Tax Chamber
First-tier Tribunal for Scotland

[2022] FTSTC 1

Ref: FTS/TC/AP/19/0030

Land and Buildings Transaction Tax – whether Closure Notice can be cancelled unilaterally – no – whether loss of tax – no section 93(3)(b) and (5) RSTPA – assessment under section 98(2) of RSTPA – invalid – appeal allowed

DECISION NOTICE

IN THE CASE OF

Wind Energy Renewables LLP

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR
KATRINA LUMSDAINE

Having heard Gordon Watt, Advocate, instructed by Mazars LLP for the Appellant; and Laura-Anne van der Westhuizen, QC, instructed by Revenue Scotland, for the Respondent

DECISION

Introduction

1. This is an appeal under Section 241 Revenue Scotland and Tax Powers Act 2014 ("RSTPA") against an assessment dated 14 November 2019 ("the Notice of Assessment") issued under Section 98 of RSTPA on behalf of Revenue Scotland.

2. The appeal is allowed. The assessment is not competent because there was no loss of tax.

The procedural history

3. On 23 December 2015, the Appellant submitted an electronic Land and Buildings Transaction Tax ("LBTT") return in respect of the assignation of a lease (relating to a wind turbine) which apportioned £832,001 of the purchase price of £7,669,650 as chargeable consideration and £6,837,649 as relating to non-chargeable assets. LBTT of £27,690 was declared on the return and was paid timeously.

4. On 27 January 2016, the Appellant's agents, Mazars LLP ("Mazars") wrote to Revenue Scotland, in some detail, clarifying the basis upon which the LBTT return had been prepared.

5. On 24 August 2016, Martin Davidson, of Revenue Scotland, issued a Notice of Enquiry to the Appellant under Section 85 of RSTPA in relation to the LBTT return. On the same day he requested that Mazars provide further information.

6. Between 24 August 2016 and 2 November 2017, Revenue Scotland and Mazars engaged in extensive correspondence. In that period, on 6 April 2017, Revenue Scotland and Mazars had a meeting.

7. On 23 November 2017, Martin Davidson wrote to the Valuation Office Agency ("VOA") to request advice on the transaction.

8. Between 10 January 2018 and 9 April 2018, further correspondence ensued between the parties.

9. By email dated 17 August 2018, Mazars, at the request of Martin Davidson, provided a discounted cash flow analysis with a copy of a fund operating cash flow.

10. In September 2018, Moira Taylor, Tax Compliance Manager of Revenue Scotland, who had been Martin Davidson's line manager then took over as lead enquiry officer as Mr Davidson was due to leave Revenue Scotland.

11. On 6 December 2018, Moira Taylor, Kirsty Ryan, a solicitor from Revenue Scotland and Chris Keenan, Revenue Scotland's external advisor with expertise in the wind farm industry met with representatives of Mazars and the Appellant for a site visit.

12. On 20 December 2018, Moira Taylor issued a Closure Notice to the Appellant in terms of Section 93 of RSTPA ("the Closure Notice"). That stipulated that there was LBTT of £194,805 due. It was paid within the 30 day period.

13. On 18 January 2019, Mazars requested a review of the decision in the Closure Notice in terms of Sections 234 and 235 of RSTPA.

14. On 7 March 2019, Revenue Scotland intimated their view of the matter in terms of Section 237(1) of RSTPA but offered the Appellant an opportunity to submit further information.

15. On 29 March 2019, Mazars provided further information.

16. On 11 April 2019, Revenue Scotland notified the Appellant that the conclusion of the review was to uphold the Closure Notice and thus the original decision.

17. On 9 May 2019, the Appellant intimated an appeal to the Tribunal.

18. On 8 November 2019, Michael Paterson, Head of Tax, Revenue Scotland wrote to the Appellant stating that:

> "I am writing to inform you that I have decided to cancel the decision as set out in Revenue Scotland's Closure Notice dated 20 December 2018 …
>
> I have decided to cancel this decision because it has come to my attention that the conduct of the enquiry in this particular case was initiated and partially undertaken by a member of staff of Revenue Scotland who was not a designated officer under the Revenue Scotland and Tax Powers Act 2014….
>
> The effect of this cancellation is to return your tax position to what it was before our enquiry was opened. However, please note that I have asked a member of Revenue Scotland's staff to consider the matter afresh, and further correspondence may therefore follow."

