[2019] UKFTT 11 (TC)

TC06920

Appeal number: TC/2018/01242

PROCEDURE - appeal in relation to a claim for relief under section 401 ITEPA - Respondents application to strike-out the appeal on the basis that the First-tier Tribunal does not have jurisdiction to hear the appeal - application upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER HEMINGWAY **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Bristol on 13 December 2018

The Appellant in person

Mr Christopher Vallis, of the Solicitor's Office and Legal Services Department of HM Revenue & Customs, for the Respondents

Introduction and background

1. In the tax year 2015/2016 the appellant was paid a sum of £35,228.15 as compensation for the loss of rights under a stock option scheme provided by his employer. It is the appellant's case that this compensation benefits from the £30,000 exemption in section 401 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**"). And so tax of £16,240, allegedly due to HMRC, is not so due.

2. The appellant's claim was made in an unsolicited return (which he subsequently amended) (referred in this Decision as a "**voluntary**" return).

3. The respondent subsequently enquired into the return and issued a closure notice dated 22 January 2018 denying the appellant the benefit of section 401 ITEPA.

4. The appellant appealed against the decision in that closure notice.

5. HMRC have now applied to strike out that appeal on the basis that since the appellant submitted a voluntary return, the provisions of section 8 of the Taxes Management Act 1970 ("TMA 1970") are not engaged. HMRC have declined to exercise their discretion to treat the voluntary return as if it was made and delivered pursuant to a section 8 TMA 1970 notice (a "**section 8 notice to file**"). They say that this means that their enquiry is invalid, as is the closure notice and so, since this Tribunal only has jurisdiction to hear an appeal under section 31 TMA, and that in turn can only be made in respect of a valid closure notice, this Tribunal has no jurisdiction.

6. And since this Tribunal has no jurisdiction, HMRC say, I must strike out the appellant's appeal under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Tribunal Rules**").

7. I have not considered the merits of the appellant's substantive appeal, and nothing in this Decision should be taken as expressing any view on the merits or otherwise of that substantive appeal.

Relevant facts and chronology

8. I was provided with a bundle of documents. The facts are straightforward and largely undisputed. I find them to be as follows:

> (1) The appellant first registered for self-assessment on 7 May 2012 for the tax year ending 5 April 2012 and was subsequently taken out of self-assessment on 13 May 2013.
>
> (2) For the year 2015/2016 the appellant's employer made the compensation payment referred to at [1] which that employer treated as income. This resulted in the appellant's PAYE income exceeding £100,000 thus bringing him back into self-assessment.

(3) The appellant submitted a voluntary return in April 2016 for the tax year 2015/2016, and subsequently amended that return on 20 August 2016 to reflect his view that the compensation payment attracted relief under section 401 ITEPA.

(4) On 16 March 2017 HMRC opened an enquiry into that return pursuant to section 9A TMA 1970.

(5) On 22 January 2018 HMRC closed that enquiry pursuant to section 28A TMA 1970. The stated conclusion in that letter (the closure notice) was that the appellant was not entitled to relief under section 401 ITEPA.

(6) The appellant appealed against that conclusion to HMRC on 27 January 2018 and subsequently to this Tribunal on 2 February 2018.

(7) On 13 April 2018 the appellant wrote to Mrs G Carwardine of the Solicitors Office and Legal Services Department of HMRC indicating, amongst other things, that:

> "My understanding is that the closure notice being appealed purports to be issued under section 28A Taxes Management Act 1970 (TMA) and that would be dependent on a valid enquiry opened under s. 9A TMA to enquire into a return under s.8 TMA that in turn requires that I am given notice by an officer of the Board to make a return.
>
> I am not aware of any notice by an officer of the Board to make a return for the tax year ended 5 April 2016 and instead believe my return was "voluntary" meaning that an enquiry under s.9A TMA and the subsequent closure notice is not valid.
>
> I apologise for raising this now, particularly as HMRC's Statement of Case may be in the late stages of preparation but I have only recently become aware of this point made by the FtT."

There then follows a link to the First-tier Tribunal Decision of *Patel* (*S Patel and U Patel v HMRC* [2018] UKFTT 0185).

(8) In her letter of 27 June 2018 written to the appellant, Gill Carwardine indicated that her understanding from Mr Hemingway's letter of 13 April was that he did not want it to be treated as a return under section 8 TMA 1970. She explained HMRC's policy about accepting returns voluntarily on the same basis as returns received in response to a notice issued under section 8 TMA 1970 and indicated that this was the case provided that the intention of the taxpayer was that it should be treated as such.

