



Neutral Citation: [2022] UKFTT 373 (TC)

Case Number: TC08622

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2022/00936

CORPORATION TAX – application for closure notice – whether reasonable grounds to maintain the enquiry exist where Appellant’s evidence is that the information and documentation outstanding does not exist – no – closure notice directed

Judgment date: 12 October 2022

Decided by:

TRIBUNAL JUDGE AMANDA BROWN KC

Between

NEWPIER CHARITY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 10 October 2022 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) the parties having consented and the Tribunal considering it able to decide the matter on the basis of an agreed bundle of documents in 6 parts.

Unfortunately, those bundles, did not reflect the list of documents served and, whilst apparently including all correspondence between the parties the bundle did not include documents which had been annexed to such correspondence nor the annexes to the witness statements served in connection with this application. However, the Tribunal file did appear to include further relevant information, though not all of it. Where relevant information has been taken from documents on the Tribunal’s file this is noted in the decision.

DECISION

INTRODUCTION

1. This is an application made by Newpier Charity Limited (**Appellant**) pursuant to section 28A(4) Taxes Management Act 1970 (**TMA**) for a direction requiring HM Revenue & Customs (**HMRC**) to issue a closure notice for an enquiry in respect of the corporation tax return in respect of the accounting period ended 30 June 2017. HMRC object to the application.

FACTUAL BACKGROUND AND FINDINGS

2. On 18 June 2018, the Appellant submitted its corporation tax return for the accounting period ended 30 June 2017. The Appellant's accounts, on which the tax return is prepared, include payments made in the sum of £821,000 reducing the Appellant's creditors balance to Ambertown International Limited (**Ambertown**).

3. The payments were viewed by the Appellant's trustees as payments made wholly for the purposes of the charity and, as such, that there was tax relief on them.

4. In exercise of their powers under paragraph 24(1) Schedule 18 Finance Act 1998, on 6 June 2019 (within the required 12 months), HMRC opened an enquiry (**Enquiry**) into the return. The schedule of information provided at the time the Enquiry was opened included a general request for information as to the nature of expenditure and related party transactions. In particular information regarding payments made to Ambertown.

5. Through those enquiries and pursuant to a number of information requests the following facts (which appear to be agreed between the parties) have been established:

(1) In the accounting period ended 30 June 1988, the Appellant bought shares in Berisford International plc a company listed on the London Stock Exchange (**Berisford Shares**).

(2) The purchase of the Berisford Shares was funded by a loan from Citibank N.A. (**Citi**). The value of that loan, by reference to the annual accounts (available on the Tribunal file as an annex to the statement of Mr Brian White) of the Appellant for the year ended 30 June 1988 was £11,630,967. On 11 August 1989, the Appellant granted a fixed charge to Citi over the Berisford Shares. On 10 April 1990 further security was provided to Citi by way of a floating charge over the whole of the Appellant's undertakings and all of its property other than the Berisford Shares (as per the Notice of Mortgage document attached to Mr White's statement and available on the Tribunal's file). The accounts to 30 June 1989 show the investment and the loan and reference the security given.

(3) The Citi loan was also subject to a third-party guarantee (as noted in the accounts for year ended 30 June 1990 – such accounts being on the Tribunal file).

(4) On 3 July 1990 Citi called in the loan which, together with interest to that date was £11,731,742.16 (the copy letter was available on the Tribunal file). This was following a collapse in the value of the Berisford Shares. The Berisford Shares were sold for £6,142,500, the shortfall of £5,359,254 was settled by the third-party guarantors (as noted as a post balance sheet event in the accounts to 30 June 1990 obtained from the Tribunal file). The settlement was on the basis that such guarantors had "confirmed that they will not seek repayments of amounts owing to them and will continue to provide financial support to the company for a period of not less than twelve months from the date of this report".

(5) Subsequent accounts for the Appellant (by way of example the accounts for the period to 30 June 1994 (also taken from the Tribunal file)) show creditors falling due

after more than one year as including £7,285,152 to creditors who “have confirmed that they will not seek repayments of amounts owing to them and will continue to provide financial support to the company for a period of not less than twelve months from the date on which these accounts are approved.”

(6) Citi have confirmed that they no longer hold any records relating to the original loan or security.

