TC03605

Appeal number: TC/2013/05882, TC/2013/05637 & TC/2013/07670

PROCEDURE – Information Notices approved by the Tribunal – Paragraph 3 Schedule 3 Finance Act 2008 – application to set aside approval – jurisdiction – whether procedural irregularity – Rules 19, 38 Tribunal Rules – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR A M SKELLY **Applicants**
M JENNER
J A MEHIGAN

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in private in Manchester on 9 May 2014

Miss Zizhen Yang of counsel instructed by HNW Tax Advice Partners Limited for the First Applicant and by NT Advisers Ltd for the Second and Third Applicants

Ms Aparna Nathan of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Background

1. On 14 March 2014 I approved Information Notices pursuant to Paragraph 3 Schedule 36 Finance Act 2008 to be issued by the Respondents ("HMRC") to 199 individual taxpayers. Those individuals had each entered into a marketed tax avoidance scheme known as "Project 2010". Dr Skelly, the first applicant was one of those taxpayers.

2. HMRC's applications for the Project 2010 Information Notices came before me on 13 February 2014 and were adjourned for a further hearing on 4 March 2014. At both hearings HMRC's applications were dealt with in private and on an ex parte basis, that is without notice to the taxpayers.

3. The Information Notices require the taxpayers to provide documents and information by 13 May 2014. In the light of the present application HMRC has extended the time for compliance

4. In a written application to the Tribunal dated 10 April 2014 Dr Skelly made the present application asking the Tribunal to:

(1) Set aside the decision to approve the Information Notices, alternatively

(2) Provide full written reasons for the decision to approve the Information Notices, and/or

(3) Direct HMRC to provide copies of all documents, information and submissions relied on by HMRC at the ex parte hearings together with notes of the hearings, and/or

(4) Extend the time for a further set aside application.

5. I describe Dr Skelly's application more fully below. Dr Skelly was treated as being representative of the other taxpayers who received Project 2010 Information Notices.

6. On 18 March 2014 I approved Information Notices also pursuant to Paragraph 3 Schedule 36 Finance Act 2008 to be issued by HMRC to 390 individual taxpayers. Those individuals had each entered into a marketed tax avoidance scheme known as "Working Wheels". Mr Jenner and Mr Mehigan, the second and third applicants were two of those taxpayers.

7. HMRC's applications for the Working Wheels Information Notices came before me on 10 October 2013 and were adjourned for a further hearing which took place on 4 March 2014. Again, at both hearings HMRC's applications were dealt with in private and on an ex parte basis.

8. The Information Notices require the taxpayers to provide documents and information by 16 June 2014.

9. Mr Jenner and Mr Mehigan made written applications dated 13 April 2014 in identical form to Dr Skelly's application. Mr Jenner and Mr Mehigan were treated as being representative of the other taxpayers who received Working Wheels Information Notices.

10. In the submissions before me both counsel focussed primarily on Dr Skelly's application. It was not suggested that any different considerations applied to the applications made by Mr Jenner and Mr Mehigan.

11. By way of summary at this stage Miss Zizhen Yang, who appeared for the applicants, submitted that there was no justification for the hearings seeking approval of the Information Notices to have been conducted in private and without notice to the taxpayers. The Tribunal was therefore entitled to and should set aside its decision approving the Information Notices. The other relief was sought in the alternative.

12. Ms Aparna Nathan, who appeared for HMRC on these applications but not at the hearings approving the notices, submitted that it was not open to the applicants to go behind the approval that the Tribunal had already given. Any remedy the applicants might have would be by way of judicial review.

13. I consider the detailed submissions of counsel below. Before doing so I set out the statutory framework in relation to Information Notices and the procedural provisions relevant to the present applications.

Statutory Framework – Information Notices

14. References to paragraph numbers in this decision are to Schedule 36 Finance Act 2008. Schedule 36 is concerned with the powers of HMRC to obtain documents and information relevant to the tax affairs of taxpayers.

15. Paragraph 1 gives power to an officer of HMRC to require a person by notice to provide information or documents "*if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position*". Paragraph 2 contains a similar power to obtain information or documents from a third party. I am not concerned with third party notices in the present applications.

