[2018] UKFTT 228 (TC)

TC06461

Appeal number: TC/2017/06056
TC/2017/06463

INCOME TAX – Self-Assessment returns – enquiry into 2015-16 and prior years from 2011-12 to 2014-15 – applications for closure notices – s 28A Taxes Management Act 1970 – whether enquiry being related to a company relevant – whether tribunal has jurisdiction to consider complaints against the conduct of HMRC officers – whether new evidence admissible at the stage of closing submission – whether reasonable grounds for not issuing closure notices; yes – quality of information provided – taxpayer's co-operation and extent of disclosure – risks identified in taxpayer's income and capital profile – third-party information notices approved by the Tribunal – whether period for the issue of notices can be specified; no – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAULINE McWATT **Applicant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MEMBER SUSAN STOTT

Sitting in public at the Tribunals Service, George House, Edinburgh on 7 and 8 December 2017, and written submissions for the applicant and for the respondents on 26 January 2018

Mr Anthony Crewe, Advocate, of Grant Thornton LLP, for the Applicant

Mr Alan Compton, of HM Revenue and Customs, Solicitors Office and Legal Services, for the Respondents

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DECISION

Introduction

1. The matter in front of us is in relation to an application dated 8 August 2017 by Mrs Pauline McWatt, under s 28A(4) of the Taxes Management Act 1970 ('TMA') for a direction that a closure notice be given under s 28A(1) TMA in respect of the enquiry under s 9A TMA into the tax year 2015-16.

2. On 18 August 2017, Grant Thornton notified the Tribunal to lodge a second closure notice application in relation to the years 2011-12, 2013-14, and 2014-15, but excluded specifically the year 2012-13, which was noted in the email as: 'save at this time the 2012-13 tax return which we will revisit at a later date'.

3. In the skeleton argument filed with the Tribunal on 6 December 2017, Mr Crewe stated that the application is to include also 2012-13.

4. HMRC did not oppose to such an inclusion, and the Tribunal considers it expedient to dispose of all relevant years together in this decision. This decision therefore applies to the years of enquiry 2015-16 and the earlier years from 2011-12 to 2014-15.

Evidence

5. Mrs McWatt was represented by Mr Crewe of Grant Thornton in these proceedings. She provided a witness statement but did not give evidence. She was in attendance for almost all parts of the hearing. Mrs McWatt's husband, David McWatt gave evidence on the first day of the hearing and was cross-examined.

6. Mr Compton of HMRC Legal Services represented the respondents, and led the evidence of Officer Lisa Marshall, who joined the case team on 23 December 2016, and was the case worker who opened the enquiry in January 2017 into Mrs McWatt's 2015-16 self-assessment return. The cross-examination of Officer Marshall's evidence resumed on the morning of 8 December 2017.

7. On the adjournment of Officer Marshall's evidence session, the Tribunal requested certain documents being referred to in her evidence but not included in the hearing bundle to be provided. Mr Compton was able to do so promptly and made those documents, such as the Integrated Compliance Environment ('ICE') Report and relevant records from the Land Register, available to the Tribunal and Mr Crewe on the morning of 8 December 2017.

8. Officer Marshall's evidence was followed by Officer Robb's, who is a team leader of the enquiry unit for 'Wealthy / Mid-sized Business Compliance'. Officer Robb was not originally called as a witness, and as such he did not provide a witness statement. His evidence supplemented Officer Marshall's by relating HMRC's engagement with Mrs McWatt prior to the formal opening of the enquiry in January 2017.

9. It became clear from the cross-examination of Officer Marshall's evidence that the applicant's case, to a significant extent, was relying on the period of information exchange prior to the opening of the enquiry in January 2017. HMRC have maintained that the pre-January 2017 engagement between HMRC and Mrs McWatt is not notably relevant to the closure notice applications. Nonetheless, Officer Robb was called as a second witness for the respondents on the second day in order to address those questions put to Officer Marshall in cross-examination that would be more suitably answered by Officer Robb.

10. There was no issue as to the credibility of any of the witnesses. We accept each witness's evidence as to matters of fact.

Post-hearing directions and submissions

11. In support of Officer Robb's oral evidence, the Tribunal gave oral directions at the end of the hearing, followed by written directions, for those documents in relation to the pre-January 2017 period which were referred to in his evidence to be produced. These documents were furnished to the applicant and the Tribunal by electronic submission on 19 December 2017 as seven appendices with a covering memorandum from Officer Robb containing his comments thereon.

12. As a result of the additional witness from the respondents, the parties' closing submissions were furnished to the Tribunal as written submissions pursuant to Tribunal's directions issued on 13 December 2017, and amended on 22 December 2017, following an application from the applicant that the written submissions be simultaneous rather than sequential as originally directed. The written submissions were made simultaneously on 26 January 2018.

Preliminary matters

Request for anonymisation

13. At the commencement of the proceedings, Mr Crewe addressed the Tribunal on the matter of anonymisation, in terms as stated in his skeleton argument:

> 'During the course of the hearing, it is almost inevitable that reference will be made to the corporate enquiry [of the company of which Mr McWatt is a director] and if the identity of the appellant [sic] and her husband is made public in the Tribunal's judgement, it will become public knowledge that the company is under enquiry by HMRC. The appellant [sic] would ask that the Tribunal consider anonymising the judgement so that Mr and Mrs McWatt cannot be identified.'

14. The Tribunal responded by stating the following:

> (1) A hearing is in public unless otherwise directed. The session list would have listed Mrs McWatt as the applicant in these proceedings, and that information is now in the public domain.

(2) There was no application preceding the listing to have the hearing in private, or to anonymise Mrs McWatt as a party in these proceedings. The hearing would therefore proceed in public. The principle of open justice is fundamental, and there is no general exception to open justice where privacy or confidentiality is in issue.

(3) While an anonymity order under s 11 of the Contempt of Court Act 1981 can still be made following a hearing that has been held in public, such an order will only be granted in the most compelling circumstances after balancing the rights of various parties concerned, including third parties such as the public and the press. An application must be made for the grant of such an order to be considered. The Tribunal does not regard what has been stated in the skeleton argument as amounting to an application or representing sufficient grounds for anonymity.

15. No application for anonymity has subsequently been made, and no part of this decision is redacted.

16. We note that Mr Crewe has referred to Mrs McWatt consistently as the 'appellant', both in the skeleton argument and in his closing statement. For the avoidance of doubt, no assessment has been raised by HMRC to date; no appealable decision exists for an appeal to be brought by Mrs McWatt. We refer to her as the applicant throughout.

Proceedings in relation to Information Notices

17. Separate proceedings have been brought by HMRC for the issue of information notices under Schedule 36 to the Finance Act 2008 ('Sch 36 Notices'). Notwithstanding the fact these proceedings are separate from the matter in front of us, for clarity and completeness, we set down out these proceedings in brief, not least for ease of reference in our consideration of the closure notice applications.

18. The following information notices in relation to the enquiries opened into the tax position of Mrs McWatt have been issued:

(1) On 4 October 2017, a first-party notice was approved by Judge McKeever and this has not been fully complied with and is now subject to penalties under Sch 36.

(2) On 18 October 2017, Judge Poole reviewed the matter and wrote to Grant Thornton, stating that the first-party notice is not an appealable decision, and advised: 'The remedy of any aggrieved party must be by way of judicial review proceedings'. No such proceedings would seem to have been initiated to date.

(3) On 12 January 2018, Judge Mosedale approved the issue of third-party notices to banks with whom the applicant had held accounts as at 12 January 2018. The Tribunal was made aware of this application from Officer Robb's evidence, which was made to enable HMRC to gather the bank records which the applicant has declined to provide.

The Law

Relevant legislation

19. The enquiry into the returns was brought under s 9A TMA, which provides, *inter alia*, as follows:

> **'9A Notice of enquiry**
>
> (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry") –
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed.
>
> [...] –
>
> (4) An enquiry extends to –
>
> (a) anything contained in the return, or required to be contained in the return, including any clam or election included in the return, ...'

20. The legislation relevant to this application comes under sections 28A and 48 of the Taxes Management Act 1970 ('TMA').

