# TC04609

**Appeal numbers: TC/2014/02334**
**TC/2014/02603**
**TC/2014/02355**
**TC/2014/02357**
**TC/2014/04767**

***PROCEDURE – whether there is an interaction between self-assessment enquiries, corporation tax enquiries and Schedule 36 Notices and penalties on the one hand, and possible criminal prosecution on the other – adjournment and directions for a preliminary hearing on these issues of principle – whether cases should remain joined – whether to grant privacy direction – whether to recategorise as complex – held, cases to remain joined but recategorised as complex, privacy direction not granted***

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

**GOLD NUTS LIMITED and others** **Appellants**
**SHAMIR PRAVIN BUDHDEO**
**LEYTON ORIENT DISPENSARY LIMITED**
**DISPENSARY HOLDINGS LIMITED**
**NOVISCOM LIMITED**

**- and -**

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

**TRIBUNAL: JUDGE ANNE REDSTON**
**MS HELEN MYERSCOUGH**

**Sitting in public at the Royal Courts of Justice, Strand, London on 3 February 2015**

**Mr Budhdeo in person; Mr James Onalaja of Counsel, for Gold Nuts Limited and related companies and Mr Beecham Koonjah of Noviscom Limited, for Leyton Orient Dispensary Limited, Dispensary Holdings Limited and Noviscom Limited.**

**Mrs Yeeni Naylor of HM Revenue & Customs Appeals and Reviews Unit for the Respondents.**

DECISION

**Introduction and summary**

1. These cases were listed for a two day hearing to decide various appeals and applications ("the Appeals and Applications") made by Mr Budhdeo and the companies at [15] and [16] below ("the Companies"). They included:

(1) an application to close an enquiry which had been opened by HM Revenue & Customs ("HMRC") on Mr Budhdeo under Code of Practice 9 ("COP9");

(2) applications to close enquiries opened under Finance Act 1998, Schedule 18, paragraph 24 ("Sch 18") into some of the Companies' corporation tax ("CT") returns;

(3) applications to close enquiries opened under Taxes Management Act 1970 ("TMA") s 9A into Mr Budhdeo's self-assessment ("SA") tax returns for 2011-12 and 2012-13;

(4) appeals against Notices issued under Finance Act 2008, Schedule 36, paragraph 1 ("Sch 36 Notices");

(5) appeals against penalties issued under Finance Act 2008, Schedule 36 ("Sch 36").

2. It appeared to us that there were five issues:

(1) whether the Tribunal should allow the application made by Mr Budhdeo and Mr Koonjah to set aside and amend the direction made by Judge Kempster on 15 January 2015;

(2) whether the Tribunal had the jurisdiction to close a COP9 enquiry, and if so, whether it should direct the closure of the enquiry;

(3) whether HMRC was using its civil powers to obtain information for the purposes of a possible criminal prosecution of Mr Budhdeo, and if so, if this was compatible with:

(a) the provisions of the Police and Criminal Evidence Act 1984 ("PACE"); and

(b) Article 6 of the European Convention of Human Rights ("the Convention");

(4) if HMRC was using its civil powers to obtain information for the purposes of a possible criminal prosecution of Mr Budhdeo, what approach the Tribunal should take in relation to the Appeals and Applications, particularly in the context of:

(a) TMA, section 28(6), which states that the Tribunal shall direct the closure of an SA enquiry on application by the taxpayer, unless satisfied that there are reasonable grounds for not doing so;

(b) the similar provisions in Sch 18, para 33(3) in relation to applications to close enquiries into CT returns;

(c) the requirement in Sch 36, para 1 that the information or document is "reasonably required by the officer for the purpose of checking the taxpayer's tax position";

(d) the Tribunal's power to cancel a penalty under Sch 18, para 48;

(e) the Human Rights Act 1998 ("HRA"), section 2(1), which says that primary legislation shall be construed "so far as it is possible to do so" in

a way which is compatible with a person's rights under the Convention, and HRA s 3, which says that a tribunal must "take into account" judgments of the European Court of Human Rights when determining a question in connection with a person's Convention rights, "so far as…it is relevant to the proceedings in which that question has arisen"; and

(f) the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), particularly the overriding objective at Rule 2 and the power to stay proceedings at Rule 5(3)(j);

(5) taking into account the Tribunal's decisions on Issues (3)-(4), whether it should:

(a) close one or more of the enquiries opened under Sch 18 into the Companies' CT returns;

(b) close one or both the enquiries opened under TMA s 9A into Mr Budhdeo's SA tax returns for 2011-12 and 2012-13;

(c) confirm, vary or set aside the Sch 36 Notices;

(d) confirm, vary or cancel the penalties issued under Sch 36;

(e) stay one or more of the Appeals and Applications under Rule 5(3)(j) pending a decision by HMRC on the possible criminal prosecution of Mr Budhdeo; and/or

(f) take another course of action.

3. In relation to Issue (1), we refused the applications to set aside Judge Kempster's direction, for the reasons given at §29ff. The Appeals and Applications remain joined.

4. Mrs Naylor applied for an adjournment to give HMRC time to take legal advice on Issue (3). The Appellants agreed that an adjournment followed by the separate hearing of Issues (2) and (3) was the appropriate way to proceed. We decided to adjourn the case and to direct that issues (2) to (4) be decided at a preliminary hearing. We invite submissions from the parties on Issue (4) as well as Issues (2) and (3) at that hearing.

