[2016] UKUT 0264 (TCC)

Appeal number: UT/2015/0089

CORPORATION TAX – validity of amendment to return made under paragraph 34(2A) Schedule 18 Finance Act 1998 - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

SPRING CAPITAL LIMITED

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Ashley Greenbank

Sitting in public at Royal Courts of Justice, Strand, London on 3 May 2016

Michael Upton, advocate, instructed by Russel & Aitken, solicitors, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the Appellant, Spring Capital Limited ("Spring Capital"), against the decision of the First-tier Tribunal ("FTT") [2015] UKFTT 0066 (TC) (Judge Brannan), which was released on 10 February 2015.

2. The appeal relates only to one aspect of that decision: that a consequential amendment made by the Respondents, HMRC, to the company tax return of Spring Capital for the accounting period ended 30 April 2008 (the "2008 period") pursuant to paragraph 34(2A) of Schedule 18 to the Finance Act 1998 was validly made.

Factual background

3. The facts are set out in [13] to [196] of the decision of the FTT. In so far as they are relevant to this appeal, the facts are not in dispute and can be summarized as follows.

4. Spring Capital was incorporated as Spring Seafoods Limited and began trading in March 2004. It changed its name to Spring Capital Limited on or about 23 February 2010.

5. For all relevant periods, two brothers, Roderick Thomas and Stuart Thomas, were shareholders in Spring Capital. We have referred to the two brothers together in this decision as "Messrs Thomas".

6. For all periods in issue, Spring Capital's business consisted of the purchase and distribution of seafood.

7. At some stage after March 2004, Spring Capital began to carry on the seafood trade previously carried on by Spring Salmon & Seafood Limited, an associated company. We have referred to Spring Salmon & Seafood Limited in this decision as "SSS".

8. At some stage in the accounting period ended 30 April 2007 (the "2007 period"), Spring Capital also commenced the business of lending money.

9. Spring Capital claimed that it was entitled to the benefit of losses made in the trade of SSS to set against its profits in respect of the period ended 9 March 2005 and the periods ended 30 April 2005 to 30 April 2009 under section 343 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"). Spring Capital also claimed that it was entitled to deductions under the intangible fixed asset rules in Schedule 29 to the Finance Act 2002 and/or Part 8 of the Corporation Tax Act 2009 ("CTA 2009") in respect of the purchase and amortization of goodwill acquired in relation to the trade previously carried on by SSS.

10. For all the periods in issue, HMRC denied the claims for the carry forward of losses under section 343 ICTA 1988 and for relief under the intangible fixed asset rules in respect of the purchase and amortization of goodwill. For most of the periods, it sought to do so by means of closure notices in respect of enquiries opened into Spring Capital's company tax returns for the relevant period.

11. As regards the 2007 period, the relevant closure notice was issued on 18 June 2010. The closure notice denied the claim for carry forward of losses under section 343 ICTA 1988 and the claim for amortization of goodwill under the intangible fixed asset rules.

12. As regards the 2008 period, HMRC sought to open an enquiry into the relevant company tax return by a letter dated 8 April 2010. It issued a closure notice in respect of that enquiry on 18 June 2010, the date on which it concluded the enquiry into the return for the 2007 period.

13. As a result of correspondence between the parties, it became apparent that the closure notice issued in respect of the 2008 period might not be valid because the notice of enquiry for that period had not been delivered to Spring Capital before the end of the enquiry window on 30 April 2010. In a letter dated 22 July 2010, HMRC accepted that because Spring Capital had not received the enquiry notice before the end of the enquiry period, the enquiry window had closed.

14. On 10 December 2010, HMRC issued a notice under sub-paragraph (2A) of paragraph 34 of Schedule 18 to the Finance Act 1998 purporting to make consequential amendments to Spring Capital's company tax return for the 2008 period by disallowing the claim for the carry forward of losses under section 343 ICTA 1988 and the claim for relief under the intangible fixed asset rules for the amortization of goodwill on the same grounds as those on which the claims for the 2007 period had been denied by the closure notice issued on 18 June 2010.