> '**28A Completion of enquiry into personal or trustee return**
>
> (1) An enquiry under section 9A(1) … of this Act 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 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.

The burden of proof

21. The statutory wording of sub-s 28A(6) TMA envisages that once the applicant has made the application, the direction shall be made *unless* HMRC can satisfy the Tribunal to the contrary.

22. In other words, the application is for the taxpayer to make, and once made, the onus rests squarely on HMRC, since the tribunal shall give the direction applied for unless HMRC meet the burden of proof.

23. In reaching a conclusion on a closure application, the Tribunal's decision has two elements, as provided by sub-s 28A(6):

(1) First, whether HMRC have proved that there are 'reasonable grounds' for not issuing a closure notice.

(2) Secondly, whether a period can be specified for the issue of a closure notice.

The Facts

24. Our findings of fact are set out with reference to the chronology of events, and not necessarily in the order in which the evidence was given. We were taken through a significant volume of documents during the evidence sessions. Our findings of fact are confined to those relevant to our two principal considerations as stated at §23.

Corporation tax enquiry and voluntary disclosure from company directors

25. Mr McWatt is a chartered accountant, and joined John R Adam and Sons Ltd as its financial accountant and has been its Financial Director for 37 years since1980. The company is a processor and trader of scrap metals. In November 2012, HMRC opened an enquiry into the Corporation Tax return of the company for the accounting period ended 31 December 2010.

26. Mr McWatt's personal tax affairs, along with those of the other three directors of the company, were reviewed as part of the standard process. The enquiry procedure for the directors involved a review of their household income and expenditure. The financial affairs of their spouse or partner also formed part of the review. The directors were invited to make voluntary disclosure in March 2014.

27. Grant Thornton are the accountants acting for the company. The enquiry into the company and its directors was handled by Mr Paul Marcroft of Grant Thornton. Mrs McWatt corresponded directly with HMRC until Grant Thornton was engaged as her representative in March 2017; thereafter Mr Marcroft has also handled the enquiries into Mrs McWatt's returns.

28. In October 2015, Officer Robb took over the corporation tax enquiry. The stage of the voluntary disclosure process would seem to involve the production of bank statements from the directors and their spouses. In evidence, Officer Robb stated the

review of Mr and Mrs McWatt's bank statements as provided for the calendar year 2010 raised the following concerns:

(1) No cash withdrawals for up to four months at a time;

(2) No food expenditure apart from a purchase from ASDA on 17 December 2010;

(3) Unexplained lodgements, for example, £400 each month which is not an inter-account transfer;

(4) No card expenditure on day-to-day items such as food, clothing or amenities;

(5) No fuel or transport costs;

(6) No property expenditure such as council tax, utilities, maintenance;

(7) No occasional spending such as birthdays, Christmas or holidays.

29. Following the review of the couple's bank statements provided for the calendar year of 2010, Officer Robb considered there were 'substantial risks' surrounding Mrs McWatt's financial affairs, and he described these risks in evidence as follows:

(1) From the ICE report, Mrs McWatt had some 40 bank accounts in the period 2012-2015;

(2) There would seem to be offshore accounts held, though only one on the Isle of Man is known through the report;

(3) Substantial capital in deposit with no known source of income;

(4) Interest in five properties with unknown source of capital to fund purchase;

(5) No evidence of living expenses through bank or credit card accounts as provided under voluntary disclosure.

Requests for bank account records in June 2016

30. By email on 27 June 2016, Officer Robb invited Mrs McWatt to provide HMRC with the following:

(1) a mandate to obtain bank account records, noting that HMRC held information which suggested that there were more accounts than those hitherto disclosed;

(2) means of meeting expenses for the Bulgarian properties, such as electricity, property fees, maintenance etc, noting that the expenses must be paid from a Bulgarian account, or a UK account funding the expenditure, and of any rental income received.

31. Mrs McWatt's email reply of 27 June was to ask HMRC to make a list of the bank accounts for her to provide the information, instead of furnishing a mandate. She also stated that she opened a Bulgarian account with 10 euros which was never operated. The reply was followed by letters of 11 and 15 July 2016, which would

seem to provide the Bulgarian account bank statement of 10 euros and two bond certificates referred to earlier; (these letters were not included in the bundles).

32. By letter dated 19 July 2016, Officer Robb wrote to Mrs McWatt stating that the bank statements provided so far did not cover other accounts in existence during the calendar year of 2010 of which HMRC held information. In reply to Mrs McWatt's suggestion, Officer Robb stated:

> 'I have offered to contact the banks directly to confirm whether those additional accounts were in existence during the 2010 calendar year. I believe that this is the quickest and most effective way of resolving the apparently conflicting information. I also believe that providing a mandate would lead to a saving of both time and costs for you. However, you do not appear keen to provide such a mandate and have offered to make the necessary enquiries yourself.
>
> In which case, I am prepared to go along with your request that I provide you with a list of the banks and account numbers information held by HMRC so that you can approach the banks directly. It is possible that some or all of these accounts may not have been in operation during the 2010 year. If that proves to be the case, I would need a letter from each bank confirming that the accounts were not in use and the date(s) they were opened/closed.' (The letter attached a list of the accounts as an appendix)

33. By email dated 27 July 2017, Mrs McWatt replied, stating that she had 'researched the extensive list' of 25 accounts and set out her 'answers' by itemising the account numbers, 18 accounts of which were marked: 'Not in operation in 2010':

(a) Alliance & Leicester – 3 accounts
(b) Birmingham Midshires – 4 accounts
(c) Santander – 8 accounts
(d) Cheshire Building Society – 1 account
(e) Aldermore Bank Plc – 1 account
(f) Virgin Money Plc – 1 account

34. The other seven accounts were given the following answers:

(1) Alliance & Leicester – 1 account already submitted

(2) Yorkshire Building Society – 1 account already submitted

(3) Bank of Ireland – account detail given not an account number and no accounts in operation with Bank of Ireland in 2010.

(4) Another account number 74333 – replied to as 'not an Account No.'

(5) HBOS plc – not an Account No. All accounts operational in 2010 for HBOS have already been submitted.

At this juncture in the email text, it was stated: 'Two Accounts of twenty five outstanding', followed by listing the account details of:

(6) Coventry Plc

(7) A.A.

The email concluded by stating: 'Please confirm receipt of Statements from Coventry and AA.'

Meeting with Mr and Mrs McWatt on 27 January 2017

35. It would appear that HMRC held a meeting with each of the company directors, with their spouse in attendance, or if in absence, with the spouse's signed authority. Mr Marcroft of Grant Thornton approached HMRC for 'an interview brief' ahead of the meeting scheduled to take place with Mr and Mrs McWatt on 27 January 2017.

36. While it is not common practice to respond to such a request, HMRC nevertheless did so on this occasion by email response dated 7 November 2016, listing the areas of their concerns they intended to address, chiefly in respect of the absence of cash to meet living costs and personal expenditure for the household. The reply also stated that: 'HMRC have issued tax returns and enquiries will be opened as soon as the returns are received', and '[i]f Mrs McWatt shows a willingness to co-operate' then HMRC would be able to discuss their concerns following their review of the bank statements at the meeting.

37. In evidence, when Officer Robb started to relate the meeting of January 2017, Mrs McWatt left the hearing room abruptly; (she later returned). It would be fair to say that the reference of the meeting of January 2017 at various junctures in the course of the hearing represented a sensitive trigger of some kind to Mrs McWatt.

38. Officer Robb's oral evidence in this respect was therefore somewhat curtailed. He supplemented his evidence in the memorandum accompanying the supporting documents submitted post-hearing as directed by the Tribunal in the following terms:

> 'When Mrs McWatt entered the meeting on 27th January 2017, I was immediately advised that she was unwilling to discuss anything to do with her personal financial affairs at this meeting.
>
> I was concerned that Grant Thornton had not advised me about Mrs McWatt's intentions prior to the meeting.
>
> Following Mrs McWatt's comments I asked Mr Marcroft whether we would still be able to discuss Mr and Mrs McWatt's household income and expenditure. Mr Macroft said there would be elements that would be difficult to discuss but he would tell me when this was the case and they wouldn't answer the questions.
>
> The meeting ended abruptly when I asked Mr and Mrs McWatt who lived in their household during 2010. This is a standard question and was particularly relevant to this enquiry due to there being no grocery purchases made by Mr and Mrs McWatt until 17 December 2010.
>
> Mrs McWatt's decision not to answer any questions at this meeting meant that I could not establish how Mrs McWatt funded foreign property costs.'

