[2017] UKFTT 0137 (TC)

TC05631

Appeal number: TC/2015/06810

Costs – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10(1)(b) – closure notices given six days before hearing of application for tribunal to direct that HMRC give closure notices — whether withdrawal indicated unreasonable conduct of proceedings – test set by Upper Tribunal in* Tarafdar *applied – held: early withdrawal did not indicate unreasonable conduct – whether HMRC's reversal of an earlier letter sent by one of its officials indicated unreasonable conduct of proceedings – held: this was unreasonable conduct – due to circumstances, discretion to award costs in respect of that conduct not exercised – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

LYLE & SCOTT LIMITED
WINN & CO (YORKSHIRE) LIMITED
GREENSTONES HOLDINGS LIMITED
DYNAMIC CASSETTE INTERNATIONAL LIMITED

Applicants

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON

Sitting in public at Fox Court, London on 19 September 2016

Mr Michael Jones, instructed by RPC, for the Applicants

Ms Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. This was an application for the tribunal to award costs on the grounds that HMRC had acted unreasonably in proceedings whereby the applicants applied to the tribunal for a direction that HMRC give certain closure notices. The proceedings never went to a hearing because, six days before the date listed for the hearing, HMRC gave the closure notices.

The application

2. By letter of 18 April 2016, RPC, solicitors to the applicants, applied to the tribunal for costs against HMRC pursuant to s29(4) Tribunals, Courts, and Enforcement Act 2007 and rule 10 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009, in relation the applicants' applications dated 19 November 2015 seeking closure notices pursuant to paragraph 33 Schedule 18 Finance Act 1998. This was accompanied by a schedule of costs claimed.

Evidence

3. I had a bundle of documents containing correspondence between the parties and an authorities bundle. At the hearing HMRC produced an extract from Ms Nathan's electronic diary showing her conference with HMRC concerning this application on 11 March 2016 (the electronic diary entry was created on 26 February 2016).

4. Ms Nathan made certain factual assertions in the course of her submissions. To the extent these assertions were not supported by the documentary evidence, I have disregarded them (as no witness evidence was given at the hearing)

Findings of fact

5. On dates in May 2013, HMRC opened enquiries into the tax returns of the first three applicants for specified accounting periods. Enquiries were opened in respect of the fourth applicant in November 2013. The enquiries all related to the "Dividend Replacement Strategy", an arrangement notified to HMRC under the disclosure of tax avoidance schemes legislation (and allocated a reference number).

6. On 19 November 2015, the applicants made applications under paragraph 33 Schedule 18 Finance Act 1998 to the tribunal for a direction that HMRC close those enquiries within 28 days of the tribunal's determination of the application. In their applications, they said:

> "HMRC have been provided with copies of the documentation relating to the arrangements which form the basis for their enquiry into [the relevant tax return]. Representatives of the taxpayer have corresponded extensively with HMRC in response to their requests for information and documents. The taxpayer considers that HMRC

have all the information and documentation they require in order to enable them to reach a conclusion regarding the enquiry…"

7. The tribunal proposed that all four applications be heard at the same time by the same panel; the parties did not object to this.

8. On 17 December 2015 HMRC sent the applicants notices (the "notices to provide information") to provide information and produce documents under their powers in paragraph 1 Schedule 36 Finance Act 2008. The information and documents were to be sent by 22 January 2016. The notice letters were signed by Lee Smith, Inspector, from HMRC Counter-Avoidance in Luton, and said:

> "As you will be aware I have made enquiries into the use of this arrangement and you have already provided a number of documents regarding this. I wold now like to see some further documents and information as detailed on the attached schedule. I believe these are reasonably required. This means that it is reasonable for me to ask for these so that I can check the company's tax position and in particular so that I can review your company's use of the avoidance scheme called Dividend Replacement Strategy, also known as Aikido."

9. The information and documents in the schedule to the letter were (in summary):

(1) Documents relating to employment terms of the individuals who were either directors and/or beneficiaries of the trust involved in the arrangement;

(2) Other details of the directors' working arrangements; and

(3) Details of any guarantees over the liabilities of the company provided by any director, shareholders or beneficiary of the trust.

