenue** has the power, whilst the ensuing enquiry is ongoing, to amend a company's self-assessment if it forms the opinion that the amount of tax stated in the return as due is insufficient (see FA 1998, Sch 18, para 30).

[7] As regards the giving of notices, the Taxes Management Act 1970 (TMA) makes provision. Section 108(1) includes the following: '… service on a company of any document under or in pursuance of the Taxes Acts may be effected by serving it on the proper officer.' The 'proper officer' is, in terms of s 108(3), the secretary of the company. Section 115 of TMA includes the following provisions:

> '(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post and if to be given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by

> or on behalf of any body of **Commissioners**, may be so served addressed to that person—
>
> (a) at his usual or last known place of residence, or his place of business or employment, or
>
> (b) in the case of a company, at any other prescribed place and, in the case of a liquidator of a company, at his address for the purposes of the liquidation or any other prescribed place.
>
> (3) In subsection (2) above 'prescribed' means prescribed by regulations made by the Board …'

No regulations have been promulgated under s 15(3).

The course of events

An affidavit by Simon Kenneth Owen Read, Inspector of Taxes based at the **Inland Revenue**'s Special Compliance Office in Bristol, sets out the history relating to the petitioners' tax return and the questions raised by **the Revenue** in respect of it. The affidavit referred to various documents which were lodged as productions and referred to in the course of the hearing and parties seemed to be in agreement that the history of events was as it appears from the affidavit and from them.

[8] It seems that **the Revenue** first raised concerns regarding the petitioners' tax return with them and their advisers on an informal basis. The petitioners had two separate sets of advisers in respect of their dealings with **the Revenue**, Tenon and a firm called Kirkpatrick & Hopes. A representative of Tenon, Roger Barnard, met with a representative of **the Revenue**, Sue Hicks, on 6 March 2002 at Tenon's offices in Basingstoke. It is evident that the likelihood of a notice of enquiry being issued was in the minds of both Sue Hicks and Roger Barnard. Her note of that meeting, the accuracy of which was not disputed, records: 'Barnard confirmed that Hicks should send the Enquiry Notices to Kirkpatrick & Hopes.'

[9] In the event, Sue Hicks, on behalf of **the Revenue**, sent a notice of enquiry by letter dated 27 March 2002, addressed to the petitioners' company secretary at the Reading address to which I have referred. It was one of the letters contained within an envelope addressed to **Spring Salmon Ltd**, a company in the same group of companies, but there was no doubt that it was received by a director of the petitioners, Mr R C Thomas.

[10] The respondents also sent a copy of the notice of enquiry to Kirkpatrick & Hopes under cover of a letter also dated 27 March 2002 which began:

> 'I have today given notice under Paragraph 24(1) Schedule 18 FA 1998 to your client company, **Spring Salmon** & **Seafood Ltd**, of my intention to enquire into the company's return for the year ended 31 July 2000. I attach a copy of the notice.'

[11] There then followed various requests for information arising from **the Revenue**'s consideration of the petitioners' tax return. Whilst the requests for information are not expressly stated to be notification under para 27 of Sch 18 it looks as though **the Revenue** may have intended that they be so regarded. However, for present purposes, nothing turns on the question of whether or not the letter to Kirkpatrick & Hopes was effectively notification for the purposes of para 27. Kirkpatrick & Hopes responded to the letter of 27 March 2002 by letter dated 2 April 2002, in the following terms:

> '**Spring Salmon** & **Seafood Limited**
>
> Thank you for your letter of 27 March 2002.
>
> We are preparing our reply to your letter. This will follow as soon as possible.'

[12] **The Revenue** sent them a reminder by letter dated 16 May 2002 and they replied in a letter dated 10 June 2002 which included the following terms:

'**Spring Salmon & Seafood Ltd**

Thank you for your letter of 16 May 2002.

Unfortunately, we are still awaiting certain information to complete our reply. This will follow as soon as possible.'

