# TC08287

*CORPORATION TAX – application for closure notices – whether HMRC had sufficient information to close the enquiries – yes – whether the existence of an ongoing diverted profits tax review period provided reasonable grounds for refusing to issue a closure notice – no – application upheld.*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2021/01561**
**TC/2021/01562**
**TC/2021/01563**
**TC/2021/01564**

**BETWEEN**

**VITOL AVIATION UK LTD**
**VITOL S.A. IN RESPECT OF ITS UK PERMANENT ESTABLISHMENT**
**VITOL SERVICES LIMITED**
**VITOL BROKING LIMITED** **Applicants**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The hearing took place on 26-29 July 2021. With the consent of the parties, the hearing took place on the Tribunal's video hearing platform. A face to face hearing was not held because of restrictions arising from the coronavirus pandemic.**

**Mr J Ghosh QC, Michael Ripley and Laura Ruxandu, counsel, instructed by Slaughter and May, for the Applicants**

**Mr M Fell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. The Applicants apply for closure notices under paragraph 33, Schedule 18, Finance Act 1998 ("Schedule 18") in respect of enquiries into the corporation tax self-assessment returns filed by the Applicants as follows:

(1) Accounting period ended 31 December 2016, opened 12 July 2018;

(2) Accounting period ended 31 December 2017, opened 5 November 2019;

(3) Accounting period ended 31 December 2018, opened 4 December 2020.

### Background

*Advance pricing agreement application*

2. The Applicants are all members of the 'Vitol' corporate group (the "Vitol Group"), which principally trades energy and commodities globally. The European operations of the Vitol Group are based in Geneva, Switzerland. The main Swiss legal entity is Vitol S.A. ("VSA").

3. The Applicants carry on the UK activities of the Vitol Group, as follows:

(1) Vitol Services Limited ("VSL") provides services (such as treasury, accounting, legal, risk management, IT maintenance, physical infrastructure development and shipping and logistics services) to various other group entities (including VSA);

(2) Vitol Broking Limited ("VBL") provides brokerage services to VSA;

(3) Vitol Aviation UK Ltd ("VAUL") undertakes transactions concerning aviation fuel;

(4) VSA has a permanent establishment in the UK ("VSA PE") arising as a result of services carried out on its behalf by traders in VBL in which VBL acts as a dependent agent. This entity is included as an applicant because its UK corporation tax returns are inextricably linked with those of VBL.

4. The Vitol Group and HMRC entered into a unilateral advance pricing agreement ("APA") covering the periods 31 December 2010 to 31 December 2015 inclusive.

5. During late 2015, the Vitol Group and HMRC began discussions regarding an APA for the accounting period ending 31 December 2016 onwards. HMRC advised that they would accept a formal application for a new bilateral APA between HMRC and the Swiss tax authorities. Following standard procedures, HMRC also required that the Vitol Group provide an analysis of the potential application of diverted profits tax ("DPT") to be considered alongside the APA application.

6. The new bilateral APA was formally applied for on 18 August 2016, and a revised application was made on 7 October 2016. The application included the requested DPT analysis. It also included an explanation of the Vitol Group's business, their transfer pricing proposal, and a masterfile of evidence and analysis in support of the application. The APA has not, as at the date of the hearing, been agreed.

*Diverted profits tax*

7. During the discussions regarding the APA, HMRC issued the following DPT notices to each of VSL and VBL:

(1) accounting period ended 31 December 2016: preliminary notices issued 24 November 2020, charging notices issued 22 January 2021;

(2) accounting period ended 31 December 2017: preliminary notices issued 29 June 2020, charging notices issued 25 August 2020.

8. The review period for these notices is ongoing, and will end on 25 December 2021 for the 2017 charging notices and 22 May 2022 for the 2016 charging notices.

9. HMRC have not issued any DPT notices to VSL and VBL for the year ended 31 December 2018. No DPT notice has been given to VSA or VAUL for any period.

*Enquiries*

10. Also during discussions in respect of the APA, HMRC opened the enquiries set out in §1 above. Enquiries were also opened into the Applicants' returns for the accounting period ended 31 December 2015. These related to a period for which an APA had been agreed and were closed by HMRC with closure notices issued on 3 June 2021.

11. It is common ground between the parties that the only outstanding matter in respect of the enquiries is the proper arm's length price which should be charged by VBL and VSL for services supplied between themselves and VSA in accordance with UK transfer pricing and permanent establishment legislation.

12. HMRC have refused to issue closure notices in respect of the enquiries and, accordingly, on 26 April 2021, the Applicants applied to the Tribunal for closure notices in respect of the enquiries set out in §1 above.

**Relevant law – Schedule 18 of Finance Act 1998 ("Schedule 18")**

13. A company is effectively required by paragraph 3 of Schedule 18 to deliver a company tax return of reasonably required information, accounts, statements and reports which are (a) relevant to the tax liability of the company, or (b) otherwise relevant to the application of the Corporation Tax Acts to the company. "Tax" is defined in paragraph 1 of Schedule 18 as being, for the purposes of Schedule 18, "corporation tax including, except as otherwise indicated, any amount assessable or chargeable as if it was corporation tax".

14. Paragraph 24 gives HMRC power to enquire into a company tax return within specified time limits. Paragraph 25 provides that an enquiry may extend to anything contained in the return or required to be contained in the return.

15. Paragraph 31 allows a company to amend its company tax return during the enquiry period, although such an amendment does not restrict the enquiry. The amendment does not take effect until a final closure notice is issued in respect of the enquiry, or a partial closure notice is issued in respect of the matters to which the amendment relates. There are no appeal rights in respect of amendments made by a company to its company tax return.

16. Paragraph 32 provides that an enquiry is completed when a closure notice is issued; such a closure notice may be partial or final and the enquiry is either partially or fully completed accordingly.

17. Paragraph 33 ("Para 33") provides as follows:

> (1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs give a partial or final closure notice within a specified period.
>
> (2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).

> (3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a partial or final closure notice within a specified period.

18. Paragraph 34 requires that a closure notice (whether partial or final) must state, inter alia the officer's conclusions and that either:

(1) no amendment is required; or

(2) the amendments that are required to give effect to the conclusions stated in the notice

19. Appeal rights apply to any amendments made to a company tax return by a closure notice.

**Whether HMRC have reasonable grounds for not giving a closure notice**

20. Para 33 places the burden of proof on HMRC to demonstrate that they have reasonable grounds for not giving a closure notice within a specified period. If HMRC cannot satisfy that burden of proof, the Tribunal is required to direct that the closure notice shall be given.

21. HMRC submitted that they had reasonable grounds for refusing to closure notices because:

(1) the Applicants have not provided information reasonably requested by HMRC and required for HMRC to arrive at conclusions needed to formulate the closure notices; and

(2) the issue of closure notices for VBL and VSL would pre-empt the end of the DPT review periods for these companies.