(7) By reference to documents obtained by HMRC from Companies House in Gibraltar (such documents were not made available to the Tribunal but were referenced by HMRC in correspondence and in their witness statement, apparently accepted by the Appellant) it appears that Joyana Holdings Ltd (**Holdings**) was the initial creditor referenced in the Appellant’s accounts. The Appellant’s obligations to Holdings were assigned to Joyana 1992 Limited (**J1992**) on 19 April 2012. There is a discrepancy between the value of the asset as stated in the accounts for each of Holdings and J1992.

(8) There was a further assignment of the Appellant’s obligations to Ambertown Limited (**Ambertown**) on 28 April 2015 at which time the balance said to be due by the Appellant was stated to be £6,894,064.02.

(9) No accounts have been prepared for Ambertown.

(10) In the year to 30 June 2017 payments totalling £821,000 were made to various members of the Marguiles family.

6. However, there are a number of requests for information which have been made and which remain outstanding as follows:

(1) Letter of 13 August 2021:

(a) An explanation for the discrepancy between the balance sheets of Holdings and J1992.

(b) Documentation to support the transfer of the balance from Holdings to J1992.

(c) A narrative to explain why the decision was not made for the charity to be wound up when the bank recalled the loan.

(d) A breakdown to explain how the creditor balance of £7,285,152 originated when the financial accounts describe a shortfall of £5,359,254

(2) The information requested by HMRC by letter dated 29 April 2022 (a copy of which was not provided to the Tribunal only the covering email) stated in HMRC’s witness statement to concern information regarding the Marguiles family who, it was claimed by the Appellant were the third-party guarantors for whom Holdings, J1992 and Ambertown act as nominees. It is understood that the information requested is:

(a) Documentation to prove that the Marguiles family stepped in to repay the shortfall on the Citi loan as guarantors

(b) Documentation to prove that the charity had a legal obligation to repay the shortfall paid by the guarantors

(c) The name of the nominee company under which the shares were held in order to establish the Appellant as the beneficial owner

(d) Documentation to prove the creditor balance of the Appellant is held by Ambertown

7. On 2 February 2022, the Appellant made the present application for a closure notice and by notice dated 16 May 2022 HMRC objected.

THE SUBMISSIONS OF THE PARTIES

8. On the basis that charity tax relief applies in respect of income or gains used wholly for taxable charitable purposes HMRC contend that it is their duty to ensure that the Appellant's income has been so applied. They contend that as the Appellant's income has apparently been paid to connected individuals/entities in the year under enquiry it is necessary for them to be satisfied as to the identity of the recipients and the nature and purpose of the payments made. The information and documentation requested pertains to reasonably establishing whether the income has been applied for charitable purposes and, until that information/documentation is provided it is reasonable that the enquiry not be closed.

9. By the witness statement of Mr Robert Bakewell, HMRC assert that they are unable to be satisfied:

(1) That the amount borrowed by Citi was used to acquire the Berisford Shares on the basis that the amount loaned exceeded the nominal value of the shares charged by way of security.

(2) As to whether the Appellant held the shares in Berisford International plc as claimed as the Appellant is not listed as a shareholder.

(3) As to the identify of the third-party guarantors

(4) Whether there is any legal obligation to reimburse the third-party guarantors for the sums paid by way of shortfall to Citi

(5) And, whether the payments said to have been made to members of the Marguiles family at the direction of Ambertown represent charitable expenditure.

10. Accordingly, and by reference to *Steven Price* [2011] UKFTT 624 (TC), they should not be required to close the Enquiry whilst the requested information and documentation remains outstanding as they are "entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess".

11. By reference to *McWatt v HMRC* [2018] UKFTT 228 (TC) they contend that the Tribunal must be satisfied that there are objectively reasonable grounds for making a direction to issue a closure notice taking account of the following factors:

(1) Whether the enquiry has been inappropriately or unreasonably protracted.

(2) Whether there has been undue delay or caution on HMRC's part in closing the enquiry.

(3) Proportionality and the burden on the taxpayer should the enquiry continue.

12. As confirmed in *Frosh & Another v HMRC* [2017] UKUT 320 (TCC) HMRC contend that it is only relevant to consider whether it is reasonable to require them to close the Enquiry and that the exercise to be carried out by the Tribunal is a value judgment.

13. The Appellants appear to accept that information/documentation has been requested by HMRC which remains outstanding but contend that it is unavailable and, in any event, irrelevant to the enquiry. They contend that it is unreasonable to expect the information and documentation relating to transactions more than 20 years earlier to be available and that as there is no power to assess for such periods the documents and information cannot be reasonably required before the Enquiry is closed.