[13] Kirkpatrick & Hopes then wrote to the respondents again, in a letter dated 17 July 2002 which included the following:

'**Spring Salmon & Seafood Ltd**

Further to our letter of 10.6.02, please accept our apologies for the continued delay in supplying the information requested by you.

We are still awaiting certain information and the holiday season has held this up longer than expected. We will send a full reply as soon as possible.'

[14] Sue Hicks telephoned Kirkpatrick & Hopes on 25 July 2002 and spoke to Mr Gray, who appears to have been the author of the letter of 17 July. He said that they were still awaiting information to enable them to respond.

[15] An amendment to the petitioners' self-assessment was issued by **the Revenue** under and in terms of para 30 of Sch 18 on 6 November 2003.

[16] Finally, in an e-mail to Sue Hicks dated 5 December, the petitioners' director, Mr R C Thomas stated:

'In order to clarify the position regarding the mis-service of the 3S notice of enquiry I have forwarded to you my e mail sent to Roger Barnard on 12/4/02. The photos show that the 3S notice was stapled to the **Spring Salmon** notice and that it was contained in an envelope addressed to the Company Secretary, **Spring Salmon Ltd**. The point I wish to make is that it seems to me that this notice was issued with the full force of the law invoking a specific section of the 1998 Finance Act; it was not just a casual request for information. It would seem reasonable that such a legal notice should have been contained in an envelope addressed to the company concerned and that it should have been kept confidential. In my last e mail regarding this issue I was expressing my disappointment not with Kirkpatrick & Hopes but with Tenon.'

The forwarded e-mail referred to was as follows:

'Roger

I have attached three photos showing the envelope containing the notice to **Spring Salmon Ltd** and showing the notice to **Spring Salmon** & **Seafood Ltd** stapled to this and to a single copy of their code of practice booklet. I will ask Andrew to come by and witness the letter.

Best regards

> Rod'

[17] It was, accordingly, clear that it had occurred to the petitioners' director to question the mode of intimation of the notice of enquiry very shortly after he received it, although he did not, at that stage, suggest that the notice should have been sent to the petitioners' registered office. His reference to it not being just a casual request for information is not, however, easy to follow since the notice of enquiry that he received made no request for any information at all, its function being simply to put the taxpayer on notice that **the Revenue** were intending to do so.

*[**2004**] **STC 444** at 449*

Challenge to the validity of the notice to enquire

[18] The petitioners challenge the validity of the notice of enquiry on the basis that it required, in their submission, to be sent to their registered office. It would follow that, if the notice of enquiry was invalid, so was the amended assessment that was issued on 6 November 2003. The question of whether or not the notice of enquiry was valid was raised as an issue for determination at the first hearing, with the petitioners seeking declarator that **the Revenue** is not entitled to enquire further into their return for the year ending 31 July 2000. Parties were agreed that, in the event that the notice of enquiry was found to be invalid, such a declarator would be appropriate and the amendment to the petitioners' self-assessment would also fall to be reduced. In considering whether or not the notice to enquire was valid, various questions arose.

Whether the notice to enquire required to be in writing?

It was fundamental to the petitioners' case that the notice of enquiry required to be issued in accordance with the provisions of s 115 of TMA. It was, accordingly, first necessary to determine whether, to comply with that section, the notice of enquiry required to be in writing at all. Counsel for the petitioners submitted that, to comply with s 115, it did. Counsel for the respondent submitted that it did not. In support of his submission, Mr Mitchell QC founded on s 832(1) of the Income and Corporation Taxes Act 1988 (ICTA) which provides:

> 'In the Tax Acts …
>
> "notice" means notice in writing or in a form authorised (in relation to the case in question) by directions under section 118 of the Finance Act; …'

'Tax Acts' is defined in s 831(2) as being ICTA and all other provisions of the Income Tax Acts and Corporation Tax Acts, and 'Corporation Tax Acts' is defined in s 831(1) as being the enactments relating to the taxation of the income and chargeable gains of companies.