(9) She then went on to say:

> "As you have indicated that you do not want your return to be treated as a voluntary return, this will mean that it was not a section 8 return and the

subsequent enquiry into that return open under Section 9 Taxes Management Act 1970 was not valid and the conclusion at the end of that enquiry is not a valid decision that can be appealed to the Tribunal."

If you choose for this to be the case. it also means that you won't have established your liability for the tax year in question. HMRC will subsequently make an assessment for the amount of tax believed to be due. You will have the right to appeal this decision so you will be able to get the substantive issue before the Tribunal via this means.

Alternatively, if you would like your return to be treated as a voluntary return, the same statutory consequences will follow as if it were a return submitted in response to a Section 8 notice, including powers to enquire under Section 9A Taxes Management Act 1970. This option would mean that the conclusion is valid and is a decision that can be appealed to the Tribunal. If you choose this option, there is also a strong likelihood that your appeal proceedings will be halted pending the final determination of any appeals (including applications for permission to appeal) to the Upper Tribunal or other Court of Record against the First-tier Tribunals decision in Patel & Patel."

(10) The appellant responded to that letter by way of his letter dated 30 June 2018. He pointed out that HMRC appeared to be in default of their obligation to supply a statement of case, and then went on to say that it was his view that the enquiry had been closed, his tax return amended and an appealable decision thus made.

"The fact that HMRC may not have opened an enquiry validly does not entitle HMRC to deny that a return was made, particularly where a subsequent enquiry was made into the return.

I cannot make any sensible representations to HMRC about the letter to me dated 27 June 2018, so there is nothing further that HMRC will need to consider from me and therefore no reason for a stay."

(11) By way of a letter dated 31 July 2018 to HMCTS, Gill Carwardine made this application for the appellant's substantive appeal to be struck out. The basis of that application is, as mentioned at [5] above that:

(a) the appellants tax return for 2015/2016 was not submitted pursuant to a notice under section 8 TMA 1970;

(b) the appellant had suggested in his letter of 13 April 2018 that he did not want the return treated as a voluntary return to which HMRC's discretionary treatment (i.e. to treat it as if it had been served pursuant to a section 8 notice to file) should apply; and

(c) accordingly, the enquiry opened into the return was not a valid enquiry; any closure notice closing that enquiry was not a valid closure notice; there was therefore no appealable decision within the ambit of

section 31 TMA 1970 and so the First-tier Tribunal has no jurisdiction to hear the appeal and must strike it out.

Relevant legislation

9. Section 8 TMA 1970 provides:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board:

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice…."

10. Section 9 TMA 1970 provides:

"(1) Subject to sub-sections (1A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say -

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance, a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source....."

11. Section 9A TMA 1970 provides:

"(1) An officer of the Board may enquire into a return under section 8…"

12. Section 28A TMA 1970 provides:

"(1) This section applies in relation to an enquiry under section 9A(1) or 12ZM of this Act."

13. Section 31 TMA 1970 provides:

" (1) An appeal may be brought against:

(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or

(d) any assessment to tax which is not a self-assessment."

14. Rule 8(2) of the Tribunal Rules provides:

"(1) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal:

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them."

Respondents' position

15. The Respondent's position is that the tribunal does not have jurisdiction in relation to these proceedings and they must be struck out. The rationale for this application is as follows:

(1) Under section 31 TMA 1970, only a conclusion stated or an amendment made by a closure notice which was made under section 28A or 28B of the TMA 1970 is appealable.

(2) A closure notice given under section 28A TMA 1970 is only valid if it is given in relation to an enquiry under section 9A of the TMA 1970.

(3) Under section 9A TMA 1970, an enquiry may only be made into a return under section 8 of the TMA 1970.

(4) The appellant accepts that his tax return submitted for the tax year 2015/2016 was not submitted pursuant to a notice requiring him to submit such a return under section 8 TMA 1970. As such it was a voluntary return.

(5) A voluntary return is only a return under section 8 TMA 1970 if the respondents choose to treat it as such as return.

(6) Given the objection raised by the appellant in his letter of 13 April 2018, the respondents have decided that, in accordance with their policy regarding treating voluntary returns as being made pursuant to a notice given under section 8 TMA 1970, to treat the return as not being made pursuant to such a notice. The consequence therefore is that the return was not made under section 8 TMA 1970, the enquiry could therefore not be opened because the return was not made under section 8 TMA 1970 and was thus invalid. The closure notice was an invalid closure notice because it purported to close an invalid enquiry. And thus, there is nothing in section 31 TMA 1970which gives the appellant an appeal right against an invalid closure notice.

