Neutral Citation: **[2024] UKUT 00114 (TCC)**

Case Number: UT-2023-000051

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

Income tax- application for closure notices - whether reasonable for HMRC to continue with their enquiries - FTT directed a closure notice under section 28A Taxes Management Act 1970 – HMRC's appeal dismissed

Heard on: 26 March 2024
Judgment date: 07 May 2024

Before

JUDGE RUPERT JONES
JUDGE GUY BRANNAN

Between

THE COMMISSIONERS OF HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

JONATHAN HITCHINS (1)
JEREMY HITCHINS (2)
THE EXECUTOR OF STEPHEN HITCHINS (3)

Respondents

Representation:

For the Appellants: Sadiya Choudhury KC, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondents: Keith Gordon, counsel, instructed by Crowe LLP

DECISION

INTRODUCTION

1. This is an appeal by HM Revenue and Customs ("HMRC") against the decision of the First-tier Tribunal ("FTT") released on 16 February 2023 ("the Decision") which directed HMRC to issue closure notices under section 28A Taxes Management Act 1970 ("TMA") in respect of enquiries into the Respondents' self-assessment tax returns.

2. The hearing before the FTT took place in two parts. The first hearing occurred on 26 May 2022, but it became apparent that there was insufficient time to conclude the hearing. We were informed that the parties encouraged the FTT to list a further hearing for later in the year in the hope that the parties would be able to narrow the issues between them. The second hearing took place on 28 November 2022.

3. Essentially, in this appeal, HMRC argue that in the Decision the FTT failed to apply the relevant legal principles in determining the closure notice applications and, alternatively, that the FTT erred in law in the way that it did so.

4. HMRC appeal with the permission of the FTT granted on 9 May 2023.

5. For the reasons given below, we dismiss HMRC's appeal.

6. References in square brackets are to the Decision, unless the context otherwise requires.

LEGISLATION

7. Section 28A(4) TMA permits a taxpayer to apply to the FTT for a direction that HMRC issue a closure notice within a specified period. Section 28A(6) provides that the FTT is obliged to give such a direction unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. The burden is on HMRC to show that there are reasonable grounds for refusing the applications. In short, the FTT was not satisfied that there were reasonable grounds for not issuing a closure notice: see [64].

8. HMRC opened all the enquiries into the Respondents' self-assessment returns in order to ascertain whether one or more of the Respondents was liable to a charge to income tax under Chapter 2, Part 13 Income Tax Act 2007 ("ITA") which contains provisions known as the "transfer of assets abroad" ("ToAA") legislation.

9. The ToAA legislation is complex anti-avoidance legislation which can give rise to a charge to tax in a number of circumstances. In their skeleton argument and at the hearing before us HMRC accepted that their enquiries, which had previously been broader, now related solely to section 731 ITA. This provision imposes a charge to income tax on income treated as arising to an individual section 732. Section 732, in broad terms, applies by virtue of subsection (1) if: (a) a relevant transfer occurs; (b) an individual receives the benefit in a tax year; and (c) the benefit is provided out of assets which are available for the purpose as a result of the transfer or one or more associated operations.

10. For the purposes of the ToAA legislation it was common ground that it was possible for relevant transactions to occur many years before the tax year in which the income arose or benefits were made available and which were subsequently subject to tax under the ToAA legislation in a later year. It therefore followed, that HMRC may, in the course of an enquiry, require information in relation to an earlier year if it was relevant to the tax position of an individual in a later year.

APPLICABLE CASE-LAW

11. It was common ground before the FTT, at [8], and before us that the correct approach to be adopted by the FTT in determining an application for a closure notice was that outlined by

Judge Falk (as she then was) in *Beneficial House (Birmingham) Regeneration LLP & Stanley Dock (All Suite) Regeneration LLP v HMRC* [2017] UKFTT 801 (TC) ("*Beneficial House*") at [15]:

> "There was no dispute as to the relevant principles to apply. Both parties referred to my decision in *BCM Cayman LP and others v HMRC* [2017] UKFTT 226 (TC), which reviewed the relevant case law. I would also refer to the subsequent Upper Tribunal decision in *Frosh and others v HMRC* [2017] UKUT 320 (TCC). In summary:
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> (1) The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a "reasonable balance" to HMRC's substantial powers to investigate returns (*HMRC v Vodafone 2* [2006] STC 483 at [33] and [34]) and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry (*Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]). The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case (*Frosh* at [43]). This involves a balancing exercise.
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> (2) The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer (*Jade Palace Limited v HMRC* [2006] STC (SCD) 419 at [40]).
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> (3) The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified (*Eclipse Film Partners*, and *Jade Palace* at [42] to [43]). It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry: see *Steven Price v HMRC* [2011] UKFTT 264 (TC) at [40].
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> (4) A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry. What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an "informed judgment" of the matter (*Eclipse Film Partners* at [19]).
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> (5) If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate: see for example *Steven Price*, and also *Andreas Michael v HMRC* [2015] UKFTT 577 (TC). The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case: *Frosh*.
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> (6) The Supreme Court's comments on the subject of closure notices in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 are highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice is performing an important public function in which fairness to the taxpayer must be matched by a "proper regard for the public interest in the recovery of the full amount of tax payable", although where the facts are complicated and have not been fully investigated the "public interest may require the notice to be expressed in more general terms" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In *Frosh* the Upper Tribunal

> commented at [49] that a closure notice in broad terms is "not the norm" and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable."

FACTUAL BACKGROUND

12. The FTT outlined the lengthy history of the enquiries into the Respondents' returns at [6], [10]-[45]. Those findings are summarised below.

13. The Respondents are three brothers, Jonathan, Jeremy and the late Stephen Hitchins (referred to below, respectively, as Jeremy, Jonathan and Stephen and collectively as "the Respondents").

14. The Respondents applied to the FTT under section 28A TMA for closure notices in respect of open enquiries into their self-assessment tax returns for the following years:

Jeremy Hitchins

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

Jonathan Hitchins

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

Stephen Hitchins (deceased)

Tax year	Enquiry Opened	Date of Application
2012/13	17 October 2014	24 July 2020
2013/14	1 December 2015	24 July 2020
2014/15	24 June 2016	24 July 2020
2016/17	6 November 2017	24 July 2020
2017/18	14 October 2019	24 July 2020
2018/19	20 October 2020	28 October 2020
2019/20	19 January 2022	11 February 2022

15. There were a number of underlying transactions which formed the background to the enquiries. These were summarised by the FTT at [20]-[26] as follows:

> "20. RHG was founded by the Applicants' father - Robert Hitchins. The company was incorporated in December 1960 and the two subscriber shares

were transferred, and a further 98 shares allotted, to Robert and his wife Ada in 1962. They were resident in the UK at the time. In 1974 they emigrated to Guernsey, where they remained resident and domiciled until their deaths in 2001 and 1997 respectively.

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

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

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

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

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

26. In the course of an appeal against one of the many Schedule 36 notices, Mr Cassidy [1]stated in his witness statement that the £40m dividend declared by RHG was not paid to Bay Group Limited ("BGL") (a company incorporated and resident in Bermuda). However, he did not state to whom the dividend was paid."

16. The FTT at [27]-[33] discussed a difference in view between the parties which related to RHG's form 363a Annual Return dated 14 February 2004. The FTT concluded at [32]-[33] that Mr Rolls, the HMRC officer handling the enquiry, had misinterpreted the information contained in form 363a Annual Return and preferred the Respondents' view of the transactions which was summarised as follows at [31]:

"… [Bay Almanzora Limited ("BAL")] (previously called Bay Holdings Limited) owned 999,899 ordinary shares and 100 deferred shares in RHG, and IBL owned 1 ordinary share in RHG. The following events then took place:

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

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

[1] A partner in the accounting firm Crowe LLP, advisers to the Respondents.

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

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

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

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

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

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

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

17. The FTT concluded at [34]:

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

18. BAL, BHL and MBH were all incorporated and resident in Bermuda. Relkeel was incorporated and resident in the UK.

19. The FTT referred to certain transactions concerning companies called Foxseal Limited (UK) and Saint Ledger Ltd (Bermuda) and to certain companies owning properties in Spain, but HMRC accepted that it could not justify keeping the enquiries open by reference to these companies and transactions.

