[2019] UKFTT 710 (TC)

TC07482

INCOME TAX – closure notice and amendment to 2012-2013 return – HMRC's disallowance of partnership losses for relief against other income on the basis he was a partner in Great Marlborough LLP which was not trading on a commercial basis with a view to profit – HMRC's issuing of two letters purporting to open an enquiry – HMRC's failure to open an enquiry into the partnership return - number of procedural challenges – validity of HMRC's section 9A TMA 1970 enquiry – validity of HMRC closure notice – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00594

BETWEEN

JORG MARTIN **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Taylor House, London on 10-11 July 2019 with written closing submissions on behalf of HMRC on 11 September 2019 and from the Appellant on 11 October 2019 received by the Judge on 13 November 2019

The Appellant appeared in person

Jonathan Davey QC, Barbara Belgrano and Sam Chandler, Counsel instructed by HM Revenue and Customs' Solicitor's Office appeared for the Respondents

DECISION

INTRODUCTION – THE DECISION UNDER APPEAL

1. The Appellant appeals against a closure notice issued by HMRC in respect of his 2012-2013 tax return (the "12/13 Return") dated 7 July 2017. The closure notice disallowed the Appellant's claims to:

a) a partnership loss of £438,817, relating to Great Marlborough LLP, which HMRC decided was not available for relief against other income; and

b) loan interest relief of £558 relating to Great Marlborough LLP ("GM LLP"), which HMRC decided was not available for relief against other income.

2. As a result of disallowing both the Appellant's claims in full, HMRC amended the Appellant's 12/13 Return reducing the claims to nil. The 12/13 Return was amended from the claim that the Appellant had paid £229,594.29 too much tax to show that he had paid £9,919.18 too much tax (a difference of £219,675.11).

3. HMRC had been ordered by the First-tier Tribunal (the 'FTT') to end their enquiry and issue the closure notice following a successful application by the Appellant. On 12 June 2017, following a hearing on 22 May 2017, the FTT (Judge Mosedale) released its decision in respect of the application for closure of the enquiry into the 12/13 Return (*Jorg Märtin v HMRC* [2017] UKFTT 0488 (TC) (the "FTT's *Märtin* Decision"). The FTT's *Märtin* Decision ordered HMRC to close the enquiry into the 12/13 Return within 30 days of the release of its decision[1].

THE GROUNDS OF APPEAL WITHIN THE NOTICE OF APPEAL

4. The precise scope of the appeal before the Tribunal is not straightforward to identify. The nature and grounds of the appeal have developed since the Appellant sent his email which is taken to be his Notice of Appeal. By the time the hearing of the appeal was concluded, and even in post hearing submissions, the issues in the case have evolved greatly. The issues now raised are dealt with in greater detail below. The Tribunal begins by outlining the key challenges raised by the Appellant's Notice of Appeal.

5. The Appellant's Notice of Appeal was not contained in the standard form so there were no formally pleaded grounds. Instead the Notice was accepted to be an email to the Tribunal dated 2 January 2018 in which the Appellant simply stated (so far as relevant):

"As I explained in my previous application in detail I do not believe that HMRC ever opened a valid Section 9A enquiry into my 2012/13 tax return. Despite years of correspondence and the May 2017 Tribunal hearing HMRC so far has never provided any explanation/evidence that a valid s9A enquiry into my 2012/13 tax return was ever opened. Without any valid enquiry opened by HMRC I am due a substantial tax refund for 2012/13."

6. The reference to a "previous application" appears to be a reference to an email to the FTT dated 6 September 2017. That email, states (so far as is relevant):

"In regards to the grounds of my appeal – as I stated in my previous correspondence to the Tribunal I believe there was no valid s9A enquiry opened into my 2012/13 tax return. Without valid enquiry opened by HMRC the 2012/13 tax return should stand as originally filed (and hence I should receive the tax refund as per that filing).

[1] The decision also made reference to HMRC's enquiry in respect of the tax year 2014/2015 but the Appellant's appeal against this enquiry was struck out by the FTT (Judge Mosedale) in October 2018 ([2018] UKFTT 660 (TC)).

However, in case the Tribunal should have a different view and conclude that a valid s9A enquiry notice was issued for 2012/13 I believe there would be another ground for the Tribunal to consider.

In the 2012/13 Closure Notice HMRC declines the tax refund on the basis that I did not provide any information to HMRC. However, as discussed in the previous hearing HMRC never requested any information from me for three years (hence my reason for requesting Closure Notice from the Tribunal). Only when I requested Closure Notice did HMRC request information (on a voluntary basis) from me – but the purpose for that information request (only a couple of hours before the Tribunal deadline to state any grounds expired) was surely only for HMRC to have any grounds in order to avoid the Tribunal to direct immediately closure notice.

If allowed this would raise a very serious issue of abuse-of-power by HMRC vs any taxpayer. In the future HMRC would simply never need to request any information from the taxpayer and could simply deny any tax refunds. And if the taxpayer then seeks a closure notice from the Tribunal in order to get his tax refund HMRC could then use that lack of information (due to HMRC never asking for any) as the reason to keep any tax refund. In effect that would invite fraud by a government entity which is surely not in line neither with UK nor EU democratic principles."

7. In his email of 6 September 2017 the Appellant makes a general reference to "previous correspondence to the Tribunal". It is likely be a reference to an earlier email and attachments sent to the FTT by the Appellant dated 7 August 2017. His email to the Tribunal of 7 August 2017 consists of a two-page covering letter and a further two documents totalling five pages titled 'Facts and case law: Invalid 7 January 2014 s9A enquiry notice' and 'Facts and case law: Invalid 18 February 2014 s9A enquiry notice'. Within the covering letter the Appellant stated:

'I believe that HMRC did not open a valid s9A enquiry into my 2012/13 tax return. The two s9A enquiry notices I received are both invalid each of them for different reasons. I explained the reasons why they are both invalid in detail in two documents attached.'

8. HMRC was not copied into that email, and only received it 18 months after the event – subsequent to the email emailing his Notice of Appeal to the Tribunal, and subsequent to HMRC filing its Statement of Case on 29 May 2018 (see further HMRC's Response to Appellant's Preliminary Issue Application and Bundle Email dated 17 June 2019 addressed below).

9. Notwithstanding the manner in which the Appellant has sought to advance his appeal, this Tribunal considers that the content of the 7 August 2017 email and attachments sent to the FTT (but not HMRC) fall to be dealt with within the appeal. There appear to be essentially two points being raised therein (both of which are addressed below):

(1) HMRC's letter dated 19 February 2014 (the "Enquiry Notice") was invalid because no enquiry had been opened into GM LLP; and

(2) The Enquiry Notice was invalid because HMRC had already issued an enquiry notice in a letter (mis)dated 7 January 2014 ('the Overington Letter').

10. Therefore, by the time he emailed his Notice of Appeal in January 2018, the Appellant appeared to be raising (via an array of documents produced at different times) the following three grounds of appeal:

(a) Enquiry: The efficacy or validity of the enquiry in respect of his 12/13 Return and the Enquiry Notice which stated that an enquiry was being opened;

(b) Abuse of power / potential for fraud by HMRC: HMRC's alleged abuse of power in relation to requesting information from him;

(c) Closure Notice: The efficacy or validity of the closure notice dated 7 July 2017 in respect of his 12/13 Return.

11. The Appellant's original appeal did not include any substantive (as opposed to procedural) challenge to the content of the Closure Notice and the amendment to his return ie. challenging HMRC's disallowance of the losses he claimed in relation to GM LLP (for example, by arguing that the losses were allowable on the basis he was an active partner in a partnership that was trading on a commercial basis with a view to profit or HMRC's calculation of quantum was incorrect).

12. Indeed, in a direction dated 22 August 2017, Judge Poole considered the Appellant's emails to the FTT dated 7 & 9 August 2017 not to constitute a Notice of Appeal because they did not confirm his address. This led to the Appellant's email of September 2017 and a later Notice of Appeal being accepted as the email of 2 January 2018.

13. The FTT's letter, on Judge Poole's behalf, dated 22 August 2017 and sent to the Appellant, confirmed that it did 'now have jurisdiction to entertain an appeal from you against that closure notice and the amendment which it purported to make'. The letter continued:

'In addition, Judge Poole notes that the only ground of appeal you appear to raise is that (in essence the closure notice cannot be valid because neither of the notices of enquiry sent to you in respect of 2012-2013 were valid. This point will be resolved by the appeal; however it is important that your notice of appeal should specify, in outline, all the grounds upon which you are appealing – this is so that HMRC can fully understand and meet your case. So if there any other grounds of appeal you wish to raise (e.g. an argument that the losses were available in any event), you should do so at the outset as you may otherwise be prevented from raising them later (or risking having to bear any costs caused by seeking to make late amendments to your grounds of appeal).'

14. Notwithstanding that warning by the FTT, the Appellant did not include any substantive challenge (as explained above) to the closure notice and the amendment to his 12/13 Return in his grounds of appeal prior to the hearing. It was not included in his emails to the Tribunal of 7 August 2017 and 6 September 2017 nor in his email Notice of Appeal dated 2 January 2018, nor even in his pre-hearing submissions in May and June 2019.

15. Nonetheless, during the course of the hearing the Appellant did attempt to withdraw from his previous position by beginning to challenge the disallowance of the losses and the amendment to the 12/13 Return. However, at the conclusion of the first day of the hearing the Tribunal ruled that he was not entitled to raise that challenge within the appeal at such a late stage for the reasons set out below.

HMRC's Statement of Case and response to the Notice of Appeal

16. In HMRC's Statement of Case dated 29 May 2018 (the "SoC") the approach that HMRC adopted was to deal with the Appellant appeal as they understood it at the time.

17. HMRC submitted that only ground (c) (set out in paragraph 10 above) could be said to fall within the FTT's jurisdiction under section 31 of the Taxes Management Act 1970 ("TMA 1970"). HMRC submitted that the FTT has no jurisdiction under section 31(1)(b) TMA 1970 (which is the only subparagraph of section 31 TMA 1970 that is relevant for present purposes) to entertain an appeal against an enquiry notice or a request for information, and neither does the FTT have a judicial review jurisdiction.

18. HMRC submitted that in the circumstances, if and in so far as the Appellant's points in relation to grounds (a) and (b) have any bearing within the current appeal proceedings, HMRC understood the position to be that in challenging the Closure Notice (i.e. ground (c) above) the Appellant was looking to contend that certain prior steps taken by HMRC were invalid.

19. HMRC's position in respect of grounds (a)-(c), in short, was as follows:

(a) Enquiry: Contrary to the Appellant's contention, the enquiry into the 12/13 Return was validly opened by the Enquiry Notice in compliance with section 9A TMA 1970. A partnership enquiry into Great Marlborough LLP was never opened but this was not a prerequisite for the opening of an enquiry into the Appellant's personal return, and the Enquiry Notice is not invalidated by any other document.

(b) Abuse of power / potential for fraud by HMRC: Contrary to the Appellant's contention, there has been no abuse of power on the part of HMRC in relation to the present case and it was entitled to make the requests for information that it did, but in any event, this was not relevant to the issues within the jurisdiction of the FTT in the appeal.

(c) Closure Notice: In line with the above, and contrary to the Appellant's contention, the enquiry was validly closed by the issue of the closure notice in compliance with section 28A TMA 1970. The closure notice was issued on the straightforward basis that the Appellant was not entitled to the relief which he had claimed in the 12/13 Return.

20. As to lack of substantive challenge to the closure notice, HMRC submitted that this 'showed the entirely hollow nature of Mr Märtin's appeal'. By section 31(1)(b) TMA 1970, "[a]n appeal may be brought against … (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B TMA 1970"'.

21. HMRC observed that the Appellant's appeal did not at that time include any such substantive challenge to the disallowance of his claim to partnership losses and amendment to the 12/13 Return based upon their conclusions in the closure notice that:

'a. As a partner in Great Marlborough LLP, you were not carrying on a trade on a commercial basis with a view to profit. The restriction in s. 66 Income Tax Act ("ITA") 2007, therefore applies and no losses are available for set off against other income.

b. The losses of Great Marlborough LLP appear to arise directly in connection with relevant tax avoidance arrangements. Therefore s. 74ZA ITA 2007 applies to restrict relief available to set against other income, to nil.

c. HMRC has seen no evidence that you were personally engaged in the commercial activities of Great Marlborough LLP. As per s. 103C ITA 2007, a cap of £25,000 relief against other income would apply, were it not for the conclusions in the foregoing 2 points, which restrict relief to nil.'

Issues in the appeal by the conclusion of the hearing

22. By the conclusion of the hearing, the issues in the appeal had expanded. The manner in which the Appellant has raised points has not always been easy to control perhaps because the Tribunal has given a generous measure of scope for him to raise a great number of fresh arguments. The consequence of this is that identifying what is and what is not within the scope of the Appellant's appeal has broadened since the lodging of his Notice of Appeal.

23. At one stage during the hearing the Appellant relied upon a document sent by the FTT to him with the case management directions titled 'Notes to Appellants' to suggest that he was informed he could raise any ground he chose to rely upon at the hearing. This argument is considered below.

24. Following the conclusion of the hearing in July 2019, the Tribunal issued Directions to the parties requiring HMRC to make final written closing submissions by reference to various submissions that the Appellant had relied upon up to the conclusion of the hearing:

i) the Appellant's grounds of appeal to HMRC and the Tribunal in August & September 2017 and January 2018;
ii) the Appellant's submissions in his emailed documents dated 20 and 30 May 2019;
iii) the Appellant's submissions in his outline of case of June 2019;
iv) the Appellant's oral submissions, except that ground of appeal raised during the hearing which the Tribunal ruled would not be considered.

25. The Tribunal has already highlighted above - the issues raised identified at paragraph 24(i) - the grounds of appeal in the Notice of Appeal of January 2018 and emails of August and September 2017.

26. In relation to the Appellant's submissions identified at paragraph 24(ii), by way of a Preliminary Issue Application dated 20 May 2019 the Appellant sent an email to the FTT attaching an application for determination of a preliminary issue. The issue was what representations, if any, HMRC would be allowed to make at the hearing in July 2019 (the "Preliminary Issue Application"). The basis of the application was the Appellant's contention that HMRC ought to have adduced evidence in support of the validity of HMRC's enquiry into his 12/13 Return at the hearing of his application for closure of the enquiry in May 2017. He stated:

'The preliminary issue being what representations (if any) HMRC will be allowed to make and what evidence (if any) HMRC will be allowed to adduce and /or rely on at such hearing. It is my position that HMRC will have the burden of proof and will have to plead a prima facie case in particular in regards to the aspect if and when a Section 9A enquiry was opened into my 2012/13 tax return. Without a valid s9A enquiry HMRC had no legal power to amend that tax return.'

27. On 30 May 2019 the Appellant sent an email ('the Bundle Email') to the FTT, touching upon a number of matters, several for the first time. Presumably recognising that they did not formally form part of the appeal, the Appellant sought by the Bundle Email to put various objections "on record", including:

(a) The argument referred to at paragraph 9(2) above as regards the (mis)dating of the Overington Letter;
(b) The argument referred to above as regards HMRC's alleged failure to prove the validity of the Enquiry Notice at the May 2017 hearing;
(c) A new allegation as to the date of filing of the 12/13 Return;
(d) A procedural contention regarding the scope of his Notice of Appeal;
(e) A serious allegation against HMRC in respect of their dating of a request for information dated 16 January 2017 (that they had backdated the request to 16 January when it had only been issued or raised after that date, for example on 23 January 2017).

28. HMRC responded to the Preliminary Issue Application by filing a written Response dated 17 June 2019 ("Response to Preliminary Issue Application"). The FTT (Judge Mosedale) dismissed the Preliminary Issue Application by way of decision dated 19 June 2019. The Judge refused to hold a hearing of a preliminary issue but stated that the Appellant was free to make submissions to the hearing judge that the documents relied upon by HMRC did not prove what HMRC alleged they prove but that he should serve an outline of his case in accordance with earlier directions issued in November 2018.

29. The Judge also directed that in so far as HMRC sought permission to rely on a further witness statement at the hearing of the appeal in July 2019 (which they did through Ian Stannard's second witness statement dated 27 June 2019) they ought to prepare and serve the statement and then seek the Appellant's consent with any decision on admissibility, if necessary, being made at the start of the hearing.

30. In relation to the Appellant's submissions in paragraph 24(iii) above, on 26 June 2019, in the 14 days before the hearing as directed, the Appellant served an "Outline of Case". This was thirteen pages and concluded:

Conclusion
My appeal is based on two grounds:
1) The officer concluded that her closure notice was under Section 28A. That conclusion seems incorrect (as HMRC did not issue a valid s9A enquiry notice into the 2012/13 tax return within the statutory limit).
2) Even if HMRC had issued a valid s9A enquiry notice, the officer incorrectly amended the 2012/13 tax return seemingly without having any evidence about the LLP/the activity levels of its individual LLP members. If the officer had any information it was withheld from me. HMRC accepted each taxpayer's case to be *"fact specific"*. Hence the positive conclusions do not appear reasonable on the basis of the information included in the documents bundle. So there appears to be no case for me to argue.

31. Thus as well as echoing some of the above mentioned points, the second ground raised for the first time and a very late stage, a challenge to the reasonableness of the reasons and conclusions in the HMRC's closure notice (it remains to be noted that this was still not a positive assertion that he was entitled to the reliefs he claimed and HMRC had wrongly disallowed the partnership losses or that the losses were allowable). The Outline of Case also included further arguments:

> (a) The contention that HMRC did not produce a notice to file a return in compliance with section 8 TMA 1970;
>
> (b) The contention that section 9A TMA 1970 has no application outside England, Scotland and Wales;
>
> (c) The contention that the Enquiry Notice was merely a "customer letter", rather than a notice of enquiry compliant with section 9A TMA 1970.

32. These are new points: a characterisation which the Appellant appeared to accept on the first day of the hearing of the appeal on 10 July 2019.

33. The Appellant submitted in his Outline of Case that his first ground (The Validity Issue i.e Section 28A does not apply) was based on several arguments:

'1) Tax law provides that HMRC can only issue one s9A enquiry notice per tax return. The 19 February 2014 letter appears to be the second letter issued for 2012/13 and hence invalid under s9A(3).

2) There is no evidence of any Section 8 notice validly issued and served for 2012/13. So HMRC were never in a position to adduce evidence of any s9A validity at the 22 May 2017 hearing.

3) UK Parliament has seemingly limited the jurisdiction of Section 9A to England, Scotland, Wales. However, HMRC issued and served the purported 2012/13 s9A closure notices to a Swiss address. Therefore, the purported 2012/13 closure notice does not appear to be validly served (as outside jurisdiction) and hence invalid.

4) There is no evidence that the HMRC officers issuing the letters dated 7 January 2014 or 19 February 2014 even realized that they issued a s9A enquiry notice to an address in Switzerland. Doing so could have subjected HMRC under Swiss jurisdiction. If that was the intent of the letters it would have required authorisation by senior HMRC officers (and there surely would be evidence of such authorisation).

5) In the purported 2012/13 s9A closure notice dated 19 February 2014 the HMRC officer refers to the powers under "Code of Practice 8" which does not appear to be intended for recipients outside the UK as it asserts provisions that would be unlawful in Switzerland (e.g. "We may decide to visit your

business premises"). Hence my position that this reference/enclosure confirms that the officer did not intent to serve this notice in Switzerland.

6) The 19 February 2014 makes it clear that HMRC's intention at the time was to issue a subsequent enquiry into the 2012/13 accounts of Great Marlborough LLP. But such subsequent enquiry into the LLP under s12AC would have had the effect under s12AC(6) of an issuance of a s9A notice to all LLP partners including myself. The HMRC Manual EM7042 provides very clear guidance in such case – the letter to a partner should not be considered an official notice. And hence it is my position the 19 February 2014 letter was not intended as an official notice, it was simply a „costumer service" letter informing me that HMRC intended to enquire into Great Marlborough LLP (which HMRC's Special Investigation team subsequently seemingly decided was not necessary).'

34. In relation to the Appellant's submissions identified at paragraph 24 (iv) above, the Appellant raised further grounds of appeal during the course of his oral submissions at the hearing. In the course of his oral closing submissions at the hearing of 10-11 July 2019, the Appellant addressed what he described as "key points" underlying his appeal. He submitted that:

(a) HMRC had failed to advance its position at the hearing of his application to close the enquiry and should not be permitted to do so now;
(b) No notice pursuant to section 8 TMA 1970 had been issued by HMRC;
(c) Section 9A TMA 1970's reach was limited to England, Scotland and Wales, as evidenced by certain text on the page of the printed Westlaw / Thomson Reuter version of the legislation to be found in the authorities bundle;
(d) HMRC had waived the right to information by virtue of delay in the course of the enquiry;
(e) The Closure Notice was unreasonable in that it was the product of an empty file.

Evidence filed by the Appellant in support of his appeal

35. A preliminary point to note at this stage is that the Appellant did not produce any witness statement at any time in the proceedings nor any other independent documentary evidence (the only documents in the bundle upon which he relied were his correspondence with HMRC and the FTT). Nonetheless the Appellant was permitted during the hearing of the appeal to rely upon factual evidence contained with his Outline of Case dated 26 June 2019, in addition to the points of a legal nature.

36. The Appellant's failure to serve any witness statement and independent documentary evidence in support of his appeal was in breach of the directions of November 2018 issued by the FTT for the service of any witness statement by 8 February 2019. More peculiarly, the Appellant acted in the face of Judge Mosedale's clear explanation in the *FTT's Martin decision* in 2017 as to the requirements for him to provide evidence in any closure notice appeal:

'33. Moreover, if they closed the enquiry by amending the tax return to exclude the tax relief claim, that would give Mr Märtin only two options. Either he would have to give up his claim to the tax relief or he would have to appeal the closure notice. If he appealed the closure notice, the burden would be on him to prove his entitlement to the loss relief he had claimed, and he would be unable to do so in the absence of evidence supporting his claim. Moreover, the Tribunal could compel disclosure of all relevant documents in any event. So in reality, whether I ordered closure or not, in all likelihood Mr Märtin would have to produce the information and documents requested to stand any chance of obtaining the relief, so why not order closure?'

Ruling refusing the Appellant permission to make a substantive challenge to the closure notice and amendment to his return

The Appellant's submissions

37. Towards the end of the first day of the hearing the Appellant made explicit for the first time that he did seek to make a substantive challenge to HMRC's conclusions set out in the closure notice of 7 July 2018. He accepted that he had not previously articulated himself properly but now sought to assert that the losses claimed through GM LLP were allowable. Therefore, he did seek to challenge HMRC's disallowance and the amendment to his return under the closure notice.

38. He submitted that he had intended to appeal on this ground when he challenged the reasons for the closure notice – for instance in the emails of September 2017 and 20 May 2019 and the Outline of Case of 26 June 2019 set out above. He was now seeking to argue and give evidence that he was an active partner in GM LLP which was trading on a commercial basis with a view to profit so that their losses were allowable partnership losses.

39. He accepted that although he did not make the ground of appeal explicit in the appeal to the Tribunal in his emails of August or September 2017 to the Tribunal nor in his Notice of Appeal in January 2018 (nor even in the correspondence and submissions of May and June 2019) he did make clear that he did not understand how HMRC reached the reasons in the closure notice that they did.

