Neutral Citation: [2025] UKFTT 00415 (TC)

Case Number: TC09481

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal references: TC/2024/04098
TC/2024/04099; TC/2024/04100
TC/2024/04101; TC/2024/04102
TC/2024/04103; TC/2024/04104

CLOSURE NOTICE APPLICATIONS – whether to consider "without prejudice" documents – whether closure notice applications should be refused pending decision of Supreme Court on judicial review brought by some of the Applicants – effect of closure notices on HMRC's power to issue Schedule 36 Notices – balancing the factors – applications allowed

Heard on: 18 and 19 March 2025
Judgment date: 7 April 2025

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

REFINITIV LIMITED

REFINITIV TRANSACTION SERVICES LIMITED

LIPPER LIMITED

REFINITIV UK EASTERN EUROPE LIMITED

REFINITIV BENCHMARK SERVICES (UK) LIMITED

THOMSON REUTERS (PROFESSIONAL) UK LIMITED

TR ORGANISATION LIMITED

Applicants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Applicants:	Jonathan Peacock KC and Michael Ripley of Counsel, instructed by Baker & McKenzie LLP
For the Respondents:	John Brinsmead-Stockham KC and Alice Defriend of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Applicants were, at all relevant times, members of the Thomson Reuters Group ("the TR Group") and were party to various intra-group transactions with Thomson Reuters Global Resources ("TRGR"), an entity in the TR Group that was tax resident in Switzerland. On 11 December 2020, HMRC opened enquiries into the Applicants' corporation tax ("CT") returns for the 2018 year. On 19 June 2024, the Applicants applied to the Tribunal for directions that those enquiries be closed, pursuant to Finance Act 1998, Sch 18, para 33(3) ("the closure notice applications").

2. The Applicants were represented by Mr Peacock KC with Mr Ripley, while Mr Brinsmead-Stockham KC and Ms Defriend appeared for HMRC. I am grateful to all counsel for their clear submissions, both written and oral, and am also grateful to their instructing solicitors.

3. The background to the closure notice applications was complex, as explained below. A key factor was that three of the Applicants had made parallel Judicial Review ("JR") claims. These were heard first by the Upper Tribunal ("UT"), see *R (oao Refinitiv and Others) v HMRC* [2023] UKUT 257 (TCC) and then by the Court of Appeal, see *R (oao Refinitiv and Others) v HMRC* [2024] EWCA Civ 1412. Both the UT and the Court of Appeal dismissed the JR claims, but the Applicants then applied to the Supreme Court for permission to appeal ("PTA"), and that application had not been determined at the time of this hearing.

4. HMRC's main submission before this Tribunal was that the CT enquiries into the three Applicants who had made the JR claim should remain open until after the outcome of the JR was known. The Applicants' position was that HMRC had already come to an "informed judgment" and both could and should issue all the closure notices.

5. Having considered and weighed the relevant factors, I decided for the reasons explained in the main body of this judgment that HMRC had failed to meet their burden of showing that any of the enquiries should remain open, and I directed that they issue the closure notices.

THE BACKGROUND

6. At all relevant times, TRGR, the Swiss resident entity, held the main Intellectual Property ("IP") assets of the TR Group. From at least 2008 until 2018, services relating to IP were supplied by various of the Applicants to TRGR; the issue between the parties being the transfer pricing of those services.

7. HMRC's position was summarised by Henderson LJ in the Court of Appeal as follows, where the acronym "TR UK" is used for the UK-based companies which brought the JR:

> "Those services enhanced the value of the IP held by TRGR, which TRGR used to make profits which were taxed at much lower rates in Switzerland than the headline rates of UK corporation tax. HMRC's case, in short, was that TR UK did not receive the compensation for providing those services that they would have done if the services had been provided at arm's length, and that TR UK thereby received a potential advantage in relation to UK taxation because their profits subject to UK corporation tax were lower than they would have been under an arm's length relationship with TRGR. In broad terms, this remained the position until the IP was sold by TRGR in 2018 for a very substantial gain, as part of a disposal by the Thomson Reuters group of its "Financial & Risk" ("F&R") business unit to a new joint venture company, Refinitiv Holdings Limited. It was also part of HMRC's case that the services supplied by TR UK to TRGR throughout the period from 2008 to 2018 contributed (a) to the generation of annual profits by TRGR in future years (as

well as in the year of supply) and (b) to the value of the IP sold in 2018, and thus to the capital profits made on the sale by TRGR in 2018."

The APA

8. Having carried out a detailed review, in 2012 HMRC agreed an Advance Pricing Agreement ("APA") in relation to transactions between TRGR and three of the Applicants, Refinitiv Ltd ("Refinitiv"), Lipper Ltd ("Lipper") and Refinitiv UK Eastern Europe Limited ("REEL"), together, "the APA Entities". The APA covered the period from 1 October 2008 to 31 December 2014, and provided that the services were taxed on the basis of what has been described as a "cost-plus" method[1].

9. In July 2014, the Applicants approached HMRC to initiate a new APA, which would have effect from 1 January 2015 to 31 December 2020, but no new APA was agreed. HMRC formed the view that cost-plus was not appropriate and instead a "profit-split" method should be used.

The CT enquiries

10. HMRC opened enquiries into the CT returns of certain of the Applicants for the years 2013 and 2014, and for all the Applicants for 2015-2018. The first enquiry began on 3 November 2015 and the last on 11 December 2020, when enquiries were opened into the Applicants' 2018 CT returns.

11. The enquiries were closed on either 3 March 2023 or 31 July 2023, apart from those into the 2018 CT returns. The Applicants appealed all the CT closure notices to HMRC, but have not yet notified those appeals to the Tribunal.

The DPT assessments

12. Diverted Profits Tax ("DPT") was introduced by Finance Act 2015 ("FA 2015) and by s 116(1) took effect for accounting periods beginning on or after 1 April 2015. Section s 98(4) provides that where HMRC issue a charging notice, the DPT is payable in full within 30 days and "may not be postponed on any grounds".

13. On 8 February 2018, HMRC issued DPT charging notices for 2015 to all but two of the Applicants; on 15 February 2021 they issued notices for 2016 to all but one of the Applicants; on 9 February 2022 and 20 August 2021 they issued charging notices for 2017 and 2018 respectively to all the Applicants. In addition, HMRC issued supplementary charging notices and/or amending notices to various of the Applicants. The Applicants appealed the DPT charging notices to HMRC but have not yet notified those appeals to the Tribunal.

14. HMRC accepted that they had applied the same transfer pricing analysis when issuing the CT closure notice amendments and the DPT charging notices.

