{2015} UKFTT 0470 (TC)

# TC04637

**Appeal number: TC/2013/07150**

***Procedure - appeal against closure notice – identification and scope of "conclusion" in closure notice- Tower McCashback and Fidex considered***

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

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

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER**

**Sitting in public at Belfast on 23 June 2015**

**Oliver Conolly and Ben Elliott, counsel, for the Appellant**

**Nicolas Hanna QC, instructed by the Crown Solicitor's Office, for the Respondents**

DECISION

## Introduction

1. The Tribunal has before it:

   (1) an application by the Appellant to strike out the HRMC case under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal's Rules"); and

   (2) an application by HMRC to amend its statement of case.

2. In this appeal, the Appellant appeals against a closure notice dated 2 May 2013, upheld in a review decision dated 19 September 2013, following an enquiry into the Appellant's tax return for 2009-10.

3. The Appellant is a partnership of which two brothers are the partners. The original partnership tax return for 2009-10 showed a loss of £7,224,131. The closure notice under appeal amended this to a profit of £672,285. This difference of £7,896,416 is explained as follows. The Appellant purchased two properties in September 2007 and July 2008. The Appellant says that the properties were purchased during a property boom, and that their market value at 5 April 2010 was less than their purchase price. On that basis, the partnership's tax return for 2009-10 included a figure of £7,896,416 for "cost of sales", which the Appellant has explained was a net realisable value adjustment for the two properties. This was disallowed in the closure notice against which the Appellant appeals, which states that it is "removing the adjustment for the revaluation of both sites".

4. It is common ground that the Appellant's claim for the decline in value of the properties requires *both* of the following two conditions being met:

   (1) the properties must have been trading stock (as opposed to investment assets), *and*

   (2) the partnership must have been engaged in a trade in 2009-10, the year in which the loss relief was claimed.

The question whether the former condition is satisfied in the present case is referred to as the "Trading Stock Issue". The question whether the latter is satisfied is referred to as the "Commencement of Trade Issue".

5. The Appellant's strike-out application contends as follows. The conclusion in the closure notice was confined to the Commencement of Trade Issue, which is thus the only point in issue between the parties forming the subject matter of the appeal that the Tribunal has jurisdiction to hear. The HMRC skeleton argument has since abandoned any reliance on the Commencement of Trade Issue, and HMRC now put their case solely on the basis of the Trading Stock Issue. As the Tribunal has no jurisdiction to hear and determine the Trading Stock Issue, the HMRC case should be struck out. As HMRC have conceded the one point that the Tribunal does have jurisdiction to hear, the result would be for the appeal to be decided in the Appellant's favour.

6. HMRC opposes the Appellant's strike-out application, and in turn makes an application to amend its statement of case, and submits a proposed amended statement of case setting out the HMRC position on the Trading Stock Issue.

**Background facts**

7. By letters dated 12 April 2012, HMRC notified the Appellant and its agent that HMRC was opening an enquiry into the Appellant's tax return for 2009-10. The letter to the Appellant's agent relevantly stated as follows:

> I will be checking your client's partnership tax return for the year shown above. Please find enclosed a copy of the letter that I have sent to your client today, which gives details of my check. … To help me with my check, please let me have the following:
>
> 1. An explanation of the loss.
>
> 2. What is the nature of the venture to include the addresses of all properties and a description of each one?
>
> 3. When, exactly did it begin?
>
> 4. A brief history to include details of work done, planning permission, advertising and supporting evidence.
>
> 5. A description of the Opening Stock, £1,160,384, Capital Introduced £10,788,747, the origin of the capital, whether it came from taxed sources and evidence in support.
>
> 6. Analysis of and evidence in support of Sales £865,000, Cost of Sales £7,896,416, General Administrative £788, Interest £177,395, Other Finance Charges £14,532 and Drawings £8,001,276
>
> 7. Identify all estimated and balancing figures.

8. The Appellant's agent responded with information under cover of a letter dated 21 June 2012. This explained amongst other matters that the opening stock figure of £1,160,384 was the purchase price of one of the two properties, that the capital introduced figure of £10,788,747 was the purchase price of the other property plus certain other expenses, and that the cost of sales figure of £7,896,416 was a net realisable value adjustment in respect of the two properties.

