McKie&Co

RUDGE REVENUE REVIEW

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'£9m GOES WEST'

INTRODUCTION

When the Upper Tribunal confirms a taxpayer's self-assessment and rejects in its entirety HMRC's contention that the self-assessment should be increased by £30.6m, one would not expect HMRC to announce that the taxpayer had lost and that HMRC had won a tremendous victory. Yet that is what happened in *Bristol & West Plc v HMRC*.[1]

The case considered interesting technical points as to what constitutes a Closure Notice and when such a notice is issued. More fundamentally, however, the Government's response to the Upper Tribunal's decision raises the question of where is the dividing line between the Government providing information to the public on taxation matters and publishing misleading propaganda.

The case concerned transactions taking place under a tax planning strategy aimed to take advantage of an anomaly in FA 2002 s.83 & Schs. 26 - 28[2] which introduced a new regime for Corporation Tax on profits and losses from derivative contracts.

THE SUBSTANTIVE ISSUE

In this review, we do not examine in detail the operation of the tax planning transactions which were the subject of the case because that planning could apply only to transactions between two companies in the same group on a date in an accounting period of the acquiring company which commenced on or before the 1st October 2002.[3] The tax planning opportunity, if that is what it was, is now truly past.

The planning involved the novation of an interest rate swap contract from Bristol & West Plc ('B&W') to Bank of Ireland Finance Ltd ('BIBF') for a premium of £91m[4] (the '£91m Receipt') which was accepted to be a market value premium.[5] B&W and BIBF were both members of the Bank of Ireland group.[6] The novation was effected with a view to achieving a tax advantage.[7] It was thought that the £91m Receipt by B&W would escape Corporation Tax whereas the payment of £91m by BIBF would be taken into account in determining its future profit, or loss, on the contract.[8] HMRC claimed that the new derivative provisions of FA 2002 could only apply where they applied to both parties to the transaction and, as they did not apply to BIBF, they could not apply to B&W.[9] The result, the Revenue argued, was that B&W was assessable on the

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1 *Bristol & West Plc v HMRC* [2014] UKUT 0073 (TCC). The Upper Tribunal's decision is referred to in these footnotes simply as the 'UT Decision'. The citation reference of the First-tier Tribunal decision was [2013] UKFTT 216 (TC). The decision of the First-tier Tribunal (the 'FTT') is referred to in these footnotes simply as the 'FTT Decision'

2 These provisions have now been re-written in CTA 2009 Part VII

3 FTT Decision para. 4

4 FTT Decision para. 1

5 UT Decision para. 10

6 FTT Decision para. 1

7 FTT Decision para. 53

8 FTT Decision para. 4

9 UT Decision para. 94

whole of the £91m Receipt, which represented its profit on the contract, although the assessable amount was to be attributed to particular accounting periods of the company in accordance with normal accounting practice.[10] The FTT found that, on the basis that HMRC were correct in saying that the receipt was chargeable, it was to be charged as to £30.6m in B&W's accounting period ended 31st March 2004 with the balance of £60.4m to be brought into charge in later accounting periods.[11] This does not seem to have been challenged in the Upper Tribunal.[12]

The Upper Tribunal found for HMRC on the question of the construction of the relevant tax legislation[13] (the 'Substantive Issue') but it reversed the decision of the FTT[14] in rejecting HMRC's purported amendment of the company's self-assessment tax return because of HMRC's errors in respect of the issue of the relevant Closure Notice (the 'Procedural Issue').[15]

THE PROCEDURAL ISSUE

The Relevant Legislation

The Relevant Statutory Provisions

The relevant statutory provision dealing with Closure Notices for Corporation Tax purposes was, and remains, FA 1998 Sch. 18 para. 32(1)[16] which provided:-

> 'An enquiry is completed when the Inland Revenue by notice (a "closure notice") inform the company that they have completed their enquiry and state their conclusions.
>
> The notice takes effect when it is issued.'