Appellant's position

16. The appellant's arguments, with which I deal more fully later in this decision, can be distilled into the following:

(1) The giving of a section 8 notice to file is not a pre-requisite to filing a valid tax return. *Patel* was wrongly decided and is any event not binding and can be distinguished. A voluntary return is a return made under section 8 TMA 1970.

(2) HMRC had accepted his return without questioning its validity. They also accepted the amendments to the return.

(3) HMRC have not acted in accordance with their policy towards treating voluntary returns as being made pursuant to a notice to file under section 8 TMA 1970. That policy has been described differently in different circumstances. HMRC should have exercised their discretion in the appellant's favour and deemed the return to have been given pursuant to a valid notice to file.

(4) HMRC had initially treated his voluntary return as having been given under a notice to file. It was only when they were in default of directions to provide a statement of case that they took the point. This has resulted in a procedural injustice and is not fair. The tribunal might have an estoppel power to prevent HMRC using their powers in this way. The tribunal certainly has wide powers regarding evidence. It was wrong for HMRC to invoke their policy only when the appeal was about to be heard.

(5) The appeal right under section 31(1)(b) TMA 1970 is against any "conclusion" in a closure notice. This does not have to be a valid conclusion nor indeed one stated in a valid closure notice.

(6) The closure notice did not just close the enquiry. It operated as a free standing assessment which was not a self-assessment so the appellant has an appeal right against the conclusion in the closure notice under section 31(1)(d) TMA 1970.

(7) A strike out wastes everyone's time. It is a draconian sanction and should not be deployed in this case.

Discussion

17. I start first with the consideration of the primary point raised by the appellant which is whether a voluntary return is, as a matter of law, given "under" section 8 TMA 1970 for the purposes of section 9A TMA 1970.

18. I am firmly of the view that it is not. I gave a decision to this effect in the case of *Wood v HMRC* [2018] UKFTT 74 *("Wood")*. This was cited with approval in *Patel*. The relevant extract from *Patel* is set out below:

"Post-hearing submissions

72. After the hearing of this appeal on 1 and 2 February 2018, HMRC informed me by a letter dated 22 February 2018 of a decision released by the FTT on 13 February 2018 in *Wood v HMRC* [2018] UKFTT 74 (TC) (Judge Popplewell and Mr Silsby) *("Wood")*. HMRC's submissions were contained in their letter of 22 February 2018 and those of the appellants in written submissions dated 6 March 2018.

73. In Wood the individual taxpayer appealed against penalties imposed for the late submission of his tax return. The FTT concluded that no s.8(1) TMA notice had been served on the taxpayer by HMRC ([56]). Paragraph 1(1) of Schedule 55 Finance Act 2009 stated that:

> "a penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date".

74. The Table referred to was to be found in paragraph 1(5). It specified an income tax return as being a return "under Section 8(1)(a) of TMA 1970".

75. At [29]-[40] the FTT said:

> "29. Firstly, is Schedule 55 engaged if, in respect of a return under Section 8(1)(a) TMA no notice to deliver such a return is given to the appellant? In our view the answer is that Schedule 55 is not so engaged.
>
> 30 . We say this for a number of reasons.
>
> 31. The first is that on the words of the statute, there is a clear link between a notice to be given to a taxpayer by HMRC, and the obligation on the taxpayer (in response thereto) to deliver a tax return to HMRC. The use of the word "may" in Section 8(1) has given us pause for thought. However, we do not believe that this means that HMRC have a discretion as to whether to serve such a notice on a taxpayer. Nor that there is also a residual or parallel regime which obliges a taxpayer to submit a return under Section 8(1)(a) even if HMRC have not given him a notice. ("May") simply means that if a taxpayer is given such a notice, he must file a return.
>
> 32. If Parliament had intended that the obligation to deliver a Section 8(1)(a) return was an absolute obligation, irrespective of whether HMRC had required a taxpayer to do so, there seems to be no reason why there should be any reference to a notice requirement at all.
>
> 33. It is of course the case that a taxpayer has an obligation to notify chargeability under Section 7 TMA. But any such notification is notification under Section 7 and is (obviously) not a return under Section 8(1)(a). And failure to notify under Section 7, whilst it might bring with it

penalties of some sort, does not bring with it penalties under Schedule 55. There is no reference to Section 7 TMA in the table in paragraph 1(5)(b) of Schedule 55.

34. It is clear from Sections 8(3)-8(4B) that the notice under Section 8(1) is an important document.

35. It may require different information, accounts and statements for different periods or in relation to different descriptions of sources of income (Section 8(3)); it may require different information, accounts and statements in relation to different descriptions of person (Section 8(4)); and it requires particulars of any general earnings if a notice is given to a non-resident (Sections 8(4A) and 8(4B)).