5. We considered whether the case should be held in private, but decided that it should not, see §60ff.

6. We reclassified the case as complex, for the reasons set out at §80ff. The consequences of that classification are explained at §94ff.

**Difficulties with the material provided to the Tribunal**

7. Before the hearing, we received seven lever arch files of documents from HMRC and a skeleton argument from the Appellants. The day before the hearing, we were informed by the Tribunals Service that further documents had been provided by the Appellants and were on their way to Royal Courts of Justice. However, the Appellants' four lever arch files arrived after the hearing. The Appellants did not seek to refer to these bundles at the hearing but instead made oral submissions, so this difficulty did not affect the proceedings.

8. From the papers provided to the Tribunal there appeared to be inconsistencies between the material relied on by HMRC and that relied on by the Appellants as to the enquiries which had been opened; the Sch 36 Notices and penalties which had been issued; the enquiries for which an application for a closure notice had been made

to the Tribunal, and the Sch 36 Notices and penalties which had been appealed to HMRC and those which had been notified to the Tribunal. These facts need to be established before the case is heard.

9. Directions to assist with establishing the facts, and with the provision of information for the future conduct of the case, have been issued at the same time as this decision.

**Background**

10. This section sets out the background. It is based on the Tribunal's understanding, derived from the correspondence provided and for the avoidance of doubt does not constitute findings of fact. These will be determined at the preliminary and substantive hearings. Because of the lack of clarity about certain factual matters, see §8 above, at various places in this decision we have used the words "some" or "at least some" in relation to the Appeals and Applications.

11. Gold Nuts Limited is the parent company of a group which consists of the following companies:

(1) Venture Pharmacies Limited;

(2) Chemistree Homecare Limited;

(3) Chemistree Limited ;

(4) Blackbay Ventures Limited;

(5) Zanrex Limited;

(6) Corona Properties Limited;

(7) Bronze Properties Limited:

(8) Vertex Properties Limited;

(9) R Square Properties Limited;

(10) Leyton Orient Dispensary Limited;

(11) Dispensary Holdings Limited; and

(12) Enviroplex Limited.

12. Mr Budhdeo is a director of these companies. He is also a director of Noviscom Limited, a company which is not part of the Gold Nuts group.

13. On 6 December 2013, HMRC wrote to Mr Budhdeo informing him that they were enquiring into his affairs under COP9. He was provided with the booklet which sets out that Code of Practice ("the COP9 Booklet"), which has the subheading: "HMRC investigations where we suspect tax fraud."

14. The Tribunal was provided with a copy of the COP9 Booklet provided to Mr Budhdeo. The first paragraph reads:

> *HM Revenue & Customs (HMRC) Investigation of Fraud statement*
>
> The Commissioners of HMRC reserve complete discretion to pursue a criminal investigation with a view to prosecution where they consider it necessary and appropriate.

> In cases where a criminal investigation is not started, the Commissioners may decide to investigate using the COP9 investigation of fraud procedure.
>
> Under the investigation of fraud procedure, the recipient of COP9 is given the opportunity to make a complete and accurate disclosure of all irregularities in their tax affairs.
>
> Where the recipient fails to make a full disclosure of the tax frauds they have committed, the Commissioners reserve the right to start a criminal investigation with a view to prosecution.
>
> In the course of the COP9 investigation, if the recipient makes materially false or misleading statements, or provides materially false documents, the Commissioners reserve the right to start a criminal investigation into that conduct as a separate criminal offence."

15. The second paragraph of the COP9 Booklet is headed "Introduction" and begins:

> "We issue this Code of Practice in selected cases where we suspect tax fraud. In many cases we carry out criminal investigations of suspected fraud with a view to prosecution. But under this Code, we offer you instead the chance to make a full disclosure under a contractual arrangement called a Contractual Disclosure Facility (CDF). You have 60 days to respond. If you make a full disclosure of all tax frauds and irregularities, we will not pursue a criminal investigation with a view to prosecution."

16. The scope of the COP9 enquiry into Mr Budhdeo includes all entities over which he is able to exercise control. Mr Budhdeo was offered the CDF referred to in the Introduction, and further set out at Section 2 of the COP9 Booklet as follows:

> "2.*1 The Contractual Disclosure Facility (CDF) – what am I being offered*?
>
> The CDF offers you the chance to disclose any tax fraud you have been involved in. Remember this offer expires 60 days after you receive our letter making the offer.
>
> 2.2 *HMRC's undertaking*
>
> In exchange for your undertaking, we agree that we will not pursue a criminal investigation into the tax frauds you disclose.
>
> 2.3 *Your undertaking*
>
> You undertake to make a full disclosure of all your tax irregularities under the terms of the CDF…
>
> This is the only way that you can be certain that we will not carry out a criminal investigation into the tax frauds we suspect.
>
> The CDF is only suitable for you if you:
>
> - Have committed tax fraud
> - Wish to fully disclose the tax frauds you have committed…"

17. On 10 December 2013, Mr Budhdeo replied. He refused to sign the CDF, and said "I unequivocally and resolutely deny any tax fraud…I have not committed tax fraud and I will not admit to something I have not done."