[19] The submission for the petitioners was then to the effect that TMA was an enactment relating to the taxation of the income and chargeable gains of companies. Accordingly, the notice of enquiry, to comply with s 115 of TMA, also required to comply with s 832(1) of ICTA and so had to be in writing.

[20] Mr Hodge QC, for the respondent, advanced a contrary interpretation. He drew attention to the fact that para 24 of Sch 18 of FA 1998 did not expressly require the notice of enquiry to be in writing and that that contrasted with the terms of para 28(2)(a) which requires that a notice of appeal against a para 27 requirement must be in writing. I note that para 30(4) also requires that notice of appeal against an amended assessment, must be in writing.

[21] It was further submitted on behalf of the respondent that a consideration of the history of s 9A of TMA, which makes provision for the ability of **the Revenue** to enquire into the tax return of an individual taxpayer,

showed that Parliament had given consideration to the question of whether or not such notices had to be in writing and made express provision to that effect when it was to be made a requirement. Prior to the coming into force of the Finance Act 2001, s 9A had provided:

> '(1) An officer of the Board may enquire into—
>
> (a) the return on the basis of which a person's self assessment was made …
>
> if … he gives notice in writing … of his intention to do so.'

That section now provides:

> '(1) An officer of the Board may enquire into a return … if he gives notice of his intention to do so …'

Following that logic, it was clear that had it been intended that notices of enquiry under para 24 of Sch 18 required to be in writing, express provision to that effect would have been made.

[22] Further, s 832 did not, he submitted, apply to the interpretation of the provisions of TMA. Section 118 of TMA provided that it and the 'Tax Acts' were two separate entities. That approach is demonstrated diagramatically in the 'family tree' of tax legislation that is set out in the 43rd edition of *Tolley's Yellow Tax Handbook*, from which it is clear that the expression 'Tax Acts' does not include TMA.

[23] I have reached the conclusion that the respondents' submission on this matter is to be preferred. There is no apparent reason for Parliament's failure to provide that notices of enquiry should be in writing if that was what it meant which does not make it difficult to conclude that that was not what was meant. I agree that s 832(1) of ICTA does not apply so as to affect the interpretation of the provisions of TMA. It seems clear that TMA is separate and distinct from the group of statutes referred to as 'the Tax Acts' in that section. Further, there are instances, in the tax legislation to which I was referred, of express provision for notices to be in writing being made and that makes it difficult to escape the conclusion that it was not considered necessary for notices of enquiry to be in writing. No doubt, since **the Revenue** will not be in a position to make a requirement for information under para 27 or an amendment to a company's self-assessment under para 30, if timeous notice of enquiry has not been given, it would be wise to have a written record of such notices being given lest timeous intimation be disputed. The wisdom of such an approach is not, however, to say that it is an approach which must, to comply with the legislation, be followed. I note that, in this case, **the Revenue** did, however, give notice to the petitioners of their intention to enquire into their tax return, in writing.

Whether the notice to enquire, if in writing, required to be sent to the petitioners' registered office?

The petitioners' central argument was that notice of enquiry required to be sent to their registered office and since **the Revenue** had, admittedly, not done so, the notice that they did receive was not valid and no valid procedure could follow thereon. It was submitted that the provisions of s 115 of TMA were mandatory and that, in the case of companies, the only relevant provisions were those contained in s 115(2)(b). Counsel for the petitioners advanced an interpretation of s 115(1), (2) and (3) which involved reading those provisions together with the provisions of s 725 of the Companies Act 1985. No regulations had ever been prescribed under s 115(2) and (3) of TMA and that meant, it was submitted, that resort had to be had to what he referred to as the 'background provision' of s 725(1), which reads:

> 'A document may be served on a company by leaving it at, or sending it by post to, the company's registered office.'

[24] Since the provisions of s 115 were mandatory, that meant that notices had to be served at the registered office and could not validly be served anywhere else. The purpose of the provisions was, it was submitted, to confer a degree of formality on the proceedings which could be compared to the formalities required in connection with the service of court documents including those required for the initiation of proceedings.