Enquiry into 2015-16 return

39. By letter dated 26 January 2017, Officer Marshall opened a s 9A TMA enquiry into Mrs McWatt's self-assessment return for the year 2015-16 (submitted 17 October 2016), and requested the following items of information to be provided:

> (1) Statements of all bank, building society or credit card accounts, in sole or joint names covering the period 6 April 2015 to 5 April 2016.
>
> (2) The addresses of all properties and land owned both in the UK and abroad, either independently or with others during the period to 5 April 2016. Please provide details of when the property or land was purchased, the price paid and how it was funded.
>
> (3) A full analysis of annual expenditure for your properties in Bulgaria: electricity, insurance, maintenance etc and confirm which method of payment is used to meet this expenditure. Please also provide the account(s) the Bulgarian expenditure is deducted from.
>
> (4) Please advise if you are in receipt of any rental income from your Bulgarian properties.

40. Mrs McWatt's full reply dated 26 February 2017 is as follows:

> 'I have no income other than interest on bank accounts
>
> I have neither bought nor sold any property during the period 2015/16.
>
> I have never rented any property either in the uk or abroad
>
> I have no expenses for property either in the uk or abroad' (punctuation original)

The first Sch 36 notice and ensuing correspondence

41. On 7 April 2017, Officer Marshall issued a Sch 36 notice for items (2) and (3) of the information originally requested on 26 January 2017.

42. On 25 April 2017, Grant Thornton replied to the Sch 36 notice stating that the documents and information were not reasonably required, for the reasons:

> (1) that Mrs McWatt 'has at no point in the last twenty years been in receipt of taxable income, of any description, other than bank interest disclosed in the recently submitted returns';
>
> (2) no properties were acquired in the year and no income received from any property interests in 2015-16 or any other tax years;
>
> (3) no expenses of any description were incurred in respect of any properties.

43. No appeal was lodged, however, against the Sch 36 notice. No penalty was imposed for the failure to comply with the Sch 36 notice, since Mrs McWatt had provided a letter from her GP dated 31 March 2017.

44. On 15 June 2017, Officer Marshall replied to Grant Thornton, giving reasons why the Sch 36 items were 'reasonably required' to check Mrs McWatt's tax position:

> (1) HMRC hold information suggesting Mrs McWatt has interests in a number of properties both in the UK and abroad;
>
> (2) Without a known source of income it is unclear how the purchase of these properties was funded;
>
> (3) The return for 2015-16 declared interest received of £5,910, and applying prevailing interest rates, it suggests that there is a substantial amount of capital which requires an explanation since for 20 years Mrs McWatt has no known source of income.

45. The letter reiterated the request for details of bank, building society and credit card accounts held in the year with their statements, and for details of all mortgage, finance and personal loan accounts held with supporting documents for the year 2015-16, and broadened the request for similar information and documents to be provided for the years from 2011-12 to 2014-15 on a voluntary basis.

46. On 12 July 2017, Grant Thornton wrote in reply with the salient points being:

> (1) HMRC have been given 'voluminous contemporaneous documents' to demonstrate Mrs McWatt's sole source of capital has been gifts from her husband.
>
> (2) Apart from the family home, Mrs McWatt has an interest in five properties: 50% interest in 3 properties in the UK, acquired in 2007, 2011, and 2013 (occupied by family members with no rent received and borne no expenses), with a total purchase value of £488,000 (being £138,000, £167,000 and £183,000); the 100% interest in 2 properties in Bulgaria (acquired off plan during 2005; ownership assumed in 2009; never let out; sold in 2012-13) were purchased at 52,000 and 72,000 euros.
>
> (3) That no bank statements for 2015-16 or any other years from 2011-12 onwards would be provided by either Mr or Mrs McWatt.
>
> (4) HMRC have Mrs McWatt's line by line bank statements for all bank accounts held for the entirety of 2010 calendar year, and of the same for Mr McWatt. From these statements, the gifts totalling £77,100 can be identified as from Mr McWatt to his wife out of his taxed income. The evidence from 2010 is reflective of the habits between the couple in the course of their marriage and the source of Mrs McWatt's capital.
>
> (5) Cheque payments from Mr McWatt to Mrs McWatt include: £500 monthly, £250,000 in March 2011, £154,000 in March 2012, £136,000 in April 2013 and £28,000 in June 2013, enclosing a copy of the three cheques cleared by the bank in 2012 and 2013.
>
> (6) A total of £663,100 can be traced as gifts from Mr McWatt between 2010 and 2013 and similar gifts prior to 2010 which enabled Mrs McWatt to generate bank interest and to acquire the five properties as disclosed.

(7) Mrs McWatt's personal tax affairs are in no way associated with those of Mr McWatt's employer. Whether Mr McWatt has been in receipt of untaxed income from his employment is of no relevance to the tax affairs of Mrs McWatt.

Enquiry opened into prior years 2011-12 to 2014-15

47. On 8 August 2017, Officer Marshall opened enquiry into Mrs McWatt's SA returns for the four years from 2011-12 to 2014-15 (submitted in April 2017), with the same information requests made for each year as those made for 2015-16.

48. For the year 2012-13, additional information was requested due to the property disposals. No capital gains computation was included in the return, and HMRC requested information in respect of: (a) the agent used for the purchase and disposal of the foreign properties; (b) the capital gains computation with breakdown of costs and documentary evidence for the transactions; (c) any third parties involved in managing the foreign properties giving details of arrangements and contact; (d) utility costs for the foreign properties – electricity, gas, insurance policies, maintenance and how these costs were met with documentary evidence of these expenses.

Applications for closure notices

49. On 8 August 2017, the same date as the enquiry was opened into the earlier years, Grant Thornton applied to the Tribunal for a closure notice to be issued in relation to the enquiry for the year 2015-16.

50. On 18 August, a second application was made and extended on 6 December 2017 to include all earlier years from 2011-12 to 2014-15.

Grant Thornton's representations in respect of HMRC's first-party notice application

51. By emails of 19 July 2017, Officer Robb informed Grant Thornton HMRC's proposal to apply to the Tribunal to serve a first-party notice on Mrs McWatt under para 3(2) of Sch 36 for two categories of information and documents: (1) details of all bank and credit card account records, and (2) details of all mortgage, finance, and personal loan accounts, and the period concerned was 6 April 2011 to 5 April 2016.

52. By letter dated 11 August 2017, Mr Marcroft wrote in response to the proposal. The letter of six pages long repeated the information already given in the letter of 12 July 2017 in various manner and form, and did not disclose any new information. The letter stated that the information and documentation requested 'is not reasonably required for the purpose of checking Mrs McWatt's tax position' for the said years.

53. The first-party information notice was approved on 4 October 2017 by Judge McKeever. Nine items of information requests were listed, three of which were in relation to property ownership details in the years of enquiry, and considered to have been complied with by HMRC at the hearing. Six items remained outstanding at the time of the hearing, which related to bank account and credit card records for the said years, and of the evidence how property maintenance and running costs were met.

Grant Thornton's reply to the enquiry letter of 8 August 2017

54. On 17 August 2017, Mr Marcroft responded to Officer Marshall's letter which opened enquiries into the years from 2011-12 to 2014-15.

55. The salient points in the reply are as follows:

(1) Re: properties in which Mrs McWatt has a part interest, 'we do not understand what relevance the name and address of the co-owner of the properties has to the tax affairs of our client'; that the purchase price of these properties have been provided, and that 'this information is readily available to HMRC via other government departments'.

(2) That Mrs McWatt has not personally incurred any expenditure in respect of any of the properties in which she has an interest, nor received any rental income therefrom.

(3) Re: apartments in Bulgaria, no rental income ever received.

(4) Re: purchase of the Bulgarian apartments, unable to recall the details of the agent; unable to confirm from which bank account payment was made, nor able to provide the associated bank statement; attaching an extract of the purchase documents which confirmed the property purchased and price paid.

