



TC06126

Appeal number: TC/2017/2557

INCOME TAX – Closure Notice application – s 28A(4) TMA 1970 - enquiry open for over six years – information notice issued after request for closure notice made – whether HMRC acted unreasonably – whether closure should be ordered

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr DAVID BENSON

Applicant

-and-

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: Judge Peter Kempster
Mr Ian Menzies-Conacher FCA**

Sitting in public at Centre City Tower, Birmingham on 4 September 2017

The Applicant appeared in person

Ms Sadiya Choudhury of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. By an application filed on 21 March 2017 Mr Benson requested a Tribunal direction requiring HMRC to issue closure notices in relation to open enquiries into his self-assessment tax returns for the tax years 2008-09 and 2009-10 (“the Application”).

Law

2. Section 28A Taxes Management Act 1970 provides:

“**28A Completion of enquiry into personal or trustee return or NRCGT return**

(1) An enquiry under section 9A(1) or 12ZM 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.”

Background

3. Mr Benson filed his 2008-09 self-assessment return electronically on 27 January 2010. It included a “white space” entry disclosing information concerning his participation in certain tax planning structures, discussed further below. HMRC opened an enquiry into the return (s 9A TMA 1970 refers) on 9 December 2010, and on the same date requested certain documents and information from Mr Benson’s advisers, Montpelier Tax Consultants (Isle of Man) Limited and Montpelier (Trust and Corporate) Services Limited (“Montpelier”). On 18 February 2011 Montpelier supplied information to HMRC.

4. Mr Benson filed his 2009-10 self-assessment return electronically on 2 November 2010. It also included a white space entry. HMRC opened an enquiry into the return on 12 October 2011, and on the same date wrote to Montpelier stating, “As you will be aware a similar check is currently being undertaken into your client’s self-
5 assessment tax return for the year ended 5 April 2009. As a substantial amount of information has already been provided in respect of this year I do not, at this stage, intend asking for the same information which relates to the year ended 5 April 2010.”

5. On 14 October 2016 HMRC wrote a precursor letter to Mr Benson and Montpelier stating that HMRC intended to issue follower notices and accelerated payment notices
10 (part 4 Finance Act 2014 refers) to Mr Benson concerning his participation in tax avoidance schemes in the tax years 2006-07 and 2007-08. On 28 October 2016 HMRC issued the follower notices and accelerated payment notices. On 27 October and 1 November 2016 Montpelier replied stating that they were not Mr Benson’s tax agent.

15 6. On 11 February 2017 Mr Benson wrote to HMRC stating that it was now many years since the enquiries were opened, and requesting that closure notices be issued for both years “so that the matter can be closed or the appeals process can be progressed.” On 20 February 2017 Mr Benson resent that letter by email (redating the letter as 20 February), explaining that he was unsure to which person at HMRC the
20 request should be sent.

7. On 21 March 2017 Mr Benson filed the Application with the Tribunal (applying for closure notices for both years).

8. On 22 March 2017 HMRC replied to Mr Benson, stating:

25 “Thank you for your email dated 20 February 2017. I am sorry that you have not received any details regarding the enquiries into your Self-Assessment Returns for the tax years ending 5 April 2009 & 2010.

Your case has been dealt with by other teams in HMRC in the past. My team have taken over responsibility for the enquiries into your Returns therefore if you have any further queries please do not hesitate to
30 contact me or my team on the telephone number above.

Having reviewed your case, at this moment, I am not in a position to provide you with Closure Notices as the enquiry work has not been fully completed. To enable HMRC to progress our enquiries please provide the following documents:

35 For the tax year ending 5 April 2009, please send me the following details:

1. A copy of your consultancy agreement with Rathowen Ltd.
2. Copies of all bank statements for the period 6 April 2008 to 5 April 2009 demonstrating Rathowen's payment of Consultancy fees.

5 3. On review of the information provided, I note that the letter from Rathowen Ltd dated 22 August 2008 addressed to you refers to 'The Fernleigh Employee Benefit Trust'. Please provide information and/or records regarding this trust, including how it operates and any promotional material you received from it.