19. On 11 November 2019, Revenue Scotland lodged a submission dated 8 November 2019 with the Tribunal stating that it had cancelled the decision in the Closure Notice which was the subject matter of that appeal, requesting an Order dismissing the appeal and undertaking to meet the Appellant's reasonable expenses.

20. On 14 November 2019, Moira Taylor wrote to the Appellant referencing Mr Paterson's letter and served a Notice of Assessment ("the Assessment") in respect of

LBTT under Section 98 of RSTPA. It was in exactly the same sum, namely £194,805 as in the Closure Notice.

21. On 13 December 2019, the Appellant lodged this appeal with the Tribunal.

22. In the interim on 13 November 2019, the Appellant had applied for an award of expenses on a basis to be determined once it had obtained further information as to the circumstances that had led to the Closure Notice being cancelled.

23. That application was sisted to allow the parties to negotiate. The sist expired on 3 September 2020 and on 10 September 2020, Directions for the hearing on expenses were issued. In compliance with those Directions, Revenue Scotland lodged submissions on 9 October 2020 and the Appellant on 19 November 2020. Supplementary submissions were lodged by the parties on 16 and 30 December 2020 respectively.

24. The hearing of the application for expenses was heard on 16 February 2021 and a Decision allowing the application was issued on 31 May 2021 with an amended Decision under the rule allowing correction of clerical errors etc issued on 8 July 2021.

25. On 14 September 2021, having considered the Appellant's application dated 9 August 2021, Revenue Scotland's Answers thereto dated 25 August 2021 and the Appellant's response dated 9 September 2021, the Tribunal issued an Order directing that Revenue Scotland should lead evidence first as to the competency and timing of the assessment.

26. Thereafter there was some correspondence between the parties in regard to the forthcoming hearing. On 16 December 2021, in dealing with those issues, I emailed the parties pointing out that having reviewed my notes from the hearing on expenses, I had observed that counsel for the Appellant had presaged a situation where the Appellant would argue, as a preliminary matter, that there was no appealable decision given the terms of RSTPA. I pointed out that, whether or not the Appellant did so, it raised the issue as to whether or not there was an appealable decision and if not, then the Tribunal would have no jurisdiction and must *ex proprio motu* consider the issue. I raised that because it was plainly a preliminary issue and if, as seemed likely to me, jurisdiction had to be considered on the first day, then that would impact on the necessity for expert witnesses to be present, or not.

27. There was correspondence from both parties in regard to the question as to whether or not the Appellant was raising the issue. Given the holidays, an extension of time was allowed for the lodgement of Skeleton Arguments and the parties were referred to *Burgess & Another v HMRC*[1].

[1] [2015] UKUT 578 (TCC)

28. The Skeleton Arguments were duly lodged and the Appellant again raised the issue as to whether the assessment was valid.

29. At the outset of the hearing, Revenue Scotland's Skeleton Argument not having addressed the competency issue, the Tribunal explained that on the face of it there appeared to be a possible problem. The Tribunal explained the law on the subject as we understood it. The parties were granted an adjournment to take instructions. They reverted requesting that the issue be decided as a preliminary matter.

The expenses hearing

30. At paragraph 3.18 of his submissions for the hearing dated 19 November 2020, Mr Watt had first argued that it was not open to Revenue Scotland to unilaterally withdraw the Closure Notice and he cited *HMRC v Bristol & West plc*[2] ("B & W").

31. Both Ms Lumsdaine and I, who heard the expenses hearing, have it noted that Revenue Scotland stated explicitly that the decision to cancel the Closure Notice had been made on the basis that it was arguable that that Closure Notice was not valid. They stressed at a later stage that they were not stating that it was invalid but that it was "just debateable". That was supported by the submissions for that hearing where they stated at paragraph 81:

> "The respondent makes no concession as to the validity of the enquiry. Further, in determining the respondent's application anent the expenses of this appeal, the FTTS ought not to determine any question as to the validity of the enquiry. That issue is live in the separate appeal before the FTTS at which evidence will be led. To make findings relative to the validity of the enquiry would prejudice those proceedings. In any event it would be inappropriate to make such findings, no evidence having been led on the subject in these proceedings."