(5) Re: sale of the Bulgarian apartments, attaching email correspondence with agent; capital loss on disposal of apartments, computation attached.

(6) Re: management of the apartments, no third parties were involved.

(7) Re: 'no utility, insurance or maintenance costs incurred in respect of the properties during the year'; (the Tribunal is unclear which particular year out of the years under enquiry was meant by Mr Marcroft).

HMRC's response of 4 September 2017

56. On 4 September 2017, Officer Marshall set out her response to the latest information provided in Mr Marcroft's letter of 17 August 2017, which covered three main areas:

(1) Acquisition documentation for each property in the UK and Bulgaria remained outstanding; e.g. the sources of funding for the purchase evidenced by personal bank statements or mortgage applications, solicitor's statement of account, purchase agreements from foreign property companies, contracts with details of stage payments.

(2) Bulgarian apartments –

(a) From the extract of purchase documents, the buyer 'also takes the obligation to pay annual fee for maintenance of the complex' (Article 2(1)); 'The buyer takes the obligation to pay the due fee for maintenance and management of the complex' (Article 2(2));

(b) From the email of 12 March 2012, the agent a Mr C Gater, 'refers to amenities bills, maintenance fees and any property council tax due';

(c) Emails and documents in relation to the sale, Mrs McWatt stated on 1 February 2012 that she will contact Fort Noks to ask them to allow the estate agent into her property to take photos, which suggests that Fort Noks may manage the properties.

(3) UK properties –

(a) £400 cash deposited monthly into Mrs McWatt's bank account in 2010, while stated as a repayment of a loan from a family member, no further documentation such as loan agreements provided; HMRC are to ascertain if the deposits represented rental income.

(b) Information held by HMRC suggests that Mrs McWatt is registered for Council Tax charges at 2 of the Hamilton properties of which she has an interest.

57. Officer Marshall's letter continued by relating that Fort Noks is a real estate company based in Bulgaria which sells and rents properties, and some of the apartments rented out by Fort Noks are situated in the same complexes as those owned by Mrs McWatt. The Fort Noks website states that after the first purchase payment is received, the client is entitled to use or rent the property. Fort Noks also offers cleaning and repairs services, and manages payment of the running accounts for the taxes, electricity and water related to the rental apartments.

58. Officer Marshall pointed out that the various statements that had been to assert that the fact Mrs McWatt did not incur any property costs (of any kind) for her UK or Bulgarian properties would seem to be contradicted by the presence of Fort Noks in relation the Bulgarian apartments, and by Mrs McWatt being registered as liable for Council Tax for two of the UK properties.

59. In conclusion, Officer Marshall requested: (a) a signed mandate to enable HMRC to approach Fort Noks for details of their dealings with Mrs McWatt; (b) all personal bank statements or passbooks for the period 6 April 2012 to 5 April 2013 held in the UK and abroad, independently and with others to be provided to determine whether rental income was received and how expenditure was met, and (c) the loan details in relation to the regular cash deposits shown in the 2010 bank statements.

Grant Thornton's reply of 3 October 2017

60. In response to Officer Marshall's September 2017 letter, Mr Crewe (not Mr Marcroft) replied, enclosing the following:

(1) A letter from Fort Noks stating that: 'we confirm that apartments 434 [at complex A] and 778 [complex B] were not rented out in the period 01.01.2009 – 31.12.2012 year'.

(2) An email dated 21 September 2017 from South Lanarkshire Council from a Ms Dugan confirming that 'Mrs McWatt has never paid Council Tax at either of the [Hamilton] addresses'.

(3) A statement from Joanne Falconer stating that she 'received an interest free loan which [she] was paying back at £400 per calendar month during 2010'.

61. As to the additional information requested, Mr Crewe stated that Mrs McWatt 'does not believe it is reasonably required' to finalise the enquiries.

The ICE Report

62. The tool, internally known as 'Integrated Compliance Environment' ('ICE'), compiles information provided to HMRC. Officer Marshal's evidence made reference to the ICE report, which she consulted in connection with making the information requests. Officer Robb referred to the 'substantial risks' associated with Mrs McWatt's financial affairs as suggested by the ICE report.

63. A printout of the report generated on 28 September 2016 was provided on commencement of the second day of hearing. The three-page long report lists the bank account holdings under Mrs McWatt's name in the years 2008 to 2016. The following information is presented in the report:

(1) Around 55 accounts are listed which had a deposit balance during or at the year end of the period concerned. While not all the accounts continued to be operated in the 9 years covered, half of listed accounts would seem to carry deposits for a consecutive three or four years.

(2) The institutions with which accounts were held include: Alliance & Leicester, Birmingham Midshires, Santander, HBOS, Bank of Scotland, Bank of Ireland, Aldermore Bank, Shawbrook Bank, One Savings Bank, Virgin Money, Yorkshire BS, Cheshire BS, Conventry BS.

(3) The untaxed interest totals (without the pence) shown for the years are:

(a) 2008 – £9,005

(b) 2009 – £4,334

(c) 2010 – £6,118

(d) 2011– £9,860

(e) 2012 – £7,399

(f) 2013 – £10,526

(g) 2014 – £10,306

(h) 2015 – £2,308

(i) 2016 – £1,664

(4) The cash value at year end of ISA accounts held shows a consistent trend of increase from £9,512 in 2008 to £63,797 in 2016.

(5) The cash value from accounts other than ISA is estimated by grossing up on the untaxed interest received by applying the prevailing rates of interest of 0.5% for each year, giving balances in cash value ranging from

£166,977 in 2008 at the lowest to over £2 million at the highest in 2013 and 2014.

Mr McWatt's evidence

64. Mr McWatt's evidence, to a large extent, was to testify what has been presented in written correspondence in reply to the information requests from HMRC. The applicant's responses, directly or via Grant Thornton, have been related earlier, and Mr McWatt's evidence covered the following main areas:

(1) That his net income and gross gains totalled: £210,720 for 2011-12, £203,266 for 2112-13, £69,079 for 2013-14, £62,463 for 2014-15 and £59,926 for 2015-16, a total of £605,454.

(2) That he has been in the habit of gifting to his wife capital throughout their marriage. The cheques for such gifts vouching transfers in total of £328,000 from 2011-12 to 2015-16 were produced.

(3) That around £600,000 was gifted to his wife in the years from 2010 to 2016; (that a cheque for £250,00 in March 2011 shown on his bank statement cannot be produced by Mrs McWatt's bank).

(4) That he received gross sums from the company's 'Growth Share Ownership Plan' ('GSOP') which was based on profits in the three years 2010-11 to 2012-13. The capital gains tax payable on the GSOP sum for each tax year in the following January was met by Mrs McWatt transferring money back to Mr McWatt's account; that a total £150,000 was 'returned' to Mr McWatt over three years.

(5) That the UK properties were purchased jointly with each of the children with Mrs McWatt holding a 50% interest, and from which no rent was received; that Mrs McWatt would have provided more than 50% of the capital while the other party awaited a mortgage, and this sum would not necessarily be repaid.

(6) That the Bulgarian properties were bought off the plan as advertised by a Russian agent on its website; he and Mrs McWatt had taken summer holidays in Bulgaria a couple of times near the complexes; apartments were bought as furnished with standardised furnishing; the legal transactions for both purchase and sale took place in Bulgaria; apartments were never let, and eventually sold to individuals.

(7) That the enquiry had impacted on Mrs McWatt's health, especially with it following close in time to the death of their son in February 2016. That the meeting on 27 January 2017 had to be aborted as the question on how many people were in the McWatt household triggered the memory of the loss of her son for Mrs McWatt.

Mrs McWatt's complaint letter and witness statement

65. By letter dated 19 February 2017, Mrs McWatt lodged a formal complaint against Officer Robb and another officer (in charge of the enquiry into the company)

for 'Bullying and Breach of Confidentiality'. The five-page long letter is an account from Mrs McWatt's perspective of HMRC's dealings with her, covering the period from the informal request on 22 December 2015 to submit her bank statements for the calendar year 2010 to the aborted meeting on 27 January 2017.