15. The total DPT charged for 2015 to 2018 was £314,816,260, of which £188,509,331 related to the 2018 year, including £165,301,934 charged to Refinitiv. HMRC subsequently agreed that the non-APA Entities had been overcharged by around £10m (I had no information about the position of the APA-Entities). It appeared to be common ground that HMRC were unable to repay that money until the appeals against the relevant charging notices were determined.

The JR

16. The APA Entities considered that the 2018 DPT charging notices issued to them were inconsistent with and undermined the APA. On 16 November 2021, they filed a JR claim on

[1] Strictly speaking this was not correct, see [7] of the Court of Appeal judgment, but both parties have used that term, and I have done the same.

the basis that HMRC had misconstrued the effect of the APA and had acted in breach of their public law obligations.

17. The UT heard the JR application on 17 and 18 July 2023, and on 20 October 2023 issued their decision dismissing the claim. The APA Entities applied for permission to appeal, which was granted. On 15 October 2024, the Court of Appeal upheld the UT's judgment, finding that the APA did not "relate" to the transfer pricing of services provided in 2018: Henderson LJ said that this conclusion was "simple and obvious". The Court refused permission to appeal.

18. On 7 February 2025, the APA Entities filed a PTA application at the Supreme Court. At the time of this hearing, it was not known whether the Supreme Court will give permission.

In summary

19. As is clear from the foregoing:

(1) the Applicants have appealed all the DPT charging notices, including that for 2018.

(2) HMRC closed all the CT enquiries other than those for 2018, and all those closure notices have been appealed to HMRC; and

(3) transfer pricing was the only issue in dispute for all those years, and it was common ground that it had to be approached in the same way for DPT and for CT.

20. However, HMRC has not issued any of the Applicants with closure notices for the 2018 year. Those enquiries also related only to transfer pricing, other than that for Refinitiv, where one or more other matters are being considered.

THE CLOSURE NOTICE APPLICATIONS

21. On 19 June 2024, the Applicants applied to the Tribunal for directions that HMRC issue a partial closure notice for Refinitiv in relation to the transfer pricing enquiry, and final closure notices for all the other Applicants. The applications were thus made after the UT judgment, but before the case was heard by the Court of Appeal.

22. In the rest of this decision, I have not distinguished between (a) the partial closure notice and (b) the applications for final closure notices, unless it is necessary to do so.

The main and supplementary bundles, and the witness

23. The parties filed an authorities bundle of 390 pages, a main document bundle of 7,507 pages and a supplementary bundle of 358 pages. The Applicants also handed up further documents relating to the JR; HMRC did not object and I accepted these into evidence.

24. Officer Donna Stephens provided a witness statement, gave evidence-in-chief led by Mr Brinsmead-Stockham, was cross-examined by Mr Peacock, answered questions from the Tribunal and was re-examined by Mr Brinsmead-Stockham. She was a straightforward and credible witness.

The without prejudice bundle

25. The Tribunal was also provided with a third bundle which the parties called the "without prejudice bundle", and I have used the same name. Until the evening before the hearing, I had received no related information to explain the purpose or contents of this bundle. However, because it was entitled "without prejudice", I decided when preparing for the hearing (a) not to read the documents in the bundle but to ask the parties for submissions at the inception of the hearing, and (b) to refresh my knowledge of the relevant case law. I summarise the position below:

(1) Without prejudice documents are not generally admissible, see *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887 at [34] and *Williams v Hull* [2009] EWHC 2844 (Ch).

(2) The only guidance I identified as to the position of a judge asked to consider as part of the resolution of the substantive dispute, documents which one party considered to be without prejudice, was summarised in *AZ v BY* [2023] EWHC 2388 (TCC). In that case Constable J in the High Court set aside the decisions of an adjudicator who had considered material one of the parties had stated to be without prejudice, holding that:

> "an error as to the admissibility of without prejudice material is an error of law that could potentially impact the fairness of the decision-making process in accordance with the rules of natural justice".

(3) I also noted that this approach appeared to have been followed in *N Brown v HMRC*, where Judge Sinfield first decided whether a document was privileged, and Judge Jonathan Richards (as he then was) subsequently heard the substantive appeal, see [2016] UKFTT 445 (TC) and [2019] UKFTT 0172 (TC) respectively.

26. At 4.45pm on the day before the hearing, I was provided with HMRC's Reply to the Applicants' skeleton; this had been filed and served at 5pm on Friday 14 March 2025. In the Reply, HMRC said that the Applicants' position was that (a) the documents in the without prejudice bundle were privileged and (b) the Tribunal therefore should not review them, but HMRC did not agree.

27. I began the hearing by informing the parties that I had not viewed any of the documents in the without prejudice bundle, and then invited short submissions. Mr Peacock confirmed that the Applicants considered that the documents in this bundle benefited from "without prejudice" privilege, and should not therefore be taken into account when deciding these closure notice applications. Mr Brinsmead-Stockham disagreed, saying they were not "documents in the course of a negotiation with a view to settling anything" but instead "simply part of an information gathering exercise" and were "an ordinary part of the course of the ongoing correspondence".

28. I decided to hear and decide the substantive dispute about the closure notices without having regard to any of the material in the without prejudice Bundle, having taken into account the following:

(1) were I to view the documents in that bundle, there was a risk, however slight, that my decision on the closure notice applications would be open to challenge on the basis that I had been unconsciously biased by one or more of the documents contained within that bundle;

(2) neither party had asked in advance for there to be a preliminary hearing before a different judge as to whether the Tribunal could take into account the documents in the without prejudice bundle; and

(3) the Applicants had applied for closure notices on 19 June 2024, and were I to recuse myself having decided the without prejudice issue, there would be a further delay in making a closure notice decision, which itself was a highly time-sensitive issue.

29. Mr Brinsmead-Stockham subsequently accepted that the documents in the without prejudice bundle were not of core relevance to HMRC's case.

THE LAW

30. In this decision, all legislation and case law is cited so far as relevant to the issues in dispute. The key provision is FA 1998, Sch 18, para 33, which reads:

> "(1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs give a partial or final 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 partial or final closure notice within a specified period."

31. In *R&C Commrs v Vodafone 2* [2006] STC 483, Park J said at [43]:

> "Paragraph 33 is meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal."

32. Park J explained this further at [44]:

> "Schedule 18 is, I believe, constructed so as to produce a reasonable balance. It imposes obligations on companies to make self-assessments of their own corporation tax liabilities. It gives to the Revenue substantial powers to investigate returns and self-assessments which companies make. Conversely one would expect, and in my view one finds in para 33, a protection for companies that wish to question whether in their particular circumstances the use by the Revenue of some of their Sch 18 powers is, or continues to be, justified."

