Neutral Citation: [2025] UKFTT 00027 (TC)

Case Number: TC09399

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2023/00362/00363/00364

Keywords: Partial Closure Notice- identification of conclusion and reasons- TowerMCashback, Investect and Fidex applied, permission to amend statement of case to add another reason- permission granted

Heard on: 4 December 2024
Judgment date: 9 January 2025

Before

TRIBUNAL JUDGE GETHING

Between

BARCLAYS BANK PLC
Roder Investments No 1 Ltd
Order Investments No 2 Ltd

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kevin Prosser and Mr James Henderson, of counsel

For the Respondents: Mr Julian Ghosh, Charles Bradley and Ms Laura Ruxandu, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. The issue in this case was whether HMRC can amend their statement of case issued in response to Barclays Bank PLC's ("Barclays") appeal and grounds of appeal against partial closure notices ("PCNs") issued by HMRC on 22 August 2022 or whether the PCNs properly construed would prevent HMRC from doing so.

2. HMRC sought to make changes to paragraphs 12.1, 12.4, 19, 20 and 21-24. The parties had reached agreement on all the changes save for changes to paragraphs 12.1 and the new 12.4 before the hearing, albeit that HMRC were to produce further and better particulars of the new paragraphs 20-24.

3. I find the following facts for the purpose only of determining this issue and not for the purpose of the substantive hearing:

(1) In 2008 HMRC securitised the beneficial ownership of $20billion worth of certain debt assets by assigning the equitable interest only in the debt assets to a company referred to as "***Newfoundland***", a related party, in consideration of Newfoundland issuing senior and subordinated notes. Barclays used the senior notes as collateral in the US repo market.

(2) The senior notes had a coupon of 3 month's US$ LIBOR plus 250bps. The junior notes had a coupon equal to the balance of the interest on the debt assigned to Newfoundland. The subordinated note holder had the right to call for the redemption of both senior and junior notes.

(3) The parties entered into a total return swap under which Newfoundland's actual return on the notes was agreed to be exchanged for US$ LIBOR plus 280bps on the principal amount outstanding on the underlying loans.

(4) Barclays continued to recognise the underlying loans in its solus accounts and did not recognise the senior or junior notes or the associated derivatives.

(5) In 2014/15 the senior notes were transferred in tranches at their par value plus accrued but unpaid interest to two other Luxembourg subsidiaries acting in partnership which carried on business in Luxembourg. The partnership is known as "B***CIP***". Barclays provided a loan to BCIP at US$ LIBOR plus 10bps which was drawn down in tranches. The parties also entered into derivative contracts which were designed to ensure that Barclays regulatory capital position was unaffected by Barclays' exposure to BCIP.

(6) In March 2015 the majority of the loan by Barclays to BCIP was repaid. BCIP borrowed the money from one of the two partners in BCIP called BCTL and another related party called Lamorak. The loans had the same coupon as the BCIP loan. The BCIP loans were funded by BCTL transferring certain Newfoundland securities to Barclays under a repo agreement between BCTL and Barclays.

(7) The coupons on the senior notes net of finance costs accrued in the Luxembourg entities were sheltered by Luxembourg losses.

(8) Barclays in its solus accounts, recognised a failed derecognition liability (FDRL) equal to the consideration for the sale of the senior notes because it continued to recognise the underlying loans in its balance sheet and did not recognise the notes. Barclays also recognised an interest expense in respect of the FDRL on an amortised cost basis which was roughly equal to the coupon on the senior notes.

(9) In its tax returns for the periods ended 31 December 2014 and 2015, Barclays recognised the coupon on the BCIP loan as income but deducted the FDRL interest expense, thereby giving rise to a net reduction in the taxable profit of £929,151 for 2014 and £63,800,069 for 2015 as compared with the profits had Barclays not sold the senior notes or entered into the BCIP loan.

(10) HMRC opened an enquiry into the returns for 2014 and 2015 on 15 December 2016 under paragraph 24(1) Schedule 18 Finance Act 1998. One of the matters that was subject to the enquiry were the arrangements described above and whether the arrangements were on arm's length terms and whether a transfer pricing adjustment should be made. The correspondence between the parties was extensive.

(11) Partial closure notices were issued on 22 August 2022 under para 32(1) Schedule 18 Finance Act 1988 accompanied by a covering letter dated 22 August 2022.

(12)The parts of the closure notices and covering letter in dispute read as follows:

"***About the matter we have finished checking***

Details of the matter we have finished checking are shown below

Description of the matter
The arrangements transferring the Newfoundland senior notes to BCIP
Our conclusion about the matter
It is HMRC's view that for transfer pricing the actual provision entered into between Barclays and [the two partners] acting in partnership as BCIP, differs from the arm's length provision which would have been made between independent enterprises. As per section 147 TIOPA 2010 it is therefore appropriate for tax purposes to replace the actual provision with the arm's length provision. HMRC's view is that the actual provision would not have been entered into by independent parties acting at arm's length and the actual provision is to be disregarded and replaced by no provision for tax purposes. The appropriate adjustment is to increase Barclays profits to what they would have been had the actual provision not been imposed.
Reason for the conclusion
HMRC's reason for our conclusion is set out in the enclose 'view of the matter' letter.