9. By a letter to the Appellant's agent dated 3 July 2012, HMRC expressed the view that on the basis of the available information, there was no evidence of trading.

10. A response from the Appellant's agent dated 8 October 2012 provided further information. It explained that the properties had been purchased with the intention of developing them, that the development plans had been put on hold following the 2008 property crash, but that the partners continued to be actively engaged in monitoring the market place and discussing with third parties how best to take the development forward, and that the activity of the Appellant was therefore an adventure in the nature of trade.

11. A response from HMRC dated 9 November 2012 relevantly stated as follows:

> The evidence supplied this far does not demonstrate that the partnership has begun to trade. Yes, the property was acquired with the intention of developing it. However, intention alone is not enough. The 'development' has not matured into an active project.

12. A response from the Appellant's representatives dated 20 November 2012 stated that they did not have any further information to present, and foreshadowed a request for review or Tribunal appeal in relation to the matter. The letter then asked HMRC to confirm, in the event that a review or Tribunal appeal led to a finding that trading had commenced and was continuing, whether "this would result in the claims made by our clients being approved and the refunds of tax sought being released".

13. A response by HMRC dated 11 December 2012 requested further information and stated that "I can't comment on whether a refund would be issued after an independent review or First Tier Tribunal as such a decision would be based on the precise wordings of their findings".

14. Under cover of a letter dated 15 February 2013, the Appellant's representatives provided further information.

15. A letter from HMRC dated 15 February 2012 then requested an analysis and figures in support of the sales figure of £865,000. It also requested further information, expressing the view that "it has become clear that 'intent to trade' forms a big part of the interpretation on whether trading commenced or not".

16. A response from the Appellant's representative dated 26 March 2013 provided further information, including an explanation that the sales figure of £865,000 was rental income from one of the properties.

17. On 2 May 2013, HMRC issued the closure notice against which the Appellant now appeals. This stated relevantly as follows:

> My conclusion
>
> I don't believe the partnership ever commenced trading for reasons already put to your agent and that any expense incurred so far would have to be treated as pre-trading expenditure. I further believe that all income and expenditure contained in the return relates to property investment income. 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.

18. In a letter dated 28 May 2013, the Appellant's representative disagreed with the HMRC conclusion that trading had not commenced.

19. In letters dated 13 June 2013, HMRC offered the Appellant an independent review, and stated "I wish to reaffirm our opinion that trading never commenced".

20. The Appellant accepted the offer of an independent review. This resulted in a HMRC review decision dated 19 September 2013, which upheld the closure notice. The review decision relevantly stated as follows:

> Based on the facts and circumstances in your case, no trade of property dealing/trading actually commenced. Apart from the purchase of two sites in Northern Ireland, no "operational activities" took place. …In conclusion therefore no property dealing or property trading commenced—the little that has happened is pure pre-trading expenditure.

21. By a notice of appeal dated 15 October 2013, the Appellant commenced the present appeal before the Tribunal. The Appellant's grounds of appeal relevantly stated:

> We disagree with HMRC's view that a property trade has not commenced and that all income and expenditure within the Partnership tax return relates to property investment income. We believe a trade has commenced and that income and expenditure relating to such should be returned as a trade within the partnership return.

22. HMRC submitted its statement of case dated 17 December 2013. The concluding paragraph of the section of the statement of case headed "The Respondent's contentions" (paragraph 5.8) stated that "In conclusion HMRC contends that no property dealing or property trading commenced and that the little that has happened is pure pre-trading expenditure". The final paragraph of the statement of case, under the heading "Conclusion", stated that "HMRC asks the Tribunal to determine that the partnership has not yet started trading in property and that the appeal against the closure notice is dismissed". The first paragraph of the section of the statement of case headed "The Respondent's contentions" (paragraph 5.1) stated as follows:

> The respondent contends that on the basis of the facts presented in this case, no trade of property dealing/trading actually commenced because apart from the purchase of the relevant sites no operational activities have taken place. Development is not in itself necessarily a trade at all; it all depends on what one intends to do with the property once it is developed. If one intends to sell ones interest or grant a long lease at a premium one is a trader but if one intends to let the property at a commercial rent then one is an investment company.

