[2016] UKUT 0525 (TCC)

Appeal number: UT/2015/0183

INCOME TAX — partnership return — closure notice under s 28B TMA 1970 — strike out application on basis that HMRC had conceded the only conclusion stated in the notice — whether FTT correctly identified the conclusion — appeal against refusal to strike out dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

B & K LAVERY PROPERTY TRADING PARTNERSHIP **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp
Judge Sarah Falk

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 2 November 2016

Oliver Conolly and Ben Elliott, Counsel, instructed by ASM (M) Ltd (Chartered Accountants) for the Appellant

Richard Vallat, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The underlying dispute the subject of this case relates to a claim to a loss of £7,224,131 in the appellant's 2009-10 return. The loss was attributable to a "net realisable value adjustment" of £7,896,416 (referred to below as the "revaluation adjustment") in respect of two properties owned by the appellant. Following an enquiry into the return HMRC issued a closure notice dated 2 May 2013. The closure notice amended the loss to a profit of £672,285, reflecting the disallowance of the revaluation adjustment. The appellant appealed to the First-tier Tribunal (Tax Chamber) ("FTT").

2. In a decision released on 28 September 2015 with neutral citation [2015] UKFTT 0470 (TC) the FTT refused the appellant's application to strike out HMRC's case on the basis that the FTT did not have jurisdiction, and also allowed HMRC's application to amend its statement of case. This is an appeal against that decision (the "FTT decision").

Background

3. The appellant is a partnership of two brothers. It purchased two properties in September 2007 and July 2008. The appellant maintains that they were bought with the intention of developing them, that the purchases occurred during a property boom and that the properties' values then dropped considerably, leading to the revaluation adjustment the subject of the dispute. The revaluation adjustment was made in the partnership accounts in accordance with (on the appellant's case) Statement of Standard Accounting Practice 9 ("SSAP 9"). It was reflected in an amended partnership return for 2009-10 as "cost of sales", and also in claims by the partners to set their shares of the loss against general income under s 64 Income Tax Act 2007. SSAP 9 requires "stock", defined as including "goods and other assets purchased for resale", to be stated at the lower of cost and net realisable value.

4. In order for the revaluation adjustment to be taken into account for tax purposes both parties accepted that the partnership must have been engaged in a trade at the relevant time, and also that the properties in question must have been held as trading stock (and therefore on revenue account rather than as capital assets). During the enquiry, and up until HMRC's skeleton argument was served shortly before the hearing date, HMRC's focus was on whether the partnership had commenced a trade (the "Commencement Issue"), rather than on the question of whether the properties were held as trading stock (the "Stock Issue"). In its skeleton argument it instead switched to focusing on the Stock Issue, arguing that the properties were investment assets and stating:

> "If the properties were correctly categorised as trading stock, which is not accepted, [HMRC] do not intend to argue that the trading venture had not commenced."

5. This led to the appellant's strike out application. The basis for the application was that the closure notice was confined to the Commencement Issue, and that HMRC had now abandoned that argument. In those circumstances the appellant argued that the FTT had no jurisdiction and that HMRC's case should be struck out with the result that the

appellant succeeded. HMRC resisted the appellant's application and made its own application to amend its statement of case to set out its position on the Stock Issue.

6. No separate arguments were raised before us in relation to the FTT's case management decision allowing HMRC's application to amend its statement of case. The FTT decision records at [51] that the appellant would not object to HMRC's application if its strike-out application did not succeed.

The relevant statutory provisions

7. The enquiry into the appellant's 2009-10 return was opened under s 12AC(1) Taxes Management Act 1970 ("TMA"). The closure notice was issued under s 28B TMA which provides (so far as relevant):

> "(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued."

8. Section 31(1) TMA provides:

> "An appeal may be brought against—
>
> …
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)…"

9. The appellant's strike out application relied on rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT rules"), which provides that the FTT must strike out the whole or a part of proceedings if it does not have jurisdiction in relation to them.