***Ground 1: requested information outstanding***

22. HMRC contended that there were two areas of enquiry for which information requests remained outstanding:

(1) whether various services provided by VBL and VSL to VSA and other parties in the Vitol Group, and capital required to provide those services, have been given a less than arm's length value thereby conferring a potential advantage in relation to UK taxation (the "transfer pricing issue"); and

(2) whether if VSA PE were a separate enterprise dealing wholly independently with VSA, it could reasonably have some profit attributed to it (the "PE issue").

23. For the transfer pricing issue, HMRC submitted that they needed to incorporate an appropriate reward for contributions which can be benchmarked. They also needed to test whether the profitability of trades was consistent across the Vitol Group, regardless of product, location and method of financing.

24. For the PE issue, HMRC submitted that they need to ascertain the correct equity and loan capital attribution to VSA PE and the correct pricing of service provision between VSA PE and VSA.

25. In order to resolve both areas of enquiry, HMRC stated that they required information from the Applicants which, it was submitted, had been requested but had not been provided.

26. HMRC have requested information from the Applicants at various times since the APA application was made in 2016. Inevitably, there has been some cross-over in respect of requests for information relating to the APA application, the enquiries and the DPT process. Requests for information were suspended for some time as the parties worked to consider a particular transfer pricing model proposed by the Applicants in 2019.

27. By November 2020 it is clear from correspondence that the parties remained in considerable disagreement about various aspects of that transfer pricing model. On 16

November 2020 the Applicants asked HMRC to provide a consolidated list of information which HMRC considered they needed to see in the context of their current position in order to be able to issue closure notices.

28. On 3 December 2020, HMRC confirmed that they were finalising an information request. On 11 December 2020, HMRC issued the information request as a Schedule 36 information notice. This notice contained requests for 84 items of information in various categories.

29. At the date of the hearing, the information still considered to be outstanding had been reduced to 13 items:

(1) the profitability spreadsheet including pivot table that showed the profit or loss for each business and product area for each of 2016, 2017 and 2018 (the "Spreadsheets") and also confirmation where the Crude and Naphtha details can be identified within the Spreadsheets;

(2) narrative explanation and supporting computations showing how front office employee bonus figures are arrived at, including the relationship between the bonuses and the profit made by specific product areas (Schedule 36 Notice, items 4 and 5), in respect of both issues;

(3) breakdowns of VSA profits, turnover and expenses (Schedule 36 Notice, items 7 and 8) in respect of both issues;

(4) details relating to shares issued to staff in 2015 and 2017 for functions carried out in Switzerland (Schedule 36 Notice, item 18), in respect of the transfer pricing issue;

(5) details of how each hub recognises and prices activities of finance staff within VSA (Schedule 36 Notice, item 29), in respect of the transfer pricing issue;

(6) details of VSA capital used by or loaned to other trading hubs or for trades other than those booked by VSA (Schedule 36 Notice, item 32e), in respect of both issues;

(7) details of joint ventures under which management information services are provided to independent third parties (Schedule 36 Notice, items 38 and 39b), in respect of the transfer pricing issue;

(8) details of how other geographical business hubs recognise the provision and pricing of the management information system used by the Vitol Group (Schedule 36 Notice, item 42), in respect of the transfer pricing issue;

(9) details of the mechanism for rewarding various services provided to VSA from Rotterdam (Schedule 36 Notice, item 47), in respect of the transfer pricing issue.

30. Officer Brannan's evidence was that, following provision of the information, HMRC would need to produce its own fully evidenced and tested transfer pricing model.

31. Officer McFall's evidence was that the information was required to check the assumptions which underpinned the transfer pricing model proposed by the Applicants in April 2020 and modified by HMRC in July 2020. She considered that the model would be appropriate for transfer pricing purposes if the assumptions on which it was based were accurate and necessary adjustments made to other inputs.

32. From her evidence, references to "checking the assumptions" underlying the model in fact meant checking that the information provided was accurate, and she agreed that she had no reason to expect that the underlying data would not agree with the information provided by the Vitol Group.

33. If the assumptions could not be confirmed, her evidence was that the information requested would then allow HMRC to construct a further alternative transfer pricing model.

34. This evidence is, however, somewhat at odds with the correspondence. On 6 November 2020, HMRC sent a detailed letter to the Vitol Group, headed "HMRC's position on Vitol Transfer Pricing Model".

35. This letter states that it describes HMRC's "position on each of the inputs to the model". It states that HMRC have had to make a number of assumptions to fill in gaps in their functional analysis, but nevertheless clearly states that they were willing to discuss the proposal which they were presenting. In particular, in areas where HMRC state that they do not agree with the Vitol Group's position and ask for further details of that position, HMRC either set out a "pragmatic" option that they would accept as a reward attributable to relevant functions or state that they do not consider that the relevant function requires any reward and so should be excluded from allocation.

36. Both Officer Brannan and Officer McFall accepted in oral evidence that this position was compliant with HMRC's Litigation and Settlement Strategy ("LSS"). Officer McFall accepted that the amount of tax in dispute set out in her witness statement was derived from the model and was also compliant with the LSS.

37. In summary, the position set out by HMRC in November 2020 was one which HMRC believed was – had the Vitol Group agreed with it – a basis for concluding the matters under enquiry. In the hearing, Officer Brannan stated that he "would not disagree" that HMRC were in a position to close the enquiries in November 2020.

38. The decision in *BCM Cayman LP v Revenue and Customs Commissioners* [2017] UKFTT 226 (TC) ("*BCM Cayman*") set out a helpful summary of the legislation and case law relevant to closure notices. In particular (at §27), the decision in *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 ("Eclipse") was noted:

> "It is implicit in the powers given to the general or special commissioners to give a direction requiring the issue of a closure notice, and as part of that 'reasonable balance', that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation – what is required is that he should have conducted his enquiry to a point where it is reasonable for him to make an informed judgment as to the matter in question, so that, exercising such judgment, he can state his conclusions and make any related amendments to the taxpayer's return. The exercise of that judgment may require the officer to express his conclusions in broad terms…"

39. In *Eclipse*, the conclusion was that HMRC had reached a stage in their enquiries where they had sufficient information to make an informed judgement as to the relevant matters (in that case, the trading status of the applicant). The additional lines of enquiry would not be at all likely to inform that judgement further.

40. In considering the facts of this case, it is clear that HMRC had in fact made an informed decision in November 2020 when they put forward details of an LSS compliant model on which the enquiries would have been settled if the Applicants had agreed the position.

41. The figures put forward by HMRC in November 2020 in the model, and the model as a whole, were agreed by both HMRC witnesses to be LSS compliant and Officer McFall's witness statement clearly states that she had formed the view that the provisions between the parties differed to those that would have been agreed at arm's length and that a tax advantage had therefore been conferred on VSL and VBL in respect of UK taxation.