23. Various procedural steps in the proceedings followed, leading to the filing and serving of skeleton arguments of the parties.

24. The Appellant's skeleton argument dated 29 January 2015 argued that the Appellant was engaged in a trade with respect to both properties from the date of acquisition onwards, and that the appeal should therefore be allowed.

25. The HMRC skeleton argument dated 5 February 2015 argued that as the two properties were not correctly categorised as trading stock, but were in fact investment assets, the value adjustment was impermissible. The skeleton argument stated at paragraph 3 that "If the properties were correctly categorised as trading stock, which is not accepted, the Respondent's do not intend to argue that the trading venture had not commenced". The skeleton argument denied that HMRC had ever conceded that the Appellant had a trading intention at the time of acquisition of the properties, noting that the closure notice under appeal contained the words "I further believe that

all income and expenditure contained in the return relates to property investment income" (see paragraph 17 above).

26. By an application dated 10 February 2015, the Appellant made the application now under consideration to strike out the HMRC case (see paragraph 5 above).

27. On 25 March 2015, HMRC filed an answer to the strike-out application, as well as the HMRC application to amend their statement of case (together with the proposed amended statement of case).

28. On 22 April 2015, the Appellant filed a skeleton argument for the strike-out application, as well as a response to the HMRC application to amend their statement of case.

29. On 22 April 2015, HMRC filed a skeleton argument in relation to both applications.

30. A hearing of the two applications was held on 23 June 2015. Counsel for the Appellant also produced a written speaking note for the hearing.

## Applicable legislation

31. Section 28B of the Taxes Management Act 1970 ("TMA") relevantly provides:

> (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.

32. Section 31(1) TMA provides:

> (1) 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), …

33. Section 49A TMA provides that if a notice of appeal is given to HMRC, the Appellant may require HMRC, or HMRC may offer, to "review the matter in question", or the Appellant may notify the appeal to the Tribunal. Section 49D TMA

provides that if the Appellant notifies the appeal to the Tribunal, the Tribunal is to "decide the matter in question". "Matter in question" is defined in s 49I(1) TMA to mean "the matter to which an appeal relates".

34. Rule 8(2)(a) of the Tribunal's Rules requires the Tribunal to strike out part of the proceedings if the Tribunal "does not have jurisdiction in relation to the proceedings or that part of them".

## Relevant case law

*Tower MCashback*

35. An issue in *Tower MCashback* was whether the taxpayer was entitled to capital allowances claimed under former s 45 of the Capital Allowances Act 2001 ("CAA"). There were four subsections to that provision, setting out various requirements to be met in order for the section to apply, or circumstances in which the section would not apply.

36. The High Court (Henderson J) (*Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2008] EWHC 2387 (Ch), [2008] STC 3366) considered that the relevant legal principles were as follows:

(1) No form has been prescribed for closure notices, and in practice, closure notices are usually given by letter (at [111]).

(2) Section 28B(1) TMA contains the only statutory requirements, and it follows that the closure notice need not be a long or complicated document (at [112]).

(3) There is no express statutory requirement to give reasons in a closure notice, and no basis for implying any such obligation. An appeal lies under section 31(1)(b) TMA against a "conclusion" or "amendment" but there is no provision for an appeal against reasons. Similarly, the duty of the General or Special Commissioners hearing the appeal is not to review or adjudicate upon the officer's reasons, but rather to consider whether the amounts are excessive or insufficient: see TMA 1970 section 50(6) and (7) (at [113]).

(4) It follows from s 50(6) and (7) TMA that the General or Special Commissioners hearing the appeal are not confined to an examination of the reasons advanced by HMRC in support of the conclusions set out in a closure notice, and that they are not compelled to treat an amendment to a return under section 28A or 28B as fixing the maximum amount of tax which is recoverable, and that they may take the initiative and apply the law to the facts in the manner that appears to them to be correct, regardless of the arguments advanced by either side, and that they must be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice (at [114]-[115]).