[25] The petitioners strongly relied on the case of *Dept of Agriculture for Scotland v Goodfellow* 1931 SC 556, as support for the submission that the relevant statutory

provisions relating to service of notices on companies fell to be interpreted as being mandatory. Reference was also made to the case of *Molins plc v G D SpA* [2000] 1 WLR 1741 as an example of service being held invalid where there had been a failure to comply with procedural rules and to the case of *Kenneth Allison **Ltd** v A E Limehouse & Co* (*a firm*) [1992] 2 AC 105. It was submitted on behalf of the petitioners that it was never an answer, if service required to be in accordance with a particular formality, to rely on the fact that the recipient actually received the document (*Blackfriars* (*Scotland*) ***Ltd** v John Laurie* 2001 SLT 315). Whilst parties could, it was accepted, agree to a different method of service, no such agreement had been entered into in this case and it was patently obvious that the requirements of s 115 of TMA had not been complied with.

[26] Counsel for the respondent submitted that the petitioners' assertion that s 115 of TMA, as read with s 725 of the Companies Act 1985, was prescriptive was an erroneous one. There was nothing for instance, in s 115 to invalidate a notice which was simply handed to a company director at a meeting. Reference was made to the Interpretation Act 1978, s 5 and Sch 1, which provided that in any Act, unless the contrary intention appears, 'person' includes a body of persons corporate. Applying that meaning to s 115, it was clear that the whole of sub-s (2) made provision for companies, not just sub-para (b). The notice in the present case had been posted to the petitioners' business address. Such a means of service fell within the provisions of s 115(2)(a) and, accordingly, even if s 115 was prescriptive, the respondents had complied with its provisions. Counsel for the respondent submitted that it was not instructive to consider the authorities relating to service of court documents. Provided it could be established that **the Revenue** posted the notice to enquire to the petitioners' correct business address, they could satisfy the requirements of s 115 (*Re a Debtor* (*No 1240/SD/91*)*, ex p the debtor v IRC* [1992] **STC** 771*; R v General Comrs of Income Tax for Tavistock, ex p Adams* (1969) 46 TC 154).

[27] Counsel for the respondent submitted further that even if it was appropriate to consider the terms of s 725 of the Companies Act 1985, something which was not conceded, that section was merely facilitative, to assist third parties in their dealings with companies. It did not require that all notices be served at the company's registered office. Counsel for the respondent observed that, in terms of s 108 of TMA, a document can be served at the address of the proper officer of a company and that, in terms of Rule of Court 16.1(b) a summons can be served at the place of business of a company. These examples of instances whereby persons could give notice to a company by means other than at its registered office were indicative of the petitioners' approach being ill-founded. The purpose of serving any document was to ensure that its contents were available to the recipient (*Hastie & Jenkerson* (*a firm*) *v McMahon* [1990] 1 WLR 1575*; EAE* (*R T*) ***Ltd** v EAE Property **Ltd*** 1994 SLT 627) and if that had been achieved then that was sufficient, other than in cases where special ceremony was required (*Sharpley v Manby* [1942] 1 KB 217). This was not such a case.

Discussion

I have no hesitation in reaching the view that the notice to enquire did not require to be served at the petitioners' registered office. Such a conclusion would require an interpretation of s 115 of which its terms do not justify. I agree with Counsel for the respondent that it is appropriate to rely on the provisions of the Interpreta-

tion Act 1978 so that the word 'person' in s 115(2) falls to be read as including a corporate body. That means that, in terms of sub-para (a), a notice can be served on a company at its place of business. Further, when it is read in that way, the use, in sub-para (b) of the word, 'other', makes sense. It would not do so if sub-para (b) were the only provision relating to service on companies. The correct interpretation is, in my opinion, that sub-para (b) makes provision for

service on a company at a place 'other' than its place of business, if any such place is prescribed. In the absence of regulations prescribing any such place, resort can still be had to sub-para (a) and the person serving the notice can pray in aid the provisions of s 7 of the Interpretation Act 1978 to prove that service was duly effected on the company.

