Neutral Citation: [2023] UKFTT 00127 (TC)

Case Number: TC08732

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2020/02496,
TC/2020/02497
TC/2020/02498

INCOME TAX – application for closure notices – enquiries first opened in 2014 - application of Chapter 2, Part 13, Income Tax Act 2007 to offshore transactions – whether reasonable for HMRC to continue with their queries – whether HMRC are able to make an informed judgment – closure notice directed - section 28A Taxes Management Act 1970

Heard on: 26 May 2022 and 28 November 2022
Judgment date: 16 February 2023

Before

TRIBUNAL JUDGE ALEKSANDER

Between

JONATHAN HITCHINS (1)
JEREMY HITCHINS (2)
TM HITCHINS AS EXECUTOR OF STEPHEN HITCHINS (3)

Applicants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Keith Gordon, counsel, instructed by Crowe UK LLP

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

DECISION

INTRODUCTION

1. The form of the hearings was V (video) using the HMCTS video hearing service. The documents to which I was referred were an electronic hearing bundle of 1130 pages, a supplementary bundle of 308 pages, and an additional supplementary bundle of 21 pages.

2. Prior notice of the hearings had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearings remotely in order to observe the proceedings. As such, the hearings were held in public.

3. At the hearings, Mr Gordon represented the Applicants, and Ms Choudhury represented HMRC.

4. Witness statements were produced from William Rolls, an HMRC officer, and John Cassidy, a partner at Crowe UK LLP, and each of these witnesses gave oral evidence and was subject to cross-examination.

5. The applications were originally listed to be heard for one day on 26 May 2022. However, it was only possible to hear the evidence of the two witnesses on that date, and there was insufficient time for submissions. I therefore gave directions for a further one day hearing to be listed for the purpose of hearing the submissions of the parties. The parties indicated that it might be possible for them (in the light of the evidence given) to reach agreement on disclosures which would settle the application and avoid the need for the further hearing. But in the event, the parties were unable to reach agreement, and the second day of the hearing went ahead on 28 November 2022.

APPLICATION

6. The Applicants have applied under s28A Taxes Management Act 1970 ("TMA") for closure notices in respect of open enquiries into their self-assessment tax returns for the years set out below.

Jeremy Hitchins ("Jeremy")

Tax Year	Enquiry Opened	Date of Application
2017/18	14 October 2019	24 July 2020
2018/19	20 October 2020	28 October 2020
2019/20	2 December 2021	11 February 2022

Jonathan Hitchins ("Jonathan")

Tax Year	Enquiry Opened	Date of Application
2017/18	14 October 2019	24 July 2020
2018/19	20 October 2020	28 October 2020
2019/20	2 December 2021	11 February 2022

Stephen Hitchins (dec'd) ("Stephen")

Tax Year	Enquiry Opened	Date of Application
2012/13	17 October 2014	24 July 2020
2013/14	1 December 2015	24 July 2020
2014/15	24 June 2016	24 July 2020
2016/17	6 November 2017	24 July 2020
2017/18	14 October 2019	24 July 2020
2018/19	20 October 2020	28 October 2020

2019/20	19 January 2022	11 February 2022

7. Section 28A(4) TMA permits a taxpayer to apply to this Tribunal for a direction that HMRC issue a closure notice within a specified period. Section 28A(6) provides that the Tribunal is obliged to give such a direction unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. The burden is on HMRC to show that there are reasonable grounds for refusing the applications.

