[2017] UKFTT 0226 (TC)

TC05714

Appeal number: TC/2016/06296
TC/2016/06297

Income tax and corporation tax – partnership and corporation tax returns – applications for closure notices under s 28B TMA 1970 and paragraph 33 Schedule 18 FA 1998 – whether HMRC should be entitled to conduct further enquiries in respect of alternative arguments and reasoning justifying conclusions – applications allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

BCM CAYMAN LP **Applicants**
BLUECREST CAPITAL MANAGEMENT CAYMAN LIMITED
BLUECREST CAPITAL MANAGEMENT LP
BLUECREST CAPITAL MANAGEMENT LLP
BLUECREST CAPITAL MANAGEMENT (UK) LLP

- and -

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

TRIBUNAL: JUDGE SARAH FALK
MICHAEL BELL ACA CTA

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 3 March 2017

Malcolm Gammie QC and Michael d'Arcy, instructed by Slaughter and May, for the Applicants

Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application that HMRC be directed to issue closure notices within a specified time in respect of their enquiries into certain of the applicants' tax returns. There were two separate applications that were consolidated and heard together. These are referred to below as the Cayman application, made by BCM Cayman LP and BlueCrest Capital Management Cayman Limited (the "Cayman applicants"), and the PIP application, made by BlueCrest Capital Management LP, BlueCrest Capital Management LLP and BlueCrest Capital Management (UK) LLP (the "PIP applicants"). A list of the returns under enquiry in respect of which the applications are made is set out in the appendix to this decision.

2. Prior to the hearing HMRC had conceded that times should be set for closure notices to be issued, but they disputed the period that should be allowed. The applicants had requested that HMRC be directed to issue closure notices within 30 days, whereas HMRC contended that they required three months to close the enquiries in respect of the Cayman applicants and seven months to close the enquiries in respect of the PIP applicants.

3. Our decision, which we communicated to the parties at the hearing with reasons to follow, is that HMRC be directed to issue closure notices as follows:

(1) in respect of the Cayman application, within 30 days of the date of this decision; and

(2) in respect of the PIP application, by 31 May 2017.

Background and substantive issues in dispute

4. BlueCrest conducts a fund management business in the UK. Until 1 December 2008 the UK operations were carried on by BlueCrest Capital Management LP, from that date by BlueCrest Capital Management LLP, and from 1 April 2010 by BlueCrest Capital Management (UK) LLP. References below to the "UK partnership" are to whichever of these partnerships carried on the UK operations at the relevant time.

5. BlueCrest Capital Management Cayman Holdings Limited ("Cayman Holdings") and BlueCrest Capital Management Cayman Limited ("Cayman Limited") were incorporated in the Cayman Islands in 2007. Cayman Limited established the partnership now known as BCM Cayman LP ("Cayman LP").

6. The underlying dispute that is the subject of the Cayman application relates to a transaction undertaken shortly after the Cayman structure was established in 2007. In brief summary, Cayman Limited borrowed to acquire a partnership interest in the UK partnership (at that time BlueCrest Capital Management LP), and then made a capital contribution of that partnership interest to Cayman LP. The borrowings comprised a loan from RBS and loan notes issued to the selling partners. RBS also became a corporate partner in Cayman LP and entered into a total return swap with Cayman Holdings under which RBS received fixed payments and agreed to pay a proportion

of profits it received from Cayman LP (referred to as "super-profits"). Holdings agreed to inject any amounts received into Cayman Limited as share capital. RBS was subsequently replaced by a member of the Morgan Stanley group and the total return swap was replaced by another arrangement with a similar effect, which terminated in 2010. Further transactions were undertaken in 2011 under which Cayman Limited financed an additional acquisition of partnership interests and refinanced its existing debt.