Paragraph 34(1) - (3) then provided that:-

> '(1) The company has 30 days beginning with the day on which the enquiry is completed in which -
>
> (a) to amend the return that was the subject of the enquiry -
>
> (i) to accord with the conclusions stated in the closure notice, and
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> ...
>
> (2) If after the end of that period of 30 days the Inland Revenue are not satisfied-
>
> (a) that the return that was the subject of the enquiry -
>
> (i) is correct and complete, and
>
> (ii) in the case of a return for the wrong period, is a return appropriate to the designated period, and

[10] FTT Decision para. 5
[11] FTT Decision paras. 81&82
[12] UT Decision para. 126
[13] UT Decision para. 126
[14] FTT Decision para. 36
[15] UT Decision para. 69
[16] All statutory references in this article are to FA 1998 Sch 18 unless otherwise stated

(b) that any necessary amendments have been made to any other return delivered by the company that are required to give effect to the conclusions stated in the closure notice,

they may, within the following period of 30 days, by notice to the company make such amendments of that return or those returns as they consider necessary.

(3) An appeal may be brought against any such amendment of a company's return.'

The Relevant Facts

The relevant facts in relation to the Procedural Issue were as follows.

On the 30th October 2007,[17] Gavin Howard, the senior HMRC Officer who was the principal point of contact in respect of major tax issues concerning the Bank of Ireland group, placed a document on the desk of his colleague,[18] Mr Gill, another senior HMRC official,[19] who was responsible for the issue of Closure Notices and other amendments to returns.[20] It asked him to raise Closure Notices in respect of two other members of the Bank of Ireland group and to take certain action in relation to group relief in respect of B&W.[21] The First-tier Tribunal commented:-

'We were shown the document, and to our eyes it was perfectly clear.'[22]

In spite of the clarity of this document, on the 30th October 2007 Mr Gill input instructions into HMRC's computer system (called COTAX), which included an instruction to issue Closure Notices in relation to B&W's accounting periods ended 31st March 2003 and 31st March 2004.[23] This immediately created a file within the COTAX system, although anyone logging on to the system could not see the data which had been input to the system on the day they logged on.[24] At some time on the 30th October 2007, Mr Howard realised that an error had been made and sought to prevent notices generated by the system being received by B&W by changing the address on the system to which notices were to be sent to that of HMRC.[25] Because he was unable to see on the day of input whether this information had been successfully input it was only on the 31st October that he ascertained that the address had not been changed.[26]

HMRC's system was that the print run for issuing Closure Notices began at 6am on the day following their input so that, in respect of the notices to B&W, including the notice in respect of its accounting year ended 31st March 2004 (the 'Original Notice'),

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17 Or possibly on the previous day. FTT Decision para. 17
18 FTT Decision para. 17
19 FTT Decision para. 28
20 FTT Decision para. 17
21 FTT Decision para. 17
22 FTT Decision para. 17
23 FTT Decision paras. 13 & 17
24 FTT Decision para. 18
25 FTT Decision para. 19
26 FTT Decision para. 20

it would have begun at 6am on the 31st October 2007. The Tribunal was asked to assume that the Original Notice would have been printed and inserted into an envelope by 7.44am on the 31st October 2007.[27]

The Upper Tribunal judgment records that:-

> 'It was theoretically possible for Mr Howard to go and rummage through all the Closure Notices in their envelopes that were still in HMRC's clutches on 31st October 2007 but I assume that task was so large it was not considered worth doing. As my decision will show had they stopped that Closure Notice being sent out none of the problems would have ensued.'[28]

Under HMRC's system, the notices were not collected for posting (by second class post) by Royal Mail until Thursday 1st November 2007.[29] The FTT assumed that they would not have been received by the appellant until Saturday 3rd November 2007 at the earliest.[30] Having ascertained, on the 31st October 2007, that he could not prevent the Original Notice being sent to B&W, Mr Howard sent an email (the 'HMRC Email') to Mr Boyd, who was the Head of Tax at Bank of Ireland and the person who dealt with all major tax disputes concerning Bank of Ireland group companies, including the novation dispute.[31] The email said:-

> 'I wanted to pre-warn you that 2 Closure Notices were today issued in error in relation to [B&W] for periods ended 31/03/03 and 31/03/04. We will be taking action to correct the position in due course. I'll confirm the position in writing within the next few days.'[32]

Mr Boyd, who was unwell and at home, replied at 8.16am on that day by email, saying 'OK Gavin, Thanks.'[33]

The FTT's judgment goes on to record that on the 8th November 2007 HMRC sent a letter to B&W (the 'November 2007 HMRC Letter') which:-