36. In other words, the delivery of a return containing information under Section 8(1)(a) must contain the information which is requested by HMRC pursuant to a notice previously given to that taxpayer. And that notice identifies the information which that particular taxpayer may be required to provide in the return under Section 8(1)(a). In other words, they are two parts of the same process. The process is instigated by HMRC giving a notice to a taxpayer to make a return, such notice including the information which that return must include; and the taxpayer responding by making and delivering that return to HMRC.

37. Without the notice, the taxpayer is unable to make and deliver a return containing the information prescribed by HMRC because he has not received a notice prescribing that information.

38. What then is the position when a taxpayer is given no notice to file but still files a return. In those circumstances, can Schedule 55 apply? In our view no. Slightly oddly, if a taxpayer submits a return, notice for which he was never given, then the statutory pre-requisite for a return under Section 8(1)(a) is unfulfilled and thus Schedule 55 has nothing to bite on.

39. This may be a reasonably commonplace situation. Many individuals and their agents file electronic returns or download paper returns which are then filed through the post. And many will do so, spontaneously, knowing that they or their client has a source of income which needs to be returned. Having filed that return, we have no doubt that, if it is late, HMRC will impugn them under Schedule 55 for penalties.

40. But to get home on this, it is our view that HMRC must also prove that notice had been given to the taxpayer to deliver that return. Without such notice, then notwithstanding that a return has actually been filed, Schedule 55 cannot bite because any such return is not made pursuant to Section 8(1)(a). It has not been made in response to the requisite notice."

76. At [43]-[47] the FTT also discussed whether the use of a pro forma tax return downloaded from HMRC's website should be construed as the taxpayer

having been given a s.8(1) TMA notice to file a tax return. The FTT concluded that it should not – a conclusion which was not questioned by HMRC in their letter to the Tribunal of 22 February 2018.

77. HMRC submitted that *Wood* was of limited assistance in the present appeal. First, the question of the correct construction of s.8 TMA was not argued before the FTT in *Wood*. Secondly, the FTT did not consider the operation of HMRC's collection and management powers under s.1 TMA, s.5 CRCA and HMRC's ancillary powers under s.9 CRCA.

78. Mr Ramsden, in his written submissions, noted that the FTT in *Wood* did not cite *Bloomsbury* and *Revell* but reached a conclusion which was consistent with those earlier decisions. This supported, in Mr Ramsden's view, the appellants' submission that the answer was plain and obvious on the face of the legislation itself.

79. Furthermore, Mr Ramsden submitted that the FTT in Wood was correct to conclude that the downloading of a tax return form from HMRC's website was not a s.8(1) TMA notice to file a tax return, for the following reasons:

80. A downloaded *pro forma* tax return:

(a) was not a notice issued by HMRC to the taxpayer in question requiring that taxpayer to make a return;

(b) was not addressed to the taxpayer in question or personalised in any way, so that it could not identify the information which the "particular taxpayer" must provide (see [36] in *Wood*);

(c) could not impose any statutory requirement on the taxpayer to do anything pursuant to s.8(1) TMA: Mr Ramsden gave the example of a taxpayer who downloaded a *pro forma* tax return and then decided not to submit it for some reason

(d) moreover, the issue by HMRC of a s.8(1) notice had timing consequences: it could determine the filing date for the return under s.8(1F) and s.8(1G) TMA — including the resulting consequences for the time limit within which HMRC were permitted to open an enquiry under s.9A TMA 1970 since that time limit was based on the filing date for the return under s.8 (see s.9A(2) and (6) TMA 1970) —and a *pro forma* tax return could not have any of these consequences, since there was no "filing date" for it.

Discussion of construction of s.8 TMA

81. Notwithstanding the skilful submissions of Ms Nathan, I have concluded that the voluntary returns made by the appellants were not returns made under s.8(1) TMA, with the result that an enquiry could not be opened under s.9A TMA.

82. It seems to me that the statutory language is perfectly clear and no application of the doctrine of purposive construction can lead to a different result.

83. An enquiry into a taxpayer's self-assessment tax return is permitted by S.9A TMA. This allows an officer of the Board to "enquire into a return under section 8".

84. This therefore raises the question of what exactly is "a return under section 8." The answer is provided by s.8 itself in the following terms:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, *he may be required by a notice given to him by an officer of the Board—*
>
> > *(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice*, and
> >
> > (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."(my emphasis)

85. It is plain that "a return under section 8" is a return which the taxpayer has been "required by a notice given to him by an officer of the Board to make and deliver to the officer". There is no arguable alternative interpretation.