Legislation

15. Paragraph 34 of Schedule 18 Finance Act 1998 provides:

> "(1) This paragraph applies where a closure notice is given to a company by an officer.
>
> (2) The closure notice must –
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required –
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period.
>
> (2A) The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.
>
> (3) An appeal may be brought against an amendment of a company's return under sub-paragraph (2) or (2A).
>
> (4) Notice of appeal must be given –
>
> (a) in writing,
>
> (b) within 30 days after the amendment was notified to the company,
>
> (c) to the officer of the Board by whom the closure notice was given.
>
> (5) In this paragraph "the designated period" means the period designated in the closure notice."

The FTT's decision

16. The issues before the FTT are set out in paragraph [2] of the FTT's decision. They were as follows:

> (1) whether Spring Capital was entitled to carry forward losses under section 343 ICTA 1988 in respect of losses incurred by SSS in its trade;
>
> (2) whether an undertaking given to the Court of Session on 19 May 2010 in relation to proceedings for the restoration of SSS to the register of companies precluded HMRC from enquiring into the quantum of losses available for carry forward under section 343 ICTA 1988;
>
> (3) whether the consequential amendment in respect of the 2008 period was validly made; and

(4) whether Spring Capital was entitled to relief under the intangible fixed asset rules in respect of the purchase of goodwill relating to the former trade of SSS from Messrs Thomas in 2004 for the period ended 9 March 2005 and for the amortisation of that goodwill for the periods ended 30 April 2005, 2006, 2007 and 2008.

17. The FTT decided:

(1) Spring Capital was prima facie entitled to relief for losses under section 343 ICTA 1988 but the question of quantum (and related matters) was adjourned for a further hearing after the final determination of other appeals;

(2) the undertaking did not preclude HMRC from enquiring into the quantum of the losses available for carry forward under section 343 ICTA 1988 in respect of all periods under appeal;

(3) the consequential amendment in respect of the 2008 period was validly made; and

(4) Spring Capital was not entitled to relief under the intangible fixed asset rules in respect of the purchase or amortization of goodwill in any of the periods in issue.

18. For the purposes of the remainder of this decision, two aspects of the FTT's decision merit further explanation.

19. As regards the claims for relief in respect of the purchase and amortization of goodwill under the intangible fixed asset rules, Spring Capital's claims relied on an assertion that on 22 September 2004, SSS had transferred its seafood trade to Messrs Thomas and then, on the same day, Messrs Thomas transferred the seafood business to Spring Capital for a consideration equal to its market value. This transaction is referred to in the FTT's decision as the "tri-partite transaction". HMRC on the other hand contended that there was no evidence that the tri-partite transaction had taken place and submitted that there had been a gradual migration of the seafood trade from SSS to Spring Capital.

20. On this point, Spring Capital had submitted that HMRC was bound by certain findings of fact of the First-tier Tribunal sitting in Edinburgh in another appeal to which Spring Capital was not a party, *Spring Salmon and Seafood Ltd v. HMRC* [2014] UKFTT 887 (TC), in which the Tribunal had proceeded on the assumption that the tri-partite transaction had taken place. That appeal is referred to in the FTT's decision as the "Edinburgh Appeal".

21. The FTT found that HMRC had not disputed the tri-partite transaction in the Edinburgh Appeal only for the purpose of allowing the issues in that appeal to be determined and that neither HMRC nor the FTT were bound by the findings of fact in the Edinburgh Appeal. On the basis of the evidence before it, the FTT also found that the tri-partite transaction did not take place and accordingly that Spring Capital was not entitled to deductions in respect of the purchase or amortization of goodwill in any of the periods in issue.

22. Spring Capital also contended before the FTT that the consequential amendment to the return for the 2008 period was invalid for two reasons: first that there was no conclusion in the return for the 2007 period which required the amendment of the return for the 2008 period; and second because the notice of the consequential amendment under paragraph 34(2A) of Schedule 18 to the Finance Act 1998 had to be issued at the same time as the closure notice. The FTT held that the consequential amendment was valid and that there was no requirement that the notice under sub-paragraph (2A) had to be issued at the same time as the relevant closure notice.