33. In *Frosh v HMRC* [2017] UKUT 320 (TCC) ("*Frosh*")], the UT (Judges Berner and Cannan) held at [43] that in deciding whether to give a direction under para 33(3), the Tribunal had to make "a value judgment…in each case", and continued:

> "Every case depends on its own facts and circumstances, and is concerned with a question of reasonableness…the value judgment required of the FTT in addressing a particular case should not be subjected to any kind of straitjacket. The only relevant legal principle to be applied by the FTT is to consider whether HMRC have reasonable grounds for not giving a closure notice within a specified period. It is for the FTT to consider the question of reasonableness without any further gloss on that concept."

34. The UT continued at [58] by saying there was "a statutory presumption that the FTT will make a direction for closure and that the burden rests on HMRC to show that they have reasonable grounds for not issuing a closure notice within a specified period".

35. In *Beneficial House v HMRC* [2017] UKFTT 801 (TC) ("*Beneficial House*") at [15]. Judge Falk (as she then was) set out the relevant principles; her summary was subsequently approved by the UT in *HMRC v Hitchins & Ors* [2024] UKUT 114 (TCC) at [11]. It reads:

> "(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 (*HMRC v Vodafone 2* [2006] STC 483…]) and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry (*Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]). The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case (*Frosh* at [43]). This involves a balancing exercise.

(2) The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer (*Jade Palace Limited v HMRC* [2006] STC (SCD) 419 at [40]).

(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 (*Eclipse Film Partners*, and *Jade Palace* at [42] to [43]). It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry: see *Steven Price v HMRC* [2011] UKFTT 264 (TC) at [40].

(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 (*Eclipse Film Partners* at [19]).

(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: see for example *Steven Price*, and also *Andreas Michael v HMRC* [2015] UKFTT 577 (TC). 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: *Frosh.*

(6) The Supreme Court's comments on the subject of closure notices in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 ["*Tower*"] 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" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In *Frosh* the Upper Tribunal commented at [49] 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."

THE NON-APA ENTITIES AND THE APA ENTITIES

36. HMRC accepted that they had no reasonable grounds for not closing the enquiries of the non-APA Entities, and there was therefore no dispute that closure notices should be directed for all of the Applicants other than the three APA Entities.

37. The rest of this judgment thus concerns only the APA Entities, and references to "the Applicants" and "the applications" are to be read as referring only to those three companies and their closure notice applications, unless the context otherwise dictates.

38. It is clear from the law set out above that:

(1) I must allow the applications unless HMRC have reasonable grounds for not giving closure notices within a specified period, the burden being on them;

(2) in deciding the applications, I must exercise a value judgment, determining what is reasonable on the facts and circumstances of this case, and

(3) that process involves a balancing exercise.

39. In carrying out that exercise, I considered and weighed the factors set out below.

INFORMED JUDGMENT

40. In *Beneficial House*, Judge Falk said that what is required for a closure notice direction to be given 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".

41. HMRC set out in their skeleton argument why in their view they were unable to make that informed judgment until the outcome of the JR was known. They said that if the Supreme Court were to allow the JR, this would:

> "significantly affect the method and approach that HMRC would have to adopt in respect of the Transfer Pricing Issue. In particular, it would be necessary for HMRC to determine, *inter alia*:
>
> (i) what intellectual property ("IP"), if any, was created or enhanced in value by the APA services;
>
> (ii) how the value of that specific IP should be amortized over succeeding years; and
>
> (iii) how to incorporate the analysis in (i) and (ii) into HMRC's overall analysis of the Transfer Pricing Issue."

42. Mr Peacock challenged that submission for the reasons set out below.

The relief sought

43. Mr Peacock said that the reliefs sought in the JR were a quashing order, a declaration of unlawfulness and an order requiring repayment of the relevant DPT, and that if the Supreme Court granted those reliefs, it would not address "the numerical consequences" relevant to the closure notices.

44. On this point I agree with HMRC. If the Supreme Court were to allow the JR, HMRC would need to consider how that judgment affected the transfer pricing methodology. In simple terms, at least some of the services provided by the Applicants would then need to be valued on the cost-plus basis set out in the APA rather than on the profit-split basis.

45. As to whether HMRC were able to do that exercise now, so that they could work out the consequences if the Applicants succeeded at the JR, it was clear from Ms Stephens's evidence that:

(1) HMRC had already estimated the transfer pricing adjustment which would apply to the capital profits made on the sale by TRGR in 2018, albeit only on a "high level" basis: Ms Stephens said in cross-examination that it was "a very rough estimate"; but

(2) work had not yet begun on the adjustment to operating profits which would also be required; this was not straightforward as it included treating expenses in a way which was compliant both with the APA and with accounting rules (which require expenses to be deducted in the year they are incurred).

46. HMRC had therefore carried out only some of the work required to come to the "informed judgment" as to the transfer pricing adjustments which would be required if the Applicants succeeded in the JR. In any event I also agree with HMRC that it is not realistically possible for HMRC to form that judgment until the JR has concluded, because until that point it cannot be known how the APA would affect the transfer pricing adjustments required: any work carried out now would be based on probabilities rather than knowledge.

The "primary" basis

47. Mr Brinsmead-Stockham had accepted on behalf of HMRC that:

(1) the profit-split basis was HMRC's preferred basis;

(2) HMRC had come to an informed judgment as to how to close the Applicants' enquiries by applying the profit-split basis; and

(3) HMRC could thus issue closure notices on that basis to all the Applicants quickly, subject to complying with internal administrative and approval requirements.

48. Mr Peacock submitted that this was all that was required. HMRC had come to an "informed judgment" as to the correct tax payable; this was their "primary" position, and there was no need for HMRC to wait to see whether they needed to change that position as the result of the JR. He drew attention to *Vitol Aviation v HMRC* [2021]UKFTT 0353 (TC) ("*Vitol*"), where HMRC gave as one of the reasons for delaying the issue of closure notices that they wanted to "construct alternative transfer pricing models, if these should be required". Judge Fairpo rejected that submission, saying at [71]:

> "it is not reasonable for enquiries to be kept open for HMRC to refine details of their conclusions in this manner. Such transfer pricing models would clearly not be required to reach an informed judgement on the matter under enquiry…HMRC had reached that judgement already."

49. Although it was common ground that HMRC had come to an informed judgment as to the correct tax payable by the Applicants, I agree with Mr Brinsmead-Stockham that the position here is very different to that in *Vitol*. In that case, HMRC wanted to construct alternative models to support a hypothetical secondary position. In this case, there was parallel litigation which would *determine* whether HMRC had to change their approach.