32. Had we been asked to decide the matter we would have found that the Closure Notice was valid. Section 85 of RSTPA provides that a designated officer may enquire into a return but there is no provision that the Notice of Intention to make an enquiry is to be issued by a designated officer. As we note below, for a time Martin Davidson was a designated officer, and the Closure Notice was issued by a designated officer.

Designated officer and the enquiry

33. We note that the decision to open an enquiry was endorsed by the Board of Revenue Scotland on 12 August 2016.

34. Martin Davidson was not a designated officer for the purposes of Section 252 RSTPA and only became a designated officer in October 2017. Moira Taylor was a designated officer and it was she who issued the Closure Notice having reviewed the

[2] [2016] EWCA Civ 398

files, visited the site and taken external advice. The appealable decision in the Closure Notice was therefore taken by a designated officer.

35. The decision to close the enquiry was endorsed by the Board of Revenue Scotland on 12 December 2018.

Overview of Revenue Scotland's arguments

36. It was not disputed that Revenue Scotland bore the burden of proof in regard to competency. The assessment under Section 98 would only be competent if there was a loss of tax.

37. Ms van der Westhuizen conceded that the Closure Notice had been a valid Closure Notice.

38. She argued that Revenue Scotland had the right to withdraw the Closure Notice and therefore there was a loss of tax. Consequently, the assessment was valid provided Revenue Scotland could establish that the officer had acted honestly and reasonably.

39. The issue before us was whether or not Revenue Scotland had the right to withdraw a Closure Notice unilaterally. Ms van der Westhuizen argued that *B & W* was authority only for the proposition that a Closure Notice cannot be withdrawn unilaterally where the purpose of so doing is to either keep an enquiry open or to re-open an enquiry. It is not an authority for the proposition that a Closure Notice can never be withdrawn or cancelled. She cited *Redmount Trust Co Ltd v HMRC*[3] ("Redmount") at paragraphs 2 to 6 and 151 to 154.

40. She argued that the withdrawal of the Closure Notice cancelled Revenue Scotland's view of the matter so the Closure Notice was not in force when the Assessment was made. The enquiry had not been re-opened by the cancellation and the tax position had simply returned to what it had been before the enquiry had been opened. In terms of Revenue Scotland's care and management powers, Section 3(1) of RSTPA meant that they had to collect underpaid tax. There was no prejudice to the taxpayer in consequence.

41. Her alternative argument was that if Revenue Scotland did not have the power to withdraw or cancel Closure Notices unilaterally then disputes would be forced into the Tribunal when, *de facto,* the decision had been cancelled and that could not have been the intention of Parliament.

Overview of the Appellant's arguments

42. LBTT is a self-assessed tax and the effect of Section 93(3) of RSTPA is that the Closure Notice makes an amendment and in terms of Section 93(5) of RSTPA, that

[3] [2021] UKFTT 0443 (TC)

amendment is instantaneous. The amended return supersedes the self-assessment return and takes effect when issued. That creates a legal liability to pay in terms of Section 93(6) of RSTPA. That all makes procedural sense because the liability replaces the debt in the self-assessment return.

43. Mr Watt relied not only on *B & W* but also on *R(oao William Archer) v HMRC*[4] ("Archer 1") and the *Queen on the application of Archer v HMRC*[5] ("Archer 2") for the propositions that Section 93(3) RSTPA was the equivalent of Section 28A(2) Taxes Management Act 1970 ("TMA") and that an amended self-assessment return is still an assessment.

44. As far as withdrawing a Closure Notice is concerned, he relied on *B & W* as he had throughout.

45. Lastly, in this context, he argued that Section 94 of RSTPA was broadly in similar terms to the like UK provisions which for corporation tax are paragraph 33 part IV Schedule 18 Finance Act 1998 (FA 98) and for income tax Section 28A(4) TMA. There is no point in having that power if it is open to the authority to unilaterally withdraw.

