[2016] UKFTT 155 (TC)

TC04942

Appeal numbers: TC/2015/04557 and TC/2015/04618

INCOME TAX – Closure Notice application – Failure by Respondents to comply with Tribunal instruction – whether reasonable grounds for not issuing closure notice – Application allowed – Section 28A Taxes Management Act 1970

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) PETER NICHOLS
(2) COLIN FRENCH **Applicants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 1 March 2016

Keith Gordon and Ximena Montes Manzano, instructed by McCarthy Denning for the Applicants

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

DECISION

1. Section 28A(1) of the Taxes Management Act 1970 ("TMA") provides that an enquiry by HM Revenue and Customs ("HMRC") into a tax return under s 9A TMA is completed "when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions." A taxpayer may, under s 28A(4) TMA apply to the Tribunal "for a direction requiring an officer of the Board to issue a closure notice within a specified period". Where such an application is received by the Tribunal s 28A(6) TMA provides that it:

> … shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

Therefore, the Tribunal must direct that a closure notice be issued unless HMRC can establish that there are reasonable grounds for not doing so.

2. Mr Peter Nichols and Mr Colin John French have each made applications for closure notices as set out in the table below:

Applicant	**Tax Year**	**Date Enquiry Opened**	**Investments covered**	**Tribunal ref**
Peter Nichols	2006-07	27/06/08	411862/Foxcover 411864/Hamilton HFD	TC/2015/04576 TC/2015/04583
Peter Nichols	2007-08	17/03/09	411865/Hamilton HFD2 411866/Hamilton Babcock	TC/2015/04557 TC/2015/04578
Peter Nichols	2008-09	05/01/11	411867/Cobalt DataCentre	TC/2015/04617
Peter Nichols	2009-10	14/12/11	411868/Hamilton HFD3 411869/Hamilton HFD4 411880/Hamilton HFD4	TC/2015/04561 TC/2015/04562 TC/2015/04616
Peter Nichols	2010-11	18/01/13	411888/Dunalastair Data 1 411889/Cobalt Bdg 9C 411891/Dunalastair Data 2	TC/2015/04580 TC/2105/05691 TC/2015/04563
Colin French	2009-10	14/12/11	411887/Cobalt Bdg 30	TC/2015/04618

3. By directions dated 22 September 2015 the Tribunal consolidated all of the applications by Mr Nichols under reference TC/2015/04557. It was also further directed that the applications of Mr Nichols and Mr French "shall proceed together and be heard together by the same Tribunal."

4. The Tribunal also, on 22 September 2015, wrote to the parties requesting listing information (eg whether it was intended to call witnesses, whether counsel would be instructed etc). The letter of 22 September 2015 from the Tribunal to HMRC contained the following paragraph:

> You will be aware that under the TMA the Tribunal will grant the application unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. You should provide the Applicant and the Tribunal with your grounds (if any) for opposing the application and state what evidence you rely on in support of them no later than 14 days in advance of the hearing date. Failure to do so may lead to the application being granted or the hearing being adjourned (possibly with a costs order against you).

5. On 27 November 2015 the parties were notified of that the applications were listed for hearing on 1 March 2016.

6. An application to postpone this hearing was made by HMRC on 23 February 2016. This was to enable them to instruct counsel in the light of information filed on behalf of Mr Nichols and Mr French with the Tribunal earlier that month together with their witness statements. The application was opposed on the basis that that this information had previously been provided to HMRC in the course of their enquiries and that witness statements of Mr Nichols and Mr French merely set out the background to their closure notice applications. As the Tribunal had advised HMRC by letter, dated 22 September 2015, of the closure notice application and both parties of the date of hearing by letter, dated 27 November 2015, and as there had clearly been sufficient time for the parties to instruct counsel I refused the postponement application.

7. At 19:17 on 29 February 2016, the evening before the hearing, evidence in the form of a witness statement from John Leverington, HMRC's Technical Lead of Enterprise Allowances within Counter-Avoidance was sent as an attachment to an email to the Tribunal. Later that same evening, at 19:23, a witness statement of Paul Wills, Technical and Professional Adviser within the Statutory Valuations Team of the Valuations Office Agency, was sent to the Tribunal attached to an email. The witness statements were also provided to the representatives of Mr Nichols and Mr French around the same time as they had been sent to the Tribunal.