> '…recited that "The present position is that, albeit in error, closure notices were issued on 30 October 2007 and those notices are effective under para 32(1) Sch 18 FA 1998 marking the completion of the enquiries into the returns made by [the appellant]." The letter went on to suggest that the manner in which this error could be rectified would be to amend the return, pursuant to para 34 of the same Schedule.'[34]

So the November 2007 HMRC Letter seems to have been based on the view that, having raised the Original Notice, HMRC could amend B&W's return under para. 34(2)

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27 FTT Decision para. 20
28 UT Decision para. 27
29 FTT Decision para. 20
30 FTT Decision para. 20
31 FTT Decision para. 10
32 FTT Decision para. 21
33 FTT Decision para. 21
34 FTT Decision para. 23

by increasing its taxable income in respect of that part of the £91m Receipt which was to be taken to its profit and loss account in the period concerned.

The FTT commented that:-

> '... where the Closure Notice had required no amendments, there were no amendments to be made, either by the taxpayer under para. 34(1) or HMRC under para. 34(2), and this proposed course was therefore manifestly wrong.'[35]

The Upper Tribunal explained that:-

> 'the difficulty with that position is that HMRC now acknowledge that it was not possible to proceed in that way once the enquiry had been closed.'[36]

At some time before the 19th December 2007 HMRC then issued notices of amendment.[37] Mr Boyd, wrote to HMRC on the 19th December 2007, as follows:-

> 'On the assumption that it was correctly issued within the Taxes Act ... I wish to appeal against the notice of amendment ... on the grounds that it is not in accordance with the facts...'[38]

Mr Howard then seems to have changed his mind as to the validity of the Original Notice and wrote on the 23rd April 2008 to B&W saying that Mr Boyd was to:-

> '... take this letter as notice that I am formally withdrawing the Closure Notices issued for both periods ...'[39]

It seems that Mr Howard asserted that HMRC had the power to do this under the general care and management power provided by TMA 1970 s.1.[40] He then went on to say that he was withdrawing the notices on the basis of legal advice that they could be withdrawn.[41] The Upper Tribunal Decision records that it appears that he later received further advice that the notices had not taken effect at all[42] and further notices which HMRC asserted were notices under para. 32(1), including a notice in respect of B&W's Accounting Period ended 31st March 2004 (the 'Later Notice'), were issued[43] at some later time.[44]

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35 FTT Decision para. 24
36 UT Decision para. 47
37 UT Decision para. 50
38 UT Decision para. 50
39 UT Decision para. 51
40 FTT Decision para. 25
41 UT Decision para. 52
42 UT Decision para. 55
43 UT Decision para. 56
44 The decisions of the FTT and UT do not record the date of issue of the Later Notice but it is apparent from the UT decision that it must have been issued some time after the 4th February 2010. UT Decision paras. 54 - 56

An appeal may be brought against any amendment of a company's return under para. 34(2).[45] It is not clear from the published judgments of the FTT and the Upper Tribunal what was the nature of B&W's appeal. Was it an appeal against the amendments to the return made by HMRC in late 2007 in respect of the Original Notice or an appeal against the amendments[46] made after, and in respect of, the Later Notice?

THE FTT'S CONCLUSION OF THE PROCEDURAL ISSUE

The FTT's Summary of the Relevant Law

The FTT's judgement says:-

> 'Whilst there are no further material statutory provisions, we consider that the following summary reflects the correct legal position, and we believe that none of the following points were disputed by the appellant. We consider, thus, that:
>
> - Statute law prescribes no particular form for the issue of closure notices. It would admittedly be unusual for a closure notice to be issued by e-mail, but we accept that a valid closure notice issued in writing, including e-mail, that informed the company into whose return HMRC had been making enquiries that the enquiries had been completed, stating the conclusion of those enquiries or indicating that no adjustments were required, would be a valid closure notice.
> - In accordance with the decision of the Supreme Court in the case of *Tower Mcashback LLP v Revenue and Customs Comrs* ... in construing a closure notice it is permissible to refer to the surrounding circumstances, and other related documentation.
> - Paragraph 32 contains no requirement that a closure notice should state its date of issue, and there is no specific provision, in relation to closure notices, that indicates when a closure notice has been issued.'[47]

The FTT's Conclusion and Its Reasoning

In order to apply the provisions of para. 32(1) it is obviously necessary to know what is a Closure Notice and when it is issued.