40. He submitted that the first time he heard any information to support the conclusions under the closure notice was when he heard Mr Stannard's evidence on the first day of the hearing on 10 July 2019. This was the first time the reasons for the conclusions were explained to him. He accepted he had not raised the issue explicitly before but he was unrepresented and had not articulated himself very well. He was Swiss and acting in a foreign language and a foreign jurisdiction.

41. He also relied on the FTT's document entitled 'Notes to Appellants' which accompanied the directions sent to him on 16 November 2018. This states: '*At this stage you do not have to reply to the Statement of Case [of HMRC]. If the case you will present differs from that HMRC or HO have outlined, do not worry. You should let them know and you will have very opportunity to present your case when your appeal is heard*'.

Reasons for the Tribunal's ruling

42. The Tribunal has already given its reasons for refusing to allow the Appellant to add to his grounds of appeal and rely on this evidence and submission in the course of his appeal. The ruling was given orally at the conclusion of the first day of the hearing but there was no transcriber present nor recording of the first day of the hearing (there was on the second day). Therefore, the Tribunal sets out its reasons in writing for the benefit of the Appellant.

43. The Tribunal's power to control the arguments and evidence heard and grounds of appeal is under Rule 5(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

44. It decided that the Appellant would not be permitted to introduce evidence on this issue or raise the new substantive ground of appeal: that the partnership losses of GM LLP were allowable, that the LLP was trading commercially with a view to profit or that he was an active member so he was entitled to claim relief.

45. The Tribunal decided it would not be just and fair nor in accordance with the overriding objective to admit the evidence and new ground of appeal. Rule 2 of the Tribunal Procedure Rules provides:

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

46. The Tribunal also considered by analogy the common law principles on extending time to admit late appeals such as expounded by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 01708 TCC. These include: the length of any delay in raising the ground of appeal, the reasons for that delay and the consequences of not allowing the amendment to the Appellant's grounds of appeal.

47. The Tribunal accepts that the 'Notes to Appellants' guidance which is helpfully issued by the FTT is capable of being read ambiguously in the extract taken out of context by the Appellant but it should not be so. When read as a whole, the notes issued by the FTT make clear that there will be serious consequences for Appellants in not disclosing or stating their case in advance of the hearing. For example, it also states:

'*If you do not provide a list of Documents, the Judge at the hearing may not permit you to use any documents to support your case other than those produced by the other party, and the bundles at the hearing may not include the documents to which you wish to refer*',

'*It is important that they know in advance the case the other side will put at the hearing*' and

'*If you do not tell the Tribunal the names of your witnesses, the Judge at the hearing may not allow them to speak.*'

48. More specifically, the Appellant was warned in the letter of 22 August 2017 from the FTT about the consequences of not raising a substantive challenge to the closure notice (that the losses were allowable). Therefore, it should reasonably have been clear to the Appellant, as is the law, that he could not continue to raise new points in the proceedings whenever he wished to and that the Tribunal would guarantee to hear them. He was made alert to the law that the Tribunal might refuse to allow him to introduce new arguments during the course of the hearing or at very short notice. The letter read:

"… it is important that your notice of appeal should specify, in outline, all the grounds upon which you are appealing – this is so that HMRC can fully understand meet your case. So if there are any other grounds of appeal you wish to raise (e.g. an argument that the losses were available in any event), you should do so at the outset as you may otherwise be prevented from raising them later (or risking having to bear any costs caused by seeking to make late amendments to your ground of appeal)."

49. Mr Davey QC for HMRC vigorously objected to the Appellant being allowed to add to his grounds of appeal to include the substantive challenge.

50. The Tribunal has already noted that it intended to give the Appellant a considerable degree of latitude during the course of proceedings, including before and during the hearing, and allowed him to raise many new points and grounds of appeal despite them not being included in his original grounds of appeal set out between August 2017 and January 2018. The Tribunal has made allowances and entertained new arguments, some even after the hearing, on

the basis of equality of arms - that the Appellant was unrepresented litigant and a Swiss resident facing an unfamiliar jurisdiction and a well-resourced and well-represented State authority in the form of HMRC.

51. However, it is to be noted that the Appellant's written and oral English was excellent, and he presented as highly intelligent and was evidently able to structure an argument. He had enjoyed previous familiarity with the Tax Tribunal having won his closure notice application in 2017 when similarly unrepresented. He had further experience of proceedings in 2018 relating to the striking out of his appeal against the enquiry into his 14/15 tax year.

52. As noted above, the Appellant had never filed any witness statement in the proceedings let alone by February 2019 as required by the directions of November 2018 and the guidance accompanying the directions was quite clear that the appellant party could also be a witness.

53. Further, despite these significant misgivings and in the interests of fairness, the Tribunal did allow the Appellant to rely on the Appellant's second and new ground raised in his Outline of Case of 26 June 2019. It also allowed him, as a very late substitute for a witness statement, to rely on the factual assertions in the same document as evidence (this is addressed below). The relevant passages from the Outline of Case identified the new second ground of appeal as:

'Even if HMRC had issued a valid s9A enquiry notice, the officer incorrectly amended the 2012/13 tax return seemingly without having any evidence about the LLP/the activity levels of its individual LLP members. If the officer had any information it was withheld from me. HMRC accepted each taxpayer's case to be *„fact specific"*. Hence the positive conclusions do not appear reasonable on the basis of the information included in the documents bundle. So there appears to be no case for me to argue.

I have received bundle and the witness statements and exhibits and looked that and I looked at all the bundles – 'I couldn't see they were reasonable conclusions and –'It is my position that the burden of proof is on HMRC to demonstrate that this particular conclusion is correct (and s28A did indeed apply) and Mrs Omole had a statutory right to amend the 2012/13 tax return. There are also "reasons" stated that I consider unsubstantiated and based on incorrect underlying conclusions on the information available in the documents bundle. The conclusions need to be reasonable - on the basis of the documents in the bundle or the witness statements there is no information available that allows me to verify that they are.'

54. The second ground within the Appellant's Outline of case served in June 2019 comes closer to but still did not raise the substantive argument or ground of challenge – that the claimed partnership losses were allowable because he was an active partner in GM LLP which was trading on a commercial basis with a view to profit.

55. This new second ground of appeal was still only a challenge to the reasonableness of HMRC's reasons and conclusions within the closure notice. At best, even if a challenge to the conclusions and reasons within the closure notice without asserting any positive case could be read as an oblique but substantive challenge in an appeal against a closure notice, the Appellant misunderstands and reversed the burden of proof in his argument. The burden of proof in any appeal against a closure notice and amendment to a return is manifestly upon the taxpayer.

56. To the extent that a 'reasonableness challenge' was a new ground of appeal or the Tribunal has jurisdiction (when this may be a public law challenge) the Tribunal addresses the issue below. The Tribunal goes on to decide that HMRC's reasons were reasonable and justified by the evidence of Officers Mrs Omole and Mr Stannard.

57. Notwithstanding not permitting the Appellant to raise the substantive ground of appeal afresh, the Tribunal did therefore allow the Appellant to raise a challenge to HMRC's reasons and conclusions for the Closure Notice and amendment to the Appellant's 12/13 return.

58. For the reasons set out below the Tribunal is satisfied that HMRC provided prima facie evidence of a link between GM LLP and the Icebreaker scheme and that the claimed losses were disallowable for the reasons given. The burden was not on HMRC, particularly given the issues pleaded prior to the hearing, to provide any further evidence or information in support of their conclusions. HMRC's reasons and conclusions did not rely on any lack of information provided by the Appellant. The burden was on the Appellant to provide evidence and argument in support of his case. He provided nothing other than the argument that HMRC had given insufficient reasons for its conclusions in the closure notice.

59. The Appellant's reasonableness challenge also included the argument that HMRC never asked for information about GM LLP despite him offering it in 2014 until they made their request under an Information Notice in January 2017 which only occurred after he had made his closure notice application. His original complaints about the closure notice concerned not requesting information from him and the lack of information provided by HMRC.

60. In the email of 6 September 2017 he includes an assertion that 'the 2012/13 closure notice declines the tax refund that I did not provide any information to HMRC'. He had also made the complaint about lack of reasons for the conclusions in the closure notice in his appeal to HMRC in August 2017 when he stated the 'reasons for your decision [to issue the closure notice and amend his return] were that you are stating are based on assumptions without any evidence and justification'. These earlier complaints formed the basis to the challenge to reasonableness of HMRC's conclusions which was revived in front of the Tribunal in June 2019.

61. However, as addressed below, the reasons for their conclusions were set out by HMRC in the amendment and closure notice. HMRC relied on the three substantive points set out above. and not on the absence of information from the Appellant. At no earlier stage in this appeal against the closure notice, or at all in the closure notice application, did the Appellant put forward a positive position or evidence that he was an active member of the LLP or that it was trading on a commercial basis with a view to profit. He simply alleged a lack of information provided by HMRC both in relation to the application for a closure notice and on the appeal against the closure notice.

62. The Tribunal is satisfied that it would have caused delay to allow the evidence and new ground of appeal to be admitted and argued at such a late stage of proceedings. Simply admitting the evidence would require proceedings to be extended considerably. It would have required the postponement of the hearing for both parties to prepare to meet the arguments. It would likely have required a much longer hearing than the remaining day of the hearing to accommodate the service of and hearing of the evidence and argument for which no party was prepared. The Appellant had not yet given evidence on the first day when the Tribunal made its ruling.

63. It would likely have required significant further evidence to be served by both parties and the calling of further witnesses to give oral evidence. It may also have caused prejudice to HMRC in its ability to meet this argument in 2019 when it may not have evidence available to it in 2019 which it might have had in 2017 had the ground of appeal been raised at that time.

64. This ground of appeal had been raised far too late by the Appellant. He sought to introduce the substantive challenge in the middle of the hearing. The Appellant had accepted it was a new point that was not explicitly raised in his appeal lodged at the Tribunal through emails in August/September 2017 and his emailed Notice of Appeal of January 2018. It was not raised in any of his May or June 2019 submissions. He had not even raised the point earlier in the closure notice hearing in 2017. This was despite Judge Mosedale indicating in the FTT

Martin decision in 2017 that HMRC had reasonable information on which to close the enquiry on basis of what they had rather than needing further information from the taxpayer.

65. The burden of proof is on the Appellant under in any appeal to the FTT to establish any challenge to any conclusion or amendment to return under a closure notice. The burden of proof was not on HMRC to prove their conclusions were correct - all the Appellant's arguments had been predicated on this incorrect basis.

66. The Tribunal did not accept that the Appellant had a good reason for not raising this ground of appeal at an earlier date. The Appellant had failed to raise the issue in his September 2017 or January 2018 appeal notices. This was despite the specific invitation and warning of the consequence of any failure by Judge Poole in the FTT's letter of 22 August 2017. There had been clear guidance given to the Appellant to raise all points and he had not been misled. He had received many opportunities prior to the hearing to raise the substantive challenge.

67. The Appellant was able at all time to understand and follow the procedures. Were he in any doubt about them, the burden would be on him to seek advice and representation as necessary. The Tribunal's communications had been clear and the Appellant had excellent English. This was demonstrated by his lengthy and structured correspondence, oral and written submissions to the Tribunal, questioning of witnesses and oral evidence given. The Appellant had at no previous stage suggested at any stage that GM LLP's losses were allowable – he had only ever challenged HMRC lack of reasons in support of the conclusions in the closure notice.

68. The Tribunal declined to permit the Appellant to make a substantive challenge to the conclusions under the closure notice at such a late stage during the hearing. It was satisfied that it was not in accordance with the overriding objective, not just nor fair, to admit the evidence and ground of appeal.

Admitting Mr Stannard's second witness statement in evidence

69. HMRC relied on statements of Mrs Omole and Mr Stannard (first statement dated 8 February 2019). These were short three and five-page statements served on the Appellant in compliance with directions dated November 2018 to serve by that date. There can be no objection to their admission. The Appellant had over five months prior to the hearing to consider their contents and, if he had chosen, to seek to amend the directions to serve evidence in reply. Indeed, as already observed, he filed no witness statement evidence by 8 February 2019 nor before or during the hearing.

70. At the outset of the hearing the Appellant objected to the admissibility of Mr Stannard's second witness statement dated 26 June 2019 (served some fourteen days before the hearing). The Tribunal admitted the statement (de bene esse) during the hearing and heard oral evidence from Mr Stannard relating to both his first and second statements. The Tribunal decided it would rule conclusively on admissibility following the conclusion of the hearing and invited the parties to address this in closing written submissions.

The Appellant's objection

71. The Appellant's objection was based upon the very late service of the statement, the prejudice caused to him in responding to it and his inability to receive a fair trial were it to be admitted. He submitted that the evidence was served in breach of the November 2018 directions for service of witness statements by 8 February 2019, thus this statement was over four months late.

72. In his written closing submissions dated 11 October 2019 the Appellant submitted that HMRC served significant amounts of evidence late - with extraordinary delays and no good reason for any delay:

a) The purported 14 January 2014 filing date of the 2012/13 tax return (on 14 March 2019 i.e. with 62 days delay v the 11 January 2019 Tribunal deadline); no late submission permitted

b) Evidence purportedly linking Great Marlborough LLP to Icebreaker LLPs/Icebreaker Tribunal decisions (on 26/27 June 2019 i.e. with 2+ years delay and no reason for the delay)

c) Purported evidence relating to the 7 January 2014 Mr Overington letter (on 26/27 June 2019 i.e. 16/17 months delay and no reason for the delay)

d) Purported evidence relating to the date of 16 January 2017 letter by Mrs Omole (on 26/27 June 2019) is provided by Mr Stannard (who did not post that letter)

e) Purported additional evidence by Mrs Omole (on 11 Sept. 2019 i.e. with 8 months delay v the 11 January 2019 Tribunal deadline).

The Tribunal's decision and reasons

73. The Tribunal admits Mr Stannard's second statement under Rule 15 of the Tribunal Rules for the following reasons.

74. In summary, admitting Mr Stannard's second witness statement into evidence enables the Tribunal to deal fairly with the Appellant's grounds of appeal than would otherwise be the case. Further, there is no prejudice caused to the Appellant by allowing in the statement in circumstances where: (i) it is responsive to late points that the Appellant has raised; (ii) it is short; (iii) it was provided to the Appellant some two weeks prior to the hearing giving his sufficient time to prepare and respond; (iv) the Appellant was given the opportunity to cross-examine Mr Stannard on his second statement during the hearing. In all the circumstances, the Tribunal admits Mr Stannard's second witness statement into evidence.

75. Further, the Tribunal admitted the Appellant's factual evidence contained in his Outline of Case dated 26 June 2019 even though a) it was never formally served in a witness statement and thus was in breach of directions; b) it was very wide ranging in nature; c) HMRC had no advance notice of it being relied upon as evidence until the Tribunal admitted it on the first day of the hearing itself (Mr Davey only had overnight to prepare cross examination of the Appellant which took place on the second day of the hearing).

76. Fairness and equality of arms militated in favour of HMRC's evidence being admitted. There was good reason for late service and the admission did not unduly prejudice the Appellant but its exclusion would have unduly prejudiced HMRC.

77. The Tribunal rejects the proposition that HMRC had served evidence unreasonably late. The only statement it served in breach of the November 2018 directions was Mr Stannard's second statement. It had good reason for doing so as the evidence contained within the statement primarily responded to points raised by the Appellant in his email submissions of 20 and 30 May 2019 (the Bundle email and application for a preliminary issue).

78. Mr Stannard's second statement consisted of twelve paragraphs, only nine of which were substantive. It is short.

79. Paragraphs 4 to 7 of that statement addressed the dating or misdating of the Overington letter dated 7 January 2014 which the Tribunal addresses. It responded to the allegation made by the Appellant in May and June 2019 that the Overington letter was correctly dated and hence there was no valid enquiry notice (this had been raised in August 2017 in the Appellant's email to the Tribunal but HMRC had not previously seen this). The three paragraphs of the statement

deal with the reasons why the letter was unlikely to have been correctly dated and was a typographical error for 7 January 2015.

80. The statement also rehearses the evidence of emails from the Appellant where he accepted this. Mr Stannard explains that the Overington Letter was issued out of caution in case there was not an enquiry open. In fact, the 18 February 2014 Enquiry Notice appears to have been overlooked by HMRC but Mr Stannard explains that the transfer of a large volume documentation from Leeds to London in May 2014 meant there was no certainty that there was already an open enquiry.

81. Paragraphs 9 to 12 of Mr Stannard's second statement respond to another of the Appellant's new allegations that HMRC backdated its letter dated 16 January 2017 requesting information. Mr Stannard's evidence was that the request for information sent by HMRC to the Appellant by post on 16 January 2017 was created and sent as it was dated. He stated that HMRC had not backdated this request even though the Appellant stated he may not have received the letter at that time and not by 23 January 2017. Mr Stannard explained that the request was sent to the Appellant again, this time by email dated 24 January 2017.

82. Paragraph 8 of Mr Stannard's second statement expands upon his first statement as to why HMRC believed that GM LLP was associated with the Icebreaker litigation. It is set out in full below.

83. The Tribunal admits this evidence because it permitted the Appellant to raise the new challenge to the reasonableness of HMRC's conclusions in the closure notice and amendment to return. This paragraph responds to that challenge and supports the reasons and conclusions in the closure notice.

84. The Tribunal is satisfied that HMRC was entitled to rebut the Appellant's allegation that it simply relied upon the absence of information provided by the Appellant as its reasons for issuing the closure notice and amending his 12/13 return. The essence of Mr Stannard's evidence is not new and was set out in correspondence with the Appellant since 2014 and in the conclusions themselves under the closure notice of 2017. It was also addressed in his first statement of 8 February 2019. Further to paragraph 8 of the statement Mr Stannard did produce some limited fresh evidence of Companies House documents and charge documentation as exhibits (50 pages).

85. HMRC had served an application on 17 June 2019 to rely upon the statement in reply to the issues raised by the Appellant in his bundle email and preliminary issue application of 20 and 30 May 2019. That application explained why it was necessary to file a statement responding to and addressing points arising from the Bundle email eg. (the allegation there were two purported 2012/13 enquiry notices – the issue of the Overington Letter – and the allegation that HMRC in fact only created the Information noticed 16 January 2017 at a later time on 23/24 January 2017 after the Appellant point out that he letter did not seem to exist.

86. The granting of permission to HMRC to rely upon Mr Stannard's second statement is what fairness requires having regard to the manner in which the Appellant has sought to advance his appeal. In particular the statement addressed and responded to issues raised in the Appellant's email of 30 May 2019 and Outline of Case dated 26 June 2019.

87. The Appellant has continuously and repeatedly raised new points with the HMRC and the Tribunal – several including factual elements throughout over two years of litigation regarding the closure notice. Subsequent to the close of pleadings, right up to and indeed during the appeal hearing itself the Appellant raised new grounds of appeal. If any such arguments are to form part of this appeal, then it is only fair that HMRC is permitted properly to respond, and Mr Stannard's second witness statement is an important part of that response.

The Facts

88. The factual background to the appeal was set out in HMRC's SoC (at paragraphs 8 to 28), in the witness statements of Iain Stannard dated 8 February 2019 ("Mr Stannard's first statement") and Adeyinka Omole dated 8 February 2019 ("Mrs Omole's statement"), and in Iain Stannard's supplemental statement dated 26 June 2019 ("Mr Stannard's second statement"). The first two statements were served in compliance with the Tribunal's directions for the hearing and gave the Appellant plenty of opportunity to consider and prepare to meet at the hearing in July 2019.

89. The Tribunal admits Mr Stannard's second statement of 26 June 2019 for the reasons set out above. It heard the evidence contained within it during the hearing de bene esse without conclusively ruling upon its admissibility.

90. Both Ms Omole and Mr Stannard gave oral evidence and were cross examined by the Appellant during the hearing. The Tribunal found their evidence to be credible and reliable.

91. As noted above, the Appellant did not provide any witness statement in support of his appeal nor any documentary evidence in support (this appears to be deliberate as the Appellant attempted to rely on the argument that HMRC had failed to produce evidence or prima facie case in support of the closure notice). This was despite the Tribunal's directions dated 16 November 2018 which stated that any witness statement should be served by 8 February 2019.

92. The Appellant attempted to argue that this direction did not apply to him because it referred to each party serving statements from all witnesses on whose evidence they intend to rely. However, for the reasons the Tribunal has already explained, there was no real ambiguity that this direction would apply to him and the Notes to appellants enclosed with those directions specifically says: *'For this reason the Tribunal requires both sides to submit in advance written statements from every person (called a witness) they will call upon at the hearing to give evidence about what happened. The main witness is often the appellant'*.

93. Nonetheless, in the interests of justice and fairness the Tribunal admitted and heard oral evidence of fact from the Appellant, using the statements or assertions of fact in his thirteen-page Outline of Case dated 26 June 2019 as the basis of his evidence in chief. He was cross examined by Mr Davey on the second day of the hearing. The Tribunal did not accept the reliability of the Appellant's evidence in a number of regards. This is for the reasons set out below both in this section and in the discussion section of this decision.

94. The Tribunal finds the following facts on the balance of probabilities. It also makes relevant factual findings to the same standard in the discussion section of this decision.

95. On 14 January 2014 the Appellant filed his 12/13 Return, in which he claimed losses of £438,817 attributable to his membership of Great Marlborough LLP ("GM LLP"), and loan interest payments of £558 which HMRC understood to have been incurred in relation to GM LLP. The prima facie effect of such claims was to reduce his taxable income in that tax year from £675,441 to £236,066 and purportedly entitle him to a tax repayment of £229,594. To the extent that the Appellant asserts that he did not file his 12/13 Return on 14 January 2014 but some other date this is rejected for the reasons set out in the discussion section below.

96. On 19 February 2014 HMRC wrote to the Appellant (i.e. the Enquiry Notice) notifying him of its intention to open an enquiry into the 12/13 Return pursuant to section 9A TMA 1970. The letter was sent by post to his address in Switzerland where he is resident. The Enquiry Notice made references to the fact that the 12/13 Return included a claim in respect of losses arising from GM LLP. The letter began:

'Check of Self Assessment tax Return – Year Ended 5 April 2013

Thank you for your tax Return for the year ended 5 April 2013. I would now like to check your return. My check will be made under Section 9A Taxes Management Act 1970.

Your Return includes a claim in respect of losses arising from Great Marlborough Limited Liability Partnership. It is intended to check the 2013 Return of Great Marlborough Limited Liability Partnership when that Return is received by HMRC. The check will be conducted via the nominated partner and will be carried out by my colleague in Specialist investigations Leeds.

Under the authority of section 59B(4) Taxes Management Act 1970 I do not intend to give effect to your repayment claim until I have completed my check.
…….
After the check is completed I will et you know if your return is correct. If tis not correct you might have to pay more tax or we might have to pay something back to you……'

97. It was and remains HMRC's position (see Mr Stannard's first statement at paragraphs 3 to 4) that GM LLP is an "Icebreaker" partnership, Icebreaker being an established tax avoidance scheme. The Icebreaker scheme has been the subject of proceedings before the FTT and UT for many years, in particular since 2010. The four principal Icebreaker decisions are *Icebreaker 1 LLP v HMRC* [2010] UKFTT 6 (TC); *Icebreaker 1 LLP v HMRC* [2010] UKUT 477 (TCC); *Acornwood LLP v HMRC* [2014] UKFTT 416 (TC); *Acornwood LLP v HMRC* [2016] UKUT 36 (TCC); *Seven Individuals v HMRC* [2017] UKUT 132 (TCC).