The closure notice

10. The key question in this appeal is the correct construction of the closure notice issued on 2 May 2013. The substantive part of the closure notice, which was issued in the same terms to each partner, read as follows:

> "**My conclusion**

> [1] I don't believe the partnership ever commenced trading for the reasons already put to your agent and that any expense incurred so far would have to be treated as pre-trading expenditure. [2] I further believe that all income and expenditure contained in the return relates to property investment income. [3] I have therefore amended the return, removing the adjustment for the revaluation of both sites, retained the rental income and allowed the expenditure incurred on a without prejudice basis.
>
> [4] I have amended your partnership loss figure to reflect this. [5] The figure for your partnership loss is as follows:
>
> - The original Partnership loss figure was £7,224,131
> - The Partnership profit figure is now £672,285
>
> I enclose details of how I worked out this figure."

The numbering was not in the original but was added in submissions to us, and we will also use that numbering for ease of reference.

11. The attached schedule shows the following:

> "Income
>
> | | |
> |---|---|
> | Less Admin costs | £865,000 |
> | Less interest charges | £788 |
> | Less Finance Charges | £177,395 |
> | Chargeable | £672,285" |

The FTT decision

12. The FTT decision summarised the correspondence during the enquiry and in connection with the review decision that confirmed the conclusions in the closure notice. It noted the view expressed by HMRC in the correspondence that the evidence did not demonstrate that the partnership had begun to trade. It set out the history of the appeal including HMRC's statement of case where it contended that "no property dealing or property trading commenced and that the little that has happened is pure pre-trading expenditure", and its skeleton argument in which it argued that the properties were investment assets and said that if the properties were categorised as trading stock it did not intend to argue that the trade had not commenced.

13. The FTT decision went on to consider the relevant legislation and case law. This included the High Court, Court of Appeal and Supreme Court decisions in *Tower MCashback LLP and another v Commissioners for Her Majesty's Revenue & Customs*, [2008] EWHC 2387 (Ch) and [2008] STC 3366, [2010] EWCA Civ 32 and [2010] STC 809, [2011] UKSC 19 and [2011] STC 1143 respectively, and the Upper Tribunal decision in *Fidex Ltd v Revenue and Customs Commissioners* [2014] UKUT 454 (TCC), [2015] STC 702. At that time the Court of Appeal had not heard *Fidex* and so their decision ([2016] EWCA Civ 385, [2016] STC 1920) was unavailable to the FTT.

14. After summarising the parties' submissions the FTT went on to say (in the light of *Tower MCashback* and *Fidex*) that a closure notice need not give reasons, but that the

"conclusion" reached would limit the Tribunal's jurisdiction. The FTT then referred to the comment of Moses LJ in the Court of Appeal decision in *Tower MCashback* at [35] that the "subject-matter of [a Tribunal] appeal is defined by the subject-matter of the enquiry and the subject-matter of the conclusions which close that enquiry" and to a comment made on that by the Upper Tribunal in *Fidex* at [45] that they did not understand Moses LJ to have intended to broaden the scope of the appealable issues (see [54] and [55] in the FTT decision). The FTT went on to say:

> "[56] … the Tribunal therefore proceeds on the basis that the subject-matter of the enquiry may confine, and/or provide context for the proper interpretation of, the conclusions in the closure notice, but that the subject-matter of the enquiry will not expand the jurisdiction of the Tribunal beyond the scope of the conclusions in the closure notice."

15. The FTT then identified the issue for decision as whether the Commencement Issue was the sole conclusion in the closure notice or whether it was merely a reason for a broader conclusion that the appellant was not entitled to make the revaluation adjustment, and held that it must interpret the closure notice in context, having regard to the subject matter of the enquiry, the closure notice and any other relevant correspondence ([57] and [58]).

16. The FTT found that the notice which opened the enquiry was not limited either to the Commencement Issue or indeed to the revaluation adjustment, that the enquiry itself was not confined to the Commencement Issue and furthermore that the closure notice was also not confined to the revaluation adjustment, since it also mentioned rental income and expenditure in sentence [3] (see [59] to [61]). The FTT went on to say:

> "[62] The Tribunal also notes that in circumstances where a taxpayer must fulfil several requirements in order to be eligible for a relief, the enquiring officer would only need to determine that any one of those requirements is not satisfied in order to conclude that the taxpayer is not eligible for that relief. If it is clear to the enquiring officer that one of the requirements is not satisfied, it would be unnecessary for the enquiring officer to consider whether or not each of the other requirements is satisfied. The enquiring officer could simply conclude that the taxpayer is not entitled to the relief for the reason that one of the requirements has not been satisfied. That would not be a concession that any of the other requirements is necessarily satisfied. Rather, it would simply be a case of reaching a conclusion (that the taxpayer is not entitled to the relief) for a single reason, in circumstances where there may or may not be other reasons also why that conclusion must be reached.
>
> [63] In such a case, it would seem unlikely that the enquiring officer would make the non-satisfaction of one requirement the conclusion of the closure notice, rather than the reason for the conclusion that the taxpayer is not entitled to the relief. While each case must be determined on its own circumstances, this is a factor to be considered. Different considerations may apply if the enquiring officer indicated in the course of the enquiry that he or she was satisfied as to all requirements except one, and that what remained to be determined in the enquiry was whether the remaining requirement is satisfied."

17. The FTT found that HMRC had not accepted prior to the closure notice that the appellant had satisfied the Stock Issue. It agreed with HMRC that a letter in which HMRC acknowledged that the properties were acquired with the intention of developing them was not inconsistent with them being developed as an investment, and found that HMRC had not provided a confirmation, as the appellant had requested, that the Commencement Issue was the only issue ([64] to [67]).

18. Going on to consider the wording of the closure notice, the FTT said at [68]:

> "The Tribunal considers that the word 'therefore' in the third sentence of the operative paragraph … suggests that that sentence is stating a conclusion, based on what precedes it. In other words, it suggests that the first two sentences of that paragraph are the reasons for a conclusion in the third sentence. This also seems to follows from the subject matter of the third sentence, which deals with not only the net realisable value adjustment, but also the rental income and expenditure. The necessary implication of the third sentence is that the Appellant is not entitled to make the adjustment for the revaluation of the properties. While this is not formally identified as such as the conclusion of the closure notice, the Tribunal bears in mind that it is not appropriate to construe a closure notice as if it is a statute or as though its conclusions, grounds and amendments are necessarily contained in separate watertight compartments, labelled accordingly [referring to the Upper Tribunal in *Fidex*]. Overall, the Tribunal considers that the wording of the closure notice suggests that the third sentence states a conclusion in respect of three items in the tax return, and that the first two sentences provide the reasons in respect of that conclusion in relation to the first of those three items."

19. The FTT commented at [69] that it did not consider that its jurisdiction could be affected by anything said after the closure notice was issued, subsequent documents only being relevant insofar as they might shed light on the correct interpretation of the notice. It found that there was nothing in those documents that affected its decision, and went on at [70] and [71] to decide that the "conclusion" in the closure notice insofar as the revaluation adjustment was concerned was that it was disallowed, with the result that the Tribunal had jurisdiction in relation to the Stock Issue. It also allowed HMRC's application to amend its statement of case ([73]).

The appellant's submissions

20. In summary the appellant submitted that the FTT had misconstrued the closure notice, departing from its plain wording, and in doing so had made an error of law. The relevant conclusion was contained in sentence [1], namely the Commencement Issue. Sentence [2] contained another conclusion. Sentence [3] stated the amendments rather than the conclusions as the FTT had held. The FTT had wrongly conflated the conclusion with the amendments, whereas the statute required them to be distinct, the latter giving effect to the former. It also erred in seeking to go beyond the express terms of the closure notice to find an implied conclusion. A closure notice must state both the conclusion and the amendments.

21. Counsel for the appellant submitted that the principles to apply in construing a closure notice were authoritatively summarised by the Court of Appeal in four points in *Fidex* at [45] (set out below), superseding the Upper Tribunal's nine point summary based on *Tower MCashback*. Enquiry correspondence could not widen the conclusion stated in a closure notice and did not need to be considered where the conclusion was clearly stated. Construction of a closure notice was not a question of fact but a question of the application of law to the facts, which was a question of law and therefore could be the subject of an appeal to the Upper Tribunal: *Murray Group Holdings Ltd v HMRC* [2015] CSIH 77 at [42]. The construction of any written document was a question of law: *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, HL. There was no scope for the Tribunal to conduct a weighing exercise, balancing statutory protection for the taxpayer against the need to ensure that the public are not "wrongly deprived of contributions to the fisc", as Moses LJ put it in *Tower MCashback* at [38]. Although the Court of Appeal in *Fidex* at [51] endorsed the Upper Tribunal's view that it was not appropriate to construe a closure notice as if it was a statute, that was obiter and the Court of Appeal did not in fact blur the distinction between reasons, conclusions and amendments, even though conclusions in some contexts might be reasons in others, and in a case like *Fidex* there might be a close resemblance between conclusions and amendments.