(5) That is not to say, however, that an appeal against a closure notice opens the door to a general roving enquiry into the relevant tax return. It follows from the fact that the taxpayer's right of appeal under s 31(1)(b) TMA is confined to an appeal against any conclusions stated or amendments made by a closure notice that the scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return. That is the only appeal which the Commissioners have jurisdiction to entertain. (At [116].) "… an appeal under section 31(1)(b) may not stray beyond the subject matter of the conclusions and amendments (if any) stated in the closure notice" (at [118]).

(6) HMRC should ensure that they have considered all the points on which they may wish to rely before a closure notice is issued. Issue of the notice is an irrevocable step, and once it has been taken the battle ground on any future appeal will be defined by reference to it (at [128]).

37. The closure notice in that case stated as follows (see at [120]):

> I have now concluded my enquiries into the Partnership Tax Return for the year ended 5 April 2004. As previously indicated, my conclusion is:
>
> The claim for relief under S45 CAA 2001 is excessive.
>
> The Partnership Return for the year ended 5 April 2004 is amended as follows.
>
> Capital Allowances £nil
>
> Allowable Loss £nil

38. Henderson J considered that the words "as previously indicated" in the closure notice could only refer to the previous correspondence and discussions which had taken place between the parties, which had culminated in a letter from HMRC to the taxpayer stating that the claim "fails on the [section] 45(4) CAA 2001 point alone". Henderson J considered as follows:

> That statement was clear and unambiguous, and would have conveyed to any reasonable recipient that HMRC's challenge to the effectiveness of the scheme was confined to section 45(4). … To put the same point another way, it seems to me that read in context the conclusion stated in the letters to the LLPs was equivalent to: "The claim for relief under [section] 45 CAA 2001 is excessive [for the sole reason that section 45(4) applies so as to disqualify the expenditure on the software from being first-year qualifying expenditure]." … If this is right, it must then follow in my judgment that the scope of any appeal was confined to the question whether section 45(4) did indeed apply ... The Special Commissioner had no jurisdiction to entertain the wider question whether the other requirements of section 45 were satisfied, because the appeal would then no longer be an appeal against the conclusions stated in the closure notice. (At [120]-[122].)

39. HMRC appealed against this decision to the Court of Appeal, where the decision of Henderson J was reversed on this issue (*Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2010] EWCA Civ 32, [2010] STC 809). In the Court of Appeal, Moses LJ (with whom Scott Baker LJ agreed) said:

(1) "It is to the Special Commissioner and now to the First-Tier Tribunal that the statute looks to identify what s.28ZA describes as the subject-matter of the enquiry. The Closure Notice completes that enquiry and states the Inspector's conclusions as to the subject-matter of that enquiry. The appeal against the conclusions is confined to the subject-matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the Special Commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject-matter may be entertained by the Special Commissioner subject only to his obligation to ensure a fair hearing." (At [41].)

(2) "Protection of the public requires, at the least, that other issues arising from the subject-matter of the enquiry ought to be considered, if necessary, by the fact-finding tribunal. ... Provided a party can be protected from ambush, the only limitation on issues which might be entertained by the Special Commissioner is that those issues must arise out of the subject-matter of the enquiry and consequently its conclusion, and be subject to the case management powers to which I have referred." (At [42].)

40. Applying those principles to the case at hand, Moses LJ concluded that Henderson J had been wrong, in that:

(1) It had been a matter for the Special Commissioner to identify the subject-matter of the appeal, who had correctly identified the stated conclusion as being to deny the allowances under s 45 CAA and the income losses. (At [50].)

(2) Whilst the closure notice did refer to previous correspondence which focussed on s 45(4), the closure notice itself was in plain terms a refusal of the claim for relief under s 45 CAA, and there was neither statutory warrant nor any need to look further. While s 45(4) was the issue which prompted the inspector to issue the closure notice and was the reason for doing so, it was not the subject-matter of the enquiry, nor the conclusion stated in the closure notice and the closure notice did not have the effect of limiting the appeal to that single issue. (At [51]-[52].)