Grounds of appeal

23. The application for permission to appeal set out two grounds of appeal.

(1) The first was that the FTT had erred in law in determining that a valid consequential amendment had been made to the return for the 2008 period because the closure notice for the 2007 period did not include any consequential amendment to the return for the 2008 period and, in any event, the disallowance of a deduction for the amortization of goodwill in the 2008 period did not arise as a consequence of a decision in respect of the return for the 2007 period.

(2) The second was that the FTT erred in law in its interpretation of paragraph 34(2A) of Schedule 18 to the Finance Act 1998 in that any notice which is given under sub-paragraph (2A) of paragraph 34 must be given at the same time as the issue of the relevant closure notice.

24. The FTT granted permission to appeal to the Upper Tribunal on the basis that the appeal was confined to the grounds specified in the application.

25. Spring Capital abandoned the first ground of appeal set out in the notice of appeal - that the amendments to the return for the 2008 period were not consequential upon matters determined by the closure notice for the 2007 period - in advance of the hearing of this appeal.

26. Following the grant of permission to appeal, Spring Capital made an application to amend its grounds of appeal to introduce a further ground of appeal. That new ground of appeal was that the FTT erred in law in deciding that neither the FTT nor HMRC were bound by the findings of the FTT in the Edinburgh Appeal. That application was due to be heard at the commencement of the hearing of this appeal, but it was not pursued by Spring Capital.

27. As a result, the only ground of appeal before us was that the FTT erred in law in finding that the amendment to the return for the 2008 period pursuant to paragraph 34(2A) of Schedule 18 to the Finance Act 1998 was validly made because the notice under sub-paragraph (2A) could only validly be given at the same time as the issue of the relevant closure notice.

The parties' submissions

Spring Capital's arguments

28. In his skeleton argument, Mr Upton identified the following arguments:

(1) on a proper interpretation of paragraph 34, any notice which is given under sub-paragraph (2A) has to be given at the same time as - or at least on the same day as - the relevant closure notice is issued;

(2) even if his first argument is not correct, on a proper interpretation of paragraph 34, a notice under sub-paragraph (2A) must be given within a reasonable time after the closure notice is issued;

(3) even if his first and second arguments are not correct, the general principles of administrative law require HMRC to issue any notice under sub-paragraph (2A) within a reasonable time after the closure notice is issued.

29. Mr Upton did not pursue the third argument at the hearing. So the discussion was limited to the first and second arguments.

The first argument

30. Mr Upton says that, on a proper interpretation, paragraph 34 has to be read as requiring any notice that is given under sub-paragraph (2A) to be given at the same time as - or at least on the same day as - the relevant closure notice is issued.

31. He says the wording of paragraph 34 assumes that the issue of the closure notice and giving of the notice of any consequential amendments under sub-paragraph (2A) are a single administrative act under which HMRC sets out the amendments required to the return which has been under enquiry (in the closure notice) and the implications of those amendments for other returns (in the notice under sub-paragraph (2A)).

32. In support of this submission, Mr Upton refers to the structure of paragraph 34. He says that it is clear from the wording of sub-paragraph (1) - "This paragraph applies *where* a closure notice is given by an officer" (emphasis added) – that the operative provisions of paragraph 34 in sub-paragraphs (2) (delivery of the closure notice) and (2A) (delivery of notice of consequential amendments) must occur at the same time. When sub-paragraph (2A) provides that "the officer *may* by further notice" make amendments to other returns, it is a necessary implication that that further notice must be given at that time.

33. Mr Upton also refers to the wording of sub-paragraph (2A) itself. Sub-paragraph (2A) refers to a "further notice". That reference might be read as suggesting that the notice could be a later notice. However, Mr Upton says that the word "further" is used to draw a clear distinction between the closure notice dealing with the period under enquiry and the notice under sub-paragraph (2A) dealing with other periods. The legislation envisages that the notice under sub-paragraph (2A) may be a separate notice.