22. The FTT considered the enquiry correspondence as it was entitled to do, but erred in identifying the scope of the enquiry and in drawing the inferences it did about the scope of the closure notice. The application of SSAP 9 did not depend on whether a trade existed, and that issue was the sole focus of the enquiry. The FTT also made an incorrect finding that the Stock Issue had not been conceded during the enquiry.

23. HMRC could have identified any of three issues to deny loss relief, namely the Stock Issue, the Commencement Issue and whether the properties had in fact declined in value as claimed. They chose only the Commencement Issue, and this was conceded in their skeleton argument. The FTT erred in law at [62] and [63] in the FTT decision (see [16] above). It was clear from the cases that a conclusion could be narrowly stated, capturing only one of the conditions for a relief, and it would not be implicit that the conclusion was a general denial of the relief.

HMRC's submissions

24. Counsel for HMRC submitted that the FTT correctly summarised and applied the law. The Court of Appeal decision in *Fidex* summarised the law rather than extending or developing it. The overall effect of the closure notice should be considered and the approach to construction should not be overly technical or pedantic, but even on a detailed sentence by sentence analysis HMRC's construction was to be preferred. Sentences [1] and [2] in the closure notice set out some of the reasons for the conclusion, which was contained in sentence [3]. The amendments giving effect to the conclusion were in sentences [4] and [5]. The closure notice should also be construed in context: context was not only relevant to resolve ambiguity as counsel for the appellant suggested.

25. Counsel also submitted that identifying the subject-matter of and conclusions in a closure notice was primarily a matter for the FTT as the fact-finding tribunal, and that the Upper Tribunal and superior courts should exercise caution in deciding to revisit such questions. An analogy was drawn with the approach to case management questions. In addition, insofar as a balancing exercise was required the public interest (in collecting tax) should prevail over a taxpayer who had suffered no prejudice.

Discussion

Common ground

26. There was a considerable amount of common ground between the parties about the principles to apply. It was accepted (as s 28AB clearly requires) that a closure notice must state both the conclusion and the amendments. It was also rightly accepted, as is clear from the case law and s 31 TMA, that the terms of the closure notice will determine the FTT's jurisdiction on the appeal. Both parties also agreed that it was possible to frame a closure notice either narrowly or widely, so the FTT's jurisdiction was capable of being curtailed.

27. In addition, both parties accepted that it was appropriate to apply the test of what a closure notice would convey to a "reasonable recipient", referring to Henderson J's decision in the High Court in *Tower MCashback* at [120]. And there was acceptance that the context of the enquiry was relevant, although on the appellant's case only in the event of ambiguity.

Effect of Court of Appeal decision in Fidex

28. We agree with counsel for HMRC that the Supreme Court decision in *Tower MCashback* remains the leading authority, and that since the Supreme Court endorsed the approach to the principles to apply adopted by Moses LJ in the Court of Appeal and (except to the extent of any difference) Henderson J in the High Court, those judgments are also highly significant. We do not agree with counsel for the appellant's suggestion that the Court of Appeal decision in *Fidex* altered or narrowed the principles to apply. However, the Court of Appeal decision in *Fidex* is nonetheless important and is of course in any event binding on us. It provides an additional explanation of some of the comments made by Moses LJ in *Tower MCashback*, particularly about the subject matter of the enquiry (discussed further below). It also makes some additional points that are relevant to consider, including the points made at [51] where Kitchin LJ, giving the only judgment, approved the Upper Tribunal's view that:

> "it is not appropriate to construe a closure notice as if it was a statute"

and went on to say that the Upper Tribunal was right to emphasise that:

> "…while there must be respect for the principle that the appeal does not provide an opportunity for a new roving enquiry into a company's tax return, the FTT is not deprived of jurisdiction where it reasonably concludes that a new issue raised on an appeal represents an alternative or an additional ground for supporting a conclusion."