The Law

46. Insofar as relevant the following sections of RSTPA read:-

> "**85 Notice of Enquiry**
>
> (1) A designated officer may enquire into a tax return if subsection (2) has been complied with.
> (2) Notice of the intention to make an enquiry must be given …
> (3) …
> (4) A return that has been the subject of one notice under this section may not be the subject of another, except a notice given in consequence of an amendment of the return under section 83.
>
> **93 Completion of enquiry**
>
> (1) An enquiry under section 85 is completed—
> (a) when a designated officer informs the relevant person by a notice (a "closure notice") that the enquiry is complete and states the conclusions reached in the enquiry, or
> (2) …
> (3) A closure notice must either—
> (a) state that in the officer's opinion no amendment of the tax return is required, or
> (b) make the amendments of the return required to give effect to the officer's conclusions.
> (4) …

[4] [2017] EWHC 296 (Admin)
[5] [2017] EWCA Civ 1962

(5) A closure notice takes effect when it is issued.
(6) …

94 Direction to complete enquiry

(1) The relevant person may apply to the tribunal for a direction that a closure notice is to be given within a specified period.
(2) The tribunal hearing the application must give a direction unless satisfied that Revenue Scotland has reasonable grounds for not giving a closure notice within that period.

98 Assessment where loss of tax

(1) This section applies if a designated officer comes to the view honestly and reasonably that—
(a) an amount of devolved tax that ought to have been assessed as tax chargeable on a person has not been assessed,
(b) an assessment of the tax chargeable on a person is or has become insufficient, …
(2) The designated officer may make an assessment of the amount, or additional amount, that ought in the officer's opinion to be charged in order to make good to the Crown the loss of tax.

102 Conditions for making Revenue Scotland assessments

(1) A Revenue Scotland assessment may be made only where the situation mentioned in section 98(1) or 99(1) was brought about carelessly or deliberately by—
(a) the taxpayer,
(b) …
(2) But no Revenue Scotland assessment may be made if—
(a) the situation mentioned in section 98(1) or 99(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been calculated, and
(b) the return was in fact made on the basis prevailing, or in accordance with the practice generally prevailing, at the time it was made.

Discussion

47. The issue here is that an assessment under Section 98 of RSTPA can only be issued if it is to make good a loss of tax. It was common ground between the parties that if a Closure Notice cannot be withdrawn unilaterally then there would have been no loss of tax because in terms of Section 93(3)(b) of RSTPA the Closure Notice actually makes the amendments of the return required to give effect to the officer's conclusions. Section 93(5) of RSTPA states that that takes effect when the Closure Notice is issued. Essentially the issue turns on whether or not Revenue Scotland had the power to unilaterally cancel or withdraw the Closure Notice.

48. Both parties confirmed that they believed that the Closure Notice had been valid when it was issued.

49. Ms van der Westhuizen argued that Revenue Scotland routinely withdraw Closure Notices. Whether or not they do so is irrelevant if they are not entitled to do so in terms of the relevant law so that argument does not assist.

50. The Explanatory Notes to RSTPA at paragraph 10 state:

> "The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

We therefore look at the equivalent provisions in UK law and those have been considered in case law.

51. Part IV Schedule 18 FA 98 makes provision for enquiry into self-assessment tax returns by companies. Paragraph 32 provides as follows in relation to completion of the enquiry:-

> "An enquiry is completed when an officer of Revenue & Customs by notice (a 'closure notice') informs the company the officer has completed the officer's enquiry and states the officer's conclusions. The notice takes effect when it is issued".

52. Paragraph 33 makes provision for the company to apply (then) to the Commissioners for a direction that HMRC give a Closure Notice within a specified period. The Commissioners are obliged to give that direction unless satisfied that HMRC have reasonable grounds for not giving a Closure Notice within a specified period.

53. Paragraph 34 makes provisions for amendment of the return after completion of the enquiry.

54. These paragraphs are very similar to Sections 93 and 94 of RSTPA, the difference being that rather than stating the officer's conclusion, Revenue Scotland actually makes the amendments to the return.