The accompanying view of the matter letter also dated 22 August 2022 reads as follows:

'Newfoundland' enquiry APE 31 December 2014 and 31 December 2015 – HMRC's 'view of the matter'

"Following our recent discussions with Barclays on the sale of the Newfoundland ("NFL") senior notes from Barclays Bank PLC ("BBPLC") to Barclays Claudas Investments Partnership ("BCIP"), HMRC are now in a position to set out our view of the matter for the accounting periods ending 31 December 2014 and 2015.

1. *<u>Facts</u>*

   The relevant facts are substantially set out in the 'Statement of Facts' papers agreed between Barclays and HMRC during the Newfoundland enquiry.

2. *Transfer Pricing*

2.1 It is HMRC's view that the actual provision entered into between [the partners] acting in partnership as BCIP, and Barclays differs from the arm's length provision which would have been made between independent enterprises. As per section 147 TIOPA 2010 it is therefore appropriate for tax purposes to replace the actual provision with the arm's length provision which is detailed below.

Actual provision

2.2 The actual provision consists of the following connected transactions:

[the 2014 transactions are described – involving the sale of the Newfoundland Notes, the funding loan, the dates of prepayment of the funding loan, the funding of the prepayments, the credit risk mitigations

2.3 the transactions form a single provision because they are all interlinked and interdependent upon each other and were entered into in relation to the same arrangement.

2.4 [Details the function of the entities based in Luxembourg]

2.5 [Deals with the lack of reward for the services provided by the Luxembourg entities.]

Arm's Length Provision

2.6 HMRC's view is that the actual provision would not have been entered into by independent parties acting at arm's length. The actual provision is therefore to be disregarded and replaced by no provision for tax purposes. This is because:

(i) When taken as a whole, the actual provision delivers an economically irrational outcome for Barclays. Specifically, Barclays has committed to recognising an expense in respect of the coupon on the [Newfoundland] senior notes and a significantly lower interest income on the funding loan, without recognising an arm's length reward.

(A) Based on the terms and conditions of the actual provision and ignoring the effect of the connection between Barclays and BCIP and the partners on the provision) Barclays suffers a material loss on both a pre and post-tax basis This means that there is no commercial incentive for independent persons to impose such provision.

(B) This conclusion holds irrespective of whether any group exists. Barclays is not compensated for the net losses it incurs on terms that would have been adopted by independent parties: therefore, the outcome is not at arm's length at the level of Barclays. It is not possible to adjust the sale price to compensate Barclays for the losses it incurs as the price an independent party would pay for the senior notes is capped at close to par plus accrued interest. This is because the senior noteholder (Barclays) holds the right to call for the securitisation to be unwound at par value on 30 days' notice.

(C) It is not appropriate to consider any commercial benefits which may flow back to Barclays from BCIP …. Which only arise due to their connectivity in determining the economical rationality of the parties.

This is because such a benefit would not be present between independent parties.

(ii) The CRM arrangement also affect the commerciality ….

2.7 It is therefore HMRC's view that the Newfoundland transactions entered into by Barclays and BCIP meet the conditions for non recognition set out in para 1.122 and 1.123 of the 2017 TPG. Therefore, for the accounting periods ending 31 December 2014 and 31 December 2015, the appropriate adjustment to the taxable profits of Barclays under section 147(3) TIOPA 2010 is to increase its profits to what these profits would have been, had the actual provision not been imposed."

(13) HMRC sought to amend their statement of case to include the possibility of a transfer pricing adjustment other than complete disregard of the transaction and to expand the arrangements to include the prior arrangements in 2008.

(14) Barclays objected to HMRC's proposed amendments.

(15) At the opening of the hearing only the amendment to clause 12.1 and the new clause 12.4 of HMRC's Statement of Case were contested.

(16) HMRC state that the main purpose of the amendments to HMRC's statement of case is clarificatory. HMRC explained that in seeking to agree a set of facts it became clear that Barclays misunderstood the case. The burden of proof is on Barclays to show its returns are correct. Barclays must set out its case for HMRC to respond.

(17) HMRC consider it is in the interests of justice for these points to be made in HMRC's Statement of Case to allow the parties to better prepare for the hearing. The issues have been discussed since January 2024 when HMRC set out their view on the case. HMRC consider that the substance of the amendments was identified as it stems from the partial closure notice and there is no prejudice to Barclays and Barclays have not pleaded prejudice.

(18) Barclays objects to the amendments to paragraphs 12.1 and the new paragraph 12.4 of HMRC's statement of case because Barclays considers that they fall outside the scope and subject matter of the appeal because they represent wholly different conclusions to the conclusion reached in each of the two PCNs.

The statutory provisions

3. Closure notices – Schedule 18 Finance Act 1998 (***Schedule 18***)

3.1 Para 31 of Schedule 18 provides that any matter that is subject to an enquiry is completed when HMRC informs the company by notice (a partial closure notice) that they have completed their inquiry into the matter.