7. There are a number of open issues in relation to the Cayman structure. Using the labels adopted by the parties these are:

Issue 2: whether the super-profits should be treated as arising directly to Cayman Limited for tax purposes;

Issue 4: whether Cayman Limited's interest costs are an allowable deduction at all in computing the profits of its UK permanent establishment (which it had by virtue of its indirect interest in the UK partnership), on the basis that the expense did not relate to the UK trade;

Issue 4b: whether Cayman Limited's interest costs are restricted because its UK permanent establishment was thinly capitalised;

Issue 3: whether those interest costs are restricted or disallowed entirely on the basis that Cayman Limited was a party to the loans for an "unallowable purpose" (see sections 441 and 442 Corporation Tax Act 2009); and

Issue 5: whether any relief available for the interest costs was deductible as a trading expense or as a non-trading debit.

8. The PIP application relates to a partnership incentive plan (PIP) first put in place in 2008. Under the PIP structure a corporate partner, initially a company called Special Capital Limited ("SCL") and subsequently a company called Avon Limited ("Avon"), became a partner in the UK partnership and was allocated profits. For convenience we shall refer to SCL throughout. SCL re-invested profits received in the UK partnership as "special capital" and made indicative awards of that capital to individual members of the partnership. Indicative awards became final at a later date if certain conditions were met, and at that point could be withdrawn in cash.

9. HMRC's primary argument (referred to as "Issue 1" by the parties) is that SCL was effectively a conduit and that individual partners should be subject to income tax on the profits on the basis that the PIP is part of the UK partnership's profit sharing arrangements. They have also raised further arguments in the alternative. The first of these (referred to as the "Secondary Argument") is that if they are wrong on Issue 1 then the transfer of special capital by SCL to the individual partners gave rise to taxable income for the individuals under – as the argument is now formulated – the miscellaneous income head of charge. Alternatively, HMRC contend that the individuals are taxable on the special capital allocated to them under Chapter 4 Part 13 Income Tax Act 2007 (the "Sale of Occupation Income" argument). They have also raised inheritance tax issues. None of the Secondary Argument, the Sale of

Occupation Income argument or the inheritance tax issues would require amendments to the partnership returns that are the subject of the PIP application.

Evidence

10. In addition to a significant amount of documentary evidence which largely comprised correspondence relating to HMRC's enquiries, we had available witness statements from three witnesses, Rachel Frusher, Lucy Day and Robin Aitchison. Ms Frusher and Mrs Day are HMRC employees. Ms Frusher is currently the "issue owner" in respect of the Cayman related enquiries and Mrs Day is the issue owner in respect of the PIP matter. Mr Aitchison is a partner in Ernst & Young LLP and has advised the applicants throughout the relevant period. All three witnesses produced witness statements. In the event it was not necessary to hear oral evidence from Mr Aitchison because his witness statement largely addressed developments that had occurred since HMRC's witnesses had produced their initial witness statements, and by the date of the hearing Ms Frusher and Mrs Day had produced supplementary witness statements which responded to the points raised. We accepted HMRC's unopposed application to admit these further statements. Both Ms Frusher and Mrs Day were cross-examined on their witness statements. We should make it clear that we accepted their evidence on matters of fact, including as to their belief as to what was required to be done before closure notices could be issued and the time required to do that work. Our disagreement relates to what work is in fact required.

Findings of fact

Cayman application

11. By the date of the hearing the outstanding matters which HMRC considered were delaying the issue of closure notices in relation to the Cayman enquiries related to Issue 4b and Issue 3. No further information or work was required in respect of the other issues.

12. In HMRC's view Issue 4b required further work to be done by HMRC's transfer pricing specialist. Ms Frusher estimated that this would take six to eight weeks and would be based on information HMRC already held. On Issue 3, HMRC considered that they needed time to review the documentation they held to determine the accuracy of the applicants' assertion that the Cayman structure was not considered as an alternative to the PIP. In HMRC's view this was essential to enable it to take a view on whether to continue a challenge based on unallowable purpose. Cayman Limited had responded on 12 January 2017 to a formal information notice requiring further information and documents in respect of the potential use of the Cayman structure as an alternative to the PIP. The response stated that (whilst the applicants did not consider the information requested to be relevant or necessary) there was no information relating to the potential use of the Cayman structure as an alternative to the PIP contemporaneous to Cayman Limited putting its financing structure in place in 2007, as the PIP had not been formally considered at that time. It added that formal consideration of the PIP commenced in early 2008. Ms Frusher was in the process of reviewing the documentation HMRC already had access to in order to check the