55. *B & W* considered paragraphs 32 to 34 of FA 98 in relation to Closure Notices. The facts are completely different in that HMRC had posted a Closure Notice but issued an email to the taxpayer which arrived before the Closure Notice stating that the Closure Notice had been issued in error.

56. Under the heading "Law and Analysis" Lord Justice Briggs stated at paragraph 24:-

> "24. The following matters are common grounds between the parties **and we see no reason to doubt them**: … (emphasis added)
>
> iv) A Closure Notice once issued cannot be withdrawn unilaterally by HMRC

v) Having issued a Closure Notice, HMRC have no power to amend the relevant tax return otherwise than to give effect to the conclusions stated in the Closure Notice: see paragraph 34(2)(b)."

57. He went on to say at paragraphs 33, 35 and 36:-

"33 … The Notice takes effect when it is issued, neither earlier or later. This interpretation accords both with the purpose of this part of the enquiry procedure, and with the procedural consequences of a Closure Notice. Taking the whole of paragraph 32(1) in its own context, the scheme requires HMRC first to decide to close its enquiry, so that it has been completed, to form a concluded view as to whether, and if so what, amendments are needed to be made to the self-assessment return to which the enquiry relates, and then to communicate both the completion of the enquiry and their conclusions to the taxpayer …

35. We do not doubt that the conclusion of an enquiry and the expression of HMRC's conclusions in a Closure Notice leaves open for further debate, negotiation and settlement the final outcome as to the extent of the taxpayer's tax liability. But we reject any notion that the closure of the enquiry and the expression of HMRC's conclusions arising from it can be belittled as a mere procedural pause. Closure marks an important stage at which the enquiry (with HMRC's attendant powers and duties) ends, HMRC is required to state its case as to the amount of tax due, in the Closure Notice itself, following which its power to amend the assessment is limited to such amendments as will give effect to those conclusions. These provisions contain requirements of real potential value to the taxpayer, hence its right under paragraph 33 to seek a direction that HMRC issue a Closure Notice.

36. Furthermore, the Closure Notice marks the beginning of a series of precisely timed stages during which, first, the taxpayer is permitted to amend its own self-assessment; secondly, HMRC is, if not satisfied by any such amendment, empowered to amend; and thirdly, such an amendment may be challenged by the taxpayer by way of appeal. It would gravely detract from the procedural certainty intended to be created by those provisions and time limits if HMRC had a unilateral power to deliver a suspended closure notice intended to come into effect on some date in the future, which is itself not specified in the notice."

58. We added the emphasis in the quotation from paragraph 24 because rather than noting what the parties had agreed the Court positively endorsed that clear statement of the law and without any qualification.

59. Whilst *B & W* dealt with FA 98, the two *Archer* cases considered Section 28A TMA, and the provisions of Section 28A(2) to (4) read:-

"(2) A partial or final Closure Notice must state the officer's conclusions, and

(a) state that in the officer's opinion no amendment of the return is required, or
(b) make the amendments to the return required to give effect to his conclusion.

(3) A partial or final Closure Notice takes effect when it is issued.
(4) The taxpayer may apply to the Tribunal for a direction requiring an officer of the Board to issue a partial or final Closure Notice within a specified period."

60. As can be seen that mirrors the provisions of Sections 93 and 94 of RSTPA.

61. Mr Watt relied on paragraphs 55 and 57 of *Archer 1* where Mr Justice Jay confirmed that a Closure Notice is the formal document which amends a return as well as the self-assessment included within the return. The statutory scheme predicates the giving of notice of amounts of tax being assessed and that is given effect to by directly altering the taxpayer's self-assessment. He made it clear at paragraph 72 that a Closure Notice assesses the taxpayer's tax liability.

62. *Archer 2* simply confirmed the position.

63. Ms van der Westhuizen referred the Tribunal to *Redmount* and relied on paragraphs 151, 152 and 154. The only similarity between that case, which in any event, is a First-tier decision, is that a Closure Notice and a Discovery Assessment were both issued by HMRC and they related to the same underlying transactions.