8. Judge Falk (as she then was) helpfully summarised the case law relating to closure notices in *Beneficial House (Birmingham) Regeneration LLP & Stanley Dock (All Suite) Regeneration LLP v HMRC* [2017] UKFTT 801 (TC), at [15]:

> There was no dispute as to the relevant principles to apply. Both parties referred to my decision in *BCM Cayman LP and others v HMRC* [2017] UKFTT 226 (TC), which reviewed the relevant case law. I would also refer to the subsequent Upper Tribunal decision in *Frosh and others v HMRC* [2017] UKUT 320 (TCC). In summary:
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> (1) The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a "reasonable balance" to HMRC's substantial powers to investigate returns (*HMRC v Vodafone 2* [2006] STC 483 at [33] and [34]) and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry (*Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]). The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case (*Frosh* at [43]). This involves a balancing exercise.
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> (2) The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer (*Jade Palace Limited v HMRC* [2006] STC (SCD) 419 at [40]).
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> (3) The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified (*Eclipse Film Partners*, and *Jade Palace* at [42] to [43]). It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry: see *Steven Price v HMRC* [2011] UKFTT 264 (TC) at [40].
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> (4) A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry. What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an "informed judgment" of the matter (*Eclipse Film Partners* at [19]).
>
> (5) If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate: see for example *Steven Price*, and also *Andreas Michael v HMRC* [2015] UKFTT 577 (TC). The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case: *Frosh*.
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> (6) The Supreme Court's comments on the subject of closure notices in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 are

> highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice 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", although where the facts are complicated and have not been fully investigated the "public interest may require the notice to be expressed in more general terms" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In *Frosh* the Upper Tribunal commented at [49] that a closure notice in broad terms is "not the norm" and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable.

9. I was also referred by Mr Gordon to the decision of this Tribunal in *Gulliver v HMRC* [2017] UKFTT 222 (TC) as being particularly apt to the circumstances in this case:

> 14. Section 28A(4) of TMA 1970 permits a taxpayer to apply to the Tribunal for a direction that HMRC issue a closure notice within a specified period. Section 28A(6) provides that the Tribunal is obliged to give such a direction unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. In considering whether there are "reasonable grounds", I will consider both the extent to which HMRC's queries are relevant to their enquiries and the extent to which Mr Gulliver has answered those queries. Both of those issues need to be considered since, if HMRC have raised reasonable and relevant queries which Mr Gulliver has not answered, that may well establish a "reasonable ground" for not directing HMRC to close the enquiry. By contrast, if HMRC have not received answers to questions that are unreasonable or irrelevant, that is unlikely of itself to constitute a "reasonable ground" of the kind referred to in s28A(6).

BACKGROUND FACTS

10. These enquiries have long history. In relation to Stephen, they started some eight years ago, and the underlying events into which HMRC are enquiring go back nearly 20 years.

11. In fact, this is not the first enquiry by HMRC into the tax affairs of the Applicants. One of the Applicants' submissions is that the underlying events under enquiry had been fully disclosed to HMRC between 2006 and 2008 in the course of a previous enquiry which had been closed by Officer Rolls without any amendments in January 2011.

12. Officer Rolls' explanation for the current enquiries is that the previous enquiries had not considered the potential application of Chapter 2, Part 13, Income Tax Act 2007 ("ITA 2007") relating to "transfers of assets abroad" ("ToAA"). In the period since the current enquiries were started, their scope has narrowed, and are now concentrated on two offshore structures – one relating to the Robert Hitchins Group Limited ("RHG"), and the other to investments in properties in Spain. Officer Rolls believes that there are various transactions and associated operations involving these structures which might give rise to ToAA liabilities.

13. The Applicants' position is that they come from a wealthy family and have benefited from substantial gifts from their late parents. They submit that the historic events being investigated by HMRC are not relevant for the ToAA legislation.

14. During the course of the enquiry, HMRC have issued six Schedule 36 information notices in respect of Stephen's tax returns. In each case, he answered those questions that he considered were relevant to the returns under enquiry, and entered into correspondence in relation to the questions in dispute. In each case these notices were either subsequently withdrawn or the subject of successful appeals in respect of the disputed items. The last two of these notices were

withdrawn in February 2020 following the provision of information by Mr Cassidy in a witness statement (a copy of which was included in the bundle) given in relation to appeals against those notices.