42. It should be noted that LSS §17 states that the terms on which HMRC will settle by agreement will also take into account which outcome secures the right tax most efficiently. The LSS at §18 also sets out that, where there is a range of possible figures, HMRC will not settle by agreement for an amount which is less than it would reasonably expect to obtain from litigation.

43. The reasons given for requesting each outstanding item of information were, essentially, that the information would enable HMRC to calculate more precise numbers than those which they were already prepared to accept in November 2020. There was no evidence put forward that the information requested would alter the overall conclusions which HMRC had reached as to the relevant matters under enquiry.

44. The November 2020 letter sets out HMRC's views with regard to transfer pricing, but it is clear from correspondence and the evidence of the witnesses that the model being discussed was intended to cover the profit attribution to the permanent establishment as well. As noted above, Officer Brannan agreed that HMRC were in a position at that date to close the enquiries.

45. In addition, Officer McFall's witness statement also makes it clear that HMRC has concluded that the profits declared by the UK permanent establishment of VSA were not calculated in accordance with the separate enterprise principle and were not terms that would have been agreed by parties dealing at arm's length, and that the attribution of equity and loan capital to the permanent establishment had not been taken into account. That is, she had reached an informed judgement on the matters under enquiry in respect of the permanent establishment.

46. I find that by November 2020, before they issued the information request, HMRC were in a position where they had made an informed decision as to the relevant matters under enquiry and had set out their conclusions and also set out the basis on which amendments could be made to the relevant returns.

47. I conclude, therefore, that the continuing queries for which HMRC requested additional material do not comprise reasonable grounds for not issuing the closure notices sought by the applicants.

***Provision of information***

48. Given the conclusion above, it is not strictly necessary to consider whether any of the specific information requests would amount to reasonable grounds for refusing to issue closure notices. However, as there was considerable discussion as to the provision of information, I have considered the submissions made by the parties with regard to HMRC's information requests below.

49. As set out in the background above, there is a considerable amount of history between HMRC and the Applicants with regard to discussions and the provision of information over the course of time. The enquiries in this case began in 2018 but arose in the context of an APA renewal application made in 2016, in connection with which substantial amounts of information had been provided and discussed before the enquiries were opened. The evidence indicates that there was an ongoing discussion between the Applicants and HMRC throughout the enquiry period which was apparently good-natured and co-operative although the parties were obviously unable to reach agreement on all of the matters in question.

50. The information request of 11 December 2020 needs to be considered in context: it was not issued by HMRC in frustration at a failure to provide information requested, as is often the case.

51. Instead, it was specifically requested by the Applicants on 16 November 2020 in order to try to bring about a resolution to the disagreement as to the appropriate return for services provided within the Vitol Group. The parties had agreed to suspend specific information

requests whilst discussions were taking place, although information was clearly still passing between them as part of the ongoing discussions.

52. The Applicants asked for a "consolidated list of all of the information HMRC would require in order to finalise [their] views such that [they] would be in a position to issue closure notices for all of the years under enquiry". In passing, I note that, although the Applicants argued that HMRC had known that some of the information requested did not exist, this request does not clearly request a list of outstanding information, but simply asks for a consolidated list of all information which HMRC consider they require. The requests for material which had been stated not to exist need to be considered in the very wide description given to HMRC.

53. As noted above, almost all of the information requested was agreed to have been provided and there were a very limited number of information requests which remained outstanding at the hearing. During the hearing, Officer McFall also accepted that a number of those items of information did not exist. As such, requests for those items of information could not form reasonable grounds for refusing to issue a closure notice.

54. The principal dispute between the parties regarding the information request centred on HMRC's request for "The profitability spreadsheet including pivot table that showed the profit or loss for each matrix for each of 2016, 2017 and 2018 along with the number of hedge groups for each matrix" (together, the "Spreadsheets").

55. HMRC had been given access to the Spreadsheets for 2016 and 2017 at a meeting at the Vitol Group's offices on 14 June 2019. The minutes of that meeting prepared by HMRC noted that the Spreadsheet did not provide results by trader or by group entity; one column which had been intended to enable a breakdown by trader did not give any information which could be reliably aggregated.

56. In her witness statement, Officer McFall stated that she considered that the Spreadsheets would provide evidence of the trading results of individual traders, and that the Spreadsheets would provide evidence where the economic activity that produced the profits was undertaken.

57. Officer McFall explained that, regardless of the meeting minutes from June 2019, she nevertheless believed that the management information systems could provide information by trader or group entity and that the Spreadsheet could be manipulated to show that data. She was unable to say why she believed that to be the case.

58. HMRC submitted that the Vitol Group had not provided the spreadsheets to HMRC. This statement was somewhat incomplete.

59. The Vitol Group's initial response to the request was that, for reasons of confidentiality, they did not want to allow copies of the information to leave their control. Accordingly, they stated that they would make a version of the spreadsheets available to HMRC at their premises in London and noted that such an arrangement had worked in the past. As noted above, HMRC had examined some of the relevant spreadsheets at the Vitol Group offices in June 2019.

60. This was refused by Officer Brannan in April 2021, citing concerns over COVID and stating that HMRC had concerns about being able to navigate, analyse and review the data in an unencumbered way without being time limited.

61. In subsequent correspondence, between two and three weeks before the hearing, the Vitol Group reiterated their concerns as to confidentiality and offered to allow HMRC to access the information either in person, at the Vitol Group offices or HMRC premises, or any other location of HMRC's choice for the purposes of checking the information which had been included in the transfer pricing model which had been under discussion. Alternatively, they offered HMRC remote access to the Spreadsheets via mechanisms which would enable HMRC

to work with fully functional spreadsheets. In a further alternative, the Vitol Group offered to provide a reasonable number of locked laptops to HMRC with the relevant files. These would allow HMRC to work with, but not extract and save to their own computers, the relevant data.

62. The Applicants also stated that, if HMRC concluded after this access to the data that they needed the data to be able to construct an alternative transfer pricing model, then they would allow HMRC to extract the data to their own systems.

63. HMRC contended that none of these options was sufficient and also submitted that HMRC did not generally agree to examine material in this way.

64. Officer McFall's evidence was further that "a static copy of the spreadsheets will temper HMRC's ability to sufficiently test the robustness of the assumptions because we would have to backward engineer the static copy into a working model which may introduce errors, and require further assumptions and estimates, especially in relation to inputs to the spreadsheet calculations that are drawn from other parts of the [management information systems]." Although this was set out in her witness statement, which was produced before the Applicants made the alternative offers set out above, her evidence in the hearing was that she still needed the copies of the Spreadsheets to be able to check information which she believed could be extracted from the management information systems.