3.2 Para 34 (2) provides that where a partial closure notice is issued the notice "*must state the officer's conclusions and:*

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

*(b) m*ake *the amendments of that return that are required –*

i. to give effect to the conclusions stated in the notice, and"

3.3 Para 34(3) permits an appeal to be brought against "*an amendment of a company's return"* under para 34(2). And 34(4) requires the appeal to be made

to the officer by whom the partial closure notice was issued, in writing within 30 days.

3.4 Appeals and Reviews – Sections 49A, 49B, 49E, 49G and 49I Taxes Management Act 1970 ("TMA")

3.5 Section 49A applies where an appeal has been made to HMRC. The appellant can request a review, HMRC can offer a review or the appellant may notify the appeal to the Tribunal.

3.6 Section 49B applies where the appellant has asked for a review. Section 49B(2) requires HMRC "*to notify the appellant of HMRC's view of the matter in question.*"

3.7 Section 49E (5) permits HMRC to uphold, vary or cancel HMRC's view of the matter as set out in the partial closure notice. Section 49E(6) requires HMRC to notify the appellant of the conclusions of the review and their reasoning within a specified period. Failure to do so results in the conclusions being upheld.

3.8 Section 49G deals with notification of the appeal to the Tribunal by the appellant after the review has been concluded. Section 49G(4) states that where an appellant notifies the Tribunal of an appeal, "*the tribunal is to determine the matter in question*".

3.9 Section 49I (1) defines *"matter in question"* as "*the matter to which the appeal relates*".

3.10 Section 50(6) provides that is on an appeal the Tribunal considers an appellant to have been overcharged by an assessment, the assessment shall be reduced accordingly.

4. Transfer Pricing Provisions

I set these provisions out in full as the structure of the provisions is pertinent to HMRC's case as to what is a conclusion and what is a reason and to Barclays case as to what is the conclusion.

*Section 147 Taxation (International and Other Pprovisions) Act 2010 ("**TIOPA**") provides:*

*"147 **Tax calculations to be based on arm's length, not actual, provision***

(1) For the purposes of this section "the basic pre-condition" is that—

(a) provision ("the actual provision") has been made or imposed as between any two persons ("the affected persons") by means of a transaction or series of transactions,

(b) the participation condition is met (see section 148),

(c) the actual provision is not within subsection (7) (oil transactions), and

(d) the actual provision differs from the provision ("the arm's length provision") which would have been made as between independent enterprises.

(2) Subsection (3) applies if—

(a) the basic pre-condition is met, and

(b) the actual provision confers a potential advantage in relation to United Kingdom taxation on one of the affected persons.

(3) The profits and losses of the potentially advantaged person are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

(4) Subsection (5) applies if—

(a) the basic pre-condition is met, and

(b) the actual provision confers a potential advantage in relation to United Kingdom taxation (whether or not the same advantage) on each of the affected persons.

(5) The profits and losses of each of the affected persons are to be calculated for tax purposes as if the arm's length provision had been made or imposed instead of the actual provision.

(6) Subsections (3) and (5) have effect subject to—

(a) section 165 (exemption for dormant companies),

(b) section 166 (exemption for small and medium-sized enterprises),

[(ba) section 206A (modification of basic rule where allowances restricted for certain oil-related expenditure),]

(c) section 213 (this Part generally does not affect calculation of capital allowances),

(d) section 214 (this Part generally does not affect calculation of chargeable gains),

(e) section 447(5) and (6) of CTA 2009 (this Part generally does not affect how exchange gains or losses from loan relationships are accounted for), . . .

(f) section 694(8) and (9) of CTA 2009 (this Part generally does not affect how exchange gains or losses from derivative contracts are accounted for)[, and

(g) section 938N of CTA 2010 (this Part treated as of no effect for the purposes of Part 21B of CTA 2010 (group mismatch schemes))].

(7) The actual provision is within this subsection if it is made or imposed by means of any transaction or deemed transaction in the case of which the price or consideration is determined in accordance with any of sections 225F to 225J of ITTOIA 2005 or any of sections 281 to 285 of CTA 2010 (transactions and deemed transactions involving oil treated as made at market value).

Section 148 deals with the participation condition. The parties agree that the participation condition is satisfied.

*151 "**Arm's length provision**"*

"(1) In this Part "the arm's length provision" has the meaning given by section 147(1).

(2) For the purposes of this Part, the cases in which provision made or imposed as between any two persons is to be taken to differ from the provision that would have been made as between independent enterprises include the case in which provision is made or imposed as between two persons but no provision would have been made as between independent enterprises; and references in this Part to the arm's length provision are to be read accordingly."

155 "Potential advantage" in relation to United Kingdom taxation

(1) *Subsection (2) applies for the purposes of this Part.*

(2) *The actual provision confers a potential advantage on a person in relation to United Kingdom taxation wherever, disregarding this Part, the effect of making or imposing the*

actual provision, instead of the arm's length provision, would be one or both of Effects A and B.