The closure notices and charging notices already issued

50. Mr Peacock also relied on the fact that HMRC had already issued:

(1) closure notices to Refinitiv for years 2013 through to 2017 inclusive, and for Lipper and REEL for the years 2015 to 2017 inclusive; all were on a profit-split basis and those years would also be affected by if the Applicants won the JR; and

(2) DPT charging notices to all the APA Entities for the years 2013 to 2018 inclusive, again on a profit-split basis, and those similarly would require amendment if the Applicants were successful at the Supreme Court.

51. Mr Peacock submitted that this supported the Applicant's case that closure notices could and should be directed for 2018. In response, Mr Brinsmead-Stockham said:

(1) The issue the Tribunal had to decide was whether to direct HMRC to close the 2018 enquiries into the APA Entities; that decision did not encompass what HMRC had already done in relation to enquiries for other years, or in relation to DPT.

(2) HMRC had issued the last of those earlier closure notices on 31 July 2023, just after the ending of the UT hearing of the JR application. At that time, HMRC had thought the JR would shortly come to an end. They had not realised the Applicants would apply for permission to appeal, not only to the Court of Appeal but also to the Supreme Court.

(3) HMRC may have been wrong to have issued closure notices for the earlier years.

(4) The 2018 CT assessments will be larger and more significant than those for earlier years, as can be seen by reference to the DPT charging notices: over half the DPT relates

to the APA Entities in 2018. The amount of tax at stake is a material factor when comparing these closure notices with those previously issued.

52. Although I agree with Mr Peacock that HMRC's closure of earlier enquiries without waiting for the outcome of the JR is a relevant factor, in my judgment it is one to which little weight should be ascribed, for the reasons given by Mr Brinsmead-Stockham. The basis used for the DPT charging notices is even less relevant, because FA 2015, s 95 sets out prescribed dates by which charging notices must be issued, and in consequence HMRC could not delay until after the conclusion of the JR.

HMRC's delay?

53. Mr Peacock also submitted that HMRC could and should already have carried out an alternative analysis and calculation on the basis that the Applicants would win the JR. He said HMRC "knows full well how to do this [and]…could have done it" but had simply failed to carry out the exercise.

54. Mr Brinsmead-Stockham responded by saying that HMRC had been working on the profit-split approach, and were not in a position to share the outcome of that work with the Applicants until September 2023. Until then, "the entire focus of both parties" in their discussions was about the financial consequences of that approach, and it was only subsequently that HMRC had sought additional information from the Applicants which would be relevant to the adjustments which would have to be made if the JR application succeeded.

55. I agree with Mr Brinsmead-Stockham for the reasons he gave that there has been no "undue delay" by HMRC in carrying out an analysis on the assumption that the Applicants succeed in the JR.

The wording of the closure notices

56. Mr Peacock also submitted that HMRC could avoid the difficulties of not knowing how the position would change if the Applicants won the JR, by issuing closure notices in broad terms. He referred to *BCM Cayman and others* [2017] UKFTT 0226 (TC) ("*BCM Cayman*"), a decision of Judge Falk sitting with Mr Bell. The issue in two of the applications was the disallowance of interest; the Tribunal held that HMRC could issue a closure notice stating the interest was disallowed, followed by two different reasons as to why that was the case (or in the alternative, could refer in the closure notice to earlier correspondence).

57. I agree with Mr Peacock, for the following reasons:

(1) it is clear from *Tower* that a closure notice can be issued "in broad terms", for instance where the facts are complicated and have not been fully investigated, see Lord Walker's judgment at [18] of that decision; and

(2) although Lord Hope went on to say at [85] of the same judgment that issuing closure notices in broad terms should not be the norm, that was because "uninformative" closure notices were unhelpful to taxpayers and the Tribunal.

(3) In this case, both parties are fully aware of the position, and there would be no unfairness to the Applicants if the closure notice were widely drafted. This is instead a paradigm case where it is appropriate for the closure notice to be issued in broad terms.

58. I also noted that HMRC had taken that approach when issuing at least some of the closure notices for the earlier years: for instance, that issued to Refinitiv for 2015 sets out the conclusion that "Trading Profits and Profits Chargeable to Corporation tax, have been understated by £87,313,635", and under the heading "reasons for our conclusion", the text reads (my emphasis):

> "As both the company and TRGR are part of the same group of companies, the participation condition of Section 147, Part 4, TIOPA 2010 is met and the profits of the company, in respect of transactions with TRGR, are required to be calculated for tax purposes as if the arm's length provision had been made or imposed where the imposition of the actual provision otherwise confers a tax advantage. **HMRC's view is that the company's transactions with TRGR are not calculated at the arm's length price and this has resulted in the understatement of trading profits stated above**.

59. This closure notice thus does not mention the profit-split method, although that has been used as the basis for calculating the quantum of the adjustment. HMRC could therefore issue closure notices for the APA Entities using similar wording.

The powers of the Tribunal to amend the quantum

60. Having a broadly worded closure notice would of course be insufficient, were there to be no way to change the quantum to reflect changes which might be required if the Applicants win the JR. But, as Mr Peacock said, the TMA provides just such a mechanism. When HMRC issue a closure notice, they are amending the taxpayer's self-assessment returns, see FA 1998, Sch 18, para 34. When the taxpayer appeals the amendment, the Tribunal may increase or decrease the amount charged by using the powers given by TMA s 50(6) and (7), which read:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b)-(c) …
>
> the assessment…shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment6
>
> (b)-(c) …
>
> the assessment or amounts shall be increased accordingly."

61. Mr Brinsmead-Stockham, rightly did not suggest that there was any reason why the amount charged by the closure notice amendments could not be increased or decreased under this provision, were HMRC subsequently to change their reasons in the light of a Supreme Court decision.

Conclusion on "informed judgment"

62. For the reasons set out above, HMRC have a good reason for wanting to know (a) whether the Supreme Court will issue a binding judgment on the JR issue, and (b) whether that judgment changes how the APA impacts the transfer pricing used in 2018.

63. However, that is not enough on its own for HMRC to succeed. The statutory test is that HMRC has "reasonable grounds for not giving a closure notice", not that they have "a" good reason. In order to rebut the presumption that the enquiries be closed, all the facts and circumstances of the particular case must be considered, balanced and weighed.

64. On the basis of the facts and circumstances of this case, I agree with the Applicants that:

(1) HMRC are in a position to issue closure notices in broad terms which are wide enough to cover both their current view and any subsequent changes consequent upon a Supreme Court judgment in the Applicants' favour; and

(2) the Tribunal could subsequently adjust the quantum of the closure notice amendment to reflect any such change.

65. Although it is reasonable for HMRC to want to wait until after the JR, that is insufficient on its own to provide them with the necessary "reasonable grounds". I have therefore gone on to consider the other factors put forward by both parties.