response to the formal information request. Based on her discussions with the previous issue owner for Issue 3, who is very familiar with the documents, Ms Frusher believed that the review was required. There was a significant amount of material to review. Ms Frusher was concerned that there could be material that was inconsistent with the response given in January. Ms Frusher expressed her concern that the Cayman arrangements had previously been described to HMRC as being intended to provide equity incentivisation, but if they were considered as an alternative to the PIP that would indicate an income incentive plan or income deferral plan rather than an equity incentive plan as previously expressed. Although she accepted that the particular document referred to in support of her concern in her second witness statement in fact related to a quite separate employee savings plan rather than what became the PIP, she wanted to review any material relating to an informal consideration of the PIP before formal consideration of it started in early 2008. She pointed out that there had been an indication in early 2014 in correspondence from Ernst & Young on the PIP that the Cayman structure had been considered as an alternative. She considered that her review could necessitate further requests for information and that it would be very difficult to ask for further information once closure notices had been issued. Her estimate was that she required three months for this task.

13. Ms Frusher's understanding was that HMRC needed to set out in the closure notice the arguments it was relying on as alternatives to Issue 4 and that it should also set out the figures, showing the extent of the disallowance for thin capitalisation reasons in the case of Issue 4b and what proportion of the interest should be disallowed on a just and reasonable apportionment in the case of Issue 3.

PIP application

14. As far as the PIP application was concerned, in addition to further work required in relation to issues which HMRC accepted did not affect the applicants:

(1) HMRC had concerns about apparent inconsistencies in the approach that had been taken to withholding and redacting information on the basis of privilege and relevance;

(2) HMRC needed copies of and further time to analyse documents which were said to be commercially sensitive (including appraisal information), to which HMRC had been given access to view but not copies, and also required sample copies of further documents that may be relevant to the calculation of non-trader compensation;

(3) HMRC was concerned that it had not seen all presentations made to individual partners in relation to the PIP;

(4) HMRC intended to make a request to SCL for bank statements; and

(5) HMRC also required additional time to analyse the responses received on 12 January 2017 to formal information notices issued on 19 December 2016.

15. On the first point, Mrs Day explained that that over 2,700 documents had been withheld on legal professional privilege grounds from a review of around 106,000 documents relating to a sample of 10 out of about 175 individual partners. Although HMRC had been advised that Slaughter and May had checked each document individually and confirmed that it was covered by privilege, HMRC continued to have concerns about the large number of documents withheld on privilege grounds and considered that they may include some which are not privileged and which are relevant to the PIP enquiries. HMRC were also concerned about documents withheld on grounds of relevance. Documents had been withheld on the basis that they contained only a "fleeting reference" to the PIP. HMRC wished to see these documents.

16. Mrs Day's second witness statement described specific documents that had been the subject of inconsistent treatment, in some cases being withheld or redacted but elsewhere supplied in full. However, in the case of each of these documents either HMRC had now agreed that privilege applied, or Slaughter and May had confirmed that the document should have been redacted or withheld on grounds of privilege, relevance or sensitivity, or it had transpired that the document had been supplied previously, or in the case of one document that HMRC may have been comparing what were in fact two different documents. Nevertheless Mrs Day remained concerned about inconsistencies.

17. Mrs Day said that HMRC was currently reconsidering a request it had previously made to seek a schedule of documents in respect of which privilege was claimed, if necessary using the formal information notice provisions in Schedule 36 Finance Act 2008 ("FA 2008") and the procedure under regulations made pursuant to that schedule that permitted disputes over privileged documents to be referred to the tribunal.

