[2017] UKFTT 0488 (TC)

TC05942

Appeal number: TC/2016/06334

INCOME TAX - applicant allegedly implemented icebreaker type-scheme – enquiry opened – no action taken – three years later applicant applies for closure - HMRC then requests information – information not provided – whether reasonable grounds for not issuing closure notice – in absence of evidence on reason for delay, no – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

JÖRG MÄRTIN **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, the Strand, London on 22 May 2017

The appellant in person

J Davey QC, and I Afzal, S Chandler and N Macklam, all Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 19 February 2014, HMRC opened (or purported to open) an enquiry into the applicant's 2012/13 tax return. The letter stated that the enquiry was opened on a protective basis and while HMRC might later require information from the taxpayer, none was required at that time. On 15 July 2016, HMRC opened an enquiry into the applicant's 14/15 tax return. On 15 November 2016, the applicant made an application to the Tribunal to order HMRC to close the two enquiries. On 1 March 2017, HMRC closed the enquiry into the 14/15 return without making any amendment to that tax return.

The law

2. The application was made under s 28A Taxes Management Act 1970 ('TMA') which provided as follows:

> (1) An enquiry under section 9A(1)...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.
>
> In this section, 'the taxpayer' means the person to whom the notice of enquiry was given.
>
> (2) 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.
>
> (3) A closure notice takes effect when it is issued.
>
> (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
>
> (5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b))
>
> (6) The Tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

Background

3. It appeared to be accepted by both parties that the appellant made a claim to loss relief arising out of the activities of Great Marlborough LLP. HMRC's case is that in doing so he had participated in a tax avoidance scheme, very similar to that considered by the FTT and Upper Tribunal in the various *Icebreaker* and *Acornwood* cases ([2010] UKFTT 6 (TC); [2010] UKTU 477 (TCC); [2014] UKFTT416 (TC); [2016] UKUT 361 (TCC); and [2017] UKUT 132 (TCC)). I do not need to, nor do I make any findings of fact about the exact arrangements on which in any event I heard no evidence.

4. It was accepted that apart from various letters passing between the parties, no progress with either enquiry occurred until Mr Märtin applied for closure of them in

late 2016. In response to that application, on 16 January 2017, HMRC wrote to Mr Märtin and the Tribunal opposing the closure of the 12/13 enquiry and presenting Mr Märtin with a long list of information and documents required to be provided to HMRC. It was accepted by Mr Märtin that even as at the date of the hearing, he had not provided the requested documents and information to HMRC.

5. A formal letter notifying closure of the 14/15 enquiry was sent to Mr Märtin on 1 March 2017. It made no amendment to his 14/15 tax return.

Procedural matters

12/13 enquiry

6. Mr Märtin claimed that the 12/13 enquiry was not validly opened although he did not explain his grounds for making this claim. I pointed out that if he was right, the Tribunal would appear to have no jurisdiction to close the enquiry. Mr Märtin elected not to pursue the point in this hearing but reserved the right to raise it in any subsequent proceedings challenging the validity of any amendment to his 12/13 tax return which HMRC might make when the enquiry was closed.

14/15 enquiry

7. In the hearing, Mr Märtin indicated that he did not accept that the Tribunal had no jurisdiction with respect to the 14/15 enquiry. While it had been closed, with no amendments being made, the letter from HMRC dated 1 March 2017 stated that there might be amendments to his 14/15 tax return following the enquiry into Great Marlborough LLP's 14/15 tax return.

8. As I understood Mr Märtin's point, it was that he did not accept that HMRC had actually closed the 14/15 enquiry, because they had indicated that they might make later amendments. Therefore, if the enquiry was not closed, that left scope for the Tribunal to order closure.

