Neutral Citation: [2023] UKFTT 857 (TC)

Case Number: TC08958

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester

Appeal reference: TC/2020/03826
TC/2021/00154
TC/2021/00806

INCOME TAX – relief for gifts of shares to charity – determination of market value of the gifted shares – ss 272 and 273 TCGA – shares in companies admitted to trade on the Alternative Investment Market (AIM)

PROCEDURE – abuse of process – delay by HMRC in issuing decision under appeal

Heard on: 26-29 June 2023
additional written submissions on 12 July 2023
Judgment date: 05 October 2023

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER
JOHN AGBOOLA, JP

Between

(1) GRAHAM CHISNALL
(2) FRANK COCKER
(3) NEIL MCARTHUR

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Alistair Webster KC, instructed by direct access

For the Respondents: James Henderson, Edward Waldegrave and Gareth Rhys, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. In appeal number TC/2020/03826, the market value of the shares in Frenkel Topping Group Plc that the Appellant gifted to charity on 8 September 2004 was 48.5 pence per share, and the market value of the shares in Vista Group Plc that the Appellant gifted to charity on 23 March 2005 was 82 pence per share.

2. In appeal number TC/2021/00154, the market value of the shares in Frenkel Topping Group Plc that the Appellant gifted to charity on 28 October 2004 was 47.375 pence per share.

3. In appeal number TC/2021/00806, the market value of the shares in Frenkel Topping Group Plc that the Appellant gifted to charity on 10 September 2004 was 42.92 pence per share, the market value of the shares in Vista Group Plc that the Appellant gifted to charity on 18 January 2005 was 77.49 pence per share, and the market value of the shares in Frenkel Topping Group Plc that the Appellant gifted to charity on 21 March 2005 was 43.71 pence per share.

REASONS

SUMMARY

4. In tax year 2004-05, the Appellants gifted to charities shares in companies listed on the Alternative Investment Market ("AIM") of the London Stock Exchange, one of which was Frenkel Topping Group Plc. In their self-assessment tax returns, they claimed relief pursuant to s 587B of the Income and Corporation Taxes Act 1988, which entitled them to claim as a deduction in calculating their total income the market value of the shares gifted to charity. Following enquiries into their tax returns, HMRC issued closure notices concluding that the market value of the shares at the time of gifting was lower than the amounts claimed in their tax returns. The Appellants appeal against the closure notices.

5. The Appellants rely solely on the prices at which the shares traded on AIM as evidence of their market value at the time of gifting. HMRC rely solely on expert valuation evidence, produced during the course of the proceedings, that the market value was even lower than the amounts on which the closure notices were based. HMRC now disavow reliance on the valuations on which the closure notices were based.

6. The closure notices were issued well over a decade after the enquires into the tax returns were opened. The Appellants have applied for an order that HMRC should not be permitted to take further steps in the appeals and that the appeals should be allowed, on the basis that the inordinate and inexcusable delay by HMRC is an abuse of process. In this decision, the Tribunal dismisses that application. The Tribunal finds that it can exercise its powers to eliminate unfairness to a party in proceedings before it that is attributable to an abuse by the other party, even if that conduct occurred before the decision under appeal was issued. However, the Tribunal finds that it has not been established that delay by HMRC in issuing the closure notices affected the fairness of the hearing of these particular appeals.

7. As to the substantive appeals, the Tribunal finds in this decision as follows. The Appellants bear the burden of proving that the closure notices overcharge them to tax. However, as HMRC contend that the closure notices *under*charge the Appellants to tax, HMRC have the burden of proving that this is the case. All parties agree that the Tribunal is faced with a binary choice between the respective positions of the parties.

8. The practical result of HMRC's position in these proceedings, whether intentional or not, is to undo the effect of the Tribunal decision in *Netley v Revenue and Customs* [2017]

UKFTT 442 (TC) ("*Netley*"). In *Netley*, HMRC had contended that the market value of Frenkel Topping shares on 28 July 2004 was 6.6 pence per share, but the Tribunal found instead that the market value on that date was 17.5 pence per share. The closure notices in these appeals were based on an expert valuation that took as its starting point the Tribunal's finding that the market value on 28 July 2004 was 17.5 pence per share. The evidence on which HMRC now relies in these proceedings is an expert valuation by an internal HMRC valuer, which is closer to the valuation originally contended for by HMRC in *Netley*. The fact that the expert valuer is an employee of HMRC does not render this expert evidence inadmissible, but its evidential weight is diminished by HMRC's failure to explain why they contend that it is more reliable than the earlier valuations, and the fact that the expert is an HMRC employee. On balance, the Tribunal decides that the prices at which shares traded on AIM has greater evidential weight.

FACTS

Appeal number TC/2020/03826

9. On 8 September 2004, the Appellant, Mr Chisnall, gifted to charity a parcel of shares in Frenkel Topping Group Plc ("**Frenkel Topping**").

10. Frenkel Topping was a public company listed on the Alternative Investment Market ("**AIM**") of the London Stock Exchange. It was originally established in April 2003 as WC Co (4) Limited, and later renamed as Forward Link Limited. In January 2004 it re-registered as a public limited company. It was a cash shell. It subsequently acquired two existing businesses, Frenkel Topping Ltd (a forensic accountancy business originally established in the 1970s) and Frenkel Topping Structured Settlements Limited (an additional business that developed out of the former, and which had existed since at least the 1990s, involving the investment of personal injury awards). Forward Link then changed its own name to Frenkel Topping Group Plc, and was admitted to trade on AIM on 28 July 2004. The process by which all this happened was complex, and involved various personae.

11. On 23 March 2005, Mr Chisnall additionally gifted to charity a number of shares in Vista Group Plc ("**Vista**").

12. Vista was a public company listed on AIM. It was originally established in July 2003 as Readymatch Limited. In July 2003 it re-registered as a public limited company. It was also a cash shell. It subsequently acquired an existing business, Vista Panels Limited, which had existed since at least the 1990s and which manufactured PVC door panels. Readymatch then changed its name to Vista Group Plc, and was admitted to trade on AIM on 19 December 2003. Again, the process by which all this happened was complex, and involved various personae.

13. In his self-assessment tax return for the year ended 5 April 2005, Mr Chisnall claimed relief pursuant to s 587B of the Income and Corporation Taxes Act 1988 ("**ICTA**") in respect of the gifts of these shares to charity. Relief was claimed on the basis that the value of the Frenkel Topping shares gifted on 8 September 2004 was 48.5 pence per share, and that the value of the Vista shares gifted on 23 March 2005 was 82 pence per share.

14. On 15 November 2006, HMRC opened an enquiry into the tax return.

15. On 10 May 2019, HMRC issued a closure notice, which concluded that the value of the Frenkel Topping shares gifted on 8 September 2004 was 14.6 pence per share, and that the value of the Vista shares gifted on 23 March 2005 was 22.75 pence per share.

16. In relation to the Frenkel Topping shares, the closure notice expressly adopted the valuation of those shares as at 8 September 2004 given in a valuation report dated 6 December 2017 by Mr Michael Weaver of Duff & Phelps, who had been engaged by HMRC

to determine the market value of Frenkel Topping shares on eight specific dates, including all of the dates relevant to the present appeals (the "**Weaver Report**").

