TC05602

Appeal numbers:
TC/2014/02334;TC/2015/00527;TC/2014/02338;TC/2015/00530;
TC/2014/02344;TC/2015/00524;TC/2014/02346;TC/2015/00522;
TC/2014/02348;TC/2015/00531;TC/2014/02351;TC/2014/02352;
TC/2015/00523;TC/2014/02353;TC/2014/02354;TC/2015/00529;
TC/2014/02355;TC/2015/00528;TC/2014/02357;TC/2014/02359;
TC/2015/00526;TC/2014/04767;TC/2015/00532;TC/2014/05153;
TC/2014/02603

INCOME TAX – CORPORATION TAX – appeals against Sch 36 Notices and against penalties – applications to close enquiries – whether to stay the appeals and applications behind Mr Budhdeo's judicial review application –* Veolia *distinguished – whether dominant purpose of the enquiries and Sch 36 Notices to obtain information to prosecute Mr Budhdeo – whether information can be a statutory record – whether the Sch 36 Notices should be upheld, varied or set aside – whether to confirm the penalties – whether to close the enquiries

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOLD NUTS LIMITED **Appellants**
VENTURE PHARMACIES LIMITED
CHEMISTREE LIMITED
BLACKBAY VENTURES LIMITED
ZANREX LIMITED
CORONA PROPERTIES LIMITED
BRONZE NUTS LIMITED
VERTEX PROPERTIES LIMITED
R SQUARE PROPERTIES LIMITED
LEYTON ORIENT DISPENSARY LIMITED
DISPENSARY HOLDINGS LIMITED
ENVIROPLEX LIMITED
NOVISCOM LIMITED
SYMBIO ENERGY LLP
SHAMIR PRAVIN BUDHDEO

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice, Strand, London from 31 October 2016 to 3 November 2016

Mr Shamir Pravin Budhdeo in person and Mr Beecham Koonjah of Noviscom Limited, for the other Appellants

Ms Harry Jones, of HM Revenue and Customs' Appeals and Reviews Unit, for the Respondents

DECISION

Introduction and summary

1. This decision encompasses the following appeals and applications ("the appeals and applications"):

(1) applications to close enquiries opened by HM Revenue & Customs ("HMRC") into the corporation tax ("CT") returns of the corporate appellants ("the Companies"); into two self-assessment ("SA") tax returns submitted by Mr Shamir Pravin Budhdeo ("Mr Budhdeo"); and into the partnership return of Symbio Energy LLP ("Symbio") for the period ended 5 April 2013. In total there were 41 closure applications before the Tribunal;

(2) appeals made by certain of the Appellants against Notices issued under Finance Act 2008, Schedule 36, paragraph 1 and by Symbio against a Notice issued under Finance Act 2008, Schedule 36, paras 1 and 2. In this decision, both types of Notice are called a "Sch 36 Notice". There were 17 such Notices under appeal, each of which required one or more listed items ("Item" or "Items"); altogether 158 Items were listed; and

(3) appeals against fixed penalties charged on Mr Budhdeo, Symbio and Noviscom Limited ("Noviscom") for failure to comply with a Sch 36 Notice.

2. At the time the appeals were notified to the Tribunal, Mr Budhdeo was a director of many of the Companies and a partner in Symbio. In this decision, Mr Budhdeo, Symbio and the Companies are together referred to as "the Appellants".

3. There were two preliminary hearings of the appeals and applications. The first was on 3 February 2015 ("the First Hearing"), at which HMRC applied for an adjournment to allow time to take advice on the issues raised by the Appellants. That adjournment was granted and a number of preliminary matters were decided by the Tribunal and set out in its decision ("the First Decision").

4. The second hearing was on 13 and 14 October 2015 ("the Second Hearing"). It decided various preliminary matters of law. That decision was issued on 8 February 2016 ("the Second Decision") along with detailed directions relating to the appeals and applications ("the February Directions").

5. Mr Budhdeo applied to stay the hearing of the appeals and applications. His application was supported by the other Appellants, but resisted by HMRC. I heard and refused the application at the hearing, and gave outline reasons. Although Mr Budhdeo and Mr Koonjah then withdrew from the proceedings, I decided it was in the interests of justice to continue.

6. In relation to the substantive issues, I decided that:

(1) the Sch 36 Notice issued to Mr Budhdeo is varied to remove one Item, see §441-§443;

(2) the Sch 36 Notices issued to Blackbay Ventures Ltd ("Blackbay") and Enviroplex Ltd ("Enviroplex") in relation to those companies' 2010 CT returns are varied to change one Item on each Notice, see §231-§232 and §298;

(3) all other Sch 36 Notices are upheld in full;

(4) HMRC's enquiries into the 2011 CT returns made by Corona Properties Ltd ("Corona"), Dispensary Holdings Ltd ("DHL") and Vertex Properties Ltd ("Vertex") are to be closed within 30 days of the date of issue of this decision, as is the enquiry into the 2012 return for DHL, see §278ff; 283ff and §357ff;

(5) I do not direct the closure of any other enquiries; and

(6) each of the three Sch 36 fixed penalty notices is confirmed.

7. The legislation relevant to the appeals and applications is set out in Appendix 1.

8. The Appellants' attention is drawn to the classification and related costs issue at the end of this decision.

The evidence

9. HMRC provided the Tribunal with bundles containing the documentation relating to the appeals and applications, some of which were originally provided to HMRC and the Tribunal by the Appellants (together "the Bundles").

10. The following HMRC Officers provided witness statements:

(1) Mr Anthony Douglass, who was until 21 August 2014 the HMRC investigating Officer responsible for the enquiries into the Companies and into Symbio;

(2) Mr James Moss, who replaced Mr Douglass as the Officer responsible for those enquiries; he was previously part of the enquiry team run by Mr Douglass; and

(3) Mrs Karen Murphy, an inspector in HMRC's Specialist Investigations (Fraud and Bespoke Avoidance) team, who is responsible for the COP9 enquiry into Mr Budhdeo.

11. Mr Moss provided three witness statements, of which two were provided after the date required by the February Directions. Mrs Murphy provided two witness statements, of which the second was provided after the date required by those Directions. The Appellants had received copies of these witness statements before the hearing, and Mr Budhdeo and Mr Koonjah confirmed that they had no objection to their late submission, and I admitted them into evidence. The statements were supplemented by oral evidence led by Ms Jones. I found all three witnesses to be honest and reliable.

12. Mr Budhdeo provided a witness statement dated 31 March 2015 but did not give oral evidence. His witness statement essentially sets out a summary of communications between the Appellants and HMRC, and as such is not in dispute. In

relation to HMRC's minutes of a meeting held on 22 November 2012 ("the Meeting Minutes") Mr Budhdeo says:

> "The minutes of the meeting however contained numerous errors, few of which I quoted for instance as the statement pertaining to the fact that the 'group is now willing to co-operate', which was clearly incorrect and misleading. It was made clear through various correspondences that the group had been cooperative from the beginning of the enquiry. As well as the minutes did not contain any reference to the history of the case with particular reference to the COP 9 allegations, the subsequent correspondences and the conversations pursuant to the conduct of the HMRC agents who caused such consternation in the investigation."

13. Although Mr Budhdeo states that the Meeting Minutes contained "numerous errors" none of the points he makes in the paragraph cited above, or in his correspondence with HMRC, seeks to challenge any of the information about the Appellants' businesses set out in the Meeting Minutes. His witness statement also records that HMRC had invited the Appellants:

> "to address any material inaccuracies which could lead to incorrect assumptions being made about the business or the way in which it operates, normally by way of an addendum to the signed meeting notes."

14. No such corrections were made. I have therefore relied on the Meeting Minutes in making findings of fact.

15. From the evidence in the Bundles, together with the witness evidence, I find the facts set out in this decision.

PART 1: MR BUDHDEO'S APPLICATION FOR A STAY

16. Mr Budhdeo made three applications for this hearing to be stayed. His first two were refused by Judge Mosedale on the papers. His third, dated 13 October 2016 and received by the Tribunals Service on 20 October 2016, provided further reasons why the stay should be allowed.

17. On 20 October 2016 I gave Mr Budhdeo permission to make his stay application orally on 31 October 2016, being the first day listed to hear the appeals and applications. I said that if the stay was not granted, I would immediately proceed to hear the substantive appeals and applications, and that "both parties must come prepared for that possible outcome".

18. The Appellants filed and served joint written submissions in relation to the stay application, and Mr Budhdeo and Mr Koonjah also made oral submissions. HMRC provided a written skeleton argument opposing the application, and Ms Jones made oral submissions.

The facts

19. On 6 December 2013, Mrs Murphy wrote to Mr Budhdeo, saying:

> "HMRC have information that gives us reason to suspect that you have committed tax fraud. I intend to investigate the suspected tax fraud and so am notifying you that HMRC's Investigation of Fraud Code of Practice (COP9) applies to your tax affairs from the issue date of this letter. My investigation will cover all your tax affairs."

20. Mrs Murphy enclosed with her letter a copy of a booklet which sets out that Code of Practice ("the COP9 Booklet"). The second paragraph begins:

> "We issue this Code of Practice in selected cases where we suspect tax fraud. In many cases we carry out criminal investigations of suspected fraud with a view to prosecution. But under this Code, we offer you instead the chance to make a full disclosure under a contractual arrangement called a Contractual Disclosure Facility (CDF). You have 60 days to respond. If you make a full disclosure of all tax frauds and irregularities, we will not pursue a criminal investigation with a view to prosecution."

21. On 10 December 2013, Mr Budhdeo replied. He refused to sign the CDF, and said "I unequivocally and resolutely deny any tax fraud…I have not committed tax fraud and I will not admit to something I have not done".

22. On 4 March 2014 Mrs Murphy wrote again to Mr Budhdeo, saying:

> "I have received authority to progress this case as a civil investigation. Please note however that as stated in COP9, this does not prevent your tax affairs from being the subject of a criminal investigation in the future."

23. The COP9 enquiry remained ongoing as at the date of this hearing.

24. One of the issues decided at the Second Hearing was whether the First-tier Tribunal ("the FTT") has the jurisdiction to close an HMRC enquiry opened under COP9. I decided that the FTT has no such jurisdiction, and that "the only way to challenge that enquiry is by judicial review at the Administrative Court", see [77] of the Second Decision.

25. On 19 May 2016, Mr Budhdeo filed a judicial review ("JR") claim with the High Court. Under the heading "Details of the decision to be judicially reviewed" is written:

> "Judicial Review of decisions of Her Majesty's Revenue & Customs in relation to the Code of Practice 9 Procedure instigated in respect of Mr. Shamir Pravin Budhdeo as confirmed in the Judgment of Judge Redston dated 08 February 2016."

26. In an attached document, headed "Combined statement of facts and grounds" Mr Budhdeo set out the HMRC decisions he was seeking to challenge as being:

> "a. To initiate a COP 9 enquiry into Mr Budhdeo's affairs;

> b. To initiate a COP 9 enquiry in circumstances where there were no reasonable grounds to sustain an allegation of tax fraud against Mr Budhdeo;
>
> c. Alternatively, to refuse to provide any or any adequate disclosure to Mr Budhdeo setting out the basis for or causes of the allegations of tax fraud against him; or
>
> d. Alternatively, to refuse to close the COP9 enquiry following the decision not to provide any or any adequate disclosure as to the basis for the allegation of tax fraud against him."

27. The document stated that those HMRC decisions were unlawful because:

> "a. they were taken without proper regard to the element of coercion and pressure present in the COP 9 procedure;
>
> b. they were unreasonable in that they were taken on the basis of information which was not capable of sustaining a reasonable suspicion of fraudulent activity;
>
> c. alternatively, they were taken without proper regard to and are incompatible with Mr Budhdeo's Article 6 rights and particular his right under Article 6(3)(a),'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'."

28. Mr Budhdeo asked the High Court for:

(1) a declaration that HMRC has not disclosed to him any information capable of constituting reasonable grounds for alleging tax fraud against him;

(2) a declaration that HMRC has acted in a way which is incompatible with his Article 6 rights; and

(3) an order requiring HMRC to close the COP9 enquiry.

29. On 5 August 2016 Soole J considered Mr Budhdeo's permission application on the papers. He refused permission because the application was "long out of time" and also because:

> "The grounds of claim have no substance. In particular there is no arguable basis for the contentions that the instigation of the COP9 procedure constituted unlawful duress or that the investigation (including its continuation and the Defendant's responses to requests for information and disclosure) were unlawful."

30. Mr Budhdeo subsequently applied for an oral hearing of his JR application; this was listed for 6 December 2016.

The Appellants' submissions

31. The Appellants had two main submissions. The first was that there was overlap and "linking" between the matters to be decided at this hearing, and those which would be before the High Court in Mr Budhdeo's JR application. The second was

that if the hearing continued, Mr Budhdeo would be unable to give evidence for the reasons explained at §36ff below.

Overlap and linking

32. The Appellants cited *Veolia and others v HMRC* [2015] EWCA Civ 747 ("*Veolia*"), in which the Court of Appeal considered whether to allow HMRC's application to stay those appellants' JR proceedings, pending the hearing of their substantive appeals at the FTT. Arden LJ, giving the only judgment with which Black and Floyd LJJ agreed, summarised the issue in her opening paragraph:

> "If both [the JR and the FTT case] proceed at the same time, there may be different findings of fact…There are also considerations of cost and delay and the use of scarce court resources for what might turn out to be a valueless duplication of effort…"

33. The Appellants said that this was also the case here because:

> "if the matters are to proceed to decide on the substantive issues while the Judicial review is in progress then such a step would result in parallel proceedings essentially involving the same facts. This would in turn may lead [sic] to different findings of fact and may in fact turn out to be a valueless duplication of effort. It is to be noted that such duplication is not acceptable as it wastes time and costs and is contrary to the interests of justice."

34. The Appellants submitted that the following factors showed the requisite degree of overlap and linkage:

(1) On 30 May 2014, Mr Mark Ratcliff, a Tribunal Caseworker for HMRC, applied to the Tribunal for Mr Budhdeo's closure notice application to be joined and heard together with closure notice applications submitted by the Companies, on the basis that "all appeals will be handled by the same caseworker".

(2) On 14 June 2014 Mr Ratcliff wrote again to the Tribunal, saying that:

(a) "the COP 9 enquiry into Mr Budhdeo is fundamentally linked to the enquiries into the companies" and his closure notice application "inherently interlinked" with the Companies' applications;

(b) Mrs Murphy was working with the caseworker managing the enquiries into the Companies;

(c) the CT enquiries into the 2011 years were opened "as a direct result of the COP9 enquiry";

(d) where companies are "closely" controlled as they are here, the tax affairs of the directors and shareholders are a factor in HMRC's consideration of the corporate entities with which they are involved; and

(e) if the cases are not joined, the Tribunal "may not get an accurate and full picture of HMRC's enquiries or the issues at hand".

(3) At the First Hearing, the Tribunal identified certain preliminary matters to be heard at the Second Hearing, one of which was whether the FTT had jurisdiction to close a COP9 enquiry. When that issue was considered at the Second Hearing, the Tribunal decided that it did not have that jurisdiction. The Appellants said that preliminary matters should be resolved before the Tribunal went on to consider the substantive appeals and applications, and Mr Budhdeo's application to close the COP9 enquiry would not be determined until after the High Court had heard or otherwise resolved his JR application.

(4) At the First Hearing the Tribunal recategorised the appeals and applications as "complex". The Appellants submitted that if the Tribunal were to hear the substantive issues, even though one of the preliminary issues remained unresolved, "the Tribunal has failed in its approach requiring this categorisation, when the matter was first brought before it" and "the entire purpose of the categorisation is futile".

(5) At the end of the Second Decision, the Tribunal extended the normal appeal period because of "interlinking" between the preliminary and substantive issues. For ease of reference, the relevant passage of the Second Decision is at [326] and reads:

> "The normal time limit for making [a permission to appeal] application is that it must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, because of the interlinking between these preliminary issues and the substantive hearing of the Appeals and Applications, I direct that the 56 days within which a party may send or deliver an application for permission to appeal shall run from the date of the substantive decision. This means that no appeal need be made until after the parties have received the Tribunal's decision on the outcome of the Appeals and Applications. This will follow the substantive hearing."

(6) The linkage between the JR application and these proceedings is self-evident, given that the Appellants' primary ground of objection to the enquiries and Sch 36 Notices is that HMRC's dominant purpose is to obtain information about Mr Budhdeo, to assist with his possible criminal prosecution.

35. The Appellants also submitted that, if Mr Budhdeo were successful in his JR application, HMRC would close some or all of the enquiries and withdraw some or all of the Sch 36 Notices. To proceed with the substantive hearing now would therefore be inappropriate, and waste time and costs.

Mr Budhdeo's ability to give evidence

36. Mr Budhdeo submitted that if the hearing proceeded, he would be unable to give evidence. He said that this was because he had been "charged" with a criminal offence within the meaning of Article 6 of the European Convention on Human Rights ("the Convention"), as the Tribunal had found in the Second Hearing, and so had a right not to self-incriminate. He said "I can't defend myself because I have a right not to give evidence".

37. He added that, if the Appellants continued after this hearing to fail to respond to the Sch 36 Notices, HMRC has the power to impose daily penalties of up to £60 a day. By his calculations this could come to £65,000 per Appellant. Mr Budhdeo said that HMRC would then be using a financial penalty to force the Appellants to give evidence. This constituted duress, an abuse of power and a breach of the Criminal Justice Act.

38. The Appellants also referred to the Tribunal's finding in the Second Decision that Article 6 did not allow any of the Appellants to refuse to respond to Sch 36 Notices or to HMRC's enquiries into the SA or CT returns. They submitted that, if the Appellants successfully appealed that part of the Second Decision, that success would be nugatory if Mr Budhdeo had given evidence in these proceedings.

HMRC's submissions

39. Ms Jones began by pointing out that Mr Budhdeo had not been granted permission to commence JR proceedings, and that his application had been dismissed by Soole J on the papers as significantly out of time and without merit. Even if permission were to be granted on 6 December 2016, she submitted the appeals and applications should not be stayed, because there was "insufficient nexus" between the matters which would be before the High Court and those to be decided by this hearing.

40. She distinguished the Appellants' position from that in *Veolia*, where it was accepted that the taxpayers were seeking "effectively the same relief in the two sets of proceedings". That is not the position here. By his JR application, Mr Budhdeo is seeking two declarations and an order, as repeated in italics below. In her submission, none of these overlap with these proceedings, for the following reasons

(1) *A declaration that HMRC have not disclosed to him any information capable of constituting reasonable grounds for alleging tax fraud against him.* Mr Budhdeo has already applied to the FTT for a similar disclosure. The Tribunal found that none of the points on which disclosure was sought was relevant to the substantive issues to be considered at this hearing, see [302] of the Second Decision.

(2) *A declaration that HMRC has acted in a way that is incompatible with Mr Budhdeo's Article 6 rights.* Even if the High Court were to find that the COP9 enquiry breached Mr Budhdeo's Article 6 rights, any flaw in the COP9 process is irrelevant to appeals and applications, which are statutory enquiries.

(3) An order requiring HMRC to close the COP9 enquiry. HMRC will not withdraw the Sch 36 Notices or close the enquiries into the Appellants' CT, SA and partnership returns, even were the High Court to order the closure of the COP9 enquiry. It is the FTT (not the High Court) which has jurisdiction to close those enquiries and to decide appeals against Sch 36 Notices.

41. Ms Jones accepted that there was overlap between the factual background to the COP9 enquiry and the appeals and applications. However, the "Background and

Facts" section of the "Combined Statement of Facts and Grounds" in Mr Budhdeo's JR application consisted only of correspondence between the parties. None of this was in dispute. As a result, neither the High Court nor this Tribunal was required to decide any contentious factual issue common to both proceedings.

42. As to the Appellants' other submissions on linkage, Ms Jones said that the classification of the cases as complex was not relevant to the stay application, and neither were the appeal rights set out at the end of the Second Decision. Mr Budhdeo's submissions on evidence were flawed, as there were no criminal proceedings.

Discussion

43. It is not for me to assess the probability of Mr Budhdeo succeeding in his JR permission application or in his substantive JR application. I have therefore considered his stay application on the basis that he succeeds in obtaining permission to bring his JR application, and that he subsequently succeeds at the High Court, so that HMRC close the COP9 enquiry.

Issues and interlinking

44. It is clearly undesirable for the same issues to be litigated in two separate sets of proceedings, as Arden LJ says in *Veolia*. However, I agree with Ms Jones, for the reasons she gives, that the issues which would be decided in Mr Budhdeo's JR application are not the same as those before this Tribunal. That this is the position can be clearly seen when each of the three types of substantive issue are considered:

(1) *Closure notice applications*: HMRC will not close the CT and SA enquiries if it loses the JR case. The High Court cannot order the closure of these enquiries. It is instead for HMRC to make its case before this Tribunal as to why the enquiries should remain open. The Appellants can submit that the enquiries should be closed, for instance because HMRC's dominant purpose is to obtain material to prosecute Mr Budhdeo, but those submissions can only be considered by this Tribunal, not by the High Court.

(2) *Appeals against Sch 36 Notices*: HMRC has confirmed that these will not be withdrawn if it loses the JR case. The High Court cannot order HMRC to withdraw the Sch 36 Notices. It is this Tribunal which has the jurisdiction to decide whether the information and documents set out in those Notices are "reasonably required" for the purposes of checking each Appellant's tax position.

(3) *Appeals against penalties for non-compliance with Sch 36 Notices*: it is for the Appellants on whom penalties have been levied to demonstrate that they have a reasonable excuse for not paying the penalties and it is this Tribunal, not the High Court, which decides whether or not that is the case.

45. I also considered whether, as the Appellants submit, the same factual issues will need to be determined by the High Court and this Tribunal. However, as Ms Jones said, none of the "Background and Facts" section of the "Combined Statement of Facts and Grounds" in Mr Budhdeo's JR application was in dispute.

46. The Appellants placed considerable weight on Mr Ratcliff's letters of 30 May and 4 June 2014. But the purpose of those letters was to put forward HMRC's reasons why Mr Budhdeo's application to close his SA enquiry should be joined with applications made by the Companies to close their CT enquiries. It is this Tribunal which has jurisdiction to decide both Mr Budhdeo's closure application and those of the Companies, so it makes sense for them to be listed and heard together. It is irrelevant that the appeals and applications will be handled by the same HMRC case worker.

47. Mrs Murphy's co-operation with the HMRC Officers engaged in the CT and SA enquiries is part of the factual background to the appeals and applications. It is not in dispute, so does not need to be determined by any court or tribunal. Although her involvement may be relevant to the dominant purpose of HMRC's enquiries and Sch 36 Notices, that too is a matter for this Tribunal to determine. Furthermore, Mrs Murphy's working arrangements were not referred to in the "Background and Facts" section of the "Combined Statement of Facts and Grounds" submitted to the High Court, so cannot be relevant to the JR application.