86. Furthermore, the use of the word "may" ("[the taxpayer] *may* be required by a notice given to him") in s.8(1) provides no assistance to HMRC. The use of the modal auxiliary verb "may" plainly confers on HMRC a discretion whether to issue a notice under s.8(1).2 They are not bound to issue a notice in every case. HMRC may decide not to issue a notice to a taxpayer because, for example, that individual's income tax liabilities could be fully collected under the PAYE system. But the fact that HMRC has not, for whatever reason, issued a notice to a taxpayer does not mean that a voluntary return submitted by the taxpayer becomes a return under s.8.

87. I find myself in full agreement with the view expressed by Judge Popplewell in *Wood* at [31]to the effect that there is a clear link between the delivery of a notice under s.8(1) and the obligation to deliver a return ("he may be required by a notice…(a) to make and deliver… a return"). The obligation arises because of the notice and without the notice there is no obligation. It is when a taxpayer delivers a return in discharge of this obligation that the taxpayer has delivered a "return under s.8" TMA. Moreover, this conclusion is consistent with the reasoning of this Tribunal in the *Bloomsbury* (on the analogous company tax provisions) and *Revell* cases cited above.

88. That conclusion cannot be changed by any application of the doctrine of purposive construction. The words used by Parliament in this statutory provision are entirely clear. Whilst a court or tribunal is not confined to a literal interpretation of the statutory words, but must consider the context and scheme of the Act as a whole, purposive construction cannot be used to give effect to a perceived different or wider policy objective in cases where the words used by Parliament do not bear that meaning. As the Upper Tribunal (Asplin J and Judge Berner) said in *Revenue and Customs Commissioners v Trigg* [2016] STC 1310, at [35]:

> "There is also, in our judgment, a distinction between the policy behind, or the reason for, the inclusion of a particular provision in the legislative scheme and the purpose of that provision. Parliament might wish to achieve a particular result as a general matter, and legislate for that reason or in pursuit of that policy. But if the statutory language adopted by Parliament displays a narrower, or more focused, purpose than the more general underlying policy or reason, it is no part of an exercise in purposive construction to give effect to a perceived wider outcome than can properly be borne by the statutory language."

This passage was cited with approval by the Upper Tribunal in *Flix Innovations Limited v HMRC* [2016] STC 2206 at [42] and in *HMRC v Michael and Elizabeth McQuillan* [2017] UKUT 344 (TCC).

89. In this case, the meaning of the words used by Parliament is so clear that it cannot be changed by reliance purposive interpretation – the legislature's purpose is made manifest by its language: a return under s.8 is only made where a return is filed in pursuance of an obligation to do so created by a notice given to the taxpayer under s.8(1) TMA."

19. *Patel* is not binding on me, but I agree with the conclusion reached by Judge Brannan in it.

20. I accept that the circumstances in *Patel* and *Wood* are different from those of the appellant. But that does not alter the fundamental principle which *Patel* illustrates; namely that a voluntary return is not a return which has been made "under" section 8 TMA 1970. The differences between the appellant's position and those in *Patel* do not affect that conclusion. The legal position is, in my view, that unless a return is given in response to a section 8 notice to file it will not be given under section 8 TMA 1970 for the purposes of section 9A TMA 1970 even if HMRC's policy is to treat it as having been so made if certain criteria are fulfilled.

21. Nor do I think, for the reasons given in *Wood* (at [31-32] of that decision) and in *Patel* (at [85-87]) that the word "may" in section 8(1) TMA 1970 means, as the appellant has argued here, that a valid return can be given under section 8 even though it has not been submitted pursuant to a section 8 notice to file. The appellant submits that the draftsman would have used the word "shall" (as he has, for example, in section 28C TMA 1970) if the draftsman had intended that the only circumstances in

which a valid return could be given would have been in response to a section 8 notice to file. I disagree, as I have said, for the reasons set out above.

22. The appellant's second substantive point concerns the exercise of HMRC's discretion to treat his voluntary return as one made pursuant to a section 8 notice to file. The appellant says that HMRC should have exercised their discretion in his favour. They have failed to follow their own procedure. They decided to take the point late in the day having already accepted the return (and indeed his subsequent amendment to his self-assessment) as a valid one. They did so because they had failed to comply with directions to submit a statement of case. This failure means that HMRC should either treat the return as one submitted pursuant to a valid section 8 notice to file or that I should direct them to do so. I have an estoppel power to prevent HMRC from now denying the validity of the return and I should exercise it to prevent procedural unfairness or an injustice being meted out to the appellant.