17. The approach to valuation adopted by the Weaver Report was to take as its starting point the finding made by a differently constituted Tribunal in *Netley v Revenue and Customs* [2017] UKFTT 442 (TC) ("***Netley***") at [277] that the market value of Frenkel Topping shares on 28 July 2004, the date of its admission to AIM, was 17.5 pence per share, and to adjust that figure in accordance with a stated methodology to determine the market value on the eight specific subsequent dates with which that report was concerned.

18. On 25 September 2020, HMRC issued a review conclusion letter, upholding the closure notice. In relation to the Vista shares, the review conclusion letter indicated that the closure notice had adopted the valuation of those shares as at 23 March 2005 given in a valuation report dated 18 June 2018 by Mr James Taylor, who was a Grade 7 officer employed by HMRC in its Shares and Assets Valuation Branch ("**SAV**"), and who was an Associate of the Royal Institute of Chartered Surveyors ("**RICS**"). Mr Taylor had been asked to provide his opinion of the open market value of small minority shareholdings in Vista as at nine specific dates, including all of the dates relevant to the present appeals (the "**Taylor Report**").

19. The approach adopted by the Taylor Report was to consider "relevant factors" from various transactions that occurred in the establishment and flotation of Vista. These were in particular the acquisition by Readymatch of Vista Panels Ltd, the average price paid by or on behalf of the 22 investors who initially subscribed to its shares, the placing/listing price, transactions recorded on AIM on 19 December 2003 and shortly thereafter, and certain other factors. The report concluded that the placing/listing price of 95 pence per share did not represent a reliable indicator of the market value of the shares on 19 December 2003, and that the AIM trading prices thereafter did not represent any reasonable or reliable benchmark as to the open market value of the shares.

20. On 29 October 2020, the Appellant brought the present proceedings before the Tribunal.

Appeal number TC/2021/00154

21. On 28 October 2004, the Appellant, Mr Cocker, gifted to charity a parcel of shares in Frenkel Topping.

22. In his self-assessment tax return for the year ended 5 April 2005, Mr Cocker claimed gift relief pursuant to s 587B ICTA. Relief was claimed on the basis that the value of the Frenkel Topping shares on 28 October 2004 was 47.375 pence per share.

23. On 10 October 2005, HMRC opened an enquiry into the tax return.

24. On 29 November 2018, HMRC issued a closure notice, in which HMRC concluded that the value of the Frenkel Topping shares on 28 October 2004 was 14.5 pence. The closure notice expressly adopted the valuation of those shares as at 28 October 2004 given in the Weaver Report.

25. On 15 December 2020, HMRC issued a review conclusion letter, upholding the closure notice.

26. On 14 January 2021, the Appellant brought the present proceedings before the Tribunal.

Appeal number TC/2021/00806

27. On 10 September 2004, the Appellant, Mr McArthur, gifted to charity a parcel of shares in Frenkel Topping.

28. On 18 January 2005, Mr McArthur additionally gifted to charity a parcel of shares in Vista.

29. On 21 March 2005, Mr McArthur gifted to charity further shares in Frenkel Topping.

30. In his self-assessment tax return for the year ended 5 April 2005, Mr McArthur claimed gift relief pursuant to s 587B ICTA. Relief was claimed on the basis that the value of the Frenkel Topping shares on 10 September 2004 was 42.92 pence per share, that the value of the Vista shares on 18 January 2005 was 77.49 pence per share, and that the value of the Frenkel Topping shares on 21 March 2005 was 43.71 pence per share.

31. On 15 November 2006, HMRC opened an enquiry into the tax return.

32. On 31 January 2019, HMRC issued a closure notice. The effect of the closure notice was to conclude that the value of the Frenkel Topping shares gifted on 10 September 2004 was 14.6 pence per share, that the value of the Vista shares gifted on 18 January 2005 was 22.75 pence per share, and that the value of the Frenkel Topping shares gifted on 21 March 2005 was 17.5 pence per share.

33. On 27 November 2020, HMRC issued a review conclusion letter, upholding the closure notice. The review conclusion letter indicated that in relation to the Frenkel Topping shares, the valuation of those shares on the relevant dates given in the Weaver Report had been adopted, and that in relation to the Vista shares, the valuation of those shares on the relevant date given in the Taylor Report had been adopted.

34. On 10 March 2021, the Appellant brought the present proceedings before the Tribunal.

All three appeals

35. In its statement of case in all three appeals (dated 15 February 2021, 21 April 2021 and 22 July 2021 respectively), HMRC contended as follows. The correct valuation of the shares on the material dates is a matter for expert evidence in due course. HMRC reserve the right to contend before the Tribunal that the values on the relevant dates were actually lower or higher than the values adopted in the closure notices, if such a position is justified by the expert evidence to be presented by HMRC to the Tribunal in due course.

36. On 23 June 2021, the Tribunal directed that these three appeals shall be case managed together and heard together by the same Tribunal.

37. HMRC subsequently produced two expert valuation reports by Mr Iain Cook, dated 19 February 2022, valuing the shares in Frenkel Topping and Vista respectively (the "**Cook Reports**"). Mr Cook is a senior share valuer employed by HMRC in SAV, and is an Associate Member of RICS. The valuations in the Cook Reports are significantly lower than those in the Weaver Report and Taylor Report on which the closure notices were based (see paragraph 48 below).

38. On 21 August 2022, the Appellants applied for an order that HMRC should not be permitted to take further steps in the appeals and that the appeals should be allowed, on the basis that the continuation of the proceedings constitutes an abuse of the process of the Tribunal (the "**Appellants' abuse of process application**"). The Appellants note that the tax reliefs in question were for the year 2004-05, and that the closure notices were issued in November 2018 and January 2019 (some 12 or 13 years after the enquiries into the tax returns were opened). They maintain that "in view of the inordinate and inexcusable delay by the respondents in the course of their dealings with the issues giving rise to these appeals, leading to the loss of potentially important evidence, the respondents should not be allowed to further oppose the appeals on the ground of abuse of process leading to the loss of a fair

trial". On 5 October 2022, the Tribunal directed that this application should be dealt with at the hearing of the substantive appeals.

39. The substantive hearing of the appeals was held on 26 to 29 June 2023. Oral evidence was given by all three Appellants, and by HMRC's expert, Mr Cook.

40. HMRC made clear at the hearing that they are not aware of any tax avoidance motive on the part of these Appellants, and that HMRC consider that the presence or absence of tax avoidance is irrelevant to the issues which the Tribunal needs to decide. HMRC also confirmed that there is no suggestion that the prices at which the shares traded on AIM on the relevant dates were affected market manipulation. While HMRC do not exclude the possibility of a tax motive behind the investment on the part of other investors, all parties agree that that these particular appeals involve a straightforward exercise in determining the market value of specific shares on specific dates.

41. The Appellants contend that the appeals should be allowed, either on the basis of the Appellants' abuse of process application, or alternatively, on the basis of a substantive determination of the appeals. The Appellants' case is that the market value of the shares at the time of each gift is to be determined by reference to the price at which those shares traded on AIM at the relevant time.

42. The Appellants acknowledge that shares in Frenkel Topping and Vista were not traded on AIM on every day, and in fact, none were traded on the specific dates on which any of the gifts in these appeals were made. The Cook Reports indicate (and the Appellants do not dispute) that between 28 July 2004 (the date that Frenkel Topping was admitted to trade on AIM) and 20 April 2005 inclusive, there were trades in Frenkel Topping shares on only 10 days (on some of which there was more than one trade), and that between 19 December 2003 (the date that Vista was admitted to trade on AIM) and 10 May 2005 inclusive, there were trades in Vista shares on only 23 days. In those respective periods, there was a total of 16 trades in Frenkel Topping shares (at prices between 49.63 pence per share on 28 July 2004 and 37 pence per share on 20 April 2005) and 23 trades in Vista shares (at prices between 114.00 pence per share on 13 May and 7 June 2004, and 71.50 pence per share on 10 May 2005).