34. Mr Upton also notes that sub-paragraph (2A) talks of "company tax returns *delivered* by the company", which, he says, must be taken to mean returns that have been delivered at the time of the issue of the closure notice, and refers to amendments "that are *required* to give effect to the conclusions stated in the closure notice", which he says must refer to amendments required as at the date of the closure notice.

35. Mr Upton acknowledges that paragraph 34 imposes no express time limit on the provision of a notice under sub-paragraph (2A). He says that this is because there was no need for the draftsman to include an express time limit as the necessary implication is that the notice under sub-paragraph (2A) must be served at the same time as the closure notice.

36. On that basis, Mr Upton says that it would be inconsistent with the scheme of the legislation not to read in a time limit. Although there is no time limit on HMRC's right to enquire into a return once an enquiry has been properly opened, a taxpayer has a remedy to prevent the abuse of that right in that the taxpayer can apply to the Tribunal for the issue of a closure notice. Mr Upton says that this is an important right to enable the taxpayer to obtain certainty and finality in his, her or its tax affairs.

37. The making of a consequential amendment by serving a notice under sub-paragraph (2A) is an ancillary part of the process of closing the enquiry. The taxpayer has a limited but important right to bring the enquiry to an end by applying to the Tribunal for the issue of the closure notice. It would be an odd result therefore if, although the principal enquiry had been brought to an end, the enquiry could, in effect, continue in relation to consequential amendments without the taxpayer having an ability to terminate that process. The taxpayer's rights to obtain certainty and finality would be crucially undermined if HMRC were not required to issue a notice under sub-paragraph (2A) at the same time as the issue of the relevant closure notice.

38. Furthermore, Mr Upton says that his interpretation provides a reasonable result. When an enquiry is brought to an end by the issue of a closure notice, the taxpayer has a relatively short period in which to decide whether or not to appeal. It is important that, at that time, the taxpayer has full knowledge of all of the potential consequences of HMRC's decision. If the notice under sub-paragraph (2A) could be given at a later date, the taxpayer would have to decide whether or not to appeal a closure notice without the knowledge of the full consequences of the decision.

39. Mr Upton also points to various paragraphs in HMRC's published guidance, in particular, to two passages from HMRC's Enquiry Manual.

40. The first is from paragraph EM3871. It provides as follows:

> "Your manual closure notice with Revenue amendment must:

- say that you have completed your enquiry into the return;

- state your conclusions, taking into account any taxpayer amendments deferred under FA98/SCH18/PARA31(3) and any effect on other returns made by the company…"

41. The second is found in paragraph EM3878. It states:

> "FA98/SCH18/PARA34(2A)
>
> An enquiry into the return for one period may give rise to consequential amendments to the return(s) for other periods. Your closure notice should include your conclusions about the effect to those returns. The closure notice should not make the amendments of those other returns. You do that separately, using the Revenue Amendment function in COTAX."

42. Mr Upton suggests that these paragraphs are written on the assumption that any notice under sub-paragraph (2A) should be given at the same time as the relevant closure notice and, at the very least, demonstrate that his interpretation does not present an unworkable solution for HMRC.

43. For all of these reasons, Mr Upton says that the correct interpretation of paragraph 34 is that any notice under sub-paragraph (2A) must be given at the same time as the relevant closure notice. Any other interpretation, he says, would allow HMRC free-rein to open closed periods. That, he says, is not a tenable argument. Sub-paragraph (2A) is not intended to provide a "cure-all" for HMRC errors.

The second argument

44. Mr Upton's second argument is that, even if his first argument (that the notice under sub-paragraph (2A) must be given at the same time as the relevant closure notice) is not correct, a notice under sub-paragraph (2A) must be given within a reasonable time after the closure notice is issued.

