

## Closure Notices.

### 1. The end of the enquiry

Section 28A was amended by F(No 2)A 2017<sup>1</sup> and now provides:

#### ***28A Completion of enquiry into personal or trustee return or NRCGT return<sup>2</sup>***

*(1) This section applies in relation to an enquiry under section 9A(1) or 12ZM of this Act.*

*(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.*

*(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice") –*

*(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or*

*(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.*

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

*(2) A partial or final closure notice must state the officer's conclusions and –*

*(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 partial or final 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 partial or final 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)).*

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<sup>1</sup> s 63, Sch 15 paras 1, 12 with effect in relation to an enquiry under TMA 1970 ss 9A, 12ZM or 12AC or FA 1998 Sch 18 where notice of the enquiry is given on or after 16 November 2017 or the enquiry is in progress immediately before that day

<sup>2</sup> The reference to NRCGT will go when the new Part 1 TCGA 1992 comes in next year, abolishing NRCGT – schedule 2 para 25, Finance (no3) Bill 2018

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

(7) *In this section “the taxpayer” means the person to whom notice of enquiry was given.*

(8) *In the Taxes Acts, references to a closure notice under this section are to a partial or final closure notice under this section.*

This is the ‘main’ definition re closure notices, but note also that there are others e.g:

1. the nearly identical provisions in s28B TMA, re partnerships;
2. Schedule 18 of FA 1998 re corporation tax;
3. the unamended version in TMA 1970 Schedule 1A para 7 re Claims;
4. The unamended version in Schedule 10 of FA 2003 re SDLT returns
  - a. It makes some sense that there is no Partial Closure regime for the latter two – those returns are by nature confined to one issue, but does reveal that the underlying policy was not to deal with preliminary issues, but completely separate ones.

## 2. Why is it important?

A closure notice

5. is the method by which an officer of the revenue tells you he has finished his enquiries,
6. creates a liability to pay any additional tax 30 days after the date on which the PCN/FCN is issued<sup>3</sup>,
7. is a necessary precursor to appealing or reviewing most decisions by the revenue – Section 31 TMA 1970 states:

### ***31 Appeals: right of appeal***

(1) *An appeal may be brought against—*

- (a) *any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),*
- (b) *any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),*

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<sup>3</sup> Under TMA 1970, Sch 3ZA, para 5 and 8

*(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or*

*(d) any assessment to tax which is not a self-assessment.*

**(2) If an appeal under subsection (1)(a) above against an amendment of a self-assessment is made while an enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment *none of the steps mentioned in section 49A(2)(a) to (c) may be taken in relation to the appeal until a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued.***

Section 49A gives the taxpayer the right to for a review and the right for the taxpayer to notify the Tribunal of the Appeal.

There is also the referral procedure under section 28ZA:

### ***28ZA Referral of questions during enquiry***

*(1) At any time when an enquiry is in progress under section 9A(1) or 12AC(1) of this Act in relation to any matter, any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination.*

*(2) Notice of referral must be given—*

*(3) jointly by the taxpayer and an officer of the Board,*

*(4) ...*

Prior to the introduction of the partial closure regime, this provision served the need to deal with difficult questions within a broader enquiry. However the need for a joint election required a collaborative relationship between the Revenue officer and the taxpayer, and so the mechanism was not particularly well used. The new partial closure regime was initially conceived as an adjustment to s28ZA that removed the need for joint election. It perhaps makes section 28ZA almost redundant.

Also note that no closure notice can be issued on the question under referral whilst it is underway (TMA 1970 s28ZD).

### **3. The Final Closure Notice**

The requirements of a closure notice have been explored in depth, most recently by the Court of Appeal in *Archer*<sup>4</sup>, where the court ruled that a closure notice was required to state the amount of

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<sup>4</sup> R (on the application of Archer) v Revenue and Customs Commissioners [2017] EWCA Civ 1962

tax for which the taxpayer was liable if the enquiry concluded that a amendment to the return was necessary.

