[2019] UKFTT 0358 (TC)

TC07186

Procedure - application for disclosure - application to strike out – whether Tribunal has jurisdiction - whether grounds have no reasonable prospect of success

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/02284

BETWEEN

RALPH HELY-HUTCHINSON

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 26 April 2019

The Appellant in person

Alice Carse, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns two applications under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") by the parties to this appeal. The first is an application for disclosure, dated 5 December 2018, by the Appellant, Mr Hely-Hutchinson. The second is an application by the Respondents ("HMRC") to strike out seven of the Appellant's eight grounds of appeal, ie all but Ground 6, which was contained in their Statement of Case dated 28 December 2018. Although the Appellant's application was the first in time, it makes sense to consider HMRC's application first as my decision in relation to that application may affect the scope of the Appellant's application for disclosure or even render it otiose.

BACKGROUND FACTS

2. I summarise the background facts which I have taken from the grounds of appeal, statement of case and skeleton arguments only to put the parties' applications and my decision in context. Nothing in what I say below should be taken as a finding of fact for the purposes of the substantive appeal.

3. The Appellant was employed by ABN AMRO Bank ("ABN AMRO") between 1989 and 2008. From 1998, ABN AMRO operated an adjustable share options scheme ('the Scheme') under which certain employees received part of their remuneration in the form of options for shares in a subsidiary company called Armadale Limited. The Appellant, along with other employees, participated in the Scheme and exercised the options at their nominal exercise price in the tax years 1998-99 and 1999-2000. The Appellant provided details of the Scheme and the share options in his self-assessment tax returns for those years and paid income tax on the value of the shares received. Neither return included a claim for losses in relation to the share options.

4. In or around 2002, HMRC challenged ABN AMRO's position that remuneration by way of share options was not subject to secondary (employer) class 1 National Insurance Contributions ("NICs"). In October 2002, ABN AMRO sent a memorandum to employees who had received the share options informing them of HMRC's challenge and assuring the employees that, having paid income tax on the options in full, it would not affect them.

5. In December 2002, the Court of Appeal decided *Mansworth v Jelley* [2002] EWCA Civ 1829 in favour of the taxpayer. In January 2003, HMRC issued a Technical Note setting out their view of the tax treatment of share options following *Mansworth v Jelley* ("the 2003 Guidance"). HMRC stated that the gain or loss on the disposal of shares acquired by the exercise of such options should be calculated by deducting from the disposal proceeds both the market value of the shares at the time the option was exercised and any amount chargeable to income tax on the exercise of the option. The 2003 Guidance potentially gave rise to capital losses, which had not previously been claimed, in many cases. Subsequently, that view was reversed by section 158 Finance Act 2003 but only in respect of options exercised after 9 April 2003.

6. Following the issue of the 2003 Guidance, ABN AMRO advised its employees to claim allowable losses and amend their returns. The Appellant made the claims and amendments by way of a letter dated 29 January 2003 to HMRC. The Appellant claimed capital losses for 1998-99 and 1999-2000. The losses were calculated by reference to the value of the shares at exercise of the option and the amount charged to income tax under the scheme, ie in line with the 2003 Guidance. The Appellant set the losses against capital gains on disposals of assets in that and subsequent years of assessment. As a result of the recalculation, the Appellant's

assessments for tax years 1998-99 to 2001-2002 were reduced by £12,521.20. That amount has not been repaid by HMRC.

7. On 2 June 2003, Dave Smith, HM Inspector of Taxes, wrote to the Appellant stating:

> "You have submitted claims to capital losses for 1998-99 and 1999-00 … Following on from these claims you have made timeous requests that your 2000-01 and 2000-01 Tax Returns be amended to reflect the carry forward effect of these losses.
>
> I intend making enquiries into the claims and amendments. I enclose a copy of 'Enquiries into Tax Returns by local Tax Office' and a Question and Answer leaflet. …
>
> The Revenue is enquiring into your participation in the ABN Ambro (sic) Armadale share option scheme. One area of enquiry involves the claims arising from the Mansworth v Jelley case. The Revenue does not accept, for this scheme, that the additional losses claimed under that cases are due. One consequence is that no repayments will be made. At this stage, I do not intend to ask any questions about this matter as matters are being discussed between the Revenue and your employer and their advisers. However, I will advise later if I need any further information from you or if there are any amendments arising because of this enquiry."