18. In relation to category (2) above (commercially sensitive documents), Mrs Day wished to obtain copies of and have further time to analyse documents which HMRC had been given access to view, although she accepted that HMRC had now viewed copies of documents in this category and that an opportunity to do so had been provided at a much earlier stage. She also wished to obtain sample copies of further documents that may be relevant to the calculation of non-trader compensation (relating, as the name suggests, to individuals not directly engaged in trading), since HMRC considered they had seen very little information on that.

19. As regards presentations (category (3)) a response had recently been received confirming that copies of all presentations had been supplied. However, there was no specific response in relation to an email dating from 2008 that Mrs Day had highlighted and that appeared to refer to the existence of a presentation, and she wished to pursue that.

20. On category (4), the applicants had advised that all bank statements of SCL in their possession had been supplied, but this did not include bank statements for the period from 2 May to 4 November 2008. HMRC had now approached SCL direct, and the requested mandate had just been supplied (although it emerged at the hearing that the mandate might be in the name of the wrong bank). HMRC's view was that the

bank statements were relevant to understanding how the PIP operated and with whom control of the "special capital" lay: HMRC wanted to see the level of control exercised by SCL, and considered that the bank statements could be relevant to that.

21. As regards category (5), Mrs Day had not yet had the chance to do a substantive review of the documents received on 12 January. She was particularly keen to understand the profit allocation methodology better and how this tied into the tax computations. In her view the documents made it clear that the profit allocation process was key, but she did not have all the details of how awards were calculated. HMRC did know the provisional and final awards to each individual and used this knowledge as the basis for their discovery assessments. However, they wanted to understand better the basis on which awards were made, including how it might tie in to appraisal information.

22. In cross-examination Mrs Day gave a number of justifications for the further requests. First, Mrs Day referred to the fact that HMRC had alternative arguments to Issue 1, and that having taken advice she believed that these arguments would need to be set out in the closure notices in respect of the partnership returns even though they did not directly affect the content of those returns. She also noted that the representative partner had been responsible for discussing the alternative arguments with HMRC throughout the process and that the issues could well be heard together by the tribunal. Secondly, information requested in respect of items such as presentations and sensitive documents and (potentially) documents claimed to be privileged would give an indication of what individual partners were aware of and how the figures were arrived at, which was relevant to Issue 1. HMRC wished to set out their conclusions in the closure notices based on their findings on what they considered to be the key evidence. HMRC was entitled to ask for information underlying the figures in the tax returns in order to check those figures. Similarly, the SCL bank information was relevant to the level of control exercised by SCL, and although Mrs Day accepted that Issue 1 did not hinge on that point she did not think that the point had been fully considered and she wished to do so before issuing closure notices. Thirdly, SCL had re-contributed as special capital 78% of what it was allocated, and HMRC needed to determine how to deal with the balance: should they restate allocations by reference to 100% or 78%, and if the former how should they allocate the difference? And how should differences between the amounts of special capital and individual awards made be addressed? On these points, the information supplied on 12 January included for the first time details of individual partners' income points under the terms of the UK partnership agreements, which may be the appropriate basis for addressing these points.

The relevant legal principles

23. Section 28B Taxes Management Act 1970 ("TMA") provides:

> "(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

> In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.
>
> (2) A closure notice must either-
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.
>
> (4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend-
>
> (a) the partner's return under section 8 or 8A of this Act, or
>
> (b) the partner's company tax return,
>
> so as to give effect to the amendments of the partnership return.
>
> (5) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
>
> (6) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).
>
> (7) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

For corporation tax purposes paragraph 33 Schedule 18 Finance Act 1998 provides:

> "(1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a closure notice within a specified period.
>
> (2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).
>
> (3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a closure notice within a specified period."

Under both s 28B and paragraph 33 Schedule 18 the burden is on HMRC: the application should be granted unless HMRC show that there are reasonable grounds for refusing it.