98. The decision of the FTT (Judge Colin Bishopp and Mr Richard Law) in the Icebreaker case of *Acornwood LLP v HMRC* [2014] UKFTT 416 (TC) ("*Acornwood*") was released in May 2014 (the "FTT's *Acornwood* Decision"). This dealt with "LLP level issues" in respect of 5 lead LLPs plus (via a Rule 18 direction) 46 follower LLPs. It also dealt with "member level issues" by way of a joint reference under section 28ZA TMA 1970. The FTT's "underlying, and fundamental, conclusion" was that "the Icebreaker scheme is, and was known and understood by all concerned to be, a tax avoidance scheme" (FTT's *Acornwood* Decision at [506]). In the event, the FTT disallowed the majority of the losses claimed by the LLPs, and disallowed the members' claims to sideways loss relief.

99. More particularly, so far as regards the members' claims to sideways loss relief, the FTT held (see the 2014 Decision at [507]):

(1) None of the appellant partnerships' trades were carried on a commercial basis and with a view to profit (as to which see the requirements within sections 380 and 381 Income and Corporation Taxes Act 1988 ("ICTA 1988"), and, post the 2006/07 tax year, sections 64, 71 and 72 of the Income Tax Act 2007 ("ITA 2007")).

(2) None of the individual referrers was an active partner (as to which see the restriction of sideways loss relief within section 103C ITA 2007).

(3) The main purpose of an individual referrer participating in a later LLP (Mr Hawksbridge) was to secure sideways loss relief in order to avoid tax (members involved in arrangements postdating 21 October 2009 being subject to the anti-avoidance provision at section 74ZA ICTA 2007).

100. On 19 August 2014 HMRC wrote to the Appellant stating that GM LLP was one of the 46 follower LLPs bound by the FTT's *Acornwood* Decision. As the Appellant subsequently pointed out in his reply dated 25 September 2014, this was incorrect, with GM LLP only having been incorporated recently (2012). HMRC wrote to Mr Märtin, correcting its previous statement, on 15 October 2014 . It was in the context of these exchanges that Mr Märtin asserted

his view that GM LLP was to be distinguished from the LLPs under consideration in the FTT's *Acornwood* Decision.

101. The Appellant did so in the following terms. In his letter to HMRC dated 25 September 2014 he stated:

'I have read the decision with great interest and came to the conclusion that the circumstances of those LLPs were in many aspects different from Great Marlborough. Hence I would argue that the Tribunal decision is also for that reason not applicable to Great Marlborough.' In his letter 31 October 2014 he stated 'Moreover, I would like to emphasize again that from reading the Tribunal decision I have come to the conclusion that Great Marlborough differs in key aspects from the LLPs bound by the judgement. In particular the activity at Great Marlborough seems to be at much higher levels compared other LLPs with our members making very vital decisions in terms of ongoing operations as well as investments into new artists.'.

102. On 7 January 2015 (in a letter incorrectly dated 7 January 2014) HMRC Officer Mike Overington wrote to the Appellant informing him of HMRC's intention to enquire in the 12/13 Return under section 9A TMA 1970 (the "Overington Letter"). That letter began:

'Check of Self-Assessment Tax Return – Year ended 5 April 2013
Thank you for your tax return for the year shown above, which we received on 14 January 2014.
Please take this letter as notice of my intention to enquire into that return under Section 9A Taxes Management Act 1970.
The enquiry relates to the circumstances surrounding your involvement in Great Marlborough and the activities undertaken by you within this partnership.
…….
When I look at this aspect I may find that I need to extend my enquiry. If this happens I will let you know.
Under the authority of Section 59B(4A) Taxes Management Act 1970 no repayment will be made in respect of 2012-2013 whilst the enquiry is in progress.'

103. Contrary to the Appellant's submissions, the Tribunal accepts HMRC's evidence that the letter was misdated as 7 January 2014 when it was created or issued one year later on 7 January 2015.

104. Mr Stannard explained how the Overington Letter came about in his first and second witness statements. The Appellant's case was transferred from Leeds to the London team in May 2014. The new team had to familiarise itself with a large volume of documentation relating to the Icebreaker scheme. In the circumstances there would not at that time have been certainty that there was already an open enquiry in respect of his 12/13 Return.

105. The Overington Letter would therefore have been issued out of caution in case there was not an enquiry open. This letter plainly bore an incorrect date of 7 January 2014. There is no reasonable or logical basis for concluding that HMRC would have issued an enquiry notice on that date. It would make no sense – it was issued on 7 January 2015 (not 2014) and would have been sent out by post shortly thereafter. It was almost a year after HMRC issued its Enquiry Notice of 19 February 2014.

106. The Tribunal sets out below its reasons for making this finding on the evidence and rejecting the Appellant's suggestion that the Overington letter bore the correct date upon it of 7 January 2014. For example:

- the Appellant has not sought to contend that the Enquiry Notice dated 19 February 2014 is incorrectly dated.
- the Appellant has not sought to contend that he did not receive the Enquiry Notice.

- the Appellant has stated in terms in correspondence with the Tribunal that he did receive the Enquiry Notice.
- the Appellant has not sought to contend that he did not receive the Overington Letter.
- the Appellant has stated in terms in terms in correspondence with the Tribunal that he did receive the Overington Letter.
- the Appellant has stated in terms to HMRC his understanding that the date on the Overington Letter (i.e. 7 January "2014") is a "typo". In September 2015 the Appellant wrote to HMRC stating: "*I am contacting you in regards to your letter dated 7 January 2014 (even though I believe this was a typo and the actual date of the letter was 7 January 2015).* As it happens, the Appellant's letter was itself (it would appear) incorrectly dated – 18 October 2015 rather than 18 September 2015.
- In November 2016 the Appellant wrote to HMRC stating: "*In January 2015 I received an HMRC letter from Mike Overington with an enquiry notice under Section 9A. Please note that the date of this letter (it should have been 7 January 2015 instead of 7 January 2014) is incorrect as my 2012/13 tax return was only filed on 14 January 2014*."
- the Appellant has indicated to HMRC that he received the Overington Letter in early 2015, not early 2014. In the Appellant's September 2015 letter he refers to it being "eight months" since HMRC's Second Letter.

107. The Tribunal accepts HMRC's evidence that the reference to "2014" rather than "2015" on the Overington Letter was a typographical error.

108. In the circumstances, the Tribunal is satisfied that it is clear that the Overington Letter (mis)dated 7 January 2014 postdates the Enquiry Notice dated 18 February 2014.

109. Further, simply applying the balance of probabilities the Tribunal to the likelihood of the parties' rival contentions, HMRC's evidence is to be preferred over the Appellant's.

110. The Tribunal is satisfied HMRC's position is straightforward and likely: someone wrote the year "2014" rather than "2015" when dating HMRC's Second Letter. This often happens in the month of January.

111. This contrasts dramatically with the Appellant's apparent position, which is based on the propositions that HMRC: (i) looked to open an enquiry into the 12/13 Return before the 12/13 Return had even been filed on 14 January 2014, (ii) notwithstanding that the 12/13 Return had not been filed, decided to word the letter so as to thank the Appellant for receipt of the 12/13 Return ("Thank you for your tax return for the year shown above, which we received on 14 January 2014"), and (iii) then having drafted the notice, only sent it out some 13 months later, in February 2015.

112. The Tribunal also accepts HMRC's case, that HMRC's Overington Letter was sent out of an abundance of caution following the transfer of the matter to a new case team. HMRC's primary position is that its letter of 19 February 2014, i.e. the Enquiry Notice, was a valid notice of enquiry.

113. On 18 September 2015 the Appellant wrote to HMRC indicating that had received HMRC's Second Letter "eight months" earlier and stating that he believed that the "7 January 2014" date on HMRC's Second Letter was a typographical error:

"*I am contacting you in regards to your letter dated 7 January 2014 (even though I believe this was a typo and the actual date of the letter was 7 January 2015).*"

114. On 6 October 2015 HMRC wrote to the Appellant stating its view that GM LLP was a tax avoidance scheme and that in those circumstances HMRC would be withholding any

repayments arising. By the same letter, HMRC informed the Appellant that HMRC required no information at that stage but that HMRC might require information in the future.

115. On 28 January 2016 HMRC wrote to Mr Märtin stating that an enquiry for the 2012/13 tax year had been opened in respect of the partnership, GM LLP. This was incorrect; the mistake having arisen by reason of incorrect information on HMRC's computer system. HMRC never opened an enquiry into GM LLP for the tax year 2012/2013.

116. On 4 August 2016, the Upper Tribunal ("UT") (Mr Justice Nugee) upheld the FTT's *Acornwood* Decision so far as regards the LLP level issues (*Acornwood v HMRC* [2016] UKUT 0361 (TCC)). The member level issues were listed to be heard by the UT in the autumn of 2016.

117. By application notice dated 15 November 2016, the Appellant applied to the FTT for closure of the enquiry into the 2012/13 Return. In his closure notice application he stated:

"*In January 2015 I received an HMRC letter from Mike Overington with an enquiry notice under Section 9A. Please note that the date of this letter (it should have been 7 January 2015 instead of 7 January 2014) is incorrect as my 2012/13 tax return was only filed on 14 January 2014*."

118. On 16 January 2017 HMRC requested information and documentation in respect of the claims for relief made by the Appellant in his 12/13 Return. The Tribunal rejects the Appellant's suggestion that it actually did so on a later date such as 23 January 2017 but backdated the request to 16 January 2017. This is for the reasons set out in the discussion section of this decision. Again, the Tribunal accepts Mr Stannard's evidence in his second statement on this issue. This was another unfounded allegation against HMRC, this time of serious misconduct.

119. On 23 January 2017 the Appellant declined to provide the information sought but simply relied on his submissions that there had been not valid enquiry into Great Marlborough LLP and HMRC had had plenty of time to request additional information either in regard to GM LLP or his activities within the LLP.

120. He stated he had even proactively offered to provided information if needed but his offer was never taken up over the previous two years. He stated he had not received any request for further information from HMRC. However, he objected to the request in regards to both closure notices (for the 2012-12 and 2014-15 tax years) on the ground that the request did not seek information that would be required for either closure notice. This was notwithstanding the Appellant's contention that GM LLP should be distinguished from the LLPs subject to the FTT's *Acornwood* Decision (upheld by the UT).

121. On 31 March 2017 the UT (Nugee J) upheld the FTT's *Acornwood* Decision in respect of the member level issues (*Seven Individuals v HMRC* [2017] UKUT 132; together with *Acornwood v HMRC* [2016] UKUT 0361 (TCC) (the "UT's *Acornwood* Decisions")).

122. On 12 June 2017, following a hearing on 22 May 2017, the FTT released its decision in respect of the Appellant's application for closure of the enquiry into the 12/13 Return (*Jorg Märtin v HMRC* [2017] UKFTT 0488 (TC) (the "FTT's *Märtin* Decision")). By the FTT's *Märtin* Decision, the FTT ordered HMRC to close the enquiry into the 12/13 Return. The FTT also (among other things):

(1) Recorded that the Appellant had claimed that the enquiry into the 12/13 Return was not validly opened but had not explained the basis for such claim (at [6]).
(2) Recorded the FTT's observation that if the Appellant was right in relation to his invalid enquiry claim then the FTT appeared to have no jurisdiction to close the enquiry (at [6]).

(3) Recorded the Appellant's election not pursue his invalid enquiry point at the 22 May 2017 hearing (at [6]).
(4) Held that HMRC's January 2017 request for information was for relevant information and was not excessive in scope (at [28]-[30]).
(5) Held that that the question of whether or not HMRC's January 2017 request was made under Schedule 36 of the Finance Act 2008 was not relevant to the determination of the Appellant's application for closure of the enquiry (at [24]).
(6) Recorded the Appellant's acceptance that he had not provided any of the documents and information which HMRC had requested in January 2017 (at [27]).

120. Following the FTT's decision, on 7 July 2017 HMRC issued the Closure Notice which is the subject of this appeal. The Closure Notice was issued by HMRC Officer Mrs Adeyinka Omole and stated:

"My Decision
I have concluded that
1. The partnership loss of £438,817, relating to Great Marlborough LLP, is not available for relief against other income.

2. The loan interest relief of £558 relating to Great Marlborough LLP, is not available for relief against other income.

My reasons
This is for the following reasons:
1. Partnership Loss
a. As a partner in Great Marlborough LLP, you were not carrying on a trade on a commercial basis with a view to profit. The restriction in s. 66 Income Tax Act ("**ITA**") 2007, therefore applies and no losses are available for set off against other income.

b. The losses of Great Marlborough LLP appear to arise directly in connection with relevant tax avoidance arrangements. Therefore s. 74ZA ITA 2007 applies to restrict relief available to set against other income, to nil.

c. HMRC has seen no evidence that you were personally engaged in the commercial activities of Great Marlborough LLP. As per s. 103C ITA 2007, a cap of £25,000 relief against other income would apply, were it not for the conclusions in the foregoing 2 points, which restrict relief to nil.

2. Loan interest relief
a. The loan interest has not been used wholly for the purposes of a trade carried on by the partnership on a commercial basis with a view to profit. The requirement set out in s. 398(2)(b) ITA 2007 is not met and therefore a claim to loan interest relief under s. 383 ITA 2007 cannot be made.

b. The loan interest appears to arise directly in connection with relevant tax avoidance arrangements. Therefore in accordance with s. 809ZG ITA 2007, no relief is to be given."

123. Thus, the Closure Notice disallowed the claims made in the 2012/13 Return on the basis that the applicable requirements for sideways loss relief were not made out having regard to the requirements of sections 66 (restriction on relief unless trade is commercial) and 74ZA (no relief for tax-generated losses) of the ITA 2007.

124. The Closure Notice further stated that, even disregarding sections 66 and 74ZA, given the absence of any evidence of the Appellant's personal engagement in the commercial activities of GM LLP, any relief would have been capped at £25,000 on the basis that the Appellant was not an active partner within the meaning of section 103C ITA 2007.

125. HMRC's conclusion in such regard was reached: (i) in the light of and in line with the FTT's *Acornwood* Decision and UT's *Acornwood* Decisions in respect of the Icebreaker scheme, with which, having regard to the Companies House publicly available information (as to which see Mr Stannard's second statement at paragraph 8), GM LLP was considered to be associated; and (ii) having regard to the Appellant's failure to make good evidentially his assertion that GM LLP and its members should be distinguished from other Icebreaker LLPs.

126. There then followed further correspondence between (variously) the Appellant and HMRC, and the Appellant and the Tribunal (see, for example the emails of August and September 2017 addressed above).

127. On 7 August 2017 the Appellant sent an appeal to HMRC against the closure notice (this was the same day he sent his first appeal email to the Tribunal as set out above). In his email to Officer Omole (the Officer who issued the closure notice) the Appellant stated:

'I disagree with your closure notice…..In your closure notice you also never establish if a valid s9A enquiry was opened (I believe that was not the case) The reasons for your decision which you are stating are based on assumptions without any evidence and justification. You are fully aware that HMRC's investigation team never requested any information from me over the course of three years. So the lack of information is due to the failure at your investigation team. That is not a justification for making an amendment to the tax return and withholding the tax refund.

The essence of my appeal is that without any valid s9A enquiry into my 2012/2013 tax return the statutory limits for requesting information have passed years ago. Therefore, the 2012/13 tax return now stands as originally filed and hence I should have received the resulting tax refund.'

128. On 4 December 2017 HMRC's review of the Closure Notice confirmed that HMRC's view remained as set out in the Closure Notice.

129. By email dated 2 January 2018 Mr Märtin appealed to the FTT. The Tribunal has already addressed the procedural history of the appeal and the subsequent applications made in June 2019.

The Appellant's evidence of fact contained in his outline of case of 26 June 2019

130. The Tribunal sets out below the evidence of fact that the Appellant presented in his Outline of Case dated 26 June 2019.

131. Although he did not file a witness statement at any point in proceedings, and in particular despite the directions requiring service by 8 February 2019, the Tribunal considered it in the interest of justice to admit it as his evidence in chief. The Appellant was cross examined upon his evidence on the second day of the hearing.

132. The Tribunal sets out within the discussion section of this decision those parts of the evidence that it rejects as unreliable and the reasons for doing so. The Tribunal has already given some reasons above for rejecting the suggestion that the Overington letter was correctly dated as 7 January 2014.

133. The Appellant stated as follows:

Leaving UK residency and filing the 2012/13 UK tax return

1) I left the UK for Switzerland on 25 March 2013 and informed HMRC by the relevant form „P85 Leaving the UK - getting your tax right".
2) For 2012/13 an implied tax rate of approx. 51% was deducted at source. As that tax rate was above the top end of the UK tax band (50% at the time) I was owed a tax refund for 2012/13.
3) Accordingly, during the course of 2013 I contacted a UK accounting firm (Taxxa LLP) to file a 2012/13 UK tax return on my behalf.

4) In early October 2013 I provided my accountants with relevant information to file the 2012/13 tax return.
5) I received the prepared 2012/13 tax return on 30 December 2013 from my accountants. That version is identical with the one in the bundle (and hence I assume they filed the return on my behalf on or around 30 December 2013).
6) The filing of the tax return resulted in a GBP 229,594.29 tax refund on HMRC's online system for 2012/13 consisting of two parts: GBP 219,675.11 sideways loss relief resulting from a stake in Great Marlborough LLP and an additional GBP 9,919.18 overpayment due to deduction at source.
7) The GBP 9,919.18 overpayment was refused by HMRC for over 3 years without any apparent statutory basis. It required the 2016 Tribunal application to resolve this in March 2017 (with additional compensation for loss in March 2018). The remaining GBP 219,675.11 were amended by the 2012/13 closure notice and are subject of this appeal.

The two purported „letters" / enquiry notices

8) The previous (as well as the current) document bundles did not include any notice under Section 8 relating to 2012/13. Hence there appears to be no evidence to conclude if and how the statutory requirement under s9A(1) was determined when any of the purported notices were subsequently issued.
9) With date ***7 January 2014*** HMRC (Mike Overington) sent a letter to my address in Switzerland. That letter purports to be under Section 9A relating to my 2012/13 tax return (***„the first purported s9A letter"***). It is my position that the officer did not intend this letter to be a s9A notice validly issued and served in Switzerland (and it was served outside the statutory time limit). Furthermore, in that letter HMRC state *„at this stage we do not require information or documents from you…"*. I do not consider the letter a valid s9A enquiry notice and HMRC never suggested it was. The only disagreement appears to be over the exact date of this letter. Under Swiss law (if it were HMRC's position that the letters were validly served in Switzerland then Swiss law should apply) 7 January 2014 would be considered the date of the letter (*D.S. v Verwaltungsrekurskommission des Kantons St. Gallen & Kantonales Steueramt*).
10) With date ***19 February 2014*** HMRC (Miss Rodgers) issued a letter to my address in Switzerland (***„the second purported s9A letter"***). It is my position that the officer did not intend this letter to be a s9A notice validly issued and served in Switzerland. HMRC consider this letter the first purported s9A letter and consider it valid. I disagree (with details provided under „The Validity Issue") so I consider HMRC have the burden of proof that this was the first letter and validly issued and served in Switzerland (meeting the statutory requirements of s9A as well as the statutory requirements under Swiss law in order to be validly served). For avoidance of doubt, the SoC at §10 makes an unsubstantiated and misleading claim that *„Great Marlborough was one of the „Icebreaker" partnerships, Icebreaker being an established tax avoidance scheme which was subject of proceedings at the time…"*. There is no reference to any of that in the letter. In fact, Mrs Vallens of HMRC's Special Investigation team never opened any enquiry into the 2012/13 LLP accounts (presumably because she concluded there was no reason for such enquiry). ***The period prior to 16 January 2017 - HMRC did not „positively engage" and required no information***

11) With date ***19 August 2014*** I received a letter from HMRC (Mr Stannard). That letter appeared to be sent in error. It had three assertions - 1) it appeared to be a follower notice relating to Great Marlborough LLP 2) Mr Stannard implied I had a tax liability with HMRC 3) he offered me to contact HMRC and they would *„positively engage with [me]"*.
12) Accordingly, I replied directly to Mr Stannard (by letter dated ***25 September 2014***). In regards to 1) I informed him that he was *„factually incorrect"* (as Great Marlborough LLP was never involved in any Tribunal case either then, since then nor are any currently pending). I also informed him on 2) that I had overpaid taxes (regardless of Great Marlborough) and thus HMRC actually owed me a refund. I also informed him 3) *„that the circumstances of those LLPs were in many aspects different from Great Marlborough"* and that I would be *„very happy to discuss any of the above in more detail"* (expecting his offer to *„positively engage"* to be genuine).
13) With date **15 October 2014** Miss Sanjoori replied on behalf of HMRC/Mr Stannard. She addressed the first reason by clearly stating *„[I] should not have received this letter"*. But she failed to address the other two aspects.
14) Hence I re-iterated by letter dated **31 October 2014** that HMRC owed me a tax refund and offered again *„I would be happy to discuss any of the above [incl. Great Marlborough] in more detail."*

15) Neither Miss Sanjoori nor anyone else from HMRC ever replied to this letter.
Therefore, I do not accept the position at §13 of the SoC *„the Appellant did not provide any evidence to substantiate his view."* It was HMRC who did not reply, did not require any information (confirmed also in subsequent correspondence) had already confirmed in writing that I *„should not have received"* the 19 August 2014 letter. Hence there was nothing to substantiate. Moreover, it was HMRC's Special Investigation team who at that point had seemingly decided not to open an enquiry into Great Marlborough LLP for 2012/13.
16) With date **18 September 2015** I sent a letter to Mr Overington. Other HMRC officers (Miss Rodgers, Mr Stannard, Miss Sanjoori) did not require any information. At this point he was the only HMRC officer who had suggested in his 7 January 2014 letter that he *„may need"* information. I requested payment release of my tax refund (assuming that he had concluded by now that he did not require any information).
17) With date **6 October 2015** I received a response letter from N J Counter/HMRC. The officer clearly stated „*we do not need any information at this time"*. He also made unsubstantiated claims such as *„HMRC believes that Great Marlborough is an avoidance scheme"* and that HMRC were *„enquiring into Great Marlborough LLP"*. I interpreted the letter of HMRC claiming statutory rights under s12AC(6) TMA.
18) Accordingly, I contacted Great Marlborough LLP and was informed that HMRC had never opened an enquiry into the 2012/13 LLP accounts. The 12 months statutory window for an enquiry into the 2012/13 LLP accounts had at that point expired. Accordingly, I sent a reply to N J Counter / HMRC dated **30 December 2015** informing the officer that I was not aware of any 2012/13 enquiry into Great Marlborough (and had confirmed that with the LLP). Once again, I also requested release of the tax refund.
19) With date **28 January 2016** I received a response letter from Mrs J McGraw/HMRC. The officer clearly claimed statutory rights under s12AC(6) on the basis of an enquiry opened into the 2012/13 LLP accounts on 3 September 2014. She did not request information but refused repayment of any refund.
20) In **February 2016** I confronted Great Marlborough LLP with Mrs J McGraw's claim that the 2012/13 LLP accounts were purportedly under enquiry since 3 September 2014 and requested clarification.
21) At the time I was not informed by Great Marlborough LLP how they attempted to clarify this aspect. I only learned subsequently (when I obtained evidence for the 22 May 2017 hearing) that Mr John Nisbet contacted HMRC to clarify if the 2012/13 LLP accounts were under enquiry.
22) By email dated **3 May 2016** Mr Stannard/HMRC provided Mr Nisbet an update that he did not find any record of any s12AC enquiry notice being issued to Great Marlborough for 2012/13. However, he also raised *„the possibility of discovery amendments being issued"* for Great Marlborough LLP.
23) In **August 2016** I contacted Great Marlborough LLP again and requested confirmation if HMRC had opened a valid enquiry into the 2012/13 LLP accounts (or not). I was informed that HMRC (Mr Stannard) had confirmed that there was no such enquiry.
24) Accordingly, with date **8 September 2016** I sent a response letter to Mrs McGraw/HMRC informing her that her claim of an open 2012/13 LLP enquiry was incorrect and that HMRC had confirmed that to the LLP. I requested once again release of the tax refund, **a response by 10 October 2016.** Otherwise I informed her I intended to apply for closure notice with the Tribunal.
25) By email dated **15 September 2016** Mr Stannard/HMRC provided Mr Nisbet an additional update once again confirming no record of any s12AC enquiry notice issued to Great Marlborough for 2012/13. He also suggested that HMRC considered various *„options"* how to avoid the release of any tax refunds such as *„issue amendments to the partnership returns under the discovery provisions"* or *„challenging the individual claims themselves"*. As with the 3 May 2016 email, I had no knowledge of its existence at that time (and learned about them only in May 2017 ahead of that Tribunal hearing).