8. The Appellant replied by letter of 4 June 2003. The letter stated that the enquiry was unfair because it arose from an investigation into ABN AMRO's liability to pay NICs which did not affect the Appellant's amendments to his returns which were calculated in accordance with the 2003 Guidance. Having referred to "all the years in question", the Appellant stated in the next paragraph:

> "You have chosen to open enquiries in to (sic) my claims and amendments although, as you will be aware, enquiries have already been opened and in to (sic) some of these years. As no enquiry existed prior to my recent claims I can only assume that one has now been opened with the express intention of delaying and frustrating my claim …"

9. HMRC sent the Appellant further letters dated 27 June 2003 and 7 August 2003 setting out more information about the basis of the enquiries.

10. In 2005, ABN AMRO told relevant employees, including the Appellant, that the discussions with HMRC had been concluded by a confidential agreement which did not prejudice the claims of the employees in any way.

11. On 7 July 2006, the Appellant wrote to HMRC requesting an update on the enquiries. HMRC replied on 26 July 2006 and told the Appellant that they intended to litigate the issues and an appeal was unlikely to be heard before the beginning of 2007.

12. In the relevant tax returns, the Appellant's CGT liability for 2005-06 and 2006-07 was provisionally reduced by £24,625 by reason of chargeable gains being set off against the rolled forward capital losses.

13. On 19 March 2008, HMRC sent a fax to the Appellant of their letter dated 8 January 2008 opening an enquiry into the Appellant's tax return for the year 2005-06 in which he had included losses relating to the disposal of shares under the Scheme against capital gains tax.

14. On 26 April 2008 the Appellant requested an update regarding the enquiries into the claims in respect of the losses. During a telephone call on 21 May 2008, HMRC informed the Appellant that if he sought to utilise the losses and they were found not to be due, he would

have to repay them together with interest and possibly penalties. He was also informed that the loss issue was a long way off settlement.

15. During 2008, HMRC received legal advice that the 2003 Guidance was incorrect and the correct position was that, where the shares are treated as having been acquired at market value, that value is the full measure of their deemed cost of acquisition. Accordingly, any income tax liability that arose on exercising the option is not to be taken into account when computing any chargeable gain or allowable loss accruing on a disposal of the shares.

16. On 9 January 2009, HMRC opened an enquiry into the Appellant's tax return for the year 2006-7 in which he had included losses relating to the disposal of shares under the Scheme.

17. On 12 May 2009, HMRC published Revenue & Customs Brief 30/09, later supplemented by Revenue & Customs Brief 60/09 published on 11 September 2009, (together the "2009 Guidance") which explained their new understanding of the law and in what circumstances they would be bound by the 2003 Guidance. HMRC stated in the 2009 Guidance that they would only apply their new view of the law to taxpayers where there was an open enquiry. The 2009 Guidance stated that taxpayers whose losses had previously been accepted would be allowed to retain them and also to carry forward any unused losses in the future.

18. In Answer 15 of Revenue & Customs Brief 60/09, HMRC stated that: -

> "… in some limited circumstances, to apply the statute may be so unfair as to amount to an abuse of power by HMRC and in these circumstances HMRC may be bound by its previous guidance. We will normally be bound by our previous guidance where the taxpayer can demonstrate that he or she
>
> • Reasonably acted in reliance on the previous guidance, and
>
> • Would have suffered detriment from the correct application of the statute."