[28] Interpreting s 115(2)(a) so as to extend its sphere of operation beyond service on individuals also results in postal service on a partnership in Scotland being provided for. No other part of s 115 would cover postal service on a Scottish partnership and there were, at the time the provisions of that section were enacted, as was discussed in the course of the debate, occasions upon which **the Revenue** did require to send documents to Scottish partnerships, as distinct from the individual partners.

[29] Further, to introduce as necessary 'background' to the interpretation of s 115, the provisions of s 725 of the Companies Act 1985 appears to me to be wholly unwarranted. There is no apparent justification for reading them into s 115(2) as a fallback in the event of regulations not being promulgated. Even if there were, I agree with the submission on behalf of the respondent that s 725 is not mandatory. Central to the petitioners' approach was the argument that the statutory provisions under consideration should be read as mandatory rather than permissive because they contained a list of options for service. Hence the reliance on the *Goodfellow* case. That was, however, a case concerning the provisions of the Agricultural Holdings (Scotland) Act 1923 whereby notice of intention to bring a tenancy to an end, to be valid, required to have been served in the form and manner prescribed by the Sheriff Courts (Scotland) Act 1907. The latter provided, in terms of r 113, that a landlord 'may' serve removal notices in one of three specified methods. The court held that failure to adopt one of those three methods when serving such a notice rendered it invalid.

[30] The petitioners sought to liken the provisions of s 115 of TMA to those which were under consideration in that case by referring to the fact that whilst the word 'may' rather than 'shall' is used in both of its subsections, provision is made for service to be effected under s 115 in various different ways. Thus, a list of options was, it was submitted, provided and **the Revenue** could not effect service by a means outwith that list.

[31] It is, however, notable that the court was careful to indicate in the *Goodfellow* case that the use of the term 'shall' in the underlying provisions of the Agricultural Holdings Act affected the interpretation of the available list of options for service so as to make it clear that they were the only options that could be used. As Lord Anderson said that the effect of reading the statutes together was that: 'The term 'may' of the rule is designed to give a choice, but a choice which is **limited** to the three categories therein mentioned.' Further, the word 'shall' does not appear in s 115 of TMA and s 725 of the Companies Act 1985 contains no list of options. The only means of service mentioned in that section is service at a company's registered office. I am not persuaded that the reasoning in the *Goodfellow* case requires me to read s 725 of the Companies Act 1985 as providing that the only way of serving a document on a company is to do so. Further, I note that the combined effect of s 108(1) and (3) and s 115(1) of TMA is that a notice can be served on a company by delivering it to the last known place of residence of the company secretary, which will not usually be the company's registered office. That, of itself, seems to undermine the petitioners' argument that notices can only be sent to the registered office.

[32] I also agree that service or intimation of a notice of inquiry does not appear to be a step that calls for special formality but rather falls into the category of cases where it is recognised that the purpose of service

of a notice is to see to it that the recipient is informed. Indeed, it is probably more accurate to refrain from referring to 'service' of the notice. Paragraph 24 does not require 'service' and since, as I

have already discussed, the notification required does not even need to be in writing, it is better to refer to the notice as requiring intimation.

[33] It is sufficient for the purposes of the argument advanced that I determine that the notice to enquire was sent to the petitioners in a manner that complied with the provisions of s 115 of TMA. I would, however, add that s 115 is not, in my view, prescriptive. It certainly sets out a means by which **the Revenue** can put effective intimation beyond doubt but these are not the only means by which intimation may be achieved. I see no reason why, for instance, effective intimation would not be achieved by handing a notice of enquiry to a company director in the course of a meeting.