45. Mr Upton says that it is incumbent upon a court or tribunal to interpret legislation in order to obtain a fair and just result. He refers to extracts from leading texts on statutory interpretation. The first extract is from *Bennion on Statutory Interpretation: A Code* (6th edition), which states at section 265:

> "**Section 265: Law should be just and fair**
>
> It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction that leads to injustice. The courts nowadays frequently use the concept of fairness as the standard of just treatment".

46. He also refers to *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (10th edition) and in particular paragraph 19.1.5 (the presumption against unfairness), which states:

> "There is a general presumption that the legislature does not intend to achieve a result that is manifestly unfair, unreasonable or arbitrary."

and paragraph 19.1.6 (the presumption against double taxation) which refers to the judgment of Lord Scott in *R (Edison) v Central Valuation Officer* [2003] 4 All ER 209 where he states, at page 243:

> "The so-called presumption against double taxation is in reality no more, and no less, than the formulation in a taxation context of the broader interpretative presumption that Parliament does not intend that legislation should bring about results that are unreasonable or unfair or arbitrary."

47. It would be unfair and unjust, Mr Upton says, for the Tribunal to interpret paragraph 34 in a manner which would allow HMRC to issue a consequential amendment after an unreasonable delay following the issue of a closure notice. In this respect, Mr Upton relies on many of the points that he made in relation to his first argument.

48. For this reason, Mr Upton says that the Tribunal must read sub-paragraph (2A) with the addition of the words "within a reasonable period of time". On the question of what would amount to a reasonable period of time, Mr Upton says that this must be judged by reference to the facts of each case. In the present case, there was a gap between the time at which HMRC became aware that the service of the notice of enquiry in relation to the 2008 period was invalid, in July 2010, and the date on which it issued the notice under sub-paragraph (2A), in December 2010, of approximately five months. In that period, HMRC took no action even though it was in possession of all of the relevant facts. HMRC was well aware of the defect in the service of the notice of enquiry in relation to the 2008 period. There was no reason for any further delay.

HMRC's arguments

49. Miss Choudhury, for HMRC, says that there was no error of law in the FTT's decision. She makes the following points in response to Mr Upton's arguments.

Spring Capital's first argument

50. Miss Choudhury says that a proper interpretation of paragraph 34 does not require a notice under sub-paragraph (2A) to be given at the same time as the relevant closure notice.

51. It is clear from the drafting of paragraph 34 that the issue of the notice under sub-paragraph (2A) is a separate act.

52. Sub-paragraph (2A) itself states that the amendment may be made by "further notice". So the drafting clearly contemplates that that notice can be a separate notice from the closure notice. There is nothing in paragraph (2A) to say that that notice must be given at the same time as the closure notice or included in it.

53. There is a separate right of appeal under sub-paragraph (3) in relation to an amendment made under sub-paragraph (2A). The time for that appeal runs from the time at which the further notice is issued.

54. The wording of sub-paragraph (1) and, in particular, the use of the word "where" just determines when paragraph 34 applies. It simply sets out the conditions for the operative provisions of paragraph 34 to apply. It does not determine the timing.

55. If Parliament had intended that the notice under sub-paragraph (2A) must be given at the same time as the relevant closure notice, it could have included words to that effect. There are many provisions within the remainder of Schedule 18 which contain specific time limits. The fact that there is no express time limit is evidence that none was intended.

56. The purpose of the provision is to ensure that HMRC can give full effect to the conclusions in the closure notice. In the present case, when the closure notice for the 2008 period was given, HMRC thought that there was an open enquiry. It was only later, in July 2010, that it became apparent that the notice of the enquiry for the 2008 period had not been delivered before the end of the enquiry window and so the enquiry window had closed. In the absence of the consequential amendment under sub-paragraph (2A), the taxpayer would still be able to claim relief under section 343 in respect of the carry forward of losses and for the amortization of goodwill under the intangible fixed asset rules even though those claims might be inconsistent with the returns for other periods. Sub-paragraph (2A) provides the means to ensure that the decisions made in a closure notice are given full effect for other periods for which the enquiry window may have closed and in respect of which a discovery assessment may not be available.