9. However, I do not agree with Mr Märtin's premise: on the contrary, I consider that the 14/15 enquiry was closed. The letter of 1 March 2017 clearly stated that the enquiry was complete and that no amendment of the return was needed. It therefore fulfilled the requirements of s 28A(1) and (2)(a). While it did indicate that there might be later amendments to Mr Märtin's 14/15 tax return, it clearly stated that any such amendment would be as a result of the check on Great Marlborough LLP. S28B(4) TMA entitles HMRC to amend a partner's returns following an enquiry into the partnership tax return: that is a quite separate power to the one which enabled HMRC to amend a taxpayer's return after an enquiry into it. So the 14/15 enquiry was closed but there remained for Mr Märtin the possibility that an amendment to his 14/15 tax return made under s 28B(4). This Tribunal has no jurisdiction to prevent such an amendment being made.

10. In conclusion, I find that this tribunal in this hearing had no jurisdiction to order closure of the 14/15 enquiry as it had been closed before the hearing took place.

Bundle

11. Mr Märtin complained that HMRC had not delivered a complete bundle to him by the due date of 14 days before the hearing. HMRC had apologised by letter that due to an oversight they had failed to produce the bundle until a few days after the due date. Further, various inter-parties correspondence which Mr Märtin wanted to be added to the bundle had originally been missing from it. Mr Märtin appeared to accept that he had a complete bundle by the date of the hearing. In any event, he said he did not wish to pursue any complaint on this matter and elected to proceed with the hearing.

Objection to HMRC's schedule

12. About a week prior to the hearing, as an addendum to their skeleton argument, HMRC served on the appellant a schedule setting out, against the list of the documents HMRC had required in their letter of 16 January 2017, HMRC's view of why each item was relevant to the tax enquiry.

13. Mr Märtin asked me to exclude this addendum on the grounds it was served too late. The Tribunal's letter dated 15 December 2016 and sent to HMRC after receipt of the closure application, had directed HMRC to provide to the appellant 'your grounds (if any) for opposing the application and state what evidence you rely on in support of them within one month of the date of this letter'. The addendum was served not served 'til May 2017

14. I found that on 16 January 2017, on the due date, HMRC had served its grounds for resisting the closure application. Those grounds included a general explanation of why the documents requested on the same date were considered relevant, but did not contain the details on the addendum provided in May 2017. The grounds provided in January triggered a response from Mr Märtin in which he questioned the relevance of the documents sought.

15. I consider that, while HMRC were required to state their grounds within one month of notification of the closure application, they were not required to state their grounds in such detail that at the hearing they could add nothing to what they had said in their initial response; moreover, in this case, there had been a subsequent exchange of correspondence between the parties from which it was apparent that Mr Märtin did not accept HMRC's assertion that the documents were relevant. In my view, it was open to HMRC in the hearing to attempt to expand on their case as contained in their grounds of 16 January 2017.

16. Moreover, it had been open to HMRC to make detailed submissions on relevance at the hearing, and they had not been required to give advance notice of this to the appellant as there had not been any directions for skeleton arguments. Despite this, HMRC had served a skeleton including this addendum. Doing so gave Mr Märtin a week's advance notice of what would be said at the hearing. It was his choice whether or not to read it in advance: he had had the opportunity to do so.

17. In all the circumstances, HMRC were permitted to make the detailed submissions on relevance they sought to make in the addendum and Mr Märtin's objection was overruled.

Witness summons

18. On 12 April 2017, some 6 weeks before the hearing, Mr Märtin applied to the Tribunal for a witness summons against 4 HMRC officers. This application did not comply with the Tribunal's practice statement on requests for witness summons, in particular because he had not approached the witnesses in advance to request voluntary attendance. It seems he made this error because a telephone enquiry with the Tribunal had elicited the mis-information that there were no rules on how to apply for witness summons. Then, compounding its mistakes, the Tribunal failed to refer Mr Märtin's application to a judge until 11 May, making it impossible for me, even if Mr Märtin rectified the application, to grant the application in good time before the hearing on 22 May.

19. I indicated before the hearing that I would consider the application for witness summons at the outset of the hearing and that, if granted, it might lead to postponement of the hearing. In the event, Mr Märtin elected (with HMRC's consent) to hear HMRC's case first, so that he could decide whether he still considered the witnesses' evidence relevant to the issue before the Tribunal. Having heard HMRC's case, he withdrew his application.