10 4. Information regarding the sub-fund in your name ('The David Allen Benson Sub Fund'). Among other, please provide details on how it was set up, how the balance of the sub-fund is calculated, how the money is transmitted to you and what is the interaction with Fernleigh Employee Benefit Trust. Please provide any supporting documentation regarding that.

15 5. Details of the 'end client'. As part of your consultancy agreement with Rathowen Ltd, who did you provide your services to? How did you arrange to provide your services to them? Please provide any supporting documentation.

For the tax year ending 5 April 2010, please send me the following details:

20 1. A copy of your consultancy agreement with Rathowen Ltd (if different from above).

2. Copies of all bank statements for the period 6 April 2009 to 5 April 2010 demonstrating Rathowen's payment of Consultancy fees.

3. Information and/or records regarding 'The Fernleigh Employee Benefit Trust' (if different from above).

25 4. Details of the 'end client'. As part of your consultancy agreement with Rathowen Ltd, who did you provide your services to? How did you arrange to provide your services to them? Please provide any supporting documentation.

5. Copy of the loan agreement with Ronsard Ltd

30 From examining the information we currently have at hand, my position so far is that the amounts you have received from Ronsard Limited that were described as 'loans' during the years in question may form part of your taxable income. This is because it appears to be disguised remuneration. The government is introducing the 2019 Loan Charge to tackle disguised remuneration arrangements. The loan charge will be on the cumulative balance of any unpaid loans received that have not previously been taxed; this may include any accrued interest, of all such loans that you have received under the loan arrangements.

40 A number of people like you, who used Ronsard and similar schemes have already settled their tax affairs and others are talking to us about settling. The benefits to you in settling now include gaining certainty over your tax affairs and concluding our investigation into the tax years ending 5 April 2009 & 2010.

13. On 21 June 2017 HMRC issued a formal information notice (sch 36 Finance Act 2008 refers) requiring the information detailed in their 22 March letter (“the Sch 36 Notice”).

14. On 26 July 2017 Mr Benson replied, stating:

5 “The documents and information requested in [the Sch 36 Notice] are
historical in nature and could have been requested by HMRC at the time
that its enquiries were first opened. However HMRC chose not to
request such material at that time, nor indeed at any time in the
10 following 5 years or so. In fact HMRC did not contact me at all about
the open enquiries in question during that period.

I therefore believe that the issuance of this Information Notice is an
attempt to present the illusion that there are ongoing enquiries, so that
HMRC can seek to resist my own recent request for closure notices.

15 In the context of the above I believe that the Information Notice you
have issued is both unreasonable and vexatious, and I wish to appeal
against it.”

15. On 15 August HMRC confirmed the issue and contents of the Sch 36 Notice, and
advised Mr Benson that within 30 days he could either request a formal internal
review or make an appeal to the Tribunal.

20 **HMRC’s evidence**

16. Mr James Mills adopted and confirmed a witness statement dated 17 August 2017,
gave oral evidence in support of that statement, and answered questions from Mr
Benson and the Tribunal. Mr Mills is an HMRC Inspector of Taxes; since November
2015 he has been assigned to a team investigating “contractor loans tax avoidance
25 schemes”. In November 2016 he became a lead investigator on certain undisclosed
tax avoidance schemes, including products promoted and implemented by Montpelier.
He had personal knowledge of events since November 2016; for prior events he relied
on the files maintained by his predecessor and colleagues.

17. Mr Mills stated:

30 (1) Some years ago HMRC became aware of a tax avoidance scheme
promoted by Montpelier, involving the use of a Manx partnership to claim
exemption from UK tax pursuant to the UK/Isle of Man double taxation
convention (“the DTA Scheme”). That exemption was removed by
retrospective legislation, and the Tribunal case of *Huitson v HMRC* [2015]
35 UKFTT 448, [2016] SFTD 37 confirmed that the tax advantage was not
available.