(3) *Effect A is that a smaller amount (which may be nil) would be taken for tax purposes to be the amount of the person's profits for any chargeable period.*

(4) *Effect B is that a larger amount (or, if there would not otherwise have been losses, any amount of more than nil) would be taken for tax purposes to be the amount for any chargeable period of any losses of the person."*

HMRC's case

5. HMRC state that the amendments at 12.1, and 12.4, of the Statement of Case are within the Tribunal's jurisdiction, they are clarificatory in nature and in allowing HMRC to make them will further the Tribunal's overriding objective of dealing with the cases fairly and justly.

   5.1 On any view the PCN's dated 22 August 2022 concerned the arrangements involving the transfer of the Newfoundland senior notes to BCIP and the conclusion is that section 147 TIOPA applies.

   5.2 The amendments to the returns increased the profits of Barclays to what they would have been had the actual provision not occurred. The scope of the appeal is therefore the transfer pricing treatment of the actual provision pursuant to section 147 TIOPA.

   5.3 HMRC's primary reason for saying the actual provision differs from the arm's length provision is that the arrangements wouldn't have been entered into by persons at arm's length. This is the no provision approach. But it does not change the scope of the appeal that the amendments were made because the actual provision was different from the arm's length provision within section 147 TIOPA.

   5.4 HMRC say that Barclays' case is that the appeal comprises one issue only- whether no provision would have been made between arm's length parties. If that were the case the Tribunal would be unable to dismiss the appeal even if the arm's length provision resulted in the same adjustments as were made by HMRC or a modest adjustment would be made to the amendment. This is akin to saying the Tribunal has no jurisdiction if there is another reason for the conclusion.

   5.5 HMRC say Barclays' approach conflates conclusions and reasons. It seeks to tie the hands of the Tribunal and is inconsistent with Barclays' own grounds of appeal which propose that the actual provision may be replaced with an arm's length provision at para [9].

   5.6 The PCNs were issued under Para 32(1) of Schedule 18 when HMRC concluded their enquiries into the matter and, as required by para 34(2), the PCNs contained the officer's conclusions and indicated what amendments were required to be made to the return. Para 34(3) provides that an appeal may be made against the amendments to the return.

   5.7 The scope of the current appeal is therefore governed by the principles regarding closure notices set out by the High Court, Court of Appeal and Supreme Court in *Tower MCashback LLP and another v Revenue & Customs Commissioners* [2008] STC 3366(HC), [2010] STC 809 (CA) and [2011] STC 1143 (SC) ("***Tower MCashback").*** (The case concerned an appeal against conclusions and

amendments and not an appeal against amendments under Finance Act 1998 but the principles apply nonetheless.)

(1) The subject matter of an appeal is defined by the subject matter of an enquiry and the subject matter of the conclusions which close the enquiry, per Moses LJ at [35]

(2) Although the subject matter of an appeal is defined by the conclusions and amendment to the return, section 50 TMA does not bind the hands of the Tribunal to the precise wording of the closure notice when hearing the appeal, per Lord Hope at [84].

(3) A closure notice ought not to be construed as if it were a statute, or as if its conclusions, reasons and adjustments were contained in watertight compartments, labelled accordingly. The FTT cannot be deprived of jurisdiction where it reasonably concludes that a new issue raised on an appeal represents a new or alternative ground for supporting the conclusion. See Kitchen LJ in *Fidex Ltd v Revenue & Customs Commissioners* [2016] EWCA Civ STC at [51] ("***Fidex***").

(4) These principles were followed by the UT in *B&K Lavery Property Trading Partnership v Revenue and Customs Commissioners* [2016] UKUT 525 (TC) ("***Lavery***"), see Judges Bishopp and Falk at [34] to [38]. The UT confirmed that a closure notice must be considered in its context not only where the closure notice is ambiguous, the identification of any surrounding circumstances requires questions of fact to be determined and following Chitty on Contracts, construing written instruments is a mixed question of law and fact. The issue becomes one of law once the facts are determined.

(5) Identifying the context against which the closure notice must be construed is a question of fact. This is the role of the FTT/Special Commissioners. In *Tower MCashback* Moses LJ indicates that:

(i) The FTT have to balance the need to preserve the protection for the taxpayer not to be ambushed against the need to protect the public from loss of tax, see [38].

(ii) It is the FTT to which the legislation looks to identify what section 28ZA TMA describes as the subject matter of the enquiry see [41]. Contrary to the view of Henderson J in the High Court, the FTT must identify the subject matter of the appeal [50] and the closure notice itself does not allow so restrictive a view of the subject matter of the appeal [51]. Moses LJ's comments at [41],[50] and [51] were approved by Lord Walker in the Supreme Court

(iii) The principles that are to be applied in determining the scope of an appeal by reference to the content of the closure notice were summarised by the Court of Appeal in *HMRC v LG Park Ltd* [2023] EWCA Civ 1193 , 4WLR 83 at [47] and [48] ("*LG Park Ltd*") which endorsed its own decision in *Investec Asset Finance PLC v HMRC* [2020] EWCA Civ 579 at [70] to [73] ("*Investec*"):

i. The changes made to the legislation to deal with self-assessment were not intended to dramatically narrow the scope of an appeal.