[34] Whether the parties had agreed that the notice to enquire should be sent to the offices of the petitioners' agents, Kirkpatrick & Hopes

This question arose from a consideration of whether, in the event that it was mandatory to send the notice of enquiry in a manner which complied with s 115, there had been an agreement between parties that it should in fact be sent to the offices of their agents, Messrs Kirkpatrick & Hopes. It was accepted on behalf of the petitioners that it would always be open to parties to agree that service should be effected in some manner other than that provided for by s 115. Thus if, for example, at a meeting with a representative of **the Revenue**, a taxpayer indicated that the notice of enquiry could just be handed to him there and then, and the notice was handed over, that would suffice. In the present case that had not, however, happened nor, according to the petitioners, had there been any agreement that the notice of enquiry could be intimated to them in any means other than as provided for by s 115.

[35] In particular, whilst the petitioners accepted that a notice of enquiry was received by Kirkpatrick & Hopes under cover of **the Revenue**'s letter of 27 March 2002, they did not accept that that amounted to effective intimation. As regards the reference in the note of the meeting of 6 March 2002 at Tenon's offices to Mr Barnard saying that the notice of enquiry should be sent to Kirkpatrick & Hopes, that was not, it was submitted, an indication of an agreement that that would amount to sufficient service. The reference was there simply by way of clarification in circumstances where the taxpayer had two sets of agents. It was to indicate to which, of the two of them, the notice should be sent. If the letter of 27 March 2002 was examined in the context of **Revenue** practice, which was to send copies of notices of enquiry to taxpayers' agents, it ought not to be seen as amounting to intimation of the notice of enquiry at all. It did not appear that that was what Sue Hicks thought she was doing. Rather, she must simply have been following the guidelines issued by **the Revenue** and copying the notice to the taxpayers' agents.

[36] On behalf of the respondent, it was submitted that the clear import of the note of the meeting was that parties had agreed that the notice of enquiry could be intimated to the petitioners' agents, Kirkpatrick & Hopes and that was what had happened.

Discussion

[37] The notice of enquiry was sent to the petitioners, at their business address. A copy of it was sent to their agents, Kirkpatrick & Hopes. Another of their agents had, some three weeks earlier, told Sue Hicks of **the Revenue** that she should send the enquiry notice to Kirkpatrick & Hopes. It may well be that it was assumed that the notice would also be sent to the petitioners and it is evident that Sue Hicks expressly sent a copy of the notice to those agents on the same day as she sent notice to the petitioners. I do not, however, conclude that the fact that she appears to have had it in mind that the original notice was being sent to the petitioners

with a copy of it being sent to the agents deprives the communication to the agents of having the character of valid intimation.

*[**2004**] **STC 444** at 454*

[38] The petitioners' approach appeared to involve regarding the sending of the copy of the notice of enquiry to the agents as something other than effective notification because notice of enquiry had also been sent to the petitioners. However, what was agreed at the meeting of 6 March 2002 was not that the notice of enquiry should be sent to Kirkpatrick & Hopes in the event that it was not being sent to the petitioners and that in those circumstances but only in those circumstances would it be regarded as effective notice, but simply that it should be sent to those agents. I do not construe the statutory provisions as directing that one and only one notice of enquiry can be sent. Further, I agree that what was recorded in the note of the meeting of 6 March 2002 was agreement to the effect that, as regards intimation of any notice of enquiry, the petitioners would be content if it was sent to their agents, Kirkpatrick & Hopes. Had **the Revenue** not sent a notice of enquiry to the petitioners, effective intimation of the notice to enquiry would, accordingly, have been achieved by sending the letter of 27 March 2002 to Kirkpatrick & Hopes enclosing a copy of the notice. Similarly, if the notice of enquiry sent to the petitioners was tainted by invalidity arising from the means of service adopted or otherwise, **the Revenue** can found on the notice that was sent to Kirkpatrick & Hopes. There is no doubt that it was timeous. In these circumstances, even if I am wrong in holding that the notice of enquiry sent to the petitioners at their business address was valid, it would follow that there had still been valid intimation by means of the notice of enquiry sent to Kirkpatrick & Hopes, because of the nature of the parties' agreement.