10. HMRC wrote to the tribunal on 4 January 2016 stating (amongst other things) that HMRC did intend to resist the applications for closure notices "because information required to settle the enquiries is outstanding." HMRC's letter was signed by Brian Skelley, Senior Technical Caseworker, from HMRC Local Compliance Appeals and Reviews in Newcastle. RPC were sent a copy by email.

11. Mr Skelley wrote to RPC on 7 January 2016 stating (in response to a question asked of him by RPC in a letter of the previous day) that the "outstanding information" referred to in his letter to the tribunal of 4 January 2016 "is that required by the [notices to provide information]." He went on: "Unless the information provided in response to those notices raises further query or requires clarification then I can confirm that Closure Notices will be issued once the [notices to provide information] have been complied with."

12. The tribunal wrote to the parties on 21 January 2016 notifying them of a hearing on 24 March 2016 in respect of the applications for closure notices.

13. By letters of 19 January and 21 January 2016, RPC provided Mr Smith with responses of the first, third and fourth applicants to the notices to provide information. Each response was about a page long; one response (on behalf of the fourth applicant) enclosed another document, which was also about one page long.

14. In respect of the second applicant, RPC asked HMRC, by letter of 22 January 2016, for an extension of time for compliance with the notice to provide information, to 19 February 2016; this was granted by Mr Smith. On 1 February 2016 RPC responded to the notice to provide information on behalf of the second applicant in a letter of less than a page, enclosing copies of two directors' service agreements.

15. RPC emailed Mr Skelley on Monday 8 February 2016 enclosing copies of letters sent by Mr Smith of HMRC to RPC on 2 February 2016 stating that the first, third and fourth applicants had complied with the notices to provide information. RPC said that they anticipated receiving similar confirmation in respect of the second applicant shortly. They asked Mr Skelley to confirm that closure notices would be issued in respect of the first, third and fourth applicants; and asked him to respond by Wednesday 10 February, as they needed to make a decision about instructing counsel for the hearing by Thursday 11 February.

16. Mr Skelley replied to RPC by letter emailed on Thursday 11 February, and copied to Hilary Woolston of HMRC, as follows: "I can confirm that as the [notices to provide information] have been complied with I will be writing to the Tribunals Service to advise them that HMRC will no longer be opposing the closure notice applications in respect of the [four applicants]."

17. On the evening of the next day, Friday 12 February, RPC sent two emails:

(1) A letter (by email, copying Mr Skelley) to the tribunal, referring to and enclosing Mr Skelley's letter of the previous day, stating that RPC "intend to seek clarification with HMRC with regard to the timing of the issue of the Closure Notices"; and requesting that the listing of the 24 March hearing be maintained "until we receive confirmation that the relevant Closure Notices have been issued and that there is no need for the application to proceed".

(2) An email to Mr Skelley (copying Ms Woolston of HMRC), attaching a copy of the above letter to the tribunal, and asking for confirmation by 5 pm on Friday 19 February, of when the Closure Notices would be issued. They added: "We do not intend to withdraw our applications to the First-tier Tribunal until we have received confirmation from you that the Closure Notices have been issued, or will be issued by a specified date which is acceptable to our clients. Should there be any undue delay in providing the confirmation we seek, our clients will seek a costs order against HMRC."

18. On the following Tuesday, 16 February, RPC received two emails from HMRC:

(1) The first, from Mr Skelley (copying Ms Woolston) and sent at 8:52 am, said that Mr Skelley had referred the matter of the issue of closure notices to his colleague, Ms Woolston "who is responsible for arranging the issue of closure notices and she or a member of her team will reply to you regarding the timing of the issue of the notices". The letter suggested that if RPC had further queries regarding the issue of the closure notices, they should contact Ms Woolston direct.

(2) The second, sent at 6:36 pm, came from Simon Pooley, Senior Lawyer, Personal Tax Litigation Team, HMRC Solicitor's Office. This said as follows:

> "Your letter dated 12 February 2016 and the Appeals & Reviews team letter dated 11 February 2016 were drawn to my attention for the first time yesterday afternoon.
>
> The letter dated 11 February 2016 from the Appeals & Review team was sent without the Respondent's instructions due to a misunderstanding and should be disregarded. I apologise for any confusion which may have been caused.
>
> The correct position is that I am awaiting instructions in respect of the Sch 36 notices and closure notice applications and I shall revert back to you and the Tribunal on those items as soon as I have instructions.
>
> Please can you ensure that all future correspondence in respect of these appeals is sent to me at the above email address."