j. There are protections for the taxpayer, but a narrow confinement of the subject matter was not intended to be one of them.

k. Further, the venerable principle of tax law to the effect that there is a public interest in taxpayers paying the correct amount of tax, also has a role to play.

l. The FTT must determine the scope of an appeal and is best placed to consider the context of the closure notice and the surrounding circumstances to determine whether the subject matter of the appeal is broader than the particular conclusion and adjustments addressed in the closure notice. So HMRC should be allowed to put forward further arguments in an appeal even if they result in larger amounts of tax being due, provided all the different arguments deal with the same matters in question identified in the closure notice.

m. In some cases, HMRC may not be restricted to advancing further reasons in support of conclusions but may also be entitled to take a different approach from that taken on the face of it in the Closure Notice, including one that could result in more tax being due.

(6) The Upper Tribunal in *Daarasp LLP v The Commissioners of HM Revenue & Customs* [2019] UKUT ("***Daarasp***") recites the principles to be applied in construing the scope of the closure notice at [25]. The venerable principle is referred to at (10). The Upper Tribunal confirm that there are checks and balances in the legislative scheme of self-assessment designed to protect the taxpayer but a narrow confinement of the subject matter of the appeal is not intended to be one such protection for the taxpayer. The venerable principle - that taxpayers should pay the correct amount of tax – is also an important underlying factor in any tax matter and has a role to play in interpretating a closure notice.

6. The correct construction of the PCNs in this case in HMRC's view is:

6.1 The matter being considered is the arrangements transferring the Newfoundland senior notes to BCIP (including those in 2008) and the correct interpretation of the conclusions and amendments is the correct transfer pricing of the arrangements. It is not a narrow subject matter but a reasonably open one. This is supported by

(1) **the wording of the PCN's**- the conclusion is that the actual provision differs from an arm's length provision and section 147 applies. The amendment is explained by HMRC's view on the arm's length provision. The no provision argument is the reason for the amendment not the conclusion. The conclusion is that the arm's length provision should be substituted for the actual provision. The appellant's view is too narrow. They construe the PCN as if it were a statute which is cautioned against in the authorities. They focus on the words "*no provision*" under the heading "*Our conclusion about the matter*" which supports a form over substance approach and seeks to restrict the jurisdiction of the courts, contrary to authority.

(2) **the context** as revealed in correspondence and notes of meetings during the enquiry, reveals the scope of the enquiry which is the correct transfer pricing of the arrangements and the application of section 147 TIOPA.

Only in the last stage of the enquiry did HMRC identify the no provision reason. It was only a reason for the application of section 147 and was adopted as the most prominent reason.

(3) **Barclays' own construction of the PCNs** as set out in their grounds of appeal supports HMRC's construction of the PCNs. It is open to the Tribunal to determine the correct arm's length provision. Barclays may not be allowed to plead that where the provision entered into between Barclays and BCIP is not arm's length there is some unidentified and unparticularised pricing that can be done so that the no provision reason fails.

(4) **the venerable principle and section 50 TMA.** The Court of Appeal has indicated that this has a part to play in construing closure notices. Barclays approach seeks to tie the hands of the Tribunal by arguing that if the provision is not arm's length and the no provision argument is wrong, then the Tribunal cannot determine the correct approach. This is wrong in logic and law.

6.2 Accordingly, the subject matter of the PCN's covers the amendments made by HMRC in their statement of case and invite the Tribunal to allow HMRC to amend their statement of case as set out in the Appendix 1 to their applications.

Barclays's case

7.1 Barclays objects to the amendments made to HMRCs statement of case at paragraphs 12.1 and 12.4 because they represent a wholly different conclusion from that stated in the PCNs. Specifically:

(1) The actual provision now being referred to in para 12.1 includes the 2008 securitisation transaction and not just the 2014 sale of the senior notes.

(2) The new para 12.4 now contemplates that the provision may be entered into by independent parties but would have been priced differently form the actual provision.

7.2 Barclays view of the case law as it applies to the meaning of the closure notice:

(1) Barclays accepts that the principles established in *Tower MCashback* apply equally to a case such as this which is an appeal by a company under the Finance Act 1998 as it does to appeal by individuals under the Taxes Management Act 1970. This is so notwithstanding that appeals by companies are against amendments make to assessments whereas appeals by individuals may be made against conclusions or amendments. The appeal in *Tower MCashback* was in fact just an appeal against an amendment.

(2) Barclays points out that in *Tower MCashback* the closure notice stated merely that the claim for 100% capital allowances on the provision of software was excessive and the claim was reduced to nil. The covering letter of the closure notice stated that the claim for capital allowances was denied by virtue of section 45(4) applying. (Section 45 is a technical provision concerning the claimant granting rights to another person to use or otherwise deal with the software.) After the appeal by the taxpayer HMRC argued in the alternative that the expenditure had not been on software.