20. I note, in passing only as that application was withdrawn, that there was some question over the relevance of the witnesses' evidence. Mr Märtin originally indicated that he wanted to call them to prove that there was no enquiry in Great Marlborough LLP's 12/13 tax return: however, this was not in dispute. So the evidence was not relevant on that point.

21. Nevertheless, it remained Mr Märtin's case that the four witnesses could give relevant evidence about why HMRC did nothing to progress the enquiry into his tax return for three years: it seems he wanted to suggest to them that they had done nothing in order to delay making the repayment to which (he considered) he was entitled. However, taking into account it was for HMRC to establish if they could reasonable grounds not to order closure, Mr Märtin decided he did not wish to call witnesses.

Mr John Nisbet's witness summons

22. An adviser to Mr Märtin, Mr John Nisbet, produced a written witness statement for the hearing. He was not available to give evidence as he was on holiday (due to the fact that the Tribunal booked the hearing on a date outside the dates of the hearing window). HMRC did not object to the admission of the witness statement, on the grounds that the content of it was not in dispute.

23. Mr Nisbet gave evidence in his statement about HMRC's earlier stated belief that there was an enquiry into Great Marlborough LLP's 12/13 tax return, and their

ultimate acceptance in September 2016 that there was not. I accept this evidence: it was not in dispute.

Status of information request

24. There was some dispute between the parties (and indeed originally amongst various representatives of HMRC) whether the January 2017 information request was an 'information notice' within the meaning of Sch 36 Finance Act 2008. Mr Märtin maintained that it was not and Mr Davey maintained that it was. In any event, it was clear that Mr Märtin did not consider that it was a Sch 36 notice and had not attempted to appeal it to this Tribunal.

25. I do not determine whether or not it was a Sch 36 information notice. The answer to that question was not relevant to this application. What was relevant is that it was not in dispute that HMRC had requested information and documents from the applicant which it had not received. Whether HMRC could impose a penalty under Sch 36 for failure to comply with an information notice was not a question for this hearing.

Reasonable Grounds

The taxpayer has failed to provide HMRC with any information about the tax loss claim he has made

26. HMRC must satisfy me that there are reasonable grounds to keep the enquiry open or I must order closure. The grounds which they put forward is that the taxpayer had not provided them with the relevant information and documents for which they had asked.

27. In particular, as I have said, it was not in dispute and I find that on 16 January 2017, HMRC sent a request for information to the appellant. They requested the information be provided by 17 February 2017. Mr Märtin accepted that he had not provided any of the documents and information requested by the due date or indeed at any time.

28. One of Mr Märtin's complaints was that the information requested was voluminous. However, he made no real attempt to persuade me that the information requested was excessive. It appeared to be accepted that Mr Märtin was, or purported to be, an active partner in a loss-making LLP and was claiming a very substantial tax relief. It was to be expected that there would be a great deal of relevant paperwork.

29. Another of his complaints was that the information requested was not relevant. Again, he made no real attempt to persuade me that it was not relevant: he did not point to any particular item and make out a case it was not relevant. On the contrary, as I have discussed at §§12-17, HMRC had prepared a schedule which set out the relevance of each and every item of the request and I accept, based on that, each and every item was relevant to the tax enquiry.

30. I find HMRC's information request was for relevant information and was not an excessive request.

31. Should an closure application be refused when the taxpayer has failed to provide relevant information that has been requested? In a case where the taxpayer's potential tax liability was unquantified ordering closure would put HMRC in a difficult position as they would not have the necessary information to even know to what figure to amend the tax return. But in this case that was not an issue: the loss claimed by Mr Märtin was precisely quantified and known to HMRC. It would be possible to issue a closure notice denying the exact amount of the tax relief claimed.

32. Indeed, HMRC accepted that if I granted Mr Märtin's application, they would close the enquiry, but almost certainly by amending Mr Märtin's tax return to exclude the claimed loss. Although they had no paperwork, it was clear that they considered Mr Märtin had participated in an icebreaker scheme similar to the one in *Acornwood* and that it was likely (in their view) he was not entitled to the claimed loss relief.