19. RPC responded to HMRC (Mr Pooley, and copying Ms Woolston) on 23 February 2016, expressing surprise that Mr Skelley's letter of 11 February was written without instructions – as they had understood Mr Skelley to be the person authorised to speak on behalf of HMRC. They said they understood that Mr Skelley had himself "sought instructions from the HMRC officer with overall responsibility for this matter (Ms Woolston), with whom (and with her predecessors) [RPC had] been corresponding for well over two years and who has overseen the working of the relevant enquiries during that period". They further said that "the people within HMRC who were responsible for making the statements referred to above [ie Mr Skelley and Ms Woolston] were best placed to decide whether they had sufficient material to allow them to close the enquiries; they plainly decided that they did and this was communicated unambiguously to our clients." They concluded:

> "In the circumstances, there is no justification for further prevarication on the part of HMRC in this matter. Mr Skelley has confirmed HMRC's position in clear and informed terms, and we should be grateful for your confirmation of when HMRC will issue the Closure Notices it has agreed to issue so that the costs which will be incurred by our clients in attending the First-tier Tribunal on 24 March 2016 can be avoided. Should you maintain that HMRC wish to resile from their clearly stated position it will be necessary for our clients' application to be determined by the Tribunal on 24 March 2016, and in such an eventuality we hereby put you on notice that our clients will seek their costs".

20. On 11 March 2016, HMRC had a conference with counsel (Ms Nathan) in respect of the applications for closure notices. This had been put in Ms Nathan's diary on 26 February 2016.

21. RPC wrote by email to Mr Pooley on Friday 18 March 2016 noting that they had not received a reply to their 23 February letter, or HMRC's bundle for the hearing of the application for closure notices. Mr Pooley replied later the same day, saying:

(1) He had now received instructions in respect of the notices to provide information, and the applications for closure notices.

(2) Regarding the notices to provide information – Mr Pooley noted that Mr Smith had already confirmed compliance on the part of three of the four applicants. He said that HMRC's confirmation in respect of the second applicant would be with RPC shortly.

(3) Regarding the applications for closure notices, he said:

> "The [notices to provide information] having been complied with, I enclose copies of the closure notices that have been issued to your clients today…In the circumstances, I invite you to arrange withdrawal of the closure notice applications so that the hearing listed for 24.3.16 may be vacated by agreement."

The enclosed closure notices made no tax return adjustments in respect of first, second and third applicants. In respect of the fourth applicant, the returned loss of £3,222,644 was adjusted to disallow two amounts related to the tax avoidance scheme, together amounting to £1,060,350.

22. The tribunal wrote to the parties on Monday 21 March 2016 cancelling the hearing – listed for Thursday 24 March – for the application for closure notice directions, as the closure notices had been issued.

The law

23. Under paragraph 24 Schedule 18 Finance Act 1998, HMRC may enquire into a company tax return if they give notice to the company of their intention to do so within the time allowed.

24. Paragraph 32 provides that an enquiry is completed when HMRC by notice (a "closure notice") informs the company they have completed their enquiry and state their conclusions.

25. Under paragraph 34, the closure notice must:

> (a) state that, in HMRC'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 to give effect to the conclusions stated in the notice.
>
> An appeal may then be brought against such an amendment.

26. Under paragraph 33, a company may apply to the tribunal for a direction that HMRC give a closure notice within a specified period; and the tribunal shall give a direction unless satisfied that HMRC have reasonable grounds for not giving a closure notice within a specified period.