19. HMRC enclosed copies of the 2009 Guidance in a letter to the Appellant dated 12 November 2010. On the same day, HMRC issued two closure notices disallowing the losses amounting to £24,625 claimed in relation to 2005-06 and 2006-07. The Appellant appealed against the closure notices in a letter dated 7 December 2010.

20. On 30 April 2014, HMRC issued four closure Notices to the Appellant for the years 1998-99, 1999-2000, 2000-01, 2001-02. The Appellant appealed against the closure notices in a letter dated 22 May 2014.

21. On 27 May 2014, HMRC opened an enquiry into the Appellant's tax return for the year 2012-13 in which he had claimed losses relating to the disposal of shares under the Scheme. On 4 June 2014, HMRC issued a closure notice in which they disallowed the losses. The Appellant appealed on 5 June 2014.

22. The effect of the closure notices was to either reject the Appellant's claims for allowable losses accruing on his exercise of options under his employer's share option scheme or to amend his returns in which the losses had been taken into account when computing later chargeable gains.

23. HMRC rejected the Appellant's appeals. He sought review in respect of all the closure notices. In a letter dated 16 February 2015, HMRC stated that the conclusion of the review was that all the closure notices should be upheld.

24. In 2014, the Appellant made an application for judicial review. The essential question in the judicial review was whether HMRC could resile from their previous view of the law as expressed in the 2003 Guidance in the circumstances of the case. It was not concerned with the correctness of HMRC's view, which is the subject of the Appellant's appeal in this Tribunal.

Whipple J granted the judicial review, quashed the decisions and remitted the matter to HMRC to make a fresh decision consistent with her judgment – see [2015] EWHC 3261 (Admin). That decision was reversed on appeal by the Court of Appeal – see [2017] EWCA Civ 1075. Leave to appeal to the Supreme Court was refused in July 2018.

GROUNDS OF APPEAL

25. The Appellant now appeals to the First-tier Tribunal ("the FTT") against the seven closure notices issued by HMRC in November 2010, April 2014 and June 2014 in relation to the years 1998-99, 1999-2000, 2000-01, 2001-02, 2005-06, 2006-07 and 2012-13. The Appellant's grounds of appeal are expressed (and further developed) in his 76 page grounds of appeal as follows:

(1) HMRC failed to open valid enquiries into the four tax years up to 5 April 2002 and thus partly in consequence, into the tax years 2005-6, 2006-7 and 2012-13 and the 2005/6 enquiry was not opened within the prescribed time limits;

(2) the conduct of the enquiries was defective and in breach of HMRC's statutory powers;

(3) the closure notices were defective and/or unlawful and did not comply with HMRC's own guidance;

(4) HMRC failed to apply RCB 60/09 (Answer 15) to the Appellant's case;

(5) partial waiver of privilege;

(6) the 2009 Guidance is unlawful/ultra vires and HMRC failed to apply the law correctly or at all to the Appellant;

(7) breaches of the European Convention on Human Rights and/or Human Rights Act 1998; and

(8) interest has been incorrectly applied for 2005/6 and 2006/7.

APPLICATION TO STRIKE OUT

26. HMRC apply for part of the Appellant's case to be struck out under rule 8 of the FTT Rules on the grounds that:

(1) the FTT does not have jurisdiction to consider all or part of Grounds 2 to 5 and 8 (rule 8(2)(a) of the FTT Rules); and

(2) Grounds 1 to 5, 7 and 8 have no reasonable prospect of success (rule 8(3)(c) of the FTT Rules).

27. As stated above, HMRC have not applied to strike out Ground 6 or any part of it.

Relevant FTT Rule

28. Rule 2 of FTT Rules provides, so far as material:

> "(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 -
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(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."