65. I was referred to the decision in *Qualapharm Limited v Revenue & Customs Commissioners* [2016] UKFTT 100 (TC) ("*Qualapharm*") which concluded (in the context of an appeal against an information notice) that information should be sent to HMRC in a particular form. The decision in *Qualapharm* in this context focussed on a request in an information notice for specific data to be sent to HMRC in electronic form. The appellant had stated that it would only allow inspection of the information on their own computers and would allow some records to be printed out.

66. Para 7(1)(b) of Schedule 36, Finance Act 2008, states that a person is to provide information or documents "by such means and in such form (if any), as is reasonably specified or described in the notice". The information notice issued by HMRC requested that the information be provided either by email or via a shared workspace under HMRC's control.

67. In *Qualapharm*, Judge Mosedale dismissed the appeal on the basis that HMRC had the right to specify form in the information notice and had reasonably specified electronic form in the information notice. As such, she concluded that it was not open to the appellant to argue that the material should be provided in a different form. I note that *Qualapharm* is a First-tier Tribunal decision and is not binding on this Tribunal.

68. In my view, the key point in the legislation and in *Qualapharm* in this context is "reasonable". HMRC contended in the hearing that the information was required to check the transfer pricing model. Officer McFall stated that she expected that the checks would show that the data was correct.

69. There was no clear evidence as to why direct access within HMRC's systems was required for these checks. Indeed, Officer McFall's evidence as to the problems and concerns involved in a static spreadsheet appear, in my view, to support the need to work with the Spreadsheets on the Applicants' systems: any copy sent to HMRC to load onto their systems would appear to be necessarily static in that it would be disconnected from the underlying management information systems referred such that the referenced "inputs from other parts" of the management information systems would not be available for testing.

70. HMRC also contended that they required the data on their own systems in order to be able to use their own information to construct alternative transfer pricing models, if these should be required.

71. As made clear in the decision in *BCM Cayman* referred to above, and the preceding case law which it summarised, it is not reasonable for enquiries to be kept open for HMRC to refine details of their conclusions in this manner. Such transfer pricing models would clearly not be required to reach an informed judgement on the matter under enquiry, which was whether the transfer pricing and profit allocation arrangements applied by the Applicants for the years in question were appropriate. HMRC had reached that judgement already. Given the inherent nature of transfer pricing such refinement of numbers could continue indefinitely without ever reaching a conclusion. For this reason, the OECD notes that what should be sought in transfer pricing is a "reasonable estimate" rather than expecting transfer pricing to be an exact science (see, for example, §1.13 of the OECD Transfer Pricing Guidelines (2010)).

72. It should be also borne in mind that a closure notice does not commit HMRC to the conclusions in that notice, given the decision in *Tower MCashback LLP 1 and another v Revenue & Customs Commissioners* [2011] UKSC 19. To the extent that HMRC might later decide that they wanted to put forward an alternative model in the context of an appeal, they would not be precluded from doing so by the details of the closure notice.

73. It was not suggested that HMRC would be constrained by the contents of a closure notice in the context of any discussions with the Swiss tax authorities if an application were to be made by the Vitol Group to engage the mutual agreement procedure in the UK-Switzerland double tax agreement in respect of transfer pricing arrangements.

74. I find that HMRC's contentions that the information was not made available to them are not established as regards the Spreadsheets. The contentions put forward by HMRC as to why it was reasonable for the information to be provided to them only by email, or by way of upload onto their own systems are not, in my view, supported by the evidence of HMRC's witnesses. The Applicants had provided mechanisms by which HMRC could check the data as required and which would allow for those checks to take into account the underlying data drawn upon by the Spreadsheets which HMRC considered important. I do not consider that HMRC needed to be able to construct alternative transfer pricing models to be able to issue closure notices in respect of the enquiries.

75. Regarding HMRC's contention that, in effect, HMRC would never agree to view material rather than take copies, I note that the decision in *BCM Cayman* states that HMRC had been given access to view commercially sensitive information but had not been given copies (§14(2)). I also note that HMRC in 2019 had viewed some of the Spreadsheets at the Applicants' offices rather than requiring direct provision of those Spreadsheets.

76. Accordingly, I consider that the Spreadsheets information was made available to HMRC. As such, HMRC's contentions regarding the Spreadsheets would not have been reasonable grounds for refusing to issue a closure notice within a specified time period.

77. With regard to the other items which were agreed to exist, I would comment as follows:

(1) Item 3 – details of where in the Spreadsheets certain data could be found; as above, I consider that this information had been made available to HMRC and so would not have been reasonable grounds for refusing to issue a closure notice within a specified time period.

(2) Item 7 – HMRC had been advised that the information was in the Spreadsheets (in the Applicants' response to the information notice) and did not provide any evidence to the contrary; as above, I consider that this information had been made available to HMRC and so would not have been reasonable grounds for refusing to issue a closure notice within a specified time period.

(3) Item 18 – HMRC had requested details of specific rewards by individual for certain non-UK individuals. The Applicants argued that the provision of this information would be in breach of GDPR even if detailed by function rather than by individual as there were limited individuals involved and identification by function would effectively identify individuals. In the hearing, it was stated that this information was required for transfer pricing purposes to cross-check against the UK equivalent information to ensure that the attribution was made on the same basis in both the UK and Switzerland. However, it was also accepted that the UK attribution had been established on the basis of aggregate information, and that the equivalent aggregate information had been provided for Switzerland. As such, I consider that this information had been made available to HMRC and so would not have been reasonable grounds for refusing to issue a closure notice within a specified time period.

(4) Items 38 and 39 – HMRC had requested information about certain joint ventures entered into whereby the joint venture counterparty was provided with information from a particular part of the Vitol Group information systems. HMRC argued that they wanted to see the information to establish whether it might provide grounds for establishing a comparable for transfer pricing the provision of services between group entities. The Applicants argued that the details were not reasonably required by HMRC as they could not form the basis of a transfer pricing comparable, as the counterparties were only given access to specific information and that none of the counterparties had access to the entirety of the information systems used within the group. However, I note that HMRC had concluded, in a report attached to an email of 21 August 2020, that there was no realistic prospect of using the joint venture information as a mechanism for valuing the information systems. Officer Brannan agreed in the hearing that HMRC considered that there was no significant contribution made to the Vitol Group's profits by the information systems. As no reason was given for the apparent change of direction, it seems that the request was more in the nature of speculation rather than because there was any clear reason to believe that the information would be relevant. I do not consider that the information was reasonably required for the purposes of the enquiry and so consider that failure to provide the information would not have been reasonable grounds for refusing to issue a closure notice within a specified time period.

78. Accordingly, for the reasons set out above, I do not consider that HMRC had reasonable grounds in relation to the information request for refusing to issue a closure notice within a specified time period. It is unnecessary in context to consider what might have been an appropriate time period, although I note HMRC had accepted that they would have been able to undertake the analysis within four weeks and then obtain internal sign-off within seven weeks. This timeline was not disputed by the applicants.