41. There was then a further appeal to the Supreme Court, which dismissed the taxpayer's appeal on this point: *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] 2 AC 457. Lord Walker of Gestingthorpe at [17]-[18] (with whom Lord Rodger, Lord Collins, Lord Kerr, Lord Clarke, Lord Dyson agreed) considered that to the extent that there was any difference between Henderson J and the majority of the Court of Appeal as to the principles to be applied, he preferred the approach of Moses LJ, and said at [18] that:

> This should not be taken as an encouragement to officers of HMRC to draft every closure notice that they issue in wide and uninformative terms. In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms.

42. Lord Hope added at [85] that:

> I would therefore respectfully endorse the points that Lord Walker makes in para 18. Our decision to dismiss the cross-appeal should not be taken as indicating that uninformative closure notices of the kind that Mr Frost, no doubt under pressure, issued in this case should be the norm. The aim should be to be helpful, both to the taxpayer and to the Tax Tribunal which will have to case manage any appeal. The officer should wherever possible set out the conclusions that he has reached on each point that was the subject of enquiry which has resulted in his making an amendment to the return.

*Fidex*

43. In *Fidex Ltd v Revenue and Customs Commissioners* [2014] UKUT 454 (TCC), [2015] STC 702 ("*Fidex*"), the Upper Tribunal considered the decisions in *Tower MCashback*, and summarised the applicable principles at [62] as follows:

> (1) An appeal to the FTT in such a case as this is brought against "an amendment of a company's return" which is required to give effect to conclusions stated in a closure notice.
>
> (2) The scope of the appeal is defined by and confined to the subject matter of the enquiry, the conclusions and amendments (if any) in the closure notice. An appeal does not permit HMRC to launch a new roving enquiry into a tax return.
>
> (3) It is the HMRC officer's conclusions/amendments in the closure notice which matter, and not the process of reasoning which has led to them.
>
> (4) The officer does not need to give reasons for his conclusions.
>
> (5) The officer has a duty to make the closure notice as helpful to the taxpayer as is possible or appropriate in the circumstances.
>
> (6) The FTT has jurisdiction to entertain legal arguments which have played no part in the officer's reasoning for the conclusions in the closure notice; any element of ambush or unfairness must be avoided by proper case management.
>
> (7) It is a matter for the fact finding tribunal (the FTT) to identify the subject matter of the enquiry, the conclusions and, therefore, the appeal.

> (8) In determining these matters the context is relevant and may include, in addition to the subject matter of the enquiry and the contents of the closure notice themselves, any other relevant correspondence.
>
> (9) In making its determination the FTT should also balance protection of the taxpayer with the public interest in the collection of the correct amount of tax.

44. In *Fidex*, the closure notice had denied a tax loss, relying on a certain statutory provision ("paragraph 19A"). The issue was whether HMRC could then, in a Tribunal appeal against the closure notice, rely on a different statutory provision ("paragraph 13") to justify denial of that tax loss. The First-tier Tribunal held that HMRC could do so, and this decision was upheld on appeal by the Upper Tribunal.

45. The Upper Tribunal summarised the argument on behalf of the taxpayer in that case as follows (at [70]):

> The essence of Mr Flesch's submissions is that the FTT failed to recognise what he submits is the clear distinction between the conclusion expressed in the closure notice and the amendments required to give effect to it. Mr Flesch submits that what [the FTT] described as the "expressed grounds for the conclusion" (namely that there was no paragraph 19A debit) was in fact the conclusion itself. By the same token, that which [the FTT] identified as the conclusion ("that there was no loss …") was the amendment required to give effect to the conclusion.

46. In dismissing this argument, the Upper Tribunal said at [73]:

> In our view Mr Flesch's approach to the interpretation of the closure notice in this case is too rigid in the boundaries he seeks to draw; it would impose on HMRC's challenge to the claimed loss precisely the kind of straitjacket on the advancement of other legitimate factual or legal arguments which Moses LJ proscribed, and would represent a misapplication of the principles derived from the case law.

47. The Upper Tribunal added that:

(1) In the circumstances of that case, it was at all times the admissibility of that debit that was the subject matter of HMRC's concern, and although the correspondence during the enquiry and the closure notice focused on paragraph 19A, the FTT was entitled to regard the paragraph 19A issue as the legal ground or argument, rather than the entirety of the subject matter of the enquiry and its conclusions. The FTT was accordingly entitled to find that the Paragraph 13 Issue constituted an additional ground on which HMRC could seek to uphold its essential conclusion. (At [74].)