23. The powers of this tribunal in this area have been conveniently set out in the Upper Tribunal decision of *Birkett v HMRC* [2017] UKUT 89 which is binding upon me. The relevant extract is set out below:

> *"Relevant principles*
>
> 30. The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: Hok at [36], Noor at [25], BT Trustees at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the

> UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

31. Some cases are relatively straightforward. *Hok* is a good example. The appeal to the FTT was against fixed penalties of £100 per month. The FTT's jurisdiction was given by s. 100B TMA (set out above at paragraph [27]). That only entitled it to determine if the penalties had been incurred and if the amounts were correct. The issue which was sought to be raised (was it unfair of HMRC to levy the penalties because of delay?) did not go to either issue. Hence the FTT had no jurisdiction to consider it.

32. In other cases the Court may have to construe the statutory provision conferring jurisdiction on the FTT to decide the scope of it. An example is *BT Trustees*. Here the appeals were against closure notices. The FTT'sjurisdiction was given by para 9(7) of sch 1A TMA (set out above at paragraph [29]). That entitled the FTT to determine if the claims for tax credits "should have been allowed". The Court of Appeal held that that was limited to the question whether the claims should have been allowed as a matter of tax law, and as not extending to the question whether the taxpayers should have been allowed the benefit of the extra statutory concession. That must on analysis have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 0135 (TC).

33. However we do not read the Court of Appeal in *BT Trustees* as having laid down any general rule as to the FTT's jurisdiction applicable in all cases. It is noticeable that in relation to Sales J's judgment in *Oxfam* they said (at [141]):

> "We have heard no argument about s. 83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section."

That confirms that they viewed the question whether Sales J was correct on s.83(1) VATA as a question of interpretation of that section. His view that

> s.83(1) was wide enough to include the question of public law argued before him (had HMRC acted in breach of a legitimate expectation?) is to be contrasted with the view of the UT in *Noor* that the jurisdiction of the FTT under s. 83(1) was limited to the amount of input tax as a matter of the VAT legislation. Like the Court of Appeal in *BT Trustees* we do not propose to express a view on the jurisdiction of the FTT under s. 83(1), which does not arise in the present appeal; but it can be seen that what is in issue is the correct interpretation of that provision."

24. The application of these principles to the present case is, in my view, straightforward. The issue in this case boils down to whether a voluntary return is given, (for the purposes of section 9A TMA), as a matter of law, "under" section 8 TMA 1970. This is a question of law. I have decided that to be the case (see [20] above). HMRC may have a policy that if certain criteria are met they will treat a voluntary return as having been made pursuant to a section 8 notice to file (and so made "under" section 8 TMA 1970). The legal framework allowing them to do this may be under section 1 TMA 1970 or under the Commissioners for Revenue and Customs Act 2005. But in any case it involves the application of a non-statutory policy towards a particular set of circumstances. It is not enshrined in primary legislation. It involves the exercise of a discretion by HMRC who indicate that they will so exercise that discretion in accordance with a certain policy.

25. In deciding the issues in this case, it is my firm view that I have no supervisory jurisdiction over the way in which HMRC have exercised that discretion towards the appellant. It is matter for judicial review and I have no judicial review jurisdiction. It seems to me that even if HMRC's position regarding acceptance of voluntary returns is ultimately enshrined in statute, it is in some way concessionary since, in my view, it is not enshrined in section 8 TMA 1970 itself and it is clear that this tribunal's ability to review such concessionary treatment by HMRC is outside this tribunal's jurisdiction.

26. I agree, therefore, with Mr Vallis that I have no jurisdiction over this matter and cannot impugn HMRC's exercise (whether valid or invalid) of their discretion that the voluntary return submitted by the appellant has not been deemed to be given under section 8 TMA 1970. This is the case irrespective of whether there is an (as the appellant argues) inconsistency in HMRC's policy as evidenced by this application and in *Patel*. Nor do I have jurisdiction to consider any perceived unfairness or injustice of which the appellant complains. Again that is outside my remit.

27. And so I cannot treat the voluntary return as one which was given under section 8 TMA 1970, nor can I direct that HMRC's failure (if any) to follow their policy means that the return should be deemed to have been given under section 8 TMA 1970.

28. The appellant also submits that the voluntary return was in fact given pursuant to a notice under section 8 TMA 1970 since the first page of any return includes a notice to make a return. For the reasons set out in *Wood* (see [38-40] of *Wood* above), I do not consider that a downloaded tax form means that the notice has been "given"

to him by an officer of the Board.