**Ground 2: DPT review has not ended**

79. HMRC argued in the alternative that they had reasonable grounds for refusing to issue closure notices because issue of such notices would pre-empt the end of the diverted profits tax ("DPT") review periods for two of the applicants, VBL and VSL.

80. DPT was introduced in Finance Act 2015 and summarised in *R (Glencore Energy UK Ltd) v Revenue & Customs* [2017] EWCA Civ 1716 ("*Glencore JR*") as (§8):

> … a tax introduced to counter the use of aggressive tax planning deployed by multinational corporate groups to divert profits which would otherwise have been subject to corporation tax in the UK away from the UK to low tax jurisdictions, thereby eroding the UK tax base. The tax becomes chargeable in relation to "taxable diverted profits" arising to a company in a relevant accounting period … under certain conditions, in an amount calculated by

> comparing the UK tax payable in relation to the arrangements which result in the diversion of profits with the notional tax payable in the UK if they had not been diverted.

81. The issue in this case arises because s85 Finance Act 2015 provides that taxable diverted profits are to be calculated (in this context) as the sum of a notional additional amount, less the amount in respect of which the company is chargeable to corporation tax by reason of a transfer pricing adjustment which is taken into account in an assessment to corporation tax which is included in the company's tax return before the end of the DPT review period.

82. Such a transfer pricing adjustment will arise where the company amends its tax return within the relevant time limits (including the extended time limits applicable during a DPT review period) or where HMRC issue a closure notice in respect of transfer pricing.

83. The calculation of the notional additional amount and other details of DPT are not relevant to this particular issue, other than to say that the Applicants do not agree with HMRC's view as to the application of DPT to their circumstances.

84. A DPT review period is the period of fifteen months following the issue of a DPT charging notice by HMRC. During this period, an officer of HMRC must carry out at least one review of the amount of DPT charged by the charging notice on the company for the accounting period.

85. During the review period, the officer may reduce or increase the amount of taxable diverted profits to which the notice relates (or may make no changes to it).

86. A company may appeal the charging notice (including any increased amount) within thirty days of the end of the review period, provided that the amount set out in the charging notice has been paid. A company may also dispute the DPT charge with HMRC during the review period provided that they first pay the amount set out in the charging notice.

***HMRC's submissions***

*Whether HMRC obliged to tax disputed amounts under corporation tax rather than DPT*

87. HMRC contended that there is nothing in the legislation which requires HMRC to tax disputed amounts under corporation tax rather than DPT. Instead, it was contended that the legislation requires HMRC to bring relevant amounts into tax under DPT, as HMRC are required to give a preliminary notice to a company where an officer has reason to believe that the statutory conditions are met and that taxable diverted profits have arisen to the company. HMRC are also required to determine whether to issue a DPT charging notice after considering the representations of the company.

88. HMRC further argued that the power to bring profits into tax under corporation tax rests with the company, which is given a statutory right to amend its return during the first twelve months of the review period in order to bring the relevant amounts into corporation tax.

89. The overlap relief in s100A Finance Act 2015 which gives corporation tax relief for amounts which are subject to both corporation tax and DPT is stated to arise where "the company failed" to amend its return. HMRC noted that the legislation does not provide that amounts which are subject to corporation tax will not be subject to DPT and, accordingly, that Parliament cannot be considered to have had a preference for diverted profits to be taxed under corporation tax.

90. HMRC also noted that s100A Finance Act 2015 does not provide that an amount which is subject to tax will not be chargeable to DPT. The section simply provides for relief from corporation tax. As such, it could not be suggested that Parliament intended that diverted profits should be subject to corporation tax instead.

*Purpose of Para 33*

91. HMRC submitted that the proper purpose of Para 33 is to close a corporation tax return and that the powers of the Tribunal to close a corporation tax enquiry should not extend to closing such an enquiry before the end of the DPT review period for the following reasons:

(1) The DPT legal framework represents a new legal state of affairs which did not exist when Schedule 36 Finance Act 1998 was enacted. Parliament cannot have contemplated that the powers could be used to closure a corporation tax enquiry before the end of a parallel DPT process;

(2) The use of the powers by the Tribunal would represent a fundamental departure from the function of striking a balance between the obligations of companies and the powers of HMRC regarding corporation tax referred to by Park J in *Revenue & Customs v Vodafone 2* [2005] EWHC 3040 (Ch) (*Vodafone 2*). It would move well beyond the Tribunal deciding whether HMRC has had enough time and information and should state its conclusions with regard to corporation tax. HMRC contended that the Tribunal would be deciding whether a set of profits should be subject to corporation tax or DPT;

(3) It is a well-established principle that clear words are required before Parliament can be taken to have delegated its power of taxation on the executive; the same must go for the judiciary. It is submitted that clear words would be needed before a statute could be read as having the effect that the task of deciding whether an entity should be subject to one tax or another falls on the judiciary;

(4) Construing the Tribunal's powers in this way would create intractable problems. It would be possible for the Tribunal to balance an alleged entitlement of the company to pay the lower rate of tax with the needs of HMRC to have adequate information and time to arrive a reasonable set of conclusions on corporation tax. A complex transfer pricing case could easily extend beyond the DPT review period.

92. HMRC also contended that it was clear from the correspondence between the parties and in the application grounds that the Applicants have requested closure notices in order to be able to ensure that they are exposed only to corporation tax and not to DPT. HMRC submitted that the clear purpose of Para 33 is, as set out in *Vodafone 2*, to provide taxpayers with a protection for taxpayers in respect of HMRC's powers to enquire into returns.

93. Following *R v Southwark Crown Court ex parte Bowles* [1998] AC 641 it was submitted that it would be outwith the jurisdiction of the Tribunal to make a decision which is made for some purpose other than the dominant purpose of the legislation.

94. Further, the purpose of the DPT legislation in Finance Act 2015 is, as set out in *Glencore JR*, to counter the use of aggressive tax planning deployed by multinational corporate groups. The first instance decision with regard to *Glencore JR, Glencore Energy UK Ltd v Revenue & Customs Commissioners* [2017] STC 1824 (*"Glencore Admin")* referred to DPT as covering the 'misapplication' of transfer pricing rules.

95. The legislation incentivised companies to amend their own tax returns to remove profits relating to such planning from the scope of DPT. It was contended that, if HMRC were to be compelled to bring diverted profits into account under corporation tax through a transfer pricing adjustment, there would be a diminished incentive for companies to avoid such aggressive tax planning.

*Anomalies*

96. The use of closure notices during a DPT review period would also give rise to anomalies:

(1) There would be a difference in treatment between aggressive tax planning capable of being addressed through a transfer pricing adjustment and aggressive tax planning which cannot be addressed through transfer pricing adjustments.

(2) It is not always the case that a corporation tax enquiry is opened where there is a DPT review period, given that the time limits for opening enquiries and the time limit for issuing a preliminary notice for DPT do not necessarily coincide. Where there is no corporation tax enquiry, the taxpayer cannot apply for a closure notice and so would be disadvantaged in comparison with a taxpayer who is subject to an enquiry.