The FTT did not specifically discuss the first question, although in discussing the second it placed emphasis on characteristics of a Closure Notice which it derived from para. 32(1); that is, the Closure Notice is a notice to the company concerned.

> 'The decisive factor in relation to this issue [of whether the Original Notice was ever issued] is that the state of affairs, defined by para 32, Sch 18 to constitute a "closure notice" is the issue by HMRC of a notice, informing the taxpayer that

[45] Para. 34(3)
[46] Neither the judgment of the FTT nor that of the Upper Tribunal reveals that such amendments were made but the proceedings would make little sense if they were not
[47] FTT Decision para. 27

> HMRC have completed their enquiries, and stating their conclusions. That paraphrase rolls together the two sentences of para 32.
>
> As a general matter, we accept that the normal meaning of "issuing" something is to provide it, make it available, or deliver it. Accordingly our expectation, before referring to the context, is to suppose that a notice will only be issued when it is sent, or possibly received. The notion of saying that a notice in a letter has been issued when the letter has been typed or printed, and before it has been despatched, is inconsistent with the general meaning of the notion of "issue". Even if the computer and other instructions meant that a letter sent for printing was automatically the subject of an irrevocable instruction that, once printed, it should subsequently be despatched, we still conclude that on the ordinary meaning of the term "issue", the notice would not be issued until it was despatched.
>
> We consider that the notion of what constitutes an issue should certainly pay regard to the context. Thus, taking an example that we mentioned in the hearing, it might be appropriate to say that a passport was issued when the document had been created, even if it was not sent to the applicant. Taking the facts of the present case, however, when the notice must be something that notifies the taxpayer of some state of affairs, the case for saying that such a notice can only be issued when the process of notification commences (or possibly when it is actually effected by receipt of the notice by the taxpayer) is absolutely compelling. We conclude, therefore, that the earliest possible date on which to say that the notice had been issued was 1 November, the date when we were told that it would have been collected for posting by the Royal Mail.'[48]

So on the basis that the notice could not have been issued before the 1st November and that Mr Howard's email to Mr Boyd had informed him that the Original Notice was 'issued in error' the FTT concluded that:-

> 'Addressing the question, thus, of whether on 1 November, it could be said that the appellant had been notified that HMRC had concluded their enquiries into its 2004 tax return, the obvious and only conclusion is that the taxpayer had not been so notified. The appropriate person in the appellant's group had been notified that a letter had been sent in error and the substance of the information was that HMRC had not completed their enquiries. Accordingly nothing that performed the function of notifying the taxpayer that the enquiries had been completed had been issued, and so no closure notice had been issued.'[49]

THE UPPER TRIBUNAL'S CONCLUSION ON THE PROCEDURAL ISSUE

The Upper Tribunal, however, pointed out that although the HMRC Email alerted Mr Boyd to the fact that there had been an error of some sort in the issue of the Original Notice, it did not tell him the nature of that error or that the Original Notice was invalid or withdrawn.[50]

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[48] FTT Decision paras. 30 - 32
[49] FTT Decision para. 33
[50] UT Decision para. 37

The Upper Tribunal accepted that:-

> '... it would have been possible ... for Mr Howard to have recalled the Closure Notices by his email of the 31st October 2007 [the HMRC Email] because the earliest day on which it can be said that the notices were issued is 1st November 2007.'[51]

The Upper Tribunal went on to say, however, that the HMRC Email 'does not purport to withdraw the Closure Notices ...'[52] Rather, the Upper Tribunal said, '... what the email does is to put the effect (possibly) of the Closure Notices on hold until [Mr Howard's] definitive communication is received.'[53]

The Upper Tribunal then went on to consider the November 2007 HMRC Letter. It regarded it as lifting the suspension of the Original Notice so as to bring it into effect and as erroneously purporting to make amendments to B&W's returns. It said:-

> 'The key paragraph is the second paragraph namely "the present position is that albeit in error the Closure Notices are effective marking the completion of the enquiries into the returns."
>
> Nothing in my view could be clearer as to HMRC's stance. That has the effect of lifting the agreed suspension so that the Closure Notices become effective. It would have been equally open to Mr Howard by my analysis to have said the Closure Notices were withdrawn. However he did not do so.
>
> The letter then went on to deal with how Mr Howard proposed to address the self- assessments concerning the derivatives [by making amendments to B&W's return under the provisions of para. 34(2)] ...
>
> The difficulty with that position is that HMRC now acknowledge that it was not possible to proceed in that way once the enquiry had been closed. It is clear as I have said HMRC were not intending to give up on the assessments and it is also clear as I have said that Mr Boyd knew that. However HMRC were in error in thinking that it could allow the enquiry to be closed in accordance with paragraph 32 and somehow maintain the right to investigate further the question of the derivatives.'[54]

On this basis, the Upper Tribunal concluded that the Original Notice was valid and that the amendments to B&W's return were not because they did not fall within para. 34(2).