48. The Appellants also submitted that the substantive issues should not be determined while one of the preliminary issues remained unresolved, namely whether the Tribunal had jurisdiction to close a COP9 enquiry. That issue does not remain unresolved. It was instead decided by the Second Decision. Any challenge to the COP9 enquiry has to be made by JR. There is no reason to stay the substantive appeals and applications pending any such application.

49. I gave permission for an extended time limit for appealing the Second Decision because, as all parties have accepted, there is "interlinking" between the preliminary issues and the substantive issues. However, that extended time limit does not carry with it any inference that the substantive proceedings must be stayed until his JR application has been resolved.

Daily penalties

50. Mr Budhdeo also submitted that, if HMRC imposed daily penalties, these would force the Appellants to provide information under financial duress. However, there is no link between that submission and the stay application, because no daily penalties are before this Tribunal and because HMRC's statutory power to issue daily penalties is irrelevant to the JR application.

Categorisation

51. The Appellants are correct that the appeals and applications were categorised as complex following the First Hearing. One of the criteria for being so categorised is the case engages "a complex or important principle or issue". The Tribunal set out the five issues which were engaged by the appeals and applications at [2] of the First Decision. These were:

(1) an application by the Appellants to reverse the joinder of the appeals and applications;

(2) whether the Tribunal had jurisdiction to close the COP9 enquiry;

(3) whether the protections provided by Police and Criminal Evidence Act 1984 ("PACE") and the Convention were breached by the CT and SA enquiries, Sch 36 Notices and penalties;

(4) how the Tribunal should respond to the decision in Issue 3, taking into account the Tribunal's statutory powers and its obligations under the Human Rights Act 1998 ("HRA") and the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"); and

(5) the substantive appeals and applications, in the light of the Tribunal's decisions on Issues (3) and (4).

52. The Tribunal recategorised the appeals and applications because Issues (3) and (4) raised complex or important principles or issues, see [89] of the First Decision. Issue (2) was not relevant to the recategorisation. It follows that the Tribunal has never suggested, by recategorisation as complex or otherwise, that the substantive appeals and applications are dependent on resolution of the COP9 enquiry.

Right to silence

53. The Appellants also submitted that they might appeal against the Tribunal's finding in the Second Decision that Mr Budhdeo's Article 6 right did not allow any of the Appellants to refuse to respond either to Sch 36 Notices or to HMRC's enquiries into the SA or CT returns, and that, if Mr Budhdeo gave evidence in these proceedings, the Appellants would, in terms, have conceded that they had to answer HMRC's questions.

54. This has nothing to do with Mr Budhdeo's application to stay the appeals and applications behind his JR case. It is, instead, a submission that the appeals and applications should be stayed because the Appellants have not yet sought permission to appeal the Second Decision. It is therefore irrelevant to the stay application which the Tribunal has been asked to decide.

55. I also found the submission to be without merit, because:

(1) Mr Budhdeo is the only Appellant to have provided a witness statement, and his statement consists almost entirely of a recitation of agreed facts. No part of it engages with the particular questions asked by HMRC in the enquiries or the Items required by the Sch 36 Notices;

(2) if Mr Budhdeo refused to answer questions about the matters raised by the enquires, or the Items required by the Sch 36 Notices, the Tribunal would be able to draw an adverse inference from his silence. This would be the position whether or not he had a right to remain silent; and

(3) the existence of a right to silence does not prevent a person from giving evidence, so Mr Budhdeo's belief that he is unable to defend himself because he has "a right not to give evidence" is simply incorrect.

Interests of justice

56. I am required by Rule 2 of the Tribunal Rules "to deal with cases fairly and justly", which 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."

57. Because there is no overlap between the appeals and applications and the issues which would be decided in Mr Budhdeo's JR application, staying these proceedings would result in wasted time and costs, both for the parties and the Tribunals Service.

58. In relation to delay, it is nearly two years since the appeals and applications first came before the Tribunal, and any further delay is highly undesirable. There is no reason why the substantive issues cannot be properly considered at this hearing.

59. For the above reasons, I decided to refuse the Appellants' stay application.

PART 2: THE APPELLANTS' WITHDRAWAL FROM THE HEARING

60. I summarised the above reasons for refusing the stay application orally at the hearing, and went on to deal with the costs position for certain appeals and applications and with HMRC's application to admit further witness evidence, see §462ff and §11.

61. I next invited the parties' view on how the proceedings should be structured, given the number of appeals and applications. However, Mr Budhdeo said that he was withdrawing from the hearing, and Mr Koonjah stated that he had also been instructed to withdraw.

62. Mr Budhdeo said that he was withdrawing because "I have been accused of a crime and I would be unable to participate in this proceedings". He added that he had been charged with a criminal offence under the Criminal Justice Act and was withdrawing for his own protection, but understood that "the court will carry on".

63. I pointed out to Mr Budhdeo that the receipt of a COP9 letter was not a criminal charge under the Criminal Justice Act. I added that if the Appellants remained they would be able to put their case, which I understood to be focused on their submission that HMRC's dominant purpose in opening the enquiries and issuing the Sch 36 Notices was to obtain information to decide whether to prosecute Mr Budhdeo. However, both Mr Budhdeo and Mr Koonjah departed.

64. Rule 33 provides that, if a party fails to attend a hearing, the Tribunal may proceed if satisfied that the party had been notified of the hearing and it is in the interests of justice to proceed. Here, the Appellants had not failed to attend, but had

withdrawn. I went on to consider Rule 2 once more, this time to decide whether it was in the interests of justice to proceed with the hearing, despite the Appellants' withdrawal.

65. Rule 2(a) requires me to act "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". The substantive appeals and applications which remained to be determined were relatively straightforward closure notice applications, Sch 36 Notices and penalties. The complex issues of law had been fully explored in the Second Hearing.

66. In relation to cost, HMRC invested significant time in preparing for this hearing: they had put together most of the Bundles and had attended with three witnesses. Another adjournment would require further expenditure on travel costs and legal fees. HMRC has statutory responsibilities for the efficient management of the tax system and repeated adjournments waste their time and public money.

67. Rule 2(c) requires me to ensure that "so far as practicable…the parties are able to participate fully in the proceedings". In that context I took into account the following:

(1) Mr Budhdeo had said before leaving that he understood the Tribunal would continue with the hearing;

(2) the Appellants did not have good reasons for withdrawing from the hearing. Even if Mr Budhdeo's concerns about giving evidence had any foundation (which I do not accept) he and Mr Koonjah could have participated by making submissions and cross-examining HMRC's witnesses; and

(3) the Appellants had been clearly informed by the directions issued on 20 October 2016 that if the stay was not granted, I would immediately proceed to hear the substantive matters, and that "both parties must come prepared for that possible outcome".

68. Rule 2(e) requires me to avoid delay so far as compatible with proper consideration of the issues. It has taken many months for the parties, their witnesses and their representatives to agree a four day period when they were all available to attend this hearing. If I adjourned the hearing now, it was unlikely to be relisted for at least three more months.

69. More generally, Davis LJ (with whom Sullivan LJ and Laws LJ agreed) said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28] that the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

70. Ms Jones submitted that it was in the interests of justice to continue, but that HMRC would be mindful of the fact that the Appellants were no longer represented and would endeavour to ensure that their case was put to the Tribunal.

71. Taking all the above factors into account, I decided to continue with the hearing despite the Appellants' withdrawal.

PART 3: THE APPEALS AND APPLICATIONS: OVERALL

72. This Part contains the following:

(1) the facts relevant to the appeals and applications generally;

(2) the law on statutory records;

(3) the application of that law so as to identify Items in the Companies' Sch 36 Notices which are statutory records;

(4) the parties' submissions on HMRC's dominant purpose in opening the enquiries and issuing the Sch 36 Notices, followed by my decision on that issue; and

(5) the law on closure notices.

73. The specific appeals and applications are at Part 4, which includes further findings of fact.

The facts

Mr Budhdeo's disclosed income and assets

74. At least until 2014, Mr Budhdeo lived in Pinner with his wife and four children in a house purchased for £375,000 in 2001.

75. His SA return for 2008-09 disclosed a salary of £607,500 plus benefits and/or expenses of a further £8,674, making a total of £616,174. After his personal allowance, the tax on this income was £237,004.

76. His 2009-10 SA return disclosed salary of £7,500, plus benefits/expenses of £9,160, making a total of £16,660. This is 2.7% of the previous year's income. After his personal allowance, the tax was £2,037, less than 1% of that shown as due for the previous year.

77. Mr Budhdeo's 2010-11 SA return disclosed salary of £7,700 and benefits/ expenses of £4,305, making a total of £11,805. After his personal allowance, the tax was £1,066. This was less than 2% of the income, and less than 0.5% of the tax, which had been included in his 2008-09 return.

78. His 2011-12 return disclosed "pay from all employments" of £7,208, which was less than the personal allowance for that year of £7,475. He added a "white space note" to his return stating that he was a director of all the Companies (other than Enviroplex); that he was also the director of ten other companies, being Budhdeo Holdings Limited; Vospro Technologies Ltd ("Vospro"); Chemistree Homecare Ltd ("Chemistree Homecare"); Mobisol Ltd; Symbio Europe Ltd; Silver Nuts Ltd; Symbio Power Ltd; 21st Century Solutions Ltd; Codexe Ltd and the British Independent Pharmacy & Wholesale Association ("BIPWA"). Mr Budhdeo stated that no remuneration had been received from any of these companies, other than (by

implication, because it is not listed as a company from which no remuneration was received), Venture Pharmacies Ltd ("Venture Pharmacies"). I find that the salary disclosed on Mr Budhdeo's SA return was paid by that company.

79. His 2012-13 return showed "pay from all employments" of £7,000 and interest income of £8, so his total disclosed income was below the personal allowance for the year of £8,105. The white space note repeated the list of directorships set out in his 2011-12 return, and added that Mr Budhdeo was now a director of various named companies incorporated in Lithuania, Denmark, Hungary, Latvia, Ireland, Italy and India (two companies), but received no remuneration from any of these companies, other than (again, by implication) Venture Pharmacies.

80. On 25 February 2015, Mr Budhdeo emailed HMRC's debt management department because he said he had difficulty meeting capital gains tax ("CGT") of around £418k. He asked for time to pay the CGT, and informed HMRC that he was expecting to receive £8,000 a month from his director's current account.

81. An attached expenditure statement states that his monthly mortgage costs £800 pcm; fuel and insurance for two cars is £900 pcm; school fees for four children are £960 pcm; payments towards the "subsistence living" of his parents are £1,800 pcm; his own family's food and household costs are £600 pcm; council tax is £300 pcm; pet food and insurance is £150 pcm; "clothes misc and discretionary" are £800pcm and other expenditure is £460 pcm. This totals £6,870pcm.

82. Also attached to the email is an asset and liability statement drawn up by Mr Budhdeo, which states that his net assets are £14,495,000. Of this, his personal private residence in Pinner was included at £530,000, after deducting a mortgage of £420,000; shares and investments were included at £15,000; his 65% investment in Photon Properties Ltd, a property investment company, was included at £9.75m and his investment in Symbio Energy Ltd at £4.2m.

83. This list of assets appears not to include all Mr Budhdeo's shareholdings, some of which are listed in the next part of this decision. Certainly it would be surprising if they were worth only £15,000. The list of assets also did not include his interest in a property in South View Road, Pinner, in relation to which a contract had been entered into on 4 April 2014, at a cost of £2.825k. Mr and Mrs Budhdeo subsequently made two planning applications relating to this property. The first as to alter and extend the property; the second was to demolish and rebuild, so as to increase the floor space by 57%. Both applications were refused and Mr and Mrs Budhdeo's subsequent appeal to the High Court was unsuccessful.

The Companies: ownership and directorships

84. Gold Nuts Ltd ("Gold Nuts") is the holding company for all the Companies other than Noviscom, Dispensary Holdings Limited ("DHL") and Leyton Orient Dispensary Limited ("LODL"). Gold Nuts is owned as to 12.5% by Mr Amajit Singh Hundal, with the balance of 87.5% being owned by Budhdeo Holdings, a Guernsey registered company of which Mr Budhdeo, his brother, Mr Sanjay Budhdeo and his father, Mr Pravin Budhdeo, own equal shares.

85. Mr Budhdeo, Mr Sanjay Budhdeo and Mr Pravin Budhdeo own all the shares in DHL, which is LODL's parent company. The shares in Noviscom are also owned by the same three individuals, together with Mr Joshy Mathew.

86. Mr Budhdeo, Mr Sanjay Budhdeo, Mr Mathew and Mr Hundal were also variously directors of all the Companies other than Enviroplex. The directors of that company were Mr Budhdeo's wife, Mrs Kalpna Ondhia and Mr Sanjay Budhdeo's wife, Mrs Neeta Chockshi. Mrs Budhdeo and Mrs Hundal were also directors of R Square Properties Ltd ("R Square"), together with Mr Budhdeo, Mr Mathew and Mr Hundal.

87. Mrs Teena Coosna was a director of Noviscom (with Mr Budhdeo, Mr Mathew and Mr Hundal). I note that in *Sachin Coosna v HMRC* [2015] UKFTT 234 (TC), where Mr Coosna sought to challenge a Sch 36 Notice and related penalties, he was found to be an employee of Noviscom, and the sole director and shareholder of Qualapharm Ltd ("Qualapharm"). In *Qualapharm v HMRC* [2016] UKFTT 100 (TC), also an appeal against Sch 36 Notices and related penalties, the tribunal relied on Mr Coosna's evidence to find that the Gold Nuts group was Qualapharm's main customer.

88. After the periods with which the appeals and applications are concerned, Mr Budhdeo, Mr Sanjay Budhdeo, Mr Mathew and Mr Hundal were replaced as directors by individuals resident in India, but the share ownership remained the same.

89. I find that all the Companies are linked by virtue of their common shareholdings and that they are all controlled by the same small group of individuals, including in particular Mr Budhdeo, Mr Mathew and Mr Hundal.

The Companies: business, turnover and profits

90. The nature of each company's trade is set out later in this decision, but most of the Companies are involved in pharmaceutical-related business or property investment. Some activities are outsourced by the Companies to Eclipse Infotech Services Pvt ("Eclipse"), a company based in Goa, India. Mr Budhdeo was a director of Eclipse, and he and his father are shareholders. As at the date of the meeting with HMRC on 22 November 2012, Eclipse had 110 staff, including 14 lawyers.

91. It is clear from the consolidated accounts of the Gold Nuts group that the money passing through the Companies is significant:

(1) In the 2010 calendar year, turnover is stated to be £51m and cost of sales £43m, giving a gross profit of £8.2m. Administrative expenses are shown as £7.7m; operating profit (after other income has been included) as £792k and corporation tax as £39k.

(2) In 2011 turnover is stated to be £63m and cost of sales £54m, giving a gross profit of £9m. Administrative expenses are shown as £8.8m; operating profit (after other income has been included) as £600k and corporation tax as £184k.

(3) In 2012 turnover is stated to be £67m and cost of sales £63m, giving a gross profit of £4m. Administrative expenses are shown as £6.5m; operating profit (after other income has been included) as £600k and corporation tax as £257k.

Enquiries opened in 2012

92. On 10 February 2012, Mrs Oldfield, an HM Inspector of Taxes, opened enquiries under FA 1998, Sch 19, para 24 into the CT returns of three companies in the Gold Nuts group, Blackbay, Chemistree Ltd ("Chemistree") and Zanrex Ltd ("Zanrex"), for the year ended 31 December 2010. Mrs Oldfield subsequently corresponded with Dewanis, a firm of chartered accountants who acted as agent for those companies at that time.

93. At some point HMRC issued a COP9 letter to Mr Sanjay Budhdeo. No further information was provided to the Tribunal by either HMRC or the Appellants about this COP9.

94. On 9 May 2012, a Mr Robert Burton from HMRC's Specialist Investigations Department wrote to Mr Sanjay Budhdeo in his capacity as a former director of Blackbay, Chemistree, Gold Nuts and Zanrex, stating that those companies were to be included within the COP9 enquiry.

95. On 24 May 2012, Mr Budhdeo, Company Secretary of those four companies, wrote to Mr Burton expressing his "disappointment and dismay" that HMRC were seeking to extend to the companies the accusations of "fraud and malfeasance" which had been made against Mr Sanjay Budhdeo, and pointing out that the companies had other directors.

96. On 25 May 2012, Mr Burton wrote again, stating that his letter of 9 May 2012 included a "drafting error", and that the COP9 enquiry into Mr Sanjay Budhdeo did not encompass the four companies.

97. On 28 May 2012, Mr Burton opened an enquiry into the 2010 CT return filed by Gold Nuts, and stated that "this will be an enquiry into the whole of the group and its operations, and will cover a review of the group's records and record-keeping systems". He asked for a meeting with the directors and with Dewanis, at which those issues could be discussed and the link papers "showing how the accounts have been prepared" could be collected. He attached a list of prime records and link papers.

98. On the same day, Mr Burton also wrote to Blackbay, Chemistree and Zanrex saying:

> "in the light of concerns HMRC has regarding some of the transactions undertaken by the Group and the principals behind the Group we are converting the existing Corporation Tax compliance review into a formal review covering all heads of tax."

99. He went on to say that the enquiries would cover "a review of the company's records and record keeping systems" and would also include a review of employer records and VAT records. He repeated his suggestion that it would be helpful to meet the directors and Dewanis, and attached to each letter a list of link papers and prime records, as appropriate for each company.

100. Mr Douglass subsequently took over responsibility for these enquiries, and on 11 June 2012 reissued the letters sent by Mr Burton under his own signature; the letters were otherwise unchanged.

101. On 23 August 2012 Mr Douglass issued Sch 36 Notices to the four companies under enquiry. On the same day, he opened CT enquiries into Venture Pharmacies Ltd, Enviroplex and Chemistree Homecare. That company was previously one of the Appellants but went into administration on 12 March 2015; its appeals and applications were subsequently withdrawn. I have made no findings of fact about that company, except incidentally in the context of matters relevant to the appeals and applications.

102. On 12 October 2012, having not had a reply to his questions, Mr Douglass issued Sch 36 Notices to the four companies.

103. On 22 November 2012, a meeting was held at the offices of the Gold Nuts group, located at Curo Park, St Albans. Mr Douglass, Mr Moss and two other HMRC Officers met Mr Budhdeo, Mr Mathew, a representative of Dewanis and Mr Gupta, from ARN Gupta & Co, another accounting firm. HMRC was provided with some background information about the companies under enquiry. Mr Douglass subsequently sent the attendees "the Meeting Minutes" to which I have already referred at §12.

104. On 20 December 2012, Mr Budhdeo wrote to Mr Douglass asking that the Meeting Minutes be amended to state that the companies under enquiry have never refused to co-operate. No other details of the Meeting Minutes were challenged, but Mr Budhdeo also advised Mr Douglass that he had an Iphone recording of the meeting. On 2 January 2013, Mr Douglass asked for a copy of that recording, and said that HMRC had not been informed that the meeting was to be recorded, or given the opportunity to decline to participate on that basis. No copy of the Iphone recording was provided to HMRC.

105. Over the next nine months, Mr Douglass liaised with Mr Mathew in relation to the supply of prime records and link papers for the companies now under enquiry. A total of 18 discs containing data was supplied to HMRC. At the hearing, Mr Douglass confirmed that HMRC accepted that the information and documents required by the Sch 36 Notices issued on 23 August 2012 and 12 October 2012 had been supplied.

106. On 26 November 2013, Mr Douglass informed Dewanis that he was consulting with "another directorate within HMRC". It subsequently emerged that this was "Specialist Investigations".

The COP9 letter

107. As already set out earlier in this decision, on 6 December 2013 Mrs Murphy informed Mr Budhdeo that he was the subject of COP9 investigation, which would cover all entities including companies over which he was able to exercise control. She continued:

> "I will be working jointly with the caseworkers involved with the compliance checks in the companies which you have controlled or where you are, or have been, an officer. To protect HMRC's position, those companies will receive notifications that compliance checks are open; at this time no further information or documentation will be requested."

108. Mr Budhdeo's letter refusing to sign the CDF is dated 10 December 2013.

Further enquiries opened

109. On 12 December 2013, before Mr Douglass was aware of Mr Budhdeo's refusal to sign the CDF, he opened CT enquiries into the 2011 returns of all the Companies other than Enviroplex (which stopped trading at the end of 2010) and Noviscom (which began trading in 2012). His opening letters all used the following words:

> **"Link with current checks**
>
> As you know, HMRC are already checking returns for the period ended 31 December 2010 for various connected/associated parties.
>
> The time limit for us to be able to start a check of this later return is approaching, so I need to start my check now.
>
> **What I will be checking**
>
> At the moment, I do not need any information from you about this particular return. I am protecting HMRC's position to make enquiries should the need arise and depending on other enquiries HMRC has into various connected/associated parties."

110. On 22 January 2014, having received Mr Budhdeo's refusal to sign the CDF, Mrs Murphy opened an enquiry into his 2011-12 SA tax return under TMA s 9A. The statutory time limit for opening that enquiry would have expired on 31 January 2014.

111. On 7 February 2014 Mrs Murphy told Mr Budhdeo that she had opened this enquiry in case a civil investigation was required. As already noted, on 4 March 2014 Mrs Murphy wrote again to say she had received authority to progress his case as a civil investigation. She also suggested that it would be helpful for her and Mr Douglass to meet with Mr Budhdeo "in the next few weeks" and provided possible dates.

112. On 2 April 2014, Mrs Murphy issued Mr Budhdeo with a Sch 36 Notice. On 8 April 2014 she opened an enquiry into his 2012-13 SA return, and on 7 May 2014, issued a £300 penalty for failing to comply with the Sch 36 Notice.

Further communications in relation to the Companies and Symbio

113. Meanwhile, on 8 January 2014, Mr Budhdeo had complained that Mr Douglass had obviously passed information to Mrs Murphy, and that this disclosure was illegal

because the companies in question had not given their prior approval. In consequence he had instructed Dewanis to "withdraw all support for the compliance investigation, the basis of which has been subverted".

114. On 3 February 2014 Mr Budhdeo asked for "the immediate return of all our documents and computer data" and stated that copies could not be retained by HMRC without the companies' express permission. On 24 February 2014 Mr Douglass offered to return the computer discs but said HMRC were entitled to retain copies.