29. Rule 8 of the FTT Rules relates to the striking out of a party's case and provides, so far as material, as follows:

"(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal -

(a) does not have jurisdiction in relation to the proceedings or that part of them …

(3) The Tribunal may strike out the whole or a part of the proceedings if -

…

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

Approach to strike out on ground of no jurisdiction

30. The UT has recently considered the proper approach to applications to strike out the whole or a part of proceedings for want of jurisdiction in *HMRC v Woodstream Europe Ltd* [2018] UKUT 398 (TCC) ("*Woodstream*"). At [14], the UT noted that the FTT in that case had been correct when it observed that the FTT is a creature of statute law and its jurisdiction is circumscribed by that law. In its decision, the FTT, having referred to rule 20 of the FTT Rules, stated at [44] of its decision, [2017] UKFTT 657 (TC):

"For an appeal to be entertained then there must be an enactment which provides not just for an appeal but for an appeal of the requisite character. In other words the appeal must be against an appealable decision, and a decision is only appealable if an enactment provides for it to be appealable to the Tribunal."

31. At [15] of *Woodstream*, the UT held:

"If the FTT lacks jurisdiction it must strike out the proceedings. That is a binary decision, which the Tribunal must address and determine at the hearing of the strikeout application. This is to be contrasted with an application to strike out a claim, or part of it, on the grounds that it has no reasonable prospect of success. In the latter case, the Tribunal will not exercise its discretion to strike out if there is a non-fanciful argument in support of the claim, or relevant part."

32. In [18], the UT made clear that the proper task for the FTT when considering an application to strike out for lack of jurisdiction was to determine whether jurisdiction did or did not exist: if it did, the application would inevitably be refused; and if it did not then it would inevitably be granted.

33. One area where it is well established that the FTT has no jurisdiction is judicial review. Although the FTT may consider a person's public law rights in the course of exercising its statutory jurisdiction, the FTT has no role in the enforcement of those rights directly. In *R & J Birkett T/A The Orchards Residential Home, Dunmore Residential Home, Kingland House Residential Home, The Firs Residential Home, Merry Hall Residential Home v HMRC* [2017]

UKUT 89 (TCC), the UT considered whether the FTT had erred in law in determining that it lacked jurisdiction to consider Mr and Mrs Birkett's legitimate expectation and/or in failing to take account of HMRC's common law duty of fairness.

34. Having considered the UT's previous decisions on the point in *Oxfam v HMRC* [2009] EWHC 3078 (Ch) ("*Oxfam*"), *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) ("*Hok*") and *HMRC v Noor* [2013] UKUT 71 (TCC) ("*Noor*") and the Court of Appeal's decision in *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 ("*BT Trustees*"), the UT set out the relevant principles at [30]:

> "(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

Approach to strike out on ground of no reasonable prospect of success

35. The approach to be taken by the FTT when considering an application to strike out proceedings or part of them on the ground of no reasonable prospect of success can be derived from a number of well-known cases on summary judgment under CPR 3.4 and strike out under rule 8(3)(c) of the FTT Rules. A recent statement of the guiding principles can be found in *First De Sales Limited Partnership v HMRC* [2018] UKUT 396 at [31] – [33]. In that case, the

Upper Tribunal ('UT'), while acknowledging that the summary set out by the UT in *HMRC v Fairford Group plc* [2014] UKUT 329 at [41] is very helpful, preferred to apply the more detailed guidance provided by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch). Lewison J set out the guiding principles in seven paragraphs as follows at [15]:

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 [of the Civil Procedure Rules] to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

36. Lewison J's statement of the relevant principles was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098.

37. Applying the guidance given in the cases, I consider that it would not be appropriate to strike out the Appellant's case, or part of it, on the ground that it has no reasonable prospect of success if there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of the party succeeding on the issue at a full hearing. A "realistic" prospect of success is one that carries some degree of conviction and not one that is merely arguable. It is appropriate to strike out a case which is "bound to fail". In determining whether a case has a reasonable prospect of success, I must avoid conducting a "mini-trial". More complex cases are unlikely to be capable of being resolved by way of a strikeout without conducting a mini-trial on the documents, without discovery and without oral evidence, which is not the object of a rule that has been designed to deal with cases that are simply not fit for trial at all. My role is to make an assessment of the prospects of success; not to conduct a trial or fact-finding exercise. My task is to identify cases that are not fit for a full hearing at all.