20. HMRC had previously issued six information notices under schedule 36 Finance Act 2008 to Stephen, each of which had been withdrawn or successfully appealed. Two of those notices were withdrawn on the basis that they had not been correctly authorised and were then replaced. Two of the notices were withdrawn when HMRC's case officer, Mr Rolls, considered the requests in them could be more closely targeted. Furthermore, two of the information notices were withdrawn after Mr John Cassidy of Crowe LLP, the Respondents' accountants, filed a witness statement in the appeal against them.

21. At [43] the FTT noted that HMRC were not seeking to apply the legislation in order to tax the £40 million distribution in the year it was made but rather were seeking to establish whether any relevant transfers were made or procured by any of the Respondents that led to the receipt and/or further use of that sum so that the requirements were met that there be a relevant transfer for the purposes of section 732(1)(a) ITA.

THE FTT'S DECISION

22. In the appeal before us, HMRC did not seek to disturb the factual findings made by the FTT and recorded above.

23. The FTT at [51] noted that the parties disagreed about how the ToAA legislation was to be interpreted and it accepted HMRC's submission that it should not determine whether HMRC's interpretation of the legislation was correct in order to avoid entering into the kind of debate criticised by the Court of Appeal in *Eastern Power Networks plc v HMRC* [2021] 1 WLR 4742.

24. At [53] the FTT said that even if HMRC's interpretation of the law was correct, their position was undermined because Mr Rolls had misunderstood the facts i.e. he refused to recognise the actual sequence of transactions relating to the £40 million distribution. Instead, the FTT accepted the Respondents' submission that the dividend was paid by RHG to Relkeel, and not to a Bermudan entity.

25. Next, at [55] the FTT noted HMRC's argument that the Respondents may have received the benefit in the light of the transactions which may have occurred after the appointment of the £40 million by the Settlement to a beneficiary. In that case, the condition in section 732(1)(b) ITA would be met. Therefore, if one or more of the Respondents had received a benefit from that £40 million appointed from the Settlement as a result of one or more subsequent transactions, the condition in section 732(1)(c) will be met. The subsequent transactions would, HMRC contended, constitute associated operations within the meaning of section 719. It was for this reason, the FTT noted, that HMRC wanted to know the entity or person to whom the Settlement had appointed the £40 million and how the £40 million was then applied. The FTT noted that the Respondents had argued that this simply amounted to a "fishing expedition" and that HMRC had to show some reason (based on evidence) to believe that there was a trail to be followed which would lead to a charge under the ToAA legislation.

26. On the evidence before it the FTT decided at [56]:

> (a) The £40 million distributed from RHG had been appointed by the Settlement to a beneficiary (or beneficiaries) other than the Respondents;
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> (b) There was no evidence to indicate that the funds had been transferred to or for the benefit of the Respondents; and
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> (c) There was no evidence that the Respondents had received any undisclosed benefit (whether in the tax years under enquiry or in any other tax year).

27. The FTT at [57] considered that the Respondents had been advised at all times by reputable and well-known advisers who had written to HMRC following the first hearing in May 2022 to say that they had re-examined matters and "can confirm that there are no known omissions or errors relating to the 2003 dividend on the three brothers' tax returns for the years under enquiry."

28. The FTT continued by stating at [58] that HMRC's enquiries regarding to whom the dividend was appointed and whether any of the Respondents could benefit from it amounted to a "fishing expedition" in the absence of any evidence for believing that there may be associated operations.

29. The FTT then stated its conclusions:

> "60. I find that HMRC's enquiries have been conducted to a point where it is reasonable for Officer Rolls to make an "informed judgment" of the matter, even though every line of enquiry may not have been pursued to the end. Whilst HMRC have not received answers to all of their questions, I consider that the outstanding questions relating to the £40m distribution do not have a reasonable basis and amount to a fishing expedition.
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> 61. I note Ms Choudhury's submission that if HMRC were to issue closure notices now, they would be in vague and uninformative terms. I do not agree.