66. Although coverage was given to the complaint letter in support of the applications, we make no finding of fact in respect of the complaint, since the substance of the complaint is not relevant to our principal considerations as regards 'reasonable grounds' and 'specific time period' in relation to a direction for the issue of a closure notice.

67. The relevant parts of Mrs McWatt's witness statement of 1 October 2017 to these proceedings state the following:

> 'All capital deposited into my bank accounts are the result of gifts from my husband David McWatt.
>
> All property in which I have an interest has been acquired from savings.
>
> All income is derived from interest on bank accounts.
>
> I have never any time whatsoever charged or received rental income from any property either in the uk or abroad.
>
> The £400 deposited into my bank account is repayment of an interest free loan to a family member.'

The link of Mrs McWatt's enquiry with the corporate enquiry

68. Officer Marshall was cross-examined on the reference she made to the corporate enquiry in her letter to Mrs McWatt dated 15 June 2017, which was stated as:

> 'I fully appreciate the sensitivities around these requests but will be grateful for your assistance with this review as part of our collaborative efforts to bottom out and reach agreement on the liability of JR Adams and its participators. Such an approach will obviate the need for issuing a formal information notice under Schedule 36 and allow us to progress without further delay.'

69. Mr Crewe questioned Officer Marshall on the linkage she made between the enquiry into the company and into Mrs McWatt, on the use of the term 'participator' which is not in accordance with s 454 of the Corporation Tax Act 2010 ('CTA 2010'), since Mr McWatt is not a shareholder of the company, and on the lack of sensitive handling of the enquiry in a difficult time for Mrs McWatt.

Submissions for the applicant

70. Mr Crewe is an advocate and tax manager of Grant Thornton. His closing statement consists of 17 pages of dense prose, running to 116 paragraphs and is accompanied by five appendices containing voluminous 'new' evidence. We will address the introduction of this new evidence later in our discussion.

71. The salient aspects of the closing statement are treated as the applicant's grounds for the applications. There are five main grounds for the applications, which we summarise in the following paragraphs.

72. The first ground concerns HMRC's conduct in the period (December 2015 to January 2017) before the formal opening of the enquiry, and constitutes a substantial part of the closing statement. The essence of this ground is as follows:

> 'prior to opening these enquiries, [HMRC] pursued [Mrs McWatt] with unjustified and unreasonable vigour. The purpose of the enquiries was the continuation of this unwarranted pursuit of Mrs McWatt.' (para 3)

73. In support of the first ground, Mr Crewe attached Appendices 2 and 3, in order that 'the Tribunal can gain a fuller understanding of the nature and tenor of HMRC's "informal enquiry" and the degree of pressure they brought to bear on an unrepresented taxpayer' (para 15).

74. Appendix 2 is a 71-page long PDF document with the contents of 57 emails and Appendix 3 contains 9 letters. As Mr Crewe put it, the appendices were furnished to provide the Tribunal with 'a comprehensive copy of communications' between Mrs McWatt and HMRC in the pre-enquiry period.

75. In terms of substance, Mr Crewe's submissions for this ground can be summed up by para 17 of his statement:

> 'It could be argued that the persistence and intimidatory tone of the exchanges from HMRC during this period, when Mrs McWatt had recently suffered a particularly tragic bereavement and was not represented by a professional agent, amount to harassment. The dictionary definition includes: "*To subject (another) to hostile or prejudicial remarks or actions; pressure or intimidate.*" (italics original)

76. The second ground is to say that the duration of the enquiry should be reckoned as from December 2015 when Mrs McWatt was invited to provide information on a voluntary basis in connection with the enquiry into the company. The material point of this ground is to invite the Tribunal to elide the invitation for Mrs McWatt's involvement with the corporate enquiry with the enquiries now opened into her personal tax affairs for determining the duration of the enquiry to date as ongoing for over two years. At para 86 of Mr Crewe's statement, it states:

> '... a reasonable construction of the facts in this case is that HMRC have actually been investigating the appellant [sic] for over two years (since 22 December 2015) albeit, the first year was an "informal request for cooperation", rather than a formal enquiry.'

77. The third ground of application concerns the definition of 'participator' under s 454 of CTA 2010, which means neither Mr nor Mrs McWatt meet the statutory definition for an enquiry to be opened. As stated at para 50 of the closing statement:

> 'HMRC only pursues (or at least according to its own guidance, should only pursue) enquiries into participators i.e., *a person having a share*

> *or interest in the capital or income of the company* [s. 454 CTA 2010]. And then, only if they have demonstrated significant flaws in the company's record keeping.'

78. Essentially, the third ground is to say since Mrs McWatt is not a participator, has never been an employee, a director, or a shareholder of the company, there is no legitimate ground to extend the corporate enquiry to her. In support of this ground, HMRC internal guidance EM8210 on 'Companies: Enquiries into Directors and Participators: Opening Linked Enquiries', and EM8215 on 'Companies: Enquiries into Directors and Participators: Closure Applications' are cited.

79. The fourth ground concerns the unreliability of HMRC's data such as the ICE report, which is described as 'wildly inaccurate', and that documents and explanations have already been given to address the risks identified by HMRC. The essence of this ground is illustrated by the following submission at para 52 of the closing statement:

> 'HMRC have mentioned "risks" in this case a great deal, without defining or substantiating what those risks are. They have suggested that they have evidence (the "ICE Data") the Appellant [sic] has enormous sum of money on deposit. They have produced a rather fanciful figure of between £1.1m & £2m, despite having hard evidence to demonstrate the actual deposits were a fraction of these amounts.'

80. The fifth ground relates to the personal circumstances of Mrs McWatt and the bereavement she suffered in February 2016. That despite her personal circumstances, Mrs McWatt had given her co-operation with all the information requests on a voluntary basis prior to the formal enquiry in January 2017, and before her engagement of Grant Thornton in March 2017.

Submissions from HMRC

81. HMRC resist the applications and submit that it would be premature to issue closure notices at this stage for the following reasons:

> (1) That the Sch 36 notices having been approved by the Tribunal means that the applicant's contention that the information and documents are not 'reasonably required' cannot be relevant to these proceedings:
>
> > (a) The first-party Sch 36 notice, approved by the Tribunal on 4 October 2017, and in relation to the five years from 6 April 2011 to 5 April 2016 has not been fully complied with; the items remain outstanding include:
> >
> > (i) disposal of any properties with documentation;
> >
> > (ii) funding of property expenditure e.g. maintenance, utilities, insurance, local taxes;
> >
> > (iii) all bank, building society and credit card account statements and records;
> >
> > (iv) loan agreements in relation to the £400 monthly cash receipts.

(b) The third-party Sch 36 notices approved by the Tribunal on 12 January 2018 were issued on 15 January 2018 to several banks with whom the applicant has held accounts.

(2) The enquiry has been opened to check the applicant's tax position. The onus is on the applicant to adduce evidence to substantiate the belief that the enquiry was opened for improper reason, or that the information request is to check the tax position of another entity such as the company.

(3) There has been no notable delay: the enquiry into 2015-16 was ongoing for 6 months 13 days when the application was made, and for the years 2011-12 to 2014-15, only 9 days when the application was made.

(4) Risks in relation to capital accumulation are identified in respect of:

(a) a significant proportion of the gifts have been applied to purchase properties;

(b) the retained capital after property purchase remained sizeable to generate the levels of interest as income;

(c) significant fluctuations in the interest figures declared over the years without explanations for the divergence;

(d) a material drop in interest from £11,764 in 2013-14 to £5,209 in 2014-15 coincided with a significant disclosure made in the ongoing related corporate enquiry;

(e) the provision of bank statements would allow HMRC to identify the cause of this fluctuating capital to trace where any funds have been transferred;

(5) Risks in relation to interest declared as received:

(a) A total of 7 documents have been received from the applicant in relation to the interest declared in the return for 2015-16; each has been subject to heavy redaction by blackening out all other transactions on the page, the opening and closing balances, the period covered by the statement, the forename of the account holder, have all been blackened out; the extent of redaction means that the documents can no longer be fit for the purposes of verifying the interest figure declared.

(b) No documentary evidence has been provided to verify the interest figure for all the earlier years 2011-12 to 2014-15.