18. On 22 January 2014, HMRC opened an enquiry into Mr Budhdeo's 2011-12 SA tax return under TMA s 9A. On 8 April 2014 they opened an enquiry into his 2012-13 SA tax return.

19. In the period preceding the opening of the COP9 enquiry, HMRC had opened enquiries under Sch 18 into some of the Companies within the Gold Nuts group. They had also issued Sch 36 Notices on some of the Companies.

20. Since 10 December 2013, HMRC have opened further enquiries under Sch 18 and issued further Sch 36 Notices in relation to some of the Companies. They have also issued penalties for non-compliance with some of the Sch 36 Notices.

21. On or around 8 April 2014, an enquiry was opened into Symbio Energy LLP, a partnership of which Mr Budhdeo is a partner.

22. Mr Budhdeo said at the hearing that HMRC was using the enquiries under Sch 18, TMA s 9A and the Sch 36 Notices in order to obtain information for the purposes of a possible criminal prosecution. Mrs Naylor did not dispute that. We observe that it is also consistent with the witness statement given by Mr Douglass, the HMRC investigating officer for the Sch 18 enquiries, which concluded by saying that one of the reasons why closure notices should not be granted in relation to the Companies is that "the enquiries into these companies are integral to the COP9 enquiry on Mr Shamir Budhdeo."

23. The Companies applied to the Tribunal for closure notices for at least some of the Sch 18 enquiries. Mr Budhdeo applied to close the TMA s 9A enquiries. Mr Budhdeo and the companies have also appealed at least some of the Sch 36 Notices to HMRC, and at least some of the penalties for non-compliance with those Notices. Shortly before this hearing, Mr Budhdeo notified at least some of the Appeals and Applications to the Tribunal. Mr Budhdeo also applied to the Tribunal to close the COP9 enquiry.

24. As far as the Tribunal is aware, the cases listed before us do not include any appeals or applications concerning Symbio Energy LLP.

25. All the Appeals and Applications were joined. On 8 January 2015, Gold Nuts Limited applied to the Tribunal for the Companies' appeals and applications to be separated from the hearing of Mr Budhdeo's appeals and applications. On 15 January 2015, Judge Kempster refused that application.

**Issue (1): Applications to set aside Judge Kempster's direction**

*Submissions of the parties*

26. Mr Budhdeo and Mr Koonjah requested that the Tribunal set aside and amend Judge Kempster's direction that Mr Budhdeo's appeals and applications be joined with those relating to the Companies. They said that this separation would help prevent a leakage of information between (a) the COP9 related enquiry into Mr Budhdeo and (b) the enquiries and Notices relating to the Companies.

27. Mr Onalaja did not dissent from the submissions made by Mr Budhdeo and Mr Koonjah.

28. Mrs Naylor said that HMRC did not agree that Judge Kempster's direction should be set aside. In HMRC's view, it was entirely appropriate that all the Appeals and Applications be heard together.

*The Tribunal Rules and discussion*

29. Rule 6 of the Tribunal Rules says that:

> "(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
>
> (2) An application for a direction may be made–
>
> (a) by sending or delivering a written application to the Tribunal; or
>
> (b) orally during the course of a hearing.
>
> (3) An application for a direction must include the reasons for making that application.
>
> (4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.
>
> (5) If a party or other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction."

30. Although the Appellants did not specify that their applications to set aside and amend Judge Kempster's direction were made under Rule 6(5), we have taken this to be the case.

31. In *DDR Distributions v HMRC* [2012] UKFTT 442 ("*DDR*"), Judge Mosedale considered an application to set aside a direction. She said at [22] that:

> "in my view, Parliament only intended r 6(5) to be used in limited circumstances, and in particular where:
>
> i. Circumstances have changed;
>
> ii. Obvious error of law in direction;
>
> iii. Procedural irregularity in relation to the hearing at which direction made; or
>
> iv. A party did not appear and was not represented at the directions hearing.
>
> A judge would of course only grant the set-aside where it was in the interests of justice to so do."

32. Judge Mosedale added at [23] that "there may be some additional circumstances in which r 6(5) would be appropriate, but such circumstances would be exceptional and would not include an application on the grounds simply that a party considers the original direction was wrong." Her analysis was upheld by the Upper Tribunal in *Clear plc (in Liquidation) v HMRC* [2014] (Judge Herrington).

33. Neither Mr Budhdeo or Mr Koonjah identified or relied on any error of law or procedural irregularity in Judge Kempster's direction. Neither did they submit that circumstances had changed. The only remaining category in Judge Mosedale's list is (iv): Judge Kempster's direction was given on the papers, so there was no directions hearing.

34. However, the mere fact that there was no hearing of the direction application does not of itself mean that the direction can be set aside under Rule 6(5). It seems to us that (iv) is relevant where the parties subsequently put forward a submission or fact which was unknown to the judge making the direction, or where insufficient weight has been given to a fact or submission which a party would have put forward, had there been an oral hearing.