> HMRC are in full possession of information relating to the transmission of the distribution made by RHG on its journey up to the Settlement, and are aware that the distribution was not appointed to any of the Applicants. That should be more than enough information on which to be able to close the enquiry as regards the potential for a ToAA charge on the Applicants in respect of the distribution for the years under enquiry.
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> …
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> 63. There was considerable evidence and submissions on whether HMRC had unreasonably protracted their enquiries. These enquiries were first opened in 2014, over eight years ago. These enquiries have gone on for far too long. The reasons for the time taken cannot be ascribed solely to the fault of either HMRC or the Applicants. But as I have reached my decision without needing to consider the reasons for the delay, I have not analysed the history of the enquiries and the reasons for the delays in this decision.
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> 64. It is for HMRC to show that there are reasonable grounds for refusing the applications for closure notices. I find that HMRC have not so shown.
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> 65. The Applicants have submitted that I direct that closure notices be issued within 28 days of my decision being released. I consider that in the circumstances of this case, a slightly longer period should be allowed."

30. The FTT at [66] therefore directed that HMRC issue a closure notice for the periods under enquiry within six weeks of the date on which the Decision was released. This direction was suspended pending HMRC's appeal.

GROUNDS OF APPEAL

31. HMRC's grounds of appeal were as follows.

Ground 1

32. The FTT had set out the principles in *Beneficial House* but nowhere in the Decision did it explain how it had come to its decision based on those principles. Instead, the FTT expressed the view that HMRC's outstanding questions amounted to a "fishing expedition", presumably on the basis of its findings at [56]. In making those findings, it failed to acknowledge that the reason there was no evidence of the funds being transferred to or for the benefit of any of the Respondents, or of the receipt of any undisclosed benefit from them was that the Respondents had refused to provide that information.

33. There was therefore, according to HMRC, a gap in the FTT's reasoning on this point. If taken to its logical conclusion, it suggests that HMRC are not entitled to ask for information or conduct enquiries where they have no evidence of undisclosed income or gains. However, that is precisely the reason why enquiries into taxpayers' returns are opened and conducted, i.e. to check whether the return and self-assessment included therein is correct and complete.

Ground 2

34. The FTT referred at [57] to the Respondents' well-known and reputable advisers who had informed HMRC that they were satisfied the Respondents' returns for the years in question were correct. However, the vast majority of professional advisers with whom HMRC deal were "reputable". That does not mean that they may not be mistaken. Thus, when the advisers asserted that they had not received any distributions or "benefits" from any trusts or settlements during the years under enquiry, it was unclear whether they had appreciated all the situations in which a benefit is treated as arising under the ToAA legislation which includes benefits received indirectly. This response did not provide an answer to the question of whether there have been further relevant transactions involving the offshore structures that resulted in other income becoming payable to a person abroad which gave rise to a tax liability.

Ground 3

35. Further, the FTT had stated that it accepted HMRC's interpretation of the legislation was arguable for the purposes of determining the applications. However, it accepted the Respondents' argument that no liability arose for any of them under the ToAA legislation because the distribution from RHG had been made to Relkeel (at [53]). The argument that no liability arose if the distribution had been made to Relkeel appears to have then influenced the conclusion at [61] that HMRC had sufficient information to close the enquiries. This is the only basis on which it could hold that the closure notices would not be vague and uninformative and would satisfy the requirement in *Archer v HMRC* [2018] STC 38 that a closure notice should state the amount of tax due (but it could be an estimate).

36. The FTT failed to appreciate that under the ToAA legislation, the only consequence of the dividend being paid to Relkeel, which was UK resident, as opposed to a person abroad was that no income has become payable to a person abroad for the purposes of the charges under section 731 ITA in relation to the set of transactions referred to at paragraph 16 above. Based on those facts, the position was that the dividend was received in the form of income by a UK resident entity, Relkeel, before being converted into capital proceeds upon Relkeel's liquidation so that it was received in the form of capital by the Settlement. However, HMRC's position had always been that they are not seeking to tax the distribution in the year it was made and there was, in any event, no enquiry open in that year.

37. In accepting the Respondents' argument that no liability arose, the FTT made a further error because it failed to acknowledge that even if the dividend had been paid to Relkeel a charge could still arise under the ToAA legislation for the years under enquiry because there would still be income arising to a person abroad such as the Trust or any other entity linked to the accumulation or investment of that £40m by means of associated operations which were defined broadly under section 719 ITA as including an operation effected in relation to the "asset transferred or an asset representing the asset transferred".