(2) 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. There are difficulties in attempting to draw clear boundaries within a closure notice between a "ground" or a "conclusion" or an "amendment.

There may well be grey areas and overlaps. While there must be respect for the principle that an 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 of fact or law raised on an appeal represents an alternative or additional legal or factual ground for challenging or supporting an amendment in the closure notice. (At [76].)

(3) In the circumstances of that case, the officer did not merely amend the trading loss on the return form but clearly explained which component of that loss he considered should be changed. Having made that identification the FTT may permit reasons in support of the change to that particular debit other than those set out in the letter to be ventilated. Different considerations might well apply if HMRC had sought to argue on appeal that another figure in the computation of the loss should be changed. (At [77].)

(4) There was no material difference between the circumstances in *Fidex* and those in *Tower MCashback*. In *Tower MCashback* the legal ground of challenge also changed at the appeal but it was still a challenge to the entitlement to same capital allowance. The deployment of a different ground of challenge did not change the subject matter of the enquiry or the conclusion, which throughout were concerned with that entitlement. (At [79-80]).

(5) In such circumstances, to decide that there is no jurisdiction would allow form to triumph over substance, and would not represent an appropriate balance between the protection of the taxpayer on the one hand, and the public interest in the collection of the correct amount of tax, on the other (at [81]).

## The Appellant's submissions

*The Appellant's strike-out application*

48. The word "conclusion" in s 28B(1) TMA is not a term of art, but rather a fact- and context-dependent issue. What is a conclusion in one context may be a reason for a conclusion in another. It is always possible and necessary for the Tribunal to identify the "conclusion stated" in a closure notice, and to distinguish it from the reasons given for that conclusion. The "conclusion" in the closure notice must also be distinguished from the "amendment" made to the tax return. An "amendment" is a numerical change to a return; a "conclusion" in contrast must be a proposition that can be stated in words. Changing the £7,224,131 loss to a profit of £672,285 was the "amendment" made by the closure notice, not the "conclusion" in the closure notice.

49. Whether an appeal is against a conclusion or an amendment, the "matter in question" for purposes of the legislative provisions cited in paragraph 33 above is defined by the scope of the conclusion stated in the closure notice. The Tribunal does not have jurisdiction to decide any matter that falls outside the scope of a conclusion stated in the closure notice. HMRC has a choice as to how widely or narrowly it

formulates the conclusion in a closure notice and does not have any excuse if it does so in a narrow manner. There is no "balancing exercise" for the Tribunal to conduct in order to determine whether it has jurisdiction to hear an appeal, as that balancing exercise has been conducted by Parliament, which has determined that jurisdiction is a clear cut issue of construing the conclusion stated in the closure notice.

50. In the present case, the "conclusion" is stated in the first sentence of the operative paragraph of the closure notice (quoted in paragraph 17 above). The second and third sentences of that paragraph cannot be construed so as to import the Trading Stock Issue into the "conclusion" stated in the closure notice, and these sentences are irrelevant to the matter at hand. There is no basis for the proposition that a closure notice is deemed to state the widest possible conclusion which could have been given effect in the amendment. The reference of Moses LJ to "the subject-matter of the enquiry" cannot expand the scope of the "conclusions stated". In this case, documents preceding the closure notice do not refer to the Trading Stock Issue. The Tribunal has no jurisdiction to hear the Trading Stock Issue. In any event, HMRC formally conceded the Trading Stock Issue in the 9 November 2012 HMRC letter which acknowledges that "Yes the property was acquired with the intention to develop it".

*The HMRC application to amend their statement of case*

51. If the Appellant's strike-out application succeeds, the HMRC application to amend their statement of case will become irrelevant. If the Appellant's strike-out application does not succeed, the Appellant will not object to the HMRC application.