15. In May 2020, Officer Rolls decided to issue notices under s748 ITA 2007. Officer Rolls' motivation in deciding to seek information using the s748 procedure is not wholly clear, and there was possibly some confusion about time limits applying to Schedule 36 notices. But the impression given to me by Officer Rolls' response to questions in cross-examination was that he had become frustrated with the Schedule 36 process: the fact that the taxpayer had rights of appeal, and that he had had to withdraw notices that he had previously given. In contrast, notices given under s748 cannot be appealed. In his evidence Officer Rolls said that he chose to pursue s748 notices as he believed that overall he would obtain the information he was seeking within 3 months - which would be faster than if he issued Schedule 36 notices that could be appealed. He did not appreciate that the taxpayer could apply for judicial review (or did not appreciate that the Applicants would actually apply for judicial review).

16. Officer Rolls said that s748 notices can only be authorised by the HMRC officer with responsibility for the operation of the ToAA legislation, and that obtaining a s748 notice is not an easy or quick process, as a comprehensive dossier has to be filed with that officer, who will only authorise the issue a s748 notice if he believes it is merited. So, pursuing a s748 notice is not as straightforward as issuing a Schedule 36 notice.

17. A s748 notice was issued to Jeremy on 2 October 2020, but due to administrative oversight, notices were not issued to either Stephen or Jonathan. An application for judicial review was made to the High Court on 18 December 2020. On 18 May 2021, Jeremy's solicitors, Reynolds Porter Chamberlain LLP ("RPC"), wrote to HMRC providing some of the information sought in the s748 notice. The application for judicial review was refused on the papers on 14 July 2021.

18. Officer Rolls only discovered towards the end of 2021 that no s748 notices had been issued to either Stephen or Jonathan, so on 10 December 2021, s748 notices were issued to Jonathan and to Stephen's executors (Stephen had died on 13 August 2021).

19. RPC responded to many of the outstanding questions in the s748 notice on 28 January 2022, However, as at the date of the first hearing (26 May 2022), some information remained outstanding, and Officer Rolls issued penalties to Jonathan and Jeremy for failure to comply with the notices. In between the first hearing and the second hearing (28 November 2022) the remaining information was provided, and the penalty notices were withdrawn.

Robert Hitchins Group

20. RHG was founded by the Applicants' father – Robert Hitchins. The company was incorporated in December 1960 and the two subscriber shares were transferred, and a further 98 shares allotted, to Robert and his wife Ada in 1962. They were resident in the UK at the time. In 1974 they emigrated to Guernsey, where they remained resident and domiciled until their deaths in 2001 and 1997 respectively.

21. It appears that RHG was a very successful company. By way of example between March 1999 and March 2005 the company's P&L reserves grew from £46m to £84m, and its net assets increased from £49m to £86m.

22. By 1984, RHG's issued share capital was divided into 100 ordinary shares and 100 deferred shares. Through a series of transactions, all the ordinary shares and 99 deferred shares became owned by Bay Investments Limited ("BIL") (a company incorporated and resident in Bermuda) and the other deferred share was owned by Investments Bermuda Limited ("IBL")

(a company incorporated and resident in Bermuda). The shares in IBL and BIL were owned by Robert.

23. In 1999, Robert settled the shares in BIL and IBL into a discretionary trust managed and resident in Guernsey, The Hitchins Family Settlement ("the Settlement"). HMRC have not been provided with details of the Settlement's beneficiaries or the nature of their interests, but Officer Rolls believes that the Applicants are all beneficiaries. In addition to the Settlement, the Hitchins Declaration of Trust ("the Trust") was established outside the UK following a reorganisation of the Settlement.

24. The Applicants are (or in the case of Stephen, were) directors of RHG, but have never been shareholders of RHG.

25. The accounts of RHG for the year ended 31 March 2004 show that it paid a dividend of £40,000,000. HMRC's enquires are mainly focussed on whether this dividend (and its onward transmission) could give rise to a charge under the ToAA legislation.

26. In the course of an appeal against one of the many Schedule 36 notices, Mr Cassidy stated in his witness statement that the £40m dividend declared by RHG was not paid to Bay Group Limited ("BGL") (a company incorporated and resident in Bermuda). However, he did not state to whom the dividend was paid.