115. On 26 March 2014 Mr Budhdeo sent a letter to Mr Douglass headed "Notice of Legal Action". It alleged that Mr Douglass had breached the Data Protection Act 1998 ("DPA") by passing information about the Gold Nuts group to Mrs Murphy; he reiterated the demand that all the information supplied to HMRC be returned, and said that passing copies of that information to other parts of HMRC was a breach of copyright law. He also stated that Gold Nuts would be seeking to challenge Mr Douglass's actions by way of judicial review; that the Appellants would be applying for closure notices in relation to the open enquiries, and that "any further meetings are declined and all matters will be dealt with via the courts".

116. On 2 April 2014, Mr Douglass issued Sch 36 Notices to many of the Companies. On 22 April 2014, Mr Moss took over responsibility for the enquiries into the Companies, although for a short period Mr Douglass continued to deal with some correspondence. In particular, on 29 April 2014 he opened an enquiry into Symbio's 2012-13 partnership return.

117. On 8 May 2014, Dewanis informed HMRC that Mr Budhdeo and the Companies would be handling the enquiries directly and that the firm was no longer acting.

118. The Appellants appealed the Sch 36 Notices set out at Part 4 to HMRC and notified those appeals to the Tribunal. Applications for closure notices were also made, again as set out at Part 4.

119. On 17 July 2014, Mr Douglass issued a Sch 36 Notice to Mr Mathew, the nominated partner for Symbio. On 29 August 2014, Mr Moss issued a £300 penalty for failure to comply with that Notice.

The Appellants' skeleton arguments

120. As already stated earlier in this decision, the Second Decision was followed by the February Directions. These required the Appellants to file and serve their skeleton argument(s) no later than 21 days before the hearing and required HMRC to file and serve its skeleton argument no later than 14 days before the hearing.

121. The hearing was listed to begin on 31 October 2016. On 17 October 2016, HMRC advised the Tribunal that it had not received the Appellants' skeleton argument(s). On 18 October 2016 I directed that if the Appellants had not filed and served their skeleton argument(s) by 20 October 2016, the appeals and applications may be struck out under Rule 8(3)(a) of the Tribunal Rules. If the Appellants

complied with that new time limit, HMRC was to file and serve its skeleton argument on or before 25 October 2016.

122. On 20 October 2016 at 15.39, the Appellants emailed the Tribunal and copied Ms Jones. The email is headed "Re: Tribunal's direction dated 18 October 2016". Attached to the email was a document headed "skeleton argument further to the substantive hearing". Paragraph 2 of that document said:

> "These submission are made in addition to the previously made arguments and statements. The Appellants would wish to confirm that they intend to rely on the previously filed Skeleton Arguments."

123. The remainder of the document set out further submissions as to the reasons why the appeals and applications should be stayed pending the oral hearing of Mr Budhdeo's JR permission application. In other words, they contained little of relevance to the appeals and applications.

124. Having received that skeleton argument, and on the same day, I directed that

> "By 12 noon on 21 October 2016 the Appellants are to provide the Tribunal with electronic copies of the 'previously filed skeleton arguments' and (if different) the 'previously made arguments and statements' referred to at paragraph 2 of the Appellants' Skeleton."

125. On 21 October 2016 at 11.56 am the Appellants emailed the Tribunal saying, in relation to "the clarification requested regarding the previous statements", that they include:

> "1. Statements made further to Requests for Adjournment of the substantive hearing by Mr. Budhdeo as well the Appellants letter dated 07th August 2016, 28th September 2016 in support of the same.
>
> 2. Skeleton Argument on behalf of Mr. Budhdeo + Gold Nuts Group + Other Appellants that was previously filed (A copy has been attached)."

126. Attached to the email was a document which combined the skeleton arguments filed and served for the Second Hearing by Mr Budhdeo, by the Gold Nuts group, and by LODL, Noviscom and DHL. As these three skeleton arguments have now been filed and served as a single document on behalf of all the Appellants, I have taken it that they have jointly adopted the submissions made in those skeletons, so far as they are relevant to the substantive appeals and applications. Any references in the rest of this decision to "the Appellants' skeleton argument" or "the Appellants' submissions" without more, is to be read as a reference to these three skeleton arguments, together with the document headed "skeleton argument further to the substantive hearing".

127. Because these arguments were prepared for the Second Hearing, they contain much which is not relevant to the appeals and applications. The submissions which are relevant are set out below and in Part 4.

Statutory records

128. Sch 36, para 29 provides that a person has the right of appeal against a Sch 36 Notice, or any requirement in the Notice, but that there is no right of appeal against "a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records". It is therefore important to establish which Items in the Sch 36 Notices form part of the Appellants' statutory records, as those Items cannot be considered by the Tribunal.

129. Sch 36, para 62 is headed "statutory records" and begins:

> "For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—
>
> (a) the Taxes Acts, or
>
> (b) any other enactment relating to a tax…"

130. It follows from that definition that if a person is required by any statutory provision relating to a tax to keep and preserve information or a document, it is a "statutory record". In other words, there is no link between the tax which is under enquiry, and the source of the obligation to keep records. If, for example, a taxpayer is VAT registered, and a document is required to be kept for VAT purposes, then it is a "statutory record", even if the Sch 36 Notice has been issued in the context of an enquiry into his SA return.

131. The statutory records requirements which apply to companies are discussed at §139ff. Mr Budhdeo is required to keep the records prescribed at TMA s 12B, and the same legislation applies to Symbio. However, because the partnership is VAT registered, it is also required to keep the records set out at VATA Sch 11 para 6 and Reg 31 of the VAT Regulations 1995 ("VATR").

Statutory records - information

132. It is clear from Sch 36, para 62, set out above that both "information" and "documents" are capable of being statutory records. In *Couldwell Concrete Flooring v HMRC* [2015] UKFTT 136 ("*Couldwell*") at [19] the Tribunal (Judge Cannan and Mr Robertson) said:

> "In Schedule 36 it is both documents and information which can be statutory records. It seems to us that a requirement to keep records in FA 1998 includes a requirement to keep both documents and information."

133. In *Joshy Mathew v HMRC* [2015] UKFTT 139(TC) ("*Mathew*"), where I was the presiding judge, Mr Mathew had appealed against two Sch 36 Notices issued in the context of his SA returns. The Tribunal said:

> "*Can 'information' be a statutory record?*
>
> 53. The first question is whether TMA s 12B extends to 'information' which has not been written down, as well as to 'documents.' The

> purpose of the section is to require taxpayers to retain the material they need to file their SA returns. It uses the word 'records' rather than 'documents.'
>
> 54. The Oxford English Dictionary's first two meanings of 'record' refer to phrases, such as 'on record' and 'to take record of.' The third meaning is 'the fact or condition of being preserved as knowledge or information, esp. by being set down in writing.'
>
> 55. We therefore find that information does not necessarily have to be set down in writing before it can be a 'record' and that therefore 'information' as well as 'documents' comes within TMA s 12B."

134. I remain of the same view, both because Sch 36 para 62 specifically provides that information can form part of a person's statutory records, and also because the Oxford English Dictionary ("OED") does not limit the meaning of "record" to things "set down in writing" but recognises that it is possible to preserve information by simply remembering it. For example, a self-employed person may know that he travels 100 miles to a particular client every month for business purposes, but does not write this down. It is a statutory record because he needs this information to calculate his allowable mileage expenses. Other examples of information include a person's intention to trade (or otherwise); the share of a jointly-owned asset; the date on which two people cease to live together as a married couple and the date on which a change of "intended use" occurs for VAT. There are many others.

135. However, in *Spring Capital Ltd v HMRC* [2016] UKFTT 362 at [69]-[78] Judge Mosedale disagreed with the analysis in *Mathew*, saying at [75] that TMA s 12B only applies to information preserved "in a medium that is reasonably permanent and accessible, and not merely in someone's head". Nevertheless, she also said at [76]:

> "When s 62 Sch 36 is read with s 12 B TMA/para 21 Sch 18, it is plain that information which the taxpayer is required to keep and preserve, whether or not he has done so, is information which amounts to statutory records, and therefore information he can be required to deliver up to HMRC."

136. I did not find this part of her judgment easy to follow. She seems to be saying that information "held in a person's head" is not a statutory record for the purposes of the relevant Act, but that it nevertheless "amounts to" statutory record under Sch 36 because it is "information which the taxpayer *is required to keep and preserve*" (my emphasis). If information is not a statutory record, as she suggests is the position, it is difficult to understand the basis on which he is "required to keep and preserve" that information. However, as Judge Mosedale appears to accept that a person can be required both to preserve information, and to provide that information to HMRC if issued with a Sch 36 Notice, our disagreement may be academic.

Submissions on statutory records.

137. The Appellants have accepted throughout that they have no right of appeal against Items which constitute statutory records. However, their skeleton argument contains no submissions as to which of the Items required by the Sch 36 Notices cannot be appealed because they constitute "statutory records", and which are

appealable. As long ago as 2 June 2014, Mr Douglass asked the Companies to clarify their position in relation to statutory records, but received no response.

138. HMRC's skeleton argument sets out the parts of each Notice which it considers to be statutory records. When giving oral evidence in relation to the Companies and Symbio, Mr Moss used the same analysis as was set out in the skeleton argument. In relation to Mr Budhdeo, HMRC made no submissions as to which Items constituted statutory records; Mrs Murphy's witness statement said that HMRC were leaving this in the hands of the Tribunal.

Statutory records: legislation relevant to the Companies

139. FA 1998, Sch 18, para 21(1)(a) requires that a company keep "such records as may be needed to enable it to deliver a correct and complete return for the period". I agree with the comments made in *Couldwell* on the scope of that subparagraph:

> "[23] in our view paragraph 21(1)(a) requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete implies a requirement that the documents and information to be kept must evidence that the return is correct and complete…
>
> [25] In our view it is plainly necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors If a business operates a bank account it will need to keep a record of transactions on the account and of the balance on the account at any particular time to ensure that receipts and expenditure have been properly recorded. Not just in the company's accounting records but also that the transactions and balance on the account have been properly recorded by the bank."

140. FA 1998, Sch 18, para 21(5) specifies that a company's statutory records include:

> "(a) all receipts and expenses in the course of the company's activities, and the matters in respect of which the receipts and expenses arise, and
>
> (b) in the case of a trade involving dealing in goods, all sales and purchases made in the course of the trade."

141. All the Companies are VAT registered, and therefore required to comply with extensive statutory record-keeping requirements at VATA Sch 11 para 6 and Reg 31 VATR. The latter states that the records which must be retained include the "business and accounting records"; copies of all VAT invoices; documentation issued or received by the company relating to "the transfer, dispatch or transportation of goods" and to "importations and exportations", as well as "all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration".

142. Reg 97 of the Income Tax (Pay As You Earn) Regs 2003 ("the PAYE Regs") requires employers to retain all documentation relevant to the calculation of employees' PAYE income or the deduction of tax from those payments, and "all documents relating to any information which an employer is required to provide to HMRC" in relation to the completion of forms P11D and P9D. For the purposes of those Regulations, the term "employee" encompasses directors, see Reg 2(1) and the Income Tax (Earnings and Pensions) Act 2003, ss 4 and 5. Reg 97(1) provides that "An employer must keep and preserve for not less than three years after the end of the tax year to which they relate all PAYE records which are not required to be sent to HMRC…"

Whether contracts are statutory records

143. In relation to the contracts a company makes with its customers and suppliers, or with its workforce, I understand HMRC's positon to be that these are statutory records, but that it is in any event reasonable to require copies of these contracts in order to understand the taxpayer's tax position.

144. As already set out at §133, the relevant OED definition of a "record" is "the fact or condition of being preserved as knowledge or information, esp. by being set down in writing". A contract preserves what has been agreed between the parties and is a "record" of that agreement. Contracts are therefore "business records" within the meaning of Reg 31(1)(a) of VATR; they are also "such records as may be needed to enable [the company] to deliver a correct and complete return for the period" under FA 1998, Sch 18, para 21(1)(a). That conclusion is consistent with the purpose of both sets of provisions, namely to ensure a business retains the key documents which underpin its transactions.

Whether explanations of accounting entries/transactions are statutory records

145. HMRC's position was that, while accounting entries and invoices are statutory records, an explanation of those entries or invoices was not, although such an explanation was invariably "reasonably required…for the purpose of checking the taxpayer's tax position".

146. However, in the absence of such information, entries in the accounts are simply a list of numbers. It is not possible for a person to "deliver a correct and complete return" unless he knows to what the entries relate. For example, a list of payments to a director is a statutory record, but so too is information as to the purpose and nature of the payments. It is that information which allows the person to know whether the sum is a dividend, a loan, salary, the reimbursement of an expense, or something else. Similarly, a list of debts written off is a statutory record, but so is the information which explains why a decision has been made that these debts are not collectible; it is that information which allows the person to know whether he can deduct them from his profits. Explanations of accounting entries and of invoices therefore constitute information forming part of a company's statutory records.

147. It is of course true that such information would also be reasonably required for the purposes of a company's tax position, because it provides the explanation for entries in the prime records.

Statutory records in the Sch 36 Notices issued to the Companies

148. Statutory records specific to a single company are identified in Part 4. However, many of the Sch 36 Notices issued to the Companies contain the same or substantially similar Items. Because of this frequent repetition, it is more efficient to deal with them together.

149. On the basis of the analysis and discussion set out in the immediately preceding paragraphs of this decision, I find that the following Items in the Sch 36 Notices issued to the Companies are statutory records within the meaning of FA 1998, Sch 18, para 21(1)(a) and Reg 31 of VATR:

(1) the trial balance and extended trial balance;

(2) linking papers showing how the figures in the trial balance are reflected in the final statutory accounts, to include:

(a) all post-trial balance journal adjustments and information as to the reasons for these;

(b) the final nominal ledgers produced by the accounting software used in the preparation of the final statutory accounts;

(3) all electronic accounting records, including any spreadsheets or other schedules maintained for accounting purposes;

(4) explanations of entries in the accounting records;

(5) invoices issued or received;

(6) contracts or other agreements relating to goods or services provided or received;

(7) analysis of all (or any specified) debtor(s) as at the balance sheet date(s) setting out the full name and address of the debtor(s) and the amount owed to the company;

(8) details of the amounts owed to any creditor identified on the balance sheet or in the notes to the accounts, showing how the amount has been made up;

(9) reconciliation of management fees receivable by or payable to the company setting out the parties involved and any payments or receipts made or accrued;

(10) analysis of any loan and/or current accounts between any of the directors and the company;

(11) the opening balance of the loan account of any director;

(12) details of any credits to the loan accounts of any director, supported by documentary evidence;

(13) analysis of all or any specified expenses, including invoices, contracts/agreements describing the services or goods supplied and details of payments made and dates credited to the bank account;

(14) contracts with locums and/or subcontractors;

(15) dates, amounts and names and addresses of locums and subcontractors to whom payments have been made or accrued.

150. Several of the Sch 36 Notices ask for:

> "The names of all directors and employees (including members of their family or household) provided with a vehicle and the basis on which the company has decided that no fuel benefit arises to that or those individuals."

151. That is P11D information and so constitutes statutory records by virtue of Reg 97 of the PAYE Regs.

The parties' submissions on dominant purpose

152. This part of the decision sets out the parties' submissions on whether the enquiries should be closed because HMRC's dominant purpose in opening the enquiries and issuing the Sch 36 Notices was to obtain evidence for the possible criminal prosecution of Mr Budhdeo.

The Appellants' submissions on dominant purpose

153. In their skeleton argument the Appellants submitted that the statutory powers under which HMRC had opened and was conducting its enquiries into the Appellants' tax returns required HMRC to act "in a certain way and for a certain purpose". Specifically:

(1) an enquiry into a self-assessment return only extends to "anything contained in the return, or required to be contained in the return, including any claim or election included in the return", subject to two specific exceptions which are not relevant on the facts of this case, see TMA s 9A(4);

(2) an enquiry into a corporation tax return only extends to "anything contained in the return, or required to be contained in the return" subject to four specific exceptions, none of which are relevant on the facts of this case, see FA 1998, Sch 18, para 25; and

(3) Sch 36 Notices are to be given in relation to documents or information "reasonably required…for the purpose of checking the taxpayer's tax position", see Sch 36, para 1.

154. In the Appellants' submission it followed that "HMRC's civil enquiry powers are to be used by HMRC to facilitate the collection and management of taxes. They are not intended for the purpose of securing evidence from taxpayers to be used in criminal prosecutions of the said taxpayers". Reliance was placed on *R v Crown Court at Southwark, ex p Bowles* [1998] AC 641 at p.651, where Lord Hutton, with whom the other Law Lords agreed, approved the formulation of the test set out in *Wade & Forsyth on Administrative Law*, 7th ed (1994) at p.436:

> "Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and

> dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is *ultra vires*."

155. The Appellants submitted that the statutory enquiries were being used by HMRC to obtain evidence for the possible criminal prosecution of Mr Budhdeo, describing them as "a mere pretext" for that dominant purpose. In the alternative, obtaining that evidence was an "equal dual purpose" alongside the exercise of HMRC's statutory powers; this too was an abuse of the provisions. It followed from this improper purpose that:

(1) HMRC had no reasonable grounds for keeping the enquiries open. The Tribunal should therefore direct their closure under TMA s 28A(6) in relation to the enquiries into Mr Budhdeo and Symbio, and under FA 1998, Sch 18, para 33(3) in relation to the Companies;

(2) the information and documents set out in the Sch 36 Notices were not reasonably required by the officer for the purpose of checking the taxpayer's tax position. They should therefore be set aside by the Tribunal under Sch 36, para 32(3)(c), in so far as they did not relate to the provision of statutory records; and

(3) the Appellants had a reasonable excuse for not complying with the Sch 36 Notices. Any penalties should therefore be cancelled by the Tribunal under Sch 36, para 48(3).

156. By way of evidence for the existence of this improper purpose, the Appellants relied on:

(1) Mr Douglass' witness statement, where he stated that one of his reasons for not closing the enquiries was because they were "integral to the COP9 enquiry on Mr Shamir Budhdeo";

(2) the extracts from Mr Ratcliff's letter to the Tribunal dated 14 June 2014, already set out at §34, that "the COP9 enquiry into Mr Budhdeo is fundamentally linked to the enquiries into the companies" and the CT enquiries into the 2011 years were opened "as a direct result of the COP9 enquiry"; and

(3) Mrs Murphy's letter to Mr Budhdeo dated 6 December 2013, referred to at §107, which said she would be "working jointly with the caseworkers involved with the compliance checks in the companies which you have controlled or where you are, or have been, an officer".

157. The Appellants submitted that the above evidence made it clear that "HMRC has shared information gained in the Group investigation to pursue [Mr Budhdeo] personally" and was therefore "abusing the procedure".

HMRC's submissions on dominant purpose

158. HMRC accepted at the Second Hearing that if its dominant purpose in conducting the statutory enquiries and issuing the Sch 36 Notices was to obtain

information to decide whether to prosecute Mr Budhdeo, it would be acting *ultra vires* and so illegally, see [14(2)] and [85] of the Second Decision.

159. Ms Jones said that this has never been HMRC's dominant purpose, which was instead to seek assurances that the Appellants have declared the right tax at the right time and to make adjustments and assessments if needed. She relied on the following facts:

(1) the enquiries into the 2010 returns of Gold Nuts, Blackbay, Zanrex, Chemistree, Chemistree Homecare, Venture Pharmacies and Enviroplex were opened before Mr Douglass contacted Special Investigations, and so before the COP9 letter was issued to Mr Budhdeo;

(2) the information provided to HMRC in relation to those companies gave rise to further questions about the Companies and Mr Budhdeo;

(3) Mrs Murphy informed Mr Budhdeo on 4 March 2014 that she had "received authority to progress this case as a civil investigation" and that remained the positon;

(4) COP9 is a civil, and not a criminal procedure;

(5) no criminal charge under UK law has ever been made against Mr Budhdeo; and

(6) although a criminal prosecution is still possible, that is always the position, because any of HMRC's investigations could uncover something which would make it appropriate to prosecute. Mr Budhdeo could not be granted immunity from that risk, outside the framework of the CDF (which he had rejected).

160. Ms Jones also relied on the following evidence given by HMRC's witnesses:

(1) Mrs Murphy told the Tribunal that the purpose of her civil investigation was to "make sure Mr Budhdeo's tax return was complete and correct". She said that, on the basis of HMRC's current state of knowledge, there was a significant disparity between the taxable income disclosed on his SA tax returns and his means, as shown by the facts already set out in this decision.

(2) Mr Douglass's evidence was that he had opened the enquiries and issued the Sch 36 Notices to check the companies "had paid the right tax at the right time"; Mr Moss said his purpose in working the cases was "to check that the corporation tax returns are complete and correct".

(3) All three witnesses clearly stated that they were not authorised to carry out criminal investigations and had never been involved in a criminal prosecution process. Were they to identify material indicative of fraud, they would complete an HMRC "evasion referral form", which would then go through the relevant internal processes. None of Mrs Murphy, Mr Douglass or Mr Moss had the power to decide whether or not to prosecute.

Discussion of dominant purpose

161. HMRC has both civil and criminal investigatory powers. As the Appellants say, HMRC's civil investigatory powers include TMA s 9A, FA 1998, Sch 18, para 25 and FA 2008, Sch 36.

162. HMRC's criminal investigatory powers include those given by PACE s 114 and the related statutory instruments (SI 2007/3175, now replaced by SI 2015/1783), which link with the statutory provisions relating to the delivery of documents under TMA s 20BA and the production of documents under TMA Sch 1AA and the production of "any recorded information" including documents under VATA Sch 11 para 11. These powers have as their dominant purpose the provision of information for a criminal investigation.

163. At the Second Hearing, HMRC's Counsel accepted that HMRC could not use its civil powers for "the dominant purpose of furthering a criminal investigation", see [87] of the Second Decision. Ms Jones did not seek to resile from that position at this hearing. As both parties were in agreement on this point, I have accepted that it is correct.

164. The parties also agreed that whether HMRC has used its civil powers – opening statutory enquiries and issuing Sch 36 Notices – for the dominant purpose of gathering evidence to prosecute Mr Budhdeo is a question of fact for the Tribunal.

165. I begin by finding as a fact that the dominant purpose of the original 2010 enquiries into Gold Nuts, Blackbay, Zanrex, Chemistree, Chemistree Homecare, Venture Pharmacies and Enviroplex was not the gathering of evidence for a possible criminal prosecution of Mr Budhdeo. Those enquiries were opened before Mr Douglass had made any contact with Special Investigations.

166. The main area of dispute concerned the issuance of the COP9 letter and its aftermath. From the COP9 Booklet provided to Mr Budhdeo, together with the witness evidence, I find as a fact that after a person refuses the CDF, HMRC have the following options:

(1) to prosecute, in which case the COP9 enquiry would be passed to different Officers, authorised to carry out criminal work;

(2) to close the COP9 enquiry; or

(3) to continue the COP9 enquiry as a civil investigation.