43. The Appellants' case is that in the circumstances, the market price on any given date material to this appeal is to be determined by extrapolation from the price at which the shares traded on the last occasion prior to that date, and the price at which the shares traded on the next occasion after that date. The Appellants contend that the amounts of relief claimed in their tax returns were calculated in accordance with this methodology, and that their tax returns as originally submitted are accordingly correct.

44. The Appellants further argue that no reliance should be placed on the expert evidence of Mr Cook, as his employment with HMRC in SAV puts him in a position of apparent bias and he is not an independent expert. It is also argued that Mr Cook lacks expertise and experience in the valuation of AIM-listed companies.

45. The Appellants submit that the Tribunal should find that:

(1) the Respondents are debarred from opposing the appeals due to inordinate and inexcusable delay on the part of HMRC which has prevented the Tribunal from providing a fair trial, and the appeal is allowed on that basis, and the value of the shares gifted was the price set out in the claim for relief at issue in each appeal;

or alternatively

(2) the appeal against the relevant closure notice in the case of each Appellant is allowed on its merits, and the value of the shares gifted was the price set out in the claim for relief at issue in each appeal.

46. HMRC submit that the Tribunal should find that the market value of the shares on each of the relevant dates is the valuation in the Cook Reports, that the closure notices under appeal therefore undercharge the Appellants to tax, and that the amounts of the assessments are to be increased accordingly.

47. HMRC contend as follows. HMRC disavow any reliance on the Weaver Report or Taylor Report on which the closure notices were based, or on any other valuation. The Appellants themselves have produced no expert report. Mr Cook's expert evidence is therefore the only expert evidence in the proceedings. The market in Frenkel Topping and Vista shares was too thin for the prices at which shares traded on AIM to be a reliable indicator of market value, and the Tribunal should therefore disregard this. There have been many gift of share cases before the Tribunal, and an expert report has always been given greater weight than the prices at which the shares traded on AIM.

48. The competing positions of the parties are thus:

Frenkel Topping

Date of gift	**Appellant**	**Appellant's position (tax return)**	***Closure notice (Weaver Report)*** ***not relied on by any party***	**HMRC position (Cook Report)**
8 September 2004	Mr Chisnall	48.5p	*14.6p*	10.0p
10 September 2004	Mr McArthur	42.92p	*14.6p*	10.0p
28 October 2004	Mr Cocker	47.375p	*14.5p*	10.2p
21 March 2005	Mr. McArthur	43.71p	*17.5p*	13.2p

Vista

Date of gift	**Appellant**	**Appellant's position (tax return)**	***Closure notice (Taylor Report)*** ***not relied on by any party***	**HMRC position (Cook Report)**
18 January 2005	Mr McArthur	77.49p	*22.75p*	17.0p
23 March 2005	Mr Chisnall	82p	*22.75p*	17.0p

LEGISLATION

49. Section 587B(1), (2) and (4) of the Income and Corporation Taxes Act 1988 ("**ICTA**"), as in force at the material time, relevantly applied where an individual disposed of the whole of the beneficial interest in a qualifying investment to a charity by way of a gift. It provided that the individual could claim as a deduction in calculating their total income for the

purposes of income tax for the tax year in which the disposal was made the market value of the qualifying investment at the time when the disposal was made.

50. Section 587B(9) ICTA provided that for purposes of that section, a "qualifying investment" included "shares or securities which are listed or dealt in on a recognised stock exchange".

51. Section 587B(10) ICTA provided that the "market value" of any qualifying investment was to be determined for purposes of that section as for the purposes of the Taxation of Chargeable Gains Act 1992 ("**TCGA**").

52. Section 841 ICTA, as in force at the material time, relevantly provided:

> (1) In the Tax Acts "recognised stock exchange" means—
>
> (a) the Stock Exchange; and
>
> (b) any such stock exchange outside the United Kingdom as is for the time being designated for the purposes of this section as a recognised stock exchange by order made by the Board.

53. Section 272 TCGA, as in force at the material time, relevantly provided:

> (1) In this Act *"market value"* in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market.
>
> (2) In estimating the market value of any assets no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time.
>
> (3) Subject to subsection (4) below, the market value of shares or securities quoted in The Stock Exchange Daily Official List shall, except where in consequence of special circumstances prices quoted in that List are by themselves not a proper measure of market value, be as follows—
>
> (a) the lower of the 2 prices shown in the quotations for the shares or securities in The Stock Exchange Daily Official List on the relevant date plus one-quarter of the difference between those 2 figures, or
>
> (b) halfway between the highest and lowest prices at which bargains, other than bargains done at special prices, were recorded in the shares or securities for the relevant date,
>
> choosing the amount under paragraph (a), if less than that under paragraph (b), or if no such bargains were recorded for the relevant date, and choosing the amount under paragraph (b) if less than that under paragraph (a).
>
> (4) Subsection (3) shall not apply to shares or securities for which The Stock Exchange provides a more active market elsewhere than on the London trading floor; and, if the London trading floor is closed on the relevant date, the market value shall be ascertained by reference to the latest previous date or earliest subsequent date on which it is open, whichever affords the lower market value.

54. Section 273 TCGA, as in force at the material time, relevantly provided:

> (1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls

to be determined by virtue of section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.

(2) The assets to which this section applies are shares and securities which are not quoted on a recognised stock exchange at the time as at which their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length.

LEGAL PRINCIPLES

55. The market value of shares is to be identified on the following basis:

(1) A hypothetical sale of the shares on the relevant day is to be assumed.

(2) It is assumed that the hypothetical vendor is anonymous and a willing vendor, in other words prepared to sell provided a fair price is obtained.

(3) It is assumed that the relevant property has been exposed for sale with such marketing as would have been reasonable, and that all potential purchasers have an equal opportunity to make an offer.

(4) It is assumed that the hypothetical purchaser is a reasonably prudent purchaser who has informed themself as to all relevant facts such as the history of the business, its present position and its future prospects.

(5) The hypothetical purchaser embodies whatever was actually the demand for the asset at the relevant time in the real market.

(6) The market value is what the highest bidder would have offered for the asset in the hypothetical sale.

See *McArthur and Bloxham v Revenue And Customs* [2021] UKFTT 237 (TC) at [15], and *Netley* at [203], and the further authorities there cited.

REASONS FOR DECISION

The Appellants' abuse of process application

56. The Tribunal has jurisdiction to determine the Appellants' abuse of process application (paragraphs 38, 41 and 45(1) above).

(1) Where it is alleged by a party to proceedings before the Tribunal that an abuse on the part of another party has directly affected the fairness of the proceedings, the Tribunal will have jurisdiction to determine any dispute as to the existence of the alleged abuse, and any dispute as to whether the fairness of the hearing has been directly affected thereby, and if so, can exercise its powers to eliminate that unfairness (compare *Foulser v HMRC* [2013] UKUT 38 (TCC) ("***Foulser***") at [35]; *Hackett v HM Revenue & Customs* [2020] UKUT 212 (TCC) ("***Hackett***") at [38]-[43]). A case in which a party seeks such a remedy, and in respect of which the Tribunal has this jurisdiction, is commonly referred to as a "***Foulser* Category 1 case**", reflecting the categorisation in *Foulser* at [34].