29. While these comments might be obiter they are nonetheless authoritative ones to which we should have careful regard.

Subject matter of the enquiry: the correct approach

30. The appellant argued that the correct approach was summarised in four points by Kitchin LJ in the Court of Appeal in *Fidex* at [45]:

> "In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> iii) The closure notice must be read in context in order properly to understand its meaning.
>
> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

31. Counsel for the appellant noted that this summary differed from the nine point summary at [62] in the Upper Tribunal's decision in *Fidex*, in particular in not referring to the subject matter of the enquiry. In the appellant's view enquiry correspondence could not widen the conclusion stated in a closure notice and did not need to be considered where the conclusion was clearly stated.

32. The Upper Tribunal's approach took account of comments made by Moses LJ in *Tower MCashback*, including the following:

> "[35] …The subject-matter of this appeal is defined by the subject-matter of the enquiry and the subject-matter of the conclusions which close that enquiry…"

33. However, the Upper Tribunal also expressed the view at [45] that it did not understand Moses LJ to have been intending to broaden the scope of the appealable issues. The same point is reflected in the explanation given by Kitchin LJ in the Court of Appeal, in a passage that immediately preceded the four point summary:

> "[43] Mr Michael Flesch QC, who appeared on this appeal on behalf of Fidex, properly drew our attention to the use by Moses LJ in his judgment of the phrase 'the subject matter of the enquiry' and submitted that this is taken from s.28ZA of the Taxes Management Act 1970. But, as he correctly pointed out, this is concerned with the particular situation where, during the course of an enquiry, a question arises in connection with the subject matter of the enquiry. Where that happens the question can be referred to the FTT for a determination. No such reference was made in the *Tower MCashback* case, however.

> [44] I do not for my part consider that Moses LJ intended by the use of this phrase in some way to expand the permissible scope and subject matter of an appeal against a conclusion stated or an amendment made by a closure notice beyond that contemplated by Henderson J. Nor do I understand the Supreme Court to have sanctioned any such expansion. Moses LJ was, I think, doing no more than explaining that the closure notice must be considered in context and in light of the enquiry that preceded it. Furthermore I would reject any suggestion that Moses LJ was in any doubt about the statutory provisions in issue."

34. It is clear from this that a narrowly drawn closure notice cannot be widened by reference to the scope of the enquiry that preceded it. That makes perfect sense: an enquiry may cover a range of issues but the closure notice may state conclusions and make amendments only in respect of one matter remaining in dispute. However, we reject the appellant's submission that the only circumstance in which context should be considered is where the closure notice is ambiguous. Both Kitchin LJ and Moses LJ made clear that a closure notice must be considered in its context. Lord Hope made the same point in the Supreme Court decision in *Tower MCashback* at [84] when he said:

> "Notices of this kind, however, are seldom, if ever, sent without some previous indication during the enquiry of the points that have attracted the officer's attention. They must be read in their context."

35. No qualification was added to suggest that context is not relevant where the closure notice appears to be clear on its terms. The subject matter of the enquiry must always be considered.

Fact or law?

36. We also do not agree with the appellant that the identification of the conclusion in a closure notice is solely a question of law. Whilst construction of a document is a question of law, the identification of any relevant surrounding circumstances requires questions of fact to be determined. *Chitty on Contracts* at 13-047 describes the construction of written instruments as "a question of mixed law and fact", going on to say:

> "Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts."

37. As already discussed a closure notice must be read in the context of the enquiry that preceded it in order properly to understand its meaning. Identifying that context is clearly a question of fact. In our view this explains the references in both *Tower MCashback* and *Fidex* to the role of the FTT or (in *Tower MCashback*) the Special Commissioners. This is reflected in the following passages from the judgment of Moses LJ in *Tower MCashback*:

> "[38] … I would leave it to the commissioners and now the First-tier Tribunal to identify the subject matter of the enquiry and the subject matter of the conclusions. In doing so, the First-tier Tribunal will have to balance the need to preserve the statutory protection for the taxpayer afforded by notification that the inspector has completed his enquiries

> and the need to ensure that the public are not wrongly deprived of contributions to the fisc.
>
> [41] … it is to the special commissioner and now to the First-tier Tribunal that the statute looks to identify what section 28ZA [TMA] describes as the subject matter of the enquiry….
>
> [50] I have the misfortune to differ from Henderson J. For the reasons I have given earlier, it was a matter for the Special Commissioner to identify the subject-matter of the appeal…
>
> [51] There is a second basis on which I differ from Henderson J. Apart from the importance of leaving it to the fact-finding tribunal to determine the subject matter of the closure notice, in my view the closure notice itself does not allow of so restricted a view of the subject matter of the appeal…."