27. Officer Rolls referred in his witness evidence to the list of shareholders set out in RHG's form 363a Annual Return dated 14 February 2004 which he extracted from Companies House. These are as follows:

Shareholder	**Class and number of shares held**	**Class and number of shares transferred**	**Date of registration of transfer**
Bay Almanzora Ltd	Ord 0	Ord 999899	28/03/2003
	Def 0	Def 100	28/03/2003
Bay Holdings Ltd	Ord 0	Ord 999899	20/08/2003
		Ord 999900	04/11/2003
	Def 0	Def 100	20/08/2003
		Def 100	04/11/2003
Bay Group Ltd	Ord 999900		
	Def 100		
Investments Bermuda Ltd	Ord 0	Ord 1	25/08/2003
Relkeel Ltd	Ord 0	Ord 999900	21/10/2003
	Def 0	Def 100	21/10/2003

28. In their May 2021 letter, RPC state that Bay Holdings Limited changed its name to Bay Almanzora Limited, and another company called Bay Holdings Limited was incorporated. Officer Rolls did not believe RPC, because a commercial database to which he had access states that Bay Almanzora Limited was incorporated on 25 March 1999, whereas RPC in their letter state that it was incorporated in 2003. The Applicants submit that as Officer Rolls did not interrogate the Bermuda company registry directly, it is possible that the information held in

the commercial database is wrong, which is why there is an inconsistency in the incorporation dates.

29. Officer Rolls interprets information in the 363a return as recording the following steps:

(a) Step 1 - 28/03/2003: Bay Almanzora Limited ("BAL") received 999,899 ordinary and 100 deferred shares in RHG from Bay Holdings Limited ("BHL").

(b) Step 2 - 20/08/2003: The shares in BAL were transferred to (New) Bay Holdings ("NBH")

(c) Step 3 - 25/08/2003: IBL transferred 1 ordinary share to BGL

(d) Step 4 - 28/08/2003: A £40m dividend was paid to NBH.

(e) Step 5 - 21/10/2003: NBH transferred 999,899 ordinary & 100 deferred shares to Relkeel Limited ("Relkeel")

(f) Step 6 - 04/11/2003: NBH transferred 999,899 ordinary & 100 deferred shares to BGL.

(g) Step 7 - 10/11/2003: £40,103,381.10 passed from NBH to Relkeel, which was RHG's immediate parent company at the time.

(h) Step 8 - 10/11/2003: There was a distribution of £40m to BGL on the liquidation of Relkeel.

30. BAL, BHL, and NBH are all incorporated and resident in Bermuda. Relkeel is incorporated and resident in the UK.

31. The position of the Applicants is that Officer Rolls has misinterpreted the information shown in the 363a return. The Applicants submit that on 27 March 2003, BAL (previously called Bay Holdings Limited) owned 999,899 ordinary shares and 100 deferred shares in RHG, and IBL owned 1 ordinary share in RHG. The following events then took place:

(a) On 28 March 2003, BAL transferred its entire shareholding in RHG to NBH (the newly incorporated company with the name Bay Holdings Limited). The shares in NBH were owned by the Settlement.

(b) On 20 August 2023, NBH transferred its entire shareholding in RHG to its wholly owned subsidiary Relkeel.

(c) On 25 August 2003, IBL transferred its entire shareholding in RHG to Relkeel. At this point Relkeel was the sole shareholder in RHG.

(d) On 28 August 2003 RHG paid a £40m dividend to its sole shareholder Relkeel.

(e) Relkeel was then liquidated and the £40m distributed in the liquidation to its shareholder NBH

(f) On 21 October 2003, Relkeel transferred its entire shareholding in RHG to NBH – and although I have no express evidence on the point, this would be consistent with the RHG shares being distributed *in specie* in Relkeel's liquidation to NBH.

(g) On 6 October 2003, BGL was incorporated and on 4 November 2003 NBH transferred its entire shareholding in RHG to BGL.

(h) NBH was then liquidated and the £40m distributed in its liquidation to the trustees of the Settlement.