35. In this case, the only submission made by Mr Budhdeo and Mr Koonjah was that separating the appeals and applications before the Tribunal would help to prevent leakage of information between (a) the enquiries and Notices relating to the Companies, and (b) those relating to Mr Budhdeo. We think that submission is misplaced. Whether or not the Appeals and Applications are joined or otherwise is a different issue from the working of enquiries within HMRC. That is a matter for HMRC's own internal management, over which the Tribunal has no jurisdiction.

36. Judge Mosedale's list of the circumstances when a direction would be replaced by another is of course not statutory. We considered whether there were any other circumstances which might be relevant in this case, and found that there were not.

37. We therefore have no basis on which we can set aside Judge Kempster's direction. Furthermore, given the close linkage between the appeals and applications made by the Companies, and those made by Mr Budhdeo, we agree with Judge Kempster that it is appropriate for all the Appeals and Applications to be joined.

**Issue (2): COP9 and the Tribunal's jurisdiction**

38. Mrs Naylor said that the Tribunal had no jurisdiction to close a COP9 enquiry. She relied on *Shahzad Khan v HMRC* [2010] UKFTT 19 (Judge Brooks and Mr Midgeley). Mr Budhdeo did not put forward any legal submissions, but asked for the opportunity to research the point.

39. The only authority with which the Tribunal was provided therefore supported HMRC's position that the Tribunal has no jurisdiction to close a COP9 enquiry.

40. We reminded the parties that the Tribunal is a creature of statute, so only has the jurisdiction given to us by Parliament. We said that we too were not aware of any statutory provision giving us jurisdiction to close a COP9 enquiry.

41. However, given that we are adjourning the appeal in any event, and taking into account Mr Budhdeo's request for time to make submissions on this point, we have not decided this issue. At the preliminary hearing the parties will be free to make further submissions and put forward authorities in support of those submissions.

**Issue (3): Possible prosecution and the requirements of PACE and the Convention**

*Mr Budhdeo's submissions*

42. Mr Budhdeo said that he had refused to sign the CDF and that it was clear from the COP9 Booklet that he could therefore be prosecuted for fraud. He submitted that HMRC therefore had to operate in accordance with PACE.

43. He relied on *R v Gill* [2003] EWCA Crim 2256; STC 1229 ("*Gill*") where the Court of Appeal considered whether HMRC were required to operate in accordance with PACE. He cited his recollection of the *ratio* of the case from memory. We set out here some passages from *Gill* which are substantially the same as his recollections:

> **"[**35] It can be seen from COP 9 that it is now made clear to the taxpayer suspected of fraud that the Revenue is not at that time carrying out a criminal investigation but reserves the right to do so in the future. Although we have not seen the document sent to the appellants, we understand that it drew a similar distinction. Mr Abell [Counsel for HMRC] submits that such a document underlines his

submission that those carrying out a Hansard interview are not 'charged with a duty of investigating offences or charging offenders' within the meaning of s 67(9) of PACE and that the questions were not put 'for the purpose of obtaining evidence' within the meaning of para 10.1 of Code C in the form then in force.

[36] The judge [of the court below] accepted that submission. He held that the Hansard interview was part of a civil process designed to gather in money and not a criminal investigation. As we read his ruling, he formed the view that, if Parliament had taken the view that a caution was required it would have so provided when it enacted s 105 of the 1970 Act. In short the judge took the view that the Hansard interview was part of a separate well-understood form of proceeding outside the scope of Code C.

[37] While we fully understand the importance of the Revenue being able to recover the tax owed to it and the value of the Hansard procedure in that regard, we are unable to accept the Revenue's submission. The statement of the Chancellor of the Exchequer made in Parliament on 18 October 1990 makes it quite clear that, while in cases of tax fraud the Revenue will be influenced by a full confession in deciding whether to accept a money settlement (including presumably an appropriate penalty), it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a criminal offence or offences, so that it is in our view evident that the role of the SCO investigating tax fraud involves the investigation of a criminal offence.

[38] Although we recognise that a caution had not been administered in the past at a Hansard interview because such an interview has not been regarded by the Revenue as subject to Code C, in our judgment, that is to give too narrow an interpretation of the expression 'charged with the duty of investigating offences' in s 67(9) of PACE. The officers of the SCO were charged with investigating serious fraud and, since serious fraud inevitably involves the commission of an offence or offences, it seem to us to follow that they were charged with the duty of investigating offences.

[39] The purpose of Code C is to ensure that interviewees are informed of their rights, one of which is not to answer to questions, and to inform them of the use which might be made of their answers in criminal proceedings. It is clear from the Parliamentary statement that the SCO had the possibility of criminal proceedings in mind in respect of the fraud about which they were asking questions and we can see no reason why the Revenue should not have cautioned taxpayers suspected of fraud before asking them questions in these circumstances. We cannot see why a caution should reduce the chances of a taxpayer making a full confession, which was the purpose of the process. However that may be, since the Revenue expressly reserved the right to prosecute for fraud, it appears to us that one of the purposes of asking the questions must have been the 'obtaining of evidence which may be given to a court in a prosecution', even if the Revenue's main aim was to arrive at a monetary settlement.

[40] For these reasons we have reached a different conclusion from the judge and hold that Code C applied to the Hansard interview conducted on 8 March 1995 and that the appellants should have been cautioned and a tape recording made of the interview. The question then arises whether the evidence of what the appellants said at the interview should have been excluded under s 78 of PACE on the ground that its

> admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. We turn to that question."