40 (2) The use of the DTA Scheme was apparent from white space entries
made by participants on their returns for tax years up to and including
2008-09. For 2008-09 HMRC noted an additional white space entry,
stating that the taxpayer had received a short term, interest-free loan from

a client for whom services had been performed, which the taxpayer considered to be outside the income tax charging provisions. HMRC identified that this related to a further Montpelier tax avoidance scheme (“the Loan Scheme”).

5 (3) HMRC opened s 9A enquiries into the returns of over 700 identified users of the Loan Scheme, and initially requested a set of documents and information from each individual; Montpelier provided a standard response on each request. Many participants had used the Loan Scheme in more than one tax year; HMRC were currently enquiring into around 1,700
10 self-assessment returns. In view of the size of the task, HMRC decided to focus on a small sample of participants to understand the structure and implementation of the Loan Scheme; originally a sample of four taxpayers was used but that had grown to around 30; the members of the sample were selected by HMRC without reference to or agreement with
15 Montpelier or the taxpayers. Further particulars of the Loan Scheme were requested from each sample member. Mr Benson is not a member of the sample.

(4) Mr Mills’s current understanding of the Loan Scheme, based on the fuller investigations into the sample, was that a contractor provided their
20 services at an agreed rate to an end client (for example a bank), often via a recruitment agency. Rather than entering into a contract for services with the end client or recruitment agency, an additional intermediary, Rathowen Ltd (registered in the Isle of Man) was introduced into the contractual chain. Rathowen Ltd engaged the contractor and received the agreed rate
25 (less any fees paid to a recruitment agency). Under the contract for services with the contractor, Rathowen Ltd only paid the contractor a small amount of fees monthly. The balance of monies received by Rathowen Ltd was passed into the Fernleigh Employee Benefit Trust (after deduction of a further fee) and the trustees then made further, larger monthly payments
30 described as "loans" to the contractor. The investigations into the sample users had identified that the Loan Scheme structure was similar in structure to the DTA Scheme. One difference was that rather than one engager (Rathowen Ltd), the DTA Scheme users were engaged by one of a number of Isle of Man partnerships. In some cases where a DTA Scheme
35 user moved into the Loan Scheme, their original contract for services with the Isle of Man partnership was not replaced; HMRC had been told that these contracts had been honoured by Rathowen Ltd.

(5) There was, therefore, a difference in implementation of the Loan Scheme between users who had also used the DTA Scheme, and other
40 users. That distinction had become apparent to the investigation team only around February 2017. Mr Mills considered that affected how HMRC might challenge different groups of users of the Loan Scheme, and the calculation of tax liabilities HMRC might seek to impose on those groups.

5 (6) Mr Benson had used the DTA Scheme; that was the reason for the follower notices and advance payment notices for tax years 2006-07 and 2007-08. HMRC believed he had also used the Loan Scheme as his tax returns disclosed loans of £98,750 on the 2008-09 return and £85,500 on the 2009-10 return, and described the provision of IT services.

10 (7) In response to the initial enquiry letter in December 2010 certain documents had been provided, such as heavily redacted bank statements; these showed receipts from Ronsard (which corresponded in aggregate to the figures on the tax return for the relevant year) but did not show the receipts from Rathowen.

(8) Mr Benson's case came to Mr Mills's attention because Montpelier had stated that they did not act for Mr Benson.

15 (9) Mr Benson's request for issue of closure notices did not come to Mr Mills's attention until after 20 February 2017, when Mr Benson had resent it (redated 20 February).

20 (10) After reviewing the records held for Mr Benson, Mr Mills concluded that, while HMRC understood the generic structure of the Loan Scheme, HMRC were still checking Mr Benson's tax position in relation to his specific use of the Loan Scheme. HMRC had only limited documents and information for 2008-09 and no documents for 2009-10, and so he considered that HMRC could not close the enquiries now.

(11) Mr Mills was not aware of the Application until the Tribunal's notification dated 12 April 2017 reached him. HMRC's letter dated 18 April 2017 was written before his team were aware of the Application.