(2) However, the Tribunal has no jurisdiction or power as such to sanction HMRC for unacceptable delay in the period leading up to the making of the HMRC

decision under appeal in the proceedings before it. More generally, the Tribunal has no jurisdiction or power as such to grant a remedy to an appellant in respect of conduct by HMRC which is said to make it unlawful in public law for HMRC to seek to resist the appeal. The Tribunal does not have a judicial review jurisdiction in respect of such alleged breaches of public law by HMRC. A case in which an appellant seeks such a sanction or remedy, and in respect of which the Tribunal has no jurisdiction, is commonly referred to as a "***Foulser* Category 2 case**", also reflecting the categorisation in *Foulser* at [34]. See also *Hackett* at [43] and [46].

(3) The Tribunal's jurisdiction and powers in a *Foulser* Category 1 case are not confined to abuses that occurred after proceedings before the Tribunal were commenced. Earlier case law does not decide otherwise.

(a) There is no reason in principle why the *Foulser* Category 1 jurisdiction should be confined to alleged abuses of process occurring after the commencement of proceedings. It is a jurisdiction to protect the fairness of the proceedings, not merely a jurisdiction with respect to parties' conduct in the proceedings. The fairness of the proceedings can be affected by conduct occurring before proceedings were commenced.

(b) *Foulser* itself was not concerned with conduct of HMRC prior to the commencement of the Tribunal proceedings in that case, and does not address the question.

(c) In *Alway Sheet Metal Limited v Revenue & Customs* [2017] UKFTT 198 (TC), [2017] SFTD 719 ("***Alway Sheet Metal***"), the Tribunal expressly stated, twice, that it had jurisdiction to consider the argument that delay by HMRC in making the decision under appeal meant that the appeal could not be dealt with fairly and justly (at [101] last sentence and [105] first two sentences). However, the Tribunal found that in the circumstances of that particular case, it was not appropriate to exercise that jurisdiction (at [105] third sentence, [106] fourth sentence, and [109]). There is an obvious difference between the Tribunal lacking jurisdiction, and the Tribunal declining to exercise, in the particular circumstances of an individual case, a jurisdiction that it does have.

(d) It is true that in *Alway Sheet Metal*, the Tribunal said that the appellant was "not making any complaint as to how HMRC have conducted the litigation from the point at which the appellants notified their appeals to the Tribunal", and that he was "therefore asking the Tribunal to punish HMRC for what the appellants consider to be unacceptable delay *before* Tribunal proceedings were commenced" (at [106]). However, the Tribunal did not say that it could never be appropriate to exercise powers to remedy unfairness in situations where conduct by HMRC prior to the institution of proceedings has caused unfairness in the proceedings. Rather, the Tribunal was thereby indicating only that it was not appropriate to do so in the circumstances of that case, presumably because no particular unfairness in the proceedings themselves had been identified. At most, the Tribunal thereby indicated that delay in making the decision under appeal will not of itself necessarily cause unfairness in the proceedings, and that in the absence of any claim of unfairness in the proceedings, any request for a remedy in respect of such conduct becomes a *Foulser* Category 2 case.

(e) The Upper Tribunal reached the same conclusion in *Hackett*, in which the appellant also sought a remedy in respect of conduct of HMRC occurring before the commencement of the Tribunal proceedings. The Upper Tribunal said at [44] (first sentence) that the appellant had to establish that the abuse of process complained of fell within *Foulser* Category 1 (that is to say, that it directly affected the fairness of a hearing before the Tribunal). It further found at [46] (first sentence) that it had not been persuaded that any abuse by HMRC prior to the commencement of proceedings in that particular case had directly affected the fairness of the proceedings before the Tribunal. In the absence of any identified abuse affecting the fairness of the proceedings, the request for a remedy became a *Foulser* Category 2 case (at [46] (second sentence); also at [43] explaining *Alway Sheet Metal*). The Upper Tribunal did not find that an abuse by HMRC prior to the commencement of Tribunal proceedings could never affect the fairness of the Tribunal proceedings, or that an abuse by HMRC prior to the commencement of Tribunal proceedings that affected the fairness of the proceedings, if established, would be solely a *Foulser* Category 2 case rather than a *Foulser* Category 1 case.

(f) In *Nuttall v HMRC* [2022] UKFTT 192 (TC) ("***Nuttall* Abuse Decision**") at [24], HMRC "accepted that as a matter of principle, conduct complained of before the proceedings commenced could in an appropriate case give rise to an abuse of process falling within category 1". The Tribunal said in that case at [23] that it was difficult to see why that should not be the case. It indicated at [22] that it did not consider *Hackett* to have decided the contrary.

57. HMRC acknowledge that the enquiries in these Appellants' cases took too long.

58. However, the Tribunal is not persuaded that the delay by HMRC in issuing the closure notices has directly affected the fairness of the hearing of these appeals.

(1) The burden is on the applicant in an abuse of process application to establish the alleged unfairness.

(2) Delay on the part of HMRC in issuing a decision, no matter how inordinate and inexcusable, will generally not in and of itself directly affect the fairness of the hearing of any appeal against that decision. Some further factor will normally be required.

(3) The only further factor identified by the Appellants in these cases is said to be the loss of potentially important evidence as a result of the delay. If it is established that this has occurred, this can be a circumstance justifying an exercise of the *Foulser* Category 1 jurisdiction (*Nuttall* Abuse Decision at [37] first two sentences).

(4) However, the Appellants do not establish that any unfairness in the proceedings has been caused as a result of a loss of potentially relevant evidence due to the passage of time. In any event, the Appellants have not established that any unfairness would justify a debarring order.

(a) The Appellants' contention is that certain persons involved in the flotation of the companies, and/or who were involved in the Appellants' investments in these companies, are no longer available to give evidence about the opinions that they held and calculations they made around the time of the

flotations as to the future prospects of the companies and the value of the shares.

(b) However, the Appellants have not established that any such evidence would be of potential relevance to the determination of the market value of the shares of an AIM-listed company on the date of flotation or admission to AIM, let alone on dates thereafter. The mere fact that the Appellants consider such evidence to be potentially relevant does not make it so. The Appellants have not for instance adduced any expert evidence stating that such evidence would be relevant to the determination of the market value of the shares.

(c) Insufficient evidence has been presented by the Appellants to establish a significant likelihood that they could and would have obtained this evidence and sought to use it in the proceedings if the closure notices had been issued within a reasonable time. Nor is the Tribunal persuaded by the evidence presented by the Appellants that they have, since the closure notices were issued, made all reasonable efforts to obtain this evidence and failed, or that they could not with reasonable efforts have obtained some or all of this evidence.

(d) The Appellants have also not established that delay in issuing the closure notices has prevented them from obtaining adequate alternative evidence of the market value of the shares on the material dates, for instance by means of an expert valuation report. The Appellants contend that an expert valuation report would be expensive. The Tribunal accepts this, given that HMRC appear to be of a similar view (see paragraph 66(3)(c) below). However, there would presumably also have been costs to the Appellants in obtaining and marshalling evidence from the persons referred to in sub-paragraph (a) above. The Appellants have not presented sufficient evidence to establish that alternative evidence would be so much more expensive as to render the proceedings unfair if they are forced to rely on it.

(e) Even if the Appellants could establish some unfairness, they have not established that an order debarring HMRC from defending the proceedings would be the only way to secure fairness in the proceedings. Even assuming that the *Foulser* Category 1 jurisdiction includes a power to make a debarring order of the kind sought by the Appellants in this case, the exercise of this power would be justified only where no lesser order would meet the justice of the case (*Foulser* at [64]).