Submissions and discussion

Ground 1

38. The Appellant's first ground is essentially that the enquiries were not validly opened because HMRC failed to comply with the necessary formalities.

39. Ms Alice Carse, who appeared for HMRC, submitted that there is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient (see *Sword Services Ltd & Ors v HMRC* [2016] EWHC 1473 (Admin) at [71]). That was also the view of the Court of Appeal in *HMRC v Raftopoulou* [2018] EWCA Civ 818 which said, at [26], that it was uncontroversial that the opening of enquiries and their closure do not require any particular formality.

40. Both parties referred me to the decision of the UT in *HMRC v Mabbutt* [2017] UKUT 289. At [45] and [46], the UT set out the test for determining whether the disputed notice was sufficient to make a taxpayer aware of HMRC's intention to open an enquiry into a particular tax return. The FTT must consider whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return. The UT held that the test is an objective one and is not a matter of the parties' intentions or actual knowledge. The Appellant relied on [76] of *Mabbutt* which is as follows:

> "We do not, however, accept [counsel for HMRC's] submission that it is not necessary for an enquiry notice to specify the tax year of the return into which HMRC wish to enquire. We consider that the reference in section 9A TMA to 'a' return refers to a specific return into which HMRC intend to enquire. Moreover, the time limit in which HMRC are entitled to open an enquiry into a tax return depends on the date on which the tax return was filed. It follows, therefore, that HMRC must either specify the return in question or that it must be clear from the information contained in or enclosed with the notice into which return HMRC are intending to enquire."

41. It is clear from *Mabbutt* that the FTT must determine whether a reasonable taxpayer, in the circumstances of the Appellant, would have understood from the various communications that HMRC intended to open an enquiry into the tax returns.

1998-99 to 2001-02

42. In relation to HMRC's letter of 2 June 2003, the Appellant submitted that it lacked the specificity required to constitute notification of an intention to open an appeal. He stated that the phrase "I intend making enquiries into the claims and amendments" in the letter of 2 June 2003 did not suggest a formal process had been instigated into any particular return or returns and did not make it clear that HMRC was opening four separate statutory enquiries. He also

contended, by reference to later correspondence referred to in [9] above, that HMRC's letter of 2 June 2003 was concerned with an enquiry into ABN AMRO and the Scheme rather the Appellant.

43. In my view, the Appellant's position is unsustainable in view of the clear language of HMRC's letter of 2 June 2003. I consider that, viewed objectively, HMRC's letter of 2 June 2003 could only have been understood as notification of an intention to open an enquiry into the years 1998-99, 1999-00, 2000-01 and 2000-01. That is plain from the wording of the letter and, in particular, the first two paragraphs of the passage quoted at [7] above. In my view, there is no other plausible interpretation of the letter. I agree with HMRC that there is no requirement in statute or the authorities that separate enquiry notices must be issued in respect of each period under enquiry. Further, although it is not necessary for me to determine what the Appellant actually understood the letter to mean, I find that the Appellant did in fact understand that HMRC intended to open enquiries into his returns for those years. That is clearly shown by his letter of 4 June 2003 in response to the letter of 2 June, in particular the passage quoted at [8] above. Accordingly, I hold that the Appellant's arguments in relation to this part of Ground 1 do not have any reasonable prospect of success.

2005-06

44. The Appellant's only point in relation to the opening of the enquiry into his return for 2005-06 was that he did not receive notification of the intention to open an enquiry within the prescribed time limit.

45. The Appellant stated that he filed the return on 29 September 2006 and the wording on the front of the return showed that the filing date was 30 September. That wording was:

> "This Notice requires you, by law, to send me a tax return …
>
> You must get your tax return to me by the later of: 30 September 2006 and two months after the date this notice was given, if you want me to calculate your tax"

46. The Appellant contended that the enquiry was not opened until he received HMRC's letter on 19 March 2008 which was some 17 months after 30 September 2006. Even if HMRC's position that the enquiry was opened on 8 January 2008 were correct, that was, he submitted, over 15 months after the filing date.