25 (12) Mr Mills considered that the information and documents required by the Sch 36 Notice were reasonably required to enable consideration of the arrangements Mr Benson specifically entered into, with a view to closing the enquiries. Having reviewed the information held by HMRC specifically relating to Mr Benson, Mr Mills considered
30 that he did not have sufficient particulars to close Mr Benson's enquiries at this time. For example, he required Mr Benson's bank statements to check both the amounts of receipts received from Rathowen Ltd and the receipts from Ronsard Ltd in their capacity as trustee of the Fernleigh Employee Benefit Trust; Montpelier had supplied redacted bank statements showing
35 only the receipts from Ronsard Ltd for 2008-2009; Mr Mills could not check the declared turnover for both tax years, nor the amounts received from Ronsard Ltd for 2009-2010. A further example was that the contract for services had not yet been provided; Mr Mills had seen various contracts in the sample cases and, as Mr Benson was a user of the DTA
40 Scheme, HMRC needed to check with whom Mr Benson had contracted to provide his services; the contract may have a material impact on the structure of the transactions entered into by Mr Benson. Even after receipt

of that information, HMRC may have further questions relating to Mr Benson's particular circumstances.

(13) Mr Mills acknowledged that HMRC should have kept Mr Benson better informed as to how the sample enquiries were progressing.

5 (14) When preparing his witness statement he had not seen a copy of HMRC's letter dated 12 October 2011, and so was unaware that HMRC had stated there that they did not at that stage require any information in relation to the 2009-10 return; he did not know why there was not a copy of that letter on the file but it may have been due to the split of work
10 between members of the team.

(15) In response to questions by Mr Benson:

(a) The s 9A enquiries had been opened as Code of Practice 8 investigations.

15 (b) Taxpayers were entitled to expect openness and timeliness from HMRC.

(c) The legislative changes referred to in HMRC's letter dated 22 March 2017 had not yet been enacted. Mr Mills's understanding was that, if enacted, these would impose a standalone tax charge on outstanding loans; it would still be
20 necessary for HMRC to investigate the arrangements behind those loans.

(d) Enquiries into the earlier years of 2006-07 and 2007-08 had been closed because the position was clear following the retrospective legislation enacted to cancel any advantages from participation in the DTA Scheme. That position did not give
25 any clarity on the later years still under enquiry.

(e) He understood the sample approach had first been adopted in around October 2011. He could not comment on Montpelier's understanding, but he felt it should have been clear from the detailed investigation of the sample cases that the Loan Scheme was the subject of ongoing scrutiny.

30 (f) Mr Mills was not responsible for the follower notices and advance payment notices for the earlier years, and so could not comment on those.

35 (g) Mr Mills did not know why his colleague had telephoned Mr Benson in March 2017, nor why a letter had been sent to Mr Benson by recorded delivery, which was not usual HMRC procedure. It may have been that his colleague was aware of Mr Benson's concerns over the ongoing enquiries and requests for closure notices, and wished to confirm to him that matters were in hand.
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(16) In response to a question from the Tribunal: The current position on the sample users was that the position had been reviewed and progress was expected shortly; no user had yet been issued with a closure notice.

5 **Respondents' case**

18. Ms Choudhury submitted as follows for HMRC.

19. In view of the scale of use of the Loan Scheme, HMRC had chosen to use a sample approach to investigating the details of the scheme. That had not been discussed with Montpellier, which was why Montpellier had stated to Mr Benson that no sample had been agreed. Mr Benson was not in the sample. HMRC accepted that once they became aware that Montpellier were no longer acting for Mr Benson then HMRC should have kept Mr Benson better informed of their progress on the sample investigations.

20. Mr Mills's evidence was clear that the information and documents currently held by HMRC were not sufficient to enable closure of the enquiries. One outcome of the detailed investigation of the sample users was that different variants of the Loan Scheme appeared to have been used for different groups of users, such as those who (like Mr Benson) had previously participated in the DTA Scheme. Any dispute as to the scope of the Sch 36 Notice was not currently before the Tribunal, but the information and documents required by the Sch 36 Notice were being sought legitimately to establish the particulars of Mr Benson's implementation of the Loan Scheme and the possible tax effects of that.