16. Paragraph 3 makes provision for HMRC to obtain the approval of the First-tier Tribunal (Tax Chamber) to the giving of a taxpayer notice. HMRC do not need to obtain approval in relation to a taxpayer notice. The effect of obtaining approval is that there is no right of appeal against the taxpayer notice which the taxpayer would otherwise have in relation to an unapproved notice (Paragraph 29(3)). Nor is there any right of appeal against the Tribunal's decision to approve the information notice (Paragraph 6(4)).

17. The provisions in Paragraph 3 are key in relation to the present applications and are as follows:

" *(1)* …

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

(2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).

(3) The tribunal may not approve the giving of a taxpayer notice or third party notice unless -

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,

(b) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,

(d) the tribunal has been given a summary of any representations made by that person, and

(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.

(4) Paragraphs (c) to (e) of sub-paragraph (3) do not apply to the extent that the tribunal is satisfied that taking the action specified in those paragraphs might prejudice the assessment or collection of tax.

(5) Where the tribunal approves the giving of a third party notice under this paragraph, it may also disapply the requirement to name the taxpayer in the notice if it is satisfied that the officer has reasonable grounds for believing that naming the taxpayer might seriously prejudice the assessment or collection of tax."

18. It is also relevant to note at this stage the following points:

(1) Where a taxpayer notice is given without tribunal approval, the taxpayer can appeal the notice or any requirement in the notice unless what is required forms part of the taxpayer's statutory records (Paragraph 29(1), (2)).

(2) Where a taxpayer does appeal a taxpayer notice, the decision of the tribunal is final and there is no avenue of onward appeal (Paragraph 32(5)).

(3) Where a taxpayer conceals, destroys or otherwise disposes of documents which are the subject of a notice or in respect of which he has been informed that they are likely to be the subject of a notice then that person is guilty of a criminal offence (Paragraphs 53 and 54).

(4) Failing to comply with an information notice gives rise to civil penalties (see Part 7 Schedule 36)

19. Schedule 36 introduced a new regime in relation to HMRC's information powers. The old regime appeared in the Taxes Management Act 1970 ("TMA 1970").

20. Under the old regime a notice under section 20 TMA 1970 could not be given except with the consent of a general or special commissioner. The commissioner had to be satisfied that the inspector was justified in proceeding under section 20. Those provisions were considered in the case of *R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax [2002] UKHL 21* which went to the House of Lords in relation to issues of legal professional privilege. I was referred to the decision of the Court of Appeal at *[2001] EWCA Civ 329* where one issue was whether a commissioner hearing an application for consent had jurisdiction to permit the intended recipient of a notice to attend the hearing and make representations.

21. At [47] the Court of Appeal accepted that "*natural justice does not demand orality*". They referred to "*a small group of cases … in which the exigencies of the legislative scheme make an inter partes procedure impossible*". This was against the background of the special commissioner having accepted written submissions from the applicant but having refused to accept oral submissions on the ground that he had no power to do so. At [48] to [50] the Court of appeal accepted that the commissioner had no power to accept oral submissions. They also said that "*the risk of compromising the investigation shuts out any possibility of an oral procedure*".

22. There was also authority under the old regime that when seeking consent, the inspector had to put everything relevant and known to him, favourable and unfavourable, before the commissioner – *R v Inland Revenue Commissioners ex parte T C Coombs & Co [1991] 2 AC 283*.

Relevant Procedural Provisions

23. The following procedural rules in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273 ("the Rules") are relevant for present purposes.

Rule 2

" *(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*

(2) Dealing with a case fairly and justly includes--

…

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings …

(3) The Tribunal must seek to give effect to the overriding objective when it--

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

Rule 19

" *If a case or matter is to be determined without notice to or the involvement of a respondent--*

(a) any provision in these Rules requiring a document to be provided by or to a respondent; and

(b) any other provision in these Rules permitting a respondent to participate in the proceedings

does not apply to that case or matter."

Rule 35

" *(6) The Tribunal must send a full written statement of findings and reasons to each party within 28 days after receiving an application for full written reasons made in accordance with paragraphs (4) and (5), or as soon as practicable thereafter.*"

Rule 38

" *(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if--*

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are--

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is

received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

The Application to Set Aside

24. Both parties agree that there is no right of appeal against the Information Notices that were issued by HMRC or against my decision to approve the Information Notices.

25. The applicants have no knowledge of what material was before me when I approved the notices, nor what was said by HMRC in support of the applications for approval. That is because in both cases the Tribunal had previously directed that the hearings should be in private and the applications proceeded without notice of the hearing dates to the taxpayers.