47. As I think the Appellant accepted at the hearing, he had misunderstood the time limit provisions and there is nothing in this part of Ground 1. At the relevant time, s8(1A)(a) of the Taxes management Act 1970 ("TMA") provided that a personal tax return must be submitted by 31 January of the following year, ie 31 January 2007 in this case. Section 9A(2) TMA provided that the time limit for opening an enquiry where the return was delivered on or before the filing date is 12 months after that date. Section 9A(6) TMA provides that, for the purposes of section 9A, "filing date" means the date mentioned in section 8(1A), ie 31 January 2008 in this case.

48. However, the Appellant still has an arguable point, namely that, notwithstanding that the letter was dated 8 January 2008, he did not receive notification that HMRC intended to open an enquiry until 19 March 2008 which was after the expiry of the time limit. If the enquiry had not been properly opened then any closure notice would not have been validly issued. Section 9A TMA does not specify how the notice of enquiry is to be served but s115(2) TMA is relevant. In the case of an individual, the sub-section permits HMRC to give 'the notice or other document' by serving it addressed to the taxpayer 'at his usual or last known place of residence, or his place of business or his place of employment'. Section 7 of the Interpretation Act 1978 provides that, where an Act authorises or requires any document to be served by post,

then the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Accordingly, the Appellant is deemed to have received valid notification of the enquiry if the letter of 8 January 2008 was sent to, among other places, his usual or last known place of residence and posted so as to arrive in the ordinary course of post at a time before the enquiry window closed unless the contrary is proved. HMRC did not produce any evidence to support postage of the letter dated 8 January. The Appellant contends that he did not receive the letter until 19 March 2008 and, in my view, that is a matter which should be determined at a full hearing where the FTT can consider all the evidence relating to the point. Accordingly, I refuse to strike out this part of Ground 1 on the basis that it has no reasonable prospect of success.

2006-07, 2007-08 and 2012-13

49. At the hearing, the Appellant did not contest that the enquiries into these years had been validly opened. His challenge to the opening of enquiries into 2006-07 and 2007-08 really flowed from his objections to the enquiries into 1998-99 to 2001-02, which I have already dealt with, and he had accepted that the enquiry into 2012-13 had been validly opened in his grounds of appeal.

Decision on Ground 1

50. In conclusion, I have decided that, save for that part of Ground 1 that relates to 2005-06, Ground 1 has no reasonable prospect of success and should be struck out. The Appellant is, however, entitled to argue that the enquiry into 2005-06 was not validly opened on the ground that he did not receive notification of the intention to open an enquiry within the statutory time limit.

Ground 2

51. Ground 2 is a challenge to the Respondents' conduct of the enquiries. As the Appellant acknowledged at the hearing, this ground is really a further argument to support Ground 1. The Appellant contended that the lack of activity on the part of HMRC showed that no enquiries had been opened into the years in issue. For this submission, the Appellant relied on comments by David Richards LJ in *HMRC v Raftopoulou* [2018] EWCA Civ 818 at [33] and [34] but those comments do not provide a test but merely a way of approaching the question which I have taken into account in my consideration of Ground 1.

52. The Appellant also asserted that the manner in which HMRC dealt with or, as he put it, failed to deal with the issues between 2003 and 2010 could only be explained by the existence of a clandestine policy. That is, however, mere speculation and not relevant to the question of whether an enquiry had or had not been opened.

53. The Appellant criticised the conduct of HMRC in the course of the enquiry but HMRC's conduct is not a matter for the FTT because it falls outside the statutory jurisdiction of the FTT. Such complaints should be pursued, at first, with HMRC and then with the Revenue Adjudicator. If the conduct merits it, it may be that the Appellant could make a public law claim by way of judicial review but the FTT has no jurisdiction and no power to grant any remedy in such matters as the Appellant describes in Ground 2.