27. Under rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the tribunal may make an order in respect of costs if the tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

28. In *Shahjahan Tarafdar v HMRC* [2014] UKUT 0362, the Upper Tribunal stated at [20] that the discretion to award costs, "like any other discretion conferred on the tribunal, must be exercised judicially". The Upper Tribunal went on to say (at [34]):

> "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

29. In *Market & Opinion Research International v HMRC* [2013] UKFTT 475, the First-tier Tribunal set out (at [8]) some principles to be derived from the cases on rule 10(1)(b) which were approved by the Upper Tribunal [2015] UKUT 12 at [23]. The more relevant to this application included the following (retaining the numbering in the FTT's decision):

> "(2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in [*Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC)] by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings
>
> > "…whether they are part of any continuous or prolonged pattern or occur from time to time".
>
> (3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.
>
> (4) Actions for the purpose of "acting unreasonably" also include omissions …
>
> (6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting.
>
> (9) … rule 10(1)(b) should not become a 'backdoor' method of costs shifting."

30. The Upper Tribunal went on to say (at [49] – [50]):

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires

the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. This is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It wold not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules.

We derive some support in that respect from what Lewison J (as he then was) said in *Davy's of London (Wine Merchants) Ltd v The City of London Corporation and another* [2004] EWHC 2224 (Ch). That case concerned, in part, what notice period for a break clause inserted into a new tenancy of business premises would be reasonable. At [34], Lewison J said:

> 'What is reasonable in the circumstances of a particular case is a value judgment on which reasonable people may differ. Since judges are people, their views may differ, but some degree of diversity is an acceptable price to pay for the flexibility enshrined in the statute …'

The threshold test in rule 10(1)(b) is one of unreasonable conduct, which mandates a value judgment on which views may differ. The flexibility, and diversity, inherent in such a test must therefore be respected."

Applicants' arguments

31. Mr Jones presented the following as indicators of unreasonable conduct on HMRC's part:

(1) Mr Pooley's email of 16 February 2016, stating that Mr Skelley's letter of 11 February had been sent without HMRC's instructions due to a misunderstanding. Mr Jones submitted that this indicated unreasonable conduct on HMRC's part in one of two ways: either HMRC had permitted Mr Skelley to correspond with RPC when he was not authorised to do so – which was unreasonable conduct - or, contrary to the assertion in Mr Pooley's letter, Mr Skelley had been authorised to send his 11 February letter, but HMRC had subsequently changed its mind – again, unreasonable conduct.

(2) The delay of six weeks between 2 February 2016, the date by which all four applicants had provided HMRC with the information required by the notices to produce information, and 18 March 2016, the date on which HMRC gave the closure notices; the fact that HMRC gave the applicants no explanation for this delay while it was going on; and the fact that this delay was immediately prior to the date of the hearing of the application for closure notices. Mr Jones noted that Mr Pooley's letter of 18 March 2016, agreeing to give the closure notices, gave the same reason for so doing as did the 11 February 2016 response from Mr Skelly (withdrawn by Mr Pooley on 16 March) – namely, the applicants' compliance with the notices to provide information.

(3) A general pattern of delay:

(a) the enquiries had been going on for more than two years at the point when the applicants made the applications for closure notices;

(b) it was not until 7 January 2016 (and prompting by RPC in a letter of the previous day) that HMRC confirmed that its resistance to the applications for closure notices was linked to the applicant's compliance with the notices to provide information;

(c) it took 10 days from Mr Pooley's letter of 16 February 2016, for HMRC to arrange a conference with counsel;

(d) it took a week after the conference with counsel for HMRC to write to the applicants to agree to give the closure notices (and this was after a prompting email from RPC).

32. Mr Jones submitted that, in applying a test of reasonable conduct, one is allowed to expect more of an experienced litigant like HMRC – he cited the Upper Tribunals' decision in *MORI* at [55] – [56]:

> "In his skeleton argument, Mr Bremner submitted that if it were suggested that HMRC should be subject to some higher standard than other litigants, then HMRC would submit that such a suggestion was wrong. There was, it was argued, no justification for subjecting different litigants to different standards.
>
> To the extent this argument is concerned with the application of a test of reasonableness, and not some different or higher standard, we agree. However, the test of reasonableness must be applied to the particular circumstances of a case, which will include the abilities and experience of the party in question. The reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question. There is a single standard, but its application, and the result of applying the necessary value judgment, will depend on the circumstances."

33. In Mr Jones' submission, the *Tarafdar* test applied as follows:

Question (1): HMRC withdrew because they had received the information required by their notices to provide information.