26. The taxpayers were of course aware that HMRC was intending to apply for the Information Notices on an ex parte basis and all taxpayers were given the opportunity to make representations in accordance with Paragraph 3(3)(c).

27. Paragraph 3(3)(d) requires that the Tribunal is given a summary of any representations made by the taxpayer. The applicants each made detailed written representations to HMRC. Those written representations, rather than a summary of them, were before me at the time of approving the Information Notices. I was also provided with correspondence between HMRC and the taxpayers' representatives in connection with HMRC's proposed applications for approval.

28. It is important to note that at the approval hearings I was not directed towards anything in that correspondence to suggest that the taxpayers wished to appear in person at the hearing of HMRC's applications.

29. Miss Yang told me on instructions that the taxpayers' representatives had been told by HMRC that they had no right to be present at the hearing and HMRC had specifically refused to provide the dates of the hearings. If the representatives took that at face value then Miss Yang said they could hardly be faulted.

30. The present cases can be contrasted with the decision of the F-tT in *re An Application [2009] UKFTT 224 (TC)* where the recipients of third part notices included in their written representations a submission that the procedure was unfair and the hearing ought to be in public.

31. Paragraph 3(2A) refers to an application being made "without notice". In fact HMRC gave notice that an application was to be made to the Tribunal when giving the taxpayers an opportunity to make written representations. Strictly that appears to go beyond the requirements of Paragraph 3(3)(c) which refers to notice that the information or documents are required. The procedure adopted therefore is not

equivalent to a without notice application in civil proceedings where a party seeks an interim remedy and the other party does not know that the matter is going before the court.

32. The applicants say that they are entitled to apply under Rule 38 to set aside the decisions approving the Information Notices and that I should set aside those decisions. In order to set aside the decisions I must be satisfied of the following:

(1) That the Tribunal has jurisdiction under Rule 38 to set aside the decisions approving the Information Notices; if so,

(2) That one or more of the conditions in Rule 38(2) is satisfied; and

(3) That it is in the interests of justice to set aside the decisions.

33. Miss Yang submitted that in approving an Information Notice the Tribunal is making a decision. She relied on Paragraph 6(4) which provides that "*a decision of the tribunal under paragraph 3 … is final …*". Ms Nathan did not suggest otherwise and I accept that the tribunal does make a decision when approving an Information Notice.

34. It is also a decision which disposes of the proceedings, namely the application for approval. It is therefore prima facie a decision within Rule 38(1).

35. At various points Rule 38 refers to "a party". Rule 1 defines "party" as "*a person who is … an appellant or respondent in proceedings before the Tribunal*". Further a "respondent" is defined for present purposes as "*a person against whom the proceedings are brought or to whom the proceedings relate "*. In my view the applicants are persons to whom the approval proceedings relate. They are respondents for the purposes of those proceedings and therefore fall within the definition of a party.

36. Rule 38(3) provides for the form and time limit within which an application to set aside must be made. Ms Nathan submitted that it did so by reference to the date on which the Tribunal sent notice of the decision to the applicant but in the case of an ex parte application no decision is sent to the respondent. I accept that Rule 38(3) can be read as consistent with HMRC's position that there is no jurisdiction to set aside the approval of the tribunal. However it would certainly be possible to read Rule 38 in a practical way for the purposes of the present applications if those applications were otherwise within the terms of Rule 38. I do not accept that the terms of Rule 38 are so inconsistent with the without notice procedure that Rule 38 on its face must be taken to exclude an application to set aside the approval of an information notice.

37. In relation to Rule 38 Ms Nathan submitted that it was clearly subject to Rule 19. These were proceedings without notice to the taxpayers so that there was no requirement to provide any document to the taxpayers and any provision permitting a respondent to participate in the proceeds is disapplied.