54. It follows that Ground 2 must be struck out as the FTT does not have jurisdiction to consider it and, for that reason, it also has no reasonable prospect of success.

Ground 3

55. In Ground 3, the Appellant contends that, for various reasons, the closure notices are not valid. It is difficult to see how this argument, even if accepted, assists the Appellant. In so far as the closure notices fail to state or reflect the relevant law correctly then that will form part

of Ground 6. If the closure notices have not been validly issued or are defective on their face then the enquiries are still open and HMRC will simply issue new closure notices. Until they do, the FTT has no jurisdiction as there is nothing that it can consider and the Appellant's tax position remains unresolved. HMRC submit that Ground 3 amounts to nothing more than an attempt to challenge the closure notices on general public law grounds, eg that the conduct of HMRC was unfair. My view is that Ground 3 is a complaint about HMRC's conduct or process and, for the same reasons as in relation to Ground 2, it must be struck out because the FTT has no jurisdiction over such matters.

Ground 4

56. At the hearing, the Appellant accepted that Ground 4 must be struck out because it raised a public law point that could properly only be raised on judicial review. The Appellant contended in this ground that HMRC had failed to follow their published practice and procedure for correcting erroneous advice given to taxpayers. The FTT has no jurisdiction over such matters as it has no judicial review jurisdiction.

57. Accordingly, Ground 4 must also be struck out as the FTT does not have jurisdiction to consider it.

Ground 5

58. The Appellant readily acknowledged at the hearing that Ground 5 is not a stand-alone ground of appeal in relation to the closure notices but an assertion that HMRC have made a partial waiver of privilege in relation to the legal advice referred to at [15] above. The Appellant relied on the arguments put forward under this ground in the grounds of appeal to support his application for disclosure which is discussed below. Accordingly, I do not consider it further here but conclude that, as it is not a separate ground for challenging the closure notices which are the subject of the appeal but simply a step along the way, it has no reasonable prospects of success as a ground of appeal and should be struck out. If this ground is intended as a public law challenge then it must also be struck out because the FTT does not have a public law supervisory jurisdiction that would allow the FTT to consider it.

Ground 7

59. Ground 7 is a general assertion that HMRC have breached article 6 of the European Convention on Human Rights ("ECHR") and article 1 of the First Protocol to the ECHR ("A1P1"). In summary, article 6(1) guarantees the right to a fair and public hearing while A1P1 provides that every person is entitled to the peaceful enjoyment of his possessions and shall not be deprived of them except according to law. Paragraph 2 of A1P1 states that the article does not impair the right of the state to enforce laws to secure the payment of taxes or penalties.

60. In his grounds of appeal, the Appellant accepts that, as a general principle, many aspects of taxation fall outside the scope of the ECHR. He contended, however, that article 6 and A1P1 are breached by HMRC purporting to open enquiries into the Appellant's tax position whereas the enquiries clearly related to a third party, ie ABN AMRO. The Appellant submitted that because HMRC refused to discuss details of the enquiry into ABN AMRO with him, for reasons of taxpayer confidentiality, he had never been made aware of the 'charges' against him and thus had never been given the opportunity to address them even though they involved the threat of penalties and apparently also criminal investigation.

61. The Appellant also referred to a dispute about an amount paid on account in relation to a penalty that was not ultimately levied. The Appellant asked the Tribunal to give summary judgment on this point and order the return of the penalty in the sum of £659.69 plus interest since 2008.

62. HMRC submitted that the Appellant's challenge based on article 6 and A1P1 ECHR was considered and rejected by the Court of Appeal in his judicial review appeal – see [2017] EWCA Civ 1075 at [75]. HMRC also contended that tax disputes are not within the scope of article 6 ECHR (*Ferrazzini v Italy* [2001] STC 1314). In relation to the withholding of the amount paid on account in relation to a penalty, HMRC contend that the Appellant has not sought repayment.