Question (2): Yes, HMRC could have withdrawn earlier – in particular, from 11 February 2016, the date of Mr Skelley's letter saying that he would be contacting the tribunal to say that HMRC would no longer opposed the applications for closure notices.

Question (3): This essentially asks why did HMRC not adhere to the position in Mr Skelley's 11 February letter? Mr Jones submitted that there was no reasonable explanation:

(a) The material supplied by the applicants in response to notice to provide information (all of which was received by 2 February 2016) was not of significant volume.

(b) Formal confirmation of the second applicant's compliance with the notice to provide information only came in Mr Pooley's 18 March 2016 letter – but it had effectively already been given in Mr Skelley's 11 February 2016 letter.

(c) The adjustment to the fourth applicant's tax return in the closure notice (of around £1 million) was not obviously related to the employment contracts which had been supplied as a result of the notice to provide information.

34. Mr Jones did not accept Ms Nathan's submission that the applicants are saying that it was unreasonable for HMRC either (a) to seek counsel's advice, or (b) to fail to inform the applicants that they were seeking counsel's advice. Mr Jones accepted that it was reasonable for HMRC to seek counsel's advice. The issue, he said, was when they did so. It was not reasonable, Mr Jones submitted, to do so less than two weeks before a hearing for which notice had been given seven weeks earlier. Mr Jones accepted that it can be reasonable not to inform the other side where you are with litigation. But HMRC's silence for about a month prior to 18 March 2016 was not reasonable.

HMRC's arguments

35. Ms Nathan submitted that the threshold for the tribunal awarding costs – unreasonable conduct on HMRC's part - is not met here

36. Information provided by applicants as a result of the notice to provide information may not have been voluminous; but, as the applicants had taken part in a tax avoidance scheme, care had to be taken by HMRC to understand this information and coordinate with other aspects of this scheme.

37. HMRC needed counsel's advice as to whether HMRCs understanding was correct and whether they had sufficient information to be able to give closure notices.

38. Ms Nathan noted that Mr Skelley's 8.52 am email of 16 February 2016 made it clear that it was not he but Ms Woolston and her team who were responsible for giving the closure notices –

> "I have referred the matter of the issue of the closure notices to my colleague Mrs Woolston who is responsible for arranging the issue of the closure notices and she or a member of her team will reply to you regarding the timing of the issue of the notices."

39. Ms Nathan further noted that RPC were aware of Mrs Woolston and her role – they said in their letter of 23 February 2016:

> "Indeed we understand that Mr Skelley sought instructions from the HMRC Officer with overall responsibility for this matter (Ms Hilary Woolston) with whom (and her predecessors) we have been corresponding for well over two years and who has overseen the working of the relevant enquiries during that period."

40. Ms Nathan submitted that with different departments and multiple people involved from HMRC, there will sometimes be slips as happened here. But this falls short of unreasonable conduct.

41. Ms Nathan submitted that the *Tarafdar* tests should be applied thus:

Question (1): the reason for HMRC's withdrawal was that the applicants had complied with the notices to provide information; HMRC had considered the totality of the information in relation to the tax avoidance scheme in question and as it was implemented by the applicants; this needed to be considered with counsel; which led to the determination not to oppose the application for closure notices. In short, the applicants' compliance with the notices to provide information was a necessary, but not sufficient, condition for HMRC agreeing to give the closure notices.

Question (2): the closure notices were given in as timely a fashion as was feasible in the circumstances. Conference with counsel was on Friday 11 March; closure notices were given one week later.

Question (3): It was not unreasonable.

42. Ms Nathan submitted that, to hold that HMRC's conduct of proceedings was unreasonable, the tribunal would have to find:

(1) HMRC's seeking counsel's advice concerning the closure notices was unreasonable; or

(2) HMRC's failure to inform they applicants that they were seeking counsel's advice – this led to the silence of a month – was unreasonable.

Either of these would be surprising things to hold, Ms Nathan submitted.

43. Ms Nathan did not accept that the standard for unreasonableness is higher for HMRC – it is the same standard for all parties.

Discussion

44. The Upper Tribunal in *Tarafdar* provided the framework for approaching a costs application on the basis of unreasonable conduct (rule 10(1)(b)) where a party has withdrawn from an appeal. I shall follow that framework but first make some prefatory observations.

