

## **Open and shut?**

*Mark McLaughlin looks at HMRC enquiries into self-assessment returns and considers when it might be appropriate to apply to the First-tier Tribunal for a direction that HMRC issues a closure notice*

HMRC enquiries into self-assessment returns can be a long, time-consuming, and potentially costly process. This can sometimes lead to frustration and resentment, with the taxpayer (or adviser) perhaps considering that HMRC is unduly prolonging the enquiry, or possibly that the HMRC officer is on a 'fishing expedition' by extending the scope of the enquiry into new areas.

### **Application for closure notice**

However, there is an important protection available to taxpayers in such circumstances. The legislation dealing with closure notices by HMRC at the completion of enquiries into personal or trustee returns (TMA 1970, s 28A) includes a facility for taxpayers to apply to the tribunal for a direction requiring HMRC to issue a closure notice within a specified period (s 28A(4)). There is a similar statutory protection in respect of HMRC enquiries into the tax returns of partnerships (TMA 1970, s 28B(4)) and companies (FA 1998, Sch 18, para 33).

It should be noted that taxpayers can also apply for a tribunal direction that HMRC issues a partial closure notice (PCN). This allows specified matters in an enquiry to be resolved in advance of a final closure notice, through the issue of the PCN. However, this article focuses on applications to the tribunal for directions that HMRC issue final enquiry notices.

### **What happens next?**

If the taxpayer makes an application to the tribunal for a direction that HMRC issues a closure notice, HMRC must convince the tribunal that there are reasonable grounds for the enquiry to be allowed to continue. Otherwise, the legislation requires the tribunal to direct that HMRC issues the closure notice within a specified period (TMA 1970, s 28A(6)).

The taxpayer (or adviser) can apply to the tribunal for a closure notice at any time during the enquiry (see HMRC's Enquiry manual at EM1976). It may therefore be tempting for taxpayers to seek a closure notice at an early stage of the enquiry. However, this temptation should generally be resisted. There have been numerous cases in which tribunals have turned down applications by taxpayers for closure

notices (e.g., *Price v HMRC* [2011] UKFTT 624 (TC); *Michael v HMRC* [2015] UKFTT 577 (TC)).

Fortunately, taxpayers are allowed more than one bite of the cherry. There is no statutory prohibition on the taxpayer applying to the tribunal for a closure notice on more than one occasion in respect of the same HMRC enquiry. However, if the tribunal dismisses the applications as premature, there will be potential time and cost implications of making unsuccessful applications. The taxpayer can appeal against the tribunal's decision not to direct HMRC to issue a closure notice. Similarly, if the tribunal upholds the taxpayer's application and directs HMRC to issue a closure notice, HMRC can appeal against the tribunal's decision (TMA 1970, s 28A(5)); see EM1990).

### **The end is nigh!**

If the tribunal directs that HMRC should issue a closure notice, it will specify a timeframe for HMRC to do so. The legislation does not stipulate a deadline. In practice, the length of time specified in the tribunal's direction for closing the enquiry will vary, depending on the circumstances of the case. For example:

- in *Bloomfield v Revenue and Customs* [2013] UKFTT 593 (TC), HMRC's enquiry into the taxpayer's return for 2007/08 had been in progress for well over three years. The tribunal directed that HMRC should issue a closure notice within 30 days.
- In *Khazenifar v Revenue & Customs* [2013] UKFTT 752 (TC), the tribunal decided that HMRC had reasonable grounds for not issuing a closure notice straightaway but directed that HMRC must do so within the following six months.
- in *Khan v Revenue and Customs* [2014] UKFTT 18 (TC), the tribunal held that HMRC's enquiry into the taxpayer's tax return for 2009/10 should be concluded within nine months.

Interestingly, in *Khan* the tribunal commented: "An enquiry of this nature ought to be capable of being completed within two years, and the tribunal must guard against it becoming a fishing expedition by [HMRC] in the hope of justifying the time already spent."

### **Worse to come?**

HMRC's information powers include the power to inspect business records and premises during an enquiry (FA 2008, Sch 36, para 21(4)). It should be borne in mind that HMRC could seek to use these powers in cases where the taxpayer is considering an application for a tribunal direction that HMRC issues a closure notice.

Closure notice applications should not be taken lightly. If the tribunal directs HMRC to issue a closure notice straightaway, this is not necessarily the best outcome for the taxpayer. The closure notice will set out HMRC's conclusions at the point where the enquiry is ended. If HMRC has no information or grounds for amending the taxpayer's return, the closure notice will state that there are no amendments to the original self-assessment.

However, if the return is amended, HMRC's conclusion in the closure notice could be based on incomplete information, in which case any amendment to the taxpayer's return may be inaccurate. Additional tax (and possibly penalties) could therefore be wrongly charged, which may result in an appeal and potentially another hearing before the tribunal.

### **Circumstances differ**

No two HMRC enquiries are the same. Furthermore, previous case law at First-tier Tribunal (FTT) level does not set a binding precedent. Nevertheless, earlier cases can be instructive about circumstances where the tribunal might favour a direction that HMRC issues a closure notice. For example, at the risk of stating the obvious, the FTT is unlikely to support HMRC's attempts to pursue information or documents that are no longer available, or which never existed.

Sadly, it is not uncommon for HMRC's enquiries to drag on over a number of years. In some cases, the tribunal might consider that an enquiry has been unduly prolonged. For example, in *Newpier Charity Ltd v Revenue and Customs* [2022] UKFTT 373 (TC), HMRC objected to the taxpayer's application to the tribunal for a direction that HMRC issue a closure notice. The FTT noted the taxpayer's assertion that information and documentation requested was not available due to the effluxion of time and/or that it never existed. This had been definitively stated in two witness statements containing a statement of truth. In the circumstances, the FTT was satisfied that there were no reasonable grounds to maintain the enquiry and directed HMRC to issue a closure notice within four weeks of the date of its decision.

In *Hitchins & Anor v Revenue and Customs* [2023] UKFTT 127 (TC), applications were made to the FTT for closure notices in respect of open enquiries by HMRC into the taxpayers' self-assessment returns for 2012/13 to 2019/20. The FTT noted HMRC's enquiries were first opened in 2014 and found that HMRC's enquiries had been conducted to a point where it was reasonable for HMRC to make an informed judgment of the matter. The FTT directed HMRC to issue a closure notice within six weeks from its decision being released.

### **Alternative route**

HMRC guidance states that if a taxpayer applies to the tribunal for a closure notice (or is considering applying for one), HMRC's enquiry officer should consider whether to offer alternative dispute resolution (ADR) to the taxpayer (EM1976). ADR is

broadly a voluntary procedure for resolving tax disputes in compliance checks if appropriate, whereby a trained mediator from HMRC who was not previously involved in the case mediates between the taxpayer and the HMRC officer dealing with the case with a view to reaching an agreement between them.

The attraction of ADR is that it may help to resolve any disputes between the taxpayer and HMRC in the enquiry without a tribunal hearing; if the dispute cannot be resolved, the taxpayer could still go to the tribunal. ADR is therefore potentially helpful and should be considered in appropriate cases.

Further information on ADR is available on HMRC's website ([www.hmrc.gov.uk/complaints-appeals/how-to-appeal/adr.htm](http://www.hmrc.gov.uk/complaints-appeals/how-to-appeal/adr.htm)).

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