(5) The Appellants do not establish that any unfairness in the proceedings has been caused by loss of evidence by HMRC due to the passage of time, or by failure of HMRC to disclose relevant evidence.

(a) The Tribunal does not accept the Appellants' suggestion that HMRC is in breach of a duty to disclose to the Appellants all material relevant to the valuation of the shares that is or has been or should have been in HMRC's possession. (At the hearing, the Appellants argued for instance that "it does appear that the respondents at some stage had such material. … Where is it? Has it been preserved? Why is there no explanation as to its non-production?")

(i) Subject to any direction of the Tribunal to the contrary, in a standard or complex case each party is required to disclose to the other party

only those documents which that party intends to rely upon or produce in the proceedings (The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**"), rule 27(2)). A party is not required to disclose in addition all other relevant material in its possession.

(ii) If the Appellants believed that there are documents in the possession of HMRC without which these appeals cannot be decided fairly, the Appellants could have applied to the Tribunal for an order for specific disclosure by HMRC. The Appellants have not done so.

(iii) Unless an appellant applies for a direction for disclosure by HMRC of a specific document, or the Tribunal of its own motion issues such a direction, the question whether HMRC has that document, or whether it has been lost through the passage of time, does not affect the fairness of the Tribunal proceedings.

(b) It is for the Appellant to prove the value of the shares. The Tribunal does not accept the Appellants' contention that "the party making the inquiry [HMRC] with the power to compel production of material, which the appellants would never have had, … is inevitably under a duty to carry out its inquiries efficiently, expeditiously and with a view to making sure it secures material which is relevant".

The substantive appeals

59. The burden of proof is on the Appellants to establish that the closure notices overcharge them to tax. The Appellants therefore bear the burden of proving their contention that the market value of the shares at the time of gifting corresponded to the prices at which the shares traded on AIM at that time.

60. In a case such as the present, where HMRC contend that the decisions under appeal *under*charge the Appellants to tax, the burden of proof is on HMRC to establish this (*HMRC v CM Utilities Ltd* [2017] UKUT 305 (TCC) at [42]). HMRC thus bear the burden of proving their contention that the market value of the shares at the time of gifting corresponded to the valuations in the Cook Reports.

61. The Tribunal is faced with a binary choice between the Appellants' position and the HMRC position.

(1) Although it might theoretically be open to the Tribunal to find that neither of the opposing sides has discharged its burden of proof, such that the closure notices should stand, that would be an anomalous and unsatisfactory outcome in the circumstances of these cases, and is not an option in these proceedings.

(a) All parties positively contend that the closure notices are wrong.

(b) HMRC disavow, and the Appellants dispute, the valuations on which the closure notices are based. Counsel for HMRC expressed a preference for the Tribunal not to even look at those valuations because the parties do not rely on them and they have not been tested in cross-examination.

(2) The evidence and arguments in these proceedings do not provide a basis upon which the Tribunal could reach any other valuation.

(a) Although the Tribunal has a full appellate jurisdiction to determine the market value for itself, and may reach a conclusion that differs from that

contended for by any of the parties, it must base its decision on the evidence in the proceedings.

(b) At the hearing, all parties themselves agreed that this Tribunal cannot rely on findings of fact made by differently constituted Tribunals in other cases, or on evidence that was before Tribunals in other cases but is not before this Tribunal in the present proceedings.

(3) At the hearing, all parties put their cases on the basis that the Tribunal is in practice presented in these proceedings with a binary choice between the opposing parties' positions.

62. Faced with this binary choice, where each side bears the burden of proving its own case, the Tribunal must simply determine which side has produced the better evidence of market value. No matter how weak or unsatisfactory the evidence relied on by one party may be, it must in the particular circumstances of the present cases be accepted by the Tribunal if the evidence relied on by the opposing side is even weaker and less satisfactory.

63. The approach for determining the market value of shares in AIM-listed companies is that in ss 272(1)-(2) and 273 TCGA, and the principles in paragraph 55 above. This is because shares in AIM-listed companies are not "quoted in The Stock Exchange Daily Official List" for purposes of s 272(3) TCGA, and are "not quoted on a recognised stock exchange" for purposes of s 273(2) TCGA. All parties presented their cases on this basis.

64. The Tribunal finds that appropriate evidential weight should be given to the prices at which shares in Frenkel Topping and Vista traded on AIM during the relevant period. The question of what weight is appropriate weight will depend on the evidence as a whole.

(1) The prices at which shares trade on AIM (and indeed, the prices at which shares trade on any stock market) are generally of evidential value in determining the market value of the shares.

(a) Such prices are "information which a prudent prospective purchaser of the asset might reasonably require" within the meaning of s 273(3) TCGA. In oral evidence, Mr Cook said that a prudent potential purchaser of shares in an AIM-listed company "will look at what trades there have been", and agreed with the proposition that it would "be entirely reasonable and consistent with how investors actually act to look at the price, to see whether it is going up or down".

(b) Section 272(3) and (4) TCGA appear to assume that but for these provisions, the prices at which shares trade on any stock exchange would in any event be important information in determining the market value of those shares. The apparent purpose of these provisions is to extend that assumption even further in the case of companies listed on The Stock Exchange Daily Official List ("**SEDOL**"), by making the quoted price *conclusive* other than in specified exceptional cases, and by determining how the SEDOL quoted price for a given day is to be determined.

(c) AIM is part of the London Stock Exchange, and, in the words of Mr Cook in oral evidence, "No one is saying it's an illegitimate market".

(d) No authority has been identified for the proposition that, as a matter of law, in the determination of the market value of shares listed on AIM, the prices at which shares have traded are to be ignored.

(2) In a case where there is no other evidence relevant to market value at all, the prices at which shares actually trade on a stock market are generally likely to be sufficient to establish the market value. This does not mean that there is any *presumption* that those prices are the market value, or that the burden of proof is necessarily on any party claiming otherwise. This simply means, as a matter of practical common sense, that if there is no other relevant evidence in a case at all, these prices are likely to be sufficient to discharge the burden of proving the market value (compare *Hull City AFC (Tigers) Ltd v Revenue and Customs* [2017] UKFTT 629 (TC) at [97]-[98] quoting *Brady v Group Lotus Car Companies Plc* (1987) 60 TC 359, 336-337, 390-392).

(3) In a case such as the present, where there *is* other evidence relevant to market value, all of the evidence must be considered as a whole.

(a) Other evidence may show that the prices at which shares traded on the stock market are of little value in determining their market value, or even of no value at all.

(b) However, it is not the case, as HMRC appear to contend, that any expert valuation report must inevitably have more evidential weight than the prices at which shares actually trade on AIM, or that any expert valuation report must inevitably be accepted as better evidence unless the Tribunal finds that absolutely no weight at all can be attached to the expert report.

(i) Even if it were the case that Tribunals in practice have always given greater weight to an expert report (a matter on which this Tribunal makes no finding), as a matter of principle evidential weight falls to be determined in the circumstances of each individual case.

(ii) Even if the Tribunal gives some evidential weight to an expert report, it can still find that the prices at which shares actually traded carries greater evidential weight in all the circumstances.

65. The Cook Reports, and the oral evidence of Mr Cook, are admissible expert evidence.

(1) The fact that Mr Cook is an employee of HMRC does not make this expert evidence inadmissible.