(c) Interest has potentially been under declared in the periods under enquiry if HMRC cannot verify the extent of capital held.

(d) Accounts shown on ICE data are not fully disclosed, nor is the amount of interest on these accounts.

(e) The significant capital retained by the applicant as illustrated by the levels of interest income suggests a risk of an income source not made known to HMRC and can only be

addressed by all bank statements showing the money in-and-out of the applicant's bank accounts for the relevant years, including narrative to indicate their source and destination.

(6) Risks in relation to properties purchased with children:

(a) No evidence has been provided to support the assertion that the applicant only funded 50% of the properties purchased with the children.

(b) HMRC have legitimate concerns that the children would not be in a financial position to finance their share of the property interest.

(c) Mr McWatt confirmed as a witness that the applicant provided more than 50% of the capital on occasions and this was not necessarily repaid.

(7) Risks in relation to property expenses:

(a) The absence of any expenses whatsoever in relation to the Bulgarian properties;

(b) Documentary evidence provided shows that such expenses necessarily must have been incurred; e.g annual maintenance fee per Article 2(1) of the contract extract, insurance, utilities, tax, either paid personally or met by an agent.

(c) HMRC have been unable to find any record of such obligation being met, and have received no substantive response from the applicant on the matter after affording multiple opportunities to provide the information.

(d) Bank statements are reasonably required to identify the potential expenses incurred and whether any rent or proceeds arising from the property were received in the enquiry periods.

Discussion

82. The statutory wording of s 28A(6) is: '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.' As related earlier, there are two elements in our decision: (a) whether reasonable grounds for not issuing a closure notice; and (b) whether within a specified period.

83. Case law authorities on s 28A TMA establish that the Tribunal's decision is essentially a balancing exercise of the relevant factors, such as: whether the enquiry is inappropriately protracted (*HMRC v Vodafone 2* [2006] STC 483 at [33] and [34]); or with undue delay or caution on HMRC's part to close the enquiry (*Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]); or unreasonably protracted (*Steven Price v HMRC* [2011] UKFTT 264 (TC) at [40]).

84. That said, in *Frosh and others v HMRC* [2017] UKUT 0320 (TCC), the Upper Tribunal stated at [43] that 'reference to such cases may be helpful in identifying relevant factors to be taken into account, and thus to promote some uniformity of approach'. However, it would be 'unhelpful to seek to derive legal principles from cases which turn on their own facts', because:

> '... the value judgment required of the FTT in addressing a particular case should not be subjected to any kind of straitjacket. The only relevant legal principle to be applied by the FTT is to consider whether HMRC have reasonable grounds for not giving a closure notice within a specified period. It is for the FTT to consider the question of reasonableness without any gloss on that concept.'

With such guidance in mind, we address first the grounds of the closure applications before turning to consider the question of reasonableness.

Grounds for the closure applications

Ground 1: HMRC's conduct prior to the opening of the formal enquiry

85. Ground 1 is accompanied by Appendix 2 containing 57 emails and Appendix 3 containing 9 letters, and their introduction is prefaced by Mr Crewe as follows:

> 'We apologise for providing such a large volume of documentation at this late stage but as HMRC should have provided this but failed to do so ...' (para 15)

86. It is Mr Crewe's view that HMRC should have produced such documentation pursuant to Direction 1 issued by the Tribunal on 13 December 2017, which states:

> 'By 22 December 2017, the Respondents shall provide to Mr Crewe and the Tribunal, an electronic copy of the communications in and around June 2016, whether by letter or email, from Officer Robb to Mrs McWatt, whereby matters such as the monthly lodgements of £400 and expenses paid on the foreign properties were being raised by HMRC, and of the responses from the Appellant thereto.'

87. Direction 1 was made for the sole purpose of enabling the documents that had been referred to in Officer Robb's oral evidence to be lodged. HMRC produced seven emails and one letter *in and around June 2016*, the contents of which have been related earlier as the covering memorandum from Officer Robb with the appendices.

88. For the avoidance of doubt, HMRC have grasped the point correctly: the narrow interpretation of the direction is denoted by 'in and around June 2016'. The phrase 'in and around June 2016' was a reference to Officer Robb's evidence, in reliance of his memory during oral evidence for indicating the time of those communications as around June 2016. The direction was also specific to HMRC, since it was in relation to Officer Robb's evidence.

89. On 22 December 2017, in the amended Tribunal directions (issued on granting the application from Mr Crewe), the Judge prefaced those directions by stating expressly that HMRC had complied fully with the direction as follows:

> 'Further to the Tribunal Directions issued on 13 December 2017, and noting that Direction 1 thereof has been complied with by the Respondents, ...'

90. Mr Crewe's submission in response to the documents so lodged by HMRC pursuant to Direction 1 is as follows (para 11 of his statement):

> 'We would submit that HMRC have interpreted this Direction very narrowly and thereby effectively failed to comply with it by providing only a fraction of the communications between Mrs McWatt and HMRC.'

91. Consequently, Mr Crewe attached 'a comprehensive copy of communications during the pre-enquiry period – as we believed was directed by Judge Poon'. Appendix 2 and Appendix 3 chart the full course of correspondence between HMRC and Mrs McWatt in the period from December 2015 to January 2017.

Procedural impropriety as regards the introduction of new evidence

92. Notwithstanding the fact that the communications as contained in Appendices 2 and 3 are in possession by HMRC as a party to the correspondence, the contents of Appendices 2 and 3 represent 'new' evidence for the purposes of these proceedings. The contents did not feature in the 'documents list' before the hearing; were not included in the bundles for the hearing; and were not referred to specifically by witnesses in their evidence at the hearing. We also state the obvious that the Tribunal has not hitherto seen the contents of the Appendices until the closing submissions.

93. If Mr Crewe considered the pre-enquiry communications to be of relevance to the closure applications, he should have included them in the listing of documents per directions issued by the Tribunal in October 2017. Direction 3 states as follows:

> '3. Not later than 10th November 2017 each party shall send or deliver to the other party and the Tribunal:
>
> a. a list of documents and case law on which that party intends to rely upon or produce at the hearing and copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so; ...'

94. If he had failed to include those documents in Appendices 2 and 3, an application for their lodgement prior to, or at the hearing, could have been made. No such application has been made at any stage for the introduction of the new evidence. The Tribunal cannot admit the new evidence now at the stage of closing submission. HMRC are prejudiced as they have been 'ambushed', especially in view of the simultaneous closing submissions being directed on application by Mr Crewe to vary the original directions from sequential to simultaneous submissions.

95. HMRC have been heavily criticised by Mr Crewe for various procedural issues: for not calling Officer Robb as a witness in the first place, for putting Officer Marshall as a relatively new case worker to give evidence, for not lodging the full trail of pre-enquiry correspondence. There are no merits in any of these criticisms in the light of the applicant's failure in the first place to lodge the documents contained in Appendices 2 and 3. The procedural implications of such a failure are three-fold. First, HMRC had no indication from the applicant's list of documents for inclusion in the hearing bundle that the pre-enquiry period should become a focal point of Mr Crewe's cross-examination. Secondly, Officer Marshall was the case worker opening the formal enquiry, and was quite properly the witness to give evidence on the substantive applications. Thirdly, HMRC did respond to Mr Crewe's focus on the pre-enquiry period by making Officer Robb available to answer questions.

96. Procedural impropriety is at issue here, and a potential ground for HMRC to bring a challenge against the manner in which Mr Crewe made his closing submissions by introducing new evidence. The Tribunal cannot engage with those parts of Mr Crewe's submissions that are in relation to the contents of Appendices 2 and 3, namely the documents charting the course of correspondence between Mrs McWatt and HMRC in the pre-enquiry period from December 2015 to January 2017.

97. We should highlight that any attempt to introduce new evidence at the stage of closing submission is a cause of procedural impropriety that deserves the sternest opprobrium of the courts. The conclusion from Lightman J in *Mobile Export 365 Ltd v HMRC* [2007] EWHC 1727 (Ch) at [21] is apt as our closing remarks:

> 'I should conclude by saying a word about springing surprises on opponents, as were sprung on the Commissioners and the tribunal in this case. Such tactics are not acceptable conduct today in any civil proceedings. They are clearly repugnant to the Overriding Objective laid down in CPR 1.1 (where applicable) and the duty of the parties and their legal representatives to help the court to further that objective. The objection to them is not limited to proceedings to which the CPR are applicable.'