38. The passages in [41], [50] and [51] were approved by Lord Walker in the Supreme Court at [16] and [17]. Similarly, in *Fidex* Kitchin LJ referred at [62] and [68] to the conclusions reached by the FTT as ones they were "entitled" to reach (see also the Upper Tribunal decision at [74] and [84]).

39. We do not however agree with the analogy drawn by counsel for HMRC with case management decisions. It is clear that in case management matters the Upper Tribunal and superior courts will exercise significant caution, and should not interfere if the judge has applied the correct principles, taken into account those matters he should and has not taken account of irrelevant considerations (see for example *Goldman Sachs International v Commissioners for Her Majesty's Revenue & Customs* [2009] UKUT 290 (TCC) at [23]). The question of the correct construction of a closure notice is not a matter of discretion, but a mixed question of fact and law. If the decision discloses an error of law then an appeal will lie in the normal way.

Balancing exercise

40. Although we do not agree that there is an analogy with case management decisions, we also do not agree with the appellant that it is right to disregard the comments made by Moses LJ in *Tower MCashback* at [38] (set out at [37] above) about the need for the FTT to balance protection for the taxpayer with ensuring that the public are not deprived of contributions to the fisc. Moses LJ was making the point that this is a consideration to bear in mind in construing a closure notice. The comment was clearly a considered one. It followed a summary of the significant changes brought about by self-assessment, including the introduction of a power of enquiry only within strict time limits and the placing of restrictions on HMRC's discovery powers. Moses LJ noted at [28] that Parliament had however retained s 50 TMA in terms closely following its predecessor, making it clear that the Commissioners' (now FTT's) jurisdiction is to determine "the amount on which, in the interests of the public, the taxpayer ought to be taxed" (citing *R v Income Tax Special Comrs ex p Elmhirst* (1936) 20 TC 381 at 387, [1936] 1 KB 487 at 493). He added that that public interest "has in no way been altered by the introduction of self-assessment". However, it was clear that Parliament could not have intended the significant protections for taxpayers in the new system to be overridden by s 50 and so the effect of the changes was to place some restrictions on jurisdiction on an

appeal ([29] to [31]). The comment made by Moses LJ at [38] clearly reflects this discussion.

Scope of the enquiry in this case

41. In our view the FTT took account of the subject-matter of the enquiry to an appropriate extent, as set out in [56] of the FTT decision (see [14] above). It treated the subject-matter as context rather than as something which could broaden the scope of the appeal. The FTT reached the view, and in our view was perfectly entitled and indeed correct to do so, that neither the initial notice of enquiry nor the correspondence during it were confined to the Commencement Issue or indeed to the revaluation adjustment, and that HMRC did not concede the Stock Issue during the enquiry. The FTT was entitled to take the view that HMRC's acceptance that "the property was acquired with the intention of developing it" was not inconsistent with development for investment purposes, and also that HMRC declined the appellant's specific request to confirm that the Commencement Issue was the only issue. In our view the FTT was also correct to find at [69] that the scope of the closure notice could not be affected by anything done after it was issued, with subsequent documents only being potentially relevant if they shed light on the correct construction of the closure notice.

Construction of the closure notice

42. In our view the FTT was correct to conclude that the relevant conclusion in the closure notice was that the revaluation adjustment was disallowed. We do not agree with the appellant's argument that sentences [1] and [2] were the conclusions and sentence [3] onwards represented the amendments. Our reasons are as follows:

> (1) Applying the test of a "reasonable recipient", it is perfectly clear that the key point conveyed by the closure notice was that the revaluation adjustment was being disallowed.
>
> (2) Although the enquiry focused on the Commencement Issue it was not so confined and HMRC had not acceded to the appellant's specific request to confirm that it was the only issue. That is relevant context in determining that the conclusion reached was not limited in that way.
>
> (3) We agree with HMRC that the amendments required to be stated in the closure notice are numerical amendments: they are the alterations to the figures in the return that HMRC believe are required to give effect to their conclusions. These amendments appear at sentence [5] and are also reflected in the schedule. They are stated separately from the conclusions as the legislation requires, and give effect to them.
>
> (4) We are mindful of the guidance not to construe the closure notice as if it were a statute, and therefore do not place significant reliance on the heading in the letter or the use of the word "therefore" in sentence [3] (which might suggest a conclusion preceded by reasons). But equally we do not think it is right to treat sentence [3] as part of the amendments simply because it said "I have therefore amended the return".