Personal bar

Submissions were also advanced on behalf of the respondent to the effect that the petitioners were, in any event, personally barred from founding on any defect in intimation of the notice of enquiry. Reliance was placed on the fact that not only did the petitioners, through their agent, tell **the Revenue** to send the notice of enquiry to other agents, Kirkpatrick & Hopes but, that having been done, Kirkpatrick & Hopes entered into correspondence with **the Revenue** stating that they would give a full response to the questions contained in the covering letter and that they were gathering information to enable them to do so. Counsel for the respondent drew attention to the fact that it was not until after the 12-month period for intimation of a notice of enquiry had expired that the petitioners asserted that the notice had been invalid. That was in circumstances where the petitioners' director, Mr R C Thomas, appeared to have been aware of the potential for such an argument within a very short time of having received the notice, judging by the terms of his e-mail to Sue Hicks of 5 December 2002, and the reference in it to his e-mail to Mr Barnard of 12 April 2002. Had it been raised by the petitioners during the 12-month period, **the Revenue** would have sent another notice to meet the point. In the event, it was too late for them to do so when the point was taken. In the meantime **the Revenue** had been led to believe, from Kirkpatrick & Hopes' letters, that the petitioners did not dispute their right to make enquiries. In all the circumstances, the petitioners had a duty to advise **the Revenue** prior to the expiry of the period within which a notice to enquiry could validly be sent, if they disputed the validity of the one which they had received.

[39] In response, counsel for the petitioner did not submit that the correspondence between **the Revenue** and Kirkpatrick & Hopes could not be interpreted as showing an acceptance on their part that they should seek to answer the questions raised by **the Revenue** and an intention to do so, once the relevant information was to hand. Rather, his approach was to revert to consideration of the circumstances in which they came to receive a copy of the notice of enquiry. Sue Hicks's letter to them of 27 March 2002 did not put them in the position of being 'recipients of the notice of enquiry qua agents authorised to accept the notice'. That being so, his submission seemed to be that the correspondence was

*[**2004**] **STC 444** at 455*

irrelevant. It was not a response to a valid notice of enquiry. Counsel for the petitioners did, however, indicate that, had there been a valid notice of enquiry, they would have had to accept that the letter of 27 March

2002 could properly have been regarded as a requirement for information in terms of para 27 of Sch 18 to FA 1998.

Discussion

The petitioners' approach is, in my opinion, unsound and artificial. It is clear, as I have already indicated, that the notice of enquiry was intimated to Kirkpatrick & Hopes and it cannot be ignored that that was done on the instruction of the petitioners, through their agent, Mr Barnard. It is equally clear, from a reading of the correspondence that followed, that far from speaking up to indicate that the petitioners considered that there was defect in the intimation of the notice, the impression was given that the petitioners' agents and therefore the petitioners, accepted that they required to respond to the enquiries that were being made by **the Revenue**. If no notice to enquire had been validly intimated, there would have been no need to respond to **the Revenue**'s questions at all, it being a prerequisite to a requirement for information in terms of para 27 that notice to enquire had been given. It is not surprising, therefore, that **the Revenue** proceeded on the basis that the petitioners did not dispute their right to conduct an enquiry into their tax return. In the event, it is not necessary for me to determine the issue of whether or not the petitioners are personally barred from now challenging the validity of the notice to enquire but had it been, I would have agreed with the submission for the respondent and found that they were.

Decision

For the reasons I have discussed, I do not consider that it is appropriate that I grant the orders sought and I will reflect that by repelling the petitioners' first, second and third pleas in law.

[1] Paragraph 7, so far as material, provides: '(1) Every company tax return for an accounting period must include an assessment (a “self-assessment”) of the amount of tax which is payable by the company for that period …'

[2] Paragraph 24, so far as material, is set out at [3] post

[3] Section 115, so far as material, is set out at [7] post

[4] Section 832, so far as material, is set out at [18] post

[5] Section 725, so far as material, is set out at [23] post

Order accordingly.

Stephen Hetherington Barrister.