SUBMISSIONS AND DISCUSSION

38. Both parties agreed that we should proceed on the basis that the FTT had been correct at [51] to conclude that it should not seek to determine the disagreement between the parties on the interpretation of the ToAA legislation and how it applied to the facts before it, citing the decision of the Court of Appeal in *Eastern Power Networks plc v HMRC* [2021] 1 WLR 4742. The FTT dealt with the applications on the basis that HMRC's interpretation of the legislation was arguable. However, the parties differed in relation to how this Tribunal should proceed if we considered that the FTT had been wrong to so conclude.

39. We consider that it was open to the FTT to decline to decide on the interpretation of the ToAA legislation and its application to the facts in the present case. The competing interpretations of the ToAA legislation were not argued before us. Certainly, we could not say with any confidence that the FTT's decision on this point was wrong. Accordingly, since both parties agree that, for present purposes, we should proceed on the basis that the FTT was correct, we shall not consider this point further.

Ground 1 - submissions

HMRC's submissions

40. In relation to Ground 1, Ms Choudhury KC, appearing for HMRC, argued that although the FTT had set out the relevant principles in the extract from *Beneficial House* it did not explain how it had come to its decision based on those principles. Equally, the FTT did not make any findings based on HMRC having "unreasonably protracted" the enquiries. The FTT had expressly declined to make findings as to the reasons for the delay. Instead, the only reason given by the FTT for allowing the applications was that HMRC's outstanding questions

constituted a "fishing expedition". In the present case, HMRC's enquiries were targeted on the destination of the £40 million distribution after it left the Settlement. If the Respondents were to provide the requested information and documents, HMRC would be able to complete their enquiries and issue closure notices.

41. According to Ms Choudhury, the FTT failed to acknowledge that the reason that there was no evidence of funds being transferred to or for the benefit of any of the Respondents, or the receipt of any undisclosed benefit from them, was that the Respondents had refused to provide that information.

42. Taken to its logical conclusion, Ms Choudhury submitted that the FTT's Decision suggested that HMRC were not entitled to ask for information or conduct enquiries where they had no evidence of undisclosed income or gains. However, that was the reason why enquiries into taxpayers' returns were opened and conducted i.e. to check whether the return and the self-assessment contained in the return was correct and complete.

The Respondents' submissions

43. Mr Gordon, appearing for the Respondents, submitted that the guidance in *Beneficial House* was not intended to be a rigid checklist. In any event, the FTT had in fact applied the *Beneficial House* principles. The FTT had reached an evaluative conclusion at [58], based on its findings at [56 (a), (b) and (c)] and [57], that HMRC were not entitled to further investigate the destination of the £40 million distribution. This was, Mr Gordon argued, a straightforward application of Principle 1, viz that the FTT was required "to exercise a value judgment determining what was reasonable on the facts and circumstances of the particular case… This involves a balancing exercise."

44. Furthermore, there was a clear reference to Principle 4 at [60] when the FTT concluded that HMRC were now in a position to make an informed judgment, "even though every line of enquiry may not have been pursued to the end."

45. Mr Gordon submitted that Principles 2 and 3 focused on the question of proportionality, but they were merely an expansion of Principle 1. The second sentence of [60] was an obvious reference to Principle 2. The reference to the terms of a closure notice being "vague and uninformative" were a reference to Principle 6. The reference at [63] to the protracted nature of the enquiry was a reference to Principles 1 and 3.

46. Therefore, Mr Gordon contended that the FTT had the guidance set out in *Beneficial House* clearly in mind and there was therefore no error of law in the FTT's decision.

Ground 1 -Discussion

47. We reject HMRC's submissions.

48. First, we accept Mr Gordon's submission that the guidance in *Beneficial House* was not intended to be a mechanical checklist. Instead, it contained broad principles the relevance of which would vary from case to case.

