



TC04645

Appeal number: TC/2014/5533

APPLICATION TO CLOSE ENQUIRY – interim application for disclosure of risks identified by HMRC which led them to open enquiry – application for stay pending intended judicial review proceedings over opening of enquiry – both applications refused – closure application withdrawn – proceedings dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

QUALAPHARM LTD

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Fox Court, London on 7 September 2015

Mr Koonjah of Noviscom Ltd for the Appellant

Ms Jones, HMRC officer, for the Respondents

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DECISION

5 1. It was accepted by the appellant that HMRC had opened enquiries in time into its tax returns for the years ended 2011 and 2012. The proceedings in front of the Tribunal was an application by the appellant for closure of these two open enquiries.

2. During the course of the enquiries HMRC asked the appellant for information. It was accepted by Mr Koonjah in the hearing that none of the requested information had been provided to HMRC. The company had also been issued with Sch 36
10 information notices with which, it was accepted, there had been no compliance.

3. Before the hearing the appellant made a number of requests for the proceedings to be stayed or the hearing to be postponed. The two grounds given were:

(1) they ought to have disclosure of certain information from HMRC before the application proceeded; and

15 (2) they intended to make an application for judicial review of HMRC's decisions to open enquiries and considered that therefore their application to order closure should be stayed in the meanwhile.

4. I refused to postpone the hearing on the grounds it was clear HMRC disputed the application for disclosure and did not agree to the stay and the applications ought
20 therefore be considered at a hearing; and in any event the appellant appeared also to have appealed the issue of the Sch 36 information notices and penalties for non compliance with those notices, and there was no obvious reason why that part of the proceedings should be postponed.

Application for stay and disclosure

25 5. At the hearing, Mr Koonjah renewed the company's application for a stay of proceedings. He also objected to the hearing considering the company's appeal against the information notices and related penalties.

6. So far as the information notices and related penalties were concerned, I concluded that today's hearing was not properly called to hear this matter. While
30 there had been uncertainty since the proceedings were lodged whether the appellant had intended the proceedings to include an appeal against the information notices and penalties, this had been resolved by the recent filing by the appellant of a new appeal relating specifically to those matters. I was informed that on 2 September (ie 5 days ago) HMRC had written to the appellant informing them that HMRC accepted the
35 notification to the Tribunal as notification to HMRC and moreover that HMRC was exercising its discretion to accept the appeals out of time.

7. My conclusion was that the original proceedings (TC/2014/5533) did not include an appeal against the information notices and penalties and that the new proceedings were not (and could not have been) included in the notice of hearing.
40 While nevertheless both parties could have consented to this hearing dealing with

these matters, Mr Koonjah did not consent. Indeed, he informed me that, although he had been involved in the matter on behalf of the appellant for some time, the appellant had only actually instructed him to appear in the hearing yesterday evening, and he was not prepared to deal with the information notice and penalties appeal.

5 8. Directions for the case management of these new proceedings, on which both parties made representations to me at the end of hearing, will accompany this decision notice, although, as I said at the time, in view of the fact that the hearing was not called to deal with those proceedings, the appellant will have 14 days to lodge reasoned objections to them. I will, if appropriate, deal with any objections to them in
10 chambers.

9. So far as the closure notice application was concerned, at the hearing I refused both the application for disclosure and the application for a stay of the proceedings. I set out my reasons for this below.

Application for disclosure

15 10. The application for disclosure, as clarified in the hearing, was for disclosure of:

- (1) What HMRC considered the risks in the appellant's tax returns were which had led them to open the enquiries;
- (2) The evidence HMRC held (if any) which had caused them to reach the conclusion that there were risks of inaccuracies in the appellant's tax returns ;
- 20 (3) Evidence that the caseworker who opened the enquiries was an authorised officer;
- (4) A copy of the authorised officer's "scrutiny" of the decision to open enquiries.

Relevance to proceedings?

25 11. The appellant's case appeared to be that the enquiries were not properly opened. I pointed out that the Tribunal only has power to order disclosure under Rule 5 and Rule 16. Whichever rule was looked at, it was clear disclosure could only be ordered if relevant to the proceedings which the Tribunal was to determine. On the contrary, even if the information sought was relevant to the question of whether the enquiry
30 was properly opened, the question of whether the enquiry was properly opened was one that was most obviously relevant to a challenge in the High Court in a judicial review of the opening of the enquiry (such as the appellant had told HMRC they intended to initiate).

35 12. Having said that, however, it seemed to me that if an appellant could demonstrate that an enquiry was not properly opened, the Tribunal might consider that relevant to its decision whether there are 'reasonable grounds for not issuing a closure notice'. In other words, even if the taxpayer failed to provide the information sought by HMRC, it was possible that a Tribunal might consider there were no

reasonable grounds for refusing a closure notice if it was satisfied the enquiry should not have been opened in the first place.