Tribunal application - requesting the tax refund in the absence of any s12AC(6) statutory rights
26) By **15 November 2016** it was more than two months since my 8 September 2016 letter to HMRC and more than a month since the 10 October 2016 deadline for a reply. So I submitted an application for closure notice for 2012/13 (also for 2014/15 - but that is not relevant for this case). At that point HMRC's official position to me was still the one expressed by Mrs J McGraw on 28 January 2016 (i.e. HMRC claiming statutory rights under s12AC(6) on the basis of a purported 2012/13 LLP enquiry).

27) On **15 December 2016** the Tribunal issued a Direction which required HMRC to *„provide the Applicant and the Tribunal with your grounds (if any) for opposing the application and state what evidence you rely on in support of them within one month"*.
28) On **16 January 2017** HMRC (Mr Kreling) replied to the Tribunal. The response appears to plead with the Tribunal to postpone a hearing and allow HMRC time to ask for information. That response seems to imply to the Tribunal I had already received *„schedules of information and documents"* (but that was not yet the case). There were no schedules attached to the email as evidence. More importantly, HMRC did not state any statutory basis why it should have any right to information more than 3 years after the filing of the 2012/13 return. That reply certainly did not clarify that HMRC no longer claimed statutory rights under s12AC(6) and (in such case) what its exact new ground(s) were.
29) On **23 January 2017** I informed the Tribunal that until this point HMRC had refused the tax refund on the basis that *„HMRC supposedly had opened an enquiry into the 2012/13 accounts of Great Marlborough LLP"* (i.e. under s12AC(6). I also pointed out that at that date I had not received any information requests from HMRC and that I did not consider the information relevant *„on grounds that it does not provide information that will be required for either closure notice…nor 2) does it address the issue if HMRC opened an enquiry into the 2012/13 accounts of Great Marlborough LLP within the statutory limits…"*In essence two factually correct arguments - the subsequent Tribunal decision based on *Steven Price* confirming the first argument at §37 *„…HMRC should not open an enquiry and then first ask for documents 3 years down the line…"*. The second argument was also factually correct as at this point in time. HMRC had still not conceded that s12AC(6) was no longer their ground for rejecting my tax refund. Therefore, I consider the statement in §20 of the SoC *„the Appellant refused to provide any of the information requested"* as misleading. In my view, the appropriate statement would be that HMRC never requested any information for over 3 years and (when it did) HMRC neither adduced nor had relevant statutory grounds for such information.
30) Some 28 hours after the above I received on **24 January 2017** the „schedules of information and documents" by email from Mrs Omole (HMRC).
31) On **30 January 2017** (i.e. 46 days after the Tribunal direction) Mr Kreling (HMRC) finally conceded that HMRC did not have statutory rights under s12AC(6). That email now stated *„the opening of the s9A TMA enquiries"* as the purported ground. It was raised late and in breach of Tribunal direction. HMRC never requested permission for late submission of this ground. But if that was HMRC's ground, HMRC should have prepared any relevant evidence for the 22 May 2017 and properly adduced it through a relevant officer. But that never occurred.

HMRC's pleadings at the 22 May 2017 hearing
32) There was no SoC for the 22 May 2017 proceedings. The bundle (incl. relevant authorities) was provided late to me (and thus considered a prejudice to me). HMRC case was submitted by **15 May 2017** Skeleton Arguments. That document did not plead a prima facie case if and on what legal basis HMRC had any statutory rights to any information more than 3 years after filing of the 2012/13 return.
33) At the **22 May 2017** hearing it was established that HMRC had burden of proof. HMRC confirmed that s12AC(6) did not apply (i.e. no enquiry into Great Marlborough LLP for 2012/13). But HMRC's external legal team did not plead any prima facie case in regards to any statutory rights which would have allowed HMRC the right for information over 3 years after filing of the 2012/13 return. When confronted with the issue of a second letter (which could be purported a s9A notice) I recall the QC suggesting he was not instructed on the issue by HMRC. HMRC's officers refused to provide witness evidence. This clearly allowed HMRC to evade scrutiny of this crucial issue.
HMRC also pleaded an unsubstantiated case of Great Marlborough LLP being a tax avoidance scheme (in essence a repeat of the 19 August 2014 claims for which HMRC subsequently had already issued an apology letter).

The Tribunal decision and subsequent 2012/13 closure notice
34) The **12 June 2017** Tribunal decision recorded HMRC's pleadings at §26 *„…The grounds which [HMRC] put forward is that the taxpayer had not provided them with the relevant information and documents they had asked."* But HMRC failed to plead any prima facie case which would have provided HMRC the statutory rights to any information or to make any amendments to the 2012/13 tax return as the decision recorded at §1 *„On 19 February 2014, HMRC opened (or purported to open) an enquiry*

into the…2012/13 tax return…" I did not have the burden of proof at the hearing (HMRC did). And a taxpayer can only challenge the validity of a s9A notice in an appeal of a closure notice. But HMRC required a valid s9A in order to have any statutory rights if it intended to subsequently amend the return (which it did). Finally, HMRC also failed to plead Great Marlborough LLP being a tax avoidance scheme as recorded at §3 *„…HMRC's case is that in doing so he had participated in a tax avoidance scheme…I do not need to, nor do I make any findings of fact about the exact arrangements on which in any event I heard no evidence."* It is my position this poses a challenge for the upcoming hearing - it cannot be a re-hearing of issues where (more than two years later) HMRC's officers and their team of external barristers put in a better SoC, better evidence or feel better prepared for.

35) On **7 July 2017** and **10 July 2017** HMRC (Mrs Omole) sent to my email address three 2012/13 closure notices (with a fourth arriving by post on 3 August 2017). In her closure notice she concluded s28A applied and stated several unsubstantiated reasons purportedly allowing her statutory rights to amend my tax return (by removing GBP 219,675.11 for HMRC's benefit).

My appeal of the 2012/13 closure notice

36) In **mid-July 2017** I had decided to appeal the 2012/13 closure notice. The Tribunal online application system appeared to have changed and I wanted to ensure I applied correctly. So I called the Tribunal helpline on 25 July 2017 and was advised to contact taxappeals@hmcts.gsi.gov.uk for guidance.

37) Eventually on **7 August 2017** I applied to the Tribunal attaching the 2012/13 closure notice and outlining my first ground of appeal. I challenged the validity of both letters. As relevant to the SoC, I stated my reasons incl. that *„since the 19 February 2014 was the second s9A issued it cannot be valid"*. I also pointed out that *„HMRC never actually claimed that it had a legal basis (i.e. a valid s9A enquiry notice) for requesting additional information outside the 12 months statutory limit"* and that for years HMRC had (incorrectly) claimed statutory rights under s12AC. I also pointed out that HMRC's external legal team did not attempt to plead s9A and that this appeared to be *„a striking difference to other cases"* where HMRC appeared to establish any s9A validity through a relevant officer. Without a valid s9A notice it implies HMRC's conclusion that s28A applied had to be incorrect and *„my 2012/13 tax return would stand as originally filed"* (i.e. the amendment would be without statutory rights).

38) On **7 August 2017** I also informed Mrs Omole (HMRC) of my Tribunal application. I pointed out that in her closure notice there was no indication if and how she concluded that HMRC had statutory rights under s28A and (in the absence of any valid s9A) I disagreed with her amendment. I also challenged her *„reasons for [her] decision"* which I still consider unsubstantiated being *„assumptions without any evidence and justification."*

39) It was my understanding that the Tribunal (Judge Poole) on **22 August 2017** provided case direction firstly by confirming jurisdiction (*„The Tribunal does therefore now have jurisdiction to entertain an appeal from you against that closure notice and the amendment which it purported to make"*). Secondly, the Tribunal also stated that *„it is not legally necessary to use the Tribunal's usual form (whether online or paper)"* but *„in order to facilitate compliance with rule 20"* the Tribunal required confirmation of information such as my address and any alternative delivery address for documents. Thirdly, that Tribunal correspondence specifically referred to *„[my] emails to the Tribunal dated 7 and 9 August 2017 (and the annexure to the former email)"* and *„the only ground of appeal [I] appear to raise"* in my application. I was advised to *„specify in outline…any other grounds of appeal"* and raise them *„no later than 6 September 2017"* by using two options. I opted for the second option *„**or** confirmation of the above outstanding points, whereupon [my] appeal can be registered, formally notified to HMRC by the Tribunal, and matters can start to progress towards a hearing"*. The SoC is (in my view incorrectly) stating at §26 that I had *„been invited by the Tribunal on 22 August 2017 to submit a notice of appeal in respect to [my] appeal…"*. That appears to refer to the first of the two options i.e. „*either a standard notice of appeal*" which I did not take. As explained above, I chose the second option i.e. „*confirmation of outstanding points*".

40) Accordingly, I considered my **6 September 2017** email as a confirmation of the *„outstanding points"* while also providing a second ground of appeal in order to complete my appeal registration. It appeared to me that at the 22 May 2017 hearing HMRC resisted a closure notice because it had no information. HMRC subsequently clarified in the SoC that the conclusions were based on different reasons (seemingly some unsubstantiated information unknown and not explained to me). So the second

ground remains still valid in my view - HMRC have not provided me any information (even though I requested it) that allows me to verify the conclusions in the closure notice as reasonable. That appears to be an abuse of power.
41) At the beginning of November 2017 I had not received any confirmation nor further updates from the Tribunal. Hence I contacted the Tribunal on **2 November 2017** to ensure my 6 September 2017 email had been received (and I had provided all the information required).
42) As I did not receive any reply I contacted the Tribunal again on **26 November 2017**.
43) I received acknowledgment from the Tribunal on **27 November 2017** (that the contents of the 6 September 2017 email were noted).
44) On **4 December 2017** I received correspondence from HMRC (Mrs Omole) purporting to be a „review". In my view this document failed the Section 49E TMA statutory requirements of a review. First of all, the review §49E(4) *„must take account of any representation made by the appellant."* The documents fails in that regard (e.g. there is no reference to the Validity Issue). Secondly, any review §49E(6) must state *„the conclusions of the review and their reasoning"*. The documents fails in that regards as it is simply repeating the conclusions and reasoning of the closure. Thirdly, a review §49E(6)(a) must be completed *„within a period of 45 days"*. Mrs Omole took more than twice the time.
45) On **2 January 2018** I emailed the Tribunal with the 4 December 2017 response from Mrs Omole. I pointed out that in essence §49E(4) and §49E(6) were in my view not met. I also pointed to my previous „application filing" for which the Tribunal had already accepted jurisdiction.

The dispute of the 7 January 2014 letter and the matter of evidence
46) On **8 January 2018** I replied to the submission of Mr Kreling's (HMRC) LoD relating to my 2014/15 appeal (with a virtually identical set of documents). In that LoD the 7 January 2014 letter had a footnote stating „Incorrectly dated, should be 2015." and which I did not accept. Accordingly, I informed Mr Kreling *„the footnote should be deleted as 1) it is under dispute as part of TC/2016/06334 [note: this was the case reference of these current proceedings at that time] and 2) there is no evidence to substantiate the footnote".*
47) On **13 February 2018** Mr Kreling (HMRC) replied *„The footnote was in the previous list of documents. We think it is obvious that the date should be 2015, so we do not propose to delete."*
48) On **22 February 2018** I replied to Mr Kreling (HMRC) *„It is my understanding that „obvious" is not a legal concept. The respective letter has the date „7 January 2014" hence the Tribunal and the appellant can only assume that this is the correct date. In the absence of any evidence to the contrary the footnote should be deleted."*
49) On **9 July 2018** I submitted my List of Documents for these proceedings. I also added under the heading *„**Documents required (but not in my possession)** - Documents supporting the conclusions in the 2012/13 closure notice (as purported in the 29 May 2018 Statement of Case"*
50) On **13 July 2018** Mr Kreling (HMRC) proposed a *„Draft Joint Bundle Index"* for the 2014/15 hearing (on 24 July 2018) stating *„Please let me know if it is agreed."* His proposed index listed the 7 January 2014 letter prior to the 19 February 2014 letter (without any footnotes). I agreed to that.

The Law

134. Section 8 of the TMA 1970 provides (in part):

Section 8 TMA (Person Return)
(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax…he may be required by a notice given to him by an officer of the Board-
(a) to make and deliver to the officer, a return containing such information as may reasonably be required…

135. Section 9A TMA 1970 provides (in part):

"(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")– to the person whose return it is ("the taxpayer"), (b) within the time allowed.
(2) The time allowed is–
(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.
(4) An enquiry extends to—
(a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return,
…
but this is subject to the following limitation.
…
(6) In this section "the filing date" means, in relation to a return, the last day for delivering it in accordance with section 8 or 8A."

136. Section 28A TMA 1970 provides (in part):

"*(1) An enquiry under section 9A(1) or 12ZM 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.
(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."

137. Section 31 TMA 1970 provides, at subsection (1), as follows:

"(1) An appeal may be brought against–
(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
(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),
(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
(d) any assessment to tax which is not a self-assessment."

138. Section 114 TMA 1970 provides (in part):

11 "*(1) An assessment or determination, warrant or other proceedings which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.*"

HMRC's submissions

139. Mr Jonathan Davey QC, leading Ms Belgrano and Mr Chandler, made oral submissions during the hearing on behalf of HMRC. He addressed the scope of the appeal, the preliminary issue raised by the Appellant, the admissibility of Mr Stannard's witness statement and whether the Appellant should be permitted to argue the substantive challenge to the closure notice. He also made full submissions in writing on all other issues in the case both before and after the hearing.

140. The Tribunal summarises those submissions below but addresses them in detail during the discussion section below.

141. Mr Davey submitted that on 19 February 2014, a month after the 12/13 Return had been filed and therefore within the 12-month window for opening an enquiry into a return, HMRC gave notice of its intention, by way of the Enquiry Notice, to open an enquiry into the 12/13 Return. In so doing, HMRC fulfilled the requirements of section 9A TMA 1970. The enquiry was therefore validly opened.

142. During the course of the enquiry, and against the backdrop of the release of the FTT's *Acornwood* Decision and the first of the UT's two *Acornwood* Decisions, the Appellant asserted that the activities of GM LLP and its members should be distinguished from the LLPs (and their members) under consideration in those proceedings. HMRC requested information from the Appellant in order to analyse the strength of those assertions, but the Appellant failed to provide any such information.

143. He submitted that in the circumstances, in the light of the information available to it and in the absence of any information to the contrary (see paragraph 23 above), HMRC reasonably made the informed judgement that the sideways loss relief claimed in the 12/13 Return was not available. HMRC was perfectly entitled to do so (see *Eclipse Film Partners No 35 LLP v The Commissioners for Her Majesty's Revenue and Customs* [2009] STC (SCD) 293 at [19]). The Closure Notice was issued on that basis.

144. Mr Davey submitted the Closure Notice complied with section 28A TMA 1970 in that it informed the Appellant that the enquiry had been completed, stated the resulting conclusions, and made the amendments required to give effect to those conclusions. Thus, the Closure Notice was validly made.

145. Mr Davey submitted that the Appellant bears the burden of proof in establishing that the conclusions stated in the Closure Notice are incorrect (see *Brady (Inspector of Taxes) v Group Lotus Car Companies Plc* [1984] STC 635), (albeit that he had not in fact substantively challenged the conclusions in the Closure Notice at any time before the hearing).

146. Mr Davey made submissions on behalf of HMRC addressing the essence of each of the Appellant's arguments in the three grounds of appeal identified by the Appellant by 2 January 2018.

The Appellant's position and HMRC's response

147. So far as regard the Enquiry Notice, Mr Davey made submissions as to the various points raised.

(A) Enquiry Notice

(i) The Appellant's appeal is defective

148. Mr Davey submitted that by virtue of section 31(1)(b) TMA 1970 (which is the only subparagraph of section 31(1) TMA 1970 that is relevant for present purposes) a taxpayer is

entitled to appeal against "any conclusion stated or amendment made by a closure notice under section 28A or 28B of the TMA 1970".

149. Therefore, if and to the extent that the Appellant is seeking to appeal the Enquiry Notice, then he submitted that the appeal is procedurally misconceived, as it does not fall within the scope of section 31 TMA 1970. Section 31(1) TMA 1970 does not make provision for a taxpayer to appeal against an enquiry notice (see *Spring Capital Ltd v HMRC* [2013] UKFTT 41 (TC) *per* Judge Mosedale including at [10] and [32]).

(ii) Enquiry into GM LLP's return not a prerequisite for enquiry into the Appellant's 12/13 Return

150. Mr Davey submitted that an enquiry into GM LLP's 2012/13 tax return is not a prerequisite to opening an enquiry into Mr Märtin's 12/13 Return and making amendments denying Mr Märtin's claim for relief arising from partnership losses pursuant to section 28A TMA 1970.

151. On a straightforward construction of the legislation, the TMA 1970 sets out separate provisions for HMRC to enquire into, on the one hand, a personal tax return (section 9A TMA 1970), and, on the other hand, a partnership return (section 12AC TMA 1970). This is not surprising. HMRC may take issue with a partner's return, but not with that of the partnership, for example because the claimed losses of the partnership are not in dispute, whereas HMRC wishes to enquire into the partner's entitlement to claim relief in respect of those losses.

(iii) Typographical error in HMRC's Second Letter does not assist the Appellant

152. Mr Davey submitted that the Appellant seeks to make something of the fact that HMRC's Second Letter bears an erroneous date, namely 7 January "2014" rather than "2015". In essence, his argument appears to be as follows:

(1) It is HMRC's case that the Enquiry Notice which was sent to Mr Märtin in February 2014 opened the enquiry into the 12/13 Return.
(2) However, a personal tax return may only be the subject of one notice of enquiry (section 9A(3) TMA 1970), and in the present case there is a document, i.e. HMRC's Second Letter, that purports to be a notice of enquiry into the 12/13 Return bearing an earlier date than the Enquiry Notice.
(3) Therefore, the Enquiry Notice was invalid, and, accordingly, there was never any enquiry for the Closure Notice to close.

153. As to HMRC's reply, Mr Davey submitted that there were various points to make in such regard.

154. The first point is that the FTT will need to decide whether the Appellant is even entitled to advance this argument at all in circumstances where: (i) it is absent from the Notice of Appeal; and (ii) the Appellant has previously unambiguously accepted that the Second Letter was issued in 2015 and was merely misdated (see further below).

155. In any event, Mr Davey submitted that Mr Märtin's argument falls to be rejected. He submitted that the beginning and ultimately the end of the matter is the short and elementary point that as a matter of fact the Enquiry Notice (correctly dated 19 February 2014) predates HMRC's Second Letter of 7 January 2015 (incorrectly dated 7 January 2014). The former was sent to the Appellant almost a year before the latter.

156. Further still, even if the inherent implausibility of Mr Märtin's account could be overcome, in any event it does not get him where he wants to get to.

157. If, as the Appellant contends, HMRC's Second Letter was incapable of opening an enquiry because it fell outside the 12-month enquiry window, then the restriction at section 9A(3) TMA 1970 does not apply. Section 9A(3) TMA 1970 provides that "A return which has been the subject of one notice of enquiry may not be the subject of another". On the Appellant's case, at the time that the Enquiry Notice was sent, the 12/13 Return had not been subject of a notice of enquiry because HMRC's Second Letter was not a notice of enquiry but, rather, a nullity. It was not a valid notice of enquiry precisely because, on the Appellant's (erroneous) case, it predated and therefore fell outside the applicable 12-month enquiry window.

(iv) Non-UK dimension does not assist Mr Märtin

158. Finally, as regards section 9A TMA 1970, Mr Davey noted that in the Appellant's application for a preliminary issue, filed with the FTT on 20 May 2019, it is stated (among other things) as follows:

"Moreover, there has never been any evidence if HMRC relied on a Section 8 notice relating to 2012/13 nor if or how HMRC intended to establish jurisdiction that s9A would apply in Switzerland."

159. As to this, Mr Davey made the following points on behalf of HMRC.

160. First, the FTT has refused Mr Märtin's preliminary issue application (see Tribunal's decision letter dated 19 June 2019).

161. Secondly, HMRC repeated its observations made above, and in HMRC's Response to Appellant's Preliminary Issue Application and Bundle Email dated 17 June 2019, as to the unsatisfactory manner in which the Appellant has sought to raise new issues not included within his Notice of Appeal and merely summarily and/or haphazardly introduced by way of correspondence over a prolonged period of time.

162. Thirdly, and in any event, Mr Davey submitted that the Appellant's point is a bad one.

163. By section 9A TMA 1970, Parliament has empowered HMRC to enquire into "a return under section 8", subject to time limits, and irrespective of where the taxpayer who filed the section 8 return happens to reside at the time when HMRC decides (timeously) to open an enquiry. There is no warrant in the legislative wording for the territorial limit which the Appellant appeared to seek to impose upon the scope of HMRC's powers.