(i) At some later stage, the shares in BAL were transferred to the Trust.

32. I find that the Appellants' submission is consistent with the information in the 363a shareholder lists, with Mr Cassidy's evidence, and with the letters sent to HMRC by RPC. I have no reason to believe that the information provided by RPC is wrong and HMRC do not challenge the reliability of Mr Cassidy's evidence.

33. I find that Officer Rolls has misinterpreted the information contained in the 363a list – for example his step list does not address the transfer of RHG shares by Relkeel that occurred on 21 October 2003 and which is recorded against Relkeel's name in the 363a list. In consequence I find that his beliefs as set out above are based on a false premise. His confusion may have arisen because the shareholder list in form 363a only shows the holding of each shareholder as at the date of the form, and the number of shares that the shareholder has disposed of since the previous form 363a was filed. It does not show the number of shares acquired in that period by the shareholder.

34. The evidence before me is that the £40m distribution received by the Settlement was appointed to a beneficiary or beneficiaries (not named) before 2005. The Applicants state that none of them were recipients of the amount distributed. This is supported by letters from the trustees of the Settlement confirming that no distributions or benefits were paid to the Applicants or their families in the relevant tax years. The Applicants refuse to give details of the recipient(s) on the grounds that this information is not relevant to enquiries into the Applicants' tax liabilities.

35. There were some further transactions which Officer Rolls submits were associated operations in the form of the creation of Foxseal Limited (UK), St Ledger Limited (Bermuda) and Foxseal Limited (Bermuda). A mixture of cash and shares were distributed out through Foxseal Limited to Stephen on 2 April 2003 while he was temporarily non-UK resident during the year 2002/03, totalling £7.42m.

36. As regards the Foxseal and St Ledger transactions – RPC in their letter of May 2021 stated that St Ledger Limited held cash and investments representing income received by the Settlement. Foxseal (UK) Limited was the parent company of St Ledger Limited. Foxseal Limited was the parent of Foxseal (UK) Limited, and the shares of Foxseal Limited were owned by the Settlement. In 2002/3 a distribution of £7.42m was made by St Ledger Limited to Foxseal (UK) Limited, and then by Foxseal UK Limited to Foxseal Limited. The distribution was then paid to Stephen. Following the payment of the distribution to Stephen, the shares in Foxseal Limited were transferred to the Trust.

Spanish Properties

37. In the 1990s, the Applicants started a number of companies in Spain involved in the construction and running of a holiday resort. The Spanish companies are owned by a holding company Bay Holland BV (“BH”) based in the Netherlands. Bayantilles NV ("BA") owns 100% of the shares of BH. BA is based in Curacao.

38. Stephen acquired three rental properties in Spain from BH group companies in 2009/10. These were contributed to Spanish companies in exchange for an issue of shares in 2011/12. The Spanish companies were sold to Whitesky Co (as trustee of the "B Settlement") in 2012/13. Mr Cassidy's evidence was that the sale took place at full market value based on independent valuations. His evidence on this point was unchallenged.

39. Mr Cassidy's evidence was that the accounts of the Spanish companies show that they have consistently made losses and have never paid any dividends.

40. Significant payments of interest have been paid by the Spanish companies to the Applicants. It is not disputed that this interest has been appropriately declared on the Applicants' tax returns.

ToAA

41. HMRC are concerned whether liabilities under the ToAA legislation arise in respect of these various entitles.

42. Officer Rolls believes that the following transactions are relevant for the ToAA legislation:

> (a) The transfer of RHG shares from BHL to BAL on 28 March 2003 is a relevant transfer if, as appears to be the case, BAL was incorporated on 25 March 1999. This is because an income stream would have moved from BHL to BAL. The shares in BAL were subsequently transferred to the Trust. The shares in BAL were later transferred back to the trustees of the Settlement.
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> (b) The transfer of shares on 20 August 2003 in BAL to NBH is a relevant transfer because an income stream would have moved from one to the other. On 28 August 2003, £40m was paid by RHG to NBH.
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> (c) The transfer of shares on 21 August 2003 from NBH to Relkeel and the payment of £40,103,381.10 from the former to the latter on 10 November 2003. This is an associated operation as opposed to a relevant transfer because Relkeel Ltd was UK resident and therefore not a "person abroad".
>
> (d) The transfer of shares in NBH to BGL and the distribution of £40m from Relkeel Limited to BGL on 4 November 2003 was a relevant transfer.