(a) The fact that a proposed expert witness is an employee of one of the parties generally means that they have an actual or apparent interest in the outcome of the proceedings. However, the existence of such an interest does not automatically render the evidence of the proposed expert inadmissible. The decision as to whether a proposed expert witness with such an interest should be permitted to give evidence is a matter of fact and degree, having regard to the nature and extent of the interest or connection. (See *Gallaher International Ltd v Tlais Enterprises Ltd (No. 2)* [2007] EWHC 464 (Comm) ("***Gallaher***") at [82] quoting *Armchair Passenger Transport Ltd v Helical Bar Plc & Anor* [2003] EWHC 367 (QB) ("***Armchair***") at [29].)

(b) The Tribunal is satisfied that Mr Cook has sufficient relevant expertise to be permitted to give evidence as an expert (*Gallaher* at [82] quoting *Armchair* at [29]).

(c) The Tribunal is satisfied that Mr Cook is aware of his primary duty to the Tribunal and is willing and able despite his connection with HMRC to carry

out that duty (*Gallaher* at [82] quoting *Armchair* at [29]). In particular, in his written reports, he confirms that he understands that duty.

(2) The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence. However, it may nevertheless affect the weight of that evidence (*Gallaher* at [82] quoting *Armchair* at [29]; also *Gallaher* at [88]; *Armchair* at [63] last sentence and [65] last sentence). This issue is addressed in paragraph 66(2) below.

(3) The question of whether a proposed expert witness with an actual or apparent interest in the outcome of the proceedings should be permitted to give evidence should be determined as soon as possible in the course of case management (*Gallaher* at [82] quoting *Armchair* at [29]). Any issue as to the admissibility of Mr Cook's evidence should have been raised and decided before the substantive hearing.

66. The Tribunal finds that extremely limited weight is to be given to Mr Cook's expert evidence.

(1) In the specific circumstances of these particular appeals, the evidential weight of Mr Cook's expert evidence is seriously diminished by HMRC's failure to explain why they contend that it is more reliable than the earlier valuations.

(a) In relation to Frenkel Topping, HMRC have not sought to explain why the Cook Report is more reliable than the Weaver Report.

(i) Mr Weaver is an independent expert who was called as an expert witness by HMRC in *Netley*. His expert evidence in that case was that the market value of Frenkel Topping shares on 28 July 2004 (the date of its admission to AIM) was 6.6 pence per share. The Tribunal in *Netley* did not accept that. The Tribunal found instead that their market value on that date was 17.5 pence per share, some two and a half times higher than the amount contended for by HMRC.

(ii) After the decision in *Netley* was given, HMRC instructed Mr Weaver to prepare the Weaver Report. In that report, Mr Weaver determined the market value of Frenkel Topping shares on eight subsequent dates, based on the premise that their value on 28 July 2004 was 17.5 pence per share, as had been found by the Tribunal in *Netley*. The closure notices issued to the Appellants in the present proceedings then adopted the valuations in the Weaver Report. In other words, HMRC initially accepted the finding of the Tribunal in *Netley*, and sought to apply its consequences in the cases of these Appellants.

(iii) However, after the present proceedings were commenced, HMRC instructed Mr Cook to prepare a further report, and HMRC now rely solely on Mr Cook's report. HMRC expressly instructed Mr Cook that in his valuation he was "not to use the *Netley* decision as a starting point". The valuation that Mr Cook then produced is generally closer to the valuation of 6.6 pence per share originally contended for by HMRC in *Netley* than it is to the valuation of 17.5 pence per share decided on by the Tribunal in that case (see paragraph 48 above).

(iv) Counsel for HMRC, when asked why HMRC considered it necessary to obtain a further expert valuation for these proceedings, said that

taxpayers and HMRC will both often find it advisable at the litigation phase to instruct a different expert who has been kept completely isolated from anything that has happened before. However, that does not explain why HMRC expressly instructed Mr Cook "not to use the *Netley* decision as a starting point".

(v) The reason given in HMRC's instructions to Mr Cook for not taking *Netley* as the starting point was that "you are considering valuations at different valuation dates from the Netley decision". However, that explanation does not appear compelling, given that HMRC had earlier instructed Mr Weaver to prepare the Weaver Report which *did* take *Netley* as the starting point when determining market values on the dates relevant to these appeals. There is no suggestion that Mr Weaver, an independent expert valuer, thought that this was an inappropriate methodology. HMRC itself issued the closure notices on the basis of the Weaver Report.

(vi) HMRC state that one of the reasons why it took so many years for the closure notices to be issued in the Appellants' cases is that HMRC were awaiting the outcome of *Netley*. At the time of the *Netley* proceedings, the enquiries in the present Appellants' cases had already been open for many years, and waiting for the decision in *Netley* before even issuing the closure notices entailed further significant delay. It appears odd, to say the least, that having considered this further delay to be justified, HMRC now take the position that this Tribunal must disregard entirely the finding in *Netley* that the shares had a value of 17.5 pence per share on 28 July 2004, and must disregard entirely the Weaver Report based on *Netley*.

(vii) HMRC suggest that the outcome in *Netley* was awaited only in relation to the point of principle of whether the price at which shares were traded is determinative of the value by reference to which relief should be calculated. However, the suggestion that *Netley* was seen as a test case solely in relation to this issue seems difficult to reconcile with the fact that HMRC initially sought to apply the consequences of the valuation in *Netley* to the circumstances of the present cases, by basing the closure notices on the Weaver Report.

(viii) There are reasons for thinking that the Weaver Report would be a more reliable valuation of the Frenkel Topping shares than the Cook Report. The valuation of the Frenkel Topping shares in *Netley* was a judicial decision. In it, the Tribunal took into account the expert evidence not only of Mr Weaver, but also of another independent expert called by the appellant (Mr Houghton). The Tribunal took into account the considerable body of evidence in that case, as well as the arguments of counsel. The Weaver Report is a report of an independent expert that determines the valuation of the shares on the specific dates relevant to these appeals based on the valuation in that judicial decision. The Tribunal in *Netley* received and considered evidence in relation to a wide range of factual matters. There is no suggestion that all of the matters are considered in the Cook Report. Counsel for HMRC said that there was more evidence in *Netley* because it was "sort of test case to test the principles".

(ix) It appears that there are many appeals in gift of share cases, and that it is not uncommon for multiple appeals to involve the same companies. It is obviously in the interests of justice that there be some consistency in the valuations reached in different appeals in relation to the same company. It is true that the appellants in different cases will be independent of each other, and will be free to determine their own positions and the evidence on which they rely, and that this might potentially result in different outcomes in different cases in relation to the market value of shares in the same company on the same date. However, it is difficult to see how it could be in the interests of justice for HMRC, when litigating the valuation of shares in the same company in different cases, to disregard completely an earlier decision of the Tribunal valuing shares in the same company at a relatively proximate time, or to rely on wholly different evidence or valuation methodologies in each of the different cases for no apparent reason.

(x) It is all the more difficult to see how it could be in the interests of justice for HMRC, having issued a closure notice based on an expert valuation that takes as its staring point a Tribunal decision in a previous case, to then ask the Tribunal in an appeal against the closure notice to disregard altogether that previous Tribunal decision and the expert valuation that relies on it.