In short, the position is now, in respect of final closure notices:

1. They must (*Archer*, but see also *White v HMRC* at [12])<sup>5</sup>:
  - a. state that the officer has completed his enquiries;
  - b. state his conclusions; and
  - c. amend the claim as the officer concludes to be necessary or state that no amendment is required.
2. The closure notice itself makes the amendments – no further action is required to give effect to it – *Archer* at [27]<sup>6</sup>
3. It can be made by a combination of documents – *Bristol and West*<sup>7</sup> – or even, arguably, a notice which was not one may become one as a result of later action by the revenue – *Portland Gas Storage*<sup>8</sup>
4. There is no prescribed form for the notice - *Portland Gas Storage*. So long as it does the above it is a closure notice and can be appealed.
  - a. Does this create a problem for appealing within time? A taxpayer has 30 days to appeal a closure notice. What if they (and the Revenue) don't notice that a letter is one and so miss the deadline?
  - b. The Tribunal can give permission to appeal out of time under s49 TMA 1970. It has a general discretion. HMRC are also required to agree to late notice if there was a reasonable excuse – e.g. that the closure notice was not obviously a closure notice – and action was taken as soon as that excuse ceased to be active – i.e. as soon as the taxpayer discovered that it was a closure notice. The Tribunal's discretion is even wider, but in *AG for Scotland v General Commissioners for Aberdeen City*<sup>9</sup>, Lord Drummond provide a list of factors that ought to be considered by the tribunal:
    - i. whether the reason for the delay constitutes a reasonable excuse; in particular, any delay caused in part by the Revenue would be a very significant factor;

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<sup>5</sup> *White v HMRC* [2017] UT/2017/0087

<sup>6</sup> Endorsing *Sunlight Takeaway* [2016] UKFTT 659 (TC)

<sup>7</sup> [2016] EWCA Civ 397

<sup>8</sup> *Portland Gas Storage Ltd v. Revenue and Customs Commissioners*[2014] UKUT 270 (TCC).

<sup>9</sup> [2006] STC 1218

- ii. whether or not the taxpayer acted promptly as soon as the excuse ceased to operate;
  - iii. the balance of prejudice between the parties by allowing or refusing the late appeal;
  - iv. the balance of the public interest – the need for finality of litigation within a reasonable time, the impact on other cases that have previously been concluded and the need to respect the timeframe laid down by Parliament;
  - v. the extent to which one party's case will be affected by the loss of evidence due to the delay.
- c. So in circumstances where a closure notice is appealed late because the notice itself was unclear as to what it achieved, there would be a very strong chance of securing permission to appeal it late so long as you acted swiftly once the reality became apparent.

## 4. Formalities

The matter is further complicated by Section 114 TMA 1970, which provides that mistakes, defects and omissions, or want of form shall not quash or make void any assessment, determination or warrant under the Taxes Acts, so long as the substance is there:

### ***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.*

The Court of Appeal considered this provision in *Archer and Donaldson*<sup>10</sup>. They concluded that the provision is a broad one, and will in effect fix any closure notice so long as the things the notice is supposed to say can, objectively, be “worked out without difficulty”, by someone with the knowledge of the parties.

This makes it possible to treat as a closure notice even one which is not so on its face.

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<sup>10</sup> *Revenue and Customs Commissioners v Donaldson* [2016] EWCA Civ 761

## 5. The New Partial Closure Notice Regime

All of these questions will have to be asked again in respect of partial closure notices. As the judgement in *Archer* made clear, the requirements of a closure notice are based on an understanding of the role they play in the tax dispute process – it is necessary to a final closure notice to state the amount of tax due, if there is a change, because it is a document that creates a new liability to pay the tax.

Partial closure has a *perhaps* very different role. We will have to see where this goes, but it is worth considering the nature of ‘matter’ in the new legislation, which is currently undefined.

*The likely Revenue view:*

The origin of the Partial closure regime was a desire by the Revenue to have the power to unilaterally close down a line of enquiry in respect of one tax year without having to close all lines of enquiry, and without having to use the joint referral procedure under section 28ZA.

This was so that they could get the tax due in respect of one arrangement, on which they had come to a conclusion, without having to decide where they stood on others, if there were others. They even thought some taxpayers were complicating their affairs specifically to achieve a cashflow advantage from delaying closure.

Because of these origins, their view is likely to be that Partial Closure Notices are only available for discrete ‘matters’ – e.g. a CGT liability as opposed to an Income tax liability, when both are being enquired into – and that a *preliminary* ‘matter’ is not a matter at all for the purposes of section 28A. Current behaviour confirms that this is their view.

*An alternative interpretation*

Legislation must, however, be interpreted on its face – the purposive interpretation does not look to the purpose of the Revenue in asking for the legislation, but what the legislation as a whole indicates the purpose of the wording to be. Recourse to parliamentary materials and consultations remains exceptional, and only for resolving true ambiguity.