THE ANALOGY

66. Mr Brinsmead-Stockham sought to strengthen HMRC's case by relying on an analogy between the Applicants' JR application and the procedure set out at FA 2018, Sch 18, para 31A-D. This allows an issue to be referred to the Tribunal for determination in the course of a CT enquiry.

67. Para 31A includes the following provisions:

> "(1) At any time when an enquiry is in progress in relation to any matter relating to a company's tax return any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for determination.
>
> (2) Notice of referral must be given–
>
> (a) jointly by the company and an officer of Revenue and Customs,
>
> (b) …
>
> (c) to the tribunal."

68. Para 31C(1) provides:

> "While proceedings on a referral under paragraph 31A are in progress in relation to an enquiry–
>
> (a) no partial closure notice relating to the question referred shall be given,
>
> (aa) no final closure notice shall be given in relation to the enquiry, and
>
> (b) no application may be made for a direction to give paragraph (a) or (aa)."

69. Para 31D reads:

> "(1) The determination of a question referred to the tribunal under paragraph 31A is binding on the parties to the referral in the same way, and to the same extent, as a decision on a preliminary issue in an appeal.
>
> (2) The determination shall be taken into account by an officer of Revenue and Customs in reaching their conclusions on the enquiry.
>
> (3) Any right of appeal under paragraph 30 or 34(3) may not be exercised so as to reopen the question determined except to the extent (if any) that it could be reopened if it had been determined as a preliminary issue in that appeal."

70. The issue to be decided in the JR proceedings was set out by the UT at [65] of their judgment:

> "That dispute engages foremost a question of statutory interpretation of the Part 5 TIOPA provisions on APAs, in particular the meaning of the words in s220 TIOPA: "chargeable period…to which an advance pricing agreement relates". As applied to the facts of this case the question becomes: Is the 2018 accounting period a chargeable period to which the APA "relates" for the purposes of s220?"

71. Mr Brinsmead-Stockham submitted that this was a question of law which had arisen in the course of the HMRC's enquiries into the Applicants' returns, it was exactly the sort of issue which could have been referred to the Tribunal for determination under Sch 18, para 31A-D. Although those provisions only apply to CT and not to DPT, the issue is the same for both. The Applicants could therefore have used the referral mechanism instead of making a JR claim, and

had they done so, the enquiry would have had to remain open until the Tribunal gave the answer to the question referred.

72. In Brinsmead-Stockham's words "Functionally, what's happening in the judicial review is exactly the same as what would happen in the statutory referral process and…there's a strong basis therefore in principle for the tribunal to adopt the same approach when it comes to issuing closure notices". He criticised the Applicants, saying that they wanted to:

> "have their cake and eat it, because they are seeking to get a determination of this legal question during the enquiry…but then also forcing HMRC to issue a closure notice without the benefit of the final determination by the Supreme Court of that issue".

73. Mr Peacock rejected the analogy. He pointed out that the statutory mechanism requires the parties to make a joint referral, whereas the JR had been brought by the Applicants unilaterally. The starting point was therefore different; where both the parties had agreed to ask the Tribunal to determine a legal issue, it was plainly sensible for the appellant to be prevented from applying to close the enquiry before that issue had been determined.

74. I was initially unconvinced that para 31A-D had any relevance, but was persuaded in the course of the hearing that it does provide a relevant analogy for the reasons given by Mr Brinsmead-Stockham. Nevertheless, the two situations are only analogous, not identical. As Mr Peacock emphasised, the key difference is that the parties had not made a joint referral of an issue which they both considered needed resolution, so the Applicants could not be bound in the same way. Thus, while this analogy is relevant, I do not give it much weight.

SCHEDULE 36

75. Mr Brinsmead-Stockham said that, because HMRC could not know what the Supreme Court would decide in relation to the interaction between the APA and the Applicants' 2018 CT returns, HMRC needed to retain their powers under FA 2008, Sch 36. This would allow HMRC to require the Applicants to provide the information and documents, and so enable them to implement whatever was decided by the Supreme Court. In contrast, once the enquiries had been closed, HMRC would be unable to use the Sch 36 powers.

76. Mr Peacock advanced the following reasons why this factor should be given little or no weight:

(1) HMRC could use their Sch 36 powers after the enquiry had been closed;

(2) in any event, there was no need for those powers because

  (a) the Applicants had been co-operative throughout; and

  (b) there was no outstanding information or documents; and

(3) should that position change, the Tribunal could be asked to direct disclosure.

77. I consider and discuss each of those reasons below.

Continuing power

78. Mr Peacock's first submission was that HMRC were wrong to think that they could not use Sch 36 once a CT enquiry had been closed. He referred to para 21, which includes the following provisions::

> "(1) …
>
> (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 E[2] is met.

(4) Condition A is that a notice of enquiry has been given in respect of–

(a) the return, or

(b) …

and the enquiry has not been completed so far as relating to the matters to which the taxpayer notice relates

(5) In sub-paragraph (4), "notice of enquiry" means a notice under

(a) …or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that, as regards the person, an officer of Revenue and Customs has reason to suspect that–

(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…"

79. Condition A allows HMRC to use Sch 36 while an enquiry was in process, The Applicants had initially submitted that, after a closure notice had been given, Condition B would allow HMRC to issue the Applicants with an information notice. However, that Condition only applies where HMRC have "reason to suspect" an assessment was "insufficient". It was common ground that if the Applicants won the JR, they would pay *less* CT than under the profit-split method. I agree with Mr Brinsmead-Stockham that Condition B does not extend to cases where the assessment already made is excessive.

80. In the skeleton argument filed before the hearing, the Applicants changed their position, and relied instead on Condition C, on the basis that :

(1) DPT was a "tax other than income tax, capital gains tax or corporation tax";

(2) HMRC could therefore issue a Sch 36 Notice to obtain information and documents about the Applicants' DPT position;

(3) the same transfer pricing issues arose for DPT and CT; and therefore

(4) HMRC could use the information or documents obtained under the Sch 36 Notice to inform the CT position

81. Mr Brinsmead-Stockham accepted that it was *possible* that HMRC would retain a power to use Sch 36 after they had issued the closure notices, but described the Applicants' analysis as "speculative" and Mr Peacock's conclusion as "far from clear".

[2] Condition E relates to transfer pricing, but it was introduced by Finance (No 2) Act 2023, and took effect for accounting periods beginning after 1 April 2023

82. I too had significant doubts as to whether Mr Peacock's analysis was correct, for the following reasons:

(1) Condition C only applies where the Sch 36 Notice is given "for the purpose of checking the person's position…", and para 58 provides that "'checking' includes carrying out an investigation or enquiry of any kind". If HMRC issue the closure notices, by definition they will have *closed* their enquiries into the Applicants' 2018 returns and set out their conclusions.