***Applicants' submissions***

97. The Applicants contended that the corporation tax enquiries and the DPT notices all concerned the same transfer pricing issue and nothing else. Although it was possible for DPT to be imposed in circumstances which went beyond transfer pricing or had nothing to do with transfer pricing, there were no such other circumstances in this case. HMRC did not dispute this contention.

98. As such, the Applicants contended that the distinction in this case is, if HMRC are correct on the transfer price issue – which is of course disputed by the Applicants – that if closure notices are issued, they will be liable to corporation tax on the disputed amount at either 20% (for 2016) or 19% (for 2017 onwards). If closure notices are not issued, DPT on the disputed amount will be charged at 25%.

99. The Applicants state that they do not agree with HMRC on the transfer price issue and will either appeal the closure notices to the Tribunal or engage the mutual agreement procedure in the UK-Switzerland double taxataion treaty. They contended that they cannot do either until the corporation tax enquiries are closed. HMRC did not dispute this contention.

100. If closure notices are not issued before the end of the relevant DPT periods, the Applicants note that they will be required to appeal a charge to DPT rather than a charge to corporation tax.

*Effect on appeal rights*

101. The Applicants contended that HMRC's insistence that the company tax returns should be amended only by the Applicants has the effect of removing the Applicants' ability to appeal amendments to those returns during the review period.

102. Access to rights of appeal are fundamental constitutional rights (*R (UNISON) v Lord Chancellor* [2020] AC 869 ("*Unison*") at §65). As a matter of construction, provisions in an Act must be construed proportionately so as to preserve rights of appeal (and to minimise the effect of any statutory deterrence to rights of appeal) (*R (Haworth) v HMRC* [2021] UKSC 25 ("*Haworth*") at §61, citing *Unison*).

103. The Applicants submitted that to keep a corporation tax enquiry open, so as to deny appeal rights and to expose a taxpayer to a higher charge for a different tax, was abusive and contrary to both the purpose of Para 33 and rights of appeal. Nothing in FA 2015, Part 3 indicates that Para 33 was to be changed in any way or have a different operation consequent upon the introduction of DPT such that the existence of DPT does not affect whether a corporation tax enquiry should be closed.

*Higher charge*

104. The Applicants submitted that HMRC's approach, permitting HMRC to choose to refuse to close a corporation tax enquiry where they have sufficient information to do so, provides HMRC with a discretion as to when to impose a tax and when not to, depending on matters such as the rate of tax to which a taxpayer is exposed.

105. The decision of *Vestey v IRC* [1980] STC 10 was authority for the submission that tax legislation should not be construed so as to give HMRC a discretion as to when to impose and when not to impose a particular tax by, in this case, manipulating when a corporation tax enquiry is closed.

***Discussion***

***2018 enquiries and the VAUL enquiries***

106. I will begin with the closure notices in respect of these enquiries because HMRC submitted that the DPT review period should form reasonable grounds in respect of the corporation tax enquiries for VBL and VSL's 2018 accounting period on the basis that these raised the same underlying tax issues as the earlier periods.

107. No clear explanation was given with regard to why no closure notice should be issued for enquiries in relation to VAUL other than potentially extrapolating from Officer McFall's explanation with regard to VSA PE that, as there was a global transfer pricing approach, she thought all the closure notices should be given at the same time.

108. HMRC's submissions in respect of the Tribunal's jurisdiction with regard to the DPT grounds in general terms can be summarised as arguing that the existence of a DPT review period means that, for various reasons, there are reasonable grounds for refusing to issue a closure notice.

109. No DPT review period exists in respect of VBL and VSL's 2018 accounting period, and no DPT review period exists with regard to VAUL at all.

110. As already noted above, HMRC are not bound by the conclusions set out in a closure notice for a particular period. Such conclusions cannot therefore be binding in respect of other periods either such that closure notices issued for the 2018 accounting periods need not be definitive for earlier periods for which DPT reviews are ongoing.

111. I therefore cannot agree with HMRC's contentions on this point: a non-existent review period cannot possibly provide reasonable grounds for refusing to issue a closure notice in respect of an accounting period. This is not a decision as to which tax might apply: there is nothing in place at this time in this case which could (if HMRC are correct as to the transfer pricing issues) lead to a DPT charge in respect of the 2018 periods and the enquiries in respect of VAUL instead of a corporation tax charge.

112. Given my conclusions set out above that HMRC's continuing enquiries do not provide reasonable grounds for refusing to issue a closure notice, I therefore direct that HMRC issue closure notices within 30 days of the date of this decision in respect of the enquiries into the 2018 period in respect of each applicant and also with respect to the enquiries into VAUL.

***DPT review periods***

113. It is well established that this Tribunal has no general supervisory jurisdiction with regard to HMRC. As such, it is not open to this Tribunal to consider whether HMRC's policy of not closing enquiries where there is an ongoing DPT review period is reasonable in general terms.

114. The following discussion relates only to the question of whether *in relation to these particular applications* the existence of an ongoing DPT review period provides HMRC with reasonable grounds not to issue a closure notice in respect of the corporation tax enquiry within a specified period of time.

115. This presented some difficulty, as many of HMRC's submissions focussed in general terms on the contention that this Tribunal should not disturb HMRC's policy that it "will not generally issue a full closure notice (or partial closure notice in relation to the arrangement) … during [the part of a review period in which a company can make amendments to its company

tax return]". The submissions contained very little as to why it was reasonable *in this particular case* that a closure notice should not be issued during this period.

116. One such general contention was that issuing a closure notice before the end of a DPT review period could cause difficulties in balancing a taxpayer's alleged entitlement to pay a lower amount of tax with the need for HMRC to have adequate information and time to reach conclusions on corporation tax. It was noted that, in complex transfer pricing enquiries, these could extend beyond a DPT review period.

117. Given my conclusions above, this obviously does not apply in respect of the Applicants in this case.

***Issuing a closure notice would mean that the Tribunal was deciding which tax should apply***

118. HMRC submitted that if the Tribunal were to direct that HMRC should issue a closure notice the Tribunal would be deciding whether a set of profits should be subject to corporation tax or DPT, and HMRC contended that such a decision was outside the scope of the jurisdiction of the Tribunal.

119. Firstly, HMRC contended that it was clear from the correspondence between the parties and in the application grounds that the Applicants have requested closure notices in order to be able to ensure that they are exposed only to corporation tax and not to DPT. HMRC submitted that this was not the dominant purpose of the legislation, which was to provide taxpayers which a protection for taxpayers in respect of HMRC's powers to enquire into returns. As such, it was not within the Tribunal's jurisdiction to issue closure notices on that basis.