43. HMRC are not seeking to apply the ToAA legislation so as to tax the £40m distribution in the year it was made. HMRC are instead seeking to establish whether any relevant transfers were made or procured by any of the Applicants that led to the receipt and/or further use of that sum so that the requirements were met that there be a relevant transfer resulting in income arising to a person abroad which they had power to enjoy, or they received a benefit, for the years under enquiry.

44. Officer Rolls believes that the associated operations/transactions relating to the Foxseal companies had the aim of transferring assets from the Settlement to Stephen while he was non-resident in the UK. HMRC are not arguing that the £7.42m distributed to Stephen ought to have been taxed on receipt. Instead, they wish to determine whether the receipt of that sum when Stephen was non-resident meant he had the power to enjoy income arising to a person abroad. However, it is not clear to Officer Rolls on the basis of the current available information whether he was the transferor in respect of that income.

45. As regards the Spanish properties, HMRC are seeking to determine whether a charge arises under the ToAA legislation in any of the years in respect of which enquiries have been opened. However, without a full understanding of the offshore structures referred to above, HMRC submit that they cannot determine with any certainty whether those conditions are satisfied in the absence of additional information about the Spanish structures. HMRC wish to understand whether any of the Applicants received benefits from this structure which would be subject to tax under s731, notwithstanding the fact that the distribution received by Stephen of £7.4m while he was temporarily non-resident does not in itself give rise to a tax charge.

46. HMRC submit that they require the further information in order to be able to close their enquiries which I summarise as follows:

(a) Financial statements for the Settlement and any other entities entitled to the £40m distribution. The Applicants' response is that no such statements are available for years prior to 2012/13, and that statements for 2012/13 are irrelevant as the relevant funds left the Settlement many years previously. In response HMRC have asked for the names and addresses of the entity(ies) to whom the £40m distribution passed, and confirmation of whether those recipients retained the £40m, or passed it onwards.

(b) HMRC have also said that it would be helpful to have a copy of the trust deed for the Settlement.

(c) Do the Settlement trustees have the power to transfer capital to trusts of which the Applicants and their families can benefit and whether the Applicant's families are or could become beneficiaries of such trusts. The response of the Applicants is that in theory the answer for any discretionary trust is "yes", but this is irrelevant given that the actual distribution occurred in around 2005.

(d) Whether any of the Applicants received or are entitled to receive a distribution or benefits from the kind of trust mentioned above. If there is no such entitlement because the funds have been paid away, details of the ultimate recipients. The response of the Applicants is that they have received no such distribution themselves, and that the details of who may have received such distributions is irrelevant to the determination of the open enquiries into their tax returns.

(e) Financial statements for the Spanish property development companies, their parents (BH and BA), and the trust which has ultimate ownership of this structure. The Applicants' response is that the request is unfocussed and appears to request all accounts for all time.

47. HMRC submit that without this information, any closure notice that they might issue would be in vague and uninformative terms. HMRC are not at present able to set out whether, and if so how, a charge arises under the ToAA legislation. Nor are they in a position to quantify the amount of additional tax which would be due. As pointed out in *Frosh v HMRC* [2017] UKUT 320 (TCC), while it is possible to have a closure notice in broad terms, this should not be considered to be the norm. In *Archer v HMRC* [2018] STC 38, the Court of Appeal stated at [22] that a closure notice should state the amount of tax due (but it could, however, be an estimate).