24. Park J explained paragraph 33 Schedule 18 in *HMRC v Vodafone 2* [2006] STC 483, where he said at [33] that it was meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believed that an enquiry was being inappropriately protracted, it could bring the matter before the tribunal. He went on at [34] to say:

> "…Schedule 18, is, I believe, constructed so as to produce a reasonable balance. It imposes obligations on companies to make self-assessments of their own corporation tax liabilities. It gives to the Revenue

> substantial powers to investigate returns and self-assessments which companies make. Conversely one would expect, and in my view one finds in para 33, a protection for companies that wish to question whether in their particular circumstances the use by the Revenue of some of their Sch 18 powers is, or continues to be, justified."

25. In *Jade Palace Limited v HMRC* [2006] STC (SCD) 419 the Special Commissioner referred to Park J's judgment in *Vodafone 2*, and said at [40] that the reasonable grounds HMRC must show for not giving a closure notice should take account of "proportionality and the burden on the taxpayer". He also pointed out at [42] to [43] that the "specified period" must be sufficient for HMRC to state their conclusions, that the period necessary would vary with the circumstances and complexity of case and the length of the enquiry, and that "the longer the period of the enquiry the greater the burden on the Revenue to show reasonable grounds as to why a time for closure should not be specified".

26. In *D'Arcy v HMRC* [2006] STC (SCD) 543 the Special Commissioner stated at [12]:

> "… I see no reason why alternative conclusions should not be stated in a closure notice with the amendment necessarily giving effect to the Revenue's preferred conclusion. Indeed, if they considered that an individual was liable either to income tax on a trading profit or to capital gains tax, it would seem to be essential that they could keep both options open. There is no need for the appeal system to allow scope for such alternative contentions when they are not stated in the closure notice."

27. In *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 the Special Commissioner referred at [17] to the right to apply for a direction requiring a closure notice as being the taxpayer's protection against "undue delay or caution" on the part of the officer in closing the enquiry. After pointing out that complexity in the taxpayer's affairs and large amounts of tax at risk are likely to extend an enquiry, he referred to Park J's comments in *Vodafone 2* about "reasonable balance" and said 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 as part of that 'reasonable balance', that a closure notice can be required notwithstanding that the officer has not pursued to the end every line of enquiry or investigation – what is required is that he should have conducted his enquiry to a point where it is reasonable for him to make an informed judgment as to the matter in question, so that, exercising such judgment, he can state his conclusions and make any related amendments to the taxpayer's return. The exercise of that judgment may require the officer to express his conclusions in broad terms, or even express alternative conclusions [referring to *D'Arcy* at [12]…"

28. In *Steven Price v HMRC* [2011] UKFTT 264 (TC) the tribunal stated at [10] that whilst HMRC were entitled to issue closure notices in broad terms, they were not bound to do so and were entitled to know the full facts so that they could make an

informed decision: the statutory scheme made this clear by granting the right to issue information notices seeking documents and information reasonably required to check a tax return, under Schedule 36 FA 2008. In that case HMRC had received most of the requested documents only two working days before the hearing, and wanted not only time to review them but potentially to ask further questions. Similarly in *Andreas Michael v HMRC* [2015] UKFTT 577 (TC) the tribunal said at [30] that it was not necessary for HMRC to be certain that the figures were wholly accurate, but it would not be appropriate in that case to issue a closure notice when it was "clear that further information is or may be available" that would affect the tax liability. The further information requested in that case related to whether the taxpayer had failed to include some rental income, and whether the level of takings from a business was accurate. In *Frosh & others v HMRC* [2016] UKFTT 0558 (TC) the only documents provided in relation to the SDLT scheme the subject of that case were those included in bundles for the hearing of the application for a closure notice. It was clear from a previous settlement invitation that HMRC had already reached a view as to quantum, but the tribunal concluded that they should not order a closure notice, because it would result in an "inappropriate shifting of matters" that should be determined by HMRC to case management for the tribunal ([61]). Whilst a closure notice could be issued before every conceivable line of enquiry was concluded, the enquiry should be conducted to the point where an "informed judgment" could be taken ([51]).