164. Moreover, Mr Davey submitted that the Appellant's contention was inconsistent with recent Court of Appeal authority. The case of *R (on the application of Jimenez) v First-tier Tribunal (Tax Chamber) and another* [2019] EWCA Civ 51; [2019] STC 746 ("***Jimenez***") – permission to appeal to the Supreme Court was granted on 27 June 2019. *Jimenez* concerned the issue of whether HMRC had the power to issue a Schedule 36 information notice to a taxpayer who was resident in Dubai. In considering the territorial scope of Schedule 36, Patten LJ (giving the leading judgment) explained that, in determining the question, it was necessary to enquiry as to the purpose of the relevant provision (see [11]):

"In considering the scope of the powers contained in Schedule 36 [of the Finance Act 2008] and in particular the intended territorial reach of those powers it is necessary to place them in context. The tax position of the taxpayer which HMRC is given power to investigate is now based on the taxpayer's self-assessment of his tax liabilities. Key to the proper operation of the self-assessment system is the ability of HMRC to investigate the correctness of the assessment and the powers granted to HMRC by FA 2008 replaced those contained in the Taxes Management Act and other legislation and are designed to enable HMRC, within the limits I have mentioned, to obtain the information necessary to check that the tax position set out in the assessment is correct. In so far as the powers contained in Schedule 36 engage the rights and freedoms of the taxpayer and third parties under article 6 and article 8 of the Convention

for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), they have been held by this court to be both justified and proportionate…"

165. Mr Davey submitted that the above rationale applies to section 9A TMA 1970, which permits HMRC to investigate the correctness of, in the present case, the significant losses (and tax repayment) claimed by Mr Märtin. It is inconceivable that Parliament intended, by section 9A TMA 1970, to permit a taxpayer in the position of Mr Märtin to claim substantial UK tax losses (or a tax repayment) and then avoid any investigation by simply leaving the country. The purpose and terms of section 9A TMA 1970 exclude any presumed limitation by reference to territoriality (see *Nichols v Gibson (Inspector of Taxes* [1996] STC 1008 at 1014).

166. Further, and in any event, in *Jimenez* the Court of Appeal went on to explain that HMRC's Schedule 36 powers were exercisable in relation to a person with "an identifiable relationship with the UK" (at [35]):

"The general purpose of Schedule 36 is not in dispute. It is apparent from the references in most of paragraphs 1–10 of the Schedule to "the purpose of checking the taxpayer's tax 17 position" that these are investigatory powers designed to verify the taxpayer's self-assessment and are limited to that stated objective. This means that the powers are necessarily and only exercisable in relation to someone who is or may be liable for tax in the UK and, to that extent, has an identifiable relationship with the UK." (emphasis added)

167. Again, Mr Davey submitted that the above is directly applicable to section 9A TMA 1970 and to the present case. Ahe Appellant has a (originally uncontested) liability to UK tax and argues that, on the basis of allegedly loss-making activities carried out in the UK, he is entitled to a large refund from the UK Exchequer. As regards the 2012/13 tax year, he therefore plainly has an "identifiable relationship" with the UK.

168. He submitted that the Court of Appeal went on to conclude in *Jimenez* (at [39] and [40]) that Schedule 36 was extra-territorial in scope and that, having regard to the purpose and terms of Schedule 36, properly construed, it allowed HMRC to send an information notice to a non-resident person. In so concluding, the Court of Appeal had regard to two factors in particular: (i) first, the prevention of tax evasion which will often have a cross-border aspect to it, such prevention "serv[ing] an important public purpose in maintaining public revenue" (at [39]); and (ii) secondly, the strong policy objectives of conferring upon HMRC effective investigatory powers to investigate the position of persons abroad (at [40]).

169. Mr Davey submitted that both such factors identified by the Court of Appeal in relation to Schedule 36 have like application to section 9A TMA 1970. First, like Schedule 36, section 9A TMA 1970 is concerned with preventing tax evasion and avoidance and identifies a sufficient connection between the person receiving the enquiry notice and the UK, given that the person in question has filed a tax return and is or may be a UK taxpayer. Secondly, as in relation to Schedule 36, there is no express restriction in section 9A TMA 1970 as to its geographical operation, and (pursuant to section 115 TMA 1970) an enquiry notice can be sent to or delivered to the taxpayer "at his usual or last known place of residence". Therefore, the Court of Appeal's reasoning and conclusion in *Jimenez* is directly applicable to the territorial application of section 9A TMA 1970.

170. He submitted that tt follows that, if and to the extent that the Appellant is permitted to advance the point at all, any contention to the effect that the scope of section 9A TMA 1970 is so limited as to prevent HMRC even from being able to enquire into the Appellant's 2012/13 UK tax return, simply because he had decided to leave the country, falls to be rejected.

(B) Abuse of power / potential for fraud by HMRC; and (C) Closure Notice

171. Mr Davey submitted that the basis of the Appellant's challenge to the Closure Notice was largely parasitic upon his challenge to the validity of the enquiry which preceded it (in relation to which HMRC's submissions are set out above). However, in addition, the Appellant appeared to advance a second argument, namely that, even if an enquiry was opened into the 12/13 Return, the Closure Notice was nevertheless invalid on the basis that HMRC refused "the tax refund on the basis that I did not provide any information to HMRC".

172. He submitted that the Appellant asserts that this:

"*raise[s] a very serious issue of abuse of power by HMRC vs any taxpayer. In the future HMRC would simply never need to request any information from the taxpayer and could simply deny any tax refunds. If the taxpayer then seeks a closure notice from the Tribunal in order to get his tax refund HMRC could then use that lack of information (due to HMRC never asking for any) as the reason to keep any tax refund. In effect that would invite fraud by a government entity…*"

173. Mr Davey submitted that the Appellant's argument falls to be rejected for the following reasons.

174. First, if and in so far as the Appellant's complaint ultimately concerns a pure matter of public law, Mr Davey submitted it is outside the FTT's jurisdiction: the FTT has no judicial review jurisdiction (see *Birkett (t/a Orchards Residential Home) v Revenue and Customs Commissioners* [2017] UKUT 89 (TCC) at [30] and *Andrew Scott v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 0385 (TC) at [161]).

175. Secondly, to the extent that the Appellant's complaint is focused on the situation in which HMRC does not request information ("In the future HMRC would simply never need to request any information…" (see above)), he submitted that that is not the present case. HMRC did request information. The Appellant chose not to provide it.

176. Thirdly, Mr Davey submitted that the Appellant's contention is flawed as a matter of fact. Loss relief was refused by HMRC not because the Appellant failed to comply with HMRC's request for information, but because the unavailability of loss relief was the conclusion which HMRC quite reasonably reached on the information available to it. In so far as the Appellant's refusal to provide the information which HMRC requested is of any relevance for present purposes, it is simply that it resulted in an absence of evidential basis to counter HMRC's view that loss relief was not available.

177. Fourthly, Mr Davey submitted that it was the Appellant himself (by applying for a closure notice) who sought an order from the FTT requiring HMRC to close the enquiry. The FTT, taking the "reasonable balance" of the interests of HMRC and the Appellant into account (see *Eclipse Film Partners No 35 LLP v The Commissioners for Her Majesty's Revenue and Customs* [2009] STC (SCD) 293 at [19]), ordered HMRC to close the enquiry.

178. HMRC complied with the Tribunal's order, an informed judgement being made as to the matter in question with the conclusions and related amendments to the Appellant's return set out in the Closure Notice. The Appellant has therefore obtained the Closure Notice that he sought and does not substantively challenge the conclusions in that notice. In the circumstances, his position appears to be logically incoherent: ultimately, it is extremely hard to discern any extant complaint.

179. Finally, Mr Davey submitted that any substantive, as opposed to formal / procedural, challenge was entirely absent from the Appellant's grounds of appeal. In such regard, the Appellant chose not to avail himself of the opportunity to which Judge Poole expressly drew

his attention some two years ago (Tribunal letter (Judge Poole) to Mr Märtin dated 22 August 2017).

180. So Mr Davey submitted that whilst the Appellant criticised (incorrectly) HMRC's issuing of the Closure Notice, he had not within the proceedings at any time before the hearing appealed against the correctness of the amendments made by the Closure Notice.

Appellant's submissions

181. The Appellant made oral closing submissions on the final afternoon of the hearing. He also made written closing submissions after the hearing on 11 October 2019. These consisted of 150 pages which the Tribunal has read and considered. There is no practical way to address every point he raises within that document. However, he also provided a summary document outlining his position which is set out below and which the Tribunal does address. In those documents he expressed the arguments in support of his appeal in a new way that he had never pleaded before.

182. The Appellant argued that the following five grounds of appeal require consideration by the Tribunal. In his view they should be analysed in the order set out below and the Tribunal should also consider which party has the burden of proof on each ground:

1)- The Procedural Issue
2) - The late evidence
3) - The Validity Issue
4) - The Abuse / Reasonableness Issue
5) - Professional conduct

1) The Procedural Issue (second bite of the cherry / abuse of process)

183. The Appellant agreed with HMRC that the case at its core is simple. However, it was his position that HMRC's case was hopeless if one applied the facts to the case law.

184. He submitted that HMRC purported that the 19 February 2014 letter constitutes a valid enquiry notice. However, they did not positively plead this at the 22 May 2017 hearing. He submitted that HMRC claim they did not have to. He strongly disagreed - for the simple reason that he never accepted the 19 February 2014 letter to be a valid enquiry notice. HMRC never pleaded that at any point before or at the 22 May 2017 hearing of his application for a closure notice. HMRC simply referred to the document as a letter, made the documents bundle available only 2-3 business days before the hearing in 2017 (causing prejudice to him) and never adduced the document at the hearing itself.

185. The Appellant submitted that it follows that HMRC never pleaded a prima facie case at the 22 May 2017 hearing of there being a valid enquiry notice (despite their holding the burden of proof at that hearing).

186. The Appellant had never accepted that HMRC had opened a valid 2012/13 enquiry (in fact, as recorded by Judge Mosedale, he very much challenged that at the 22 May 2017 hearing). The facts clearly did not speak for themselves at the 22 May 2017 hearing in particular as there were two letters that purported to be enquiry notice into the same 2012/13 return. In any case, evidence needed to be adduced by a HMRC witness (if challenged) which did not occur at the 22 May 2017 hearing. As a result, the June 2017 decision of Judge Mosedale recorded only a *'purported enquiry'* (i.e. unproven).

187. Hence, the Appellant submitted that even if HMRC had attempted to plead a prima facie case (which they failed to do) he would have had numerous rebuttal arguments available that

no HMRC officer would have been able to address in cross-examination (as even HMRC's counsel agreed that these rebuttal arguments were very complex). He argued it was completely understandable that all HMRC officers refused to adduce evidence at the 22 May 2017 hearing. In particular, as the bundle HMRC served was missing key evidence (e.g. a copy of a section 8 notice to file a tax return) this made it absolutely impossible at the 22 May 2017 hearing to make any positive pleading relating to the Validity Issue.

188. The Appellant thus submitted that binding case law (*Burgess, Brimheath Developments Ltd; Gardner Shaw Ltd)* does not allow HMRC a 'second bite of the cherry' to make any representations that could have been pleaded at the 22 May 2017 hearing. He submitted he had pointed that out in his 20 May 2019 email and thus HMRC were simply abusing the Tribunal's process. In particular the Appellant submitted that the binding decision in *Burgess* makes it very clear at §58. HMRC simply failed *'to put a positive case to the FTT'* at the May 2017 hearing. Thus *'the only course open to the FTT'* now should be *'to allow [my] appeal'*.

189. The Appellant submitted it was unreasonable for HMRC to allow his appeal to proceed to a hearing at the very latest once he outlined HMRC's lack of evidence of the case in May 2019. Instead HMRC, and its legal team of unprecedented size, took actions that may be in breach of professional conduct rules in proceedings where he, the appellant, was unrepresented - and that is simply unacceptable. Therefore, the Appellant invited the Tribunal to allow his appeal on the basis of the facts, the law and the conduct of HMRC and its counsel during almost three years of Tribunal proceedings.

2) HMRC's late submission of evidence

190. The Appellant submitted that HMRC's late evidence was submitted extremely late (this is taken to be all the evidence relied upon by HMRC, not simply the second witness statement of Mr Stannard). He argued that there was no reasonable explanation for the delay. For some of the late evidence (the filing date of his 12/13 Return) HMRC did not even request permission for late submissions. He objected to the submission of late evidence for two reasons.

191. First of all, the Appellant noted the history of this Tribunal in past decisions relating to issues such as the significance of any delay as well as reasons for any delay when a delay was caused by the appellant e.g.

Abdallah El-Lamaa v HMRC [2016] UKFTT 715 (TC)
§72: *"…the tribunal has concluded that the length of delay and the insufficiently good explanation provided by the appellant must weigh against them…"*
Drinks Stop Cash & Carry v HMRC [2016] UKFTT 730 (TC)
§119: *"…'a delay of more than three months cannot be described as anything but serious and significant'…"*
§120: *"…the appellant did not offer any further explanation for the delay…"*
XG Concept Ltd v HMRC [2017] UKFTT 92 (TC)
§53: *"…HMRC submitted that a litany of failures has seriously prejudiced [HMRC's] trial preparation. I accept that submission."*
Goldshine Trade Ltd v HMRC [2018] UKFTT 601 (TC)
§108: *"…a delay of 54 days is a significant delay…"*
§146: *"..outweighed by the length of the delay and poor quality of explanation for that delay"*

192. He submitted that it follows that the Tribunal should apply the same standards (i.e. equal treatment) when (as in this case) HMRC caused the delay / failed to provide good reasons for the delay.

193. Secondly, the Appellant submitted that the Supreme Court in BPP Holdings Ltd [2017] UKSC 55 decided:

§16: *"…BPP had the right to „be put in the position so that it can properly prepare its case."*
§16: *"…'the real prejudice to the appellant is in the delay'…"*

194. The Appellant submitted it took two years to prepare for the 10/11 July 2019 Tribunal hearing and he spent hundreds of hours of his time in doing so. That came at great cost to him as unlike everyone else he was not being paid for any time spent on this case - being self-employed meant any time spent on his appeal cost him in the form of lost income.

195. He submitted that HMRC were represented throughout the proceedings by its Solicitor's Office and a QC plus additional barristers against an unrepresented Appellant. Despite this he received the late evidence only two weeks before the hearing. Thus, he could not properly prepare his case as he would like to have done (if he had received the late evidence in time). He considered the delay caused great prejudice to him. He realised that HMRC were desperate to have the late evidence allowed as otherwise they would have no case to argue but that cannot be a justification for its admission. For all of the above reasons he invited the Tribunal to dismiss HMRC's late service of evidence.

3) The Validity Issue

196. The Appellant submitted his arguments in regards to the validity issue were simple. HMRC required a "second bit of the cherry" in order to make any representations and be able to adduce (late) any evidence relating to the validity issue.

197. He submitted it was important for the Tribunal to analyse properly the facts. It was important for two reasons a) the current Tribunal was not part of the May 2017 hearing, and 2) the Appellant was unrepresented. The Tribunal needed to ensure under the principle of fairness and justice that he was not taken advantage of by HMRC being represented by a legal team of unprecedented size.

198. The Appellant submitted that the proper analysis is in a nutshell also simple. HMRC was not in a position to adduce relevant evidence of a valid s9A notice at the 22 May 2017 hearing.

199. The Appellant argued that a key reason seemed to be that HMRC was unprepared for the 22 May 2017 hearing (thus breaching Tribunal directions relating to the bundle preparation deadlines). The result was a bundle at the hearing that did not enable HMRC to adduce evidence of a valid s9A or prerequisite section 8 notice to file at that hearing. Unsurprisingly, neither was any HMRC officer willing to adduce evidence relating to any valid 2012/13enquiry nor did they even instruct their counsel to plead any valid enquiry.

200. However, the Appellant relied on the manner in which HMRC made pleadings at the 22 May 2017 hearing (albeit unsuccessfully).

201. First, HMRC claimed that Great Marlborough LLP was an Icebreaker LLP/avoidance scheme. But there was no evidence adduced and none included in the bundle for that hearing (i.e. unsubstantiated).

202. Secondly, HMRC pleaded they required information before issuing a closure notice. But HMRC did not plead on which statutory basis they would have the right to information (three+ years after filing of the 2012/13 tax return).

203. Thirdly, HMRC pleaded (in the Appellant's view incorrectly) they had issued a Schedule 36 information notice relating to his 2012/13 and did not substantiate that claim.

204. Fourthly, HMRC did not plead if and why the 19 February 2014 letter was (in HMRC's view) a valid s9A enquiry notice. As stated above, HMRC did not have sufficient evidence to adduce at that hearing.

205. Fifthly, successful pleading of the above statutory rights to information (point 2) as well as any Schedule 36 notice (point 3) would have required both a valid section 8 notice and s9A enquiry notice. So for those pleadings to succeed HMRC required adducing evidence of a valid s9A notice.

206. Therefore, the Appellant submitted that given these facts that the UT decision in *Burgess, Brimheath Developments Ltd* (in particular §41, §43-§45, §48) was binding on this Tribunal.

207. He submitted that it followed that the Tribunal in current proceedings could not allow HMRC to make any representations / adduce any evidence *"which, for HMRC to succeed, had to form part of HMRC's own case"* at the May 2017 hearing.

208. As a result, the Appellant submitted that HMRC was unable to satisfy their burden of proof on the validity issue in the current appeal. This was because all the representations HMRC were now making and the (late) evidence HMRC attempted to adduce were not permissible as HMRC had failed to plead them in May 2017.

209. He submitted that HMRC also seemed to imply that the Appellant had to plead (some of those) issues at the May 2017 hearing. But that is simply incorrect as the decision in *Burgess, Brimheath Developments Ltd* makes it clear (§48) that these "*were not issues the appellants had to raise or argue"* (as he did not have the burden of proof - HMRC did).

210. Thus even if the Tribunal were to allow HMRC "a second bite of the cherry" on the Validity Issue, the Appellant submitted that such attempt would not only be an error of law but also the additional attempt would fail on proper analysis and applications of the above restrictions resulting from *Burgess, Brimheath.* The Appellant asked the Tribunal to dismiss HMRC's submissions relating to the Validity Issue.

4) The Abuse of Power / Reasonableness Issue (the Substantive Issue)

211. The Appellant submitted that the Tribunal needed to decide all the issues above before it could even consider the substantive issue. In other words, the Tribunal would need to allow HMRC "[another] bite of the cherry", the late evidence and positively decide that on this second (or third) attempt HMRC satisfied the burden of proof that it issued a valid s9A enquiry into the 2012/13 tax return.

212. The Appellant submitted it would be rather extraordinary if the case were to ever get to this point - as it would require:

- the Tribunal to decide that a well-established legal concept with binding case law (for whatever reasons) does not apply to current proceedings;
- HMRC satisfied the burden of proof on the validity issue on the basis of a deficient Statement of Case (lacking relevant substance and with a case reference relating to different proceedings); and
- a 8 February 2019 witness statement by the relevant HMRC officer (Mrs Omole) offering no arguments/ evidence in regards to any valid 12/13 enquiry (which was further confirmed in cross-examination).

213. Nonetheless the Appellant submitted, in any event that the closure notice conclusions of HMRC Officer Mrs Omole were not reasonable for the following reasons.

214. The Appellant relied on HMRC's pleading he was presented with in form of their 15 May 2017 Skeleton and at the Tribunal hearing which consisted of the following (details of which were provided in his additional document):

- *"…HMRC are presently without any documentation specific to Mr Märtin and Great Marlborough…"*
- *"Presently, HMRC have no information relating to Great Marlborough and Mr Märtin's activities as a member…"*
- *"…HMRC remain entirely uninformed…"*

215. The Appellant submitted that, as Mrs Omole stated at the 11 July 2019 hearing, HMRC did not expect to lose the May 2017 appeal (i.e. being instructed to issue a closure notice), so it seems there was no plan when the unexpected occurred.

216. Subsequently the Appellant submitted that he received a 2012/13 closure notice that had obvious illogical and unreasonable conclusions such as:

"As a partner in Great Marlborough LLP, you were not carrying on a trade on a commercial basis with a view to profit. The restriction in s. 66 [ITA] 2007, therefore applies…"

217. He submitted that this was a positive conclusion/reason. There were only two logical explanations:

1) If the above (*"no information"*) is correct then this conclusion must be incorrect. Because as the UT in *Seven Individuals* decided the *"Commercial Basis question"* (s 66 ITA) *"can be resolved only by the analysis of the evidence"*. But *"no information"* about Great Marlborough or the Appellant as a member logically means no evidence. Hence as a matter of law this conclusion has to be incorrect.
2) The Appellant did consider the only possible alternative that Mr Davey QC may have simply misled the Tribunal and him at the May 2017 hearing (and HMRC did actually possess sufficient information to issue a closure notice).

218. The Appellant submitted that this second possibility was suggested in the 29 May 2018 Statement of Case §3(b) that "HMRC concluded (on the basis of the information that was available to it) that (i) the Appellant did not carry on a trade with a view to profit…".

219. The Appellant considered this unlikely but to cover that eventuality he put HMRC on notice in his 9 July 2018 List of Documents stating he required "Documents supporting the conclusions in the 2012/13 closure notice (as purported in the 29 may Statement of Case)."

220. The Appellant submitted that the same logic applies to the other closure notice conclusions - on the basis of *"no information"* no reasonable public decision maker could have made such (positive) conclusions. The Appellant submitted that the deadlines of 11 January 2019 (for document submission) and February 2019 (for witness statements) imposed by the November 2018 directions in these proceedings passed and no documents were provided by HMRC that supported *"the conclusions in the 2012/13 closure notice"*.

221. Thus the Appellant submitted that he prepared months for the 10-11 July 2019 hearing on the basis that HMRC had pleaded their case correctly at the May 2017 and it had indeed *"no information"*. It followed the conclusions in the closure notice were logically impossible to make and hence unreasonable.

222. HMRC's closing submissions now raise a serious issue as their position appears to be that alternative 2) was the one he should have prepared for and both the Tribunal and him were indeed misled at the May 2017 hearing.

223. If that is indeed HMRC's position now, the Appellant asked the Tribunal to allow his appeal also on the basis of the substantive issue due to abuse of process by HMRC and the extreme prejudice caused to him.

5) Professional conduct issues

224. The Appellant submitted that HMRC claimed in their closing submissions that he was haphazard - implying he was the cause for making their pleadings difficult. In his view that was a complete perversion of the facts. He listed (in the additional document) in detail the errors, misrepresentations, changes in pleading by HMRC and its counsel over the years since 2014. That had been the cause and he simply had to react to it. So in essence he submitted that what HMRC's counsel was calling haphazard is the effect of what actually HMRC (in particular HMRC's Solicitor's Office) have caused.

225. The Appellant submitted that at the heart of the appeal are a litany of failures that he considered very serious according to The Bar Standards Board Handbook Code of Conduct (which he understands applies to HMRC's counsel) as well as the SRA Code of Conduct (which he understands applies to HMRC's Solicitor's Office) in a case where the appellant is unrepresented. It was the Appellant's submission that the litany of failures has cumulatively but also individually affected the fairness and justice of current proceedings. Therefore, he asked the Tribunal to allow his appeal also for those reasons.

Discussion and Decision

226. As is evident from the Appellant's five submissions set out above and the number of issues identified at the start of this decision, the Appellant's grounds of appeal are numerous and various. However, they essentially fall into two broad grounds: challenges to the Enquiry Notice and challenges to the Closure Notice. These are the headings under which HMRC addressed the Appellant's points in their closing submissions and the same two headings are adopted below.

227. The Tribunal comes to largely the same conclusion on each ground and each issue in the appeal for largely the same reasons argued by HMRC. It has adopted much of their reasoning.

The Appellant's five grounds of appeal raised in his post hearing closing submissions

228. Before addressing those issues, the Tribunal will deal very briefly with the five grounds raised in the Appellant's written closing submissions of October 2019 which are summarised above. Unfortunately, and once again, the nature of the Appellant's case has changed and he puts his case in different ways.