13. So I then considered whether the information sought was relevant to the question of whether the enquiry was properly opened. And my conclusion was that
5 none of the information sought by the appellant was relevant to the question of whether the enquiry was properly opened. The appellant's case was that HMRC were unable to open an enquiry unless:

- (1) they had reasonable grounds to do so and in particular had identified risks of misdeclaration; moreover,
- 10 (2) before HMRC could open an enquiry they had to disclose to the taxpayer what the perceived risks were; and then
- (3) the enquiry would be limited to enquiring into the perceived risks and could not look at the taxpayer's compliance generally.

14. I asked for authority for these three propositions. Mr Koonjah said he had none
15 as he was only instructed last night: I found this rather unhelpful as he also agreed he had been involved in advising the company on these matters for some time. And while he had no case law on which to rely he did refer me to:

- (1) Two passages out of HMRC's manuals.
- (2) Article 6 of the European Convention of Human Rights
- 20 (3) The Police and Criminal Evidence Act.

15. The lack of authority produced to the Tribunal appears to be because there is no
authority. I have carried out a search and been unable to locate any authority to support any of the appellant's propositions. As HMRC pointed out, my decision in
Spring Capital Ltd [2015] UKFTT 8 (TC) refers to the fact that the legislation gives
25 HMRC an unfettered right to check taxpayer's tax returns:

“[34]...HMRC are entitled to undertake ‘fishing expeditions’ when checking returns: they do not need suspicion in order to check a return.”

16. While that was a case concerning the issue of an information notice, in my view
30 the same is true of the opening of enquiries. HMRC have the right to open them at random. I note that my research did locate one Tribunal case (*Bensoor v Devine* [2005] STC (SCD) 297) and this case was also in support of HMRC's position:

“[18]...there is nothing to limit the scope of the enquiry. I do not find this surprising, as [the legislation on opening an enquiry] is the basis
35 for purely random enquiries.....there is no basis within the legislation for questioning the scope of any form of enquiry commenced [under the legislation]...”

While, no doubt, as a matter of public law there are fetters on how HMRC can exercise this power, such as not opening enquiries for improper reasons (eg to harass
40 a taxpayer), there are no fetters in the legislation.

17. The appellant's submissions on this seemed to me to completely misunderstand the scheme of self-assessment contained in the Taxes Management Act (and for companies, Sch 18 of Finance Act 1998). The taxpayer assesses itself to tax. HMRC was given the power to check the self-assessment by opening enquiries. Nowhere
5 was the power to open an enquiry circumscribed; there was, for instance, nothing that limited an enquiry to where there was reasonable suspicion of an inaccuracy. While good management of limited resources must dictate that HMRC would direct its manpower towards returns where they had reason to suspect undeclared tax liability, the legislation did not preclude random checks. Indeed the knowledge that HMRC
10 could conduct random checks might be one of the considerations that helps keep some taxpayers careful and truthful when completing returns.

18. If, on the contrary, HMRC were precluded from conducting random checks and indeed had to justify the opening of an enquiry and even supply the evidence which had created their suspicions of an underdeclaration, it would be more difficult for
15 HMRC to open enquiries. This might mean some taxpayers would consider the risk of an enquiry so low that they would exercise less than complete care and honesty when self-assessing.

19. Parliament, by giving HMRC unfettered rights to open an enquiry, clearly did not intend taxpayers to be reassured that care and truth were optional when
20 completing returns. It would be wrong to read into the legislation a restriction which was not intended to be imposed by Parliament.

20. In conclusion, enquiries can be lawfully opened at random. Therefore, as HMRC do not have to have a suspicion of a misdeclaration in order to open an enquiry, there is no requirement to disclose any suspicion to the taxpayer let alone a
25 limitation on the enquiry: the matters of which the appellant required disclosure are therefore irrelevant to the question of whether the enquiry was lawfully opened.

21. In so far as the three matters to which the appellant did refer me as supporting its case, I find as follows:

22. the manuals: I find manual CH206150 states that HMRC 'Local Compliance'
30 team does require an officer on starting a compliance check normally to tell the taxpayer the 'risk or reason for the check'.

23. However, CH206150 is not a statement of the law. Moreover, while the enquiries in this case were opened by HMRC's Local Compliance Large and Complex Businesses, the guidance itself says that HMRC may not always be able to
35 share some of the risks identified. So even CH206150 does not bind HMRC to disclosing its concerns to taxpayers in all circumstances.