(2) The statutory provisions which apply to DPT prescribe specific time periods within which HMRC can issue supplementary and/or amending charging notices. Mr Peacock did not explain how HMRC could nevertheless be said to be "carrying out an investigation or enquiry of any kind" after the end of the last of those periods.

(3) Even if that were possible, using Sch 36 in order to obtain information for DPT if HMRC's true and dominant purpose was to change the CT assessments, would be *ultra vires*, see *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*."

(4) Neither party cited any Tribunal decision which considered whether HMRC's Sch 36 powers could be used after the closure of the related enquiry, and I too was not aware of any precedent.

No need to use Sch 36?

83. Ms Stephens said in her witness statement that:

> "I note that HMRC have relied on the ability to issue information notices under Schedule 36 of the Finance Act 2008 ("FA 2008") to obtain information from the Applicants during the course of the DPT and CT enquiries, whether by issue of such notices (on more than one occasion), or a warning that such notices would be issued if information was not provided voluntarily."

84. However, under cross-examination Ms Stephens accepted that there had been only three such occasions:

(1) In one, the issuance of the Notice triggered a formal complaint from the Applicants, and HMRC apologised for issuing it inappropriately.

(2) In another, the Notice was never issued because HMRC accepted that the Applicants were providing the information in a co-operative manner and voluntarily.

(3) Although on a third occasion a Sch 36 notice was in fact issued, this was because the parties wanted to resolve a dispute as to whether certain documents were privileged, and it was agreed that (a) HMRC would issue a Sch 36 Notice, and (b) this would be referred to the Tribunal under the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009. The hearing was listed before Judge Brooks, who held that all the disputed documents were privileged, see *Refinitiv UK Holdings v HMRC* [2023] UKFTT 222 (TC).

85. Ms Stephens went on to agree that the Applicants had been "fully co-operative and compliant" since the enquiries began over ten years previously. In submissions, Mr Brinsmead-Stockham similarly acknowledged that:

> "HMRC's reason for resisting the [closure notices] in this case is not concerned with the conduct of the applicants, as it sometimes is in these kinds of hearings."

86. I agree with Mr Peacock that the fact that HMRC have not had to use Sch 36 in order to require the Applicants to provide information and/or documents is a relevant factor in the context of HMRC's case that it is reasonable to keep the enquiries open so they can be sure they retain that power.

No outstanding information identified

87. As is clear from the case law, it is common for Tribunals to refuse closure notice applications either because a taxpayer has not complied with information requests, see for example *Andreas Michael v HMRC* [2015] UKFTT 577 (TC), or because the information had been provided shortly before the hearings and HMRC had not had sufficient time to consider it, see *Steven Price v HMRC* [2011] UKFTT 264 (TC) ("*Steven Price*"). The facts here are very different.

(1) Since the enquiries began on 3 November 2013, the Applicants have responded to over 1,000 individual information requests from HMRC, including providing over 8,000 pages of documents relating directly to 2018.

(2) The parties have also held over 300 meetings, and the Applicants have made available 30 senior managers to answer HMRC's questions.

(3) At the time the closure notice applications were made, there were no outstanding information requests.

(4) HMRC subsequently asked for further documents, all of which had been provided.

(5) After Ms Stephens received that latest tranche of documents on 20 February 2025, she emailed the Applicants saying "once I have reviewed the response in full, I will consider whether anything else might be available to request."

(6) In evidence-in-chief, she said HMRC's shares and valuation département had not yet reviewed the information provided by the Applicants on 20 February 2025, around a month before this hearing.

88. The only item which Ms Stephens was able to identify which HMRC wanted but which she said had not been provided, was a valuation of the IP on a similar basis to one carried out by KPMG at the time the new intangibles regime was introduced in 2002; that valuation had been provided to HMRC in October 2018. Under cross-examination, Ms Stephens explained that HMRC:

> "would expect some sort of exercise like that [carried out by KPMG] to be undertaken so that it could be evidenced that—what value of the APA services was present in the disposal proceeds. So, kind of splitting between APA and post-APA, we would want some sort of exercise done around that."

89. However, there was no dispute that (a) no such later valuation existed, and (b) carrying out that exercise would be "costly and onerous", involving the current owners of the IP since the disposal in 2018. Mr Peacock said, entirely correctly, that Sch 36 does not give HMRC the power to require the Applicants to carry out a valuation exercise; it only gives them the power to obtain documents and information which are already in existence.

90. Thus, while I accept that HMRC might in the future identify further relevant documents or information, the Applicants have been complying with information requests for over ten years, and there is nothing known to be outstanding which could be requested using Sch 36.

91. Although HMRC's shares and valuation département have not yet reviewed the latest information provided by the Applicants, they have had those documents for around a month, and no reason was given as to why they had failed to consider them during that time, even though HMRC plainly knew that closure notice applications had been made and that the hearing was listed for 18 March 2025. This is very different from the position in *Stephen Price,* where the appellant complied with the Sch 36 Notice by providing 60 documents only two days before the hearing.

The Tribunal's powers

92. Rule 5(3)(d) of the Tribunal Rules allows the Tribunal to direct that a party produce documents. Although not cited to me, in *Ingenious Games v HMRC* [2014] UKUT 0062 Sales LJ relevantly said at [68(iii)]:

> "According to the usual standards of justice in heavy civil litigation…it is just and fair for a party to see documents held by its opponent relevant to that opponent's pleaded case, in order to see whether they undermine that case or support the party's own case in opposition."

93. Mr Peacock submitted that were he to be wrong about HMRC's continuing power to issue Sch 36 Notices after the closure of the enquiries, HMRC could apply to the Tribunal for disclosure under Rule 5(3)(d) if (a) HMRC subsequently identified further documents; and (b) the Applicants refused to provide those documents (to which he added the rider that "realistically, that wouldn't happen because if [HMRC] ask us for particular things, we will do our best to find them").

94. Mr Brinsmead-Stockham responded by saying that "as a general matter, information gathering is properly part of the enquiry process and not part of the Tribunal's appeal jurisdiction". He relied on *Frosh* at [57], where the UT had endorsed the following passage from the FTT decision of Judge Amanda Brown:

> "…Particularly given the current position of the case law on the underlying technical issues on the application of s 45A and [s] 71A Finance Act 2003, the absence of the information and documentation requested is critical. To order a closure notice would result in the inappropriate shifting of matters properly to be determined by the Respondents to case management for the tribunal."

95. I agree with Mr Peacock. Here, the Applicants have already responded to over 1,000 requests for information and documents, and HMRC cannot identify any further documents or information which they require the Applicants to produce. This is not a case where the use of the disclosure power would cause "inappropriate shifting" to the Tribunal of matters that should be determined by HMRC as part of the enquiry. Instead, the existence of that power is directly relevant, allowing HMRC a further opportunity were they subsequently to become aware of new relevant material which the Applicants refused to supply on request.