167. It is clear from the contemporaneous documentary evidence in Mrs Murphy's letter of 4 March 2014 that she had "received authority to progress this case as a civil investigation", meaning that the third of these options had been selected, and I find this to be a fact.

168. Paragraph 7.5 of the COP9 Booklet explains what happens if that option is selected. It is headed "Protective sanctions we may take" and reads:

> "Where you reject the CDF and we carry out a civil investigation, we can use various sanctions and powers to obtain information from you.

> These are backed by financial penalties, up to an unlimited tax-related penalty. We may also approach third parties for information, either informally or using statutory powers.
>
> We may also escalate your case to a criminal investigation.
>
> If we discover irregularities we will take formal action, including the issue of assessments and we will pursue early collection of any unpaid tax plus interest. If you do not co-operate fully you will also have lost your opportunity to gain the maximum reduction of any penalty that might be due. Therefore, any penalty would be significantly higher.
>
> If you try to avoid paying your liabilities or if you attempt to dissipate your assets we will consider using insolvency action to make sure that we are able to collect the money that we believe you owe.
>
> These actions could include:
>
> - personal bankruptcy
> - compulsory liquidation
> - appointment of interim receivers or provisional liquidators
> - getting civil freezing orders over your bank accounts
> - getting legal caution over your property…
>
> If you have brought about a loss of tax through deliberate conduct for a tax period beginning after 31 March 2010, then we may be able to publish your details. However, you may be able to earn exemption from publication by fully co-operating with our investigation."

169. I accept that paragraph as an accurate description of the approaches HMRC may take when carrying out a civil investigation of a person who refused the CDF.

170. Although the paragraph states that HMRC's Specialist Investigations department can "escalate the case to a criminal investigation" following a person's refusal of the CDF, the key word is "escalate". In other words, the HMRC Officer can transfer the case to a different department which has the power to prosecute. Where, as happened in Mr Budhdeo's case, the Officer is instead given authority to continue the case as a civil investigation, the other actions listed in paragraph 7.5 are in point. None involves prosecution. Instead, the focus is on recovery of money owed, financial penalties and publication of the person's name under the "managing deliberate defaulters" provisions. All these actions are in the civil sphere. That is because COP9 is a civil, not a criminal Code of Practice.

171. It is against those background facts that the work of Mr Douglass, Mr Moss and Mrs Murphy must be understood. The Appellants seek to rely on Mr Douglass's evidence that the CT enquiries were "integral to the COP9 enquiry on Mr Shamir Budhdeo" and on Mr Ratcliff's statements that "the COP9 enquiry into Mr Budhdeo is fundamentally linked to the enquiries into the companies" and the 2011 enquiries were opened "as a direct result of the COP9 enquiry". Paragraph 7.5 of the COP9 Booklet states that a civil investigation into a person who refuses the CDF may involve issuing Sch 36 Notices to third parties. Here, Notices have been issued under

Sch 36 para 1. That course of action is also entirely consistent with an investigation which is progressing in the civil, rather the criminal, sphere.

172. Furthermore, both Mr Douglass and Mr Moss gave credible evidence that their dominant purpose in opening the statutory enquiries and in issuing the Sch 36 Notices was to establish whether Appellants' returns were complete and correct. It was not to prosecute Mr Budhdeo. I accept that evidence, which is substantiated by the following.

(1) The Items sought under the Sch 36 Notices are almost exclusively focused on the Company's tax position and that of Symbio. For example, the Sch 36 Notices issued to Blackbay require 49 Items spread over three years; only four Items ask for information/documents about directors' loan accounts. While these interlink with Mr Budhdeo's tax position, they are also highly relevant to that of the Companies: a loan to a director triggers a further corporation tax charge under Corporation Tax Act 2010 ("CTA 2010") s 455 unless it is repaid within nine months of the year end. Blackbay is also required to provide general information about company car benefits. That may or may not affect Mr Budhdeo, but is clearly relevant to its P11D obligations. Most Sch 36 Notices contain no Items referring to Mr Budhdeo – for example, Chemistree is required to provide 14 Items and Enviroplex 9 Items, and none of these mention Mr Budhdeo.

(2) As Ms Jones says, criminal investigatory powers can only be exercised by specially authorised officers, and neither Mr Douglass nor Mr Moss has that authorisation.

(3) There is nothing in HMRC's correspondence with the Appellants, or in the Meeting Notes, which supports the submission that Mr Douglass or Mr Moss's dominant purpose is to prosecute Mr Budhdeo.

173. As for Mrs Murphy, she originally worked with Mr Douglass and his team and is now liaising with Mr Moss and his team. Like Mr Douglass and Mr Moss, she too is not authorised to carry out criminal enquiries and cannot decide whether to initiate a criminal prosecution. Although she has access to information provided as the result of the statutory enquiries and Sch 36 Notices, that is exactly what one would reasonably and properly expect in the case of a civil enquiry conducted under COP9. Mrs Murphy gave clear and credible evidence that her dominant purpose was to run the COP9 civil investigation, it was not to gather evidence so as to prosecute Mr Budhdeo. That evidence is consistent with her letter of 4 March 2014 stating she had "received authority to progress this case as a civil investigation". Taking all relevant evidence into account, I find as a fact that Mrs Murphy's dominant purpose was exactly as she has stated it to be.

174. As a result, I find that the dominant purpose of the appeals and applications is not to gather information so as to prosecute Mr Budhdeo.

175. That conclusion does not mean HMRC is unable to use material gathered from the enquiries and Sch 36 Notices as evidence, were Mr Budhdeo to be charged with a

criminal offence, but rather that any such use would be a secondary and incidental consequence.

176. In the Second Decision I considered whether HMRC's use of material derived from the enquiries and Sch 36 Notices as evidence in a criminal trial would breach Mr Budhdeo's rights under Article 6 of the Convention. I repeat my conclusion here for ease of reference:

> "[204] I have found that Mr Budhdeo does not have an Article 6 right to refuse to respond to a Sch 36 Notice, but that if HMRC seek to rely on that material in a criminal trial, the judge must consider PACE s 78 in the light of the guidance given in *Beghal*. That conclusion is in accordance with the "need for a fair balance between the general interest of the community and the personal rights of the individual" as required by *Brown v Stott*. It pays proper regard to the right of the state, in the interests of the community, to require citizens to provide information about his income. But it allows evidence gathered unfairly to be excluded from a subsequent criminal trial."

The law on closure notices

177. It was common ground that HMRC has the burden of showing that there are "reasonable grounds" for not issuing a closure notice (TMA s 28A(6); TMA s 28B(7) and FA 1998, Sch 18, para 33(3)).

178. Mr Douglass opened the enquiries into most of the Companies' returns for the 2011 calendar year to "protect HMRC's position to make enquiries should the need arise". However no special legislation applies to such "protective enquiries": HMRC must still show that there are reasonable grounds for each enquiry remaining open.

179. The next following paragraphs summarise some of the many authorities on closure notices. In Part 4 of this decision I consider those authorities in the context of the applications to close the Appellants' enquiries.

180. In *HMRC v Vodafone 2* [2006] STC 483 at [44] Park J said that the statutory provisions on closure notices are "constructed so as to produce a reasonable balance" between HMRC's enquiry and investigation powers on the one hand, and protection for those who wish to question whether the use of those enquiry powers continues to be justified**.**

181. In *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 29 ("*Eclipse*") Special Commissioner Sadler said at [19] that HMRC is not required to have "pursued to the end every line of enquiry or investigation" before a closure notice can be issued, and in *Bloomfield v HMRC* [2013] UKFTT 593 (TC) Judge Blewitt took into account, when deciding whether to direct closure, "the fact that this enquiry has been ongoing for a significant period of time, the co-operation of the Appellant and the queries which remain outstanding".

182. In *Stephen Price v HMRC* [2011] UKFTT 624 (TC) (Judge Mosedale and Mr Hughes) the appellant submitted that the enquiry could be closed and an estimated assessment made. The tribunal said:

> "HMRC is 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. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)."

183. In *Estate 4 Ltd v HMRC* [2011] UKFTT 269 (TC) the tribunal (Judge Clark and Mr Hughes) said:

> "... the test to be applied by the tribunal is whether on an objective view it is appropriate for a closure notice to be issued. This involves close scrutiny of the questions put to the taxpayer and its advisers, the information provided in response and its adequacy, and the extent to which it appears to the tribunal that further enquiry would produce information enabling the company's corporation tax liability to be adjusted to a level differing from that shown in the return."

184. The statutory provisions not only require the Tribunal to decide whether to issue a closure notice, but whether to direct that closure be ordered within a specified period. As Special Commissioner Wallace said in *Jade Palace v HMRC* [2006] STC (SCD) 419*:*

> "41. The issue on such application is not simply whether a closure notice should be directed, but whether it should be directed within a specified period. The reasonable grounds must cover the setting of a period.
>
> 42. Since para 32 requires the Revenue to state their conclusions when giving a closure notice, it is clear that the 'specified period' within para 33(1) must be sufficient for this to be possible. The period necessary will vary with the circumstances and complexity of the case and the length of the enquiry.
>
> 43. The longer the period of the enquiry, the greater the burden on the Revenue to show reasonable grounds as to why a time for closure should not be specified."

185. In *Khan v HMRC* [2014] UKFTT 018(TC) (Judge Cornwall-Kelly and Mr Bird) the tribunal said:

> "[37]…the fact that the enquiry has now lasted some two and a half years, and has yet reached no conclusion, is in part attributable to poor administration by the Revenue and the probable mishandling of the taxpayer's documents. An enquiry of this nature ought to be capable of being completed within two years, and the tribunal must guard against it becoming a fishing expedition by the Revenue in the hope of

> justifying the time already spent. That said, it is also the tribunal's task to safeguard the public interest in the payment of the correct amount of tax, which involves detailed calculations and enquiries being undertaken.
>
> [38] On the one hand, the Revenue must not be constrained to close an enquiry when there is genuinely significant information which needs to be provided but, on the other hand, there is unlikely to be any ultimate prejudice to the public interest in placing a reasonable limit on the extent of the enquiry, since in any eventual amendment to his self-assessment return the taxpayer has an unrestricted right of appeal in regard to everything relevant to the year under enquiry, and he bears the burden of displacing the Revenue's assessment."

PART 4: THE APPEALS AND APPLICATIONS - SPECIFICS

186. This part of the decision considers the enquiries and closure notices relevant to each of the Companies, taken in alphabetical order, followed by Symbio and then Mr Budhdeo.

The parties' submissions

187. HMRC made detailed submissions on each Sch 36 Notice and some of the open enquiries, which I have considered under the headings applicable to each Appellant.

188. The Appellants did not make similar detailed submissions about any of the Items, but their Closure Application made on 11 April 2014 included submissions that the appeals should be allowed, and the enquiries closed within 30 days, because:

(1) the enquiries had "arisen from a collateral investigation of Mr Sanjay Budhdeo";

(2) the enquiries were being conducted "on a speculative basis", and this was not in accordance with the statutory requirements;

(3) HMRC's reason for opening the enquiries and issuing the Sch 36 Notices was "not free from malice";

(4) HMRC had originally enquired into six companies (Blackbay, Chemistree, Chemistree Homecare, Gold Nuts, Venture Pharmacies and Zanrex) in relation to 2010, and those companies had provided extensive information. Although those enquiries "did not yield anything tangible", HMRC had nevertheless opened enquiries into the same companies' 2011 CT returns, and also opened enquiries into the CT returns of other group and related companies; and

(5) this extension of the enquiries involved a "huge amount of time and resources" for the Appellants.

189. The Appellants asked the Tribunal to follow the guidance in *Bloomfield*, where the tribunal took into account "the fact that this enquiry has been ongoing for a significant period of time, the co-operation of the Appellant and the queries which remain outstanding". HMRC's enquiries into the Appellants had been ongoing for

some 13 months by the date of the closure notice applications, and despite their co-operation, HMRC had "unreasonably prolonged the enquiry without good reason".

190. The Appellants also cited the passage from *Khan*, where the tribunal had said "An enquiry of this nature ought to be capable of being completed within two years, and the tribunal must guard against it becoming a fishing expedition by the Revenue in the hope of justifying the time already spent". In the Appellants' submission, HMRC had been "conducting a fishing expedition" by extending the enquiries from the original six companies to include other tax years and other companies.

191. In relation to the Sch 36 Notices, the Appellants submitted that HMRC had not met Condition B set out at Sch 36, para 21(6). They relied on *Kevin Betts v HMRC* [2013] UKFTT 430 (TC) (Judge Perez and Ms Stalker) where the tribunal found as follows:

> "[89] On HMRC's case as summed up by Mr Birkett [representing HMRC], condition B was in our judgment clearly not met. He was in agreement that none of the information held by HMRC, either singly or taken together, gave reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. Mr Birkett's case was that he sought additional information on the basis that the additional information may, when added to the information already held by HMRC, give the "reason to suspect" required by paragraph 21(6)(a).
>
> [90] But it is clear, in our judgment, that in order for condition B to be met, there has to be reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed as regards the appellant. That is the plain and ordinary meaning of paragraph 21(6)(a), and we see no reason to go behind that. Seeking information or documents in order to try to meet condition B is simply the wrong way round in our judgment."

192. The Appellants said that the same was the case here: HMRC had repeatedly failed to explain the basis for their suspicions.

193. HMRC invited the Tribunal to reject all these submissions. There was no statutory obligation for HMRC to explain why it was opening an enquiry, and there was no evidence of malice. The six original enquiries were extended because they gave rise to further questions. In relation to Sch 36, para 21, it was Condition A, not Condition B, which applied to the Appellants, so *Betts* was irrelevant.

194. However, Ms Jones very fairly pointed out, in accordance with her undertaking to put forward any relevant points on the Appellants' behalf following their withdrawal from the hearing, that another possibly relevant point in the context of the Sch 36 Notices was whether it was reasonable for HMRC to require that the Items be delivered by post, or whether HMRC should have been willing to review the information and documents at the Appellants' premises.

195. If that point were in issue, she said that HMRC relied on *Telng v HMRC* [2013] UKFTT 0327(TC) ("*Telng*") at [41] where the tribunal (Judge Poole and Mr Dee) had

found that that the legislation allowed HMRC "to specify post or email as a 'means' of production if they so wish", provided that specification was reasonable in all the circumstances. Ms Jones submitted that this was clearly the case here: following the Appellants' covert Iphone recording of the meeting on 22 November 2012, Mr Douglass had decided that the Items should be sent to HMRC by post.

Discussion of the Appellants' submissions

196. I deal first with Sch 36, para 21. That paragraph is relevant because the Appellants have all completed tax returns, so HMRC are not able to issue a Sch 36 Notice unless one of the four conditions set out in that paragraph are met. Condition A is that "a notice of enquiry has been given in respect of…the return…and the enquiry has not been completed". That Condition is satisfied in relation to all the Sch 36 Notices, so Condition B is not in issue.

197. The Appellants assert that the enquiries arose "from a collateral investigation of Mr Sanjay Budhdeo". However, they have provided the Tribunal with no further information about this investigation, other than that it involved the issuance of a COP9 letter. I disregard this assertion.

198. I agree with the Appellants that "extensive information" was provided in response to the Sch 36 Notices issued to Blackbay, Chemistree, Gold Nuts and Zanrex on 23 August 2012 and those issued to Venture Pharmacies, Chemistree Homecare and Enviroplex on 12 October 2012. A total of 18 discs containing link documents and prime records was provided, and HMRC have accepted that there has been compliance with those Sch 36 Notices.

199. However, the material on those discs gave rise to more HMRC questions, as reflected in the further Sch 36 Notices. I must consider each of those Notices to see whether the Items are reasonably required, and having done so, must then go on to consider whether the Tribunal should direct that the enquiries be closed. It is not possible to say, just because extensive information has been supplied in relation to six companies for one year, that a line must then be drawn and all the enquiries closed.

200. Furthermore, as is clear from my further findings of fact in relation to each of the Companies set out below, it is not the case that this extensive information "did not yield anything tangible". Instead, the link papers and prime records disclosed numerous intra-company transactions which were often complicated and sometimes opaque.

201. The Appellants submitted that HMRC are on a "fishing expedition" and are asking questions "on a speculative basis". HMRC are not permitted to use the Sch 36 powers to "fish" for possible issues, see *R (oao) Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin), where Simler J said at [20]:

> "HMRC may not use their Sch.36 powers for a fishing expedition – whether for their own or the purposes of another revenue authority. A broadly-drafted request will not be valid if in reality HMRC are saying 'can we have all available documents because they form so large a class of documents that we are bound to find something useful'."

202. The statutory test is that the Items are "reasonably required". Thus, a request for information or documents cannot be unreasonable, or entirely without foundation, but that does not rule out an element of uncertainty or speculation on HMRC's part. In the final part of this decision I consider whether the "reasonably required" test has been met in respect of each Item which is not a statutory record.

203. The Appellants provide no further detail to support their assertion that HMRC's actions were not "free from malice". Possibly this is a reiteration of their submissions on dominant purpose, discussed earlier in this decision. In any event, having considered each of the Sch 36 Notices and each of the enquiries, I found nothing to suggest that HMRC was acting out of malice.

204. The Appellants also submitted that compliance with the Sch 36 Notices would involve a "huge amount of time and resources". My task is to decide whether the Items are "reasonably required"; this incorporates an obligation to consider whether they are proportionate, but that task can only be carried out in relation to each Item. I cannot allow the Appellants' appeals, and close the enquiries, simply on the basis that responding to all the Sch 36 Notices, taken together will take a long time and consume resources.

205. The Appellants say that the enquiry has been "unreasonably prolonged", as in *Bloomfield*; they also refer to *Khan,* where the tribunal said "an enquiry of this nature ought to be capable of being completed within two years". How long an enquiry takes depends on the particular facts in issue, the efficiency (or otherwise) of HMRC and the degree of taxpayer co-operation. In *Khan* the enquiry had lasted some two and a half years, partly because of "poor administration by the Revenue and the probable mishandling of the taxpayer's documents". There is no parallel with the facts of this case. In *Bloomfield,* the tribunal took into account, not only the period of time for which the enquiry had been open and the degree of co-operation, but "the queries which remain outstanding". Here the six companies originally under enquiry co-operated with HMRC, but co-operation was withdrawn following the issuance of the COP9 letter to Mr Budhdeo. There has been no response to any of the Sch 36 Notices which are under appeal, so all the Items "remain outstanding".

206. I agree with the reasoning of the tribunal in *Telng* and find that Mr Douglass's requirement that the Items be provided by post (rather being inspected at a meeting held on the Appellants' premises) was entirely reasonable. I take into account the Iphone recording of the earlier meeting; the Appellants' failure to provide a copy of that recording to HMRC despite Mr Douglass's request for its provision, and the level of detailed work required to analyse the complex network of intra-group transactions revealed by the 18 discs previously supplied. A single meeting (or even several meetings) at the Appellants' premises could not reasonably be expected to provide the answers to all HMRC's questions.

207. I turn next to the individual appeals and applications, which were helpfully set out by HMRC in a Schedule which included the applications listed in the February Directions. It also included the applications to close the enquiries into the 2012 returns of Bronze Nuts Ltd ("Bronze Nuts"), Chemistree, Corona, DHL and R Square.

This was because HMRC had recognised that the Appellants had asked on 14 July 2014 by way of an attachment to their request for closure notices, that all the 2012 enquiries be closed; the Appellants had made the same point in correspondence with the Tribunal, and I accepted this was the position. The Schedule had been provided to the Appellants before the hearing.

208. In making findings of fact in relation to transactions between the Appellants, I have referred to the statutory accounts, most of which contain a "related party" note. However, some of these related party notes disclose that the company has "taken advantage of exemption under the terms of Financial Reporting Standard 8 Related Party disclosures, not to disclose related party transactions with wholly owned subsidiaries within the group". As a result, the related party disclosures are generally limited to those between individual Appellants and companies – such as Noviscom – which are not wholly owned subsidiaries of the Gold Nuts group. It is clear from other evidence that there are significant intra-group transactions in addition to those shown in the related party notes.

209. Where I have upheld a Notice, this is because the Items which were not statutory records were reasonably required for the purposes of checking the taxpayer's tax position. I have not reiterated that conclusion in relation to each of the many Sch 36 Notices analysed below, but have explained my reasoning.

210. Where I have decided not to direct the immediate closure of an enquiry, I have similarly given my reasons. In all cases where I have come to that conclusion, I also decided not to set a future date by which the enquiry should be closed. That is because there were, in each case, too many uncertainties to make it sensible or reasonable to set such a date. Moreover, the company has not provided any time frame within which it will agree to comply with the Notices.

Blackbay

211. The following appeals and applications were before the Tribunal:

(1) applications to close HMRC's enquiries into the 2010, 2011 and 2012 tax returns; and

(2) appeals against the Sch 36 Notices issued in relation to the same three years.

Blackbay: Facts

212. Blackbay supplies pharmaceutical drugs to care homes; provides certain equipment (such as trolleys and cabinets) and trains care home staff. Its director was originally Mr Sanjay Budhdeo, but he was later replaced by Mr Uday Dhopat.

213. Blackbay was set up as a "special purpose vehicle" ("SPV") to acquire the trade of a group of companies of which Intecare Ltd was the holding company. Mr Budhdeo, Mr Hundal, Mr Pravin Budhdeo and other family members were the shareholders of Intecare and Mr Budhdeo and Mr Hundal were that company's directors. Intecare went into administration in 2008.

214. Mr Budhdeo's evidence, given at the meeting with HMRC on 22 November 2012, was as follows (where Blackbay is the "arm's length phoenix").

> "When Intecare ran into financial difficulties, its business was transferred to the Gold Nuts group through an arm's length phoenix. Sanjay [Budhdeo] was put in place by the banks as someone of high net worth as the bank was unable to be seen to lend to exactly the same management team."

215. After the transfer of the Intecare business to Blackbay, £210,182 was capitalised as goodwill in Blackbay's 2010 statutory accounts. At least some part of those capitalised sums was paid to Mr Pravin Budhdeo and to Mr Hundal on the basis that it represented repayment of amounts they had previously invested in Intecare. Blackbay's 2010 accounts also include "impairment losses on goodwill" of £530,577, which is also related to the acquisition of Intecare's business. It includes:

(1) "salary liabilities" relating to Mr Budhdeo, Mr Hundal and Mr Mathew for the year ending December 2008, totalling £407,353; and

(2) loan repayments to Mr Pravin Budhdeo of £60,000; to Mr Hundal of £10,000 and to Mr Dadrah (Mr Hundal's brother) of £14,500.

216. After the end of the 2010 year, Blackbay processed 82 journal entries, some of which relate to Mr Sanjay Budhdeo, some to Mr Budhdeo, and some to other related companies; others are transfers between different Blackbay account headings. The journal entries involving Mr Sanjay Budhdeo include two credits to his loan account of £130,000 and £20,050; the matching debit entries are Enviroplex and R Square. A further credit to his loan account of £46,069 is described as "electrician costs paid by credit card incorrectly posted" and an amount of £10,000 relates to "monies paid…for acquisition of Mercedes".