**The HMRC submissions**

*The Appellant's strike-out application*

52. The "conclusion" of the enquiry was that the Appellant was not entitled to make the net realisable value adjustment, and this defines the scope of the appeal. Having regard to *Tower MCashback* and *Fidex*, even if the Trading Stock Issue was not identified in the closure notice as a reason for the conclusion, HMRC are not prevented from raising the issue in this Tribunal appeal provided ambush and unfairness are avoided by proper case management. There is no question of HMRC launching a new "roving enquiry" into the Appellant's tax return. The 9 November 2012 HMRC letter was not a closure notice and in any event did not concede the Trading Stock Issue: an intention to develop property is neutral on the issue of whether the property has been acquired as trading stock or as an investment asset. The onus is on the Appellant to prove that the conclusion in the closure notice is wrong.

*The HMRC application to amend its statement of case*

53. The Appellant has been fully apprised of the present HMRC position since the HMRC skeleton was served. There is no element of ambush or unfairness. The Tribunal must balance protection of the taxpayer with the public interest in the

collection of the correct amount of tax. The Tribunal may be invited to infer that there was a dishonest representation on the part of the Appellant and given the amount in dispute, the public interest requires that the issue be properly and fully investigated. It has not been suggested that the Appellant will be prejudiced in any material respect.

## The Tribunal's decision

*The Appellant's strike-out application*

54. It is established by *Tower MCashback* and *Fidex* that a closure notice need not state reasons for its conclusion, and that any reasons that it does give for the conclusion will not limit the jurisdiction of the Tribunal in an appeal against the closure notice. Evidence and legal and factual arguments relevant to the correctness of the conclusion in the closure notice can be considered by the Tribunal, even if they played no part in the officer's reasoning for the conclusion.

55. On the other hand, the "conclusion" in the closure notice itself will limit the Tribunal's jurisdiction. Moses LJ said 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". *Fidex* added at [45] that:

> Moreover it is far from clear that [Moses LJ's] reference to "the subject matter of the enquiry and of the conclusions" would necessarily permit a wider range of issues to be ventilated on appeal than a reference to the "conclusions stated in the closure notice". It might just as easily serve to limit those issues in so far as the subject matter of the enquiry provides context for the proper interpretation of the conclusions in the closure notice. Therefore in referring to the subject matter of the enquiry we do not understand Moses LJ to have been intending to broaden the scope of appealable issues.

56. For purposes of the present appeal, 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.

57. The issue in the present case is thus whether the Commencement of Trade Issue was the sole conclusion in the closure notice so far as the net realisable value adjustment was concerned, or whether the Commencement of Trade Issue was merely a reason for a broader conclusion that the Appellant was not entitled to make the net realisable value adjustment.

58. In determining that question, the Tribunal finds that it must interpret the closure notice in context, having regard amongst other matters to the subject matter of the enquiry and the contents of the closure notice themselves, and any other relevant correspondence (see paragraph 43(8) above).

59. It is apparent from the 5 April 2012 notice of opening of the enquiry that the subject-matter of the enquiry was not at the outset limited to the Commencement of Trade Issue, or indeed even to the net realisable value adjustment. On 5 April 2012, HMRC did not yet even know that the figure claimed for "cost of sales" was a net realisable value adjustment in respect of two properties. The 5 April 2012 notice indicated that the enquiry included also other items in the tax return, including the figures for opening stock, capital introduced, sales, general administrative, interest, other finance charges and drawings.

60. During the course of the enquiry, the enquiry was not confined solely to the issue of the net realisable value adjustment. In particular, the HMRC letter of 15 February 2013 specifically sought further information on the figure of £865,000 for sales, to which the Appellant responded on 26 March 2013.

61. The closure notice itself was also not confined solely to the net realisable value adjustment. It specifically mentioned also the rental income (that is, the figure of £865,000 for sales referred to in the previous enquiry), and the expenditure incurred: see the third sentence of the paragraph quoted in paragraph 17 above.

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.

64. Prior to the closure notice, HMRC did not in the Tribunal's view ever accept that the Appellant satisfied the Stock in Trade Issue.