21. Mr Mills's evidence was that the issue of the Sch 36 Notice on 21 June 2017 was made without knowledge of the Application. Therefore, it was not correct for Mr Benson to have alleged that the issue of the Schedule 36 Notice was "an attempt to present the illusion that there were ongoing enquiries".

22. Given the identified uncertainties concerning which users had implemented the Loan Scheme in which particular way, any closure notices issued at this stage would necessarily be vague in nature, which would be contrary to the conclusions of the Upper Tribunal in the recent case of *Adam Frosh & others v HMRC* [2017] UKUT 0320 (TCC) at [49]. Further, given the identified uncertainties concerning which clients had paid Rathowen for services provided by Mr Benson, and the amounts, it was not yet possible to quantify the tax consequences.

23. In *Steven Price v HMRC* [2011] UKFTT 624 (TC) (at [40]) and *Jorg Martin v HMRC* [2017] UKFTT 488 (TC) (at [44]) this Tribunal had identified as the critical factual matters: why HMRC had not sought documents and information from the taxpayer earlier and, accordingly, whether HMRC had unreasonably protracted the enquiry. In the current case, the outstanding documents and information had not been requested earlier because Mr Benson was not one of the taxpayers in the sample. In both *Price* and *Frosh* a sample approach had been adopted, but with the knowledge and agreement of the taxpayers' advisers; that was different from the current case,

where the sample had been selected by HMRC without discussion with Montpelier. However, it was Mr Mills's evidence that it should have been evident to Montpelier from the investigations conducted into the sample cases that such an approach was being adopted by HMRC. In *Price* the Tribunal had stated (at [41]):

5 “It was Mr Price’s right to decide that he no longer wished to sit behind
a sample case and he wanted his enquiry brought to an end: but at that
point (March 2011) he and his advisers should have provided to HMRC
all the outstanding factual information about his implementation of the
10 scheme. Having done so only two days before the hearing, we were
satisfied there were reasonable grounds not to order a closure notice to
be issued at the hearing or at some fixed time after the hearing. Mr Price
should give HMRC time to consider the latest batch of documents and
then, if no closure notice is issued, apply for one again.”

15 Here, Mr Benson had still not produced the information and documents required by
HMRC in the Schedule 36 Notice. In *Martin*, the Tribunal was not satisfied that
HMRC had discharged the evidential burden to show why it was reasonable for
HMRC not to have requested information earlier; that was not the case here, as Mr
Mills had explained exactly why the request was not made until March 2017.

20 24. It was clear from *Eastern Power Networks PLC & others v HMRC* [2017] UKFTT
0494 (TC) that the filing of a closure notice application with the Tribunal does not
prevent HMRC from continuing the enquiry, including issuing sch 36 information
notices if appropriate. That case was determined before the Upper Tribunal decision
in *Frosh* and in relation to other passages cited by Mr Benson, to the extent that it was
incompatible, should not be followed.

25 25. Montpelier were wrong to state (in their email dated 7 April 2017 to Mr Benson)
that all the requested information had been previously provided. Some of the
documents requested are statutory records relating to an open enquiry, and thus
should have been retained (s 12B TMA 1970); others were matters that should be
obtainable from, for example, Montpelier or Mr Benson’s bank.

30 26. It would be premature for HMRC to issue closure notices in these circumstances.

Applicant’s case

27. Mr Benson submitted as follows.

35 28. The 2008-09 enquiry had now been open for over 80 months, and the 2009-10
enquiry for over 70 months. HMRC had made no attempt in all that time to ascertain
the facts they now claimed were essential, until Mr Benson demanded closure notices.
No explanation had been given as to why no progress had been made on the enquiries
in over five years. It was noteworthy that the enquiries into the previous two tax
years had been concluded fairly promptly, and that HMRC had not attempted any
enforcement of the follower notices and accelerated notices.

29. In both *Price* and *Martin* the delay by HMRC had been around three years, and in *Martin* that was held to be unreasonable; in the current case the delays were much longer.