38. Further Ms Nathan submitted that the applicants, by seeking to set aside the approvals were effectively seeking to appeal the Tribunal's decision in circumstances

where there is no right of appeal. The applications undermine the basic premise of finality. She relied on *R (otao Derrin Brother Properties Ltd) v HMRC [2014] EWHC 1152 (Admin)* at [15] and [17] where Simler J stated:

> "15. *A number of further matters in relation to third party notices of this kind are well established by reference to the predecessor s. 20 TMA 1970 scheme and apply with equal force to Sch.36 notices, as the parties agreed. First, and significantly, as held in R v Commissioners of Inland Revenue ex parte T C Coombs & Company [1991] 2 AC 283, 300C-F, 302E-F (Lord Lowry) the Tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers. Parliament designated the officer as the decision-maker and the Tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the Tribunal in particular.*
>
> …
>
> 17. *Secondly, there is no statutory appeal against notices such as those presently in issue. The only available avenue of challenge generally open is judicial review. However, these are investigative powers and Parliament has in effect decided that once the officer and, on application to it, the Tribunal, is satisfied that use of Sch.36 para.3(3) as a tool of the investigation is appropriate, it is not appropriate to provide an avenue of appeal about how the investigation should proceed. The courts should therefore be careful to avoid giving by the avenue of judicial review what is, in reality, an appeal against the Tribunal's decision. It is only exceptionally or for clearly identifiable reasons that the court will interfere to set aside a notice.*"

39. Ms Nathan submitted that there was no evidence to rebut the presumption of regularity. Simply because the hearing was conducted in the absence of the applicants was not sufficient to rebut that presumption.

40. It does not seem to me that I am concerned with the presumption of regularity in these applications. The presumption of regularity would be a matter for a court in judicial review proceedings.

41. Miss Yang submitted that the applicants were not seeking to appeal the approval decision or undermine the finality of the decision. They were seeking to set it aside only on procedural grounds. In particular she says that there was a procedural irregularity in hearing the approval applications on an ex parte basis. Procedural irregularity is one of the conditions which engages Rule 38. Whilst Miss Yang also relied on Rule 38(2)(a) and (d), it is the alleged procedural irregularity which lies at the heart of these applications.

42. Ms Nathan's principal submission was that Rule 19 excluded the possibility of an application under Rule 38. Where a matter is determined without notice, the respondent is not entitled to participate in the proceedings.

43. Miss Yang submitted that Rule 19 only applies where an application is properly brought and heard without notice. In the present circumstances she says that there could have been no proper basis to make or hear a without notice application. In those circumstances she submitted that Rule 38 is available to the applicants and provides a means to redress a procedural irregularity.

44. In support of her case that there was a procedural irregularity, Miss Yang made three main submissions, which to some extent overlap:

(1) The approval of information notices without notice to the taxpayers was contrary to natural justice and the taxpayers' human rights.

(2) As a matter of construction Paragraph 3(2A) does not permit the approval application to be made and heard without notice save in cases of secrecy or urgency.

(3) On the particular facts, the applications and hearings should not have been made and conducted without notice.

45. Miss Yang submitted that there was no requirement of secrecy or urgency in the present cases and the taxpayers had a right to be heard (in Latin, *audi alterem partem*).

46. Ms Nathan submitted that in any event there was no suggestion of a procedural irregularity. The applicant's voice had been heard through the written representations.

47. In Derrin Brother Properties, Simler J was concerned with Schedule 36 in the context of challenges by way of judicial review to various third party notices. She stated at [27]:

> " *By application also dated 30 July 2012, Mr Pandolfo sought approval from the Tribunal to the giving of the third party notices … and a direction that the hearing should be ex-parte. He stated in the application that if it were heard in public the case might be prejudiced (no doubt because his ability to put information before the Tribunal would be hampered and because of the possibility of unwittingly disclosing information or material that was confidential or might reveal the hand of the ATO and thereby prejudice the investigation).*"

48. I was referred to a number of authorities concerning the obtaining of interim remedies in civil litigation such as` *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] 1 WLR 1405*. I do not consider that those authorities are of direct assistance in the present context.

49. More relevant is *R v City of London Magistrates, ex parte Asif [1996] STC 611* where the Court of Appeal was concerned with Paragraph 11 Schedule 11 Value Added Tax Act 1994 and orders by a magistrate for access to recorded information. At p618d Kennedy LJ said as follows:

"*My conclusion therefore is that although para 11 of Sch 11 enables the commissioners to seek orders ex parte they must in each case consider, and any magistrate to whom they apply must also consider, whether it is appropriate to proceed in that way, bearing in mind that the balance is always in favour of proceedings inter partes unless there is real reason to believe that something of value to the investigation may be lost if that course is adopted.*"

50. Miss Yang also relied on the taxpayers' rights to a fair trial under Article 6 of the European Convention of Human Rights and under Article 47 of the Charter of Fundamental Rights of the European Union. See for example in relation to the right to be heard the decision of the European Court of Human Rights in *Van Orshoven v Belgium (1998) 26 EHRR 55*. It does not seem to me that in the present context these rights add anything to the principles outlined in *ex parte Asif*.