(3) The Special Commissioner considered HMRC had the right to raise another reason because the conclusion in the closure notice permitted them to do so. Henderson J considered that the correct principle was that the scope and subject matter of the appeal was defined by the conclusions stated and amendments made in the closure notice but the subject matter of the appeal had to be determined in context. In the closure notice the officer had said "I have concluded my enquiries … As previously indicated my conclusion is … the claim for relief under section 45 is excessive …" The covering letter referred to section 45(4). It also indicated that there may be other issues. In construing the closure notice Henderson J considered reference had to be had to the accompanying letter and therefore the subject matter of the appeal was confined to section 45(4). Moses LJ did not follow Henderson J because he considered the closure notice was plain on its face and there was no need to refer to the previous correspondence. Other reasons could be given for the conclusion. The appeal is against the conclusion. Lord Walker at [15] agreed with Henderson J about the scope of the appeal being determined by the conclusions in closure notice and not the reasons but did not accept Henerson J's application of the principles and therefore the interpretation of the closure notice. Lord Walker adopted the approach of Moses LJ at [17] that it is for the Tribunal to determine what the conclusion was but cautioned against wide ranging closure notices at [18].

(4) Barclays referred to Lord Hope at [84] where he indicates that the scope of the appeal is defined by the conclusions and amendments, but the Tribunal is not confined to the precise wording of the closure notice when hearing the appeal. Judge Raghavan considered in *Towers Watson v HMRC* [2017] UKFTT 0846 at [28] that this meant that there could be other reasons for the conclusion.

(5) Barclays argues that all the courts in *Tower MCashback* held that the scope and subject matter of an appeal are defined by the conclusions and amendments in closure notice. The Courts did not agree with the Special Commissioner that even if the closure notice had just referred to section 45(4) HMRC would still be entitled to run a different argument.

(6) Barclays consider that Kitchen LJ in *Fidex* simply adopted *Tower MCashback* indicating that the scope and subject matter of an appeal is determined by the conclusions and amendments in the Closure Notice, not the process of reasoning. The closure notice must be read in context to properly understand its meaning. New reasons can be advanced by HMRC subject to proper case management. In *Fidex* a loss created by derecognition of loans on a change of accounting basis was reduced to zero. HMRC sought to deny the loss on an alternative basis under para 13 of Schedule 9 to Finance Act 1996. The conclusion in the closure notice was found to be the sum of £83.9m representing the value of the derecognised bonds ought not to have been included in the change of basis adjustments. The reason was found to be the derecognition of the bonds should not have occurred. Other reasons were therefore admissible. The Tribunal unpicked the conclusion from the reasons. But the subject matter of the enquiry does not of itself expand the scope of the appeal against a conclusion [44]. It is the context but does not necessarily inform the conclusion.

(7) Barclays point out that in 2020 HMRC issued new templates for closure notices to separate the conclusions form the reasons. The third sentence in the conclusions is therefore a conclusion not a reason.

(8) Barclays also refer to the case of *Investec* and consider it is authority for the proposition that the scope and subject matter of the appeal are defined by the conclusions stated in the closure notice and the amendments made to the return except where the context of the closure notice and the surrounding circumstances demonstrate that the subject matter is broader such as where it is clear HMRC intend to advance further arguments. Barclays say there is no such circumstance here. And there was no reference to any alternative argument in the correspondence in the two-year period before the closure notice was issued.

(9) Thus the statements in *Tower MCashback* that the scope and subject matter of an appeal are defined by conclusions stated in the closure notice and by the amendments made to the return continue to represent the law subject to the exception in *Investec.* Barclays consider that Rose LJ's comments in *Investec* and Falk LJ in *LG Park HTI Limited v HMRC* need to be understood by the facts in *Investec.* The venerable principle applies to construe statutory phrases not the meaning of the closure notice. Ordinary principles must apply in construing a closure notice.

(10) Barclays refer to Court of Appeal decision in *HMRC v Bristol & West PLC* [2016] EWCA Civ 397 at [24] that HMRC has no power to amend a return otherwise than to give effect to the conclusion and that a closure notice ought to be interpreted objectively, as it would be understood by a reasonable person in the position of the intended recipient, having knowledge of the relevant context. There is therefore no scope for the application of the venerable principle.

(11) Barclays also refers to the case of *Daarasp* which confirms it is the conclusions which determine the scope of an appeal and not the reasons. Barclays consider that *Daarasp* confirms that the venerable principle has no role to play in the interpretation of the closure notice only the statutory provisions.