8. In addition, a bundle of correspondence (not all of which had been included in the applicants' bundles) was given to the Tribunal and counsel for Mr Nichols and Mr French shortly before 10:30 on 1 March 2016, the time when the hearing was due to commence.

Application

9. Mr Keith Gordon, who appeared with Miss Ximena Montes Manzano for Mr Nichols and Mr French, made an application for HMRC's evidence to be excluded on the grounds of its late service which was contrary to the clear instruction in the letter from the Tribunal of 22 September 2015. Mr Michael Paulin, for HMRC, opposing

the application appealed to the public interest in HMRC being able to ensure that the correct amount of tax was assessed in relation to the tax avoidance schemes that had been utilised by Mr Nichols and Mr French.

10. In *Mobile Export 365 Ltd v HMRC* [2007] EWHC 1727 (Ch) at [20(2)] Lightman J said:

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

11. There was no doubt that in this case that HMRC's evidence, although served very late notwithstanding the clear instruction in the Tribunal's letter of 22 September 2015, was relevant. As such, it was necessary to consider whether there was a compelling reason not to admit it given the further comment of Lightman J in *Mobile Export 365* (at [21]) that springing surprises on opponents and the Tribunal:

> "…are not acceptable conduct today in any civil proceedings. They are clearly repugnant to the Overriding Objective laid down in CPR 1.1 (where applicable) and the duty of the parties and their legal representatives to help the court to further that objective. The objection to them is not limited to proceedings to which the CPR are applicable"

12. Although apologetic for the late service of evidence, the only reason or explanation advanced by Mr Paulin for HMRC's non-compliance with the instructions contained in the Tribunal's letter of 22 September 2015 was that the provision of grounds on which the application was opposed and evidence in support was regarded by HMRC as a "satellite" affair to the continuation of the enquiry. Such a cavalier approach to the provision of such information is simply not good enough and as Lightman J said "clearly repugnant to the Overriding Objective".

13. In the circumstances, as there was insufficient time for the evidence to be properly considered by or on behalf of Mr Nichols and Mr French, I found the extremely late submission of the evidence to be a compelling reason not to admit it. In reaching that conclusion I should emphasise that it should not in any way be regarded as criticism of Mr Paulin who was instructed late in the day and who has done everything he could to assist the Tribunal. However, it cannot be right for HMRC which is, as Mr Gordon submitted, not a litigant in person, to ignore as it did the instruction in the Tribunal's letter of 22 September 2015.

14. At the same time as I was announcing my decision to refuse to admit HMRC's evidence the Court of Appeal was handing down its judgment in *BPP Holdings v HMRC* [2016] EWCA Civ 121. Given HMRC's approach to compliance with the Tribunal's instructions in this case the comments of the Senior President of Tribunals appears particularly apposite where he said:

> "37… I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate

> proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
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> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.
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> 39. I found the approach of HMRC to compliance to be disturbing. At times it came close to arguing that HMRC, as a State agency, should be treated like a litigant in person and that the constraints of austerity on an agency like the HMRC should in some way excuse unacceptable behaviour. I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not."

Closure Notice

15. As a result of the exclusion of HMRC's evidence and because s 28A(6) TMA requires the Tribunal to direct that a closure notice be issued within a specified period "unless satisfied that there are reasonable grounds" for not doing so, Mr Nichols and Mr French chose, as they are perfectly entitled to, not to give evidence or rely on any documents. There is, therefore, no evidence before the Tribunal.

16. However, notwithstanding the complete lack of evidence Mr Paulin contends that there are reasonable grounds for not directing a closure notice to be issued within a reasonable period. He relies on s 28A(2) TMA which provides:

> A closure notice must either–
>
> > (a) state that in the officer's opinion no amendment of the return is required, or
> >
> > (b) make the amendments of the return required to give effect to his conclusions

17. Although Mr Paulin accepts, as he must, that it is not necessary for HMRC to be certain that the figures are wholly accurate before they can issue a closure notice (see *Michael v HMRC* [2015] UKFTT 0577 (TC)), he contends that in this case because there are outstanding requests for information from Mr Nichols and Mr French the amount of tax outstanding has not been fixed and is not known and, as such, the Tribunal should not place HMRC in the position of "being forced to make an

assessment without full knowledge of the facts" (see *Steven Price v HMRC* [2011] UKFTT 624 (TC) at [10]).