57. Sub-paragraph (2A) is subject to important limitations. It can only be used to make amendments that are "required to give effect to the conclusions stated in the closure notice". It can only be used where it was necessary to ensure that there was no inconsistency between returns in different years. As a result, the amendments made pursuant to a notice under sub-paragraph (2A) would not come "out of the blue".

In the normal course, they would be amendments that were a necessary consequence of the decisions in the relevant closure notice. Sub-paragraph (2A) did not give HMRC free rein to reopen closed periods.

Spring Capital's second argument

58. As regards the second argument, Miss Choudhury agreed that the legislation had to be interpreted in a manner that was fair and just. However, Mr Upton's argument required the Tribunal to read words into the statute that were not there and were not necessary to correct any error in the drafting.

59. Courts and tribunals should be reluctant to read words into a statute. She referred to the judgment of Lord Nicholls in *Inco Europe Limited v. First Choice Distribution* [2000] 1 WLR 586 where he said (at page 592E):

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words."

60. Miss Choudhury suggested that the Appellant was asking the Tribunal to engage in judicial legislation. There was no error in the legislation which needed to be corrected.

61. For the reasons given in relation to the first argument, the power of HMRC to make a consequential amendment was a limited one. HMRC did not accept that it had acted unreasonably in this case. However, if HMRC were to abuse that power and to make a consequential amendment outside a reasonable period, that would be an administrative law matter, for which the remedy was judicial review.

Discussion

Spring Capital's first argument

62. Mr Upton's first argument is that on the plain meaning of the words paragraph 34 requires that any notice which is given under paragraph (2A) be given at the same time as the relevant closure notice. For the reasons that we have given below, we do not agree.

63. In our view, the natural meaning of the words in paragraph 34 is that there is no fixed time limit for the issue of a notice under sub-paragraph (2A). There is no express time limit set out in paragraph 34. Mr Upton says this is because there is no need for the legislation to specify one because it is implicit that the notice under sub-paragraph (2A) must be given at the same time as the relevant closure notice. However, the absence of an express time limit is equally consistent with there being no such requirement and, in our view, the wording of the legislation is more consistent with that conclusion.

64. Mr Upton says that the delivery of a closure notice and the issue of a notice under sub-paragraph (2A) should be treated as a single administrative act in which HMRC sets out both the amendments required in relation to the period under enquiry and the consequential amendments to the returns for other periods and that both should therefore take place at the same time. We do not agree.

65. He refers to wording of sub-paragraph (1) in support of his view and, in particular, the phrase "where a closure notice is given by an officer". In our view, sub-paragraph (1) simply sets out a condition for the operation of the other sub-paragraphs; it does not impose a requirement as to their timing. This is clear from the remainder of paragraph 34. Sub-paragraph (2A) refers to the notice of a consequential amendment as a "further notice" and clearly contemplates that the notice under sub-paragraph (2A) may be separate and distinct from the closure notice and that it can be issued at a later time. This interpretation is supported by the fact that there is a separate appeal right in sub-paragraph (3) in respect of any consequential amendment, the time limit for which runs from the issue of the further notice under sub-paragraph (2A) and not from the issue of the closure notice.

66. Mr Upton raised concerns that if HMRC were able to amend other returns under sub-paragraph (2A) at times other than at the same time as the issue of the relevant closure notice, this would undermine the taxpayer's ability to obtain finality and certainty in its tax affairs.

67. We acknowledge those points. However, the power of HMRC under sub-paragraph (2A) is limited in some important respects. The nature of the amendments that can be made by a notice under sub-paragraph (2A) is limited to those "that are required to give effect to the conclusions stated in the closure notice". That is to say the amendments must be necessary to ensure consistency with the conclusions stated in the relevant closure notice. Furthermore, a notice under sub-paragraph (2A) can only make amendments to company tax returns that have been delivered by the company. It cannot specify amendments that must be made to company tax returns that may be delivered in the future. The power is not required for future returns as HMRC will be able to open an enquiry and make the relevant amendments in a closure notice for the relevant period.