120. In my view, this submission misconstrues the legislation as above: the question is not whether the Applicants have put forward reasonable or appropriate grounds to request a closure notice. The legislation enables a taxpayer to request a closure notice and requires that the Tribunal issue such notice unless HMRC show that there are reasonable grounds for refusing the request. The question for this Tribunal is whether HMRC have demonstrated that there are reasonable grounds for refusing the application to issue a closure notice, not to consider whether the taxpayer has provided reasonable or appropriate grounds for requesting a closure notice.

121. Turning, then, to the broader contention as to whether the decision of the Tribunal would be effectively making a decision as to whether DPT could be applied to the relevant profits as the effect of the closure notice would be to ensure that DPT would not apply to those profits, I consider it is necessary to first consider the intended effect of the DPT legislation in context.

122. In submissions, HMRC quoted (under the rule in *Pepper v* Hart [1993] AC 593) the Economic Secretary to the Treasury, Mel Stride MP, at a select committee debate on 29 November 2018, in respect of the clause introducing what became s101A of Finance Act 2015:

> When DPT is charged, companies are required to pay up front before they can lodge a dispute with HMRC during the DPT review period. DPT incentivises companies to agree adjustments to their CT return during the DPT review period and thus pay the correct amount of corporation tax on their diverted profits, thereby removing such profits from the DPT charged.

123. Whilst HMRC chose to highlight the reference to incentivizing companies, I consider that it is equally important that it is clear that what is sought by the DPT legislation is that companies "thus pay the correct amount of corporation tax" on the profits in dispute. The outcome sought, satisfying the purpose of the DPT legislation, is that the company is subject to the "correct amount of corporation tax" on the disputed profits. Profits are removed from the DPT charge where the correct amount of corporation tax is paid on those profits.

124. It was submitted that the incentive created by the DPT legislation would be diminished if the relevant tax arrangements could be addressed through a transfer pricing adjustment: however, that is clearly what is envisaged by the Exchequer Secretary's statement above and so I do not consider that this submission is made out.

125. In this case, as set out above, I have concluded that HMRC has established what it considers to be the correct amount of corporation tax to be paid on the profits in dispute. It follows that the purpose of the DPT legislation would be satisfied if the closure notice is issued in this case as the effect of issuing the closure notice would be to give the intended effect to provisions of the DPT legislation.

126. The decision would not be establishing a corporation tax liability that is contrary to the purpose of that legislation, nor making an ultra vires decision that corporation tax should apply over DPT in respect of the disputed profits. As such, I consider that the contention that a decision to issue a closure notice would be outwith the jurisdiction of the Tribunal in this case is not made out.

127. The question, therefore, is whether any of HMRC's contentions that a closure notice should not be issued because there is a continuing DPT review period constitute reasonable grounds for not closing the enquiry.

***The purpose of the DPT legislation means that it is reasonable that a closure notice should not be issued***

128. HMRC submitted that the decision *Glencore Admin* stated that DPT could be applied where transfer pricing did not give an appropriate answer, and that therefore the 'counteracting' effects of the DPT legislation must have been intended to extend beyond HMRC simply making transfer pricing adjustments as it had been able to do before the DPT legislation was introduced.

129. I would point out at the outset that the statement of the Economic Secretary to the Treasury set out above does not support this, as it is clear from that statement that corporation tax on diverted profits (including, thereby, the application of the existing transfer pricing rules) is considered to provide an appropriate – indeed, the desired – outcome.

130. It was submitted that the decision in *Glencore Admin* at §9 referred to DPT as covering the 'misapplication' of transfer pricing rules.

131. The reference to 'misapplication' of transfer pricing rules in §9 of the *Glencore JR* decision is within a quote from the OECD Action Plan published on 19 July 2013. The quote from the summary of Action 7 of the OECD plan, which does not address or refer to DPT, states that

> "multinationals have been able to use and/or misapply the transfer pricing rules to separate income from the economic activities that produce that income and to shift it to low-tax environments, such as regimes that have been available in Switzerland. This most often results from transfers of intangibles and other mobile assets for less than full value, the over-capitalisation of lowly taxed group companies and from contractual allocations of risk to low-tax environments in transactions that would be unlikely to occur between unrelated parties".

132. The decision in *Glencore Admin* does not discuss this to any particular extent, although the court does note in the same §9 that "The principal aim [of DPT] is to ensure that profits taxed in the UK fully reflect the economic activity here, consistent with the aims of the G20 / OECD Base Erosion and Profit Shifting Project".

133. I note that the circumstances of this case are that the issues, and amount, in both the corporation tax enquiries and the DPT notices are the same: HMRC did not dispute the Applicants' contentions regarding this.

134. There has been no submission that, in *this* case, there has been a misapplication of transfer pricing principles such that transfer pricing rules cannot give an appropriate answer and do not fully reflect the economic activity here.

135. HMRC stated that the "taxable diverted profits arising to VBL and VSL are calculated by HMRC by reference to the provision it is reasonable and just to assume would have been made between VBL/VSL and VSA had tax not been a relevant consideration for any party". That is, by reference to standard transfer pricing principles.

136. In so far as it is possible to tell from the summary in the DPT charging notices, the calculation was based on the transfer pricing model proposed by HMRC in November 2020. That model establishes what would be an appropriate reward for the functions undertaken in the various locations and establishes an appropriate reward in respect of utilisation of capital. There was no contention otherwise made by HMRC.

137. None of the submissions made in respect of the DPT review periods provided any indication that the amount assessed for DPT purposes would be different from the amount assessed for corporation tax purposes.

138. Officer McFall's evidence was that the model being used to calculate DPT in respect of the Applicants applied transfer pricing principles, on the basis of functions carried out. No evidence was provided to suggest that this model was materially different to that being used by HMRC in respect of the transfer pricing enquiries (indeed, it was described as "very similar"). In Officer McFall's analysis of why the information requested was required, which gave reasons relating to the corporation tax enquiry, the APA application and the DPT review, none of the information requested was required for the DPT review alone. Where information was noted as being required for DPT purposes it was also noted to be required for the corporation tax enquiry and the reason given for the request was the same for both purposes.

139. HMRC submitted that the DPT legislation was intended as a deterrent to companies and that, if the DPT charge could be avoided by forcing HMRC to make a transfer pricing adjustment via a closure notice, it would significantly reduce the effectiveness of Finance Act 2015 to counteract aggressive tax planning capable of being addressed through transfer pricing. However, I note that a closure notice could only directed under Para 33 where, as in this case, HMRC have already reached an informed judgement on the transfer pricing issues. As set out above, the statement of the Economic Secretary to the Treasury makes it clear that adjustments which result in the correct amount of corporation tax are in fact a clear purpose of the legislation.

140. In this case, HMRC have made no submissions that the Applicants' APA application – which was the impetus for the enquiries and eventually the DPT notices – amounted to aggressive tax planning that was not capable of being addressed through transfer pricing. They provided no explanation as to why the relevant profits should be subject to DPT rather than transfer pricing. In the words of *Glencore Admin*, they have not shown why the profits taxed under the model which they proposed in November 2020 would not fully reflect the economic activity in the UK.