(12) In relation to transfer pricing Barclays say that section 147(1) sets out the basic precondition for transfer pricing adjustments. The two relevant elements are the actual provision and the arm's length provision. The two elements must differ. Section 147(2) then states if the basic precondition is met and the actual provision confers a potential tax advantage in relation to UK tax on one of the parties, section 147(3) applies as if the arm's length provision had been imposed and not the actual provision. Tax advantage is defined in section 155 and requires a computation of the profits of the UK resident person, and it must be determined that the actual provision creates a smaller profit or greater loss. Further section 164 requires that the legislation be applied in a manner to secure consistency between the legislation and the OECD Transfer pricing guidelines published in 2010. The guidelines identify irrational transactions that cannot be rationally transfer priced. The assignment by Barclays of the senior notes but its retention of the junior notes which gave Barclays the right to redeem all the notes would cause the senior notes to be less valuable to an arm's length party than they would be to Barclays. HMRC concluded it was an impossibility to identify a price that would satisfy both parties. The guidelines also state that if a price can be alighted upon the transaction should not be disregarded. The majority of transfer pricing cases revolve around the identification of the arm's length price. But if you are in the exceptional circumstance where no such alternative proce can be identified, then section 147(3) simply requires a disregard of the tax advantage. The tax advantage is easy to identify in the special circumstance: the whole of the deductions claimed are disregarded. Section 147 clearly applies in the exceptional circumstance. At the opening of the enquiry HMRC looked at the interest on the loan but moved to considering the transaction as a whole and moved to considering

derecognition of the transactions. There was no indication of an alternative view. But the reason there is no indication of an alternative view is HMRC thought it impossible. So HMRC pin their colours to the mast. HMRC say they did not close their mind to other reasons for transfer pricing to apply and point to 14 February 2022 letter. Barclays say that HMRC rejected that view and that is why they closed the enquiry. The correspondence shows the actual provision did not include the 2008 transaction and that the arm's length provision was no provision. The proper interpretation of the PCNs is that no provision is a conclusion. The Valentine's day letter of 14 February 2022 shows HMRC rejected the argument that there is an arm's length price. HMRC rejected the view and closed the enquiry. Barclays say HMRC had held that view for a very long time before closing the enquiry. Barclays pointed to correspondence, meeting notes and transfer pricing analyses in the period prior to the issue of the PCNs to demonstrate that the officer (Mr Haynes and later on Mr Belinski) had to all intents and purposes closed his mind to the idea of an alternatively priced transaction. The Officer had confined the focus of the enquiry most latterly to the 2014-15 transactions and consistently maintained that the actual provision ought to be disregarded with the resultant adjustment to the profits.

7.3 Turning to the construction of the PCNs, Barclays states that the conclusion in the closure notice is that:

(1) The actual provision ought to be disregarded and replaced with no provision.

(2) The actual provision being referred to is the arrangements in 2014-15 involving the transfer of senior notes between Barclays and BCIP , the prepayments funding and the CRM arrangements and not any other arrangements.

(3) The covering letter of 22 August 2022 provides the context and makes clear that the matter which HMRC has concluded its enquiry into is the 2014-15 arrangements and the transactions listed are those that occurred in 2014-15.

(4) There is no mention of an alternative reason.

(5) It is impossible to interpret the PCNs as involving a provision which is the actual provision but priced differently.

(6) Barclays construction of the PCNs is confirmed by the final sentence which requires profits to be increased to what they would have been had the actual provision not been imposed.

(7) This construction is supported by the correspondence in which Officer Haynes consistently states that it is HMRC's view that the actual provision must be disregarded because it is impossible to identify an arm's length price.

(8) There is no conflation of reasons and conclusions as HMRC used the new template.

7.4 A reasonable recipient in receipt of the PCN would consider:

(1) the conclusion to be that for transfer pricing purposes the actual provision consisting of the 2014-15 arrangements differs from the arm's length provision which would be no provision and therefore the actual provision must be disregarded.

(2) And the reason for the conclusion is as set out at paragraphs 2.6-2.7 of the letter enclosing the PCNs. The clear and deliberate separation ought not to be disregarded.

(3) HMRC's reasoning that the conclusion is that the actual provision differs from the arm's length provision and therefore section 147 applies and the no provision argument is merely a reason should be rejected because, (a) the statement about the reasons appears under the heading "*My Conclusion*" and not under the heading "*Reason for the conclusion*". and (b) The statutory provision requires that a tax advantage has to ensue as a result of the actual provision differing from the arm's length provision. So no provision is an essential part of Mr Haynes' conclusion.

(4) Barclays has not tried to tie the hands of the Tribunal they have been tied by HMRC.

(5) The Grounds of Appeal cannot enlarge to Tribunal's jurisdiction.

7.5 Barclays consider that the scope and subject matter of the appeal is not broader than the conclusion stated in the PCNs. The context and surrounding circumstances do not demonstrate a wider subject matter of the appeal. This is clear from:

(1) The absence of any statement by Officer Haynes that he intends to advance further arguments.

(2) Thus the appeal is limited by the conclusion stated in the PCNs that the actual provision comprising the 2014 -15 arrangements involving the transfer of the senior notes to BCIP differs from the arm's length provision which would have been no provision and therefore the actual provision must be disregarded.

(3) HMRC's contention that the scope of the appeal is the subject matter of the PCNs and the matter considered in the PCNs consists of the arrangements transferring the senior notes to BCIP confuses the matter which HMRC has finished checking on the one hand and the scope of the appeal on the other hand.