68. The principal purpose of sub-paragraph (2A) therefore is to provide a limited power to HMRC to make amendments to other returns in order to ensure that they remain consistent with the decisions made in the relevant closure notice in circumstances where it may be unable to open an enquiry or issue a discovery assessment. It does not provide a "cure-all" for HMRC errors.

69. The limited nature of the right goes some way to address Mr Upton's points regarding certainty and finality, although we accept that this is not a complete answer to them. However, the issue of a notice under sub-paragraph (2A) will inevitably disturb the finality of other returns. This will be the case whenever the notice is issued whether at the time of the relevant closure notice or otherwise.

70. The alternative view – that the notice under sub-paragraph (2A) must be given at the same time as the closure notice – would limit this right further. That could lead to a situation in which HMRC has no ability to ensure consistency between the return for the enquiry period and other returns unless it had issued the sub-paragraph (2A) notice at the same time as the closure notice. As Miss Choudhury points out, in the present case, the effect could be that the return for the 2008 period would contain claims for relief which had been denied in all other periods. There is no reason for imposing such a restriction on the words of the legislation and it would not be in accordance with our understanding of the purpose of the provision.

71. As for Mr Upton's concerns that the taxpayer should be able to weigh up all of the consequences of the decisions in the closure notice before deciding whether or not to appeal, we think that this issue is, in part, addressed by the limited nature of the power to make consequential amendments. If that power is limited to amendments that are necessary to give effect to the decisions in the closure notice, for the most part, the taxpayer is likely to be able to ascertain what the effect on other returns is likely to be. In any event, the taxpayer has a right to appeal against the notice under sub-paragraph (2A). It would also be open to the taxpayer to appeal against the relevant closure notice at the same time. If that appeal was out of time, the Tribunal would be able to take into account any delay in the delivery of the notice under sub-paragraph (2A) as a factor in deciding whether or not to permit an appeal against the closure notice out of time.

72. Mr Upton also referred to various passages from HMRC's Manuals. Those passages set out guidance to HMRC officers as to the usual practice that should be adopted when making consequential amendments under paragraph 34(2A). They demonstrate that HMRC's practice will usually be to issue a notice of consequential amendments at the same time as the relevant closure notice. That is clearly good practice. However, we do not regard those extracts as evidence of the scope or intended scope of the provision.

73. For these reasons, our view is that, on a proper construction of paragraph 34, a notice under sub-paragraph (2A) is not required to be issued at the same time as the relevant closure notice.

Spring Capital's second argument

74. Mr Upton's second argument is that a notice under sub-paragraph (2A) must be given within a reasonable time after the closure notice is issued. This argument rested upon the principle that courts and tribunals should, when considering opposing constructions of legislation, favour an interpretation which secures a just and fair result.

75. For the reasons that we have given, the natural meaning of the words of the statute – which in our view do not require a notice under sub-paragraph (2A) to be issued at the same time as the relevant closure notice – produces a fair and just result and one which is consistent with the underlying purpose of the provision. The legislation does not contain a manifest error which would require or permit a court or

tribunal to read in any additional words such as a requirement for the notice under sub-paragraph (2A) to be issued "within a reasonable time" of the relevant closure notice.

76. As we have described above, the power of HMRC to issue a notice under sub-paragraph (2A) is prescribed by the statute. If HMRC were to exercise that power in a manner which was unreasonable in an administrative law sense, that would be a matter for judicial review.

Conclusion

77. For the reasons given above, in our view, the FTT did not make an error of law in deciding that the amendment to the 2008 return was validly made.

Disposition

78. We dismiss Spring Capital's appeal against the FTT's decision.

Costs

79. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

(Signed on original)

Greg Sinfield
Upper Tribunal Judge

Ashley Greenbank
Upper Tribunal Judge

Release date: 10 June 2016