49. The "value judgment" and "balancing exercise" which *Beneficial House* prescribes involves the FTT in an evaluative decision to be reached by the FTT in the light of all the relevant evidence. It is well-established that this Tribunal should be reluctant to interfere with an evaluative decision of the FTT, which heard the witness evidence and considered the documentary evidence, in a decision where the underlying legal principles – as in this case – are not in dispute, unless there is a clear error of law. Secondly, it is also clear that the FTT need not deal with every submission or piece of evidence, otherwise this would place an intolerable burden on the fact-finding tribunal. It was necessary only to deal with relevant evidence and submissions. Thirdly, the mere fact that the FTT does not refer to a piece of

evidence does not mean that the evidence was overlooked or ignored. Furthermore, it is also well-established that if the FTT correctly states the applicable legal principles, there is a presumption that it applied those principles unless the contrary is apparent. Moreover, it is equally well-established that this Tribunal should not adopt a nit-picking or pernickety approach to decisions of the FTT. As Mummery LJ said at [30] of the judgment of the Court of Appeal in *Brent v Fuller* [2011] ICR 806:

> "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

50. Those words resonate here. The application of the principles set out in *Beneficial House* does not require the use of the same language or the application of the principles in the same order. It is a question of substance involving the FTT reaching a broad evaluative judgment. We accept the submission of Mr Gordon, summarised above, that the FTT had in substance applied the relevant and necessary *Beneficial House* principles. To conclude otherwise would involve us engaging in the nit-picking approach against which the Court of Appeal warned in *Brent v Fuller*.

51. We also reject Ms Choudhury's submission that the logical conclusion of the Decision was that HMRC could not check a tax return or investigate an individual's tax position where HMRC had no evidence of undisclosed income or gains. Ms Choudhury objected to the FTT's characterisation of HMRC's continued enquiries as a "fishing expedition." We accept, and we did not understand this to be controversial, Mr Gordon's submission that all enquiries must be reasonably and proportionately conducted. Nonetheless, HMRC are plainly entitled to check the tax return of any taxpayer and have ample powers to do so. The question in this case is not whether HMRC can check a tax return but whether HMRC were entitled to *continue* to check (or, so to speak, to *continue* to "fish" in respect of) a tax return after an enquiry lasting many years, bearing in mind that in the case of Jeremy and Jonathan, their enquiries were effectively parasitical on the lengthy enquiry into the affairs of their late brother. Moreover, the FTT at [52] was entitled to take account of the errors and mistakes made by HMRC in the course of their enquiry. The FTT, considering the evidence, concluded that HMRC were not so entitled and we see no reason to substitute our judgment for that of the FTT.

52. HMRC also complained that in making its findings at [56], the FTT failed to acknowledge that the reason there was no evidence of the funds being transferred to or for the benefit of any of the Respondents, or of the receipt of any undisclosed benefit from them was that the Respondents had refused to provide that information.

53. We also reject that submission. It is clear from the Decision that the FTT was fully aware of the course of the enquiry and did not overlook the matters which HMRC allege. The FTT took into account at [60] the fact that 'HMRC have not received answers to all of their questions' but considered 'that the outstanding questions relating to the £40m distribution do not have a reasonable basis and amount to a fishing expedition'. It gave reasons for this conclusion at [58]: 'that in seeking full details of the beneficiary to whom the funds were appointed by the Settlement many years prior the year of enquiry, and details as to whether the beneficiary "passed it onwards, invested it on behalf of, or in any other way acted to direct that value to one or more of [the Applicants]" amounts to a fishing expedition in the absence of any evidence for believing that there may be associated operations.' The FTT's conclusion that HMRC's outstanding questions did not have a reasonable basis was within a reasonable range of conclusions and one it was entitled to reach on the evidence. It gave sufficient reasons for its conclusion. Moreover, as Mr Gordon submitted, the Respondents had, throughout the

history of the enquiries, handed over a considerable volume of information to HMRC on a voluntary basis.

54. We should add that HMRC's complaints about the Respondents' alleged failure to supply information pursuant to Schedule 36 information notices is not a matter which is appropriate for this Tribunal to investigate on appeal. We do not have a fact-finding role. We do not know whether the failure or refusal to supply information was justified or not.