229. In relation to the first ground, the Tribunal is not satisfied that HMRC have been given a 'second bite at the cherry' as the Appellant submits. No issue arises in this appeal as to issue estoppel, abuse of process nor res judicata. The proceedings before the FTT in 2017 concerned an application for a closure notice, not the validity of the enquiry and the issue was expressly reserved and not decided in those proceedings.

230. This appeal concerns an appeal against the subsequent closure notice in which the validity of the enquiry is in issue. Indeed, how could a closure notice have been granted unless there was a valid enquiry to close. In any event the issue was not determined in the 2017 proceedings and did not need to be. There are different factual and legal issues in each set of proceedings. This is addressed in more detail below.

231. HMRC has been permitted to present the evidence in response to the Appellant's appeal to defend that closure notice either because it was served in compliance with the Tribunal's

directions or for the reasons set out above. The evidence was relevant and admissible to the issues raised in this appeal.

232. If anything, it is the Appellant who is unduly focussed on the 2017 proceedings rather than the current appeal. At times he comes close to re-litigating those proceedings rather than addressing the current appeal. There is nothing within the findings of the FTT in relation to the closure notice application in 2017 that contradicts or goes behind the findings that the Tribunal is invited to make in this appeal.

233. In relation to the second ground, the Tribunal is satisfied that it should admit the evidence of Mr Stannard in his second witness statement together with the evidence he gave orally at the hearing. The Tribunal has given its reasons for doing so above.

234. In relation to the third ground, as the Tribunal has already indicated, it is the Appellant who seeks to relitigate the May 2017 closure notice application within this appeal. Whether or not HMRC produced evidence at that hearing of opening a valid enquiry by serving a valid section 9A notice is irrelevant to these proceedings. The only question is whether they served evidence of a valid notice of a section 9A enquiry on the Appellant at the relevant time and within this appeal. The Tribunal finds below that there was a valid notice of a section 9A enquiry given to the Appellant at the relevant time and that HMRC served satisfactory evidence of such within this appeal.

235. There is no reason in law that HMRC should be prevented from introducing the evidence it has in this appeal to address the issues raised in the proceedings. HMRC could not and should not have been expected to plead its arguments or introduce evidence in the 2017 proceedings which concern the current appeal. *Burgess and Brimheath* is simply an authority that requires HMRC to adduce prima facie evidence of making a discovery in appeals against the making of discovery assessments (where the burden of proof lies upon HMRC to do so). The authority is not relevant to the current proceedings where the burden of proof is upon the Appellant to establish that the conclusions in the amendment to the closure notice are wrong.

236. Further and in any event, *Burgess and Brimheath* is not an authority on abuse of process, issue estoppel nor res judicata. None of those questions arise in this case. The facts and issues in the 2017 closure notice application are demonstrably different from those raised by the subsequent appeal against that notice and HMRC have not sought to go behind any findings of the FTT in the earlier proceedings.

237. HMRC are not barred from making those argument and introducing evidence as they have only responded to grounds the Appellant now raises. The Tribunal is satisfied HMRC have acted fairly and properly in defending this appeal. The Appellant did not seek to suggest before or during the July 2019 hearing that HMRC should be barred from raising arguments that they had not raised in the 2017 hearing. He has raised this argument in his subsequent closing submissions. The argument is without merit.

238. In relation to the fourth ground of appeal, the Tribunal addresses below: the reasonableness of information held by HMRC at the time to support the conclusions within their closure notice; the evidence now available to support those conclusions; and the relevance of any inconsistent statements HMRC might have made in the May 2017 proceedings as to the extent of evidence they held.

239. In relation to the fifth ground, the Tribunal rejects the suggestion that there has been any misconduct on the part of HMRC or its legal representatives in these proceedings nor in the course of its enquiry. This is a serious and unnecessary allegation. The Tribunal rejects the suggestion that it is HMRC which has constantly changed its case but rather finds that this applies to the Appellant.

240. There are some valid criticisms that can properly be made of HMRC's approach during the enquiry which may well have motivated the Appellant's sense of grievance that was apparent throughout this appeal. While ultimately these criticisms do not assist in determining the appeal in the Appellant's favour it can be said of HMRC that:

a) they issued two enquiry notices on 18 February 2014 and 7 January 2015 (wrongly dated 7 January 2014), the effect of which is dealt with below. This caused confusion and was a mistake;

b) they suggested they would open an enquiry into the 12/13 partnership return of GM LLP but did not do so (the effect of which is dealt with below). This was a mistake;

c) they may have made submissions about the extent of information available to support the conclusions in a closure notice at the hearing in 2017 which were not accurate, mistaken or inconsistent with their current position (the effect of which is dealt with below). To the extent they did so, the Tribunal does not find that there was any intention to mislead. There has been no improper conduct on the part of HMRC nor its representatives;

d) they served a purported follower notice on the Appellant which was by mistake when they were not pursuing this course;

e) they only served an information notice on the Appellant in 16 January 2017 after the time when the Appellant applied for a closure notice in November 2016 and before that application was heard in May 2017 - they failed to issue an information until the Appellant made a closure notice application;

f) the enquiry that they opened into the Appellant's return in February 2014 took three and a half years without any significant progress being made in the enquiry; and

g) the Appellant offered twice in 2014 to provide information to them declined to accept the offer twice – the evidence given was this was on basis of resources – this may have been a factor in the Appellant's sense that he should not volunteer any information to HMRC thereafter.

A - The Validity of the Enquiry Notice of 18 February 2014

(i) The Tribunal's jurisdiction in relation to the enquiry notice

241. Before addressing particular points advanced by the Appellant under this head of challenge, there is a preliminary point to note concerning the scope of the Tribunal's jurisdiction under section 31 TMA 1970.

242. Section 31(1) TMA 1970 provides: "(1) An appeal may be brought against: *(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax), (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), (c) any amendment of a partnership return under section 30B(1) of this Act amendment by Revenue where loss of tax discovered), or (d) any assessment to tax which is not a self-assessment.*"

243. Therefore, section 31(1) TMA 1970 does not empower a taxpayer to appeal against an enquiry notice *per se*. An appeal must fall within one of the categories set out under section 31(1)(a)-(d) TMA 1970. That this is the position has been confirmed by the FTT (Judge Mosedale) in the case of *Spring Capital Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 41 (TC) (at [32] and [42]) in the context of an enquiry raised under paragraph 24 of Schedule 18 of the Finance Act 1998.

244. To the extent that the Appellant is essentially seeking to advance a freestanding challenge to the lawfulness of HMRC's enquiry then the Tribunal would have no jurisdiction on a statutory appeal to the FTT, the only forum to hear any challenge would be in a judicial review claim. In so far as the Appellant's challenge is that the Enquiry Notice was unlawful, hence there was no valid enquiry hence no lawful closure notice or amendment to his return, the Tribunal assumes that is within its jurisdiction on an appeal under section 31 TMA 1970. The Tribunal will also proceed on the basis that the burden of proof lies upon HMRC to prove that its enquiry into the 12/13 Return was valid.

245. There is some support for the proposition that if there was no valid notice of enquiry, then there was no lawful enquiry and hence no lawful closure notice and amendment to the return and the FTT may be entitled to determine this. It is to be found in the decision of Judge Greenbank in *Andrew Scott v HMRC* [2017] UKFTT 385 (TC) at [155]-[166]:

'155. I was not referred by the parties to any of the case law on the limits of the jurisdiction of the Tribunal other than the decision of the FTT in *Rotberg*. It was accepted by the parties that, as the Tribunal is a creature of statute (section 3 TCEA 2007), it can only decide matters prescribed by statute. The Tribunal does not have general or inherent powers to supervise the conduct of HMRC or any other public body by way of judicial review.

156. It follows that any question regarding the scope of the Tribunal's jurisdiction to hear any particular matter is a question of construction of the statute which gives rights of appeal to the Tribunal or defines the powers of the Tribunal in the particular case in question. But it does not follow that the Tribunal can never consider public law matters. It can and must do so if it is necessary in relation to matters that fall within its jurisdiction as prescribed by statute. (There is authority for this proposition in some of the cases referred to in *Rotberg*, see for example *HMRC v Noor* [2013] UKUT 71 (TCC) at [31] and [56], *Oxfam v HMRC* [2009] EWHC 3078 (Ch) at [68].)

157. In the present case, the rights of the taxpayer to appeal to the Tribunal against a closure notice are set out in section 31(1)(b) TMA. On an appeal, the Tribunal is "to determine the matter in question" (see section 49G(4) or section 49H(4) TMA and similar wording, to which I was not referred, in section 49D(3) TMA). If we stop at that point, the jurisdiction of the Tribunal would appear to be very broad and would seem to be capable of encompassing both whether the amendments required by the closure notice result in the correct amount of tax being charged and whether those amendments can be made at all. However, as was discussed in *Rotberg*, the jurisdiction of the Tribunal is constrained by the remedies which it is able to give and the circumstances in which it is able to give them. These are set out in section 50(6) and (7). For present purposes, the important provision is section 50(6), which permits the Tribunal to reduce an assessment if the taxpayer has been "overcharged" by the assessment.

158. At [109] to [117] of its decision in *Rotberg*, the FTT discussed the scope of section 50(6). It said this:

…….

159. It is important to set these comments in the context of the facts of the case. In that case, Mrs Rotberg was seeking to argue that the various assessments that were made on her should be reduced to nil under section 50(6) on the grounds that certain representations made by HMRC gave rise to a legitimate expectation on the part of Mrs Rotberg that no tax would be payable on the disposals. It is therefore typical of the type of case where the court or tribunal is being asked to refrain from imposing a liability or to relax a restriction on a relief imposed by the law on the basis of a public law argument, for example, that the action of HMRC is such that the taxpayer has a legitimate expectation that the liability will not be imposed or that relief will be allowed. Unless there is specific statutory authority, these cases are not within the jurisdiction of the Tribunal. They can only be the subject of judicial review. There are several examples of this type of case in the authorities (see for example, *Noor* and

Aspin v Estill, which was referred to in the extract from the FTT decision in *Rotberg* to which I have referred).

160. The argument raised by Mr Scott in this case is somewhat different. In summary, he says that the amendments made to his returns by the closure notices are invalid because the closure notices can only make amendments based on the results of an enquiry under section 9A and HMRC had no power to make an enquiry of this nature under section 9A.

161. I accept Mr Pritchard's arguments that some aspects of this ground of appeal are dangerously close to a pure public law argument of the kind that has already been rejected by the High Court. However, in the manner in which it is put, Mr Scott is, in essence, arguing that a condition to the issue of a closure notice in this form has not been met and that condition (whether there has been an enquiry under section 9A) is one prescribed by the statute. It seems to me that those are matters that can be properly raised as a challenge to an assessment made pursuant to a closure notice within the terms of section 49D(3), section 49G(4) or section 49H(4).

162. The question is whether there is anything in section 50(6) that should constrain the Tribunal from determining that issue. In my view, there is not.

163. The first consideration is whether Mr Scott could be said to "overcharged" by the assessment if his appeal is successful on this ground. In my view, he would be "overcharged" if an assessment was made and one of the conditions specified by the legislation for the making of that assessment was not met. The process of amending a return through the issue of closure notices is an integral part of the process of assessing and charging tax under the legislation. In that context, a taxpayer is just as much "overcharged" if an assessment is made on the taxpayer when it should not have been because a condition contained in the legislation for making the assessment has not been met as he or she would be if the tax charge contained in the assessment is not computed in accordance with the tax legislation.

164. In this respect, I acknowledge the comments in the decision of the FTT in *Rotberg* to the effect that "overcharged" had to be construed as focussing on the charge to tax itself rather than the on manner in which it had been determined (in particular, at [112]). Given their context, I read the references to the lawfulness of the determination of the charge as being a reference to whether the charge could be subject to challenge as a public law matter outside the purview of the tax legislation. If the FTT's view was that section 50(6) limits the Tribunal's jurisdiction to matters relevant to the calculation of the amount of the tax charge and excludes consideration of whether the assessment was validly made by reference to conditions in the tax legislation, then I disagree. But I do not believe that that was the case. For example, the FTT refers to the jurisdiction of the Tribunal extending to "considering the application of the tax provisions themselves" (at [115] and [116]).

165. The second potential constraint is whether the remedy available to the Tribunal (reducing the assessment) is an appropriate remedy given the nature of the claim (see *Rotberg* [117]). In this case, none of the concerns raised in *Rotberg* arise. The reduction of the assessments would be an appropriate remedy.

Conclusion

166. I conclude, therefore, that the Tribunal does have jurisdiction to hear the procedural issue.'

246. The Tribunal is satisfied that on a proper analysis, the only point under this ground of challenge that falls within the FTT's jurisdiction is whether, as the Appellant contends, his appeal against the Closure Notice should succeed on the basis that there was no valid enquiry for HMRC to close. That contention should be rejected for the reasons set out below.

(ii)Whether HMRC obliged to adduce evidence as to validity of enquiry at hearing of application for closure notice

247. The Appellant submits that HMRC ought to have adduced evidence in support of the validity of HMRC's enquiry into Mr Märtin's 12/13 Return at the hearing on 22 May 2017 of Mr Märtin's application for closure of the enquiry. This is argument is rejected. The reason that it is unmeritorious is because it ignores the fundamental point that the May 2017 hearing was not concerned with the validity of the enquiry into the 12/13 Return, as the FTT recorded in its decision (*Martin [2017]* at [6]):

"Mr Märtin claimed that the 12/13 enquiry was not validly opened although he did not explain his grounds for making this claim. I pointed out that if he was right, the Tribunal would appear to have no jurisdiction to close the enquiry. Mr Märtin elected not to pursue the point in this hearing but reserved the right to raise it in any subsequent proceedings challenging the validity of any amendment to his 12/13 tax return which HMRC might make when the enquiry was closed."

248. First, a challenge to the Enquiry Notice is directly inconsistent with the Appellant's application for a closure notice because a necessary precondition of that application was that there was an enquiry to close. Second, having highlighted such a potential challenge at the 2017 hearing, the Appellant specifically elected not to run it. Therefore, there is no merit in the Appellant's argument, advanced after the event, that HMRC ought to have and failed to prove at the 22 May 2017 hearing that HMRC had opened a valid enquiry. In maintaining such a submission now, the Appellant is trying to re-litigating a challenge he chose not to make earlier in earlier proceedings; he cannot do so because the Tribunal has no jurisdiction to consider it. He should be estopped in any event from taking a challenge in relation to the 2017 proceedings that was available to him in those related and prior proceedings.

249. The Tribunal accepts HMRC's submission that there is a paradox at the heart of the Appellant's position in relation to the Enquiry Notice in this appeal. Having decided to pursue a closure notice application, the Appellant is now attempting to reject the very foundation upon which that application was made and granted, namely that there was a valid enquiry in place in respect of his 12/13 Return which HMRC was required to close.

250. If the Appellant were to succeed in the present appeal on the basis of what he submits in relation to the Enquiry Notice then this Tribunal might have to decide that despite the FTT having already ordered that HMRC close its enquiry into his 12/13 Return, and despite HMRC having complied with that order, the Tribunal should now find that in reality there never was any valid enquiry to close in the first place. This would be surprising and unsatisfactory result to arrive at but the Tribunal expresses no concluded view as to whether it could do so because it finds the enquiry to be valid in any event.

251. The raising of the argument undermines the soundness of the Appellant's attempt to challenge the Enquiry Notice within the jurisdiction of the present appeal bearing in mind the position and steps that he and the Tribunal have taken to date.

(iii) Whether enquiry into GM LLP's return a prerequisite for enquiry into the Appellant's 12/13 Return

252. The Appellant asserts that the Enquiry Notice was invalid because HMRC failed to open an enquiry into the partnership return. This assertion is incorrect and is rejected.

253. An enquiry into GM LLP's 2012/13 tax return was not a prerequisite of opening an enquiry into the Appellant's 12/13 Return and making amendments denying his claim for relief arising from partnership losses pursuant to section 28A TMA 1970. This is for the simple reason that on a straightforward construction of the legislation, TMA 1970 sets out separate provisions for HMRC to enquire into, on the one hand, a personal tax return (section 9A TMA 1970), and, on the other hand, a partnership return (section 12AC TMA 1970).

254. This is not surprising. HMRC may take issue with a partner's return, but not with that of the partnership, for example because the claimed losses of the partnership are not in dispute, whereas HMRC wishes to enquire into the partner's entitlement to claim relief in respect of those losses. The fact that there may have been no enquiry into the partnership return of GM LLP may have been through mistake does not deprive HMRC of enquiring into the personal tax return.

255. Depending on the factual circumstances, it may of course make it harder for HMRC to resist a substantive challenge to any amendments to the personal tax return. It may be to the advantage of an appellant in an appeal against amendments to their personal return if sufficient evidence has not been acquired by HMRC to defend the basis to disallow losses through their lack of any partnership enquiry.

256. However, the Appellant did not seek to take advantage of this potential benefit in this appeal (until during the middle of the hearing at which time the Tribunal ruled he could not do so for the reasons set out above).

(iv) Whether Enquiry Notice of 19 February 2014 an "official notice"

257. Another strand to the Appellant's complaint as to the absence of a partnership enquiry is the contention that the Enquiry Notice dated 19 February 2014 was not an "official notice" but a mere "customer service" letter. In his Outline of Case dated 26 June 2019, the Appellant stated (point 6 on page 11):

"The 19 February 2014 makes it clear that HMRC's intention at the time was to issue a subsequent enquiry into the 2012/13 accounts of Great Marlborough LLP. But such subsequent enquiry into the LLP under s12AC would have had the effect under s12AC(6) of an issuance of a s9A notice to all LLP partners including myself. The HMRC Manual EM7042 provides very clear guidance in such case – the letter to a partner should not be considered an official notice. And hence it is my position the 19 February 2014 letter was not intended as an official notice, it was simply a "customer service" letter informing me that HMRC intended to enquire into Great Marlborough LLP (which HMRC's Special Investigation team subsequently seeming decided was not necessary)."

258. In the course of his cross-examination by Mr Davey the Appellant suggested that his interpretation of the Closure Notice should be considered alongside HMRC's Manual EM7021 referred to in the Outline of Case. The relevant passage of EM7021 states:

"You must give notice in writing of your intention to enquire into a partnership return, or amendment to that return to the nominated partner or his or her successor, see EM7021.
In addition, a letter should be sent to each partner. The standard letters are on SEES.
S12AC(6) provides that the giving of a notice under S12AC(1) shall be 'deemed to include the giving of notice under S9A(1)….'. The notification to the partners that an enquiry under Section 12AC has been opened does not therefore have a statutory function but is merely a matter of good customer service, and something we have undertaken to provide. It is not a `notice' in any formal sense and you should ensure that any notification you give that the deeming provision applies cannot be construed as a separate notice in its own right."

259. The argument therefore appears to involve the Appellant promoting a rival construction of the Enquiry Notice on the basis of the indication within the Enquiry Notice of HMRC's intent to check the return of GM LLP in due course. The Appellant is asking the FTT to characterise the Enquiry Notice as a non-statutory letter made to partners upon the opening of a partnership enquiry.

260. Before identifying the flaw in that interpretation, it is worth recalling what is actually said in the opening paragraphs of the Enquiry Notice dated 18 February 2014:

"Thank you for your Tax Return for the year ended 5 April 2013. I would now like to check your return. My check will be made under Section 9A Taxes Management Act 1970.
Your Return includes a claim in respect of losses arising from Great Marlborough Limited Liability Partnership. It is intended to check the 2013 Return of Great Marlborough Limited Partnership when that Return is received by HMRC. The check will be conducted via the nominated partner and will be carried out by my colleague in Specialist Investigations Leeds."

261. Therefore, in short, the Enquiry Notice: (i) states in terms that the enquiry is made under section 9A TMA 1970 in connection with the Appellant's tax return for 2012/13; and (ii) says that HMRC intends to check GM LLP's return when it is received by HMRC.

262. Thus, the Enquiry Notice, properly construed, clearly gave the Appellant notice of HMRC's intention to open an enquiry into the 12/13 Return, and the reference to GM LLP's future return does not nullify that notice. The Appellant's construction of the letter as simply being some sort of mere "customer service" letter subsequent to the opening of a partnership enquiry, rather than an enquiry made under section 9A TMA 1970, is incorrect; it is demonstrably at odds with what is expressly stated in the Enquiry Notice.

263. The Tribunal records that when it was put to the Appellant in the course of cross-examination that his construction of the Enquiry Notice was difficult to square with the words on the page, the Appellant did ultimately (at the third time of asking) appear to concede ground on the point:

"*Q: Do you agree with me that the idea of the 19 February 2014 letter not being an official notice is a surprising thing to say given the words on the page of that letter?*
A: I would agree with you on that statement."

264. The Appellant's subsequent suggestion in oral evidence, that a possible alternative interpretation of the Enquiry Notice presents itself if the Enquiry Notice is read alongside EM7021, is not persuaive. As set out above, the Enquiry Notice, properly construed, gives notice of an enquiry issued under section 9A TMA 1970 regardless of whether or not it is read alongside EM7021.

265. In the circumstances, the Appellant's attempt to re-interpret the clear meaning of the Enquiry Notice by reference to what is said in that document in relation to GM LLP's future return falls to be rejected.

(v) Whether HMRC had already opened an enquiry prior to issuing the Enquiry Notice of 19 February 2014

266. The Appellant seeks to take advantage of the stated date in the Overington Letter of 7 January 2014, contending that the letter it is not misdated and attempting to use this as a basis to argue against the efficacy of the Enquiry Notice dated 19 February 2014.

267. That argument is flawed for two reasons. First, the argument is internally inconsistent: the Appellant attempts to embrace two mutually inconsistent propositions. Second, the argument is evidentially unsustainable: it is clear as a matter of evidence that the date on the Overington Letter is erroneous for the reasons the Tribunal has already found above.

268. As to the first of these two points, at the heart of the Appellant's position are two propositions: (i) the Enquiry Notice of 19 February 2014 was invalid because an enquiry had already been opened in respect of the 12/13 Return on 7 January 2014; and (ii) the Overington

Letter dated 7 January 2014 was not itself a valid enquiry notice because it predated the applicable 12 month enquiry window (beginning after 31 January 2014). Propositions (i) and (ii) are inconsistent. If the Overington Letter was not a valid enquiry notice (as contended for by the Appellant), then there was no subsisting enquiry which would operate to invalidate the Enquiry Notice. Accordingly, the limitation set out at section 9A(3) TMA 1970 does not apply.

269. As to the second point, the Tribunal is satisfied that the factual assertion at the heart of the Appellant's contention is untenable for the reasons already set out above.

270. As already recorded, the Appellant has himself accepted / asserted in correspondence with HMRC and the Tribunal that the date on the letter is a typographical error:

"*I am contacting you in regards to your letter dated 7 January 2014 (even thought I believe this was a typo and the actual date of the letter was 7 January 2015)*" (September 2015 letter to HMRC)
"*Please note that the date of this letter (it should have been 7 January 2015 instead of 7 January 2014) is incorrect…*" (November 2016 application to Tribunal to close enquiry)

271. This is consistent with Mr Stannard's evidence as to the timing of the letter, as set out in his second witness statement (paragraphs 4 to 7) and during his oral testimony before the Tribunal. Mr Stannard's evidence in relation to the erroneous date is straightforward, accords with common sense and inherent probability. It is accepted.