29. Although of course it did not concern an application for a closure notice, it is clear that the comments made by the Supreme Court in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 on the subject of closure notices are also highly relevant. In particular, Lord Walker pointed out at [13] that "a great deal of expensive legal argument might have been avoided" if the inspector in that case had stood his ground and insisted that he needed more time, rather than agreeing to the demand for a closure notice, and commented at [18] that the conclusion that the closure notice in that case did not preclude HMRC from advancing a different argument on appeal:

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

Lord Hope added at [83] that "taxpayers are entitled to expect a closure notice to be informative" and at [85] that the court's decision on the closure notice issue "should not be taken as indicating that uninformative closure notices of the kind [issued in that case] should be the norm". The officer "should wherever possible set out the

conclusions that he has reached on each point that was the subject of enquiry which has resulted in his making an amendment to the return".

The parties' submissions

30. Mr Gammie, for the applicants, submitted that there was no reason for any further delay in issuing closure notices. In the applicants' view HMRC's analysis had remained essentially static since 2013 in the case of the PIP and 2014 in the case of the Cayman enquiries. The enquiry process had now extended over seven years (November 2009 in the case of the Cayman matter and November 2010 in the case of the PIP), had been handled by various different personnel and had not been pursued with sufficient expedition. The applicants had given very significant amounts of information during the enquiry and had already responded to points that HMRC considered were outstanding, making it clear in the responses to the recent formal information notices that they did not consider that the information requested was necessary or relevant. HMRC had been able to give precise estimates of the tax at stake, had made a number of discovery assessments on individuals involved, and (in respect of the Cayman dispute) had issued some accelerated payment notices in respect of Issue 2. In relation to the Cayman application, Issue 3 (as well as Issue 4b) was only a fall-back to Issue 4 and full information had been supplied. In relation to the PIP application full relevant information had been provided in respect of Issue 1 and the other arguments could not affect the partnership returns. The further information being requested was being asked for to help HMRC build a case. That was not appropriate at this stage and if further information was required in relation to items then that was properly a matter for the appeal process. HMRC had also been on notice from at least mid-November 2016 that the applicants were seeking closure notices. If closure notices were issued as the applicants requested then it was hoped that the case could be heard in 2018, whereas on HMRC's timetable a hearing was unlikely before 2019. Even 2018 would be 10 or 11 years after implementation. Evidence, particularly of such matters as unrecorded informal discussions relating to the introduction of the PIP, would be adversely affected.

31. Mr Stone, for HMRC, submitted that the enquiries were factually and legally complex, with significant amounts of tax at stake (estimated at around £250 million in the case of the PIP). Significant time and resources had already been applied by the parties, including in settling several issues, and it would not benefit any party for the final stage of completing the enquiries to be unnecessarily rushed and not properly thought through. HMRC had not delayed in progressing the enquiries. The tribunal should set a timeframe which was realistic rather than unnecessarily ambitious, which should provide for the possibility that further queries and requests for information may have to be raised with the applicants (with the responses then being analysed), and that the tribunal should rely on evidence as to how long it would take to close the enquiries rather than assertion. HMRC's issue owners were in a better position to estimate that time than the applicants. They were also approaching the task conscientiously, and the estimates were genuine. HMRC had no financial interest in delaying the issue of closure notices given that on their present view they were currently being kept out of substantial amounts of tax.

32. In relation to the Cayman application, whilst the closure notices could only make one amendment, which would be to disallow the interest entirely under HMRC's main argument (Issue 4), the passage in *D'Arcy* set out at [26] above made it clear that alternative conclusions could be stated. HMRC needed more time to determine whether they would pursue Issue 3 and, if so, what proportion of the interest should be disallowed, with that proportion being stated in the closure notice. It was also preferable to complete the thin capitalisation work now. Allowing an additional three months would not place a "burden" on the taxpayer as referred to in *Jade Palace* at [40].

33. In relation to the PIP application, whilst Mr Stone accepted that the further work HMRC wished to do related to some extent to what would be reasons for the conclusions rather than conclusions, it was clear from Lord Walker's judgment in *Tower MCashback* that a closure notice in general terms was not the goal to aim at. The public interest was in closure notices being clear. This was also not a case where the applicants were being kept out of large sums of money: the accelerated payment notices related to certain limited aspects only. In relation to privileged documents, the applicants had not even provided the minimum detail contemplated by the CPR rules, which fell short of the level of detail which could be obtained by HMRC through the procedure governing privileged documents under Schedule 36 FA 2008. It was not appropriate to transfer the burden of dealing with this to case management applications to the tribunal.