48. HMRC submit that the crucial missing information is the ultimate destination of the £40m distribution, and whether a liability arises under s721 or under s732 for an Applicant in respect of the years under enquiry. A charge could arise under s720 if any of the Applicants were a quasi-transferor. HMRC say that it is possible that as the Applicants were directors of one or more of companies through which the monies passed, they could have used their influence as directors (regardless of their lack of shareholding) to procure transfers of the shares, in such a way that they could benefit from them over and above the direct distribution of dividends. If there is an income charge under s721 it will be in the year the income arose and if there is a benefits charge under s732 it will be the year in which the benefit arose and can be matched to available relevant income within the offshore structure.

49. The position of the Applicants is that the transfer of shares in RHG to BIL and IBL was originally made by the Applicants' father almost 50 years ago. He, not his three sons, was the settlor of the Settlement, which has been the ultimate owner RHG since 1999. Ultimate ownership of RHG has been with non-UK residents since 1974, with the current ultimate owner, the Settlement, being the same owner of the RHG shares both before and after the

payment of the £40m dividend. Following the payment of the dividend, the funds as a matter of fact moved up the chain of ownership to the Settlement irrespective of anything that happened in the ownership chain. In summary, RHG and each intermediate entity was at the relevant times always ultimately owned by the same trust that received the dividend monies. Each of those entities was under the control of its shareholders, and eventually the Settlement, not the Applicants.

50. As regards the Foxseal dividend, this was paid in April 2003. Therefore, it could not have been derived from the RHG dividend, which was paid in August 2003.

Discussion

51. It became clear in the course of the submissions that the parties disagree about how the ToAA legislation is to be interpreted, and how it applies to the facts in this case. I agree with HMRC's submission that I should not determine whether HMRC's interpretation of the legislation is correct, in order to avoid entering into the kind of debate that the Court of Appeal criticised in *Eastern Power Networks plc v HMRC* [2021] 1 WLR 4742. I have proceeded on the basis that HMRC's interpretation of the legislation is arguable – and any decision as to whether it is in fact correct would be for the Tribunal hearing an appeal against any closure notices issued following the conclusion of these enquiries. For this reason, I do not address the Applicants' submissions that the ToAA code is subject to implicit restrictions such that the unfettered appointment to a beneficiary in 2003/4 draws a line under previous events.

52. I have no doubt that both Mr Cassidy and Officer Rolls gave their evidence honestly and with the intention of assisting the Tribunal. However, I find that Officer Rolls was unwilling to acknowledge or recognise any errors or mistakes that he may have made – and in consequence he rigidly adhered to his initial view of a matter, without reflecting on whether he may need to adjust his view in the light of new information (or a different possible interpretation). This was illustrated by his analysis of RHG's shareholder register, and HMRC continuing to assert in the November hearing that a £40m dividend was paid by RHG to NBH, and not to Relkeel, notwithstanding the explanations given by the Applicants, and that he was shown why his analysis is inconsistent with the entries shown on Form 363a.

53. The position taken by HMRC is that the condition in s732(1)(a) is met (that there is a relevant transfer) as a result of "the dividend being paid to the Bermudan entity prior to being paid into the UK and converted into a capital distribution that is then taken offshore and paid into the trust". But this position is based on Officer Rolls misunderstanding of the facts, as the dividend was paid by RHG to Relkeel, and not to a Bermudan entity. So even if HMRC's interpretation of the law is correct, their position is undermined because of Officer Rolls refusal to recognise the actual sequence of transactions relating to the distribution.

54. As regards the dividends paid through the Foxseal companies, as these were paid in April 2003, I find that they cannot have been derived from the RHG dividend as that was paid in August 2003. They therefore cannot be relevant to the application of the ToAA legislation to the £40m dividend (and its onward transmission).

55. HMRC also say that the Applicants may have received a benefit in the light of transactions which may have occurred after the appointment of the £40m by the Settlement to a beneficiary. In that event, the condition in s732(1)(b) would be met. If one or more of the Applicants had received a benefit from that £40m appointed from the Settlement as a result of one or more subsequent transactions, the condition in s732(1)(c) would be met. The subsequent transactions would, in HMRC's view, constitute associated operations within the meaning of s719. This is why HMRC want to know the entity or person to whom the Settlement appointed the £40m, and how the £40m was then applied. The Applicants submit that this amounts to a fishing expedition, and that for HMRC to pursue this line of enquiry, they must be able to show

some reason (based on evidence) to believe that there is a trail to be followed which would lead to a charge under the ToAA code.