7.6 Barclays considers the proposed amendments to HMRC's Statement of Case:

(1) At 12.1 are not to "clarify" their case but to create an alternative that the actual provision includes the securitisation transactions in 2008. Barclays objects to this as the actual provision referred to in the closure notice refers to the 2014-15 transaction involving the transfer of the senior notes to BCIP which is being compared to the arm's length provision not the earlier securitisation of 6 years ago. The Tribunal has no jurisdiction to consider the transfer pricing treatment of a different actual provision. This request to amend should be denied.

(2) New para 12.4 is an extension not a clarification. It seeks to include that if the arm's length provision is not no provision an alternative provision can be considered and an increase in the profits of Barclays. The existing conclusion is that no provision is the alternative arm's length provision. The Tribunal has no jurisdiction to consider a different conclusion nor a different subject matter. Barclays asks the Tribunal to direct that HMRC may not amend the statement of case to admit para 12.4.

(3) Barclays does not object to the change to para 20 as it responds to one of its own grounds of appeal, nor does it object to the new paragraphs 21-24.

(4) If the Tribunal permit the amendments to para 12.1 and the new 12.4 Barclays asks for further and better particulars.

Discussion and Decision

7. For the reasons set out below, in light of the principles set out in *TowerMCashback, Fidex, Investec, Bristol & West, and Daarsap*, I conclude that:

   7.1 Subject matter of the appeal is defined by the subject matter of the enquiry and the subject matter of the conclusions which closed the enquiry as set out in the PCNs.

   7.2 The subject matter of the enquiry that was closed by the PCN's is the arrangements between Barclays and BCI in 2014 and 2015 dealing with notes created pursuant to the arrangements made in 2008 and the application of the transfer pricing legislation in section 147 TIOPA. The arrangement in 2008 is just as much part of the 2014 and 2015 arrangements as the articles of association were part of the group relief arrangements in the case of *Pilkington Brothers Limited v Commissioners of Inland Revenue* 1982 UKHL 55 STC 705.

   7.3 The conclusion reached by HMRC was as set out in the first two sentences of the section of the Closure Notice under the hearing "***Our conclusion about the matter***". The first sentence states that it is HMRC's view that for transfer pricing purposes the actual provision entered into by the parties differs from the arm's length provision that would have been made between independent parties. The second sentence indicates the statutory provision that is in play is section 147 TIOPA 2010 which will replace the actual provision by the arm's length provision.

   7.4 The third sentence states that in HMRC's view the actual provision would never be entered into by parties at arm's length and the actual provision ought to be disregarded and replaced by no provision. The third sentence is a reason for the application of section 147 and the adjustment. This is just one possible reason as to why transfer pricing provisions should apply and is indicated as such in section 151(2) TIOPA. HMRC may rely on other reasons.

   7.5 The fourth sentence is a description of the adjustment.

8. In reaching this decision I have adopted the principles identified by the Supreme Court in *TowerMCashback,* the Court of Appeal *in Investec and Fidex and Bristol & West and the UT in Daarasp namely:*

   8.1 Closure notices ought not to be construed like statutes.

   8.2 The venerable principle has a part to play in all tax matters to ensure the correct amount of tax is collected. In this context it supports the interpretation of the closure notice in a manner to enable the correct amount of tax to be collected provided the taxpayer is not ambushed by late admissions of new argument.

   8.3 The context may be considered to identify the meaning of the closure notice. The context includes the "view of the matter" letter issued by HMRC on 22 August 2022. That letter includes in the reasons section the third sentence of the conclusion. In my view this supports the view that the third sentence is a reason

and not a conclusion. The enquiry was extensive. The issue of alternative pricing which could be an alternative reason was included in the discourse although not identified as HMRC's primary reason for invoking the transfer pricing legislation.

8.4 Although the form of closure notices was altered to create a designated area to set out conclusions and a separate area to set out reasons, undue weight should not be attached to the fact that a reason for the application of the transfer pricing legislation has been incorporated into the conclusion section as well as the reasons section.

8.5 The correct interpretation of the notice depends on what a reasonable person in the position of Barclays with Barclays' knowledge of the context would consider it to mean. As Barclays grounds of appeal include the possibility of an alternative price it would seem to me that the interpretation contended for by HMRC satisfies this requirement.

9. In my view the conclusion is that the actual provision differs from the arm's length provision and section 147 TIOPA applies. Additional reasons may be advanced as to why section 147 TIOPA applies other than the no provision reason. The adjustment reduced the claim for relief to zero.

10. The appeal is against the adjustments. The burden of proof in the appeal against the adjustments made by HMRC is on Barclays to demonstrate that the adjustments to the returns made by HMRC are incorrect. In other words, it is for Barclays to show that the actual provision does not differ from the arm's length provision or indicate the price on which the transactions would be entered into by parties at arm's length. The venerable principle requires that the Tribunal be able to dismiss the appeal in whole or in part depending on the evidence before it.

11. I allow the application but require the parties to agree appropriate directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

This paragraph to be used where the preliminary issue has not resolved all issues but you have not (yet) decided to extend time for appealing:

12. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for

13. permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

HEATHER GETHING
TRIBUNAL JUDGE

Release date: 09th JANUARY 2025