51. Turning to the construction of Paragraph 3(2A), it reads as follows:

"*An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3))*"

52. Ms Nathan submitted that use of the word "may" conferred a discretion on HMRC whether to apply for approval ex parte or on notice. That was a discretion to be exercised by HMRC in the context of their powers under the *Commissioners for Revenue & Customs Act 2005*.

53. Ms Nathan also accepted that Paragraph 3(2A) confers a discretion on the tribunal whether to hear an application ex parte or on notice. In Miss Yang's submission, the sub-paragraph was "permissive" of a without notice application, but did not require a without notice application. The same point was made by Simler J in *Derrin Brother Properties* at [11]. I accept that submission.

54. It seems to me that there is no real issue between the parties as to the construction of Paragraph 3(2A). The real difference between them is the way in which that discretion should be exercised. That is a matter for the tribunal in the first instance, and in the absence of a right of appeal for a court on judicial review.

55. Miss Yang referred me to various extracts from Parliamentary debates in Hansard when the provisions of Schedule 36 and in particular Paragraph 3(2A) were being debated in Parliament. In my view there is no ambiguity to be resolved or any other reason on the basis of *Pepper v Hart [1993] AC 593* to admit such material. Parliament has given discretion to HMRC and to the tribunal. The scope of that discretion is not something that falls to be construed by reference to Hansard (See *R v Environment Secretary ex parte Path Holme Ltd [2001] 2 AC 349 at 392*).

56. Miss Yang's third and principal submission was that in the light of her first two submissions and on the facts, in so far as the applicants know the relevant facts, the hearing should not have been without notice to the taxpayers. These were marketed tax avoidance schemes and the position of HMRC was public knowledge. Indeed the Working Wheels scheme had been the subject of a decision in the F-tT in a decision released on 20 February 2014 (*Flanagan & ors v HMRC [2014] UKFTT 175 (TC)*).

57. Miss Yang says that the consequences for the applicants are stark. The decision to approve the notices followed a procedural irregularity and cannot be appealed. The Tribunal has heard from only one side.

58. Miss Yang invited me to adopt the practice in civil proceedings of making provision for a return day so the applicants can be heard. It does not seem to me that the procedure in Schedule 36 or the Rules contemplates such a course. In my view applications under Paragraph 3 are to be heard with or without the taxpayer being present depending on the circumstances. It is not appropriate to direct a return day for applications heard ex parte to be heard inter partes.

59. Miss Yang referred me to a note in *Tilley & Collison's UK Tax Guide 2013-14*. At [3.55] the Guide says:

> "*In cases where HMRC do not wish taxpayers to appeal against taxpayer notices they can arrange for the taxpayer notice to be pre-approved by the Tribunal.*"

60. If that paragraph is intended to suggest that HMRC can simply choose to adopt the Paragraph 3 procedure with an ex parte hearing then I do not think it is right. Ms Nathan accepted that there is a discretion, but it must be exercised reasonably. A footnote to that paragraph reads as follows:

> "*Anecdotal evidence suggests that HMRC are regularly adopting this approach even where there is no issue of secrecy, thereby precluding the recipients of notices any right of appeal. "*

61. Ms Nathan submitted that the discretion to apply for approval without notice is not restricted to circumstances where secrecy is required. She gave as an example where an inter partes hearing may result in a breach of confidentiality owed to another taxpayer.

62. I do not propose to take into account anecdotal evidence. Whether or not secrecy or urgency is the only basis to justify the without notice procedure may be open to question. However it is not necessary for me to express any view on that issue.

63. If the applicants have reason to believe that there was no justification for the notices to be approved, so that Paragraph 3(3)(b) was not satisfied, then their means of challenge would be through judicial review rather than an appeal. Quite rightly that is not how they put their case on these applications. The question before me concerns the position if there was some procedural unfairness in the approval of the Information Notices.

64. In my view the terms of Rule 19 are clear. It is intended to prevent any participation in the proceedings by the respondent to a without notice application. Participation in the proceedings is a wide term and in my view it precludes an application to set aside any decision which follows a without notice application.

65. I do not consider that the overriding objective requires any different interpretation of Rule 19, for example by reading into Rule 19 a qualification that it only applies to a matter that was properly determined without notice. In my view in the present context Rule 19 together with Schedule 36 are intended to achieve finality, subject only to judicial review.