(xi) It is noted that *Netley* was designated as a lead case. Had the closure notices in the present cases been issued prior to the proceedings in *Netley*, the present appeals might have been stayed behind or heard together with *Netley*, and the Tribunal in *Netley* might have also determined the market value of Frenkel Topping shares on the dates relevant to these appeals. Counsel for HMRC acknowledges that with hindsight that might have been a good idea. The fact that the closure notices in these cases were issued only after *Netley* was decided is not a reason why they should not take the decision in *Netley* into account, and indeed, the closure notices themselves did take *Netley* into account by adopting the valuations in the Weaver Report.

(xii) HMRC's contention that *Netley* is irrelevant because it deals with the market value of the shares on different dates is not compelling. *Netley* determined the market value as at 28 July 2004. The present appeals are concerned with market value on various dates between September 2004 and March 2005. Obviously share prices go up and down, and their market value may not have been the same on the dates material to the present appeal as they were on 28 July 2004. However, no explanation has been given as to why it would have been impossible to take *Netley* as the basis for determining market value on the dates relevant to these appeals (the Weaver Report did so). No explanation has been given, for instance, as to whether the methodology applied by Mr Cook, if used to determine the market value of the shares as at 28 July 2004, would lead to a figure of 17.5 pence per share, as found in *Netley*.

(xiii) Whether or not HMRC are now deliberately seeking to undo the effect of the *Netley* decision, that is the practical result of their current

position in these proceedings. HMRC ask the Tribunal to disregard the valuation made by judicial decision in *Netley*, and a report of an independent external expert applying that judicial decision to the dates material to these appeals, and to apply instead a subsequent valuation by an HMRC employee in SAV, which expressly declines to take *Netley* as its starting point, and which is closer to the valuation originally contended for by HMRC in *Netley* that was rejected by the Tribunal in that case.

(xiv) The Tribunal makes no findings as to whether the Weaver Report *is* more reliable than the Cook Report. The Weaver Report has not been the subject of cross-examination or submissions in these proceedings. HMRC expressly disavow reliance on it. The Appellants for their part also maintain that the valuation in the Weaver Report and in *Netley* is wrong. There is no suggestion that the Tribunal should adopt the valuations in the Weaver Report as its decision in these proceedings (see paragraph 61 above). However, the Tribunal can take into account that the Weaver Report exists, and that there are reasons for thinking that it would be a more reliable valuation than the Cook Report.

(xv) In all these circumstances, the absence of any explanation by HMRC as to why they consider the Cook Report to be more reliable than the Weaver Report seriously diminishes the evidential weight of the Cook Report.

(b) In relation to Vista, HMRC have not sought to explain why the Cook Report is more reliable than the Taylor Report.

(i) Mr Cook is a valuer employed by HMRC in SAV. The Taylor Report was also prepared by a valuer employed by HMRC in SAV. HMRC do not address the question why the valuation of one valuer in SAV would be more reliable than that of another.

(ii) The Tribunal notes the HMRC explanation that they considered it to be advisable at the litigation phase to instruct a different expert, and the HMRC position that as it now relies on Mr Cook's valuation only, the Taylor Report is irrelevant.

(iii) However, the fact remains that the Taylor Report exists, and that it reaches a different valuation to the Cook Report. The existence of two contradictory valuations by different HMRC valuers in SAV undermines the evidential weight of both of them, in the absence of any attempt to address the reasons why one of them should be considered the one that is reliable.

(iv) Particularly when viewed against the background of the matters in paragraph 66(1)(a) above, the absence of any explanation by HMRC as to why they consider the Cook Report to be more reliable than the Taylor Report seriously diminishes the evidential weight of the Cook Report.

(2) In the specific circumstances of these particular appeals, the evidential weight of Mr Cook's expert evidence is seriously diminished by the fact that he is an employee of HMRC working in SAV.

(a) The fact that an expert witness is an employee of one of the parties may affect the weight to be given to their expert evidence. This may be so, whether or not the circumstances of the case satisfy the legal test for apparent bias (*Gallaher* at [88], *Armchair* at [65]; *Field v Leeds City Council* [1999] EWCA Civ 3013 at [31] May LJ).

(b) Mr Cook works in HMRC's SAV. Various members of SAV have participated in HMRC's work on cases involving claims for tax relief for gifts of shares to charity.

(c) Mr Cook said in cross-examination that he did not make enquiries about previous valuations by SAV in relation to Frenkel Topping and Vista shares "because that would immediately compromise my independence", and that "it would be frankly idiotic for me to have done that". He said that "I have been at pains really to avoid chatting about this work, this specific work with anyone in my office".

(d) Nevertheless, the Cook Reports make clear that Mr Cook was aware of the contents of the decision in *Netley*. Mr Cook *was* thus aware that the position of HMRC in that case was that the market value of Frenkel Topping shares on 28 July 2004 was 6.6 pence per share. He thus also knew that the Tribunal in that case rejected the HMRC valuation, and found that the shares had on that date a market value that was some two and a half times as much. His instructions received from HMRC then expressly asked him when preparing his valuation "not to use the *Netley* decision as a starting point".

(e) The Tribunal takes into account that the Appellants themselves dispute the valuation in the Weaver Report, and in no way suggest that the valuation in *Netley* should be treated as the starting point in the present case. However, the issue is not whether the valuations in *Netley* or in the Weaver Report is correct. The issue is whether the above circumstances affect the evidential weight to be given to the evidence of Mr Cook.

(f) There is no suggestion that suitable experts in this area so scarce that HMRC are required to rely on their own employees to give expert evidence (compare *Gallaher* at [87]). It appears that HMRC have in these proceedings asked an employee to act as expert due to the high cost of independent experts, rather than their unavailability (see paragraph 66(3)(c) below). However, the Tribunal is not satisfied that cost implications leave HMRC with no reasonable alternative. There are presumably ways for HMRC to mitigate such costs (such as through the instruction of joint experts, or through hearing more cases together, or through a greater use of the lead case mechanism).

(g) Furthermore, the Tribunal is not satisfied from the explanation given that HMRC could not have relied on Mr Weaver as the expert in these proceedings. He was HMRC's expert witness in *Netley*. He prepared the Weaver Report as an independent external expert. Furthermore, even if there was a need for a further expert report, it is not apparent why HMRC felt the need to instruct the expert expressly "not to use the *Netley* decision as a starting point". HMRC could have left it to the expert to determine what would be the appropriate starting point for a valuation.

(h) The Tribunal finds that the above matters, considered cumulatively with the matters in paragraph 66(1) above, seriously diminish the evidential weight to be given to Mr Cook's expert evidence. Although it is unnecessary to determine whether the legal test for apparent bias is satisfied, the Tribunal finds that these cumulative circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the Cook Report on Frenkel Topping is biased in favour of the position taken by HMRC in *Netley* that the shares had on 24 July 2004 a significantly lower value than 17.5 pence per share.

(i) The Tribunal emphasises that it makes no finding of actual bias on the part Mr Cook, and does not question his professionalism in any way. The finding is one of apparent bias in the Cook Report (not on the part of Mr Cook personally) based on the totality of the circumstances.

(3) In assessing the weight of Mr Cook's expert evidence, the Tribunal also takes account of the extent of his expertise in relation to AIM-listed companies.

(a) Absent any evidence to the contrary, the Tribunal accepts that a valuer, in order to value an AIM listed company, does not necessarily need to be an expert in AIM, or have specific training in the valuation of AIM-listed companies. However, in view of the matters in paragraph 66(1) and (2) above, the extent of Mr Cook's expertise in relation to AIM-listed companies assumes some relevance.