65. The 3 July 2012 HMRC letter was HMRC's initial response to the information provided by the Appellant. The initial response was that on the basis of the information available, there was no evidence of trading. This cannot be understood as an acceptance by HMRC that the Trading Stock Issue was satisfied. Rather, it is an

indication that at that stage, the Commencement of Trade Issue was an obvious prominent issue. If that issue had been decided adversely to the Appellant, there would have been no need to consider the Trading Stock Issue.

66. The Tribunal agrees with the HMRC submission that the 9 November 2012 HMRC letter did not concede the Trading Stock Issue (see paragraphs 11, 50 and 52 above; see also paragraph 22 above). The statement "Yes, the property was acquired with the intention of developing it" was not inconsistent with the property being developed as an investment asset rather than as trading stock.

67. In its letter of 20 November 2012, the Appellant in effect requested HMRC to confirm that the Commencement of Trade Issue was the only issue in connection with the net realisable value adjustment. The 11 December 2012 HMRC response declined to confirm this, and implicitly left open the possibility that there may be other issues in a Tribunal appeal. (See paragraphs 12-13 above.)

68. The Tribunal then considers the wording of the closure notice itself. The Tribunal considers that the word "therefore" in the third sentence of the operative paragraph (quoted in paragraph 17 above) 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 (see paragraph 47(2) above). 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.

69. Given that the jurisdiction of the Tribunal is determined by the conclusion in the closure notice, the Tribunal does not consider that its jurisdiction can be affected as such by anything said after the closure notice was issued. Subsequent documents can be relevant only to the extent that they might shed further light on the correct interpretation of the closure notice. The Tribunal considers that subsequent correspondence of HMRC, which confirmed the HMRC position on the Commencement of Trade Issue, contains nothing that would indicate that the Commencement of Trade Issue was the conclusion in the closure notice rather than the reason for the conclusion. The same is true of the 17 December 2013 HMRC statement of case. That document indicated that at that time HMRC intended to put its case solely on the basis of the Commencement of Trade Issue. However, that does not mean that this issue was the conclusion in the closure notice rather than the reason for the conclusion.

70. Having regard to all of the considerations in paragraphs 59-69 above as a whole, the Tribunal considers that observations of the kind in paragraph 47, made by the Upper Tribunal in *Fidex*, apply also in the present case. HMRC was concerned throughout with the net realisable value adjustment, and the closure notice removed that specific item. The Tribunal concludes that the "conclusion" in the closure notice, so far as the net realisable value adjustment was concerned, was that the net realisable value adjustment was disallowed. The third sentence of the paragraph quoted in paragraph 17 above stated the conclusion, and the reasons for that conclusion were contained in the first two sentences.

71. It follows that the Tribunal has jurisdiction in this appeal to receive evidence and entertain factual and legal arguments concerning the Trading Stock Issue, regardless of whether the Trading Stock Issue was given as a reason for the conclusion in the closure notice. There is accordingly no basis for striking out the HMRC case under rule 8(2)(a) of the Tribunal's Rules.

*The HMRC application to amend their statement of case*

72. The Tribunal is required to use its case management powers to prevent ambush or unfairness to the Appellant.

73. The 22 April 2015 response by the Appellant to the HMRC application states that the Appellant will not object to the HMRC application if the strike-out application is refused. Having regard also to the HMRC submissions in support of the application, the Tribunal considers it appropriate to allow the application.

74. The Appellant expressed concerns in a letter to HMRC dated 26 February 2015, in the written response to the HMRC application, and at the 23 June 2015 hearing that HMRC intended to make allegations of dishonesty. The Appellant objected that HMRC should not be permitted to pursue such allegations at a future hearing on the basis that they have not been set out with sufficient clarity, or alternatively, the Appellant requested directions requiring HMRC to clarify their position.

75. At the hearing, HMRC clarified that at this stage HMRC did not intend to introduce further additional documents making a positive case of dishonesty, but intended to reserve its right to ask questions in cross-examination and to make submissions at the hearing. The Tribunal is satisfied that further directions in relation to this issue are unnecessary.

**Conclusion**

76. For the reasons above, the Tribunal:

(1) refuses the Appellant's application to strike out the HRMC case under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009; and

(2) allows the application by HMRC to amend its statement of case.

77. 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.

**DR CHRISTOPHER STAKER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 28 SEPTEMBER 2015**