44. The Court of Appeal in *Gill* went on to decide, on the facts of that case, that despite HMRC's failure to comply with PACE, there was nevertheless no unfairness in admitting as evidence in the criminal case, the material HMRC had obtained in its enquiries.

45. Mr Budhdeo also referred (again from memory) to HMRC's own guidance in the Fraud Civil Investigation Manual, which, as he understood it, says that if a person refuses to agree to the CDF, that he should either be prosecuted or the COP9 investigation dropped. Mr Budhdeo had asked for various disclosures of documents created or held by HMRC about the reasons for the enquiry commencing, and about why it was continuing, but had not been provided with the material for which he had asked. He submitted that this was a breach of the disclosure provisions which would apply to evidence in a criminal prosecution.

46. He also said that under Article 6 of the Convention, he has the right to know the case against him, and for that reason too, HMRC must disclose the material on which they are seeking to rely. As we understand it, the parts of Article 6 on which he relies are Article 6(2), which states that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law" and Article 6(3)(a), which reads:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;…"

47. Mr Budhdeo said that as the burden of proof in a criminal appeal was higher than in civil matters, this should be taken into account in the way the case was approached.

48. The submissions set out above underpin Mr Budhdeo's main argument, which was that HMRC were improperly using their civil powers under Sch 18, TMA s 9A and Sch 36 to provide evidence which they could then use against him in a criminal prosecution. Furthermore, he and the Companies were being compelled to provide certain of the information by the levying of financial penalties under Sch 36. Mr Budhdeo said that the Applications and Appeals should be allowed by the Tribunal because HMRC were abusing their powers.

49. He was also concerned that the man in the street would think, from the way the case was being handled, that he was guilty of a criminal offence and said that this was reputationally damaging.

50. Having heard HMRC's submissions, set out below, Mr Budhdeo was content for the case to be adjourned and directions given for a preliminary hearing, to be followed in due course by a substantive hearing.

*Mr Onalaja's submissions*

51. Mr Onalaja echoed Mr Budhdeo's submissions on PACE, saying that there was merit in his argument that it was "procedurally wrong" of HMRC to bypass PACE.

Both he and Mr Koonjah concurred with HMRC's suggestion that this hearing be adjourned and that a preliminary hearing be directed.

*HMRC's submissions*

52. Mrs Naylor said that the Appeals and Applications were all civil matters, and that "potentially any issues which arise further down the line in context of criminal prosecution will be considered then, and if there are any breaches of PACE they will be considered then." We understand her to mean that HMRC will deal with any difficulties that their current enquiries might cause to a criminal prosecution, if or when there is such a prosecution.

53. Mrs Naylor said that, in the light of Mr Budhdeo's submissions on PACE and Article 6 of the Convention, HMRC would like to discuss the issues raised with a view to taking legal advice, and that an adjournment followed by a preliminary hearing on this issue would be of assistance.

*Adjournment decision*

54. We agree with the parties that it is appropriate for Issue (3) to be the subject of full argument at a preliminary hearing. We therefore decided to adjourn this hearing under Rule 5(3)(h) of the Tribunal Rules and made the directions attached to this decision.

**Issue (4): the position of the Tribunal**

55. Mrs Naylor said that if HMRC's use of its civil powers interferes with any subsequent criminal proceedings, that is a matter for HMRC. Mr Budhdeo disagreed. We would welcome submissions from the parties on whether the Tribunal's powers over closure notices, Sch 36 Notices and Sch 36 penalties interact with Issue (3), particularly in the context of:

(1) HRA s 2(1) and s 3, set out below; and/or

(2) the Tribunal Rules, in particular, the overriding objective at Rule 2.

56. HRA s 2(1) reads:

> **"2 Interpretation of Convention rights**
>
> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any--
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights…
>
> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

57. HRA s 3 reads:

> **3 Interpretation of legislation**
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section--
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

58. The following questions occur to us (although there may well be others):

(1) if the decision on Issue (3) is that there is a breach of PACE and/or a breach of Mr Budhdeo's Article 6 rights under the Convention, but the Tribunal nevertheless upholds the Sch 36 Notices, confirms the penalties, and/or refuses the closure notices, will we have in effect endorsed HMRC's use of its civil powers?

(2) If so, will the Tribunal have breached its obligations under the HRA, and/or will we have acted in accordance with the overriding objective?

(3) In the context of Issue (3), the HRA and the Tribunal Rules, how should the Tribunal apply:

(a) the "reasonable grounds" tests in the statutory provisions relevant to closure notices;

(b) the "reasonably required" test in Sch 36 para 1; and

(c) the "reasonable excuse" provision in Sch 36, para 45 in relation to the penalty appeals?

(4) What if any assistance is provided from the case law on the interaction between civil and criminal proceedings, such as *Mote v SSWP* [2007] EWCA Civ 1324 ("*Mote*"), and *VTFL v Clough* (previously *V v C*) [2001] EWCA Civ 1509 ("*VFTL*")?

(5) Are other Tribunal Rules relevant? For example, should we use our power under Rule 3(j) to stay any or all of the Appeals and Applications?