(5) Although not relied on by HMRC, we think that sentence [2] is of some significance, and that the FTT recognised this. Given that the partnership owned no other assets apart from the two properties the subject of the revaluation adjustment, the reference to all income and expenditure in the return relating to "property investment income" only makes sense if the two properties were held on investment account rather than as trading stock. This is inconsistent with the appellant's case. The appellant's case is that the only conclusion in the closure notice in respect of the revaluation adjustment was the Commencement Issue, not the Stock Issue. If correct this could only mean that HMRC was accepting that the properties were acquired on revenue account (in SSAP 9 terms, "purchased for resale") rather than being acquired on capital account (as investment properties), but were saying that insufficient activity had occurred for a trade to have commenced. That is simply inconsistent with sentence [2]. We do not think that this would escape the notice of a reasonable recipient. In effect, HMRC was saying that the properties were investment properties, and not trading stock. We think the FTT recognised this: see in particular the last sentence of [68] (set out at [18] above), which refers to sentence [2] as well as sentence [1] as providing reasons for the disallowance of the revaluation adjustment.

(6) We do not agree with the appellant's criticism of [63] in the FTT decision (see [16] above). The fact that an enquiry has not been limited to a specific issue is a relevant factor to consider in determining whether a closure notice is so confined. The FTT was not saying that it was not possible for a closure notice to be more limited than the scope of the enquiry: indeed the FTT said the opposite at [56] (see [14] and [41] above).

(7) Counsel for the appellant criticised the reference to "necessary implication" at [68] of the decision (see [18] above) on the grounds that it conflicts with the clear statutory requirement that a closure notice must "state" both the conclusion and the amendments. However, in our view the conclusion was stated and we do not think that the FTT was saying that it was necessary to read words in. Sentence [3] in the closure notice on its terms removes the revaluation adjustment. It would be apparent to any reasonable recipient that this was a denial of the adjustment.

43. We are also mindful that any appeal would be limited to the revaluation adjustment issue and that there would be no scope for a new "roving enquiry" (*Fidex* in the Court of Appeal at [51]). The precise basis on which the revaluation adjustment might be disallowed is properly a question for the FTT, subject to case management considerations.

Rule 8(2)(a)

44. Although not necessary for our decision in the light of the conclusion we have reached, we should make a few comments on the scope of rule 8(2)(a) of the FTT rules, which was the basis of the appellant's strike out application. This provides:

> "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; …"

45. Rule 8(2)(a) was also relied upon in *Fidex*. However, there was a difference. In that case the appellant was seeking to strike out one part of HMRC's case on the basis that the closure notice did not extend to that part. The result of striking out that part would have been that an appeal remained on foot in respect of the remaining issue.

46. In this case the effect of the appellant succeeding in its argument would be that HMRC's case would fall away entirely. It is not clear to us that this falls within rule 8(2)(a), or that if it did that it would have the result the appellant seeks. The appellant is not saying that there was no valid closure notice, and neither is it saying that its appeal against the closure notice was not valid. Rather it is saying that HMRC has conceded the only point at issue so the appellant should win. However, striking out the proceedings would mean striking out the appellant's appeal.

47. It seems to us that in these circumstances the correct analysis is that the FTT has jurisdiction to hear the appeal (under s 31 TMA and, in this case, s 49G TMA which covers appeals to the FTT after a statutory review), but that if HMRC had indeed conceded the only conclusion set out in the closure notice then the appeal could be expected to be allowed. We note that the strike out application was not made under rule 8(3)(c) of the FTT rules. Read with rule 8(7), rule 8(3)(c) confers a discretion on the FTT to bar a respondent from taking further part in the proceedings where its case has no reasonable prospect of success.

Disposition

48. For the reasons set out above the appeal is dismissed.

(Signed on original)

JUDGE COLIN BISHOPP
JUDGE SARAH FALK

RELEASE DATE: 1 December 2016