55. We reject HMRC's appeal on Ground 1.

Ground 2 – submissions

HMRC's submissions

56. In short, HMRC objected to the FTT's reference to the fact that the Respondents' well-known and reputable advisers had informed HMRC that they were satisfied the Respondents' returns for the years in question were correct.

The Respondents' submissions

57. Mr Gordon submitted that HMRC had had every opportunity to request that Mr Cassidy be recalled as a witness to clarify his firm's understanding of the statutory provisions, in case it differed from that of HMRC. They did not choose to take this course of action and it was inappropriate to use an appeal as a second opportunity to doubt Crowe LLP's technical prowess.

Ground 2 – Discussion

58. It was not clear from Ms Choudhury's submissions exactly on what legal principle this ground of appeal was based. As far as we could gather, it appeared to be that Ms Choudhury was arguing that the FTT had either taken into account an irrelevant factor or had reached a conclusion at which no reasonable tribunal could have arrived or that, perhaps, no reasonable tribunal could have reached the conclusion that the FTT did when taking account of this factor (*Edwards v Bairstow* [1956] AC 14).

59. It seems to us difficult to argue that this factor was irrelevant but exactly how much weight should be placed upon it was, in our judgment, a matter for the FTT in reaching its evaluative decision. Certainly, we thought it fell well short of satisfying the *Edwards v Bairstow* test and we did not understand Ms Choudhury to be impugning the Decision on this basis with any conviction.

60. We reject therefore HMRC's appeal on Ground 2.

Ground 3 – submissions

HMRC's submissions

61. Ms Choudhury submitted that the FTT had erred in law at [53] by accepting the Respondents' interpretation of the ToAA legislation, and finding that no liability arose for any of the Respondents because the distribution from RHG had been made to Relkeel. This appeared, Ms Choudhury contended, to have influenced the FTT's conclusion at [61] that HMRC had enough information to complete their enquiries. The FTT had failed to appreciate that because the dividend was paid to Relkeel (a UK resident) the only consequence was that no income had become payable to a person abroad for the purposes of section 720 or section 732 ITA in respect of the transactions summarised by the FTT at [31] (see paragraph 15 above).

62. However, Ms Choudhury argued, a charge could still arise under the ToAA provisions because there could still be income arising to a person abroad, such as the Settlement or any other entity linked to the investment of the £40 million distribution by means of a subsequent relevant transfer and any associated operations (broadly defined under section 719 ITA) *after*

its receipt by the Settlement. Thus (and this was HMRC's one remaining concern) the £40 million distribution may have been reinvested so that income may have arisen to an unidentified person abroad. If benefits had been provided to one or more of the Respondents which could be matched to that income in the years under enquiry then section 732 ITA might still apply and that could result in a charge to tax under section 731 ITA.

63. HMRC, based on the information available to them to date, had not been able to identify the transactions by which (or whether) this had occurred. For this reason, HMRC had on 8 November 2022, shortly before the resumed FTT hearing on 28 November 2022, asked for financial statements of the Settlement for years after 2012/13 or any years for which statements were available. For the years before 2012/13 (for which Crowe LLP had stated no records were available) HMRC asked for:

> (1) Confirmation of the names and residents of the entity/entities to whom the £40 million passed;
>
> (2) Confirmation of whether the entity/entities in question retained the £40 million proceeds themselves or passed it onwards, invested it on behalf of, or in any other way acted to direct that value to one or more of the Respondents.

64. If the Respondents provided that information, Ms Choudhury submitted, HMRC would be able to complete their enquiries.

The Respondents' submissions

65. Mr Gordon argued that HMRC misrepresented [53] of the Decision. The FTT did not say that no tax liability could arise simply because the distribution had been made to Relkeel. Instead, the FTT said that HMRC's position was "undermined" by Mr Rolls' misunderstanding of the actual sequence of the transactions relating to the distribution. The FTT had acknowledged that HMRC's case turned on investigating whether [58] "the beneficiary to whom the funds were appointed by the Settlement many years prior to the years of enquiry, and… whether the beneficiary passed it onwards, invested it on behalf of, or in any other way acted to direct that value to one or more of [the Respondents]."