**Issue (5): determination of the Appeals and Applications**

59. The purpose of directing a preliminary hearing on Issues (2) to (4) is to establish the approach the Tribunal should take to the Appeals and Applications. The preliminary hearing is thus to determine principles which will then be applied to each Appeal or Application at the substantive hearing. In summary, the matters to be decided are whether the Tribunal should:

(1) close one or more of the enquiries opened under Sch 18 into the Companies' CT returns;

(2) close one or both the enquiries opened under TMA s 9A into Mr Budhdeo's SA tax returns for 2011-12 and 2012-13;

(3) confirm, vary or set aside the Sch 36 Notices;

(4) confirm, vary or cancel the penalties issued under Sch 36;

(5) stay one or more of the Appeals and Applications under Rule 5(3)(j) pending a decision by HMRC on the possible criminal prosecution of Mr Budhdeo; and/or

(6) take another course of action.

**Privacy**

60. At the heart of Mr Budhdeo's case is his statement that he is innocent of any fraud. In addition to his submissions about the interaction between these proceedings and possible criminal prosecution, he has expressed concerns about possible reputational damage arising from the COP9 enquiry and these proceedings.

61. However, neither Mr Budhdeo nor the Companies made applications for the case to be determined in private. Although Mrs Naylor acknowledged the risk to possible future criminal proceedings, she said that was a matter for HMRC to manage and made no privacy application on behalf of HMRC.

62. Nevertheless, given Mr Budhdeo's submissions, we decided we should consider the privacy issue. Initially we thought that the preliminary hearing might be held in private, and that decision anonymised. We expressed that view at the hearing of *Joshy Matthew v HMRC,* which occurred two days after this hearing, as we needed to decide whether or not there were any relevant links between Mr Matthew's case and this one, and if so, whether any privacy ruling in this case should be extended to Mr Matthew's case. We found that there were no relevant links, so that even if a privacy direction had been in force for this case, it would not have extended to Mr Matthew's hearing.

63. However, following further consideration, we decided that there is no legal basis on which a privacy direction can now be given for this case, for the reasons set out below.

*The Tribunal Rules*

64. The starting point is that "all hearings must be held in public", see Rule 32(1) of the Tribunal Rules. Under Rule 32(2), the Tribunal is able to direct that a hearing is held in private if it considers that restricting access to the hearing is justified:

> (a) in the interests of public order or national security;
>
> (b) in order to protect a person's right to respect for their private and family life;
>
> (c) in order to maintain the confidentiality of sensitive information;
>
> (d) in order to avoid serious harm to the public interest; or
>
> (e) because not to do so would prejudice the interests of justice.

65. Two of these exceptions are potentially in issue, being (b) Mr Budhdeo's right to private life, as he may suffer reputational damage if the possibility of a criminal prosecution is publicised, and (e) the prejudice to the interests of justice if the outcome of the preliminary hearing is published, as that might damage a future criminal trial.

*Right to private life/issues of reputation*

66. In *Global Torch Ltd v Apex Global Management Ltd* [2013] EWCA Civ 819 ("*Global Torch*"), the Court of Appeal considered the issue of reputational damage in the context of a privacy application. Kay LJ, giving the judgment of the Court, said at [33]:

> "When the open justice point was being argued before the Judge [at the High Court], the position was no different from that which is present in many cases, civil or criminal. There are allegations and counter-allegations of serious misconduct. A person on the receiving end of such allegations will always be at significant risk of reputational damage. However, if the allegations are false, he will obtain his

> vindication through the judicial process, if not as a result of interlocutory application, then after a trial."

67. In *Banerjee v HMRC* [2009] EWHC 1229 (Ch), Henderson J said at [26] that:

> "In determining whether it is necessary to hold a hearing in private, or to grant anonymity to a party, the court will consider whether, and if so to what extent, such an order is necessary to protect the privacy of confidential information relating to the party, or (in terms of art 8 of the convention) the extent to which the party's right to respect for his or her private life would be interfered with. The relevant test to be applied in deciding whether a person's art 8(1) rights would be interfered with in the first place, or in other words whether the article is engaged so as to require justification under art 8(2), is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [21], [2004] 2 All ER 995 at [21], [2004] 2 AC 457 per Lord Nicholls of Birkenhead, and *Murray v Express Newspapers plc* [2008] EWCA Civ 446 at [24], [2008] 3 FCR 661 at [24], [2008] 3 WLR 1360 of the judgment of the court. If art 8(1) is engaged, the court will then need to conduct a balancing exercise on the facts, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand…In cases of the present type, the competing interest is the general imperative for justice to be done in public, as confirmed by art 6(1) of the convention."

68. Henderson J went on to say that in the context of taxation:

> "[35] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute…in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

69. From these authorities we find that the threshold is very high before the Tribunal will prefer a person's Article 8 rights over the open justice principle. Is the position any different when interlocutory proceedings, such as the preliminary hearing, are in issue?

*Interlocutory proceedings*

70. In *Richard Chan v HMRC* [2014] UKFTT 256, a case where anonymity was refused, Judge Mosedale said at [91],

> "I recognise that the general public may be less legalistic than a tribunal or disciplinary body in making make the legal distinction between what is proved (or accepted) and what is merely alleged. For this reason, it might be right to keep decisions in preliminary hearings in what is in effect an alleged dishonesty case anonymised where there is risk to reputation."