63. It appears to me that the Appellant's reliance on article 6 and A1P1 ECHR is misconceived. The Appellant's right under article 6 to a fair hearing is satisfied by the appeal proceedings of which the applications and hearing with which this decision is concerned are a part. There is, in my judgement, nothing in the suggestion that the Appellant has not been made aware of the 'charges' against him as HMRC's position in relation to the Appellant's claims and amendments is set out in the closure notices and the statement of case (although I accept that might need to be amended in the light of this decision). The FTT does not have jurisdiction to order the repayment of the amount paid on account in relation to a penalty that was not imposed because there is no appeal that would give the FTT jurisdiction in the matter. In the absence of an appeal, the FTT has no role as it does not have any general civil jurisdiction over such claims.

64. For the reasons given above, Ground 7 has no reasonable prospect of success and/or the FTT does not have jurisdiction and, accordingly, it should be struck out.

Ground 8

65. Ground 8 only concerns 2005-6 and 2006-7 and only arises if the FTT were to find against the Appellant. The Appellant contended that HMRC should have charged him interest starting from the date of notification of the change of guidance rather than the payment date for those years. In his grounds of appeal, the Appellant recognises that the FTT does not have any power to order the waiving of statutory interest but asks the FTT to use its powers to adjudicate to the extent permitted.

66. HMRC submitted that the liability to interest arises automatically under s86 TMA. It follows that ground 8 should be struck out as it has no reasonable prospect of success. Further, as the Appellant recognised, the FTT has no jurisdiction to make a declaration or give recommendations on the imposition of interest.

67. I explained to the Appellant at the hearing that the FTT has no jurisdiction to determine that interest should be payable for a period other than that specified in s86 TMA and/or at a rate less (or greater) than the rate applicable under section 178 of the Finance Act 1989. There being no other challenge to the charge to interest, Ground 8 must be struck out because the FTT has no jurisdiction and it would not have any reasonable prospect of success.

APPLICATION FOR DISCLOSURE

68. In an appendix to the grounds of appeal, the Appellant asks for disclosure of the following items:

(1) All internal communications between HMRC officers during 2003 and 2010

(2) First hand evidence of any germane enquiry during 2003 and 2010

(3) All evidence required to successfully defend a closure notice application prior to 2009

(4) Full details of the specific consideration referred to in the Respondents' letter dated 7 August 2003

(5) The 2005 agreement with ABN AMRO

(6) Identity of colleague and her/his considerations in HMRC's letter of 21 July 2016

(7) Explanation of 'big problem' referred to in an email chain dated 19-20 January 2010

(8) Evidence of the considerations/circumstances of the officers involved in the imposition / waiving of a penalty

(9) Disclosure of legal advice given to HMRC which led to the 2009 Guidance

(10) Disclosure of whether the enquiries were 'aspect' enquiries or disclosure as to the timing, authorisation and statutory basis for it becoming a wider exercise

69. The application was made before the parties had exchanged lists of documents under the standard directions for appeals in the FTT. At the hearing, I explained to the Appellant that it would be better to wait for HMRC to provide their list of documents and disclosure to take place in the normal way. Once that had happened, the Appellant could focus his application on specific disclosure of any items that he believed had not been disclosed and were relevant to the surviving grounds of appeal. Accordingly, I indicated that I would not make any decision in relation to the application for disclosure in this decision but the Appellant could renew his application at a later stage, if he wished to do so.

DISPOSITION

70. For the reasons given above, I have concluded that Ground 1 (save for that part that relates to 2005-06) and Grounds 2 to 5 and Grounds 7 and 8 of the grounds of appeal should be struck out.

71. I have not made any decision in relation to the Appellant's application for disclosure and he has permission to renew the application, if he decides to do so, after the parties have exchanged their lists of documents in these proceedings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

RELEASE DATE: 05 JUNE 2019