29. For the reasons given in *Wood* at paragraph [43-47] referred to in the extract from *Patel* above and for the reasons given by Mr Ramsden set out in *Patel* at [79-80] it is my view that the section 8 notice to file must actually be given to a taxpayer by HMRC and that without that initial approach by HMRC to the taxpayer, any return is a voluntary one.

30. The appellant submits that his right of appeal under section 31(1)(b) TMA 1970 does not require the conclusion to be a valid one nor indeed for it to be a conclusion stated by a valid closure notice.I disagree. The appeal is against a conclusion stated in a closure notice "under section 28A.....".

31. A closure notice can only be made under section 28A if it is closing an enquiry which has been opened "under section 9A(1)….".

32. So if there is no valid enquiry there can be no valid closure notice and thus no appeal right under section 31(1)(b) TMA 1970. That is the case whether the conclusion stated in the closure notice is valid or invalid. I reject the appellant's submission on this point.

33. Finally the appellant submits that even if he has no appeal rights under section 31(1)(b) TMA 1970, he does have a right of appeal under section 31(1)(d) TMA 1970. This is because the closure notice is an assessment which is not a self-assessment. This is an ingenious argument. However, unfortunately for the appellant, I do not accept it.

34. I do not think that any document given by HMRC to a taxpayer which suggests that the taxpayer might have a tax liability, constitutes an assessment. In *Raftopoulou (HMRC v Dr Vasiliki Raftopoulou* [2018] EWCA Civ 818), a case involving closure notices, the following was said by the Court of Appeal.

> "20. It was common ground before the UT, and before us, that there was no prescribed form for an enquiry notice or a closure notice. To be effective, an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be): see the judgment of this court in *HMRC v Bristol and West PLC* [2016] EWCA Civ 397; [2017] 1 WLR 2792, at [26]……..
>
> 33. In my judgment, the correct starting point for determining whether an enquiry into a claim has been opened is a consideration of the terms, context and purpose of the provisions of schedule 1A.
>
> 34. Those provisions suggest a procedure with some degree of formality and suggest also a procedure with a beginning, a middle and an end. Paragraph 5 empowers, but does not oblige, HMRC to "enquire into" a claim for repayment. This may be contrasted with replying to a claim received from a taxpayer,

having first read it and considered its contents. An officer may only enquire into the claim if, within the specified time, "he gives notice in writing of his intention to do so". Although the contents of the notice are not prescribed, it must be clear from the notice that the officer intends to enquire into the claim. As earlier noted, the opening of an enquiry has significant statutory consequences, including the right of HMRC to call for documents for the purpose of its enquiry."

35. It is my view that there is also a similar procedure and degree of formality over the making of an assessment. An assessment brings with it certain rights and obligations. There is a formal process instigated by HMRC and brings with it important safeguards for a taxpayer (the most important of which is a right of appeal to an independent tribunal). So HMRC must turn its collective mind (or someone at HMRC must do so - in many cases it must be a flesh and blood officer) to the issues which affect a particular taxpayer. And they or it does so in the conscious knowledge that by initiating that process there will be legal consequences for both HMRC and the taxpayer.

36. Secondly, the process of making and notifying an assessment is clearly a formal one as the following extract from *Khan Properties Limited v HMRC* [2017] UKFTT 0830 illustrates:

"29. There is case law on what constitutes the making of an assessment.

30. In *Burford v Durkin* (HM Inspector of Taxes) 63 TC 645 *("Burford")* Slade LJ in the Court of Appeal said:

> "In short, I accept Mr. Mathew's submission that the assessment in the present case was 'made' for the purpose of Regulation 12(1) when Mr. MacEnhill finally signed the certificate. I respectfully disagree with the Judge's view that 'once Mr. Martin had decided to make an assessment and had calculated the amounts of the assessment, then the assessments were "made"' for the purpose of Regulation 12(1).
>
> In my view, however, it does not follow that merely because the assessment was 'made' when Mr. MacEnhill finally signed the certificate, it was he who 'made' the assessment for the purpose of applying Regulation 12(1).
>
> The Special Commissioner found as a fact that Mr. MacEnhill signed the document which completed the making of the assessment as the agent and at the request of Mr. Martin. The general principle of law is expressed in the old latin tag 'qui facit per alium facit per se' – acts done by an authorised agent are deemed to be the acts of the principal."

31. Thus the making of an assessment required a decision to do so, the calculation of the figures and the ministerial or executive act of physically making it by entering the details in an assessment book. What *Burford* decided was that the executive act need not be done by the decision maker, and s

113(1B) TMA (probably enacted as a result of an earlier decision in the case) provided at that time that:

> "Where the Board or an inspector or other officer of the Board have in accordance with section 29 of this Act, or any other provision of the Taxes Acts, decided to make an assessment to tax, and have taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax."