34. Mr Stone submitted that allowing further time would avoid uncertainty in case management and unnecessary grounds of appeal, as noted by Lord Walker in *Tower MCashback* at [13], and would be in line with the comments made in *Steven Price, Andreas Michael* and *Frosh* (see [28] above).

Discussion

35. In reaching our conclusions we have sought to balance the parties' interests. We have had regard to the complexity of the enquiries, their length, the degree of cooperation which HMRC accepted that the applicants have provided during the enquiries, the significant amount of information that has been provided and the amounts involved. We have taken into account the increasing risk that evidence, and especially oral evidence relevant to matters such as the purposes for which transactions were undertaken, is becoming increasingly stale, and indeed it may reach the point where relevant individuals can no longer give evidence. We have considered whether HMRC have enough information to reach an "informed judgment", and whether further enquiries would be proportionate (*Eclipse* and *Jade Palace*), having regard to the comments of the Supreme Court in *Tower MCashback*. In accordance with the parties' submissions we have also drawn no distinction between the earlier and later periods the subject of the applications, on the basis that the issues raised are the same or essentially the same in each.

Cayman applications

36. We have concluded that there is no reason to delay the issue of closure notices to the Cayman applicants. Even if, as Mr Stone submitted (relying on the passage in *D'Arcy* cited above), it is correct that the unallowable purpose argument (Issue 3) could be stated as an alternative conclusion with the amendments to the returns giving effect to HMRC's preferred conclusion (Issue 4), it is clear that that is not necessary. The same applies to Issue 4b. It follows from *Tower MCashback* and also from *Fidex Ltd v HMRC* [2016] EWCA Civ 385 that it is perfectly legitimate for HMRC to state that their conclusion is that the interest is disallowed. Issue 4, Issue 3 and/or Issue 4b can appropriately be stated as reasons for that conclusion, or HMRC could simply refer to earlier correspondence for those reasons.

37. Whilst we understand that further work on Issue 3 may enable HMRC to decide either not to pursue it or to pursue it but specify a percentage of the interest that should be disallowed which is less than 100% (and similarly that further work on Issue 4b may enable HMRC to refine their views on the extent of a disallowance on thin capitalisation grounds), we consider that it is not appropriate to delay any further. As well as the considerations referred to at [35] above we have taken into account the fact that the Cayman applicants have already responded to a formal information notice on what HMRC regard to be the outstanding query. HMRC's desire to make further enquiries suggest that they do not accept that response. That is a serious matter, particularly in the context of an enquiry where they accept that the applicants have been cooperative.

38. We are also mindful of the fact that, at the substantive hearing, the burden of proof would be on Cayman Limited to demonstrate the absence of an unallowable purpose, or that any such purpose should not lead to a full disallowance of the interest. In practice it is likely that the matter will need to be dealt with in oral evidence about the discussions that occurred before the Cayman structure was put in place in 2007. Gathering evidence of this, and putting together the necessary witness statements, will be a matter for Cayman Limited and the burden will be on it and not HMRC (other than, possibly, in relation to any subsequent order of costs should Cayman Limited succeed). We do not consider that any further investigation by HMRC at this time, particularly given the response to the formal information notice to the effect that there is no relevant information, is likely to provide any material assistance in that respect. The tribunal will reach its own conclusion on the issue, including as to any percentage disallowance, based on the evidence before it.

PIP applications

39. We do not consider that there is any requirement that the closure notices issued to the PIP applicants should cover the Secondary Argument or the Sale of Occupation Income argument, neither of which affect the partnership returns, and we do not therefore consider that further work on these aspects justifies any delay in issuing closure notices to them.