45. The proceedings here were not a conventional 'appeal' but rather an application to the tribunal to direct that HMRC give closure notices within a specified period. The tribunal must grant such applications unless HMRC has reasonable grounds for not giving the closure notice. Closure notices are part of the machinery for finalising a company's liability for corporation tax in an accounting period: they mark the end of HMRC's enquiries and therefore, in 'normal' circumstances, the end of HMRC's ability to amend the tax return. HMRC will therefore want to have a full understanding of the relevant facts before giving a closure notice. An application to the tribunal for a direction to give a closure notice is, as Park J said in *HMRC v Vodafone 2* [2006] STC 483 at [43], "meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal". This explains the interaction in this case between (a) the proceedings commenced by the applicants in November 2015 for the giving of closure notices, and (b) the notices to provide information, issued by HMRC about a month

later – the latter were a precursor to HMRC giving the closure notices that were the subject matter of the proceedings.

46. Turning now to the three questions set out by the Upper Tribunal in *Tarafdar*:

Question (1): What was the reason for the withdrawal of HMRC from the appeal?

47. As the proceedings here were applications for closure notices, the question here is – what was the reason for HMRC giving the closure notices on 18 March 2016, six days before the date listed for the hearing of the applications? Based on the documentary evidence presented at the hearing, I find the answer to be that, by 18 March 2016, the following had occurred:

(1) HMRC had received the information and documents required by the notice to provide information,

(2) HMRC had considered the impact of that material on the applicants' tax liabilities for the relevant accounting periods,

(3) HMRC had taken advice from counsel on the applicants' tax liabilities for the relevant accounting periods, and

(4) HMRC had applied all of the above in preparing the closure notices that were give on 18 March 2016.

Question (2): Having regard to that reason, could HMRC have withdrawn at an earlier stage in the proceedings?

48. HMRC could have given the closure notices earlier if they had done one or more of the following:

(1) Not taken advice from counsel;

(2) Taken advice from counsel at an earlier date than they did;

(3) Taken less time considering the impact of the material sent by the applicants in response to the notice to provide information;

(4) Taken less time applying the information and advice received in preparing the closure notices.

Question (3): Was it unreasonable for HMRC not have withdrawn at an earlier stage?

49. I approach this by asking if it was unreasonable for HMRC not to have done one or more of the things listed immediately above (which would have allowed them to give the closure notices earlier).

(1) Was it unreasonable of HMRC to take advice from counsel? I find that it was not: the applicants in the relevant accounting periods had taken part in a notified tax avoidance scheme and I infer from the documentary evidence that the legal issues to which this scheme gave rise were far from "run of the mill".

(2) Was it unreasonable of HMRC not to have taken advice from counsel at an earlier date? Given that the final information and documents in response to the notices to provide information were provided on 1 February 2016, and it is reasonable that HMRC took some time to consider the impact of that material before taking advice from counsel, I find that that the earliest time that HMRC could have taken counsel's advice was on or around 11 February 2016 (the date by which at least one official of HMRC, Mr Skelley, had come to a view about the impact of the information and documents received). As it was, HMRC did not have their conference with Ms Nathan until one month later, 11 March 2016. This one-month delay fell into two parts:

(a) The two-week delay between arranging the conference (26 February) and holding it (11 March) was due to scheduling constraints. I do not consider it unreasonable of HMRC to have accepted this two-week delay, rather than try to find an alternative counsel who may have had a freer diary.

(b) As to whether it was reasonable of HMRC to take two weeks (from 11 February to 26 February) to arrange the conference – I find that the reason for this delay was the need for Mr Pooley and others in HMRC who had superior decision-making power to Mr Skelley's, to consider the material sent in response to the notices to provide information. In judging whether it was unreasonable of HMRC to have acted as they did in taking this additional two weeks, I must judge HMRC by the standard of a reasonable person in their circumstances. Here, I find that the relevant circumstances of HMRC were those of a large tax administration considering issues arising from a notified tax avoidance scheme, about one month prior to a hearing in the tribunal to consider those issues. I do not consider it unreasonable for such an organisation to have a team of several senior professionals devoted to the task – hence, I do not find it unreasonable that four officers within HMRC (Mr Smith, Mr Skelley, Ms Woolston and Mr Pooley) representing at least three different departments (Appeals and Reviews in Newcastle, Counter-Avoidance in Luton, and the Solicitor's Office in London) were involved. Nor do I find it unreasonable that, due to the sophistication of the issues and the need for all the members of the team to consider the issues, it took two weeks longer than it might otherwise had done, to organise the conference with counsel.