5 30. In both *Frosh* and *Price* there had been a sampling approach, agreed in advance with the taxpayers' advisers. HMRC admitted that had not been done here; Mr Benson was completely unaware of it until he read Mr Mills's witness statement, and when he raised the point with Montpelier they confirmed in writing that no sampling had been agreed with them. Mr Mills could not comment on what had happened before his involvement, and was merely assuming that sampling had been undertaken;
10 some of his other presumptions were mistaken and there was no evidence of a sampling approach having been taken.

31. He had not yet appealed to the Tribunal against the Sch 36 Notice, but was still in time to do so. He had not yet provided the requested information and documents, but he had not refused to produce them. On 28 April 2017 Mr Benson had spoken with
15 Mr Cassidy at Crowe Clark Whitehill, who had advised him that it was not appropriate to respond to the Sch 36 Notice while the Application was before the Tribunal.

32. HMRC's delays were not reasonable, and there were no reasonable grounds for not issuing closure notices.

20 **Consideration and Conclusions**

Approach

33. In determining the Application we have adopted the following approach.

34. Section 28A(6) TMA 1970 provides: "The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice
25 within a specified period." Thus there is a statutory presumption that we will make a direction for closure, and the burden rests on HMRC to show that they have reasonable grounds for not issuing a closure notice within a specified period.

35. In *Frosh* the Upper Tribunal stated (at [43]):

30 "Although we were referred to a number of cases where the FTT, and its predecessor the special commissioners, have considered applications for closure notices in the circumstances at issue in those cases, there is little authoritative guidance. That, however, is not surprising given the nature of the FTT's jurisdiction and the value judgment that is called for in each case. Every case depends on its own facts and circumstances,
35 and is concerned with a question of reasonableness. Although reference to such cases may be helpful in identifying relevant factors to be taken into account, and thus to promote some uniformity of approach, it is, we consider, unhelpful to seek to derive legal principles from cases which turn on their own facts. If a review of those individual cases shows
40 anything, it is that 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 further gloss on that concept.”

5 36. The Upper Tribunal cited the statement of Park J in *RCC v Vodafone 2* [2006] STC 483 that there must be a balance between the interest of HMRC in making enquiries in the exercise of their responsibility for the proper assessment and collection of tax, and the interests of taxpayers in achieving a timely resolution of such enquiries. Also, Park J’s statement (at [43]) that the facility to request a closure notice “is meant to be a protection to a taxpayer, by giving it a procedure whereby, if
10 it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal.”

37. The Upper Tribunal stated (at [49]):

15 “... although it is the case that a closure notice might, in certain circumstances, be in broad terms, that is not the norm, and it cannot therefore be taken as an appropriate yardstick for assessing the reasonableness of the grounds asserted by HMRC for not giving a closure notice at a particular stage in the enquiry process, or within a specified period from that time.”

20 38. The Upper Tribunal concluded (on the facts in *Frosh*) (at [58]):

25 “The FTT was entitled to find that it was not unreasonable for HMRC, before closing their enquiries, to wish to establish the individual facts and circumstances pertaining to the appellants in circumstances where the appellants were not prepared to settle on the terms proposed by HMRC, and not to rely on sampled or generic information derived from other cases.”

Findings of fact

30 39. We understand Mr Benson’s frustration that he has open s 9A enquiries into two self-assessment returns that have been ongoing for (respectively) 6 years 8 months and 5 years 10 months. We accept his explanations that:

(1) He heard nothing about the progress on the enquiries from October 2011 until March 2017 when he received a reply to his request for closure notices.

35 (2) As far he was concerned, there appeared to have been no progress in all that time.

(3) HMRC did not mention to him any sampling investigations being undertaken on other taxpayers, and Montpellier had denied this to him when he asked them.

(4) He had not specifically refused to provide the requested information and documents, but had been professionally advised that it would not be appropriate to respond while the Application was before the Tribunal.

40. We accept HMRC's explanations that:

5 (1) In view of the number of returns under enquiry in relation to use of the Loan Scheme (around 1,700), it was reasonable to adopt a sampling approach.

10 (2) That sampling approach was instigated by HMRC without reference to the scheme promoter (Montpelier), and using a sample self-selected by HMRC.

(3) Investigations had continued into the sample, and had revealed that the detailed implementation of the Loan Scheme may vary between users – eg by those who were or were not participants in the earlier DTA Scheme.