32. *Burford* was heard in the days when the last step in the procedure for making an assessment was the physical signing of a certificate in an assessment book.

33. In *Corbally-Stourton v The Commissioners for Her Majesty's Revenue and Customs* SpC 692 ("*Corbally-Stourton*") the Special Commissioner, Charles Hellier, said:

> "THE MAKING OF THE ASSESSMENT
>
> 90. In the days before widespread computer use, when an inspector made an assessment he did so by writing it in the assessment book. In *Honig v Sarsfield* (*Inspector of Taxes*) [1986] STC 246 the Court of Appeal held that for the purposes of the then provision of s 29 TMA (which differ from those relevant to this appeal) an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In *Burford v Durkin* (*Inspector of Taxes*) [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to assess even though the assessment book was signed, at his direction, by another.
>
> 91. Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the appellant. Once keyed into the computer the amount appears in a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the appellant was notified that she would be assessed.
>
> 92. Mr Barnett put the respondents to proof that the appellant had been assessed.
>
> 93. It seems to me that Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made.

34. This decision is not binding on me, but I see no reason not to follow it."

37. There is no evidence in the present case that an officer has made an assessment and that the closure notice comprises a notification of that assessment. As Mr Vallis said, the closure notice is simply a letter setting out HMRC's conclusions. Its purpose is to close the enquiry. It is clearly stated to be made pursuant to section 28A TMA 1970. This does not constitute an assessment for the purposes of section 31(1)(d) TMA 1970. Whilst it sets out an amount for which HMRC considers the taxpayer to be liable, and potentially therefore gives him an appeal right, that right is under section 31(1)(b), and not under section 31(1)(d). It does not comprise a freestanding assessment giving a right of appeal under the latter provision.

38. And for completeness (and this was not argued by the appellant) I do not think that the appellant has any appeal right under section 31(1)(a) TMA 1970 by dint of the closure notice making an amendment to the appellant's self-assessment. An appeal right under this sub-section only applies, ultimately, if the appellant's voluntary return was made under section 8 TMA 1970. And I have decided that it was not so made.

Conclusion

39. For the foregoing reasons, it is my view that the appellant's tax return for 2015/2016 was not made following the giving of a notice to file under section 8 TMA 1970. It was a voluntary return and not made "under" section 8 TMA 1970. HMRC's behaviour to accept, initially, that return as being deemed to have been made under section 8 TMA 1970, and then subsequently deciding not to so accept it is something which I do not have jurisdiction to impugn. The closure notice is not an assessment that gives the appellant an alternative appeal right under section 31(1)(d) TMA 1970.

Decision

40. I strike out this appeal.

Every cloud

41. The appellant was anxious (as indicated by his submission that strike out was a draconian remedy and should not be granted), that the substantive technical issues in this appeal should be heard. Mr Vallis, for HMRC, accepted this and indeed is equally anxious that the merits of the appellant's technical position are tested before the tribunal.

42. Although this appeal has, therefore, been struck out, both parties recognise that there is an alternative and sensible mechanism to achieve what both want. This lies in section 711 ITEPA which states:

> "(1) A person who has PAYE income for a tax year in respect of which deductions or repayments are made under PAYE regulations made by notice require an officer of Revenue and Customs to give that person a notice under section 8 of TMA 1970 (personal return) for the tax year.

(2) A notice to an officer of Revenue and Customs under sub-section (1) must be given no later than three years after the 31 October next following the tax year".

43. The appellant is clearly within the ambit of section 711 ITEPA. All he has to do is serve a notice requiring an officer of HMRC to give him a section 8 TMA 1970 notice to file. The officer is required to do so. Indeed, as Mr Vallis indicated, this is what he anticipates will now happen.

44. The appellant is clearly within the time limit prescribed in section 711(2) ITEPA for giving his notice.

45. I imagine that HMRC will issue a notice to file, the appellant will then submit his 2015/2016 tax return on the basis that he is due the refund which he claimed, initially, by amending his 2015/2016 tax return. HMRC will enquire into that return and probably close that enquiry very quickly, arriving at the same conclusion that they have arrived at in the closure notice. The appellant will appeal, probably on the same grounds that he has made his substantive appeal and the matter will proceed to a hearing in the usual way.

46. And so the appellant has not lost his right to have the substantive merits of his appeal heard by dint of this strike out.

Appeal rights

47. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
RELEASE DATE: 5 January 2019