And in this context it is hard to see how ‘matter’ should be interpreted outside of its plain English meaning. It is a simple but broad term, clearly wide enough to include preliminary issues such as residence, domicile, time limits or even whether certain arrangements are linked or whether there was an avoidance purpose behind an arrangement.

This cannot be taken too far: there must be a need for the preliminary matter to be truly preliminary, since it must be decidable separately from the other matters under enquiry. But on balance this broader meaning is preferable.

We shall have to see which way the Courts go (it likely won't take too long).

## 6. Applications for closure

Applications for closure can be made at any time during an enquiry.

### *The Test*

Section 28(4) gives the taxpayer the right to apply for a closure notice.

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

...

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

This is necessary because enquiries have no other time limitation.

The judgment of Judge Sarah Falk in *Beneficial House*<sup>11</sup> is often quoted when setting out the law of closure notice applications:

- (1) *“The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a “reasonable balance” to HMRC’s substantial powers to investigate returns and **protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry. The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case. This involves a balancing exercise.***
- (2) ***The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer.***
- (3) *The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but **the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified.** It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry.*
- (4) *A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry. What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an “informed judgment” of the matter.*

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<sup>11</sup> *Beneficial House (Birmingham) Regeneration LLP* [2017] UKFTT 801 (TC)

- (5) *If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate. **The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal.** However, the position will turn on the facts and circumstances of each case.*
- (6) *The Supreme Court's comments on the subject of closure notices in **HMRC v Tower MCashback LLP** [2011] UKSC 19 are highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice is performing an important public function in which fairness to the taxpayer must be matched by a “proper regard for the public interest in the recovery of the full amount of tax payable”, although where the facts are complicated and have not been fully investigated the “public interest may require the notice to be expressed in more general terms”. Lord Hope also said that the officer should wherever possible **set out the conclusions reached on each point that was the subject of the enquiry.** In *Frosch* the Upper Tribunal commented that a closure notice in broad terms is “not the norm” and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable.*

This list should not be interpreted as a statement of a legal rule. As *Frosch*, the currently leading case, makes clear, the legislative test is a simple one of reasonableness, and it is uncontroversial law that a test of reasonableness involves balancing all the circumstances of the case and should not be reduced to a series of gateways.

Nonetheless, Judge Falk's list does stand as a good starting point when looking at the circumstances to consider.

### *The Burden of Proof*

It is clear that the burden under s28B(7) is on HMRC – an application for a closure notice should be granted unless HMRC show that there are reasonable grounds for refusing it<sup>12</sup>.

### *Evidence*

HMRC tend to put forward their officers as witnesses. The main reason for doing so is to put forward evidence that the taxpayer has been unreasonable, and so assuage their own delays. From a taxpayer's point of view it will normally be sufficient to rely on the correspondence between the parties – the central issue will normally resolve around the objective question of

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<sup>12</sup> *Benficial House at [14], Jade Palace Ltd v Revenue and Customs Commissioners* [2006] STC (SCD) 419

whether or not HMRC have the information necessary to reasonably make a final determination, and only where one party has behaved very badly should the point be relied on alone.

Nonetheless, because the test is one of reasonableness it is always important to be the reasonable party where possible. Communications with the Revenue prior to an application for closure should avoid being confrontational wherever possible, and, *generally*, if information can be provided easily it is often better to provide it.

### *The Result of a Successful Application*

If an application for closure is granted, the Tribunal will specify a time period for HMRC to issue the notice. The legislation doesn't stipulate any particular period, and it can vary considerably depending on the facts:

1. In *Bloomfield*<sup>13</sup>, the tribunal directed that HMRC should issue a closure notice within 30 days, on the basis that this would allow HMRC's enquiries to be concluded.
2. On the other hand, in *Khazzenifar*<sup>14</sup>, the notice was ordered within the following six months, despite the Tribunal concluding the "HMRC has reasonable grounds for not issuing a closure notice".
3. In *Khan*<sup>15</sup>, the tribunal criticised HMRC for its "poor administration" of the case and held that the enquiry should be concluded within nine months.

It is also important that winning closure is not the end of the matter. All it does is make the Revenue make a decision, and may just be the beginning of a substantive appeal process.

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<sup>13</sup> *Bloomfield v Revenue & Customs* [2013] UKFTT 593 (TC),

<sup>14</sup> *Khazzenifar v Revenue & Customs* [2013] UKFTT 752 (TC)

<sup>15</sup> *Khan v Revenue & Customs* [2014] UKFTT 18 (TC)