217. The 2010 year end journal entries also include goodwill amortisation of £473,768; business process outsourcing cost accruals transferred to Venture Pharmacies of £106,270 and a transfer to "locum expenses – audit and training" of £112,097. Further journal entries relate to costs shared with Enviroplex of £180,000 and a profit share from that company of £681,066, together with a further accrued profit share of £433,025. Enviroplex's own journal entries show a matching profit share of £681,066, but also include two other profit share amounts of £437,409 and £31,845, as well as a number of smaller intra-company transfers which were not identifiable in the journal entries for Blackbay.

218. Blackbay's statutory accounts state that in 2011 Mr Budhdeo was owed £35,795 by that company at the end of 2010; that in 2011 he borrowed £229,849 but repaid £211,206, leaving a balance owing of £18,279; that by the end of 2012 he had borrowed a further £360,609, making his director's loan account balance £378,888. The comparable figures for the other directors are:

(1) Mr Sanjay Budhdeo: £(35,795) at the end of 2010; £8,796 at the end of 2011 and £188,642 at the end of 2012.

(2) Mr Hundal: £(2,098) at the end of 2010; £(34,185) at the end of 2011, and £156,323 at the end of 2012.

(3) Mr Mathew: £(36,458) at the end of 2010; £(14,167) at the end of 2011 and £82,577 at the end of 2012.

219. Thus, by 31 December 2012 the four directors owed the company over £800k. None of these debts had any specific repayment date; all are stated to be interest-bearing.

220. The statutory accounts also record that:

(1) a credit card account in the name of Sanjay Budhdeo was used by Blackbay for the payment of its expenses. As at the end of 2010 the amount owed on the credit card was £5,319; at the end of 2011 it was £13,002 and at the end of 2012 it was nil;

(2) during 2010 transactions totalling £134,899 occurred between the company and DC Procurements Ltd ("DCP"), a company of which Mr Pravin Budhdeo was a director and shareholder;

(3) in the same year Blackbay purchased a car from Mr Budhdeo's wife for £5,650;

(4) also in 2010, an amount of £25,341 was written off as relating to abortive software development costs paid to a related company, Logicare Holdings Ltd; the 2011 accounts show a further write-off of £184,758; and

(5) in 2011 £606,000 was paid to Noviscom "in respect of pharmacy introduction and consultancy fees".

221. The consolidated accounts for Gold Nuts state that Blackbay's figures for debtors and creditors included:

(1) for 2010, other creditors of £19,942, sales of £88,010 and purchases of £218,519, all relating to LODL, and purchases of consumables and equipment valued at £74,319 from DCP, which also owed Blackbay £51,570;

(2) for 2011, other creditors of £19,557, sales of £221,509 and purchases of £716,961 (LODL); trade creditors of £440,802 (Noviscom) and other debtors of £7,499 (Noviscom) and £20,456 (Vospro, a company of which Mr Budhdeo and Mr Sanjay Budhdeo were shareholders); and

(3) for 2012, purchases of £1.4m (LODL) and "professional fees included in prepayments" of £271,182 (Noviscom).

222. As already noted, most of the entries set out above are with related companies other than those which are part of the Gold Nuts group; that is because intra-company transactions between Gold Nuts group companies are not disclosed in the statutory accounts. The only information in that regard has therefore come from the 2010 journals provided to HMRC.

Blackbay: Sch 36 Notice for 2010

223. The Sch 36 Notice for 2010 issued on 2 April 2014 required the company to provide 24 Items.

224. Item 1 requires full details of the company's shareholders from incorporation to the end of 2010 or, in the alternative, confirmation that since the acquisition of the Intecare business, Blackbay has always been owned by Gold Nuts.

225. In putting forward HMRC's reasons for this request, Mr Moss referred to the Meeting Minutes, where HMRC had been told that "the funds for purchasing the Intecare business were provided by Sanjay Budhdeo". Taking that information together with the fact that the company was also a subsidiary of Gold Nuts, it was in HMRC's submission reasonable to require this information about the company's ownership.

226. I note that there are year-end journal entries relating to transactions with Mr Sanjay Budhdeo, in addition to those which went through his loan account. Against that background, and noting also the statement that Mr Sanjay Budhdeo funded the purchase of Intecare, I agree it is reasonable for HMRC to seek to establish whether the company was at any time owned by him, by Gold Nuts, or by another person.

227. Item 2 asks for the consolidation of the intercompany position as described in the linking papers, and any intercompany reconciliations, supported by detailed narrative as to the rationale behind the individual transactions. The consolidation of the intercompany position, the intercompany reconciliations and the related explanations are statutory records.

228. Item 3 asks for "full details of the source of the credits to the directors/ shareholders loan accounts for Sanjay Budhdeo, evidenced by relevant paperwork such as loan agreements, bank statements detailing the payments and receipt". To the extent that HMRC is asking for evidence held by the company, such as loan agreements and company bank statements showing the receipt of the moneys, these are statutory records. To the extent that HMRC are asking for the other half of the entries (the source of the monies, and bank statements evidencing the payments made by Mr Sanjay Budhdeo to Blackbay) they are not statutory records.

229. I note that Mr Sanjay Budhdeo is a director and shareholder of Blackbay and also that Blackbay has not sought to argue that these documents are not in its possession or power (Sch 36, para 18). Given the year-end journals include credits to Mr Sanjay Budhdeo's loan account of over £150k where the matching entry is another group company, and a further £46k relating to "electrician costs paid by credit card incorrectly posted", I find that it is reasonable for Blackbay to be required to provide the requested information.

230. Item 4 is "the bank statements for the HSBC account held in the name of Sanjay Budhdeo t/a Blackbay Ventures and bank statements for all accounts of a similar nature". A bank account used to record a company's transactions is self-evidently part of its statutory records. I asked Mr Moss what was meant by "all accounts of a

similar nature" and he clarified that it meant any bank account which was being used to record the company's transactions. The Tribunal only has power to vary a Sch 36 Notice if the Item in question is appealable (see Sch 36, para 32(3)) and I am thus not able to vary the Notice to make this Item clearer. However, the company may be assisted by this further information given by Mr Moss.

231. Item 5 is "the credit card statements for the accounts held in the name of Sanjay Budhdeo". The statutory accounts state that a credit card account in the name of Sanjay Budhdeo was used by the company for the payment of its expenses. To the extent that the Notice is referring to that credit card, the statements are statutory records, and not appealable. The same is true of any other credit cards in Mr Sanjay Budhdeo's name which are used for the payment of Blackbay's expenses. Mr Moss helpfully clarified that the Item was not intended to extend to credit cards which are used purely personally, although it could be read in that way. I find that the current wording of the Item is wider than this and I therefore have jurisdiction to vary it.

232. I amend Item 5 to read "the credit card statements for the account held in the name of Sanjay Budhdeo to which reference is made in the statutory accounts, together with statements for any other credit card issued in his name which has been used to pay expenses on behalf of the company".

233. Items 6-9 relate to management fees incurred and received; these all require the provision of statutory records.

234. Item 10 asks for "full details of all profit share agreements entered into by the company together with full details of what the commercial benefits of the arrangements are to both parties", and Item 11 asks for "all agreements and correspondence covering the negotiation and agreement between the parties in any profit share agreement entered into by the company".

235. Item 10 does not only require information about the "profit share from Enviroplex" of £681,066 and a further accrued profit share of £433,025, both of which are included in the year end journals. Instead, it asks for "all" or "any" such agreements". I note that the Enviroplex profit share is not listed in the related party note to the company's statutory accounts, presumably because it is a fellow subsidiary of Gold Nuts; it has only come to light because the year end journal adjustments have been provided to HMRC. It is therefore possible that there are other intra-group profit share agreements under which payments were made before the end of the financial year, so are not recorded in the accounts or in the year-end journals. In any event, profit share agreements are statutory records.

236. HMRC submitted that it was reasonable to require full details of the commercial benefits of any such profit share arrangements, and I agree. In order for a payment to be allowable for corporation tax purposes, it must be made "wholly and exclusively" for the purposes of the company's trade, see Corporation Tax Act 2009 ("CTA 2009"), s 54(1)(a), and it is entirely reasonable for HMRC to seek to establish the rationale for any profit share agreements into which the company may have entered, and for HMRC to be provided with the paperwork relating to their negotiation.

237. Items 12 to 16 relate to the goodwill transactions; the first four are all statutory records. Item 16 is "agreements and all correspondence with suppliers/recipients of payments attributable to goodwill". The agreements themselves are part of the company's statutory records, being "necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period" as the tribunal put it in *Couldwell*.

238. Mr Moss said in evidence that some of the goodwill transactions set out in the year end journals were not recorded in the Administrator's report for Intecare, and HMRC therefore required the correspondence in order to understand the transactions. These included the payment of some part of the capitalised goodwill to Mr Budhdeo and Mr Hundal, the payment of amounts identified as "salary liabilities" to Mr Budhdeo, Mr Hundal and Mr Mathew totalling £407,353; loan repayments totalling £84,500 to Mr Pravin Budhdeo and Mr Hundal, and a payment to Mr Dadrah of £10,000. I agree with HMRC that it is reasonable to require the correspondence set out in Item 16, for the reasons given by Mr Moss.

239. Items 17 to 20 concern the business process outsourcing accrual transferred to Venture Pharmacies of £106,270: they are statutory records.

240. Item 21 asks for "the commercial purpose of the transactions totalling £134,899 between the company and DC Procurements Ltd, supported by the relevant invoices and details of payment". The invoices and details of payment are statutory records. I find that it is reasonable for HMRC to require that the company explain the commercial purpose of the transaction, given the "wholly and exclusively" requirement in CTA 2009, s 54(1)(a), and noting that Mr Pravin Budhdeo was a director and shareholder of DCP.

241. Items 22 to 24 require the provision of statutory records relating to subcontractors/locums and company cars.

Blackbay: Sch 36 Notice for 2011 and 2012

242. The Sch 36 Notice for 2011 requires that the company provide 14 Items. Of these, all but the two Items discussed in the next following paragraphs are statutory records.

243. Item 3 relates to the charge of £606,000 made to the company by Noviscom. It requires "full details of the services provided…and the commercial benefit to the company". HMRC submitted that it was reasonable to require that information. Given the "wholly and exclusively" test in the statute, I agree.

244. Item 9 requires Blackbay to explain a payment of £10,000 made to Mr Dadrah which is disclosed at Note 20(viii) of the statutory accounts: the company is required to say "what the liability related to, why it needed to be settled, and documentary evidence to demonstrate that there was a liability". Note 20(viii) to the accounts says that the payment was made to Mr Dadrah, the brother of Mr Hundal, one of the company's directors, "with regard to the liabilities of the business purchased by the company in 2008". HMRC submitted that it was reasonable to require this

information, and again I agree: this payment has been made to the relative of a director, and the information provided in the accounts is insufficient to determine the purpose of the payment and its tax treatment.

Blackbay: Sch 36 Notice for 2012

245. The Sch 36 Notice for 2012 has 16 Items. Of these, all but those discussed in the next following paragraphs are statutory records.

246. Item 3 relates to a further payment to Noviscom, and Item 10 to a further payment to Mr Dadrah, which Note 20(vi) to the accounts states has been made for the same reason as in the previous year. HMRC submitted that these Items were reasonably required for the reasons given above, and I agree for the same reasons.

247. Item 12 reads:

> "full details of any sources for and dates of credits to the loan accounts of Shamir Budhdeo, Joshy Mathew, Amarjit Singh Hundal to demonstrate that they were repaid within 9 months of the period end, supported by documentary evidence."

248. As already noted, a loan to a director which is not repaid within nine months of the year end triggers a further tax charge under CTA 2010 s 455. It is reasonable for HMRC to require the information in this Item.

Blackbay: closure Notice applications

249. In relation to the applications to close the enquiries for 2010, 2011 and 2012, HMRC submitted that the information disclosed by the company following the first Sch 36 Notice had shown that there were numerous complicated inter-company transactions. The accounts for the following two years showed a similar pattern. HMRC was not in a position to close the enquiries for any of the three years until the company had responded in full to the outstanding Sch 36 Notices and HMRC had considered the information provided. If the Tribunal directed the closure of these enquiries, HMRC was likely to issue amended assessments on a best judgement basis, and/or issue discovery assessments when further information was provided following enforcement of the Sch 36 Notices. The enquiries should therefore remain open until after the company had provided the information required.

250. I agree with HMRC that the intra-company position is extraordinarily complicated and difficult to follow, as evidenced by the numerous journals posted after the year end and the amount of cross-charging. Further complexity arises from payments to and from directors and shareholders and the transactions around Intecare, including in particular those involving goodwill.

251. HMRC is still waiting for Blackbay to supply the documentation requested by the Sch 36 Notices under appeal. These can be expected to shed significant light on its tax position for the three years in question. This is not a situation where HMRC is seeking to "pursue to the end" every line of enquiry, as in *Eclipse*. Neither is it one where HMRC can easily exercise judgement as to the correct figure, as in *Jade Palace*. In the words of the tribunal in *Estate4,* given the nature, range and extent of

the Items required under the Sch 36 Notices, there is a high probability that they will "produce information enabling the company's corporation tax liability to be adjusted to a level differing from that shown in the return".

252. If HMRC was required to close these enquiries now, it would be forced to make "best judgement" assessments without knowledge of the full facts. However, because it will continue to enforce the Sch 36 Notices, discovery assessments may well follow. As the tribunal said in *Stephen Price*, requiring HMRC to close the enquiries would be "inappropriate and a waste of everybody's time".

Bronze Nuts

253. The issues to be determined by the Tribunal are:

(1) the company's applications to close HMRC's enquiries into its 2011 and 2012 returns; and

(2) its appeal against the Sch 36 Notice issued in relation to its 2011 return.

Bronze Nuts: Facts

254. Bronze Nuts was set up as an SPV to acquire three shops from Hundal Corporation Ltd ("Hundal Corp"), a company partly owned by Mr Hundal, and of which he was a director. Hundal Corp went into administration in March 2009. HMRC were told at the meeting with HMRC on 22 November 2012 that Bronze Nuts was set up "in order to protect Mr Hundal".

255. The Administrator's report relating to Hundal Corp includes a Statement regarding its sale of the business and assets. The business was sold to Bronze Nuts.

256. The 2010 accounts show a turnover of £800k and loss of £54k; goodwill of £11k was written off. The journal entries for 2010 show several intra-company year-end adjustments involving Bronze Nuts, Chemistree and the Administrators.

257. The 2011 accounts state that turnover has increased to £2.3m and a loss for the year of £103k. Goodwill of £35k was written off. Debtors total £1.3m of which £475k is owed by group companies and a further £103k is owed by LODL. The company also owed £1.9m to creditors, of which £1.2m was owed to group companies. It paid rent of £18,000 in respect of a building owned by Mr Pravin Budhdeo.

Bronze Nuts: appeals and applications

258. The Sch 36 Notice contains only 1 Item, being an analysis of the "other debtors" figure in the statutory accounts of £785,316. Bronze Nuts is required to show the full name of each debtor and the amount they each owed the company at 31 December 2011. This Item is a statutory record and so not appealable.

259. I went on to consider the company's application to close the enquiries. HMRC submits that it needs to have the information required by the Sch 36 Notice in order to see whether the debtors figure has been correctly treated for tax purposes; only then can it know whether an adjustment is required to the company's CT return. I

agree that the figure for debtors is an integral part of the company's accounting records, and that a change to debtors could affect the profit calculation for the year. I take into account here that almost 50% of the debts are due from group or related companies. I decline to direct that the enquiry be closed.

260. HMRC submitted that it was also premature to close the 2012 enquiry, as there were likely to be linking matters between that year and the earlier years, as well as between Bronze Nuts and the position of other group companies. Given the complexity of the intra-company transactions as shown by the 2010 journal entries, and by the further facts found in relation to this and other Appellants, I agree with HMRC that it is premature to direct closure of this enquiry. As the tribunal said in *Stephen Price* "HMRC is 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".

Chemistree

261. The issues to be determined by the Tribunal are:

(1) the company's applications to close HMRC's enquiries into its 2010, 2011 and 2012 returns; and

(2) its appeal against the Sch 36 Notice issued in relation to its 2010 return.

Chemistree: Facts

262. Chemistree began trading as a dispensing pharmacist in January 2008. HMRC was told at the meeting on 22 November 2012 that it ran the pharmacies owned by Hundal Corp on behalf of the administrator, PKF, for the period March 2009 and September 2010. However, the Administrator's Report for Hundal Corp states that the shops were run by Zanrex.

263. In correspondence Dewanis informed HMRC that "any debts owed to [Chemistree] were not specifically taken into account by the Administrators of Hundal Corp when the business of that company was purchased by Bronze Nuts Limited". Chemistree's 2010 accounts nevertheless included a write-off of £316,085. Dewanis stated that Hundal Corp had failed to pay these six Chemistree invoices:

Date	Invoice No	£
31/10/2008	11	91,477.07
30/11/2008	12	61,375.64
31/12/2008	13	78,512.84
31/1/2009	14	72,361.82
28/2/2009	15	77,269.13
10/3/2009	10535	2,419.00
Total		383,415.5
Less VAT		(42,976.83)
Total		340,438.67

264. The difference between the £340,438 shown above, and the £316,085 written off, was not explained by Dewanis, other than by saying that the list "formed the basis" for the write off.

265. The first five invoices have sequential numbers, suggesting that no invoice was issued by Chemistree to any other customer in the four months between 31 October 2008 and 28 February 2009. The final invoice is numbered 10535, suggesting that Chemistree issued over 10,000 invoices in the ten days between 28 February and 10 March 2009.

266. Chemistree's 2010 accounts show turnover of £1.4m and a loss of £367k. After the end of 2010, Chemistree processed 54 journals. These included several significant entries relating to Enviroplex, Blackbay and Zanrex, all referred to as "intercompany" without any further details. In addition, £74,000 and £120,000 are stated to relate to the value of retail stock transferred to Bronze Nuts, and £55,130 as being received from Enviroplex as a "profit share". A management charge of £16,000 is stated to have been charged by Venture Pharmacies. A total of £231,448 is recorded as paid to suppliers of Bronze Nuts and £435,848 is entitled "supplier balances of Chemistree Ltd transferred to Bronze Nuts".

267. In the 2011 accounts, turnover is shown as nil, and the Directors' Report states the company did not trade during the year, but will resume trading "as soon as suitable activities have been identified". At the meeting with HMRC in November 2012, Mr Mathew said that Chemistree ceased trading in November 2010.

268. The 2010 accounts state that, as at the end of that calendar year Chemistree was owed £257k by group undertakings; this increased to £285k in the year ended 2011 (despite the company not having traded). The 2010 accounts also state that Chemistree owes £213k to LODL: this is classified under "other creditors"; the figure is unchanged in the 2011 and 2012 accounts.

Chemistree: Schedule 36 Notice

269. The Sch 36 Notice asked for 17 Items, but HMRC accepted before the Tribunal that Items 7-9 were incorrect and would not be pursued.

270. Items 1-4 are statutory records, and include the requirement to provide a "detailed narrative" as to the rationale for the inter-company transactions set out in the journal entries and linking papers. Items 5 and 6 relate to profit share, where the position is the same as set out above in relation to Blackbay.

271. Items 10-13 relate to Hundal Corp, including information/documents relating to the invoices set out at §263. Items 16-17 relate to locums. All these Items require the provision of statutory records.

272. Item 15 requires that Chemistree provide the lease or other rental agreement and related invoices for the property rented from Mr Pravin Budhdeo. Item 14 asks for full details of that property. The former is a statutory record, as it is part of Chemistree's business records. It is reasonable to require that the information

required by Item 14, so HMRC can determine whether the rental payments meet the "wholly and exclusively" statutory test.

Chemistree: closure notice applications

273. In relation to the 2010 enquiry, HMRC's submissions were similar to those they made in relation to Blackbay. I agree with HMRC, for essentially the same reasons. In summary, there are multiple significant transactions between Chemistree and other group/related companies, including Hundal Corp. The outstanding information/documents required are extensive, and it is entirely reasonable that the enquiry remain open.

274. In relation to 2011 and 2012, the company appears not to have traded, and no Sch 36 Notices have been issued. However, HMRC submitted that it was premature to close these enquiries before it had a clearer picture of the 2010 position.

275. Chemistree's relationship with Hundal Corp (who used to run the pharmacies) is opaque, as is its relationship with Zanrex (stated by the Administrator to be responsible for managing the pharmacies); with Enviroplex (from whom Chemistree received a profit share) and with Bronze Nuts (to whom stock and supplier balances were transferred after the 2010 year end). It is unclear why amounts owed by group companies increased by £28k in 2011, despite the lack of any trade, and why the company's debt to LODL remained unsettled two years later.

276. Taking all those matters into account, I agree with HMRC that there are likely to be links between Chemistree's 2010 CT return and those for the following two years. I also agree that the information and documents required by the Sch 36 Notice are likely to shed light on the company's tax position for all three years. There are reasonable grounds not to close these enquiries.

Corona

277. The only issues before the Tribunal were the company's applications to close HMRC's enquiries into its 2011 and 2012 returns.

Corona: closure notice for 2011

278. On the basis of the statutory accounts I find as a fact that this company did not trade during 2011 and its net assets were £1, being the price paid for a single £1 share. I asked Mr Moss why the enquiry should remain open. He said that HMRC had also opened an enquiry into the 2012 year, and there might be issues which relate back to 2011.

279. This does not, in my judgment, meet the statutory test of being "reasonable grounds" for the enquiry remaining open. HMRC have not put forward any information which might indicate that Corona was other than dormant in 2011. No Sch 36 Notices have been issued. I direct that the enquiry be closed within 30 days of the issuance of this decision.

280. That does not, of course, mean that the company can no longer be assessed in relation to 2011. Were information to come to light in the course of HMRC's other

enquiries that Corona had taxable profits in 2011, a discovery assessment might be possible. But there is nothing at present to indicate that this is the position.

Corona: closure notice for 2012

281. Corona began trading during 2012, operating in "property development and investment". The consolidated accounts for Gold Nuts state that Corona was charged by Vospro for "IT support and development" and by Noviscom for "advertisement expenses". HMRC submitted that it was reasonable to keep the enquiry open, because of the inter-linking between Corona and other group/related companies.

282. I am mindful of the fact that only some of the intra-company transactions are disclosed in the accounts because those between subsidiaries of Gold Nuts are not shown. Given that (a) extensive cross-charging clearly occurs within the Gold Nuts group as well as with related companies; (b) the 2010 journals and link papers showed the extent of the cross-charging in that year; and (c) there is abundant evidence to indicate that there has been significant cross-charging in other years, I agree that it is reasonable not to close the 2012 enquiry.