(3) Was it unreasonable of HMRC to take the time they did to consider the impact of the material sent by the applicants in response to the notice to provide information? I have touched on this above and I find that it was not unreasonable.

(4) Was it unreasonable of HMRC to take the time they did applying the information and advice received in preparing the closure notices? HMRC took one week from the conference with counsel to their giving the closure notices. I find this not unreasonable, judging HMRC by the standard of a reasonable person in their position.

50. Thus, applying the framework set out by the Upper Tribunal in *Tarafdar* for cases where one party has withdrawn from the proceedings, I conclude that HMRC's conduct of the proceedings was not unreasonable.

51. Mr Jones' submissions indicated three other possible grounds for my finding that HMRC had acted unreasonably in conducting the proceedings:

(1) The fact that Mr Pooley's email of 16 February 2016 reversed a decision communicated by HMRC to the applicants in Mr Skelley's letter of five days earlier;

(2) the lack of communication from HMRC to the applicants between 16 February and 18 March 2016; and

(3) a general pattern of delay on HMRC's part.

I take these in turn.

Reversal of earlier decision

52. Judging HMRC by the standard of a reasonable person in their position, I find that it was unreasonable conduct for HMRC to have first said, in Mr Skelley's 11 February letter, that they would be writing to the tribunal to advise that HMRC would no longer be opposing the closure notice applications, and then, in Mr Pooley's letter five days letter, to ask that this be disregarded. In my view, this "volte face" (as Mr Jones called it) fell below the required standard: a tax administration in HMRC's circumstances should have been able to avoid unauthorised communications of this kind being made. In deciding whether to exercise my discretion to award costs in respect of this unreasonable conduct (a discretion which I must exercise judicially), I take all the circumstances into account. The following facts in particular appear to me to be relevant:

(1) The incident took place just over a month before the hearing date;

(2) HMRC set the position straight within five days of Mr Skelley's 11 February letter (which included a weekend);

(3) Mr Pooley's email apologised for any confusion which may have been caused;

(4) RPC's response to Mr Skelley's 11 February letter had been to seek confirmation of when the closure notices would be issued, and expressly refuse to withdraw the applications for closure notices until the closure notices had been issued (or an acceptable date for their issuance had been given by HMRC) – in other words, the applicants were aware that further steps needed to be taken.

53. I find that this incident, unreasonable conduct though it was, was an inadvertent, one-off and short-lived "slip" (as Ms Nathan put it), and one that was quickly put right. It did not materially affect the progress of the proceedings. It does not therefore

seem to me an appropriate instance to exercise the tribunal's power to award costs. I decline, therefore, to do so.

Lack of communication

54. The applicants were not informed of the actions HMRC were taking after Mr Pooley's email of 16 February (which said that he would revert back to RPC and the tribunal once he had instructions on the notices to provide information and the closure notices). Given that HMRC's actions during that time were, as outlined above, analysing the information sent to them and taking advice from counsel on it, I do not find it unreasonable conduct on HMRC's part to have waited until those actions were completed, before resuming communication with RPC on 18 March 2016.

Other delays

55. I do not find the other alleged delays by HMRC in the proceedings, apart from those already dealt with above, to rise to the level of unreasonable conduct:

(1) The fact that HMRC's enquiries, prior to the commencement of the proceedings, had taken more than two years, was not in itself evidence that HMRC's conduct of those enquiries had been unreasonable (and still less evidence that HMRC's conduct of the closure notice application proceedings was unreasonable); and

(2) that it was only in their letter of 7 January 2016 that HMRC confirmed that their resistance to the applications for closure notices was linked to the notices to provide information, does not strike me as unreasonable conduct (particularly as RPC had only asked for this confirmation the day before).

Conclusion

56. The application for costs is refused.

57. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

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RELEASE DATE: 1 FEBRUARY 2017