

Don't take too long!

Mark McLaughlin looks at the timing of applications by taxpayers for the tribunal to direct HMRC to issue closure notices in tax return enquiries

It is said that “timing is everything”. This is often true in the context of an important facility open to taxpayers who are subject to tax return enquiries in certain circumstances. An HMRC enquiry into a taxpayer’s self-assessment return is never a pleasant experience. It can also be a time-consuming and sometimes expensive event for the taxpayer.

Seeking closure

Helpfully, an important protection is available if the taxpayer believes that an HMRC enquiry has become unnecessarily protracted. The relevant legislation dealing with closure notices by HMRC in enquiries into personal or trustee returns includes the facility for a taxpayer to apply to the tribunal for a direction requiring HMRC to issue a closure notice within a specified period (TMA 1970, 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), but this article focuses on HMRC enquiries into the tax returns of individuals.

At any time during a formal enquiry into an individual’s self-assessment return (under TMA 1970, s 9A(1)), the taxpayer can apply to the tribunal for a direction that HMRC issues a closure notice. The application is heard and decided in the same way as an appeal. The tribunal must give the direction sought unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. This places the onus on HMRC to convince the tribunal that it ought not to issue a direction.

If a direction is given, the time limit specified by the tribunal can vary depending on the circumstances (e.g., 28 days, three months or six months). The provisions apply to both full and partial closure notices; the latter relates to any matter to which an enquiry relates.

Not so fast...

Because a taxpayer can apply for a closure notice direction at any time during an enquiry, there is a temptation for the taxpayer to make an application to the tribunal too soon, in the hope that the enquiry will be closed. Unfortunately, this has resulted in the tribunal refusing a significant proportion of applications on the basis that they were made prematurely.

For example, in *Alkadhi v Revenue and Customs* [2012] UKFTT 741 (TC), in March 2010, HMRC opened an enquiry into the taxpayer’s tax return for 2007/08. An application for a tribunal direction to close the enquiry was made in November

2011, primarily based on the issue of the taxpayer's residence status. The taxpayer contended that he was non-UK resident in 2007/08, whereas HMRC's position was that the taxpayer was UK resident when the enquiry was opened. In refusing the taxpayer's application, the First-tier Tribunal (FTT) stated:

"We consider it appropriate, and probably necessary, for HMRC to examine in detail all the information contained in the 'schedule of residence' and to review all the relevant circumstances. We are unable to assess how much time this process will take. As HMRC's enquiry under s 9A TMA 1970 into Mr Alkadhi's return for 2007/08 is not complete, and as no time limit can be set for the enquiry to be completed, we are satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

The time required by HMRC to conduct an enquiry will depend on such factors as the nature of the enquiry and the complexity of the issues. The wider the scope of an enquiry, the longer the enquiry is likely to take, and the more patience and fortitude may be required by the taxpayer.

Enough is enough?

On the other hand, it may occasionally be necessary for the taxpayer to draw a line in the sand. The provision of information and explanations to HMRC may be met with requests for further information and explanations. Any progress might be slow; weeks may turn into months, and months might possibly turn into years. Sooner or later, the taxpayer may be faced with a decision whether to make an application to the tribunal for a direction that HMRC issues a closure notice. HMRC enquiries cannot be allowed to continue indefinitely.

For example, in *Hitchins & Anor v Revenue and Customs* [2023] UKFTT 127 (TC), the applicants applied to the FTT for closure notices in respect of open enquiries by HMRC into the applicants' self-assessment returns for 2012/13 to 2019/20. The FTT found that "...HMRC's enquiries have been conducted to a point where it is reasonable for [HMRC] to make an 'informed judgment' of the matter, even though every line of enquiry may not have been pursued to the end".

While HMRC had not received answers to all their questions, the FTT considered that certain outstanding questions did not have a reasonable basis and amounted to a fishing expedition. On certain other outstanding queries, HMRC confirmed that the matter in question was not the main focus of its enquiries and acknowledged that these did not justify keeping the enquiries open. The FTT noted that HMRC's enquiries were first opened in 2014 and considered that they had gone on for far too long. The FTT directed that HMRC issue a closure notice within six weeks.

All is not lost

Whilst it may be disappointing and frustrating (not to mention potentially time-consuming and costly) to the taxpayer for their application for a closure notice direction to be refused, it is not necessarily disastrous. The taxpayer is not

prevented by statute from applying to the tribunal for a closure notice on more than one occasion in respect of the same HMRC tax return enquiry. There is also a right of appeal by the taxpayer against the tribunal's decision not to direct HMRC to issue a closure notice, although HMRC's enquiry will probably continue pending a hearing before the Upper Tribunal. Conversely, if the taxpayer's application to the tribunal is successful, HMRC can appeal against the tribunal's decision (TMA 1970, s 28A(5)).

In some cases, taxpayers should be careful what they wish for. If the tribunal allows the taxpayer's application and directs HMRC to issue a closure notice within a specified period, HMRC's closure notice might amend the taxpayer's tax return based on incomplete information available at that time. This could be detrimental to the taxpayer, as it may result in excessive tax (plus interest and penalties) being charged, which may require another hearing before the tribunal.

On the other hand, if HMRC suspects that the taxpayer may be considering an application for a closure notice direction, it may be more amenable to offering alternative dispute resolution to the taxpayer (see HMRC's Enquiry Manual at EM1976), with a view to resolving the enquiry without recourse to a formal tribunal hearing.

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