(b) If Mr Cook had particular expertise in valuing AIM-listed companies, that might for instance have provided some explanation as to why HMRC chose to instruct him rather than to use an independent outside expert, or might have explained why HMRC considered his report to be more reliable than the Weaver Report or the Taylor Report.

(c) However, Mr Cook accepted in oral evidence that he cannot recall ever receiving any specific training in the valuation of AIM shares, or ever valuing the shares of an AIM-listed company, and said that those working in SAV are not generally required to value AIM shares. He also said that there is no HMRC manual giving guidance on valuing AIM shares, and that he is not aware of any such document produced by RICS. He said in oral evidence that "I am very conscious of not trying to sort of portray myself as some sort of AIM expert", and that "the reasons why I have been brought into this case is that it costs a huge amount of money to pay for an independent expert witness".

67. On balance, the Tribunal decides that the prices at which shares in Frenkel Topping and Vista traded on AIM during the relevant period have greater evidential weight than the valuations in the Cook Reports.

(1) The Tribunal bases its decision solely on the evidence before it in the present proceedings (see paragraph 61(2) above).

(2) The Tribunal does not accept the HMRC contention that although the Tribunal is not bound by findings of fact in other cases, it can be guided (but not bound) by the general approach taken in other cases of treating the volume of trading on AIM to be too small to enable the prices at which the trades took place to be a reliable indicator of market value, and of instead relying on expert valuation evidence.

(a) The Tribunal can accept as a matter of general principle that a lower volume of trading will result in lower reliability. However, the Tribunal should not simply make assumptions about what level of trading will result in what degree of reliability. This is in principle a matter for evidence or expert opinion. This question was addressed on the basis of evidence in *Close v Revenue and Customs* [2022] UKFTT 193 (TC) ("***Close***") at [91] and in *Dwan v Revenue and Customs* [2022] UKFTT 36 (TC) at [36]-[37].

(b) In some cases, it may be possible for a Tribunal to form its own conclusion on this issue based on the evidence as a whole, even though no evidence deals specifically with the issue as such. The finding in *Netley* at [247] that "trades on AIM in the period from 28 July 2004 to April 2005 … demonstrate[] a very thin market on which little reliance can be placed" was a finding based on the evidence in that case.

(c) However, the Tribunal cannot be expected to form a view on the issue in a given case in the absence of any (expert) evidence to which the Tribunal attaches significant weight that provides a basis for that view.

(d) Given its conclusions as to the weight to be attached to Mr Cook's evidence, the Tribunal is not prepared to find on the basis of that evidence that the prices at which the shares traded are of no value in determining market value. The Tribunal accepts that these prices are of less value than they would be if the volume of trading had been higher. The Tribunal cannot go further than that on the evidence available in these particular proceedings.

(e) Both parties agree that the Tribunal cannot adopt or rely on findings of fact in other cases based on evidence that is not before the Tribunal in these proceedings. The Tribunal therefore cannot rely on findings of fact in other cases that volumes of trading in shares was too thin to be a reliable indicator of market value.

(3) Apart from the HMRC contention about the small volume of trading, there appears to be no particular reason why less weight should be given to the prices at which Frenkel Topping and Vista shares traded on AIM than in the case of the generality of AIM-listed companies (see paragraph 64 above).

(a) HMRC accept that the share prices have not been affected by tax avoidance motives or market manipulation (see paragraph 40 above).

(b) There is no suggestion that the businesses acquired by Frenkel Topping and Vista were anything other than legitimate and established businesses.

(c) Although the HMRC skeleton argument sets out in detail the history of the flotation of these two companies (involving the establishment of cash shells to which investors subscribed, and which subsequently acquired existing businesses and listed on AIM), it ultimately forms no part of HMRC's case in these proceedings that there was anything unusual or improper about any aspect of the flotations that is material to the question that the Tribunal must decide.

(d) Although there were fluctuations in the prices of Frenkel Topping and Vista shares throughout the relevant period (see paragraph 42 above), there has been no suggestion that these were so great or so erratic as to make it implausible that these prices could be a reflection of actual market value, or

to make it impracticable to extrapolate from them the market value on dates on which there were no trades in these shares (see paragraph 43 above).

(4) In determining the evidential weight to be attached to the prices at which shares traded on AIM, the Tribunal takes into account in particular the matters in paragraph 64(2) and (3) above, and the fact that the only evidence relied on in these particular proceedings to the effect that these prices are an unreliable indicator of market value is the expert evidence of Mr Cook, to which the Tribunal does not attach significant evidential weight. The Tribunal also takes into account that there is no other evidence suggesting that these prices *are* of any particular reliability. In the circumstances, while accepting that evidential weight can be given to these prices as evidence of market value, the Tribunal accepts that they may well be a very imperfect measure thereof.

(5) For the reasons above, the Tribunal finds that the Cook Reports do not provide valuations to which significant evidential weight can be attached in the particular circumstances of these proceedings.

(6) At the hearing, HMRC submitted that these proceedings would be "a complete outlier" if the Tribunal were to accept the prices at which shares traded as better evidence than an expert valuation report. *Close* and *Patel v Revenue & Customs* [2019] UKFTT 620 (TC) were cited as examples of cases where no expert evidence was adduced by the appellants and the Tribunal accepted the expert valuation evidence of HMRC. However, each case will be decided on the basis of the evidence and arguments in that particular case. In both of the cases cited by HMRC, the expert was an independent external valuer, and the considerations in paragraph 66 above did not arise.

(7) The Tribunal is faced with the binary choice described in paragraphs 59-62 above. It must choose between the position of one party or the other, even if the positions of both parties are unsatisfactory. Given the circumstances of this case, it is unfortunate that there are not other options available to the Tribunal. However, as counsel for HMRC put it at the hearing, "the parties make their choices in terms of the evidence they put forward and as with all cases … [the Tribunal] have to do the best with the evidence that has been put forward in this case".

(8) Having regard to all of the matters above, the Tribunal finds that in all of the particular circumstances of the present case, the prices at which shares in Frenkel Topping and Vista traded on AIM carry more weight than the expert evidence of Mr Cook.

(9) This decision is reached on the basis of the evidence and arguments relied on by the parties in these particular proceedings, and on the basis of the clear binary choice with which the Tribunal was faced, in the unusual circumstance that both sides bore the burden of proving their respective cases.

68. The Tribunal finds that the share prices have been correctly calculated in the Appellants' tax returns on that basis.

(1) Shares in Frenkel Topping and Vista were not traded on any of the days on which the gifts were made, and the Appellants have extrapolated the market values from the prices at which the shares traded on previous and subsequent days (see paragraphs 42-43 above).

(2) HMRC have not contended that the correct application of the Appellants' methodology leads to different figures to those used by the Appellants, and have not provided alternative figures.

(3) HMRC have argued that it is impermissible to look at the prices at which shares traded on any date after the date of gift, since a hypothetical prudent purchaser could not know on that date what the price would be on a future date. The Tribunal does not accept this reasoning. The methodology described in (1) above does not make the impossible assumption that a potential purchaser would take into account the price at which the shares would trade on some future day. Rather, it assumes that the price at which shares traded on the next occasion after the date of the gift will reveal whether the shares were at the time of the gift on an upward or downward trend since the last date prior to the gift on which shares were traded. The application of this methodology has the effect that the market value on the date of the gift will be slightly higher or lower than the price at which they last traded prior to the date of the gift, to take account of that trend. This may be a very imperfect methodology, but for the reasons above, the Tribunal has accepted it in the particular circumstances of this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 05th October 2023