> 'In my view none of [HMRC's] submissions [on the validity of the Original Notice] is correct. What HMRC fails to do is to distinguish its approach to the Closure Notice from its continued desire to seek to challenge the derivatives. The Closure Notice was apparently sent erroneously. There is nothing to suggest

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51 UT Decision para. 39
52 UT Decision para. 39
53 UT Decision para. 39
54 UT Decision paras. 44 - 47

otherwise. The 07.44 email in my view can only have one construction namely that it was designed to suspend the operation of the Closure Notices. It cannot be construed as withdrawing the Closure Notices as Mr Howard clearly never intended to do so. Indeed his correspondence going to April 2010 affirmed his continued belief in the validity of the Closure Notices. The only other possibility is that the Closure Notices were not put in abeyance in which case the 07.44 email is of no effect and the Closure Notices became valid.

This has to be distinguished from HMRC's attitude as regards the derivatives. I accept it still wished to challenge the derivatives. However it believed erroneously it could do so by the procedure set out in the letter of 8th November 2007. That stance was maintained until 2010 as set out above when HMRC via Mr Howard stated that there were two possibilities; either the amendment procedure which he had persisted in, or alternatively the power to withdraw the Closure Notices 2.5 years later and substitute new ones.

It is clear that when one looks at the 8th November 2007 letter that HMRC via Mr Howard considered that the Closure Notices were valid in the sense that it intended for them to operate. I do not see how the letter can be given any other construction.

That is to be distinguished from its desire to pursue the derivatives. HMRC made a number of mistakes. First Mr Howard as early as 8th November 2007 thought he could pursue the derivatives by amending the self-assessment return. Second he decided in April 2008 that he could withdraw the earlier Closure Notices and in February 2010 submitted new ones. B&W challenged both of those possibilities in their letter of 9th April 2010 and ultimately HMRC has accepted that.

The issue here in reality is what is the effect of HMRC's mistaken belief that it could allow the Closure Notices to go ahead but still investigate the derivatives.

.....

As between HMRC and B&W it seems to me that HMRC must be held to what it says in its plain actions. By the letter of 8th November 2007 it plainly accepted that the Closure Notices were valid. That stance was clear and unambiguous and it is not affected in my view by reason of HMRC's mistaken belief that it could nevertheless still pursue the derivatives. It would be quite wrong to allow HMRC to resile from such a clear and unambiguous stance. It must bear the consequence of that absent any power to relieve from the consequences of the mistake and none is said to exist.

It follows therefore for the reasons that I have set out above my view is that the Closure Notices are valid.'[55]

[55] UT Decision paras. 61 - 69

THE UPPER TRIBUNAL'S DECISION

The result was that, although the Upper Tribunal had confirmed the FTT's conclusion in favour of HMRC on the Substantive Issue, it had reversed the FTT's conclusion on the Procedural Issue. Because of that no amendment could be made to B&W's return for the year ended 31st March 2004.

Under TMA 1970 s.50 in respect of a self-assessment, the decision for the FTT is whether or not the appellant is under charged or over charged. If the Tribunal decides that the appellant is under-charged it must increase the assessment and if it decides the appellant is over-charged it must reduce it. Otherwise the assessment stands good.

The only matter on which the Tribunal's decision is given, therefore, in respect of an appeal against an amendment of a self-assessment is on the amount on which the company is chargeable for the period concerned. Any other conclusions of the Tribunal are merely stages in arriving at its decision. The Upper Tribunal's function is to review and amend as necessary the FTT's decision. The decision in this case, therefore, was entirely in favour of B&W in as much as it entirely rejected HMRC's amendment to B&W's return on the basis of finding for B&W on the Procedural Issue even though it found for HMRC on the Substantive Issue.