24. The appellant also relied on CH23526 for its statement that enquiries had to be opened by authorised officers who had to 'scrutiny' the decision. But I find, as HMRC pointed out, that manual applies to the use of Information Powers under Sch
40 36 and not the opening of enquiries. The appellant, it appears, did not read the manual very carefully. There is therefore no basis even in the manuals for the

appellant's claim that an enquiry could only be opened with the consent of an authorised officer.

25. That point disposes of items (3) and (4) for which disclosure is requested. The request was based on a misunderstanding of the manuals. It is dismissed.

5 26. So far as items (1) and (2) were concerned, my conclusion is that there is nothing in either manual referred which means that as a matter of law HMRC must identify risks before opening an enquiry let alone notify the taxpayer of the risks. And, as I have said, there is nothing in law which restricts the enquiry to the matters identified to the taxpayer as risks.

10 27. Article 6 of the Convention: Article 6 gives persons the right to a fair trial:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

15 Mr Koonjah suggested that if the appellant was not given the disclosure it sought, the subsequent hearing of its closure application would not be fair.

28. I pointed out that Article 6 did not apply to tax matters except where penalties were concerned (*Ferrazzini* [2001] ECHR 464). Mr Koonjah's reply was that an enquiry ought to be seen as a criminal matter because, depending on what HMRC
20 found during an enquiry, they might chose to prosecute the taxpayer.

29. I did not agree: an enquiry is not itself a criminal matter. Even if an enquiry did lead to the discovery of information which led HMRC to open a prosecution, that did not make the enquiry (at least before that point) a criminal matter. In this case, the appellant did not suggest that there were any criminal proceedings currently taken
25 against it: this closure application was therefore not a criminal matter.

30. In any event, I did not consider that disclosure of the material sought was necessary for a fair trial: I did not consider, for the reasons given above, that any of the information was relevant to the question of whether the enquiry was properly opened.

30 31. Police and Criminal Evidence Act: While Mr Koonjah referred to PACE he did not explain why he thought it was relevant nor refer me to any particular part of it. I can only therefore guess the appellant's case on this.

32. My conclusion on this is that PACE has absolutely nothing to do with the opening of an enquiry under Sch 18 of the Finance Act 1998 into a corporation tax return. It is not a police matter; it is not a criminal enquiry.
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Risks were disclosed

33. A further reason for refusing the disclosure application was that disclosure has now been provided: HMRC have explained in a witness statement provided to the

appellant before this hearing but some time after the enquiry was opened what they said were areas of concern which HMRC had with the appellant's returns. The reasons centred on the company's rather unusual trading position revealed in its accounts which showed a turnover exceeding £29million in its first year of trading, achieved with only 11 staff the total salary cost of which was a mere £164,000. The Director himself was recorded as only having a salary of £2,500 despite the recorded profit of over half a million. The following year its turnover exceeded £43 million, although its profits reduced to £197,000 and its staff to 6. The director's salary also reduced to £500. The accounts also showed creditors and debtors each of about £25 million.

34. The appellant did not consider these sufficient reasons to open an enquiry. It may be they were not the only reasons HMRC had for opening the enquiry. It does not matter. HMRC have the right to open enquiries randomly: therefore they do not have to justify the decision. In any event, were I called upon to decide the matter, I would agree with HMRC that the unusual trading position of the appellant outlined above justified a compliance check.

Claim enquiry opened for improper reason

35. I have agreed with the appellant in principle that it is possible for HMRC to be challenged over the opening of an enquiry, but it seems to me that, as HMRC can chose to open an enquiry randomly in order to check a tax return, the only real grounds on which the opening could be challenged would be where there was an allegation the enquiry was not opened to check the taxpayer's return but for another reason, eg, to harass the taxpayer.

36. Here the appellant does allege HMRC had an improper motive in opening the enquiry. It says that HMRC opened the enquiry in order to gather information on one of the appellant's customers, into whom, Mr Koonjah told me, HMRC had had an open enquiry before the enquiry into the taxpayer's affairs.

37. Mr Koonjah advanced no evidence to support his case. Nor did he suggest that the questions HMRC asked, and the information sought from, the appellant were directed to the tax affairs of this customer. On the contrary, it seemed to me that the information sought was to check the tax position of the appellant, and, as I have said, HMRC appear to have good reasons for carrying out a check of the appellant's tax compliance. Further, I take into account that Parliament has given HMRC powers to seek information about taxpayers from third parties. Mr Koonjah did not suggest a reason why, if HMRC's only concern was the customer, HMRC would have chosen to open an enquiry into the appellant rather than simply issue it with a Schedule 36 Third Party Information Notice.