33. Moreover, if they closed the enquiry by amending the tax return to exclude the tax relief claim, that would give Mr Märtin only two options. Either he would have to give up his claim to the tax relief or he would have to appeal the closure notice. If he appealed the closure notice, the burden would be on him to prove his entitlement to the loss relief he had claimed, and he would be unable to do so in the absence of evidence supporting his claim. Moreover, the Tribunal could compel disclosure of all relevant documents in any event. So in reality, whether I ordered closure or not, in all likelihood Mr Märtin would have to produce the information and documents requested to stand any chance of obtaining the relief, so why not order closure?

34. On the other hand, even where a quantified sum was in dispute, HMRC should not ordinarily be obliged to make an assessment where the taxpayer has not provided the relevant information which he holds. As I said in *Price* [2011] UKFTT 624 (TC)*:*

> [10] ...HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)."

This was mentioned with approval by Judge Sinfield in *Michael* [2015] UKFTT 577 (TC) who also said:

> [30]We consider, however, that it would not be appropriate in this case to direct that HMRC must issue a closure notice when it is clear that further information is or may be available that will affect Mr Michael's liability to tax. .... Requiring HMRC to close the enquiry now would mean that they would be bound, on the evidence available to them, to amend the return .... In that situation, Mr Michael would have to

> appeal. If it can easily be established that the payments of rent are not his income ... then the issue of the closure notice at this stage and the making of an appeal would be a waste of everyone's time. Accordingly, we are satisfied that HMRC have reasonable grounds for not giving a closure notice now.

35. Therefore, the taxpayer's undisputed failure to provide the information would ordinarily be sufficient 'reasonable grounds' for this Tribunal to refuse to issue the requested closure notice even where the tax at stake is quantified, as it is here. However, the taxpayer's response was that even if the information was relevant, it was far too late for HMRC to be requesting it nearly three years after the enquiry was opened.

Information request too late?

36. Mr Märtin's view was that even if HMRC would have been entitled to ask for the documentation at the outset of the enquiry, they had procrastinated for three years. It was not right, said Mr Märtin, that HMRC could open an enquiry, do nothing for three years, and then present the taxpayer with a request for information in response to his application to close the enquiry.

37. I agree with Mr Märtin that the legislation was intended to give the tribunal the ability to protect taxpayers from unnecessarily protracted enquiries. While HMRC would ordinarily be entitled to the relevant information and documents in the taxpayer's hands before being required to close an enquiry, that would not necessarily be the case where, for instance, HMRC had procrastinated. I agree with what I said in *Price:*

> [40]We recognise that it may be appropriate to order a closure notice without full facts being available to HMRC where, for instance, HMRC have unreasonably protracted the enquiry. HMRC should not open an enquiry and then first ask for documents 3 years down the line without a reasonable explanation. In this case, as already mentioned, we find they have not acted unreasonably in proceeding with a sample of cases and this was with the agreement of Mr Price's advisers. Mr Price must therefore be taken to know that this was how HMRC was proceeding and cannot claim HMRC have been dilatory in not asking for his documents up until the point that he notified them (by asking for a closure notice) that he was no longer content to wait for HMRC to make a decision on the sample cases.

It seems to me that where there has been a significant delay by HMRC in pursuing an enquiry, it is for HMRC to give a good reason for the delay. They must show the 'reasonable grounds' for not ordering closure to the enquiry, and it is difficult to see that it would be reasonable to prolong an enquiry which had been unreasonably protracted, particularly when closing the enquiry does not prevent them refusing the applicant the loss relief to which they consider he may not be entitled.

HMRC's submission

38. HMRC's position is that the three year delay was justified. There were well over a 1,000 taxpayers who had participated in icebreaker schemes involving around 50 different LLPs. Each taxpayer's entitlement to the tax loss relief depended on (a) whether the LLP traded with a view to profit; and (b) whether the individual partners were entitled to claim a relief based on losses made by the LLP, which depended on whether the individual was an active partner and on his motivation in entering into the arrangements (citing *Acornwood* [2016] UKUT 361 (TCC) and *Seven individuals* [2017] UKUT 132 (TCC)).