66. Mr Gordon observed that HMRC had progressively narrowed their case but had maintained their original arguments at the November 2022 hearing, even when it became obvious in the course of cross-examination in the May 2022 hearing that HMRC's factual case was incorrect. It was only in their skeleton argument for this hearing that HMRC finally accepted that the case rested only on a possible charge under section 731 ITA.

67. Mr Gordon further submitted that HMRC's acceptance that the dividend had been paid to Relkeel meant that HMRC were no longer asserting that there had been a relevant transfer for the purposes of the ToAA legislation. Instead, HMRC were now arguing that there could still be income arising to a person abroad linked to the investment of the £40 million.

68. There was no evidence to support HMRC's position. In any event, this argument could have been put forward by HMRC years ago based on the public information available to HMRC. Instead, HMRC chose to base their case on a different and incorrect factual premise.

69. HMRC were, according to Mr Gordon, seeking to tax the value of any benefit that might have arisen from the investment of any part of those funds by a person abroad, assuming that the appointee(s) (or a subsequent recipient) actually transferred the funds (or part thereof) and only if such a benefit had somehow arisen to one or more of the Respondents in any one or more of the tax years under enquiry.

70. It was against this background that Mr Gordon contended that the FTT had concluded that the enquiries have gone on for "far too long." Thus, even if HMRC's interpretation of the

ToAA had technical merit, the FTT's overall analysis, applying the balancing approach to the facts, made it clear that the enquiries should not be prolonged any further.

Ground 3 – discussion

71. We reject HMRC's submissions.

72. It was clear that the FTT had section 732 ITA in mind – HMRC had raised the issue in their skeleton argument at the November 2022 hearing – and specifically addressed the issue at [58]. Moreover, we accept Mr Gordon's submission that the FTT did not say at [53] that no tax liability could arise simply because the distribution had been made to Relkeel.

73. In our view, the FTT took an overall view, balancing the various factors, and concluded that the enquiry had been unduly prolonged and should be brought to a close. There seems no doubt that HMRC's mistaken view of the facts (maintained even as late as the November 22 hearing) prolonged the enquiry, even though the FTT reached its decision without considering the reasons for the delay. The view that the enquiry had gone on for too long (see [63]) was one which the FTT was perfectly entitled to reach in its overall evaluative judgment as to whether the enquiry should be brought to a close. We do not consider that the FTT erred in reaching its conclusion.

CONCLUSION

74. We have decided that the Decision discloses no error of law. The FTT took account of (and balanced) a variety of factors in reaching its conclusion and we see no reason to interfere with its decision. Accordingly, we dismiss HMRC's appeal.

COSTS

75. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

POSTSCRIPT – GROUNDS OF APPEAL

76. We experienced some difficulty in ascertaining, from HMRC's grounds of appeal, the exact nature of the errors of law which HMRC contended had been made in the Decision. The grounds of appeal were in a narrative form and seemed to consist of a series of interrelated complaints about and disagreements with the Decision.

77. This Tribunal has recently given guidance on the correct format for grounds of appeal in *HMRC v Marlborough DP Limited* [2024] UKUT 00098 (TCC) at [178] where the Tribunal said:

> "Where an application for permission to appeal is made, either to the FTT or the UT, it seems to us essential that the application should identify, as clearly as possible, each individual ground of appeal. Ideally, each ground of appeal should be stated, as a numbered ground of appeal, in a single paragraph, which is clearly identified as stating that ground of appeal. If elaboration of a ground of appeal is required, this can be done in a set of following paragraphs, which are also clearly identified as elaborating upon that ground of appeal."

78. This guidance was given in the context of an unsuccessful *Edwards v Bairstow* challenge but is, in our view, equally applicable to any appeal against a decision of the FTT on the basis of an alleged error of law. We would merely add that the grounds of appeal should identify the precise nature of the error of law and why it constitutes an error of law (e.g. the misinterpretation of the statutory provision or a relevant authority, the failure to take account of a relevant factor and reaching a factual finding for which there was no supporting evidence)

and not merely stating that the party disagreed with the view expressed by the FTT or that the FTT erred in expressing a particular view (e.g. “the FTT erred in law by holding…”).

JUDGE RUPERT JONES
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

Release date: 08 May 2024