DHL

283. The only issues before the Tribunal are DHL's applications to close HMRC's enquiries into its 2011 and 2012 tax returns.

284. I first find as facts that DHL is the holding company for LODL and that its statutory accounts show that its only asset is its investment in LODL.

285. HMRC have not asked for any information or documents from DHL, either informally or by way of a Sch 36 Notice, but nevertheless submit that the enquiries should remain open because it is conducting enquiries into LODL for 2011 and 2012, and that LODL has not responded to the Sch 36 Notices issued. HMRC add that the further information from other companies may in due course lead HMRC to amend DHL's 2011 and 2012 corporation tax returns.

286. However, the fact that LODL is under enquiry does not of itself justify keeping open an enquiry into its parent company. HMRC has asked DHL for no information or documents. There is no evidence of intra-company transactions; instead DHL appears to be only a holding company.

287. The burden of showing that the enquiries remain open rests with HMRC, and I find it has not been met. I direct that the enquiries for 2011 and 2012 be closed within 30 days from the issuance of this decision.

288. As with Corona, it is open to HMRC to issue discovery assessments in the future, should new information come to light so as to justify such an assessment.

Enviroplex

289. There were two issues before the Tribunal:

(1) the company's application to close HMRC's enquiry into its 2010 corporation tax return; and

(2) its appeal against the Sch 36 Notice issued on 2 April 2014 in relation to the 2010 year.

Enviroplex: Facts

290. The company's 2010 financial statements state that its principal activity was "wholesale of pharmaceutical products".

291. The accounts state that in 2009 the company's turnover was £4.3m and its profits £144k. In 2010, turnover is reported as £20m, an increase of more than 400%, but made a net loss of £215,379.

292. The Directors' Report in the 2010 accounts states that the company ceased trading on 31 December 2010. There is no information as to what happened to the company's trade, or why it ceased.

293. However, Enviroplex provided HMRC with a list of 39 adjustments to its 2010 accounts, including a "profit share given to suppliers of stock" of £548,190 and a further accrued profit share of £524,707, together totalling over £1m.

294. Blackbay's journal entries, as already noted, include a transfer of "shared costs" from Enviroplex of £180,000; a profit share of £681,066 and a further accrued profit share of £433,025. Enviroplex's journal entries include a matching entry for the £681,066, together with an additional profit share of £437,409, slightly larger than the figure given here. I was unable to identify a matching entry in Enviroplex's journals for the £180,000 "shared costs".

295. The journals also show that Enviroplex paid profit shares totalling £110,781 to Bronze Nuts, Chemistree, LODL and Zanrex. None of these payments are disclosed in Enviroplex's 2010 statutory accounts. Three are made to group companies, so there is an exemption from disclosure, but LODL is not a group company.

296. A further journal entry increased management charges by £911,000 and decreased "salary recharge" by the same amount. This entry was made after Enviroplex had filed its statutory accounts with Companies House and after it had provided a copy of its statutory accounts to HMRC with its CT return. It was therefore not reflected in those accounts.

Enviroplex: Sch 36 Notice

297. The Sch 36 Notice lists 11 Items. Item 1 is similar to the same Item in the Sch 36 Notice for Chemistree, and constitutes statutory records for the same reasons.

298. Item 2 asks for details about the journal entries made on 26 April 2012 in relation to management charges and salaries, including the reasons why the adjustments were made after the accounts had been filed with Companies House and HMRC, and the name of the person making the adjustment. I find that the reason why the adjustment was made is a statutory record, because it is information necessary to ensure that the CT return is accurate. However, HMRC has not explained why it

needs the name of the person who made the adjustment, and I find that this information is not reasonably required. Item 2 is varied to remove this requirement.

299. Items 3-5 relate to management fees, and are statutory records. Items 6-8 relate to the profit share, and are either statutory records, or are reasonably required for the reasons given in relation to Blackbay.

300. Item 9 requires:

> "an explanation as to why this profitable trade ceased together with full details of any agreements (formal or informal) made regarding the selling or passing on of the trade to other individuals, corporate or non-corporate entities. Copies of any such agreements."

301. Most of this Item requires statutory records, but to the extent that it does not, I find that it is clearly reasonable to require that Enviroplex provide this information. The company managed to quadruple its turnover in the twelve month period to 31 December 2010, but then abruptly ceased to trade. The 2009 period produced a profit, and that for 2010 would have been profitable in the absence of the "profit shares" paid to other companies of over £1m.

302. Items 10-11 relate to subcontractors and locums and are statutory records.

Enviroplex: closure notice application

303. As regards the closure notices, HMRC's submissions were again similar to those made in relation to Blackbay, namely the complex intra-company transactions, the company's failure to respond to the Sch 36 Notice and the probability that there will be consequential impacts on later years. I agree with HMRC, essentially for the reasons explained in relation to Blackbay.

304. I add that the discrepancies between the journal entries on the one hand, and the statutory accounts for Enviroplex and other related companies on the other, mean that it is difficult for HMRC to place reliance on the statutory accounts, at least without further detailed work. I find that the enquiries should not be closed.

Gold Nuts

305. The following issues were before the Tribunal:

(1) applications to close HMRC's enquiries into the company's 2010, 2011 and 2012 corporation tax returns; and

(2) an appeal against the Sch 36 Notice issued on 2 April 2014 in relation to the 2012 year.

Gold Nuts: Facts

306. The statutory accounts for the year ended 31 December 2010 show that the company had losses of £7,774; in the two following years the accounts show losses of £23,976 and £44,644 respectively

307. The accounts for the year December 2012 state that the company carried out numerous transactions with LODL, and that at the balance sheet date it had "other loans" of £7,593,299, which are neither from other group companies or from a related party. Gold Nuts was in turn owed £451,658 by Symbio; £15,381 by BIPWA; £42,486 by LODL, £462,650 by Vospro and £1,322,499 by Noviscom.

Gold Nuts: Sch 36 Notice

308. The Sch 36 Notice requires 5 Items. Items 1-4 relate to the "other loans" figure of £7,593,299. Items 1, 3 and 4 are statutory records. Item 2 is "correspondence between the company and the creditor(s) relating to the loans". Mr Moss said that the company appeared to have received an interest-free loan of over £7.5m from an unrelated business, and that it was reasonable for HMRC to ask for the related correspondence. I agree with Mr Moss and find that it is entirely reasonable for the company to provide HMRC with the related correspondence.

309. Item 5 asks for a copy of the invoice relating to a fee paid to a tax adviser of £31,579. That too is a statutory record.

Gold Nuts: closure notice applications

310. HMRC submitted that the enquiry into the 2012 year should not be closed because the company had not responded to the Sch 36 Notice, and the other two years should also remain open because of the extensive intra-company transactions between its subsidiaries, which were opaque and difficult to unravel.

311. In relation to 2012, the interest free loan is a very significant sum and no explanation has been provided. Although as a balance sheet figure it has no direct effect on the profit for the year, it raises questions as to whether the company provided any *quid pro quo* in exchange for this money, and if so, whether that impacts the corporation tax computation. I therefore decide that there are reasonable grounds for not closing the enquiries into the 2012 year.

312. I carefully considered the closure notice positon for 2010 and 2011. Gold Nuts is the holding company for most of the Appellants, and I agree with HMRC that it is reasonable not to close these enquiries until the information required in relation to its subsidiaries and associated companies has been provided to, and considered by, HMRC. I therefore find that there are reasonable grounds for not directing that the enquiries be closed.

LODL

313. The only issues before the Tribunal was the company's applications to close HMRC's enquiries into its 2011 and 2012 corporation tax returns.

314. Although two Sch 36 Notices were issued on 2 April 2014, one relating to the 2011 year and one to the 2012 year, neither was appealed to HMRC.

315. On 1 July 2014, HMRC issued LODL with a penalty for failure to comply with the Sch 36 Notice relating to 2012. On 9 July 2014 LODL wrote to HMRC challenging the penalty, but that appeal was not notified to the Tribunal. On 21

August 2014, HMRC issued LODL with a Sch 36 daily penalty notice, which was not appealed to HMRC.

316. On 23 March 2016, LODL wrote to the Tribunal stating that it wanted the Sch 36 Notices and the penalty notices included in this hearing. The Tribunal responded on 5 May 2016, saying that LODL must either provide evidence that the notices had already been appealed/notified, as this was not evident from the Tribunal's records, or else lodge an application to appeal out of time. No further communication was received from the company.

LODL: Facts

317. The company is a supplier of pharmaceutical products. In the year to 31 December 2011 it sold £794,746 of goods to Blackbay; it also purchased goods from that company to the value of £221,509. In 2012, it sold £1.4m of goods to Blackbay and purchased goods of £133,549 from the same company. In 2012 Blackbay also charged LODL management costs of £50,000.

318. The statutory accounts record other intra-company transactions, including the following:

(1) at 31 December 2011, LODL owed £228,533 to Zanrex; this was reduced by £55,502 of "salary costs recharged" from Zanrex to LODL; and

(2) as at 31 December 2012, the company owed Gold Nuts £42,486 and was owed £213,368 by Chemistree, an amount which had remained unchanged since 2010, see §268.

319. LODL's statutory accounts state that in 2010 Mr Budhdeo owed LODL £110,227; this increased by £75,890 during 2011 and by a further £23,875 in 2012, making a total of £209,992.

320. As set out in other paragraphs of this decision, the consolidated accounts of Gold Nuts disclose intra-company transactions between LODL and many related companies, including in particular Blackbay, Chemistree, Venture Pharmacies and Zanrex.

LODL: Sch 36 Notices and closure notice applications

321. Both Sch 36 Notices require that the company provide:

(1) Items related to the management fees paid by the company; and

(2) Items related to the directors' loan accounts.

322. HMRC's position was that the company has not responded to either Sch 36 Notice and that it would be premature to direct that the enquiries be closed.

323. It is clear that LODL is involved in the complex intra-group transactions which have been noted in relation to the appeals and applications set out elsewhere in this decision. There is a high probability, given the nature, range and extent of the Items required under the Sch 36 Notices, that they will "produce information enabling the

company's corporation tax liability to be adjusted to a level differing from that shown in the return", as was the position in *Estate4*. If HMRC was required to close these enquiries now, it would be forced to make "best judgement" assessments without knowledge of the full facts, given that further information is likely to be made available when the Appellants comply with the Sch 36 Notices. It would be "inappropriate and a waste of everybody's time" as the tribunal put it in *Stephen Price*, to direct that the enquiries be closed now.

Noviscom

324. The following issues were before the Tribunal:

(1) an application to close HMRC's enquiry into the company's 2012 corporation tax return;

(2) an appeal against the Sch 36 Notice issued on 2 April 2014 in relation to the 2012 year; and

(3) an appeal against the fixed penalty issued on 1 July 2014 for non-compliance with that Sch 36 Notice.

325. On 21 August 2014, HMRC issued a notice charging daily penalties for the continuing failure to comply with the Sch 36 Notice. This was not appealed to HMRC and is not before the Tribunal.

Noviscom: Facts

326. Noviscom's role is to provide pharmacy regulatory services to the group and third parties. The statutory accounts state that it made a profit of £148,566 in the year to 31 July 2012, its first year of operation.

327. As at that date the statutory accounts state that Noviscom:

(1) was owed £2m, including £823k from Blackbay, £83k from R Square, £41k from Symbio Europe and £253k from Qualapharm, of which Mrs Coosna's husband was the director and shareholder; and

(2) owed £1.9m to creditors, including £201k to Chemistree Homecare and £346k to Eclipse.

328. The notes to the accounts set out the following loans to directors, all of which were made during the year, were not repaid and have no specific repayment dates.

Mr Budhdeo	£204,844
Mr Sanjay Budhdeo	£204,844
Mr Hundal	£153,633
Mr Mathew	£51,211
Mrs Coosna	£19,182

329. Included in legal and professional costs is a sum of £304,174 entitled "legal costs – action against pharma products supplier". The notes to the accounts say that this was incurred on behalf of Chemistree Homecare. The notes also say that a sum of £14,000 was paid to R Square as rent.

330. The 2012 consolidated account for Gold Nuts list a number of transactions between Noviscom and Blackbay, including a "professional fee" of £371,818 charged by Noviscom to Blackbay and "management fees" of £400,000 charged by Blackbay to Noviscom; they also record a further "management fee" charged by Venture Pharmacies to Noviscom of £56,552.

Noviscom: Sch 36 Notice and penalty

331. The Sch 36 Notice requires nine Items. These include the company's trial balance, linking papers, accounting records, directors' loan and/or current accounts, invoices, contracts to support various items in the accounts including costs shown as payable to Eclipse and the legal costs paid in relation to the dispute with the pharma product supplier. All the Items are statutory records and so not appealable.

332. As the Sch 36 Notice requires the provision of statutory records, the company cannot have a reasonable excuse for non-compliance with the Notice, and I confirm that Notice.

Noviscom: closure notice application

333. As with Blackbay and Chemistree, Noviscom's accounts disclose numerous transactions with linked companies. HMRC made similar submissions in relation to Noviscom as in relation to those two companies. I agree with HMRC, for essentially the same reasons as set out in relation to those companies.

R Square

334. The following issues were before the Tribunal:

(1) applications to close HMRC's enquiries into the company's 2011 and 2012 corporation tax returns; and

(2) an appeal against the Sch 36 Notice issued on 2 April 2014 in relation to the 2011 year.

R Square: Facts

335. The company is a property holding company. At the end of 2012 it owned depots in Newmarket, Ashford and Fordingbridge, along with two other properties. Its profit for the year ended 2011 was £5,606 and that for 2012 was £6,060.

336. The 2012 consolidated accounts for Gold Nuts state that Blackbay, Bronze Nuts, Chemistree Homecare, Venture Pharmacies and Zanrex "have given omnibus guarantee and a set-off agreement to a bank" in respect of liabilities incurred by R Square.

R Square: Sch 36 Notice and closure notice applications

337. The Sch 36 Notice asks for invoices and contracts/agreements describing services received by the company. These are both statutory records.

338. As regards the closure notice applications, HMRC's position was that the enquiries should remain open because the company had not provided the information requested by the Sch 36 Notice, and because of the linkage between the company and other group/related companies.

339. I agree that the enquiries should not be closed. Again, this company is part of the complicated intra-company network and owns some of the major assets which it is reasonable to assume have been used by group and/or related companies. The Sch 36 Notice has not yet been responded to. It is premature to direct closure of the enquiries.

Venture Pharmacies

340. The following issues were before the Tribunal:

(1) applications to close HMRC's enquiries into the company's 2010, 2011 and 2012 corporation tax returns; and

(2) an appeal against the Sch 36 Notices issued on 2 April 2014 in relation to the same three years.

Venture Pharmacies: Facts

341. Venture Pharmacies provides marketing and IT services for the Gold Nuts group and related companies. For the year ended December 2010, its statutory accounts state that its turnover was £934k, being "management charges receivable" and its administrative expenses were £884k, leaving a profit of £50k.

342. The 2010 link papers provided to HMRC state that the company paid management charges of £69k, some of which relate to LODL; others are described as "Head Office Cost Allocation". The data also shows management charges receivable of £603k from related and connected companies. Sixteen of the management charges were posted on 10 February 2011. One amount, for £226,270, was posted on 31 December 2011, twelve months after the end of the financial year in question. The statutory accounts were filed at Companies House on 4 October 2011, around two months before that journal was posted. As a result, that £226,270 is not reflected in the 2010 statutory accounts, although that is the year to which the journal relates.

343. The company's 2010 year-end journals also include a sum of £15,238 transferred to Blackbay, relating to "Samir Budhdeo balance"; a further sum of £1,500 also transferred to Blackbay, relating to Mr Pravin Budhdeo and £13,263 relating to "directors' Goa trip".

344. The 2010 statutory accounts state that the company has negative net assets of £147k; this is because creditors (at £847k) exceeded debtors (£700k). Of the creditors, £689K are intra-company; in addition, £49k was owed to Eclipse. Most of the remaining balance was owed to HMRC by way of social security and other taxes. Of the debtors, £665k are intra-company, plus a further £18k owned by LODL.

Almost all the debtors and creditors therefore arise from transactions with related companies. The company's administrative expenses include £467k of wages and salaries, plus £80k of "establishment costs".

345. In addition to the £49k owed to Eclipse, the statutory accounts state that a further £174k was paid to that company in the course of the year for "business process outsourcing", making a total of £223k. This is different from the link papers provided to HMRC, which list twelve payments due to Eclipse for business process outsourcing, one for each month of the year, totalling £199k; all these payments have a posting date of 17 February 2011.

346. The statutory accounts for the following year state that turnover has increased slightly to £1m and that expenses have increased to around the same figure. After finance charges the company made a small loss of £2k. Amounts payable to Eclipse have almost doubled, to £449k (around 50% of total expenses), as have amounts owed to group undertakings, which increased from £689k to £1.1m. Amounts owed by group undertakings increased from £665k to £937k.

347. The statutory accounts for 2012 state turnover has increased to £1,414k, and expenses increased to £1,442k. After adjustments for finance costs and depreciation the company reported a loss of £28k. Amounts payable to Eclipse are shown as £497k (35% of total expenses); a further £73k of "IT support and maintenance charges" was also deducted in arriving at the profit.

348. Inter-company balances have significantly reduced: sums owed *to* group companies has reduced from £937k to £1.5k, while amounts owed *by* group companies has reduced from £937k to £93k.

349. In the three years, the company deducted the following amounts as "wages and salaries": £467k for 2010, £325k for 2011 and £579k for 2012. In addition, directors' remuneration is stated to be nil for 2010, £12,792 for 2011 and £26,250 for 2012.

Venture Pharmacies: Sch 36 Notice for 2010

350. The 2010 Sch 36 Notice contains 11 Items. The first asks for a narrative explanation of the intra-company journal entries, and is a statutory record. Items 2-4 relate to management fees payable and are all statutory records.

351. Items 5-10 relate to the amounts shown as paid or owed to Eclipse. Of those Items:

(1) Items 5,7 and 8 are clearly statutory records.

(2) Item 6 requires that Venture Pharmacies provide "correspondence regarding the negotiation and agreement to the provision of those services". HMRC submitted that it was reasonable to require these documents in order to understand the nature and commercial benefit of the payments made. I agree: the company paid £223k to the Indian company in that year, around 25% of its total expenses. It is clearly reasonable that it provide information about the agreements which underpin those payments.

(3) Item 9 requires that that Venture Pharmacies explain why the computer records show all the payments made to Eclipse as having been made on 17 February 2011. In HMRC's view, it was reasonable to require this information, as it would help to determine whether the payments had been correctly treated for tax purposes. Again, I agree: these amounts could belong to the following year. I also observe that they do not easily reconcile with the figures in the linking papers.

(4) Item 10 asked for details of the directors' trip to Goa, including invoices (which are statutory records) but also details of who travelled, copies of booking details, the length of the trip and its purpose. HMRC drew attention to the fact that the accounts data provided by the company stated that all of the £13,263 was described as "air fare" and the sum also appeared to have been recharged to Blackbay. In HMRC's submission the information and documents were reasonably required to ensure that the P11Ds for the company had been correctly completed. I accept HMRC's submissions.

352. Item 11 concerns car benefits and is a request for statutory records.

Venture Pharmacies: Sch 36 Notices for 2011 and 2012

353. The Sch 36 Notice for 2011 lists five Items:

(1) Items 1-4 relate to the £499k paid or payable to Eclipse for business process outsourcing. Of these all but Item 2 are statutory records. Item 2 is the same as Item 6 for 2010, namely "correspondence regarding the negotiation and agreement to the provision of those services". I agree that it is reasonable for the company to provide this Item, for the reason given in relation to Item 6 for 2010.

(2) Item 5 is the same as Item 11 of 2010, and is a statutory record.

354. The Sch 36 Notice for 2012 also contains 5 Items. Items 1 and 2 relate to Eclipse and are statutory records; Items 3 and 4 relate to payments to locums and subcontractors, and are also statutory records, as is Item 5, which relates to company car benefits.

Venture Pharmacies: closure notice applications

355. HMRC's submissions on the closure notices were again similar to those made in relation to Blackbay. I agree with HMRC, essentially for the same reasons as set out in relation to Blackbay, and also because of the very significant payments for "business process outsourcing" being made to Eclipse, a related company based in India. Those sums range from 25% of total expenses in 2010 to 50% in 2011. These are high figures, particularly taking into account that Venture Pharmacies' own trade is the provision of marketing and IT services, and that it incurred UK wages and salaries of £467k for 2010, £325k for 2011 and £579k for 2012.

356. The information required by the Sch 36 Notices will allow HMRC to make a more informed decision as to the taxable profits of this company, and thus whether to

confirm, increase or decrease the figures in its CT returns. It is again premature to close the enquiries.

Vertex

357. The only issue before the Tribunal was the company's application to close HMRC's enquiry into its 2011 corporation tax return.

Vertex: Facts

358. Vertex is another property holding company. It owns the Gold Nuts group head office in Curo Park, Milton Keynes, and another property in Ipswich. Its previous name was Arctic Express Ltd ("Arctic Express").

359. Its turnover is made up of rent receivable, and in 2011 it made a profit of £19,414. Fixed assets disclosed in the accounts at the end of that year were £1.4m. Creditors totalled £1.5m, including £1.1m on which security had been given. The amount owed to creditors was therefore more than the value of the fixed assets. Nevertheless, the figure for cash and debtors meant that the company had net assets of £67k. It is therefore surprising that Note 1 of the accounts states that:

> "The financial statements show that the net current liabilities exceeded the net current assets. The company is therefore reliant on the support of the creditors…"

360. Blackbay's 2010 journal entries include the transfer from Vertex of £4,792, described as "Sanjay Budhdeo balance transfer". Zanrex's journal entries include an amount of £2,937 owed to Vertex, described as being a "trade creditor" as well as a loan of £33,000 repaid to Mr Pravin Budhdeo on behalf of Vertex.

361. The Notes to Gold Nuts consolidated accounts for 2011 state that:

> "At the balance sheet date, included within Freehold Property was a balance of £Nil (31 12 10 £360,216) in respect of a property owned by the subsidiary company, Artic Express Limited which was held in the name of the Director, Sanjay Budhdeo, who held the title to the property in trust to the order of Artic Express Limited. An associated bank loan balance of £Nil (31 12 10 £191,700) in the name of the Director, Sanjay Budhdeo has been included in the Bank Loans balance at the balance sheet date. A total bank loan interest of £2,014 (31 12 10 £4,793), rental income of £10,833 (31 12 10 £26,000) and depreciation of £Nil (31 12 10 £5,181) has been included in the Profit & Loss Account for the year in respect of this property and the bank loan."