64. The factual matrix is completely different. The Closure Notice was appealed and the matter went to the Tribunal. When a revised Skeleton Argument was lodged a new argument was advanced that both the enquiry and the Closure Notice were invalid. HMRC decided that if that argument were to be successful they would require a discovery assessment and in order to avoid the then problem of "staleness" they raised the discovery assessment as an alternative means of recovering the lost tax. In fact the Closure Notice was found to be valid. The appeal against both the Closure Notice and the discovery assessment were dismissed.

65. Whilst we agree with the decision in *Redmount* on the particular facts in that case and we understand why the discovery assessment was raised in the alternative, that has no bearing on the situation in this appeal.

66. As we have noted above, paragraph 33 FA 98, Section 28A(4) TMA and Section 94 RSTPA all give taxpayers the right to apply to the Tribunal for a direction to the taxing authority to issue a Closure Notice.

67. Revenue Scotland argue that they can withdraw a Closure Notice in circumstances where they are not doing so in order to re-open an enquiry. If they are right in that, the Tribunal could direct that a Closure Notice be issued. Thereafter if it is issued and then withdrawn, and the taxing authority then issues Section 98 assessment it would render

the Tribunal's direction pointless. That cannot have been the intention of Parliament as those provisions would be otiose.

68. Furthermore, in any event, Revenue Scotland can never re-open an enquiry since Section 85(4) of RSTPA states that an enquiry can only be opened once.

69. It is trite law that statutes should be construed purposively and they must be read in context so Sections 93 and 94 of RSTPA should be considered together.

70. The clear purpose of a Closure Notice and the right to ask for one is to give finality and certainty.

71. Since both parties are agreed that the Closure Notice in this instance was valid (and we agree), the issue of that Notice gave rise to an amended return which superseded the self-assessment return and did indeed take effect when it was issued.

72. We agree with the clear statement in *B & W* that a Closure Notice, once issued cannot be withdrawn unilaterally. That is unqualified. It is clear from paragraphs 35 and 36 of *B & W* that the purpose of a Closure Notice is to achieve finality in the process starting with the enquiry.

73. Section 94 of RSTPA reinforces that view in that Revenue Scotland or, in the rest of the UK, HMRC, can be forced to issue a Closure Notice. It cannot be the case that the taxing authority can bypass a significant protection for the taxpayer. As Lord Justice Briggs says in a slightly different context in paragraph 36 of *B & W* "It would gravely detract from the procedural certainty intended to be created by these provisions" if the taxing authority could effectively ignore the Tribunal's directions.

74. We do not understand Ms van der Westhuizen's alternative argument that if Revenue Scotland could not withdraw a Closure Notice the Tribunal would be flooded with appeals where, *de facto*, the taxing authority had withdrawn a decision. If the tax was not being pursued it is unlikely that a taxpayer would pursue an appeal beyond lodging a protective appeal and seeking a sist.

75. Mr Watt advanced a number of arguments about the quality of the Assessment but we do not address those since we find that it was not competent for Revenue Scotland to withdraw the Closure Notice and therefore the Assessment is not competent.

Conclusions

76. A Closure Notice cannot be unilaterally withdrawn; in colloquial terms, the taxing authority has only "one bite at the cherry". As a result of the Closure Notice the Appellant's LBTT return has been amended to reflect the amount of tax due. There is now no loss of tax. Therefore Revenue Scotland have no power to raise a Section 98 assessment.

77. Revenue Scotland chose (a) to decline to consider the validity of the Closure Notice until this appeal; and (b) to withdraw their defence of the appeal relating to the Closure Notice. That has had unfortunate, and it seems, unforeseen consequences for them. That is not a matter for this Tribunal. We can only apply the law.

78. As we indicate at paragraph 32 above, had we been asked in the first appeal to decide on the validity of the Closure Notice we would have had no hesitation in saying that it was valid. An enquiry does not have to be opened by a designated officer, it simply has to be decided by such an officer. The fact that Martin Davidson was not a designated officer for 14 months does not matter because Moira Taylor made the decision having reviewed everything when she took over from Mr Davidson who had by then been a designated officer for a significant period. In our view, the law is clear.

Disposition

79. The appeal is allowed.

80. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT

President

RELEASE DATE: 14 January 2022