HMRC'S PUBLIC STATEMENTS IN RESPECT OF THE UPPER TRIBUNAL'S DECISION

On the 20th February 2014 HMRC issued a press release with a banner headline 'Bristol & West Tax Avoidance Plan Loses Again'. The opening paragraph of the press release said:-

> 'Bristol & West Plc, owned by Bank of Ireland, has lost its second attempt to avoid £27[56] million of corporation tax by claiming that there was a loophole in the law governing the taxation of derivatives.'

It then went on to quote David Gauke, Exchequer Secretary to the Treasury, as saying:-

> 'This case is the result of HMRC's relentless work against a highly complex and speculative avoidance gamble that, unchallenged, would have deprived the country of over £27m in corporation tax.'

Only in a note to editors near the end of the press release did the release refer to the fact that:-

> 'The Upper Tribunal allowed Bristol &West's appeal on the point that was originally upheld in ... HMRC's favour in the First-tier Tribunal, involving a closure notice mistakenly sent out.'

[56] This appears to be Corporation Tax at 30% on the total receipt of £91m. It thus falls to reflect the £9.2m lost through HMRC's blunder

What it did not say is that, because of this error, the Tribunal's decision was entirely in B&W's favour, that it entirely rejected the amendment made by HMRC to B&W's return and that £9.2m of tax was not chargeable which would have been chargeable under the Tribunal's view of the Substantive Issue had the error not been made. This misleading information was repeated in an HMRC 'news story' released on the same day which still appears on the Government's website at the time of writing. Over two months later, HMRC's Agent Update 41, published on the 24th April 2014, continued to give this misleading view of the case saying:-

> 'Bristol & West Plc, owned by Bank of Ireland, has lost its second attempt to avoid £27m of corporation tax by claiming that there was a loophole in the law governing the taxation of derivatives.'

HMRC'S APPEAL

We understand that HMRC has been granted leave to appeal to the Court of Appeal and that the Appeal Court is expected to hear the case towards the end of this year or at the beginning of next. HMRC have appealed on the Procedural Issue and no doubt B&W will have cross-appealed on the Substantive Issue.

What is at Stake on the Appeal?

It is not clear how significant in practice it would be if the final decision on the Substantive Issue were to be unfavourable to the taxpayer.

The opportunity to undertake transactions designed to exploit the anomaly in the way that B&W aimed to do existed only for a short period of time and closed over ten years ago so the decision has no significance in respect of preventing future tax planning. The 'news story' which was published on the 20th February 2004 claimed that:-

> 'A further £215 million was protected when other followers of the plan settled before being taken to [sic] tribunal.'

If these 'followers' had settled before the Upper Tribunal hearing then the decision in that hearing, still less a decision in a future Court of Appeal hearing, cannot have been the trigger to their decision to settle. Significantly, what the 'News Story' does not claim is that there are outstanding unresolved cases in respect of similar transactions. So there is nothing to indicate that the decision in the case will be significant in settling the taxation treatment of similar transactions undertaken by other taxpayers. The Upper Tribunal's conclusion on the substantive issue will, however, be significant in respect of any assessments which HMRC may have made on B&W for its succeeding accounting periods in respect of that part of the £91m Receipt (£60.4m), which will be taken to B&W's profit and loss account for those years but it will not necessarily be determinative.[57]

[57] The Upper Tribunal's decision on the Substantive Issue, succeeding as it did its consideration of the Procedural Issue which entirely disposed of whether the Company's self-assessment should have been amended, is, arguably, obiter dictum

If the decision in the Upper Tribunal is finally confirmed by a higher court, the only absolute result of the case will, therefore, be that this blunder by an HMRC official will have reduced the Government's tax receipts by £9.2m.

DISCIPLINARY ACTION

The money lost from this failure of HMRC's staff is even more striking when one considers the Upper Tribunal's comment, given above, that:-

> 'It was theoretically possible for Mr Howard to go and rummage through all the Closure Notices in their envelopes that were still in HMRC's clutches on 31st October 2007 but I assume that task was so large it was not considered worth doing. As my decision will show had they stopped that Closure Notice being sent out none of the problems would have ensued.'[58]

£9.2m of tax would surely have paid for sufficient staff time to make the 'rummage' 'worth doing'.