Vertex: closure notice application

362. The enquiry was been opened on a "protective" basis. HMRC has not asked for any information or documents from Vertex, either informally or by way of a Sch 36 Notice. HMRC submitted that the enquiry should remain open because relevant matters may come out of the enquiries and Sch 36 Notices issued to the other group/related companies, which may also disclose matters relevant to the directors of Vertex.

363. It is clear from the company's statutory accounts that it charges rent to linked companies for their use of its properties. I considered whether it was reasonable to keep the enquiry open on the basis that the rationale and quantum of these intra-company charges is likely to emerge from information provided by those companies in compliance with the Sch 36 Notices.

364. However, there are relatively few 2011 Sch 36 Notices – for Blackbay, Bronze Nuts, Gold Nuts, LODL and Zanrex. I could not see that any of the documents or information required by those Notices would be relevant to Vertex's receipt of rental income.

365. I noted that the 2010 journals for Blackbay and Zanrex indicated that the intra-company transactions and those with directors encompassed matters other than rent, so the same may be true in 2011. I therefore considered whether it was reasonable to keep the enquiry open for that reason. But again, I was unable to see how any related information or documents would emerge from the 2011 Sch 36 Notices.

366. It is of course possible that information or documents disclosed in relation to 2010 or 2012 Sch 36 Notices for another company will provide information relevant to the 2011 enquiry into Vertex. But that is mere speculation, and it is not reasonable to keep the enquiry open on that basis.

367. HMRC has not made any enquiries, or issued a Sch 36 Notice, to find out about:

(1) the property "owned by the subsidiary company, Artic Express Limited which was held in the name of the Director, Sanjay Budhdeo, who held the title to the property in trust to the order of Artic Express Limited";

(2) the associated bank loan; or

(3) the repayment of £33,000 to Mr Pravin Budhdeo by Zanrex on behalf of Vertex, which occurred in 2010.

368. HMRC also made no submissions in relation to any of those matters.

369. I find that HMRC has not met the burden of showing that this enquiry must remain open, and I direct that it be closed within 30 days from the issuance of this decision. That does not of course prevent HMRC from issuing a discovery assessment in the future, should the relevant statutory tests be satisfied.

Zanrex

370. The following issues were before the Tribunal:

(1) applications to close HMRC's enquiries into the company's 2010, 2011 and 2012 corporation tax returns; and

(2) appeals against the Sch 36 Notices issued on 2 April 2014 in relation to the same three tax years.

Zanrex: Facts

371. Zanrex owns and runs a number of pharmacies; by the end of 2012 these were seven in number. Its statutory accounts state that turnover for 2010 was £8.4m from sales of goods and services; cost of sales was £7m, and gross profit was £167k after administrative expenses of £1.2m. Those expenses included an amount paid to "subcontractors and locums" of £266k; goodwill depreciation of £97k and management charges of £82k.

372. Zanrex received other operating income of £207k, of which £199k was from "management charges" and the balance from rent. It also "sold the goodwill of a pharmacy shop that it owned" on which it realised a profit of £563k. After finance costs of £222k, the company's profit before tax was £767k.

373. The accounts also state that, as at 31 December 2010, it owned goodwill of £567k and other fixed assets of £93k. It had negative net assets of £1.3m, owing £1m in bank loans; other creditors were £2.8m. Of that figure, £520k was owed to group undertakings.

374. The company's debtors were £1.7m, of which £970k related to group undertakings. Further sums were owed to and from linked companies: £7,340 was owed to DCP, while £12,201 was owed by Budhdeo Holdings and a further £19,786 by the Kris Adams Partnership Ltd ("Kris Adams"), a company of which Mr Budhdeo was a director and shareholder.

375. The consolidated accounts of Gold Nuts state that £150k of goods were sold by Zanrex on behalf of LODL; that LODL was paid £45k for purchases, and that a further £100k of wages and salaries was recharged from Zanrex to LODL.

376. There are 55 year-end journal entries for 2010, which include:

(1) accrued profit shares from Enviroplex of £255k) and from another linked company, Eurobay Homecare Ltd ("Eurobay") of £119k;

(2) an accrual for management charges of £199k payable to Eurobay;

(3) other entries relating to Eurobay, including a credit to trade debtors and a matching debit of £887k to an account balance in that company's name;

(4) the transfer to Blackbay of £29,618 relating to Mr Budhdeo, and a further sum of £62,919 described as "Pravin Budhdeo balance on behalf of Samir Budhdeo";

(5) a loan of £33,000 repaid to Mr Pravin Budhdeo "on behalf of group undertaking Arctic Express" as noted earlier in this decision;

(6) an amount of £24,768 to eliminate the undepreciated value of a vehicle disposed of during the year. The statutory accounts state that a vehicle was transferred from the company to Mr Budhdeo at a value of £6,500; and

(7) a "rectification" of £297k described as "Chemistree Limited transactions misposted into the Bronze Nuts account".

377. The 2011 statutory accounts state that turnover has fallen to £5m, a drop of 40%, following the disposal of three shops for a profit of £751k. Bank loans reduced from £1m to £267k. Management fee income was £90k and management charges payable were £48k. A sum of £174k was payable to "subcontractors and locums" and legal/professional fees were £34k. The company made an operational loss of £325k; after the profit on disposals was included, it made a net profit of £426k.

378. Amounts owed by group undertakings at the end of 2011 was £1.3m and amounts owed to group undertakings was £766k. The balances with DCP and Kris Adams were unchanged and the amount owed by Budhdeo Holdings increased slightly to £12,806; sums totalling £14k were payable to Vospro for "IT support and maintenance". An amount of £229k was charged to LODL, which in turn charged salary costs of £56k to Zanrex.

379. The statutory accounts for 2012 state that the company's turnover was £3m, a further significant fall, following the sale of another shop on which a loss of £41k was recorded, and there was an overall net loss of £380k. No management charges were receivable, in contrast to earlier years, but £36k in management charges was payable. Legal and professional fees tripled to £102k; the CT return disclosed that £100k of this related to "action against pharma supplier".

380. Unlike previous years, no amounts at all are shown as due to or from group companies. The intra-company balances with Kris Adams and DC Procurements were unchanged and a further sum of £17k was paid to Vospro. No figure is shown for the balance owed by Budhdeo Holdings, even by way of comparative. The notes to the accounts state that £18,499 was advanced to Mr Budhdeo and repaid in the year.

Zanrex: Sch 36 Notice for 2010

381. The Sch 36 Notice for 2010 contains 11 Items (misnumbered as 12 Items). The first asks for the consolidation of the intercompany position as described in the link papers, and any intercompany reconciliations, supported by detailed narrative as to the rationale behind the individual transactions. These are statutory records.

382. Items 2-4 relate to management fees incurred and received; these are statutory records. Items 5-7 relate to profit shares. HMRC's submissions were similar to those they made in relation to Blackbay and my conclusions are also the same. Item 8 relates to loan accounts, Items 9-10 to subcontractors/locums and Item 11 to company cars: these are all statutory records.

Zanrex: Sch 36 Notices for 2011 and 2012

383. The Sch 36 Notice for 2011 has four Items, relating to debtors, subcontractors/locums and company cars: they are all statutory records.

384. The Sch 36 Notice for 2012 has six Items. Item 1 relates to the legal costs relating to the "action against pharma supplier" and are statutory records. Item 2 requires the provision of "fully annotated" directors' loan and current accounts: these too are statutory records.

385. Item 3 requires "full details of any sources for credits to the loan accounts, supported by documentary evidence". Whether this information and any related documents are statutory records depends on the source of the credits: if that source is from elsewhere within the company, by way of a debit against another account, then it is a statutory record. If the source is external, such as a bank account held by the director, it is not a statutory record. However, as already noted, a loan to a director which is not repaid within nine months of the year end triggers a further tax charge under CTA 2010, s 455. Although no journals have been provided in relation to 2012, those for 2010 disclose that a loan of £33,000 which had been made to Mr Pravin Budhdeo was repaid by Zanrex "on behalf of group undertaking Arctic Express". It is unusual for one company to repay a loan made by another, and the purpose of the loan is not given. Moreover, it is not disclosed in Zanrex's accounts, the consolidated accounts for Gold Nuts or in the accounts for Vertex. Taking both s 455 and that evidence into account, I find that it is reasonable for HMRC to require the information in Item 3.

386. Items 4 and 5 relate to subcontractors/locums and Item 6 to car benefits; both are statutory records.

Zanrex: closure notice applications

387. HMRC's submissions here were again similar to those made in relation to Blackbay. I agree that, like Blackbay, Zanrex's financial information discloses a complicated interplay between this company and other group/related companies, with significant balances in both directions and numerous high value post-year end adjustments in 2010, the only year for which journal entries have been provided. Yet by December 2012 there is no sum payable or receivable from any group company.

388. HMRC is still waiting for Zanrex to supply the documentation requested by the Sch 36 Notices. This is extensive and can be expected to shed significant light on the company's tax position for the three years in question. I do not direct that the enquiries be closed.

Symbio

389. The following issues were before the Tribunal:

(1) an application to close HMRC's enquiry into the partnership's return for the period from 1 July 2012 to 31 March 2013;

(2) an appeal against the Sch 36 Notice issued on 17 July 2014 in relation to that period; and

(3) an appeal against the penalty issued on 29 August 2014 for failure to comply with the Sch 36 Notice.

Symbio: findings of fact about the partnership

390. Symbio was incorporated on 11 May 2012 and began trading as a supplier of solar energy on 1 July 2012. It has three members, Mr Budhdeo, Mr Hundal and Mr Mathew. It is VAT registered and Mr Mathew is the nominated partner.

391. The statutory accounts for the first period of trading state that the partnership had turnover of £7,096; cost of sales of £4,286; interest payable of £1,987 and administrative expenses of £64,197, giving a loss for the period of £63,374, which was divided equally between the partners.

392. The accounts also state that the partnership capitalised the value of the future income stream from solar panels at £407k and the value of licences at £575k; the balance sheet therefore includes intangible assets of £983k, which were reduced by amortisation of £27k. Fixed assets are £162k and stocks/work in progress £180k. Creditors total £1,028k, including "accrued expenses" of £350k; debtors total £71k and the balance sheet includes a credit of £377k for "deferred income".

393. The Notes to the accounts say that Symbio was charged fees of £350k by Blackbay and £54k by Venture Pharmacies, and that these fees have been "capitalised into licences". A further £102k relates to "purchase of solar panels through Blackbay" together with associated freight charges. Venture Pharmacies also charged Symbio a fee of £14k for "business process outsourcing".

394. The partnership owes £623k to Gold Nuts and sold electricity to Mr Budhdeo, Blackbay, Zanrex and Corona for a total of £1,667. Its tax return states that additions of £346k were made to the "special pool" for capital allowances purposes.

395. The statutory accounts for the following period, which runs from 6 April 2013 to 31 March 2014, state that:

> "During the period the LLP has sold its net assets and the business with the consideration of £6,000,000 to Symbio Energy Limited, a company in which members Shamir P Budhdeo, Amarjit S Hundal and Joshy Mathew were Directors at the balance sheet date."

396. HMRC has opened an enquiry into Symbio's return for that second year, and issued a Sch 36 Notice. That Notice is not before this Tribunal, but Mr Moss's evidence, which is not in dispute, is that the partnership has not responded to that Notice.

Symbio: findings of fact about opening the enquiry and issuing the Notice

397. As already set out earlier in this decision, on 29 April 2014 Mr Douglass opened an enquiry into Symbio's partnership return by writing to Mr Mathew as the nominated partner. He also wrote separately to each of the partners on the same day, saying:

> "if the partnership return is not correct, that may mean the figures on your personal tax return are not correct. If this is the case, we may need to amend your return. So that we can make any necessary amendments to your personal return for the year ended 5 April 2013, we are now treating your personal return as if it is also being checked. We have written to you separately about our check of other aspects of your personal return…"

398. On 12 May 2014 Symbio responded, asking for the basis on which the enquiry had been opened, and suggesting that the information and documents be provided to HMRC at an onsite meeting, because the partnership was not comfortable providing the information by post, since HMRC had previously breached copyright and the DPA.

399. On 2 June 2014 Mr Douglass replied, saying he was unaware of any complaint from Symbio about breaches of copyright or the DPA and that HMRC did not have to give reasons why the enquiry had been opened; he also made an informal request for specified information and documents. He said he would be happy to meet at Symbio's offices to discuss the specific risks he wished to address and to collect the requested information and documents but that he was "unable to agree to a meeting where HMRC's officers may be video recorded". He suggested that the meeting, instead, be held at an HMRC office.

400. On 6 June 2014 Symbio replied, saying that the partnership suspected that the enquiry into Symbio had been opened because of links between it and the Gold Nuts group. The letter went on to say that the documents would be available for inspection at the partnership's offices, and that all visitors were subject to CCTV surveillance.

401. On 18 June 2014 Mr Douglass responded, stating that his object in opening the enquiry was to check that the return was complete and correct. He also said that HMRC would be unable to inspect the documents at the partnership's premises if the inspection was to be video-recorded, but would be willing for a sound recording to be made as long as a copy of that recording was made available to HMRC. Failing that, the documents and information must either be posted, or delivered to a local HMRC office if the partnership were concerned about postal charges. In the course of his witness evidence, Mr Douglass said that he objected to the CCTV recordings because "to be under video scrutiny for a long period of time would be too stressful for [HMRC's] inspectors at the premises".

402. On 17 July 2014, no reply having been received to his letter of 18 June, Mr Douglass issued Mr Matthew (as the nominated partner) with a Notice issued under FA 2008, Sch 36, paras 1 and 2. Mr Douglass said:

> "I am issuing this notice under paragraph 1 of Schedule 36 of the Finance Act 2008…I am also issuing this notice to you [Mr Mathew] as a third party…because I am also checking the tax position of the other partners in the Symbio Energy LLP partnership."

403. The Notice contained 11 Items, all of which relate entirely to matters set out on the face of Symbio's statutory accounts. None ask for information/documents related to other elements of the partners' personal tax position. The Notice said that the Items were to be sent to HMRC by post to Mr Douglass's address.

Symbio: grounds of appeal

404. Symbio appealed against the Notice on the basis that:

(1) it was issued as part of wider and unjustified enquiries into the Companies;

(2) HMRC have not addressed complaints made by the other Appellants that HMRC has breached copyright and the DPA by passing copies of information provided by some of the Companies to Mrs Murphy; and

(3) HMRC unreasonably rejected Symbio's suggestion, made on 12 May 2014, that the information and documents be provided to HMRC at an onsite meeting.

405. I read the first of these grounds as a reiteration of the Appellants' submissions on "dominant purpose", which have already been fully considered earlier in this decision.

406. In relation to the second ground, the Tribunal has no jurisdiction to resolve complaints over either the DPA or copyright law. I note, however, that HMRC responded to Symbio by referring to the Commissioners for Revenue and Customs Act 2005, s 17(1), which provides that "Information acquired by the Revenue and Customs in connection with a function may be used by them in connection with any other function".

407. Symbio's third ground relates to the method by which the Items were to be delivered. I find that it was entirely reasonable for Mr Douglass to have refused to agree to the inspection of the documents being recorded on CCTV, for the reason he gave in his oral evidence. It was also reasonable to have specified that the Items be delivered by post, particularly as Mr Douglass had previously suggested two alternatives, making a sound recording and delivering the material to an HMRC office. Symbio responded to neither suggestion.

408. Symbio did not make any submissions about particular Items. In the next section I nevertheless consider whether each of the Items was a statutory record, and if not, whether it was reasonably required.

Symbio: Items required by the Notice

409. Item 1 requires "fully annotated copies of any loan and/or capital account operated by the partners". These are statutory records.

410. Items 2-4 require the partnership to provide full details and supporting documentation for the £575k additions to licences; the £407k addition to "guaranteed energy" and the £350k accrued expenses. These too are statutory records.

411. Item 5 requires "a full breakdown of the £401,938 deferred income figure along with supporting documentation". This figure appears to be a typographical error for £376,791: the accounts show that £401,938 is the net value of the guaranteed income after amortisation for the year. However, as this Item requires statutory records, it is not under appeal to the Tribunal. It is for HMRC to make any relevant amendment: I have no power to vary the Notice so as to correct the error.

412. Item 6 requires sales invoices, and Item 7 full details of the addition to the special pool of £346k. Both are statutory records.

413. Items 8 and 9 require documentation to support the charges from Venture Pharmacies of £54k and from Blackbay of £350k, along with an explanation of why the amounts were capitalised into licences. The first part of each Item is clearly a statutory record. The related explanation also a statutory record, because the reason for capitalisation must be known before the partnership can produce a correct return. In any event, these explanations are reasonably required for the purposes of checking the partnership's tax position, because the licence is a major asset of the partnership. Its value is given as £407k, of which £404k is derived from charges made by Blackbay and Venture Pharmacies, companies connected with the partners. It is also unclear what services had been provided, given that Blackbay's trade is to supply pharmaceutical drugs and services to care homes, and Venture Pharmacies' trade is to provide marketing and IT.

414. Item 10 requires documentation relating to the £102k purchase of solar panels through Blackbay, along with an explanation as to why they were purchased through that company. The first part of this Item is a statutory record. The second is reasonably required for the same reasons as set out in the immediately preceding paragraph.

415. Item 11 requires an explanation as to the circumstances in which electricity was supplied to Mr Budhdeo. It is entirely reasonable for HMRC to require with information about a supply of the partnership's main product to one of the partners.

416. It follows that I uphold in full the parts of the Notice which are under appeal.

Symbio: penalty

417. It was not in dispute that Symbio has not complied with the Sch 36 Notice. The statute says that a penalty "does not arise" if the person satisfies the tribunal that he has a reasonable excuse for the failure.

418. The partnership's position is that the original Notice was unreasonable for the reasons submitted, and this provides a defence to the penalty. For the reasons I have given, the Items required by the Notice are either statutory records, or reasonably required. I find that there is no reasonable excuse for the failure to comply, and I uphold the penalty.

Symbio: application to close the enquiry

419. Symbio asked for the enquiry to be closed because it has not been "made aware of the risk identified behind issuance of the current check". However, as already stated earlier in this decision, HMRC is not obliged to give a reason for opening an enquiry, so cannot be required to make the partnership aware of the risk which is being checked. That is not a ground to close the enquiry.

420. Symbio also submitted that the enquiry was "the result of a fishing expedition that the HMRC has instituted into the accounts of our associate companies"; that it

was not "an investigation based on specific risks" but rather "of speculative origin and definitely not one under the legislative mandate".

421. The "legislative mandate" at issue here is that HMRC must show that there is a reasonable basis for continuing the enquiry once it has been opened. HMRC submitted that there were reasonable grounds for not closing the enquiry, because the partnership had not responded to any part of the Sch 36 Notice. Mr Moss's witness statement said:

> "My enquiry has been open for two and a half years; rather than being in a position to close my review, I have not been able to start it."

422. HMRC also submitted that it was not in a position to close the enquiry because of linkage between the 2013 period and that for 2014, given that the assets and business of the partnership is shown in the statutory accounts to have been sold for £6m to a limited company owned by the partners.

423. It is clear from the Items required by the Notice that HMRC has a reasonable basis for keeping the enquiry open. Those Items include entirely sensible and proportionate requests for information/documents about the major assets in the partnership's accounts and about transactions with other Appellants, and none of this material has been supplied. The material requested is, in the words of the tribunal in *Khan*, "genuinely significant information which needs to be provided". I come to that conclusion without taking into account the fact that in 2014 the business and assets were sold to a company owned by the partners, although I agree with HMRC that it provides a further reason for not closing the enquiry.

Mr Budhdeo

424. As already noted earlier in this decision, on 22 January 2014 Mrs Murphy opened enquiries into Mr Budhdeo's 2011-12 SA return. On 2 April 2014 she issued him with a Sch 36 Notice; which was followed on 7 May 2014 by a £300 penalty for failure to comply with that Notice. On 8 April 2014 she opened an enquiry into his 2012-13 SA return.

425. Mr Budhdeo applied to close enquiries into his SA returns for tax years 2009-10 and 2010-11, but no enquiries had in fact been opened for those years. HMRC pointed this out to Mr Budhdeo and the Tribunal in correspondence, and suggested that Mr Budhdeo's application be treated as relating to the enquiries for tax years 2011-12 and 2012-13. The Tribunal concurred and Mr Budhdeo's submissions were made on that basis.

426. The following issues were therefore before the Tribunal:

(1) applications to close HMRC's enquiries into Mr Budhdeo's SA returns for the tax years 2011-12 and 2012-13;

(2) an appeal against the Sch 36 Notice issued on 2 April 2014; and

(3) an appeal against the penalty issued on 7 May 2014 for failure to comply with the Sch 36 Notice.

Mr Budhdeo: further facts

427. Specific facts relating to Mr Budhdeo's position are set out at §74ff and are not repeated here. In addition, the statutory accounts of the Companies disclose significant loans: for instance, Blackbay's 2012 accounts state that Mr Budhdeo borrowed £360k in that calendar year, while Noviscom's accounts for the year ended 31 July 2012 state that that he borrowed £205k.

Mr Budhdeo's Sch 36 Notice: overall submissions

428. Mr Budhdeo's submissions on the Sch 36 Notice related to dominant purpose, the lack of explanation as to why the enquiries had been opened, and malice on the part of HMRC. All those submissions have been considered earlier in this decision.

429. Mrs Murphy's evidence was that the Sch 36 Notice had been issued because she had "serious concerns" about whether Mr Budhdeo's means, as disclosed in his SA returns, were sufficient to support himself, his wife and four children and to pay the council tax and utility bills on his property.

430. She drew attention to the fact that Mr Budhdeo's income in his SA return for 2008-09 disclosed a salary of £607,500 plus benefits and/or expenses of a further £8,674, making a total of £616,174; in the following years, the taxable income in his SA returns had reduced to only 1% of that amount, but the Companies' statutory accounts disclose large loans. She also referred to the 2015 disclosure by Mr Budhdeo that his net assets were around £14.5m and that £8k per month was payable from his directors' current account by way of living expenses.

431. Taking all the above into account, she said:

> "There is a risk that Mr Budhdeo is supporting his lifestyle by using his position in the companies to extract funds from the companies without returning the appropriate amount of tax."

Mr Budhdeo: Items in the Sch 36 Notice

432. The list of Items set out in the Notice is prefaced by the words "we need the following information or documents for the period 6 April 2011 to 5 April 2012 unless otherwise stated". It goes on to list 9 Items.