39. In these circumstances, HMRC had decided to concentrate on the position of the various LLPs; so far as Mr Martin was concerned, HMRC had for some years operated on the mistaken belief that there was a valid enquiry into Great Marlborough LLP, which was the partnership whose losses for which Mr Martin claimed relief. HMRC had operated on the basis that that enquiry had to be resolved before HMRC needed to consider each individual partner's position. Further, in any event, although there were no lead cases, HMRC considered that individual taxpayers, such as Mr Martin, would be likely to accept the outcome of the litigation in *Icebreaker* and *Acronwood* on this kind of tax avoidance scheme, so until that litigation was resolved, HMRC did not need to trouble the taxpayers with providing voluminous documents and information that might ultimately never be needed.

40. However, HMRC now understood that there was no valid enquiry into Great Marlborough LLP's 12/13 tax return and further, receipt of Mr Martin's application for closure indicated that Mr Martin at least did not intend to wait for the final outcome of the litigation, so HMRC was prepared to consider Mr Martin's individual tax position and to that end had requested the documents and information they needed.

41. The difficulty for HMRC is that while this was their *submission* on why the officers of HMRC had opened the enquiry into Mr Märtin's 12/13 tax return and then failed to request any information from him for three years, and moreover one that on its face was quite plausible, this was not given to me in the form of evidence. There was no written or oral evidence from any officer. Indeed, I was informed that the officers concerned with the enquiry were in the hearing room but HMRC did not intend them to give evidence.

Evidence to support HMRC's case?

42. I note that in *Michael* HMRC officers similarly opted not to give evidence but the Tribunal proceeded on the documentary evidence, and in particular the inter-parties correspondence before the Tribunal. Here, there is inter-parties correspondence the existence and contents of which does not appear to be in dispute; but the veracity and reasonableness of the explanations given in those letters by HMRC is not accepted by Mr Märtin. He clearly wished to cross examine the officers and did not accept what they said in their letters but HMRC's choice not to call witnesses deprived him of the opportunity to test HMRC's case on the reasons for the delay.

43. In particular, Mr Märtin does not accept, as I understand it, that HMRC officers were under the mistaken impression that an enquiry into Great Marlborough LLP for 12/13 was open, or that if they had made such a mistake that it was a reasonable one to make; he also considered that they knew that he did not wish to wait for the outcome of the Icebreaker/Acornwood litigation before his own tax position was resolved as they knew he did not accept that the outcome of it would be binding on him (and indeed HMRC's case was that each taxpayer's appeal was fact specific); and lastly it was his position that information was only requested as a delaying tactic, to put off the day when HMRC would have to pay him the tax refund he considered he was owed and/or in retaliation for his taking the initiative in seeking closure.

44. The critical factual question is why HMRC did not seek any information or documents from the taxpayer for the first three years of the open enquiry. As I have said, even if the documents/information are clearly relevant to the enquiry, HMRC should not procrastinate. They may have a good reason for the delay in this case: indeed, if they could prove the case I have set out at §§38-40 above, that might well be a good reason for the three year delay. But HMRC must prove the facts on which their submission relies. Here, the appellant does not accept the reliability of what HMRC said in the various letters in evidence before me; I had no written or oral evidence from the officers, (despite some of them being present in the hearing room). So I have no evidence on which I can conclude that the disputed factual position is as HMRC represent it to be.

45. I have therefore not been satisfied <u>in the absence of evidence</u> that HMRC's three year delay in asking for the relevant documents/information was justified; and it seems to me that unless the delay is justified, the closure application ought to be granted.

46. In other words, while I agree with what I said in *Price*, this case appears to fall on the other side of the line. In *Price,* the information and documents were requested by HMRC at the outset of the enquiry; here, they have not been requested for 3 years in circumstances where HMRC have not proved that the 3 year delay was for a good reason.

47. I order closure of the enquiry within 30 days of the release of this decision.

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.

BARBARA MOSEDALE
TRIBUNAL JUDGE