141. As such, I consider that HMRC have not established that in this case the underlying purpose of the DPT legislation provides reasonable grounds for not issuing a closure notice in respect of the corporation tax enquiries into the Applicants' tax affairs.

142. HMRC contended that there would be an anomaly created if a closure notice was issued because there would be a difference in treatment between aggressive tax planning capable of being addressed through a transfer pricing adjustment and aggressive tax planning which cannot be addressed through transfer pricing adjustments. This contention was made in general terms, rather than in connection with any specific aspect of the Applicants' position.

143. To the extent that the contention is that an anomaly would arise if closure notices are able to be issued where there is an ongoing DPT enquiry, it appears any such anomaly would be clearly inherent in the legislation in any case given that a taxpayer who is not subject to an enquiry can remove a DPT charge by amending their tax return to bring amounts into charge under corporation tax. There was no explanation why an amount established by HMRC as liable to corporation tax via a closure notice should be anomalous where an amount brought into corporation tax via a taxpayer amendment would not be.

***Whether it is reasonable not to issue a closure notice to ensure that the Applicants are not advantaged in comparison with taxpayers who are subject to DPT but are not subject to an enquiry***

144. HMRC submitted that it would not be appropriate to issue a closure notice during the review period as this would put the Applicants in a better position than companies which are not subject to an enquiry during the review period.

145. Taxpayers who are subject to a DPT charge but who are not also subject to an enquiry and wish to ensure that they are subject to corporation tax on the disputed profits must amend their return and cannot appeal such an amendment.

146. This argument is, I consider, effectively that taxpayers who are subject to a corporation tax enquiry should not be able to exercise appeal rights in respect of that enquiry until the DPT review has closed, because those who are not subject to an enquiry cannot exercise appeal rights until the DPT review period has closed.

147. The question here, then, is whether HMRC's contention that the DPT review period provides reasonable grounds for refusing to give a closure notice because of the disparity that would otherwise arise between taxpayers who are the subject of an enquiry and those who are not.

148. The decisions of the Supreme Court in *Unison* and *Haworth* makes it clear that rights of access to the courts can only be curtailed by clear and express statutory enactment (see, for example, §79 of *Unison*).

149. A discretion given to a government entity is not unlimited and would not "permit [that entity] to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts" (*Unison* §84, quoting Laws J in *R v Lord Chancellor, Ex p Witham* [1998] QB 575). The case quoted was referring to a discretion granted to the Lord Chancellor, but it is clear that the matter is relevant to government discretion generally.

150. As noted, HMRC's contention in this context is effectively that it is not appropriate for the Applicants to be able to exercise appeal rights in respect of amendments to their tax return where other hypothetical taxpayers may not have such appeal rights.

151. I consider that this contention amounts to an interference with access to the courts. HMRC's position effectively makes the interference unsurmountable. Following *Unison*, such curtailment of rights of access to the court requires clear and express statutory enactment.

152. There is no such clear and express statutory enactment (nor was it suggested that there was). I consider that it would been straightforward, in making amendments to statute, for

Parliament to have included a provision that clearly stated that a corporation tax enquiry could not be closed during the DPT review period in order to ensure that no appeal could be brought during the review period. No such provision was enacted.

153. In the absence of such a provision, I find that the fact that the issue of closure notices would enable the Applicants to appeal amendments made to their tax returns while another hypothetical taxpayer would not have any appeal rights because there was no enquiry into their return does not amount to reasonable grounds for refusing to issue a closure notice.

154. The following was not specifically argued by the parties but I consider that it merits note as it appears that, contrary to HMRC's contentions, a taxpayer who is subject to a DPT review and a corporation tax enquiry may arguably be disadvantaged in comparison to a taxpayer who is only subject to a DPT review.

155. A taxpayer subject to a DPT review may, under s101A Finance Act 2015, amend their tax return in order to remove disputed profits from DPT and ensure that they are subject to corporation tax. This is at the sole discretion of the taxpayer and takes effect without HMRC being required to approve the amendment (albeit that the amendment should be as to the amount in dispute with HMRC).

156. However, para 31 Schedule 18 states that where a taxpayer is subject to an enquiry, an amendment made by the taxpayer to their return in respect of the tax in dispute will not take effect until HMRC issue a closure notice. There is nothing in either Schedule 18 or the DPT legislation which suggests that the provisions of s101A Finance Act 2015 would override para 31 Schedule 18.

157. Accordingly, where a taxpayer is subject to an enquiry and a DPT review in respect of the same disputed profits, it appears an amendment by the taxpayer in order to remove those disputed profits from DPT will not be effective unless HMRC also agree to issue a closure notice before the end of the DPT review period. If HMRC refuse without reasonable grounds, the taxpayer will be required to incur the costs of making an application to this Tribunal in order to be put in the same position as a taxpayer who is not subject to an enquiry. In such a hypothetical scenario, the taxpayer subject to an enquiry would appear to be disadvantaged.

***HMRC is expressly obliged to bring taxable profits into charge under DPT***

158. HMRC contended that the statute required HMRC to bring profits into charge under DPT. This was, again, a general contention rather than in connection with any specific feature of the Applicants' tax position.

159. The statutory references raised by HMRC require that HMRC give a preliminary notice, and that they determine whether to issue a DPT charging notice. Nothing in the statute requires that HMRC must then charge the relevant profits to DPT and cannot or should not charge some or all of those profits to corporation tax; indeed, the statement of the Economic Secretary to the Treasury quoted in submissions by HMRC clearly states the opposite.

160. HMRC's argument that statute does not indicate that Parliament had a preference for corporation tax in the context of diverted profits is somewhat undermined by the point that the statute in fact does provide that a company may amend its corporation tax return to bring amounts into tax under corporation tax rather than DPT, and that the Economic Secretary to the Treasury retary has made it clear that corporation tax is the preferred solution.

161. If Parliament had intended that such profits should preferentially be taxed under DPT rather than corporation tax, I consider that it would not have provided companies with the ability to amend their return within the review period outside the normal window given for amendment of a return. Potentially, Parliament could even have excluded companies from

making DPT-related amendments even during the normal amendment window if it intended for such profits to be subject to DPT. It did not do so.

162. Accordingly, I do not consider that HMRC have established that they are required to bring taxable profits into charge under DPT such that they have reasonable grounds for refusing to issue a closure notice.

**Conclusion**

163. For the reasons set out above, I direct that HMRC issue closure notices within 30 days of the date of this decision in respect of each of the enquiries to which this application relates.

**Right to apply for permission to appeal**

164. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal 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. 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.

**ANNE FAIRPO**
**TRIBUNAL JUDGE**

**RELEASE DATE: 27 SEPTEMBER 2021**