272. In contrast, the Appellant's contention to the contrary is not credible in that it would necessitate that: (1) HMRC had sought to open an enquiry into the 12/13 Return before the 12/13 Return had even been filed on 14 January 2014. (2) Notwithstanding (1), HMRC then decided to word the letter so as to thank Mr Märtin for receipt of the 12/13 Return ("Thank you for your tax return for the year shown above, which we received on 14 January 2014"). (3) Having drafted the Enquiry Notice in respect of a tax return that did not yet exist, HMRC only sent it out to the Appellant a year later in January/February 2015, which is when the Appellant says he received it: as evidenced by his letter ("In January 2015 I received an HMRC letter from Mike Overington with an enquiry notice under Section 9A") and his acceptance in cross-examination.

273. It does not assist the Appellant in connection with the timing of the Overington Letter that he was unwilling in cross-examination to give a straight answer as to when he believed it was sent: "I do not know when this letter was written, I don't have evidence of it".

274. Although the Appellant did not have first-hand evidence of when the document was written, it is not the case that there was no evidence from which to reasonably infer the date of its issuance. There was sufficient supporting evidence to substantiate HMRC's position that the document was issued in January 2015, including: (i) the timing of the 12/13 Return; (ii) Mr Stannard's evidence as to the progress of HMRC's dealings; (iii) the wording of the Overington Letter; and (iv) the date of receipt of the Overington Letter by the Appellant.

275. Having come to the conclusion that the Enquiry Notice validly opened the enquiry on 19 February 2014 the fact that a second notice was sent by mistake on 7 January 2015 does not invalidate the opening of the enquiry. There is no authority to suggest that a subsequent and erroneous second notice could have the effect of rendering a lawful enquiry already in place.

276. This ground of challenge is without merit in light of the evidence and is dismissed.

(vi) Whether the Appellant was provided with a notice to file under section 8 TMA 1970

277. The Appellant submits that he did not receive a notice to file under section 8 TMA 1970, and that, absent such a notice, the 12/13 Return was not a return under section 8 TMA 1970 which could be enquired into under section 9A TMA 1970. This was a new argument first raised in June 2019. Although there is a vague reference to section 8 in the Preliminary Issue Application of May 2019, the Appellant's section 8 argument only appears for the first time in his Outline of Case (second point 2 on page 11).

278. Arguably, the validity of any amendment to a return is not determined by whether a notice to file was validly issued because once the return is filed, how it came to be filed is irrelevant - the validity of the enquiry and any amendment to the return thereafter proceeds from the filing of the return (howsoever it came about) rather than the validity of the notice to file. It is debatable whether the validity of any notice to file could affect the lawfulness of the return once filed and HMRC's amendment thereafter – one might think that whether a notice to file was issued becomes irrelevant once the Appellant has filed a return.

279. However, the Tribunal will proceed on the basis that if there was no valid notice to file issue under section 8 TMA, there would be no valid section 8 return filed, no valid section 9A enquiry could then be made hence no valid section 28A closure notice and amendment could be issued by HMRC. This is because the language of section 9A refers to enquiring into a return filed 'under section 8' and the wording of section 28A refers to amendments pursuant to an enquiry under section 9A. Therefore for present purposes it is assumed that Judge Mosedale was right to state in her earlier decision in this case when considering a similar point in relation to the Appellant's 14/15 return:

Martin v Revenue & Customs [2018] UKFTT 660 stated:

86. Secondly, if he was right that the notice to file was invalid, then it follows that his tax return was not a s 9 tax return; it would therefore follow that HMRC could not enquire into it and could not issue a valid closure notice. So if he is right the notice to file was invalid, the conclusion would be that the Tribunal had no jurisdiction to order closure of the 'enquiry' as there could be no valid enquiry.

87. But he is not cut off from arguing his case that the notice to file for 14/15 was invalid: he will be entitled to put his case that it was invalid if and when HMRC amend his 14/15 return and he lodges an appeal against any such amendment. But he cannot argue it now, however much he desires finality in his tax affairs. If he wishes to make HMRC close the enquiry into the partnership return, he should either (a) apply to the Tribunal to close that enquiry – although I make no determination of whether he has the right to do so despite not being the nominated partner and/or (b) contact the partnership to persuade the nominated partner to lodge a closure application with the Tribunal.

280. Whether the Appellant was issued with a notice to file his 12/13 Return under section 8 TMA 1970 is at least in part a question of fact. HMRC's position is that the Appellant was issued with such a notice. There was some evidential material within the bundle of documents to support this.

281. In a letter dated 30 April 2013 sent from HMRC to the Appellant in Switzerland – HMRC stated:

'You cannot use the form P85 [Leaving the UK - getting your tax right] to claim a tax refund because you pay tax through the Self Assessment system. We have recently sent you a tax return for the year ending 5 April 2013 so that you can make a claim. What you need to do. You must fill it in with details of all the income you received for the period 6 April 201 to 5 April 2013 and your residence status. When you have done this you must send it back to us.'

282. HMRC also provided a computer printout of a Return Summary for the Appellant's Return for 12/13. This states that a 'Full Return' was issued on 10/05/2013 and the date of receipt of that Return by HMRC was 14/01/14 (a Full Return would include a notice to file

with it). This, although hearsay evidence of relatively weak weight, raises a prima facie case that a notice to file was issued to the Appellant in April or May 2013.

283. Further this evidence is supported by the fact that the Appellant filed a return by the relevant deadline that a notice would have required (by 31 January 2014 – whether this was in December 2013 as he claimed or, as the Tribunal finds, on 14 January 2014).

284. He accepted he received subsequent correspondence from HMRC and has never previously suggested that he filed a voluntary return without reference to receiving a notice to file. Further, the Tribunal has found the Appellant's evidence as unsatisfactory in a number of regards. Therefore, if necessary, the Tribunal would find that the Appellant was issued with a notice to file for his 12/13 return by HMRC in 2013 and that he received it.

285. The Appellant was extremely late in raising the point in his Outline of Case on 26 June 2019 and this was not a matter dealt with in any of HMRC's witness statements including Mr Stannard's second statement. In the circumstances, had the Tribunal not been satisfied on the existing evidence that a Notice to File was issued then it would have ruled that the Appellant should not be permitted to argue the ground as part of the present appeal and it would not have gone on to make any conclusive finding of fact on the issue.

286. Further and in any event, even if the Appellant did not receive a notice under section 8 TMA 1970 (contrary to the Tribunal's findings), the Appellant's argument is incorrect as a matter of law. Section 12D TMA 1970 provides (in part):

> (1) This section applies where –
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.
> (2) For the purposes of the Taxes Acts –
> (a) treat a relevant notice has having been given to the person on the day the relevant return was delivered, and
> (b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).

287. Section 12D TMA 1970 is "treated as always having been in force" (section 87(3) of the Finance Act 2019 ("FA 2019")), having been inserted into TMA 1970 in February 2019 (section 87(1) FA 2019). The only exception to this is if "before 29 October 2018" (section 87(4) FA 2019): "(a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and (b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18 to FA 1998 because no relevant notice was given."

288. Therefore, so far as regards the present case, the relevant question for the Tribunal is whether it was the ground (or one of the grounds) of the Appellant making his appeal that the 12/13 Return was not a return under section 8 TMA 1970.

289. As set out above, the Appellant made his appeal by way of email to the Tribunal on 2 January 2018, to which the Tribunal responded: "The Tribunal acknowledges receipt of your Notice of Appeal received 2 January 2018". The Appellant made his appeal on the grounds set out in the Notice of Appeal plus (the Tribunal is prepared to accept) his prior 6 September 2017 email incorporated into the Notice of Appeal by reference and his email to the Tribunal of 7 August 2017 (which HMRC did not receive at the time).

290. The Appellant's section 8 argument is not amongst those grounds. It was not raised until nearly 2 years later in the immediate run up to the July 2019 hearing. Thus, the exception does not apply in the present case: the Appellant's section 8 contention was not "the ground (or one of the grounds) for the making of the appeal".

291. Therefore, by virtue of 12D TMA, even if no notice to file for the purposes of section 8 was issued by HMRC to the Appellant, as a matter of law it is treated as having been given on the day he filed his Return (14 January 2014) and his 12/13 Return is treated as having been filed in pursuance of that notice.

(vii) Whether territorial scope of section 9A TMA 1970 limited to England, Scotland and Wales

292. The Enquiry Notice of 19 February 2014, the Overington Letter of 7 January 2015 and Closure Notice of 7 July 2017 were sent by post to the Appellant's address in Switzerland (the latter also being sent by email on 7 and 10 July 2017). This is where he was and is resident.

293. The operation of section 9A TMA 1970 is not, contrary to the Appellant's argument, limited to notices that are to be received within England, Wales and Scotland. Section 9A allows HMRC to enquire into a return under section 8 irrespective of where the taxpayer who filed the section return in question happens to reside at the time when HMRC decides (timeously) to open an enquiry. Thus, there is no warrant in the legislation for the territorial limit which the Appellant seeks to impose upon section 9A TMA 1970.

294. Moreover, as set out in HMRC's submissions, the Appellant's contention is inconsistent with the judgment of the Court of Appeal in *Jimenez*, where the Court considered the issue of whether an information notice served under Schedule 36 of the Finance Act 2008 ("FA 2008") could be issued to a taxpayer who was resident in Dubai.

295. In considering the territorial scope of Schedule 36 FA 2008, the Court of Appeal explained that it is necessary to identify the purpose of the relevant provision when determining the question of territoriality. As stated by Patten LJ (at [11] and [35]):

"11. In considering the scope of the powers contained in Schedule 36 [of the Finance Act 2008] and in particular the intended territorial reach of those powers it is necessary to place them in context. The tax position of the taxpayer which HMRC is given power to investigate is now based on the taxpayer's self-assessment of his tax liabilities. Key to the proper operation of the self-assessment system is the ability of HMRC to investigate the correctness of the assessment and the powers granted to HMRC by FA 2008 replaced those contained in the Taxes Management Act and other legislation and are designed to enable HMRC, within the limits I have mentioned, to obtain the information necessary to check that the tax position set out in the assessment is correct…

…

35. The general purpose of Schedule 36 is not in dispute. It is apparent from the references in most of paragraphs 1–10 of the Schedule to "the purpose of checking the taxpayer's tax position" that these are investigatory powers designed to verify the taxpayer's self-assessment and are limited to that stated objective. This means that the powers are necessarily and only exercisable in relation to someone who is or may be liable for tax in the UK and, to that extent, has an identifiable relationship with the UK." (emphasis added)

296. The Tribunal is satisfied that the above rationale applies to section 9A TMA 1970. The purpose of section 9A TMA 1970, like Schedule 36 FA 2008, is to enable HMRC to investigate the correctness of a taxpayer's self-assessment. As the Court of Appeal explains in *Jimenez*, the self-assessment system could not operate properly if it were possible for a taxpayer to avoid any investigation (for example, by submitting a return and ceasing to be UK-resident).

297. It is therefore not likely that Parliament intended, by section 9A TMA 1970, to permit a taxpayer in the position of the Appellant to claim UK tax losses (or a tax repayment) and to avoid any investigation by leaving the country (see also [36] of *Jiemenez,* where the Court of Appeal considers taxes which have the potential to affect persons resident outside the UK and which may also require HMRC to investigate the correctness of the tax return of a non-UK resident person).

298. Further, the Court of Appeal's explanation that HMRC's Schedule 36 FA 2008 powers are exercisable in relation to a person with an "identifiable relationship with the UK" (at [35]) applies equally in relation to section 9A TMA 1970 and the present case. The Appellant has an "identifiable relationship" with the UK. For 2012/13, he has a liability to UK tax and also argues that, on the basis of allegedly loss-making activities carried out in the UK, he is entitled to a refund from the UK Exchequer. Applying the Court of Appeal's reasoning at [35] of *Jiemenez* (above) it is therefore unsurprising that HMRC's investigative powers are exercisable in relation to the 12/13 Return.

299. The Court of Appeal in *Jimenez* identified two factors which point towards HMRC being authorised to give a taxpayer's information notice to someone outside the UK: (i) first, the prevention of tax evasion which will often have a cross-border aspect to it, such prevention "serv[ing] an important public purpose in maintaining public revenue" (*Jimenez* at [39]); and (ii) secondly, the strong policy objectives of conferring upon HMRC effective investigatory powers to investigate the position of persons abroad (*Jimenez* at [40]). The Tribunal is aware that the Court of Appeal's decision is subject to an appeal to the Supreme Court but it remains good law until such time as it is overturned.

300. Again, the Tribunal is satisfied that the Court of Appeal's analysis, and the factors to which it points in relation to Schedule 36 FA 2008, have like application to section 9A TMA 1970 having regard to the following three points.

301. First, section 9A TMA 1970 gives HMRC the power to investigate the correctness or otherwise of a tax return that has been put in. That return might involve substantial sums of money and it might involve a claim for substantial tax repayment, as in the present case. As with Schedule 36 FA 2008, one thing a section 9A TMA 1970 enquiry may be concerned with is whether there has been tax avoidance.

302. Secondly, as with the Court of Appeal's analysis in relation to Schedule 36 FA 2008, a situation in which section 9A TMA 1970 is engaged does involve a sufficient connection between the person receiving the enquiry notice and the UK: the person in question has filed a tax return and is or may be a UK taxpayer.

303. Thirdly, just as in relation to Schedule 36 FA 2008, there is no express restriction in section 9A TMA 1970 as to its geographical operation. Relatedly, pursuant to section 115 TMA 1970, an enquiry notice can be sent to or delivered to the taxpayer "at his usual or last known place of residence": there is no territorial restriction.

304. The non-statutory reference to England, Scotland and Wales in the Westlaw / Thomson Reuter source material in the authorities bundle, relied on by the Appellant in oral submissions as a feature that meant that *Jimenez* should not apply to the present appeal, is not part of the legislative wording itself and does not constitute the type of "overt or express" legislative restriction on the geographical operation of section 9A TMA 1970 envisaged in *Jimenez* (at [40]).

305. The commentary simply distinguishes the operation of the section as between England, Scotland and Wales, on the one hand, and Northern Ireland, on the other. This is because (as the Westlaw / Thomson Reuter on-line material indicates), the statute has been modified in

Northern Ireland, in particular, by virtue of the Education (Student Loans) (Repayment) Regulations (Northern Ireland) 2000 (SI 2000/121) (regulation 17(2)). Therefore, contrary to the Appellant's submission, the reference to England, Scotland and Wales on the printout in the authorities' bundle does not reflect the cutting down of the scope of section 9A TMA 1970 alleged.

(viii) Timing of filing of the Appellant's 12/13 Return

306. HMRC's position has always been that the Appellant's 12/13 Return was filed on 14 January 2014. The Tribunal has found this as a matter of fact on the balance of probabilities, not least relying upon the computer print out and entry for its receipt on that date.

307. Further the Tribunal takes into account the Appellant's unsatisfactory and unlikely contrary account. In the Bundle Email of 2019, the Appellant states that his 12/13 Return was filed on or around 30 December 2013, such date, according to the Appellant, being when he provided an identical version (which he has not disclosed) to his accountants. Therefore, he assumes that the 12/13 Return was filed (albeit "prematurely / mistakenly") at around the same time.

308. It is unclear how the question of whether the 12/13 Return was filed in December 2013 or January 2014 assists the Appellant's in his substantive appeal; indeed, the Tribunal accepts HMRC's submission that it is irrelevant.

309. In any event, the assertion is factually incorrect: HMRC's computer system records that the 12/13 Return was received on 14 January 2014 (see the "Date Received" item on the electronic version of the 12/13 Return). The Tribunal is satisfied that this evidence (as opposed to the mere assumption underlying the Appellant's position to the contrary) is to be preferred on this point.

B - The validity of the Closure Notice

(i) Tribunal's jurisdiction regarding "abuse of power" / "reasonableness" contention

310. The Appellant argued that HMRC's issuing of the Closure Notice involves an "abuse of power" / "unreasonable" conduct because HMRC refused "the tax refund on the basis that I did not provide any information to HMRC" or because it failed to provide sufficient reasons or information or a prima facie case for its conclusions within the Notice.

311. In his email of 6 September 2017, the Appellant asserted that this: "*raise[s] a very serious issue of abuse of power by HMRC vs any taxpayer. In the future HMRC would simply never need to request any information from the taxpayer and could simply deny any tax refunds. If the taxpayer then seeks a closure notice from the Tribunal in order to get his tax refund HMRC could then use that lack of information (due to HMRC never asking for any) as the reason to keep any tax refund. In effect that would invite fraud by a government entity…*"

312. In his Outline of Case, the Appellant argued (page 11): "*Even if HMRC had issued a valid s9A enquiry notice, the officer incorrectly amended the 2012/13 tax return seemingly without having any evidence about the LLP/activity levels of its individual LLP members. If the officer had any information it was withheld from me. HMRC accepted each taxpayer's case to be "fact specific". Hence the positive conclusions do not appear reasonable on the basis of the information included in the documents bundle*."

313. The Appellant did not, during oral submissions, explain his argument in detail and the Tribunal invited him to set out his position in writing particularly as regards the FTT's jurisdiction. However, the Tribunal's understanding of Mr Märtin's argument is that the

Closure Notice cannot stand because its content reflects an abusive/unreasonable approach on the part of HMRC either because it wrongly relied on an absence of information provided by him or failed to provide sufficient or reasonable reasons for the conclusions in the Closure Notice.

314. As to these arguments, the Tribunal accepts HMRC's position that the Appellant's arguments are not one that can be determined in this appeal because they fall outside the FTT's jurisdiction.

315. The issue of whether a public body, such as HMRC, has acted in a manner that constitutes an abuse of power by virtue of unreasonable/irrational conduct or otherwise is one that falls to be determined by a court (or tribunal) pursuant to "judicial review" jurisdiction which enables the court (or tribunal) to review the legality, as opposed to the merits, of the public authority's actions. The FTT (Tax Chamber) does not have such jurisdiction.

316. In its decision in *Birkett (t/a Orchards Residential Home) v Revenue and Customs Commissioners* [2017] UKUT 89 (TCC), which is binding on this Tribunal, the Upper Tribunal confirmed that the FTT does not have judicial review jurisdiction and went on to explain (at [30]) that the issue of whether the FTT can address matters of public law must be determined in the light of the particular statute conferring jurisdiction on the FTT:

"(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

317. In the present case, the FTT is exercising its jurisdiction under section 31(1)(b) TMA 1970 to entertain a taxpayer's appeal against "any conclusion stated or amendment made by a closure notice under section 28A or 28B of [the TMA 1970]". Parliament has provided a right to appeal, and has granted the FTT jurisdiction to determine, the correctness of the "conclusions stated" and/or "amendments made" by the Closure Notice.

318. This does not involve a test of whether HMRC has acted non abusively/reasonably/rationally. The relevant question is simply whether the taxpayer is being overcharged/undercharged (section 50(6)-(7) TMA 1970). (Contrast in this regard, the language used in, for example, section 28A(6) and section 28B(7) TMA 1970 where the FTT "shall" direct HMRC to issue a closure notice unless satisfied that there are "reasonable" grounds for not issuing a closure notice.)

319. Therefore, while it is open to the Appellant to challenge the amendment made by the Closure Notice on the basis that it is incorrect, he cannot do so in the FTT on the basis that HMRC has acted abusively/unreasonably/irrationally in relation to the Closure Notice in some public law sense. In any event, for the reasons set out below the Tribunal is satisfied that HMRC did not act abusively, unreasonably or irrationally in relation to the information relied on in support of the Closure Notice nor the reasons nor conclusions contained within.

(ii) Whether Mr Märtin is permitted to challenge basis for Closure Notice, i.e. that GM LLP was not carrying on its activities on a commercial basis etc

320. The Tribunal has found any reasonableness challenge to be unsound, even if it is not a matter purely of public law and thus within the jurisdiction of the FTT and available to the Appellant within these proceedings. Likewise, he has not been permitted to challenge the Closure Notice on the basis that its founding premise, that GM LLP was not carrying on its activities on a commercial basis with a view to profit and the Appellant was not an active partner. The Tribunal has given reasons above for its ruling refusing the Appellant permission to raise this ground of appeal and evidence in support during the hearing.

321. In brief, in the course of the hearing on 10 July 2019 the Appellant sought to introduce a new vein of challenge to the Closure Notice, described by the Tribunal as: "in effect a substantive challenge to the basis for the closure notice, conclusions and the amendments to his return, i.e. in effect that HMRC were wrong to disallow his losses as claimed, on the basis that the LLP was not trading as a venture for profit and/or he was not an active partner in the management".

322. The Tribunal ruled for the reasons set out above that the Appellant was not permitted to raise this new challenge. It was in effect a substantive challenge to the conclusions under the closure notice and amendment to the return raised for the first time during the hearing in July 2019. It was raised over two years after the closure notice was issued by HMRC despite never having previously been raised in any written document such as the grounds of appeal or notice of appeal or even Outline of Case and despite the Appellant having been warned by the FTT of the consequences of this failure as far back as August 2017.

(iii) Purported absence of information or insufficient reasons – reasonableness challenge

323. Despite the substantive ground for the Appellant's attempted challenge to HMRC's conclusions under the Closure Notice and amendments to the return being ruled outside the scope of the appeal, there remains the reasonableness challenge to consider.

324. One of the points left which may in principle be open to the Appellant, despite the Tribunal's preliminary conclusion that it is outside the jurisdiction of the FTT as it is primarily a public law challenge, is that a supposed lack of information or reasons supporting the conclusions provided by HMRC somehow invalidates the content of the Closure Notice. Put another way, that HMRC's reasons for its conclusions under the Closure notice were

unreasonable or irrational because they gave insufficient reasons or relied purely on an absence of information provided by the Appellant.

325. However, this too falls to be dismissed.

326. The Tribunal is satisfied that HMRC had, both at the time of the closure notice in July 2017 and by the time the appeal was determined, information to support its position that GM LLP was associated with a number of the Icebreaker entities under the umbrella of the *Acornwood* proceedings and shared many of the same borrowing arrangements and other features central to the FTT's and the UT's reasoning in *Acornwood*. It is satisfied that it gave sufficient and reasonable reasons for its conclusions under the Closure Notice and did not rely upon an absence of information from the Appellant to found its conclusions (albeit that an absence of any contrary material from the Appellant does strengthen its case).

327. This was evident from the witness statements of Mr Stannard and Mrs Omole and the documentation exhibited thereto which the Tribunal accepts as reliable and finds as fact having heard their oral evidence including being cross examined by the Appellant.

328. Mrs Omole, who issued the closure notice and amendment to the 2012/13 Return stated at paragraphs 9 and 10 of her statement:

'9. From my involvement in issuing the Closure Notice, I can say that the Closure notice was issued because:

(1) Mr Martin was not carrying on a trade on a commercial basis with a view to profit and the losses of the LLP had arisen in connection with relevant tax avoidance arrangements.
(2) By reasons of section 66 of the Income Tax Act 2007 and in addition section s74ZA and 809ZG ITA 2007, relief was not allowable.