It seems unlikely that a private sector organisation would suffer a loss of this magnitude resulting from a failure of a member of its staff without instituting some form of disciplinary procedure. We telephoned HMRC's Press Office on the 30th April 2014 to ask whether any disciplinary action had been taken in respect of any of HMRC's staff in connection with the case. At first we were told that HMRC would not comment. We were contacted later on the same day and asked for a copy of the decision which we immediately provided. Two days later we received an email which said:-

> '... below is all we are saying about this Judgment:-
>
> > "We frequently review our processes and procedures to ensure that closure notices are only issued in appropriate circumstances."
>
> Kind regards ...'

Are HMRC Likely to be Successful in its Appeal?

Will the Court of Appeal confirm or overturn the Upper Tribunal's decision? The Upper Tribunal's decision certainly poses some difficulties. It is not entirely clear of what, in the Upper Tribunal's view, the Closure Notice consisted. The Judgment refers, for example, to the Closure Notice having been 'sent erroneously'[59] which would appear to refer to the sending of the Original Notice. Perhaps the Upper Tribunal considered that the Original Notice constituted the Closure Notice within para. 32(1)?

In discussing the November 2007 HMRC Letter, however, the Upper Tribunal said:-

> 'Whilst I accept the Closure Notices have to be in one document and that it is not possible to stitch together a number of disparate documents so as to create a Closure Notice it is perfectly possible for the key document to incorporate other

[58] UT Decision para. 27
[59] UT Decision para. 61

> documents expressly by reference. That is precisely what the letter does. It refers back to the Closure Notices and says they are valid. It therefore incorporates in it the contents of the Closure Notices which provide all the information that B&W can require.'[60]

If the Closure Notice at issue had to be in 'one document' but could 'incorporate other documents by reference' that one document could not have been the Original Notice because it did not, and could not, refer to the November 2007 HMRC Letter which did not exist at the time the Original Notice was created. On the other hand, if the November 2007 HMRC Letter constituted the Closure Notice and incorporated the Original Notice by reference it is difficult to see how the HMRC email of 31st October 2007 could, to adopt the Upper Tribunal's terminology, have suspended the operation of the Closure Notice which on this view was not issued until 8th November 2007.[61]

In part, the difficulty arises because para. 32(1) provides that a Closure Notice is 'issued' at a particular time and takes effect at that time. It does not contemplate such a notice being issued at one time but being placed immediately in suspension, and being brought out of suspension at a later time.

The Upper Tribunal might have found for B&W on the Procedural Issue on the ground that the Closure Notice was the November 2007 HMRC Letter, that it was issued when that letter was received by B&W presumably shortly after 8th November 2007 and that it incorporated the Original Notice by reference.

Although there are passages in the Judgment where the Upper Tribunal appears to have had such a position in mind,[62] that does not appear to have been the basis of the Tribunal's decision.

So in view of these confusions in the Upper Tribunal's analysis, it is not clear that the Court of Appeal will confirm the Upper Tribunal's conclusion on the Procedural Issue and therefore its decision in the case. On the other hand, the Upper Tribunal did identify a real difficulty in the FTT's conclusion that the HMRC Email had the effect of indicating HMRC's intention that the Original Notice should not be a Closure Notice rather than as simply evidencing that its officer had made a mistake in issuing it.

Whether or not the Upper Tribunal's decision is overturned, the final outcome of HMRC's blunder and its subsequent decision not to bother to search manually for the Closure Notices so as to prevent them from being sent, will be, at the least, to have created a substantial risk of a loss of tax of £9.2m. If B&W are finally successful on the Procedural Issue,[63] it will actually have resulted in the absolute loss of that amount. In such circumstances it is surely legitimate for the public to expect HMRC to come clean as to whether any member of its staff has been subject to disciplinary procedures in respect of the blunder.

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60 UT Decision para. 48
61 UT Decision para. 61
62 UT Decision paras. 48 & 49
63 And not on the Substantive Issue

INFORMATION OR PROPAGANDA?

Much more disturbing, is the misleading information which HMRC, quoting the minister responsible, Mr Gauke, has published about the outcome of the case. This was not a one-off mistake. The material has been published by the Government in at least three separate forms over a period of two months. It has been repeated, uncritically, by parts of the technical press[64] and HMRC has taken no steps to correct the misapprehension it has created. In the light of this behaviour can one really trust material published by HMRC on taxation to meet the most basic standards of accuracy and honesty?

[64] See, for example, *Tax News* Issue 153 February 2014, published by CCH