71. Judge Mosedale went on to say that she was not deciding that point, as the case in question was not a preliminary decision but a final decision. However, in *Global Torch* Kay LJ said at [34]:

> "Mr Warby [for the Appellants] attempted to respond to this analysis by an alternative submission whereby he contended that, at the interlocutory stage, the open justice principle might yield to the right to privacy and protection of reputation on the basis that the putative victim has at least an arguable case. This links with his fifth submission that the open justice principle can safely be mollified at the interim stage because, if the allegations are later found to be true at trial, publicity can follow, with the result that a temporary suspension of open justice will have done no harm. I can see no warrant for a general lowering of the bar. Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice. If an application for departure is made, it will fall to be decided by reference to the principles which I have been considering, whether the proceedings are at an interim or final stage."

72. *Global Torch* was a dispute between companies. At [28] Kay LJ said;

> "It is concerned with allegations and counter-allegations of commercial misconduct, absent any element of confidential information…As with many civil and most criminal cases, grave allegations have been made. The judicial process will determine whether and to what extent they are established. Public airing of the allegations may embarrass one side or the other. It often does, but that is not in itself a good reason to close the doors of the court."

73. We considered whether there was scope for a different approach to interlocutory cases when one of the parties is a government body, as here. However, the Court of Appeal's position is clear: there is "no warrant for a general lowering of the bar" and "the open justice principle has universal application" unless a departure is strictly necessary.

74. We thus find that there is no basis to take a different approach so as to allow this case to be held in private, either (a) because of the general risks to reputation caused by the possibility of a criminal charge being aired in public, even though (b) because the preliminary hearing (and this one) are both interlocutory hearings.

*Prejudice to the interests of justice*

75. In *Mr Swallow v HMRC* [2010] UKFTT 481 (TC) ("*Swallow*") at [67] Judge Walters refers to there being "a public interest in preserving the integrity of the criminal investigation." As we understand his decision, he held the *Swallow* hearing in private, and anonymised the decision to reduce the risk of a prejudicial interaction between the tribunal proceedings and the criminal prosecution, see [78] of the judgment.

76. Although similar submissions were made in *McNicholas Construction Co Ltd v C & E Commrs* [1997] VATDR 73 (VTD 14975) ("*McNicholas*"), they were rejected by Stephen Oliver QC, the Tribunal Chairman. However, we note that HMRC's Counsel in *Swallow* informed the Tribunal at [48] that "the decision of the VAT tribunal not to stay an appeal in comparable circumstances in *McNicholas*…led to the later collapse of the related prosecutions." At [74] Judge Walters says, in reliance on a report published in *Taxation* magazine, that the trial judge in *McNicholas* decided that

that "the evidence disclosed in public at the VAT Tribunal and later published was an abuse of process, and the various defendants could not receive a fair trial."

77. In the absence of any other factors, a privacy order might therefore be justified in this case. However, another very important factor does exist, and that changes the position.

*The hearing of this case*

78. This hearing was in public, although only the parties and their representatives attended. In *Banerjee* at [38] Henderson J explained the consequences*:*

> "The preponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, if at all, only in exceptional circumstances where the interests of justice so require…The touchstone, in my view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public."

79. Although it might have been possible, because of the potential prejudice to the interests of justice, for the case to have been held in private and the decisions anonymised, that opportunity has been lost because this hearing took place in open court. As a result, there is no purpose in directing that the preliminary hearing be in private.

**Categorisation**

80. This case is currently categorised as "basic." That is the correct categorisation for a simple application for a closure notice, or an appeal against a low-value penalty. At the hearing the parties agreed that recategorisation was appropriate, although no submissions were made on whether it should be a standard or complex case.

*The Tribunal Rules and the Practice Statement*

81. Rule 23 of the Tribunal Rules says that:

> "(4) The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case--
>
> (a) will require lengthy or complex evidence or a lengthy hearing;
>
> (b) involves a complex or important principle or issue; or
>
> (c) involves a large financial sum.
>
> (5) If a case is allocated as a Complex case--
>
> (a) rule 10(1)(c) (costs in Complex cases) applies to the case; and
>
> (b) rule 28 (transfer of Complex cases to the Upper Tribunal) applies to the case."

82. A standard case is "any case that is not allocated to any of the Default Paper, Basic or Complex categories," see the *Tribunal Practice Statement "Categorisation of Cases in the Tax Chamber*."

83. At [4] the Practice Statement considers complex cases, and having set out the relevant part of Rule 23, says:

> "The Tribunal will assess whether, having regard to the nature of a particular case, any one or more of these criteria are satisfied. In making this assessment the Tribunal will take into account all the

> circumstances, including the implications of the costs-shifting regime (subject to the right of the taxpayer to opt out) and the fact that cases allocated to the Complex category are eligible, subject to various consents, to be transferred to the Upper Tribunal.
>
> If on such an assessment the Tribunal considers that a case meets the stated criteria, it will, in the absence of special factors, allocate the case to the Complex category."