14. The Appellant claims that as the Berisford Shares were shares in a FT 100 quoted company they represent a permitted investment for a charity. It is further claimed that the circumstances of the Citi loan has been evidenced (by reference to the documents referred to in paragraph 5 above) such that all repayments made in connection with the Citi loan itself and the assumption of the associated debt by the Marguiles family through a chain of nominees has been establish such that the Enquiry should be closed.

DISCUSSION

15. Section 28(4) TMA provides that a taxpayer may apply to the Tribunal for a direction requiring an officer of HMRC to issue a partial or final closure notice within a specified period. There is a presumption that the closure notice will be directed as, pursuant to section 28(6) TMA, the tribunal shall give the direction unless it is satisfied that there are reasonable grounds for not issuing the closure notice.

16. The burden of proof in this application rests with HMRC to show that they have reasonable grounds for not issuing the closure notice.

17. It is to be noted in the present appeal that the Appellant has not specified a period in which the closure notice should be issued.

18. The leading authority on how the Tribunal is to exercise its jurisdiction to direct HMRC to issue a closure notice is set out in *Frosh* from which it is to be discerned:

(1) the power to direct the issue of a closure notice is an important protection for taxpayers against inappropriately protracted enquiries;

(2) any conclusion stated in a closure notice and the amendments required to give effect to those conclusions frame the scope of the charge to tax as set out in the closure notice and thereby any subsequent dispute between the parties, they should not therefore routinely be issued in non-specific terms;

(3) the Tribunal must make a value judgment balancing the obligations on HMRC to collect the right amount of tax against the right of a taxpayer to achieve certainty within a reasonable period and only subject to reasonable enquiries.

19. The Tribunal considers that in the context of this application, and perhaps more generally, it is relevant to recognise that:

(1) When amending a self-assessment by way of closure notice HMRC must rely on the information and documentation available to them and in so doing come to a reasonable conclusion which is then for the Appellant to displace; and

(2) once a closure notice has been issued and appealed it is for the Appellant taxpayer to establish that the conclusions reached are wrong on the facts or at law on the balance of probabilities.

20. In the present appeal, and as far as material to the tax year, which is the subject of the Enquiry, HMRC have a number of concerns as to the legitimacy of the claim to charity tax relief in respect of payments made to members of the Marguiles family. On the basis of the documents available to the Tribunal, it appears to the Tribunal that a number of those concerns are reasonable concerns which might legitimise the continuation of the Enquiry. In particular (but perhaps not limited to) that:

(1) the full value of the Citi loan was not used to purchase the Berisford Shares (on the basis that the loan value exceeds the nominal value of the Berisford Shares when charged);

(2) there is no explanation for the difference between the creditor balance and the shortfall between the value of the Berisford Shares when sold and the value of the Citi loan which then required to be met by the third-party guarantors;

(3) the capacity in which Ambertown acts in respect of the creditor balance.

21. However, the Appellant has stated that the information and further documentation requested is not available due to the effluxion of time and/or that it never existed due to the nature of the arrangements and relationships. This has now been definitively stated in two witness statements which contain a statement of truth (and which thereby constitute evidence before this Tribunal and, as appropriate, subject to the provisions of the Perjury Act 1911).

22. In such circumstances, and applying the balancing exercise referred to in *Frosh*, the Tribunal is satisfied that there are no reasonable grounds to maintain the Enquiry. HMRC must decide on the information and documentation they hold. HMRC are capable of making an informed judgment as to the quality of the information provided to them and whether it justifies the claim to charity tax relief on the payments made in the accounting period to 30 June 2017. If they consider, in the absence of the further information and documentation that their concerns justify a conclusion that the payments totalling £821,000 were not eligible for charity tax relief they may close on that basis. In substance it is no different to any other closure notice where HMRC are not satisfied on the evidence as to entitlement for a relief or deduction.

23. The Appellant will be entitled to appeal the closure notice. It will then be for the Tribunal hearing the case to determine, on the balance of evidence (already produced – as it is stated that there is no more evidence), whether entitlement to charities relief is made out in relation to those payments.

24. For these reasons, the Tribunal directs that HMRC issue a closure notice for the accounting period ended 30 June 2017 within 4 weeks of the date of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

25. 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.

**AMANDA BROWN KC
TRIBUNAL JUDGE**

Release date: 12TH OCTOBER 2022