Schedule 36: conclusion

96. Having considered the various points raised by the parties, I agree with HMRC that closing the enquiries is likely to prevent them using Sch 36 to obtain information or documents. But the loss of that power must be balanced against other relevant factors, in particular:

(1) the volume and extent of the material already supplied over a ten year period;

(2) the fact that HMRC did not need to issue Sch 36 Notices to obtain that information;

(3) the existence of the Tribunal's power to direct disclosure; and

(4) the fact that HMRC are unable to identify any material which they require, to the extent that Ms Stephens was considering, not whether any further documents were *required* by HMRC, but "whether anything else *might be available to request*".

DELAY

97. Other than in relation to the point already considered at §53, it was common ground that there had been no unreasonable delay by HMRC; the dispute was whether further delay would cause the enquiries to be "unreasonably protracted".

98. The Applicants' case was that if the closure notices were not granted, there was a risk that the evidence would become stale or that witnesses would become unavailable: some have already left the business and many are elderly. Mr Peacock emphasised that although the closure notices in issue are for 2018, resolution of those appeals also involves considering what happened as long ago as 2008. He referred to *BCM Cayman*, where the Tribunal had similarly said at [35]:

> "We have taken into account the increasing risk that evidence, and especially oral evidence relevant to matters such as the purposes for which transactions were undertaken, is becoming increasingly stale, and indeed it may reach the point where relevant individuals can no longer give evidence."

99. Mr Brinsmead-Stockham suggested that this difficulty could be mitigated if individuals deposed their witness statements now, but I agreed with Mr Peacock that this would not be an adequate remedy: if witnesses are unable to attend the hearing to give oral evidence, their written statements are likely to be given no weight, or very little weight. There is therefore a real risk that further delay will prejudice the position of the Applicants.

PROCEDURE AT THE TRIBUNAL

100. Mr Brinsmead-Stockham described the issue before the Tribunal as "a forward-looking question", and it was common ground that one of the factors I had to consider was what would happen once the Applicants' appeals are notified to the Tribunal. It was also common ground that it would be in the interests of justice for (a) all the appeals of each appellant to be consolidated, and (b) the appeals of all the Applicants to be joined and proceed together. That was why the Applicants had not yet notified to the Tribunal either the DPT appeals, or the CT appeals for the earlier years where closure notices have already been issued.

101. Once the appeals have been notified to the Tribunal, they will be allocated to a category in accordance with Rule 23 of the Tribunal Rules. HMRC will then be directed, under Rule 25(1)(c), to file and serve one or more Statements of Case, so as to "set out the respondent's position in relation to the case". After those Statements of Case have been filed and served, the Tribunal will issue directions for exchange of documents and witness evidence; about the timing and length of the hearing, and about the bundles required for that hearing.

102. Against that background, two procedural issues were potentially relevant to the applications I had to decide: whether the appeals would be stayed, and the possible amendment of the Statements of Case.

Stay application

103. Mr Peacock said that:

(1) if as a result of this hearing, closure notices are granted for *all* the 2018 enquires, the Applicants will notify all the appeals; but

(2) if closure notices are granted only for the non-APA Entities, the Applicants will notify all the DPT appeals, and all the CT appeals for which they have closure notices, because further delay is in their view not in the interests of justice.

104. Mr Brinsmead-Stockham said that if the Applicants followed either of those courses of action, HMRC "will apply" to the Tribunal for the appeals to be stayed until the outcome of the JR application is known.

105. If a stay were to be granted, HMRC would then have achieved the outcome they were seeking at this hearing, albeit (probably) without being able to use Sch 36 in the meantime. Mr Brinsmead-Stockham went on to submit that, as the appeals "are likely to be stayed pending the resolution of the Supreme Court proceedings in any event…no time will actually be saved by issuing a closure notice at this time".

106. A Tribunal deciding a stay application is likely to take the approach set out in *Coast Telecom Ltd v HMRC* [2012] UKFTT 307 (TC) ("*Coast*"), which in turn had adopted the judgment of Lord Osborne, delivering the opinion of the Court of Session (Inner House) in *HMRC v RBS Deutschland Holdings GmbH* [2006] CSIH 10, [2007] STC 814 ("*RBS Deutschland*") at [22], which reads:

> "…As we would see it, a tribunal or court might sist [stay] proceedings against the wish of a party if it considered that a decision of another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so."

107. In *Coast*, Judge Berner had held at [21] that the "question is not whether the determination of another court might provide assistance, but whether it will provide material assistance".

108. Mr Brinsmead-Stockham submitted that the decision of the Supreme Court will provide the necessary material assistance, and so would satisfy the requirements in the case law. Mr Peacock said the Applicants would oppose any such application, on the grounds that staying the appeals would not be in the interests of justice.

109. Plainly, my task is not to decide a hypothetical stay application, but the Applicants' closure notice applications. As Mr Brinsmead-Stockham rightly accepted in closing, it would be an error of law for me to decide those closure notice applications on the basis of the principles in *RBS Deutschland* or *Coast*. It will instead be a matter for the Tribunal hearing any future stay application, to make its decision on the basis of the facts and submissions advanced by the parties at that time.

110. Nevertheless, in deciding the closure notice applications, I must take into account all the facts and circumstances of the Applicants' case, see *Frosh* at [43], and I accept that those facts and circumstances include what is likely to happen if the closure notices are granted.

111. I therefore take into account that, in order to succeed in their stay application, HMRC will need to show (the burden being on them) that (a) the Supreme Court decision *will* be of material assistance in resolving the CT appeals of the APA Entities, and also (b) it would be expedient to stay *all* the appeals, including those for the non-APA Entities to whom HMRC owe around £10m. In my judgment it is far from clear that HMRC will succeed, and I therefore place little weight on this factor.

Amendment of the Statements of Case

112. This issue only arises if all of the following occur:

(1) I direct HMRC to close their enquiries into the Applicants' 2018 returns;

(2) HMRC issue those closure notices in broad terms, and compute the tax due on their preferred profit-split basis;

(3) the Applicants obtain permission to appeal from the Supreme Court, so that HMRC will have to file and serve Statements of Case before the outcome of the JR is known; and

(4) the Applicants subsequently win before the Supreme Court.

113. In that scenario, HMRC will need to amend their Statement of Case to take into account the consequences of the Supreme Court judgment, but of course that would only be possible if the Tribunal hearing had not already taken place.