56. On the basis of the evidence before me, I find that:

(a) The £40m distributed from RHG has been appointed by the Settlement to a beneficiary (or beneficiaries) other than the Applicants;

(b) There is no evidence to indicate that the funds have been transferred to or for the benefit of the Applicants; and

(c) There is no evidence that the Applicants have received any undisclosed benefit (whether in the tax years under enquiry or in any other tax year).

57. I note that the Applicants have been advised at all times by reputable and well-known advisors, who wrote to HMRC following the May hearing to say that they have re-examined matters and " "can confirm that that there are no known omissions or errors relating to the 2003 dividend on the three brothers' tax returns for the years under enquiry".

58. I agree with Mr Gordon that in seeking full details of the beneficiary to whom the funds were appointed by the Settlement many years prior to the years of enquiry, and details as to whether the beneficiary "passed it onwards, invested it on behalf of, or in any other way acted to direct that value to one or more of [the Applicants]" amounts to a fishing expedition in the absence of any evidence for believing that there may be associated operations.

59. Ms Choudhury confirmed that the £40m dividend is the main focus of HMRC's enquiries, not the Spanish companies. And Officer Rolls acknowledged in the course of cross-examination that any questions he had concerning the Spanish companies were not a reason to justify delaying the closure notices sought by the Applicants. I therefore do not propose to analyse the merits of HMRC's outstanding questions relating to these companies, given Officer Rolls' acknowledgement that these do not justify keeping the enquiries open.

CONCLUSIONS

60. I find that HMRC's enquiries have been conducted to a point where it is reasonable for Officer Rolls to make an "informed judgment" of the matter, even though every line of enquiry may not have been pursued to the end. Whilst HMRC have not received answers to all of their questions, I consider that the outstanding questions relating to the £40m distribution do not have a reasonable basis and amount to a fishing expedition.

61. I note Ms Choudhury's submission that if HMRC were to issue closure notices now, they would be in vague and uninformative terms. I do not agree. HMRC are in full possession of information relating to the transmission of the distribution made by RHG on its journey up to the Settlement, and are aware that the distribution was not appointed to any of the Applicants. That should be more than enough information on which to be able to close the enquiry as regards the potential for a ToAA charge on the Applicants in respect of the distribution for the years under enquiry.

62. As regards the outstanding queries into the Spanish property structure, Ms Choudhury confirmed that it was not the main focus of the enquiries, and Officer Rolls acknowledged that these do not justify keeping the enquiries open.

63. There was considerable evidence and submissions on whether HMRC had unreasonably protracted their enquiries. These enquiries were first opened in 2014, over eight years ago. These enquiries have gone on for far too long. The reasons for the time taken cannot be ascribed solely to the fault of either HMRC or the Applicants. But as I have reached my decision without needing to consider the reasons for the delay, I have not analysed the history of the enquiries and the reasons for the delays in this decision.

64. It is for HMRC to show that there are reasonable grounds for refusing the applications for closure notices. I find that HMRC have not so shown.

65. The Applicants have submitted that I direct that closure notices be issued within 28 days of my decision being released. I consider that in the circumstances of this case, a slightly longer period should be allowed.

DISPOSITION

66. I therefore direct that HMRC issue a closure notice for the periods under enquiry within six weeks of the date on which this decision is released.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 16th FEBRUARY 2023

Authorities referred to in submissions, but not mentioned in the decision:

Bulmer v CIR (1966) 44 TC 1
Estate 4 Ltd v HMRC [2011] UKFTT 269 (TC)
Hegarty v HMRC [2018] UKFTT 774 (TC)
HMRC v Vodafone 2 [2006] STC 483
Perfectos Printing Inks Co Ltd v HMRC [2019] UKFTT 388 (TC)