Substance of this ground being a judicial review claim

98. For completeness, we should state that even if all the documents as contained in Appendices 2 and 3 have been properly lodged as evidence in the course of these proceedings, the substance of this ground of application is not a matter that this Tribunal can consider.

99. In respect of the conduct of HMRC in the pre-enquiry period, Mr Crewe's submissions represent an elaboration of the scope and the substance of Mrs McWatt's formal complaint lodged in February 2017. The causes for the complaint are to be dealt with by the formal complaints procedure within HMRC or by the ombudsman.

100. If the applicant's intention is to seek an order for closure of the enquiry, then the route is to bring a judicial review claim. The normal grounds of challenge in a judicial review action include: (a) illegality (where a decision has involved an error/errors of law or fact), (b) irrationality (*Wednesbury* unreasonableness from the Court of Appeal

precedent in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223), (c) procedural impropriety, (d) fettering of discretion, and (e) proportionality. The function of the court in judicial review proceedings is to review decisions of statutory and public authorities to see if they are lawful, rational and reached by a fair process.

101. This tribunal has no jurisdiction to consider a judicial review claim in general. The jurisdiction for judicial review as a branch of public law is firmly reserved for the High Court and its appellate courts.

102. For these reasons, the Tribunal must dismiss those parts of Mr Crewe's submissions in relation to the pre-enquiry dealings between HMRC and Mrs McWatt in their entirety.

Ground 2: the duration of the enquiry to be reckoned from December 2015

103. The closure applications are made under s 28A TMA. A closure notice is specific to a year of enquiry; the opening of an enquiry under s 9A TMA is therefore a precondition for the issue of a closure notice. Sub-section 28(1) stipulates that a closure notice is in relation to an enquiry under s 9A(1):

> '28(1) An enquiry under section 9A(1) … of this Act 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.'

104. The statutory basis for the issue of a closure notice is that there must be a valid enquiry opened under s 9A TMA, (in failure of which, the enquiry has to be established as being brought under s 29 TMA by discovery.) The validity of a s 9A enquiry is predicated on formality requirements being met, whereby: (a) the officer giving notice of an 'intention' to enquire; (b) the specific return in question to define the period of enquiry; (c) the notice is served within the time limit.

105. A closure notice is predicated on a s 9A notice, and a s 9A notice is predicated on a return being submitted. In our judgment, there is no other statutory basis for reckoning the timing of an enquiry being opened other than the date of the valid notice being served under s 9A TMA.

106. We should also mention the obvious that the enquiry into the company relates to the accounting period to 31 December 2010, which bears no correlation to the periods of enquiry now opened into Mrs McWatt's affairs.

107. A closure notice, for all its legal implications, must be specific as respects the period concerned and its conclusions. The statutory construction of the linkage between s 28 and s 9A of TMA cannot be replaced by other extraneous construction as proposed by Mr Crewe. The second ground of application is accordingly dismissed.

Ground 3: Neither Mr or Mrs McWatt is a participator of the company

108. Ground 3 is essentially to say that since neither Mr nor Mrs McWatt is a participator as defined by s 454 CTA 2010, there is no basis for HMRC to open an enquiry into Mrs McWatt.

109. The case of *Lee v R & C Commrs* [2008] Sp C 715 ("*Lee*") relates to three linked sets of applications for closure notices brought by Mrs Lee, her husband, and a company of which Mrs Lee was said to be the only shareholder. The Special Commissioner, Dr David Williams, set out the parameters for opening an enquiry under s 9A of TMA at [3] as follows:

> 'An officer wishing to conduct an enquiry into a self-assessment tax return must give notice to the taxpayer that he or she intends to do this. He or she can give notice only within a "window" of time allowed by section 9A(2) TMA. There are no preconditions that the Officer must meet when deciding to make an enquiry. But it must be an enquiry into a return. Notice cannot be given before a return is made. And it must be given within the time allowed. Once the "window" has passed, an Officer may investigate a taxpayer's affairs only by using other powers such as those in section 29 TMA.'

110. We agree with Dr Williams that: (a) 'There are no preconditions that the Officer must meet when deciding to make an enquiry'; and (b) that an enquiry under s 9A TMA must be an enquiry into a return.

111. We cannot see the relevance of this ground since HMRC's powers to open an enquiry into Mrs McWatt's tax affairs are exercised under s 9A TMA. There is no statutory limitation on HMRC as to when they can serve a s 9A notice, so long as it is a valid notice served within the statutory time limit and is in relation to a return.

112. Whether Mrs McWatt is or is not a participator is simply not relevant. The precondition that is being argued here of meeting s 454 CTA definition has no statutory basis. The reference to HMRC's guidance is irrelevant to our consideration since it is well established that HMRC's guidance has no force of law. There is no validity or relevance to this ground of application and we dismiss.

Ground 4: the unreliability of HMRC's data and the explanations proffered

113. That 'HMRC's concerns are based on wildly inaccurate extrapolation of data, which suggests that Mrs McWatt has far more capital on deposit than she has already demonstrated to HMRC'; that the ICE data have produced 'a rather fanciful figure of between £1.1m & £2m' from 'simply a very inaccurate extrapolation of hard data' (interest received by Mrs McWatt) (paras 2, 52 and 53 of closing statement).

114. HMRC's reliance on the ICE data is to give an indication for gauging the levels of risks. It appears to us that HMRC are not considering the data to be complete or accurate; otherwise there would be no need for obtaining the actual bank statements by applying to third parties.

115. The 'hard data', as Mr Crewe called them, are the amounts of interest received as declared on the returns submitted by Grant Thornton for Mrs McWatt, which we do not suppose Mr Crewe will describe as 'wildly inaccurate'. Using such 'hard data' as the basis, and applying the prevailing rate of interest of 0.5% to estimate the levels of underlying capital required to generate the interest as income, appears to us to be the best reasonable way HMRC can gauge the size of capital involved in the absence of an alternative source of information.

116. In the alternative, the applicant can provide substantive proof to establish the size of her capital deposits. In the event she had received interest at 1% on some deposits, for instance, that would reduce the size of the underlying capital. In the absence of any substantive proof, HMRC can only resort to estimation, and cannot be criticised for the unreliability of their source of data for estimation when the only person who can provide hard evidence seems to have resolutely declined to do so.

117. As to the submission that HMRC have been unreasonable in not accepting the explanations proffered to allay their concerns, it is unnecessary for us to deal with them here. Our views and reasons are as those under the heading of whether there are 'reasonable grounds' for not issuing closure notices.

Ground 5: the personal circumstances of the applicant

118. The bereavement of Mrs McWatt in February 2016 was in the foreground of the hearing and Mr Crewe's submissions. While we appreciate the central place this factor occupies in the applicant's circumstances, it cannot be a factor that occupies the centre ground in the Tribunal's consideration of a closure application.

119. As stated in *Frosh*, the only relevant legal principle is to consider whether HMRC have reasonable grounds for not giving a closure notice within a specified period. The bereavement, as a factor, is not relevant to our consideration as respects 'reasonable grounds'. It can be a relevant factor in our consideration as regards specifying a period, but is not, of itself, the central or only factor in our balancing exercise. In our view, its relevance is also limited to a situation where the ongoing enquiry has been inappropriately protracted.

120. Furthermore, this factor does not invariably work in the applicant's favour by bringing forth a closure notice, if the personal circumstances have in fact contributed to prolonging the enquiry period; for example, by stalling the progress through slow responses, by making HMRC give extension of time for compliance.

121. In the present case, the relevance we can accord to the personal circumstances of Mrs McWatt is their effect on the background and progress of the enquiry so far. It was a factor that had caused the meeting in January 2017 to be aborted; it was a factor given for the non-compliance with the first Sch 36 notice, and HMRC's subsequent extension of time; it was a factor that caused the Sch 36 penalty to be waived. From the evidence in front of us, it is a factor that has given rise to continuous circumspection on HMRC's part as to the conduct of the enquiries, and to the best way of obtaining information, such as the proposal of a mandate.