114. I agree with Mr Peacock that if the Supreme Court give permission to appeal, the JR was likely to be determined by mid-2026. I also agree with him that there is no realistic chance that the appeals will be ready for a Tribunal hearing by that date: Mr Peacock rightly described that possibility as "fanciful". That is for the following reasons:

(1) these are complex technical appeals;

(2) consolidation and joinder directions will be required;

(3) there are likely to be discussions as to whether separate Statements of Case are required for the CT and DPT appeals, or whether the appeals should be grouped in a different way;

(4) there are huge volumes of documents and time will be required to identify which are relevant; ;

(5) expert evidence is likely to be required; and

(6) "multiple witnesses of fact" are expected to give evidence.

115. Thus, if closure notices are directed, and no stay is ordered, it will still be possible within the timetable for the Tribunal proceedings to amend the Statements of Case (should that be necessary) together with any other consequential directions such as for further documents or witness evidence. Of course, no such amendment or consequential directions will be required if the Supreme Court refuse the PTA, or if they uphold the judgments of the UT and Court of Appeal.

116. I therefore accept that directing the issuance of closure notices for the APA Entities carries with it the risk that directions issued for the proceedings may need to be revised to allow the Statement(s) of Case to be amended, and for related matters to be resolved, but (a) that delay will only occur if all the conditions at §112 are met; (b) the delay consequent upon accommodating those amendments will be significantly less than if I were refuse these applications for closure notices.

TAX ALREADY PAID

117. As noted earlier in this decision, HMRC have accepted that the non-APA Entities were overcharged by around £10m of DPT, which could not be repaid until the appeals against the relevant charging notices are determined; I was not informed as to the position for the APA Entities.

118. In addition, HMRC is holding DPT of over £300m which the Applicants consider is not due. If the Applicants succeed on appeal, some or all of that tax will be repaid with interest. However, Mr Peacock submitted that statutory interest was insufficient recompense, because the Applicants could obtain a higher return by investing the money in their business; he added that "the economics of this are important".

119. Mr Brinsmead-Stockham responded by saying that it "may or may not be true" that the Applicants could have earned a higher return, but in any event it was a matter for Parliament to decide on the rate of interest, and even if the Applicants were for the time being "out of the money", that was a minor factor in the context of these closure notice applications.

120. I agree with Mr Brinsmead-Stockham that there was no evidence as to the return the Applicants would have received (and would in the future be likely to receive) had they retained the money paid over as DPT, and I also agree that as the rate of interest is set by statute, little or no weight should be placed on that factor..

121. However, of more relevance is that HMRC have over £300m of the Applicants' money which cannot be returned unless or until the appeals are determined, this adds further weight to the Applicants' side of the scales.

SOLUTION IN THE APPLICANTS' HANDS?

122. It was part of HMRC's case that the Applicants could resolve the closure notice issue by withdrawing from the JR. Mr Brinsmead-Stockham submitted that it had been their choice to apply to the Supreme Court for permission to appeal; he added that if they were to withdraw their PTA application, HMRC would issue the closure notices.

123. The Applicants' position was that HMRC's approach to the transfer pricing issues was a breach of their public law obligations and JR was the only remedy for that breach. In Mr Peacock's submission, taking this factor into account in deciding the closure notice applications would be to allow HMRC to rely on "their own unlawful behaviour".

124. Although it is true that this dispute about the closure notices would be resolved. were the Applicants to withdraw their PTA application, they have a statutory right to seek to appeal the Court of Appeal's judgment. The Supreme Court will now decide whether to hear the Applicants' appeal, and if permission is granted, that Court will determine whether or not HMRC acted unlawfully in relation to the methodology used to calculate the DPT of the APA Entities. In my judgment, the Applicants' decision to apply to the Supreme Court has negligible weight in the balancing exercise I have to carry out.

BROKEN PROMISES?

125. Mr Peacock also submitted that HMRC had repeatedly promised to close the 2018 enquiries, but had failed to so. Mr Brinsmead-Stockham accepted that at various points during the enquiries HMRC had provided the Applicants with indicative dates for closure, but he added that HMRC had not expected them to apply for permission to appeal not only the UT judgment, but also that of the CoA. Having considered the correspondence, I agree with Mr Brinsmead-Stockham and I place no weight on this factor.

WEIGHING THE FACTORS

126. For the reasons set out above, the weightiest factor on HMRC's side of the scales is that it is reasonable for them to want to know, before they issue the closure notices (a) whether the Supreme Court will issue a binding judgment on the JR issue, and (b) whether that judgment changes how the APA impacts the transfer pricing used in 2018.

127. However, that factor on its own is insufficient to provide the necessary "reasonable grounds" to keep the enquiries open, because (a) HMRC are currently in a position to issue closure notices in broad terms which are wide enough to cover both their current view and any subsequent changes consequent upon a Supreme Court judgment in the Applicants' favour, and (b) TMA s 50 gives the Tribunal the power subsequently to adjust the quantum of the closure notice amendment to reflect any such change.

128. Although it is very likely that HMRC will be unable to use Sch 36 to obtain further information and documents once the closure notices have been issued, that factor does not change the balance in HMRC's favour, because:

(1) the Applicants have already provided a huge volume of material;

(2) there are no outstanding information requests;

(3) the Applicants have always been fully co-operative in providing information; and

(4) the Tribunal has the power to direct disclosure, should that become necessary.

129. Other factors on the Applicants' side of the scales are that further delay risks evidence deteriorating and/or witnesses being unavailable, and that HMRC have over £300m of the Applicants' money which cannot be repaid unless or until the Tribunal rules in their favour. Both those factors have some weight. In contrast, I place little weight on the fact that HMRC have said they will subsequently apply for a stay, or the Applicants' decision to continue with their JR claim.

130. Having taken all relevant factors into account and weighed them, I find that HMRC have failed to meet their burden of showing that they have reasonable grounds for not issuing closure notices for the APA Entities.

Timing

131. Mr Brinsmead-Stockham said during the hearing that HMRC would be able to issue the closure notices for the non-APA Entities within 30 days; that time was required to allow for internal administration and approvals.

132. In May 2023, before the UT hearing of the JR, HMRC told the Applicants that they could issue the closure notices for the APA Entities 60 days after the publication of the UT judgment. HMRC could not have known in May 2023 whether the UT would allow or refuse the JR, and I have therefore taken it that HMRC would still be able to issue the closure notices for the APA Entities within 60 days. In the light of the various factors set out above, I would in any event not have directed a longer period.

OVERALL CONCLUSION AND APPEAL RIGHTS

133. HMRC are directed to:

(1) issue final closure notices to the non-APA Entities within 30 days from the date of issue of this judgment; and

(2) issue final closure notices to Lipper and REEL and a partial closure notice to Refinitiv within 60 days from the date of issue of this judgment.

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Release Date: 07th APRIL 2025