40. We agree with Mr Gammie that a number of the other points raised relate to items of detail that go beyond what is appropriate to be done in the circumstances in order

to issue closure notices, bearing in mind the considerations referred to at [35] above. The concerns raised by HMRC in relation to documents claimed to be subject to legal professional privilege effectively question the work done by Slaughter and May, who have confirmed the privileged status of each of the documents in question. That is a serious matter in itself, but it is also relevant that the only documents identified by HMRC to illustrate their concerns have indicated errors in which documents identified as privileged have in fact been inadvertently disclosed. Other documents sought are being requested to enable HMRC to improve their understanding of the profit allocation methodology, or (in the case of SCL's bank statements) the level of control exercised by SCL. Further work on these points would not affect the conclusions in the closure notices and the amendments made, and taking account of all the circumstances we think that delaying the issue of closure notices to permit this work so as to enable HMRC to refine its reasoning would not result in a reasonable balance between the parties' interests. We also do not think it appropriate to delay closure notices whilst HMRC obtain and review documents that contain only "fleeting reference" to the PIP, which would undoubtedly place an additional burden on the applicants that we are not persuaded would be proportionate. The tribunal cases Mr Stone particularly relied on (*Steven Price*, *Andreas Michael* and *Frosh*) can each be distinguished on the facts. In *Steven Price* most of the relevant documents had only just been received; in *Andreas Michael* the further information was needed in order to determine the quantum of the amendments to the return; and in *Frosh* only limited documentation had been supplied. In contrast, in this case the enquiries are very significantly advanced and material amounts of documentation have been supplied and reviewed.

41. However, there is one aspect which we accept does require further work, because it is directly relevant to the conclusions and amendments that would be stated in the closure notices. This relates to the need to determine how the difference between the profit allocations to SCL and the amounts re-contributed as special capital should be dealt with, and how differences between the amounts of special capital and indicative awards made to individuals should be addressed. Although a position was taken when making discovery assessments (in which we understand that the amount assessed was the higher of the provisional and final awards), we were informed that there are only a limited number of discovery assessments, and only for certain years. We accept HMRC's submission that the information received in January 2017 about individual partners' income points is relevant to this. We further accept that HMRC will need to calculate the adjustments for up to 175 partners over the six years covered by the applications, and we accept the estimate provided by Mr Stone after discussion with his clients that a realistic timeframe for the exercise was three months. In those circumstances we concluded that the appropriate final date for the issue of closure notices to the PIP applicants was 31 May 2017, approximately three months after the date of the hearing.

Disposition

42. We direct HMRC to issue closure notices to the Cayman applicants within 30 days of the date of this decision, and to the PIP applicants by 31 May 2017. The

Cayman applicants' applications are accordingly allowed and the PIP applicants' applications are allowed in part.

43. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 15 MARCH 2017

Appendix: returns under enquiry to which applications relate

Cayman application

Applicant	Period ended/tax year
BlueCrest Capital Management Cayman Limited	30 November 2007
BlueCrest Capital Management Cayman Limited	30 November 2008
BlueCrest Capital Management Cayman Limited	30 November 2009
BlueCrest Capital Management Cayman Limited	31 December 2010
BlueCrest Capital Management Cayman Limited	31 December 2011
BlueCrest Capital Management Cayman Limited	31 December 2012
BlueCrest Capital Management Cayman Limited	31 December 2013
BCM Cayman LP	2009-10
BCM Cayman LP	2011-12
BCM Cayman LP	2012-13
BCM Cayman LP	2013-14

PIP application

Applicant	Tax year
BlueCrest Capital Management LP	2008-09
BlueCrest Capital Management LLP	2009-10
BlueCrest Capital Management LLP	2010-11
BlueCrest Capital Management LLP	2011-12
BlueCrest Capital Management LLP	2012-13
BlueCrest Capital Management LLP	2013-14
BlueCrest Capital Management (UK) LLP	2010-11
BlueCrest Capital Management (UK) LLP	2011-12
BlueCrest Capital Management (UK) LLP	2011-13
BlueCrest Capital Management (UK) LLP	2013-14