10. This analysis was undertaken on the basis that Great Marlborough was a participant in the Icebreaker scheme, and, in the absence of Mr Martin providing any information or documentation to support his assertion that Great Marlborough LLP should be distinguished from the other Icebreaker LLPs in the light of the of the FTT and the UT's analysis in relation to that scheme…'

329. Paragraphs 4, 8 and 13 of Mr Stannard's first statement and paragraph 8 of his second statement stated as follows:

'4. Mr Martin is a member of Great Marlborough LLP. That LLP was not a party to the litigation referred to in paragraph 3 above, but is believed by HMRC to have been a participant in the Icebreaker scheme. It is considered to be a more recent variant of those LLPS, retaining the same structure with regard to the use of individual partner loans to increase the partners' capital contributions to the LLP over their cash contributions.

….

8. Mr Martin contacted HMRC initially on 25 September 2014 in response to this initial communication, giving rise to subsequent exchanges of correspondence (see p.66). It was in this correspondence that Mr Martin asserted that Great Marlborough differed from the LLPS under consideration by the FTT and the UT in the above decisions.

……

13…..

(1) The upshot of the decisions referred to above is that (a) the trading losses arising from the LLPs were only allowable in part; (b) they arose in connection with a tax avoidance scheme; (c) that the members of the LLPs were not carrying on a trade on a commercial basis with a view to profit, therefore losses were not eligible for relief against other income.
(2) Mr Martin has asserted that Great Marlborough was different from the other Icebreaker LLPs. On 16 January 2017, we requested information and documentation in such regard, but he refused to provide the information requested.

(3) The Closure notice denied Mr Martin's claim for tax relief in respect of LLP losses also loan interest relief. The underlying reason is clearly set out in the accompanying letter and HMRC's Statement of Case dated 29 May 2018 in these proceedings…
(4) At the core of the analysis in that regard are the findings of the FTT and the UT referred to at paragraph 13(1) above, which are such as to preclude the relief sought (by reason of the Income Tax Act 2007, ss 66, 74 ZA and 809ZG), and in the absence of any evidence to distinguish Great Marlborough from the other Icebreaker LLPs
(5) As it has been decided in the *Seven Individuals* case that none of the referrers' LLPs' trades had been conducted commercially with a view to profit, the trading losses arising form Great Marlborough were not available for use against other income.
(6) Furthermore, as it had been decided in *Acornwood* that the funds contributed by the partners that derived from their loans were not used wholly for the trade of the LLP, this had the result that relief could not be claimed for interest incurred in respect of that loan.'

'8. As I noted in my first witness statement, HMRC believed that Great Marlborough LLP was associated with the Icebreaker scheme. One of the bases for this belief appears to have been Companies House documentation, and documentation from 'Fame', which HMRC was reviewing from as early as 2013. That documentation shows that the designated member of Great Marlborough LLP were two entities known as Lothbury Finance Limited and Basinghall Limited (see IS2 p.4-5), those same companies being designated members of LLPs subject to the Acornwood proceedings which I referred to in my first witness statement. The records also suggest that HMRC reviewed charge documentation indicating that the loan arrangements for Great Marlborough LLP were materially the same as those used by those other Icebreaker LLPs (see IS2 p.9-20). The existence of Icebreaker partnership for the year of 2012/13 was confirmed by the team in Leeds when the matter was handed over to London in 2014.'

330. In the course of oral submissions, Mr Davey for HMRC referred the FTT to the numerous respects in which the Companies House / Fame documentation exhibited to Mr Stannard's second statement evidenced hallmarks of the Icebreaker structure. The Tribunal accepted these similarities and the Appellant did not seek to challenge them in any meaningful way.

331. The fact that HMRC had a basis for its view in such regard is also clear from the oral evidence given by Mr Stannard and Mrs Omole at the hearing on 10-11 July 2019.

332. Mr Stannard's evidence was to the effect that:

(1) HMRC was aware that there were different variants of the Icebreaker LLPs, one of which related to the 2012/13 tax year.
(2) The foundation of HMRC's belief that GM LLP fell within this category was information from Companies House, and also Fame, showing: (i) large losses; (ii) the same designated members (Basinghall and Lothbury); and (iii) a similar structure.
(3) Counter-avoidance directorate (of which Mr Stannard was part) took possession of the files in 2014, with the benefit of a handover notes from the investigators in the Leeds office who had previously had conduct of the Icebreaker scheme.

333. Mrs Omole's evidence, in the context of questioning from the Tribunal, was as follows:

"*Q: I think the first question, Mrs Omole, is I think you have given some evidence that you were aware or believed that the Great Marlborough LLP scheme was similar to the Icebreaker scheme. Am I right in understanding your evidence?*
A: Yes.
Q: Where did you receive that information from?

A: To a large degree that would have come from Mr Stannard in his capacity as team lead.
Q: What similarities did you believe there to be between Great Marlborough and the Icebreaker LLPs?
A: Similarities, more large loss, franking, the whole income going forward for the year, and I suppose the acknowledgment that the caseworkers had already identified Great Marlborough as being part of the Icebreaker group.
Q: Can you help me any further in your understanding of how the caseworkers identified Great Marlborough a being part of the Icebreaker group?
A: My understanding is that it was mentioned at a meeting and they were made aware of certain additional partnerships."

334. The Tribunal notes the Appellant's oral representations and evidence during the course of the hearing in relation to GM LLP's relationship with the Icebreaker scheme. It is summarised by way of HMRC's and the Tribunal's understanding of that evidence :

"Counsel for HMRC: … *Mr Märtin has given evidence that, I understand his evidence to be, not now but historically there were similarities or connections or associations, or whatever it was, between Great Marlborough LLP and some LLPs under the Icebreaker umbrella.*

Tribunal Judge*: I think he has given that answer. Yes, he has. Albeit with the caveat that without the precise documents and doing the comparisons he can't tell you exactly what they were, I think, to summarise.*"

335. As against the foregoing, the Tribunal and HMRC had (and still have) no information whatsoever to support the contrary analysis. For whatever reasons he saw fit, the Appellant has refused to provide information in the course of the enquiry. This was despite HMRC expressly requesting such information, and such request being described by the FTT as being "for relevant information and … not an excessive request" (*Martin* at [30]).

336. Nonetheless the Tribunal has quite specifically ruled out the need to go into any further detail into the Appellant's case as to a substantive challenge to the conclusions under the closure notice – it makes no findings on the merits of any question of fact as to whether the partnership losses claimed were allowable and whether the Appellant was an active partner in GM LLP and whether it was trading on a commercial basis with a view to profit. The Tribunal only records the evidence in so far as it defeats the challenge to the reasonableness of the conclusions put forward by HMRC in the closure notice.

337. Contrary to the Appellant's argument that HMRC relied improperly on an absence of information provided by him in issuing the closure notice, it may have taken it into account but not improperly so. The Appellant provided no evidence to rebut what were reasonable prima facie reasons that HMRC had for the conclusions it came to. The fact that HMRC's request for information from the Appellant was made in January 2017 during the course of the closure notice application rather than earlier, does not somehow mean that there was no need for the Appellant to substantiate his claims ahead of HMRC deciding how to close the enquiry. If he wanted the 12/13 Return to remain un-amended he had the opportunity to provide evidence in support of his case and/or HMRC could not somehow be prevented from closing the enquiry on the basis that it did. On the contrary, HMRC's position is that it closed the enquiry, as it had been ordered to do by the Tribunal, in the only way that it could properly do so, having regard to its analysis of the state of the law and the available information.

338. As stated in *Eclipse Film Partners 35 v HMRC* [2009] STC 293 (Special Commissioners) (at [19]): "It is implicit in the powers given to the General or Special Commissioners to give a direction requiring the issue of a closure notice, and is part of that "reasonable balance" [as

between HMRC and taxpayer], that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation…" In all the circumstances, including Mrs Omole having had the benefit of discussing and liaising with colleagues in the lead up to and in connection with the production of the Closure Notice, HMRC was entitled to close the enquiry by rejecting the Appellant's claim for sideways loss relief.

339. The Appellant's suggestion that information was "withheld" from him (see his Outline of Case) is not understood. In any event, it was denied by HMRC and the Tribunal accepts that information was not withheld. During the course of the enquiry, the Appellant was informed by HMRC of the basis of its unwillingness to allow his claim, namely HMRC's belief as to GM LLP's association with the Icebreaker scheme. Documentation supporting such belief is publicly available (see paragraph 8 of Mr Stannard's second statement and documentation exhibited thereto), and in any event it would have been available to the Appellant as a member of GM LLP.

340. There is a further point to make in connection with the Appellant's submission as to the purported absence of information underlying HMRC's conclusion, and that concerns the character of HMRC's process leading up to the issue of the Closure Notice. The impression of the process which the Appellant at times appeared to envisage in the course of his oral submissions was one in which Mrs Omole entirely alone – in a vacuum – took the decision to disallow him relief; and that such decision was taken despite (in the Appellant's submission) an absence of relevant material and insight.

341. However, this impression is inaccurate. As the oral evidence of Mr Stannard and Mrs Omole indicated, and as subsequent disclosure produced in accordance with the Tribunal's July Directions further shows (contained HMRC's letter to the Tribunal of 11 September 2019 in relation to disclosure and the documents which accompany that letter), the decision that was reached was not one made in a vacuum or on a whim but the result of considerable work including interaction between relevant HMRC personnel.

342. This included conversations and meetings within HMRC drawing on the repository of knowledge and information within HMRC acquired in relation to GM LLP and the Icebreaker scheme variants over the course of several years, and the circulation of a draft Closure Notice amongst relevant individuals prior to issuing.

343. In line with the above, and for the avoidance of doubt, even though the Tribunal has not gone on to consider a substantive challenge to the basis for the closure notice and the amendment to the 12/13 return, the Tribunal is satisfied that there did exist a sufficient basis for HMRC to take the stance that it did in the Closure Notice and it acted reasonably in issuing the closure notice and coming to the conclusions it did.

344. If there is jurisdiction for the Tribunal to consider and decide this issue then the burden of proof would be upon the Appellant to establish that HMRC acted unreasonably (just as the burden would be on him in a substantive challenge to a closure notice and any amendments to his 12/13 Return). The burden is not on HMRC but the Appellant and he has not discharged that burden.

345. The Tribunal is satisfied HMRC acted reasonably and gave sufficient reasons in making and relying upon the conclusions it reached in the closure notice. To the extent that this Tribunal has any jurisdiction to consider what is primarily a public law challenge, the Tribunal is satisfied that HMRC's was a reasonable position to adopt, it was neither irrational nor perverse. It is important to bear in mind in such regard that the threshold is not a high one.

(iv) FTT's decision in respect of Mr Märtin's application for closure notice

346. In addition to the various points made above, the Tribunal reminds itself of the detailed decision that the FTT (Judge Mosedale) has already made in relation to the Appellant's 12/13 Return. In urging the Tribunal now to find that HMRC was never in a position to issue the Closure Notice, the Appellant is seeking to go behind Judge Mosedale's decision in respect of his closure notice application.

347. In resisting the Appellant's closure notice application, HMRC drew to the FTT's attention HMRC's desire to obtain further information from the Appellant. However, the FTT rejected the idea that HMRC was not in a position to issue a closure notice. As the FTT stated (*Martin* at [31] and [32]):

"31. Should a closure application be refused when the taxpayer has failed to provide relevant information that has been requested? In a case where the taxpayer's potential tax liability was unquantified ordering closure would put HMRC in a difficult position as they would not have the necessary information to even know to what figure to amend the tax return. But in this case that was not an issue: the loss claimed by Mr Märtin was precisely quantified and known to HMRC. It would be possible to issue a closure notice denying the exact amount of the tax relief claimed.

32.Indeed, HMRC accepted that if I granted Mr Märtin's application, they would close the enquiry, but almost certainly by amending Mr Märtin's tax return to exclude the claimed loss. Although they had no paperwork, it was clear that they considered Mr Märtin had participated in an Icebreaker scheme similar to the one in Acornwood and that it was likely (in their view) he was not entitled to the claimed loss relief."

348. Thus, the FTT was of the view that HMRC was in a position to close, and ought to do so. Furthermore, and of importance for present purposes, the FTT held as much having regard to the likely terms on which HMRC would close the enquiry.

349. In the circumstances, the Appellant's position in the present appeal as regards the Closure Notice mirrors his position as regards the Enquiry Notice in a significant respect: it contradicts the manner in which the FTT has already dealt with the matter.

350. The Appellant urges this Tribunal now to conclude that HMRC was never in a position to close the enquiry on the basis that it did, when the FTT has already made the opposite finding, namely that HMRC was in a position to close, and, moreover, would do so "*almost certainly by amending Mr Märtin's tax return to exclude the claimed loss*". Having reviewed all the available material afresh, this Tribunal does not go behind that which it has already determined.

351. The Tribunal addresses what the Appellant perceives to be an inconsistency between HMRC's position in relation to the closure notice application and its position in the present appeal. The Appellant takes exception to the fact that in the context of his closure notice application HMRC emphasised its lack of information in relation to GM LLP whereas in the present appeal HMRC's stance is that it did have enough information to deny the Appellant's claim for loss relief.

352. As to this argument, the Tribunal is satisfied that HMRC's position in relation to the closure notice application has to be understood in context. The representations that HMRC made in resisting the Appellant's application for a closure notice should reasonably be considered against the backdrop of HMRC not having opened a partnership enquiry, and against HMRC's (then relatively recent) request of the Appellant for partnership documentation having drawn a nil return.

353. The Tribunal is mindful of HMRC's submission that it was these matters that were the focus of attention in indicating that HMRC had no information in relation to GM LLP, not the publicly available information collated within HMRC's files and/or HMRC's knowledge and understanding that there were later partnerships within the Icebreaker scheme.

354. Further and in any event, even if (contrary to the foregoing) the Tribunal were satisfied that there is a divergence between HMRC's position in opposing the closure notice application and its position subsequently, the point does not advance the Appellant's appeal.

355. As set out earlier in this decision, and in HMRC's oral and written evidence, HMRC did have information in relation to GM LLP underlying the conclusions set out in the Closure Notice.

356. Therefore, any apparent variance or inconsistency between HMRC's present position and its position in response to the closure notice application would merely indicate, at its highest, that HMRC was mistaken in early 2017 as to the extent of what it did and did not hold in relation to GM LLP. There is no evidence to support any suggestion that HMRC deliberately misled the FTT. The Appellant's arguments take his challenge no further so far as regards the outcome of the present appeal.

(v) Whether request for information misdated in January 2017

357. Finally, the Appellant makes an allegation as to the timing of HMRC's request for information dated 16 January 2017. The allegation is set out in the Bundle Email of 2019 as follows:

"*The bundle records a 16 January [2017] letter from HMRC to me. It is my position that the date on that letter appears incorrect (and it was issued at a later date). I pointed out to both the Tribunal and HMRC on 23 January 2017 that HMRC had never provided such letter. And even then it took HMRC an additional more than 24 hours to provide me with an email copy of that letter. So it is my position that it appears the letter was only created on 23/24 January 2017 after I pointed out that the letter did not seem to exist.*"

358. Therefore, the Appellant appears to be asserting that HMRC created the letter dated 16 January 2017 after he had pointed out that no request had been received (see his email to the Tribunal dated 23 January 2017) and then backdated it so as to give the impression that it was created beforehand, on 16 January 2017.

359. Thus, properly understood, the Appellant appears to be alleging something close to dishonesty or impropriety (without using those words) against HMRC.

360. The Tribunal rejects the allegation, which is unfounded. So far as the evidence is concerned, Mr Stannard's second witness statement (paragraphs 9 to 12 and the documentation exhibited thereto) addressed the point in its entirety. This material proves on the balance of probabilities that the document had been finalised and sent out by HMRC by post on 16 January 2017. It is simply that when the Appellant communicated that he had not received it a further copy was provided by HMRC by email on 24 January 2017.

361. Mr Stannard explained, and the Tribunal accepts, that as HMRC's information relating to GM LLP was not comprehensive, he commenced the preparation of a request for information and documentation to the Appellant in early January 2017. HMRC set an internal deadline of 16 January 2017 on the basis that this accorded with the deadline set by the Tribunal for provision of HMRC's grounds in relation to the Application for a closure notice plus evidence in support.

362. A draft of the request was circulated on 12 January 2017 within HMRC. It was finalised and sent to the Appellant by post on 16 January 2017 – this is supported by a contemporaneous email on the same day. On 23 January 2017 the Appellant wrote to the Tribunal stating he had not received any request for further information so it was sent again by email dated 24 January 2017.

363. Further, the notion that HMRC would have backdated a document simply in order to give the impression of compliance with an internal deadline is inherently unlikely.

364. At this point, the Tribunal notes the exchanges between Mr Davey for HMRC and the Appellant in cross-examination during which he was asked on more than five occasions to clarify whether or not he was asserting that HMRC had intentionally backdated its request for information dated 16 January 2017. He refused to provide that clarification. The fact that by the time of the 10-11 July 2019 hearing the Appellant had apparently decided that the timing of the letter "doesn't matter to me, personally, any more" is not to the point.

365. HMRC gave the Appellant specific opportunity to withdraw what HMRC took to be a serious allegation prior to the hearing, and HMRC put the Appellant on notice that if he failed to do so then HMRC would have no choice but to adduce a further witness statement (i.e. Mr Stannard's second statement) in order to deal with the allegation (see Response to Preliminary Issue Application at paragraphs 22-24).

366. The Appellant chose not to provide the withdrawal / clarification requested, thereby putting HMRC to the cost and trouble of responding to it. It was a point which is rejected. It is also another example of the unsatisfactory fashion in which the Appellant has made unfounded allegations as and when he has seen fit and apparently without regard either to their seriousness or their relevance to what the FTT has to determine in this appeal.

Validity of the enquiry and closure notices – compliance with statutory requirements

367. For the sake of completeness, the Tribunal has sought to consider whether both HMRC's enquiry and closure notice were valid or lawful and that HMRC complied with the both the statutory and common law requirements in opening and pursuing its enquiry, closing that enquiry and amending the Appellant's 12/13 Return. The Tribunal has approached all questions on the basis that it has jurisdiction to do so and that the burden of proof would be upon HMRC to establish the lawfulness of its actions throughout.

Section 9A TMA 1970 – a lawful enquiry

368. The Tribunal has already found that on 19 February 2014 (the "Enquiry Notice"), a month after the Appellant's 2012/2013 tax return had been filed on 14 January 2014, and therefore well within the 12-month window for opening an enquiry (section 9A(2) Taxes Management Act 1970, HMRC wrote to the Appellant.

369. The Enquiry Notice: (i) was from an HMRC Officer; (ii) was addressed to the Appellant; (iii) stated that it was in respect of the 12/13 Return; (iv) expressed HMRC's intention to open an enquiry into the 12/13 Return; (v) stated that the enquiry would be under section 9A the Taxes Management Act 1970 ("TMA 1970"); and (vi) stated that, after the enquiry, the Appellant would be informed whether or not he might have to pay more tax or alternatively might be due a payment from HMRC.

370. It was posted to the Appellant's address in Switzerland. The Appellant does not dispute that he received the Enquiry Notice.

371. In oral evidence the Appellant appeared reluctant to accept that the intention to open an enquiry might reasonably be inferred from the words used in the Enquiry Notice. As to this, the Tribunal is satisfied that the wording of the Enquiry Notice is clear and would plainly convey to a reasonable recipient that HMRC intended to open an enquiry under section 9A TMA 1970 in respect of the 12/13 Return. Indeed, HMRC notes that the Appellant himself previously wrote to the FTT (7 August 2017) stating that the Enquiry Notice did convey precisely such meaning: "*With letter dated 19 February 2014 HMRC intended to open a Section 9A enquiry into my 2012/13 tax return*". Any objective reader would have understood it to be a notice opening an enquiry – see *HMRC v Mabbutt* [2017] UKUT 0289 (TCC).

372. In the circumstances, the Tribunal is satisfied that the requirements of section 9A TMA 1970 were fulfilled: the effect of the Enquiry Notice was to open an enquiry into the 12/13 Return.

373. During the course of that enquiry, and against the backdrop of the release of the decision of the FTT in the Icebreaker case of *Acornwood LLP v HMRC* [2014] UKFTT 416 (TC) ("*Acornwood*") and the first of the UT's two *Acornwood* decisions ([2016] UKUT 361 (TCC)), the Appellant asserted that the activities of Great Marlborough LLP ("GM LLP") and its members should be distinguished from the LLPs and their members under consideration in the Icebreaker / Acornwood proceedings.

374. HMRC requested information from the Appellant in order to analyse the strength of that assertion. The FTT at the time described HMRC's request as being "for relevant information and … not an excessive request" (*Jorg Märtin v HMRC* [2017] UKFTT 0488 (TC) *per* Judge Mosedale at [30]).

375. However, the Appellant failed to provide any such information.

376. The Tribunal is satisfied that HMRC's enquiry was lawfully opened and conducted.

Section 28A TMA 1970 – a lawful closure notice and amendment to return

377. The Appellant successfully applied for HMRC's enquiry into the 12/13 Return to be closed.

378. The premise of that application was that there was an enquiry on foot; and the FTT held that HMRC was in a position to issue a closure notice in respect of it. Further, the FTT expressly envisaged that the likely content of the closure notice would be to deny Mr Märtin the sideways loss relief that he was claiming. The FTT stated (*Märtin* at [31]-[32]):

"31. Should a closure application be refused when the taxpayer has failed to provide relevant information that has been requested? In a case where the taxpayer's potential tax liability was unquantified ordering closure would put HMRC in a difficult position as they would not have the necessary information to even know to what figure to amend the tax return. But in this case that was not an issue: the loss claimed by Mr Märtin was precisely quantified and known to HMRC. It would be possible to issue a closure notice denying the exact amount of the tax relief claimed.

32. Indeed, HMRC accepted that if I granted Mr Märtin's application, they would close the enquiry, but almost certainly by amending Mr Märtin's tax return to exclude the claimed loss. Although they had no paperwork, it was clear that they considered Mr Märtin had participated in an Icebreaker scheme similar to the one in Acornwood and that it was likely (in their view) he was not entitled to the claimed loss relief."

379. HMRC duly complied with the FTT's direction, issuing the closure notice on 7 July 2017 (the "Closure Notice"). In light of HMRC's view of the law, and the information available to

HMRC, and in the absence of any information to the contrary, and as had been envisaged by the FTT, the Closure Notice denied the Appellant the sideways loss relief that he was claiming.

380. It is not in dispute that the Closure Notice: (i) was from an HMRC officer; (ii) informed the Appellant that the enquiry into the 12/13 Return had been completed; (ii) set out HMRC's conclusions; (iv) amended the 12/13 Return accordingly; and (v) was received by the Appellant.

381. In the circumstances, the Tribunal is satisfied that the requirements of section 28A TMA 1970 were fulfilled: the effect of the Closure Notice was to close the enquiry into the 12/13 Return.

382. The Closure Notice and amendment to the Appellant's 12/13 Return were lawfully and validly issued.

Conclusion

383. In the circumstances, this appeal should be dismissed. The Closure Notice, conclusions within and amendments to the Appellant's 12/13 return are confirmed and upheld. Notwithstanding the many points that the Appellant has attempted to raise at various times and in various ways (and notwithstanding the Tribunal's ruling that his late substantive challenge was not open to him in these proceedings), HMRC have satisfied the Tribunal that the closure notice, conclusions and amendments to the 12/13 Return were reasonable, valid and lawful.

Right to apply for permission to appeal

384. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEEASE DATE: 02 DECEMBER 2019