38. In conclusion, I do not consider that the appellant has made any attempt to substantiate this accusation and what evidence I have actually contradicts it. Therefore, in so far as this allegation was relied on as supporting an application for disclosure, I do not consider that it does support it.

Conclusions on disclosure request

39. None of the matters referred to by the appellant justified the disclosure sought. I refused the application

Stay of closure application?

5 40. The application for a stay was a rather novel application. The purpose of a
closure application is to bring to an end an enquiry: it would be unusual for an
appellant to seek to stay an application or postpone the hearing as that would suggest
that the appellant did not, contrary to its application, wish the enquiry to be brought to
an end immediately. And in any event, appellants could renew applications for
10 closure at any time during the enquiry.

41. I asked Mr Koonjah why the appellant, instead of seeking a stay, had not
withdrawn the application, as they could renew it when they were ready to pursue the
matter? His response was that the appellant considered the application would be
heard more quickly if it was an earlier application which had been stayed rather than a
15 new application.

42. I did not consider that a good reason to grant a stay. It was in any event a
mistaken view: closure applications were fast tracked in the Tribunal as they were
treated as basic cases.

43. The appellant also said that the application should be stayed or at least the
20 hearing of it postponed as (a) they needed the disclosure in order to conduct the
application and (b) they wished to challenge the enquiry by judicial review.

44. I have already dealt with the application for disclosure and dismissed it. For the
reasons already given, the information requested is not relevant to an application for
closure. It therefore does not comprise a reason for staying the application or
25 postponing the hearing of it. I go on to consider whether the threatened judicial
review was a reason for a stay.

Judicial review?

45. So far as the judicial review position was concerned, the appellant had sent an
email to HMRC stating that they intended to take judicial review action against
30 HMRC over the opening of the enquiry. The email asked to be treated as a pre-action
letter.

46. Ms Jones informed me HMRC's solicitors' office was considering whether it
was properly to be treated as a pre-action letter.

47. My view was that the appellant faced considerable difficulties in bringing a
35 judicial review action against HMRC. The enquiry into 2011 was opened on 6
December 2013 and the enquiry into 2012 was opened on 14 April 2014. It would
seem lodging a judicial review of either of these actions by HMRC would now be
well out of time. I doubted that the appellants would be successful in obtaining

permission to bring a late judicial review action as no reason for their failure to bring it on time was offered and in any event HMRC had specifically advised them in a letter dated 18 June 2014 of the right to bring such an action, yet they had still not done so over a year later.

5 48. Moreover, judicial reviews, even those lodged in time, cannot be brought as of right. Permission must be sought. This serves the purpose of preventing the High Court being clogged up with unmeritorious claims. Would the appellant be successful in getting permission? I did not think so.

10 49. For the reasons I have already given I do not think that its case at §13 is right in law nor do I think such a case has a reasonable prospect of success. Nor do I consider that its claim the enquiry was opened for improper reasons has any prospect of success as no attempt was made to substantiate the accusation and what evidence there is appears to contradict it (see §§35-38).

15 50. For these reasons, I consider it highly unlikely on the basis of what was before me that the appellant would be given leave to bring a judicial action alleging either or both that HMRC has to state its reasons for an enquiry to the taxpayer in advance or that the reason the enquiry was opened was to obtain information about another taxpayer.

20 51. Therefore, I do not consider it right to stay its closure notice application. Parties are entitled to finality with such expedition as is consistent with justice: it is wrong to permit proceedings to be stayed pending other proceedings which are most unlikely to be brought or to succeed if brought.

25 52. And in the event that I am wrong in my view and the appellant is given permission to bring such proceedings and is successful in challenging the issue of the closure notices, then I do not think they would suffer prejudice if the enquiry either continued or even if it was closed: the enquiry would be a nullity as would any closure notice issued arising out of it.

53. So there is no good reason to stay the proceedings or postpone today's hearing.

30 54. I announced my decision at the hearing. I said that the Tribunal would immediately proceed to hear the appellant's closure application.

55. Mr Koonjah had informed me at the outset that his instructions were to withdraw the closure application if the appellant's stay/postponement application was unsuccessful, and now that it had been unsuccessful, he announced that the closure application was withdrawn. He also announced an intention to appeal my decision.

35 56. I warned him that, although of course the closure application could be renewed at any time during the enquiry, if he withdrew the closure application now it was unlikely that the appellant would be able to appeal my above decision because the Upper Tribunal was unlikely to accept an appeal against an interim decision in a withdrawn appeal as it would serve no purpose. Mr Koonjah said he understood the
40 risk but wished to withdraw the closure application in any event.

57. I then formally dismissed the application and that brought the proceedings to an end.

58. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 18 SEPTEMBER 2015