15 (4) HMRC require further information from Mr Benson in relation to, for example, receipts from Rathowen (not apparent from the redacted bank statements provided in February 2011) and details of the persons to whom Mr Benson provided services. Without that information they are not in a position to quantify any adjustment to the returns they consider necessary.

Consideration

20 41. It follows from our findings above that we consider that, even after all this time, HMRC are not yet in a position to specify the nature of any adjustment to the two returns they consider necessary, nor to quantify any such adjustments.

25 42. In *Frosh* (quoted above) the Upper Tribunal stated that it is not the norm for closure notices to be in broad terms, but that this could be appropriate in certain circumstances. We agree with the views expressed by this Tribunal in *Price* (at [10]): "... it may be appropriate to order a closure notice without full facts being available to HMRC where, for instance, HMRC have unreasonably protracted the enquiry. HMRC should not open an enquiry and then first ask for documents 3 years down the line without a reasonable explanation." We also agree with the views expressed by this
30 Tribunal in *Martin* (at [44]): "The critical factual question is why HMRC did not seek any information or documents from the taxpayer for the first three years of the open enquiry. As I have said, even if the documents/information are clearly relevant to the enquiry, HMRC should not procrastinate. They may have a good reason for the delay ...".

35 43. We need, therefore, to consider the reasons why HMRC waited until March 2017 (when Mr Benson had requested closure notices) before requesting the additional information and documents, and whether that delay was a procrastination that unreasonably protracted the enquiries. Then we must judge whether the balance described by Park J in *Vodafone 2* (quoted above) falls in favour of HMRC or,
40 instead, we should direct the issue of closure notices.

44. The conclusion we have come to is that HMRC were justified in concentrating on the sample of returns they had selected for in-depth investigation, and not progressing the remaining enquiries until the results of the sample investigation gave them the information they needed to form a view on the outcome of the enquiries. Specifically on Mr Benson's enquiries, HMRC believed that Montpelier were acting for Mr Benson until Montpelier contradicted that in October 2016; Mr Benson told us that Montpelier "informally" ceased to act for him about two years after the enquiries were opened but there was no suggestion that HMRC had been informed of that. We agree with Mr Mills that Montpelier, as promoter of the Loan Scheme, must have been aware that a sample of cases was being investigated in depth by HMRC and their statement to Mr Benson that there was no agreed representative sample of users, while correct in its strict terms, does not tell the whole story. Therefore, it was reasonable for HMRC to treat Mr Benson's enquiries as being "in the queue" awaiting resolution of the investigation of the sample users. Mr Benson was entitled to tell HMRC that he was no longer prepared to await the outcome of their enquiries, and request closure notices, but he did not do that until February 2017 (and followed it with the Application to the Tribunal in March 2017). We are satisfied that once HMRC were aware of that request they promptly reviewed Mr Benson's file, established that they required further information and documents, and (on 22 March 2017) requested those particulars.

45. Although it may not have been apparent to Mr Benson, HMRC were not unreasonably protracting the enquiries; rather, they were reasonably concentrating on the sample users before drawing conclusions applicable to the remainder of the users.

46. We would also note that HMRC's investigation of the sample users has revealed that there are possibly different variations of implementation of the Loan Scheme, which may entail different tax consequences. In *Frosh* it was argued that, following from a sample exercise, HMRC fully understood the nature of the tax planning that had been undertaken by the users; even so, the Upper Tribunal stated (at [53]):

"... there is a material difference between understanding the generic nature of the arrangements that have been undertaken (which may enable HMRC to come forward with a settlement offer in appropriate cases), and having information concerning the individual case at hand which is of such a nature that it would be unreasonable not to close the enquiry."

In the current case we are satisfied that HMRC have not yet reached the situation attributed to them in *Frosh* and, therefore, it is reasonable for them not to close their enquiries.

47. Our conclusion is that HMRC have reasonable grounds for not giving closure notices within a specified period.

40 **Decision**

48. The Application is REFUSED.

49. 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 25 SEPTEMBER 2017