122. The enquiry into 2015-16 commenced on 27 January 2017, and those for the earlier years commenced on 8 August 2017. It cannot be said that these enquires have been inappropriately protracted, which means the factor of personal circumstances is of no relevance to our consideration at this stage.

The principal considerations in determining this application

Whether 'reasonable grounds' for not issuing a closure notice

123. In identifying the meaning of 'reasonable grounds', we refer to the construction adopted in case law authorities for determining an application for a postponement of tax. The statutory basis for a postponement of tax being granted is under s 55(6) TMA: 'that there are reasonable grounds for believing that the appellant is overcharged to tax'.

124. In *Sparrow Ltd v Inspector of Taxes* [2001] STC (SCD), a decision on a s 55 TMA application, the Special Commissioner, Dr Brice, adopted the meaning for 'reasonable ground' used in *Australian Doctors' Fund Ltd v Commonwealth of Australia* (1994) 49 FCR 478, as stated at [71] of *Sparrow*:

> '"To be 'reasonable', it is requisite only that they be not fanciful, imaginary or contrived, but rather they be reasonable; that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous."'

125. The construction for 'reasonable ground' in *Sparrow* is accompanied at [72] by a reference to the state of mind involved in 'believing' that is part of the statutory wording of s 55(6):

> '"[w]hen a statute prescribes that there must be 'reasonable grounds' for a state of mind ... it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."'

126. So far as the definition of 'reasonable grounds' is concerned, there is common ground between s 28A(6) TMA and s 55(6) TMA. However, it is necessary to distinguish that there is no subjective element of 'believing' in the statutory wording of s 28A(6) TMA, and the distinction means that the test of 'reasonable grounds' under s 28A(6) is to be construed essentially as an objective test.

127. Turning to the facts of the present case, and given that the burden of proof is on HMRC to establish 'reasonable grounds', we have regard to the risks identified by HMRC as the objective basis of the test for 'reasonable grounds'. In the context of the available facts, and taking into account the explanations offered by the applicant, we evaluate these risks as follows:

> (1) That Mr McWatt gifted around £600,000 to Mrs McWatt out of his taxed income over the years under enquiry, of which £150,000 was returned to Mr McWatt to meet his capital gains tax payments over 3 of the years; Mrs McWatt was left with £450,000 as the net value of the gifts.

(2) The UK properties have a total purchase value of £488,000, and though Mrs McWatt's beneficial interest is stated at 50%, it was quite probable that she contributed more than 50% of the purchase price, or advanced loans that were not repaid. The Bulgarian apartments would have tied up another £100,000 capital.

(3) Notwithstanding the capital commitments to property ownership, there seemed to be still sizeable funds in deposit to generate interest which at the peak years, exceeded £10,000 per annum. The size of underlying capital at the prevailing rate of interest of 0.5% would amount to around £2m.

(4) The abrupt drop of interest income from £10,306 in 2014 to £2,308 in 2015 coincided with the timing when HMRC opened enquiry into the company. No explanation was offered as to the diversion of funds.

(5) The foreign property ownership pointed towards the operation of bank accounts to meet property expenses, either directly or via an agent. While the amounts of expenses might not be significant, there are reasonable grounds to suggest the existence of undisclosed foreign account holdings, of which no data can yet be gathered.

(6) The ICE data list the accounts held in Mrs McWatt's name, though not with the bank account balances other than the ISA accounts. Some 55 accounts are captured as being held between 2009 to 2016. The ICE data do not purport to indicate any more than account holdings that were associated with Mrs McWatt, and on that level, the ICE data point to account holdings that are hitherto undisclosed.

(7) From the bank statements provided for the calendar year 2010, there was no cash withdrawal for up to 4 months at a time, nor transactions that suggest spending by debit or credit cards. The question remains unanswered how the household and living expenses were met.

128. These risks as identified, any one of them would have given rise to 'reasonable grounds' for not directing a closure notice. The requisite level of reasonableness is 'not fanciful, imaginary or contrived', 'not irrational, absurd or ridiculous', but agreeable to reason.

129. We should also emphasise that the test is not that the Tribunal is satisfied on full facts that a closure notice cannot be directed for issue: the full facts are known to one person alone, and that is the applicant.

Whether a period of time can be specified

130. It would be fair to say that Mrs McWatt had been completely out of the radar of HMRC as a taxpayer for at least 20 years. By being completely 'invisible' to HMRC, Mrs McWatt's financial affairs have left no trace in the tax system. This is not a case where HMRC have a standing profile of the taxpayer to commence their enquiry. These are enquiries that have to start with a blank record.

131. The enquiries were opened for just over 6 months (for the year 2015-16), and 9 days (for the years 2011-12 to 2014-15) when the closure applications were made. At the time of the hearing, the first-party information notice for 2015-16 had not been fully complied with, and no bank records would seem to have been received regarding the earlier years.

132. The explanations proffered to HMRC have raised more questions than they answered. The limited official documents provided such as bank statements are heavily redacted to disclose the minimal information. Other information was provided as a testimony, either by Mrs McWatt herself or her children. Information is related as assertions, unvouched for and unverified: such as no rental income was received, that £400 monthly deposits being a loan repayment, no property expenses incurred, such as the note on the list of accounts in 2010, most of which being 'not in operation' without any documentation to vouch for the assertion.

133. It is plain that what HMRC are looking for is full disclosure to enable them to verify whether the self-assessment returns for the said years under enquiry are complete and accurate.

134. It is equally plain to us that the applicant's responses to HMRC were characterised by a general lack of candour; that information was drip-fed to HMRC; that explanations given were not adequately substantiated by robust external evidence; that her personal circumstances circumvented the enquiry efforts and initiatives; that the full picture required by HMRC to close the enquiries is not likely to emerge without third-party information; that there is an offshore dimension to the bank account operation in these enquiries that HMRC have not yet embarked upon; and that the scope and extent of the enquiries cannot yet be delineated.

135. It seems to us that the enquiries have hardly got off the ground. The necessity to gather information from third parties, and possibly foreign institutions, will invariably take longer than if full disclosure has come from the taxpayer. Given the pattern of information exchanges between the applicant and HMRC, third-party information gathering appears to be the only viable alternative, and will ultimately provide more conclusive evidence to enable the enquiries to be properly closed.

136. A closure notice is not just to inform the taxpayer that the officer has completed the enquiries; a closure notice requires the officer to state the 'conclusions' of his enquiries. To direct a closure notice to be issued within a specified period in the present case will be to substitute the enquiry process, however lengthy it may be, with a litigation process which can be equally lengthy if not more, especially when evidence used to conclude the enquiries is not sufficient or satisfactory.

137. Procedurally, a premature closure of such enquiries can lead to unintended legal consequences, which are illustrated by the appellate history of *Tower MCashback LLP 1 and another v HMRC* [2011] UKSC 19 ('*Tower MCashback*'). Lord Walker, in giving the Supreme Court judgment on the case, stated at [13]: 'A great deal of expensive legal argument might have been avoided if [the investigating officer] had stood his ground and insisted that he needed more time to consider the matter.'

138. HMRC have a public duty to assess a taxpayer to the correct amount of tax to the best of their judgment in the light of available information. As Henderson J stated at [115] of the High Court decision in *Tower MCashback* [2008] EWHC 2387 (Ch):

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

139. Any direction to specify a time limit within which the closure notices are to be issued will frustrate the reasonable and legitimate enquiries that HMRC still need to undertake. To force the closure of such enquiries may lead to unintended legal consequences, or to the ultimate amendments and assessments being unduly low, or unduly high and be open to successful challenge – none of which will accord to the public interest for a proper closure of such enquiries, or be in the interests of justice.

Decision

140. The Tribunal is satisfied that there are reasonable grounds for not issuing a closure notice in relation to the year 2015-16, or any of the earlier years from 2011-12 to 2014-15, either at this stage or within any specified period.

141. The applications are accordingly refused.

142. 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.

DR HEIDI POON

TRIBUNAL JUDGE
RELEASE DATE: 18 April 2018

This decision has been amended and re-issued under Rule 37 of the Tribunal Rules 2009 to remove typographical errors.