433. Item 1 required Mr Budhdeo to complete a bank account certificate, setting out all bank accounts, savings accounts, loan accounts and similar, whether in his own name or jointly, and whether in the UK or overseas, held during the 2011-12 tax year. Item 2 required that he complete a credit card certificate by including all credit, debit or store cards whether in his own name or jointly, and whether in the UK or overseas during the 2011-12 tax year. Blank forms headed "certificate of bank account operated" and "certificate of credit cards operated" were attached to the Notice.

434. Given the sudden drop in Mr Budhdeo's income to a tiny fraction of its former level, taken together with the apparent gap between that disclosed income and the expenditure which is likely to be required to maintain his home and family, I agree with Mrs Murphy that both Items are reasonably required. In coming to that conclusion I take into account the regular monthly expenditure listed by Mr Budhdeo

in relation to 2015, which includes a number of what appear to be long-standing commitments: his mortgage and council tax, his children's school fees, and his parents' living costs. It is reasonable to assume that he had similar costs in 2011-12.

435. Item 3 required Mr Budhdeo to provide a schedule of any shares held in any entities, including as a nominee or in another name, showing the name and address of entity, date and cost of acquisition, date and value of sale, and including interests in partnerships and joint ventures. If Mr Budhdeo has bought and sold shares during the year, that information and the related documents need to be retained for the purposes of his SA return, and so are statutory records. But if there are no disposals and no distributions, his shareholdings will be irrelevant to his tax return. I have no information to suggest that he made disposals, and if he did receive dividends, these are not included in his SA return.

436. I have therefore proceeded on the basis that the information required by Item 3 is not a statutory record. However, given the drop in Mr Budhdeo's disclosed income, the gap between that and his likely expenditure; his shareholdings in a significant number of companies, including in particular Budhdeo Holdings and Eclipse, I find that it is reasonable for HMRC to require this information.

437. Item 4 requires a list of trusts registered in any country of the world in which Mr Budhdeo acted as settlor, trustee or beneficiary during the same period. I find, again because of the drop in his disclosed income and the gap between that and his likely expenditure, that it is reasonable for HMRC to require this information.

438. Item 5 is a schedule of any benefits or loans received because of Mr Budhdeo's position in an entity, such as a director, shareholder, partner, employee or nominee. Item 6 is, for each director's loan account, a detailed chronological breakdown with narrative description for amounts received and repaid, opening and closing balances and movements during the period, together with evidence to support any repayments made.

439. Mr Budhdeo's SA return discloses a very low income which is likely to be less than his outgoings, and the accounts of some of the Companies state that he has received loans. Given that changes were made to the accounts of Blackbay and Venture Pharmacies after they had been filed with Companies House, there might also have been changes in relation to other Companies, and/or in other years. There may have been loans from companies incorporated overseas, such as Budhdeo Holdings or Eclipse, and/or from other UK incorporated companies such as Vospro, DC Procurements or Eurobay. Taking all these matters into account, it is entirely reasonable for HMRC to seek information about loans via Items 5 and 6.

440. Item 5 also requires a schedule of benefits. Mr Budhdeo's SA return for 2008-09 disclosed benefits and/or expenses of £8,674; in 2009-10 the comparable figure was £9,160. However, no benefits or expenses are shown on his SA returns for 2010-11, 2011-12 or 2012-13. Given that sudden change of position, it was reasonable for Mrs Murphy to require that this information be provided.

441. Item 7 requires:

> "a complete, signed and dated statement of assets and liabilities held on the date that you sign the statement of assets and liabilities. A form is enclosed. If you would prefer to prepare your own statement, you may do so but you must certify that it is a complete and accurate statement and include all assets, wherever in the world they are held, in which you and your children have a beneficial interest, even if they are held by a trustee, nominee or in another name."

442. HMRC's position was the same in relation to this Item as the others, namely that there were concerns about how Mr Budhdeo met his outgoings from his declared income. However, unlike the other Items so far considered, the information being sought relates to the date on which the asset and liability statement is signed, rather than the period 2011-12. HMRC did not explain how a statement of assets and liabilities dated (say) February 2017 would shed light on Mr Budhdeo's means some five years earlier. In my judgment, too much time has passed for a such a statement to be reasonably required in the context of his 2011-12 SA return.

443. I considered whether to vary the Item, so as to tie it to the 2011-12 period, However, a schedule of a person's assets and liabilities gives a financial picture frozen at a single point in time, so has only a tangential relevance to his tax position. Ownership of an asset does not mean that a person had a taxable source of income in a particular tax year, so as to affect his tax return. Disposals, which might be relevant to a person's CGT position, do not form part of such a schedule. Taking all those matters into account, I decided not to vary this Item, but to set it aside.

444. Item 8 requires the provision of all bank and/or building society books or statements, cheque book stubs, and deposit book counterfoils from any account into which Mr Budhdeo received his employment income of £7,208 and into which he received income from, or made payments to, a director's loan account.

445. It is clear that Mr Budhdeo received a salary and it is thus reasonable to assume that this must have been paid into a bank account. But were the bank statements "requisite for the purpose of enabling him to make and deliver a correct and complete return for the year", so as to constitute statutory records? Mr Budhdeo could instead have relied on his P60, or his payslips.

446. Mr Budhdeo also received sums identified as director's loans, and on the balance of probabilities these too will have been paid into one or more bank accounts. Those bank accounts may or may not be statutory records, depending on whether Mr Budhdeo also had one or more other documents, such as a director's loans schedules. If he did, the bank statements may not have been "requisite" for the purposes of preparing his SA return.

447. Because of that uncertainty I have assumed that the bank accounts into which Mr Budhdeo's salary and loans are paid are not statutory records. However, they are highly relevant to HMRC's reasonable concerns about his very low salary and the

likely gap between that and his probable outgoings, and I find that Item 8 is reasonably required.

448. Item 9 requires Mr Budhdeo to provide, for any personal assets on which there is a charge such as a mortgage or loan, the loan agreements and/or mortgage statements which cover the whole period, and the bank and/or building society books or statements from which these payments were made for the period. HMRC's reason for asking for this information is, again, its concern about means. I find that it is reasonable to require Mr Budhdeo to provide the information at Item 9, as it will allow HMRC to understand whether he had regular mortgage interest payments during the 2011-12 tax year.

449. It follows from the above that the Sch 36 Notice is upheld, other than in relation to Item 7.

Mr Budhdeo's Sch 36 Notice: the penalty

450. Mr Budhdeo failed to comply with any part of the Sch 36 Notice. The statute says that a penalty "does not arise" if the person satisfies the tribunal that he has a reasonable excuse for the failure.

451. Mr Budhdeo submitted that "with regards to the penalty levied for not abiding with the information request, the FTT can rightly cancel the penalties when the enquiry itself is unreasonably founded". I have read "unreasonably founded" as a reference to the Appellants' submissions that the dominant purpose of the enquiries into their tax returns was to obtain information to decide whether to prosecute Mr Budhdeo. However, I have already considered and rejected those submissions. No other reason has been put forward, and I therefore find that Mr Budhdeo does not have a reasonable excuse for non-compliance with the Sch 36 Notice. The penalty is confirmed.

452. The fact that I have set aside one of the Items in the Notice does not affect that outcome. A penalty is charged if a person "fails to comply with an information notice". Mr Budhdeo did not fail to comply only with the requirements in Item 7; he failed to comply with all the requirements. As a result, the penalty is properly due.

Mr Budhdeo: closure notice application

453. Mr Budhdeo applied for the enquiry into his returns to be closed within 30 days of the date of issue of this decision. His submissions were the same as those made in relation to the Companies, which I have already considered.

454. Mrs Murphy said that she was not in a position to make an accurate assessment in relation to 2011-12 because Mr Budhdeo has not provided any of the information or documents required by the Sch 36 Notice. In relation to 2012-13 she said that there are likely to be links between that return and that for 2011-12. Furthermore, 2012-13 includes Mr Budhdeo's share of Symbio's partnership losses, and Symbio is under enquiry.

455. Mr Budhdeo is a director of all the Companies except Enviroplex. He is also a director of many other companies, including several incorporated overseas. Any payment made by one of those companies to Mr Budhdeo may be relevant to his tax position, whether or not the companies are controlled and managed in the UK. Mr Budhdeo is also a shareholder of Budhdeo Holdings, the parent company for the Gold Nuts group; of Noviscom, DHL and of Eclipse, and may also be a shareholder of other linked companies which are not Appellants. However, he has as yet provided no details of his shareholdings to HMRC.

456. When Mr Budhdeo, Symbio and the Companies comply with the Sch 36 Notices, HMRC will be able to make a much more accurate assessment as to whether his taxable income for these two years is as disclosed on his SA returns, and if not, what the correct amount should be. I therefore find that there are reasonable grounds for not directing that the enquiries into either year be closed.

457. In relation to 2012-13 I also accept Mrs Murphy's submission that there is an interaction between Mr Budhdeo's SA return and the enquiry into Symbio, and that provides a further, separate, reason for not closing the enquiry into that year.

Summary of conclusions

458. The Sch 36 Notices are all upheld, other than as follows:

(1) Item 5 of the Sch 36 Notice for Blackbay for 2010 is varied to read:

> "the credit card statements for the account held in the name of Sanjay Budhdeo to which reference is made in the statutory accounts, together with statements for any other credit card issued in his name which has been used to pay expenses on behalf of the company."

(2) Item 2 of the Sch 36 Notice for Enviroplex for 2010 is varied to remove the final phrase, so that it reads:

> "full details as to the journal entries made on 26/4/12 regarding the management charges and salaries, and an explanation as to why these entries were posted after the accounts had been supplied to Companies House and HMRC."

(3) The Sch 36 Notice for Mr Budhdeo is varied to remove Item 7.

459. I direct that the enquiries into Corona, DHL and Vertex's CT returns based on the accounting periods ending 31 December 2011, and the enquiry into DHL's CT return based on the accounting period ending 31 December 2012, be closed within 30 days of the date of issue of this decision.

460. No direction is made to close any of the other enquiries.

461. The fixed penalties charged on Noviscom, Symbio and Mr Budhdeo are confirmed.

Categorisation of the appeals and applications

462. The First Decision recategorised the appeals and applications from "basic" to "complex" under Rule 23 of the Tribunal Rules. It later became clear that certain of the appeals and applications before the Tribunal at the First Hearing had been allocated new reference numbers. I had understood that those appeals and applications would be consolidated with the original numbered appeals and applications. Had that happened, the classification as complex would have applied automatically to all the appeals and applications.

463. However, those appeals and applications which had been given new reference numbers were in fact joined to the existing appeals and applications, rather than being consolidated. In addition, with the consent of all parties, Symbio's appeals and applications were first consolidated and then joined to the existing appeals and applications. These separately numbered appeals and applications, and those of Symbio, remained categorised as "basic".

464. I informed the parties at the beginning of the hearing that it was appropriate to categorise as complex both these separately numbered appeals and applications, and those relating to Symbio, consistently with the First Decision. No party raised any objection. A list of the relevant reference numbers is attached as Appendix 2 to this decision notice.

465. One of the consequences of the recategorisation as complex is that the losing party/ies may be directed to pay the costs of the winning party/ies, see Rule 10(1)(c). However, an appellant may "opt out" of the costs risk. By a letter dated 20 March 2015 which was received by the Tribunals Service on 24 March 2015, the Appellants opted out of costs in relation to all the appeals and applications, other than those listed at Appendix 2. Although that letter was a few days after the 28 day deadline set by Rule 10(1)(c), the Tribunal has the discretion to extend time, as recently confirmed in *Aquarius v HMRC* [2016] UKFTT 0702 (TC) *per* Judge Richards. I decided that it was reasonable to exercise that discretion, taking into account the very short delay and the fact that HMRC did not raise any objection.

466. Mr Budhdeo and Mr Koonjah told the Tribunal that the Appellants also wished to opt out of costs in relation to the appeals and applications listed at Appendix 2. However, the Rules require that an opt-out be made in writing. **A letter or email to that effect must therefore be sent by or on behalf of each appellant listed on Appendix 2, by reference to the appeals and applications there set out. This must to reach the Tribunal within 28 days of the date of issue of this decision, and a copy must be provided to HMRC.**

467. I do not overlook the fact that in *Atlantic Electronics v HMRC* [2012] 45 UKUT at [7] Warren J said that the purpose of the 28 day time limit was to prevent the taxpayer from being able to "wait and see" what the outcome of his case was. He continued:

> "To take the extreme case, if the taxpayer were entitled to wait until a decision had been given, he would obviously elect for a costs shifting regime if he had won and for a no costs shifting regime if he had lost.

468. By the time the Appellants write to the Tribunal opting out of costs in relation to the appeals and applications listed at Appendix 2, they will know the outcome. However, it was the Tribunal which decided to join (rather than consolidate) these appeals and applications, and the need to make a new costs direction was overlooked until this hearing. The Appellants have already clearly stated that they wished to opt out of costs in relation to all the appeals and applications.

Full decision and appeal rights

469. This document contains full findings of fact and reasons for the decisions.

470. There is no right of appeal against the decisions on the Sch 36 Notices, see Sch 36, para 32(5).

471. An Appellant whose closure notice application has been refused has a right to apply for permission to appeal against that decision under Rule 39 of the Tribunal Rules. HMRC has the right, under the same Rule, to apply for permission to appeal against my directions to close the 2011 enquiries into Corona, DHL and Vertex and the 2012 enquiry into DHL. Noviscom, Symbio and Mr Budhdeo have the right, also under the same Rule, to apply for permission to appeal the decisions on the penalties.

472. Any such application for permission to appeal 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.

Anne Redston
TRIBUNAL JUDGE

RELEASE DATE: 16 January 2017

APPENDIX 1

TAXES MANAGEMENT ACT 1970

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2)-(3) …

(4) An enquiry extends to

(a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return,

(b) consideration of whether to give the taxpayer a transfer pricing notice under section 168(1) of TIOPA 2010 (provision not at arm's length: medium-sized enterprise),

(c) consideration of whether to give the taxpayer a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief)…

…

12AC. Notice of enquiry

(1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")

(a) to the person who made or delivered the return, or his successor,

(b) within the time allowed…

(6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry

(a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return…

…

12B. Records to be kept for purposes of returns

(1) Any person who may be required by a notice under section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other period shall—

(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are completed; and

(ii) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries.

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company…;

(b) otherwise, the first anniversary of the 31st January next following the year of assessment

or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases)…

…

28A. Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.

(5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

(6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

28B Completion of enquiry into partnership return

(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.

(2) A closure notice must either

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend

(a) the partner's return under section 8 or 8A of this Act, or

(b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.

(5) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.

(6) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

(7) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.

114 Want of form or errors not to invalidate assessments, etc

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected

(a) by reason of a mistake therein as to

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination.

INTERPRETATION ACT 1978

5. Definitions

In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.

Schedule 1 Words and Expressions Defined

…

"Person" includes a body of persons corporate or unincorporate

VALUE ADDED TAXES ACT 1994, SCHEDULE 11

6. Duty to keep records

(1) Every taxable person shall keep such records as the Commissioners may by regulations require...

(2) Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases)

(4) The duty under this paragraph to preserve records may be discharged—

(a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means,

subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

VAT REGULATIONS 1995

31. Records

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,

(b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him

(da) all certificates

(i) prepared by him relating to acquisitions by him of goods from other member States, or

(ii) given to him relating to supplies by him of goods or services,

provided that, owing to provisions in force which concern fiscal or other warehousing regimes, those acquisitions or supplies are either zero-rated or treated for the purposes of the Act as taking place outside the United Kingdom,

(e) documentation received by him relating to acquisitions by him of any goods from other member States,

(f) copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g) documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h) documentation relating to importations and exportations by him, and

(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him…

(2) The Commissioners may

(a) in relation to a trade or business of a description specified by them, or

(b) for the purposes of any scheme established by, or under, Regulations made under the Act,

supplement the list of records required in paragraph (1) above by a notice published by them for that purpose.

FINANCE ACT 1998, SCHEDULE 18

21. Duty to keep and preserve records

(1) A company which may be required to deliver a company tax return for any period must

(a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and

(b) preserve those records in accordance with this paragraph.

(2) The records must be preserved until the end of the relevant day.

(2A) In this paragraph "relevant day" means

(a) the sixth anniversary of the end of the period for which the company may be required to deliver a company tax return, or

(b) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases).

(3) If the company is required to deliver a company tax return by notice given before the end of the relevant day, the records must be preserved until any later date on which

(a) any enquiry into the return is completed, or

(b) if there is no enquiry, an officer of Revenue and Customs no longer has power to enquire into the return.

(4) …

(5) The records required to be kept and preserved under this paragraph include records of

(a) all receipts and expenses in the course of the company's activities, and the matters in respect of which the receipts and expenses arise, and

(b) in the case of a trade involving dealing in goods, all sales and purchases made in the course of the trade.

(5A) The Commissioners for Her Majesty's Revenue and Customs may by regulations

(a) provide that the records required to be kept and preserved under this paragraph include, or do not include, records specified in the regulations, and

(b) provide that those records include supporting documents so specified.

(5B) Regulations under this paragraph may

(a) make different provision for different cases, and

(b) make provision by reference to things specified in a notice published by the Commissioners for Her Majesty's Revenue and Customs in accordance with the regulations (and not withdrawn by a subsequent notice).

"Supporting documents" includes accounts, books, deeds, contracts, vouchers and receipts.

....

24. Notice of enquiry

(1) An officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed…

25. Scope of enquiry

(1) An enquiry into a company tax return extends to anything contained in the return, or required to be contained in the return, including

(a) any claim or election included in the return,

(b) any amount that affects or may affect

(i) the tax payable by that company for another accounting period, or

(ii) the tax liability of another company for any accounting period,

and also extends to consideration of whether to give the company [a notice within sub-paragraph (3).

(2) …

(3) A notice is within this sub-paragraph if it is

(a) a notice under section 184G or 184H of the Taxation of Chargeable Gains Act 1992 (avoidance involving capital losses),

(b) a notice under section 81(2) of TIOPA 2010 (schemes and arrangements designed to increase relief),

(c) a transfer pricing notice under section 168(1) of TIOPA 2010 (provision not at arm's length: medium-sized enterprise), or

(d) a notice under section 232 or 249 of TIOPA 2010 (avoidance involving tax arbitrage)

....

33. Direction to complete enquiry

(1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a closure notice within a specified period.

(2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).

(3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a closure notice within a specified period.

INCOME TAX (PAY AS YOU EARN) REGULATIONS 2003

97. Retention by employer of PAYE records

(1) An employer must keep and preserve for not less than three years after the end of the tax year to which they relate all PAYE records which are not required to be sent to HMRC by other provisions in these Regulations.

(2) The duty under paragraph (1) to keep and preserve PAYE records may be discharged by preserving them in any form or by any means.

(3) "PAYE records" means the following documents and records–

(a) all wages sheets, deductions working sheets, documents completed under regulation 46 (Form P46) and other documents and records relating to--

(i) the calculation of the PAYE income of the employees,

(ii) relevant payments to the employees, or

(iii) the deduction of tax from, or accounting for tax in respect of such payments, and

(b) all documents relating to any information which an employer is required to provide to HMRC under regulation 85 (Forms P11D and P9D)

FINANCE ACT 2008, SCHEDULE 36

1. Power to obtain information and documents from taxpayer

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—

(a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

2. Power to obtain information and documents from third party

(1) An officer of Revenue and Customs may by notice in writing require a person—

(a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ("the taxpayer").

(2) A third party notice must name the taxpayer to whom it relates, unless the tribunal has approved the giving of the notice and disapplied this requirement under paragraph 3.

(3) In this Schedule, "third party notice" means a notice under this paragraph.

....

6. Notices

(1) In this Schedule, "information notice" means a notice under paragraph 1, 2 or 5.

(2) An information notice may specify or describe the information or documents to be provided or produced.

7. Complying with notices

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

(2) Where an information notice requires a person to produce a document, it must be produced for inspection

(a) at a place agreed to by that person and an officer of Revenue and Customs, or

(b) at such place as an officer of Revenue and Customs may reasonably specify…

…

18. Documents not in a person's possession or power

An information notice only requires a person to produce a document if it is in the person's possession or power.

…

21. Taxpayer notices following tax return

(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

(5) In sub-paragraph (4), "notice of enquiry" means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that an officer of Revenue and Customs has reason to suspect that, as regards the person,—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking the person's position as regards any tax other than income tax, capital gains tax or corporation tax.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments of tax or withholding of income referred to in paragraph 64(2) or (2A) (PAYE etc).

(9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made.

….

29. Right to appeal against taxpayer notice

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

….

32. Procedure

(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3) On an appeal that is notified to the tribunal, the tribunal may—

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

(4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

….

39. Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or…

(2) The person is liable to a penalty of £300.

….

44. Failure to comply with time limit

A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45. Reasonable excuse

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

...

47. Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

48. Procedure on appeal against penalty

(1) Notice of an appeal under paragraph 47 must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax.

49. Enforcement of penalty

(1) A penalty under paragraph 39, 40 or 40A must be paid—

(a) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, or

(b) if a notice of an appeal against the penalty is given, before the end of the period of 30 days beginning with the date on which the appeal is determined or withdrawn.

(2) A penalty under paragraph 39, 40 or 40A may be enforced as if it were income tax charged in an assessment and due and payable.

…

58. General Interpretation

In this Schedule—

"document" includes a part of a document (except where the context otherwise requires),

"enactment" includes subordinate legislation (within the meaning of the Interpretation Act 1978 (c 30))...

"the Taxes Acts" means—

(a) TMA 1970,

(b) the Tax Acts, and

(c) TCGA 1992 and all other enactments relating to capital gains tax...

…

62. Statutory records

(1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of—

(a) the Taxes Acts, or

(b) any other enactment relating to a tax,

subject to the following provisions of this paragraph.

(2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts—

(a) does not relate to the carrying on of a business, and

(b) is not also required to be kept or preserved under or by virtue of [any other enactment relating to a tax,

it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.

(3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

63. Tax

(1) In this Schedule, except where the context otherwise requires, "tax" means all or any of the following—

(a) income tax,

(b) capital gains tax,

(c) corporation tax….

and references to "a tax" are to be interpreted accordingly…"

APPENDIX 2

Schedule of appeals and applications relevant to categorisation

5

	Case reference
1. BLACKBAY VENTURES LTD	TC/2015/00522
2. BRONZE NUTS LTD	TC/2015/00523
3. CHEMISTREE LTD	TC/2015/00524
4. ENVIROPLEX LTD	TC/2015/00526
5. GOLD NUTS LTD	TC/2015/00527
6. LEYTON ORIENT DISPENSARY LTD	TC/2015/00528
7. NOVISCOM LTD	TC/2015/00532
8. R SQUARE PROPERTIES LTD	TC/2015/00529
9. SYMBIO ENERGY LLP	TC/2015/05153
10. VENTURE PHARMACIES LTD	TC/2015/00530
11. ZANREX LTD	TC/2015/00531