66. It is well established that procedural unfairness in a tribunal may be remedied through a procedural remedy such as an application to set aside, through an appeal or by way of judicial review. If there is no procedural remedy or any avenue of appeal then judicial review might be available.

67. In the circumstances of these cases I consider that Rule 38 is disapplied by Rule 19. I do not have jurisdiction to set aside the decision approving the Information Notices.

68. I have already indicated that the applicants all made written representations. None of the applicants requested an oral hearing. In those circumstances I am not satisfied that there was any procedural irregularity in hearing the applications ex parte.

69. If there had been procedural unfairness, the appropriate remedy would be by way of judicial review.

Application for Written Reasons

70. The Applicants rely on Rule 35(6) as requiring the tribunal to send full written reasons for the decision to approve the application notices. Miss Yang says that fairness requires that justice should be seen to be done and that written reasons would be expected. She relied on a decision of the Privy Council in *Stefan v General Medical Council [1999] 1 WLR 1293*.

71. Ms Nathan submitted that the requirement for a decision under Rule 35 is predicated on the existence of rights of appeal. I am not sure that is right. There are a number of areas, outside of the realm of information notices, where there is no right of appeal but where the Tribunal would be expected to release a written decision. See for example the "excluded decisions" for the purposes of *Section 11 Tribunals, Courts and Enforcement Act 2007.*

72. The application however is again answered by reference to Rule 19. In this context I consider that Rule 35 would require a document to be provided to a respondent, that is a decision notice or full written reasons. However it is disapplied by Rule 19(a).

73. Miss Yang pointed to the anonymised reasons given by the F-tT in *Application by HMRC [2009] UKFTT 195 (TC)* and *re An Application [2009] UKFTT 224 (TC)*. Those written reasons were provided as a matter of discretion by the tribunal and in the latter case at the request of HMRC. I do not consider that these decisions set any precedent as to the provisions of written reasons.

74. In the case of Derrin Brother Properties Judge Berner also provided written reasons in anonymised form. His reasons for doing so appear at [5] and [6] of the decision:

> "*5. As is customary for applications of this nature, I had directed that both the hearing on 19 September 2012 and the resumed hearing on 23 November 2012 should be in private. Unusually, and given the nature of certain of the representations made, I am publishing my reasons for concluding that none of those representations prevented me from giving my approval to the issue of the third party notices.*
>
> *6. This decision does not record my reasons for being satisfied that all the relevant conditions were satisfied in this particular case. It deals only with those matters that I consider will be of general interest.*"

75. It is notable that Judge Berner expressly excluded from his decision the reasons why he was satisfied that that the conditions for approval of the notices were met.

76. It is clearly only in very exceptional cases that the F-tT does provide written decisions in relation to the approval of information notices. I do not consider in the present cases that there is any good reason to provide a written decision as to why I was satisfied that the conditions for approval of the notices were met.

Application for a Note of the Proceedings

77. The application seeks a direction that HMRC provide copies of all documents, information and submissions relied on by HMRC at the ex parte hearings, together with notes of the hearings.

78. Miss Yang relied on a decision of Lightman J in *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (unreported)*, the decision of the Court of Appeal in *Memory Corporation Plc v Sidhu [2000] 1 WLR 1443* and *Kelly v British Broadcasting Corporation [2001] Fam 59.*

79. These are authorities which apply in the very different context of ex parte applications for interim remedies in civil proceedings. It is apparent from the context set out above that different considerations apply in relation to the approval of information notices. It is not appropriate for me to make the direction sought by the applicants. Again, it is precluded by Rule 19.

Application for an Extension of Time for a Further Set Aside Application

80. The application also sought a direction that the time to make a further application to set aside the approvals should be extended to cover the possibility that additional grounds to set aside may emerge.

81. I see no reason to prospectively extend time for a further application to set aside the approvals.

Conclusion

82. For the reasons given above the applications are refused.

83. The present applications were heard in private on the basis that they were applications to set aside a decision which itself followed a hearing in private. Both parties were content with that position. I will however give consideration to the publication of this decision given the nature of the issues. Both parties will have an opportunity to make representations as to whether and how this decision should be publicised.

84. 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.

JONATHAN CANNAN
TRIBUNAL JUDGER

RELEASE DATE: 16 May 2014