18. Mr Paulin also relies on the decision of the Supreme Court in *HMRC v Tower MCashback LLP1 and another* [2011] STC 1143, in support of his public interest argument, particularly Lord Walker's approval, at [15], of the comment of Henderson J in the High Court that:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest"

Together with his observation at [18] that:

> "In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable."

As well as the comments of Lord Hope, who said:

> "83. … it is desirable that the statement by the officer of his conclusions should be as informative as possible. This is because of the function that the terms of the notice will serve in identifying the subject matter of any appeal. In this case the closure notice that Mr Frost [the Inspector of Taxes] issued was in very bald terms. All he said was that the claim for relief under section 45 CAA was excessive, and that the amount in the return for capital allowances was amended to £nil. No details were given of the reasons why he had reached the conclusion to which his amendment gave effect. The statute does not spell out exactly what it means by the words "his conclusions". But taxpayers are entitled to expect a closure notice to be more informative.
>
> 84. …
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> 85. I would therefore respectfully endorse the points that Lord Walker makes in para 18. Our decision to dismiss the cross-appeal should not be taken as indicating that uninformative closure notices of the kind that Mr Frost, no doubt under pressure, issued in this case should be the norm. The aim should be to be helpful, both to the taxpayer and to the Tax Tribunal which will have to case manage any appeal. The officer should wherever possible set out the conclusions that he has reached on each point that was the subject of enquiry which has resulted in his making an amendment to the return.

19. Additionally Mr Paulin refers to the creation in 2014 of HMRC's Counter-Avoidance business stream to bring focus and resource to historical and on-going enquires into avoidance schemes which he submits is a relevant consideration and is acute to the public interest question given that HMRC has taken a renewed approach to the recovery of tax payable. He contends that the Tribunal ought not to place restraints on this process. As Lord Walker recognised in *Tower MCashback* at [13]

that had the Inspector of Taxes, Mr Frost not issued a closure notice "after one more letter" from the taxpayer:

> "A great deal of expensive legal argument might have been avoided if Mr Frost had stood his ground and insisted that he needed more time to consider the matter."

20. While I accept that there is a public interest in taxpayers paying the correct amount of tax this a different case from *Tower MCashback* which concerned the effect of the terms of closure notice issued by an Inspector as opposed to an application by a taxpayer for the Tribunal to direct the issue of a closure notice. Also it does not follow that the issue of a closure notice in some way precludes the correct amount of tax from being paid. In cases where there is an appeal against an amendment to a return, as appears very likely in the present case, if the Tribunal decides that an appellant is overcharged or undercharged to tax it may reduce or increase the amounts accordingly (see s 50(6) and (7) TMA).

21. As to whether I should direct HMRC to issue a closure notice in the present case, as Mr Gordon submits, given the wording of s 28A(6) TMA and without any evidence how can I be satisfied that there are reasonable grounds for not directing that a closure notice be issued. The short answer is I cannot. As Nugee J observed in *Hargreaves v HMRC* [2014] UKUT 395 (TCC) at [28], albeit in relation to different statutory provisions (s 29(4) and (5) TMA) in which the burden of proof also lay on HMRC:

> "… if B chooses to call no evidence he will lose the issues on which he bears the burden (unless he can make his case on them through A's evidence)."

22. As I cannot be satisfied that there are reasonable grounds for not directing the issue of a closure notice it is necessary to consider what would be a "reasonable period" for such a notice to be issued. Mr Paulin suggested that 31 August 2016 would be appropriate provided that Mr Nichols and Mr French be directed provide HMRC with the information said to be outstanding or alternatively 31 August 2016 without such a direction. Mr Gordon suggested either 30 April 2016 in respect of all tax years or a staggered approach with the closure notice for 2006-07 being issued on 30 April 2016, 2007-08 on 31 May 2016 and 2008-09 on 30 June 2016 etc. with the closure notice in respect of 2010-11 being issued on 31 August 2016.

23. Because of HMRC's failure to comply with the instructions contained in the Tribunal's letter of 22 September 2015 there was no evidence before me of what information HMRC say is still required from Mr Nichol and Mr French and it is therefore not appropriate to make any direction for a closure notice to be conditional on the provision of such information, especially when I understand their case to be that all relevant information has already been provided. I also accept HMRC's reservations as to the practicalities of Mr Gordon's staggered approach.

24. Therefore, having regard to all the circumstances of the case, I direct that HMRC issue closure notices in respect of each and every application set out in the table in paragraph 2, above by 31 May 2016.

Right to apply for permission to appeal

25. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 4 MARCH 2016