*Case law guidance on categorisation*

84. In *Capital Air Services v HMRC* [2010] UKUT 373 (TCC) (Judges Warren and Oliver) ("*Capital Air Services*") the Upper Tribunal said at [25]:

> "In any case, it is clear beyond argument, we think, that the assessment of what is 'complex' evidence or a 'complex' issue within r 23(4)(a) and (b) is a matter of judgment. The task of making that judgment is assigned to the tribunal whose decision, if made applying the correct principles, can be overturned on an appeal to the Upper Tribunal only if it can be said that no reasonable tribunal could have reached that decision."

85. If a case comes within one of the categories listed in Rule 23(4), can the Tribunal nevertheless decide to categorise it as standard? At [29] the Upper Tribunal say that, in the context of the facts of *Capital Air Services*, they did not need to decide this question. They nevertheless continue at [30]:

> "However, we do say this: if the tribunal does have a discretion to allocate other than as Complex a case which is capable of being allocated as Complex, it must be a discretion of limited scope. The general rule should, we consider, be that a case capable of being allocated as Complex ought to be so allocated. Any discretion to allocate other than in accordance with that general rule should be exercisable only in the light of special factors."

86. In *Dreams v HMRC* [2012] UKFTT 614(TC) Judge Bishopp indicated at [31] that "special factors" meant "exceptional circumstances."

*Whether Issues (3) and (4) are "important"*

87. In deciding whether or not to categorise a case as complex, the Tribunal must first decide whether or not it meets one of the conditions in Rule 23(4). In the instant case the only relevant category is (b) "a complex or important principle or issue."

88. Issue (3) is whether, as Mr Budhdeo submits, the protections provided by PACE and the Convention have been breached by the Sch 18 and TMA s 9A enquiries, the Sch 36 Notices and the levying of financial penalties for non-compliance. Issue (4) is how the Tribunal should respond to the decision on Issue (3), when taken together with its statutory powers, its obligations under the HRA and the Tribunal Rules.

89. In our judgment, Issues (3) and (4) raise "important principle[s] or issue[s]" within the scope of Rule 28.

90. Following the guidance of the Upper Tribunal in *Capital Air Services*, we should therefore allocate the case as complex, unless there are "special factors." We are aware that the Appeals and Applications in issue here are closure notices, Sch 36 appeals and penalty appeals, and that these are routine matters. It is however, often the case that important principles are contained within a more humdrum context. We find that the routine nature of the Appeals and Applications does not constitute

"special factors" so as to allow us to categorise the case otherwise than as complex, and we so decide.

91. In coming to that decision we also considered whether it was possible to allocate only Issues (2) to (4) as complex, leaving Issue (5) as standard. But Rule 23 is clear that it is "cases" which are allocated, not "issues" or "hearings." In *Capital Air Services v HMRC* [2010] UKUT 373 (TCC) ("*Capital Air Services (Costs)*") the Upper Tribunal come to the same conclusion, see [7] to [9] of that decision.

92. We are also conscious that, although the parties agreed that the case was wrongly categorised, we did not have submissions as to whether it should be categorised as complex. However, in *Capital Air Services,* the Upper Tribunal said at [23] (emphasis in original):

> "The next question is who is to assess whether a case should be allocated as Complex. The answer to that is, we consider, clear: it is the tribunal. Rule 23(4) permits *the tribunal* to allocate a case as Complex only if *the tribunal* consider that the case satisfies one or more of the three criteria."

93. Finally, we are reassured that, in *Swallow,* which considered similar but not identical questions about the interaction between the civil and criminal law, Judge Walters also reclassified that case as complex, see [92] of the decision.

*Consequences of recategorisation*

94. One of the consequences of the recategorisation as complex is that the losing party/ies may be directed to pay the costs of the winning party/ies when the case is heard at the First-tier Tribunal under Rule 10(1)(c)(i) of the Tribunal Rules.

95. However, Rule 10(1)(c)(ii) allows each appellant to "opt out" of the costs risk if a letter or email to that effect is sent by or on behalf of each appellant to reach the Tribunal within 28 days of the date of issue the recategorisation decision. A copy of any such opt-out should also be served on HMRC. In this case, the relevant date from which the 28 days will start to run is the date on this decision notice.

96. It should also be remembered that costs directions are not automatic. Rather, they are at the discretion of the Tribunal, so deciding not to opt-out does not of itself guarantee that costs will be awarded to the winning party. But if the appellants do not opt out, they are on what is known as "costs risk."

97. The costs in question can include costs incurred before the recategorisation, see *Capital Air Services (Costs)* at [10] to [14].

98. Recategorisation may also allow the case, or one or more issues, to be transferred to the Upper Tribunal under Rule 28 rather than being decided by this Tribunal. Rule 28 provides that a transfer can only happen if (a) all parties consent; (b) this Tribunal refers that or those issues to the President of this Tribunal and (c) both he and the President of the Upper Tribunal agree that the issue(s) should be so transferred. Because the Upper Tribunal only decides questions of law, not questions of fact, a case or issue is not suitable for transfer under Rule 28 unless the facts are not in dispute.

**Decision**

99. As a result of the foregoing, we have decided Issue (1) against the Appellants, so the Appeals and Applications remain joined. Issues (2) to (4) will be decided at a preliminary hearing, with Issue (5) being decided at a subsequent substantive hearing.

**Appeal rights**

100. 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 Rules. 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 REDSTON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 20 FEBRUARY 2015**