TC07972

INCOME TAX – application by HMRC to strike out appeal on basis that it has no reasonable prospect of success – sole ground of appeal that notices to file assumed received by Appellants were not valid – application allowed and appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04196
TC/2018/04192
TC/2018/04198
TC/2018/04200
TC/2018/04203

BETWEEN

ASHER STERNLICHT
DAVID GOLDBERG
JOSHUA AARON NEUMANN
JONATHAN SCHWARZ
MOSHE BRONER-COHEN **Appellants**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The hearing took place on 16 November 2020. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions related to the COVID-19 pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The documents to which I was referred are described in the decision notice.

Keith Gordon, counsel, instructed by Cohen Arnold, for the Appellants

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

DECISION

INTRODUCTION

1. By notices of appeal dated 13 June 2018, Mr Sternlicht appealed on behalf of himself, Joshua Neumann, David Goldberg, Moshe Broner-Cohen and Jonathan Schwarz (together "the Appellants") against closure notices issued by HMRC in respect of the tax year 2011-2012 which disallowed their claims for share loss relief under Chapter 6 of the Income Tax Act 2007 ("ITA 2007"). Those claims related to amounts that the Appellants had invested in a company called Chargelock Ltd (as per the Appellants) or Chargelock Capital Ltd (as per HMRC); nothing turns on the use of different company names.

2. There were three grounds of appeal set out in the notices of appeal, relating to s16A Taxation of Chargeable Gains Act 1992, s137 ITA 2007 and whether the acquisition of shares was at arm's length (the "Original Grounds of Appeal"). HMRC filed and served its Statement of Case on 3 October 2018.

3. All the Original Grounds of Appeal have since been withdrawn by the Appellants. The only remaining issue in the appeals is a new ground of appeal (set out in full at [9] below) which asserts that the notices received by the Appellants from HMRC, stated to have been given under s8 Taxes Management Act 1970 ("TMA 1970") (the "s8 notices"), were not valid such that the subsequent notices of enquiry and closure notices were of no effect (the "New Ground of Appeal").

4. HMRC have applied to strike out this New Ground of Appeal, and thus the Appellants' appeal. It is that application which was before me.

5. In the course of the hearing of the application for the strike-out it was apparent that HMRC and the Appellants differed as to the scope of the New Ground of Appeal. HMRC considered that it raised solely legal issues. The Appellants' position was that this was not simply a legal issue but required evidence to be adduced. However, HMRC had three (alternative) arguments in support of their position that the Appellants' claim had no reasonable prospect of success, one of which would not require any evidence. I considered all of these arguments, and the Appellants' submissions in relation thereto, and for the reasons explained below concluded that the New Ground of Appeal (even when interpreted widely to cover the evidential questions raised by Mr Gordon) had no reasonable prospects of success and should be struck out.

PROCEDURAL HISTORY

6. I had before me a 101 page hearing bundle, bundles of authorities prepared by the Appellants and HMRC and a skeleton argument from each party.

7. The background set out below was common ground between the parties, and I so find as facts for the purpose of considering this application.

8. Mr Sternlicht's tax return for the tax year 2011-2012 was submitted online on 28 January 2013. HMRC issued notices of enquiry under s9A TMA 1970, and, in due course, closure notices. The Appellants appealed to the Tribunal on 13 June 2018.

9. On 22 March 2019 Mr Sternlicht notified HMRC of the New Ground of Appeal. That email referred to the fact that separately the Appellants had applied for a stay pending ADR, referred to the fact that the new ground has been or is being advanced in other cases and continued:

> "In short, it is my position that the closure notices are ineffective. The reasoning is as follows:

> 1. The appeals are against closure notices ("CNs").
>
> 2. For the CNs to be valid, there must be a valid notice of enquiry into each relevant tax return.
>
> 3. For there to be a valid notice of enquiry there must be a return being enquired into.
>
> 4. For there to be a valid return, there must have been a valid notice requiring a return under s8 TMA.
>
> 5. For the notice to be valid, it should have been issued by an officer (and not by computer).
>
> Thus the whole argument turns on point 5 above. I proceed on the assumption that each appellant (like virtually all other taxpayers) would have been sent an automated notice to file tax returns for the 2011/12 tax year (the year under appeal). Accordingly, they were not notices under s8. The consequences of that are ultimately that there can be no valid enquiry or closure notice.
>
> Under FA 2019, s. 87, step 4 has been revised – a return need not be in response to a notice. The legislation is retrospective and will therefore legitimise any voluntary returns previously made by taxpayers.
>
> However, the retrospective legitimisation of the tax return does not and cannot also have the effect of retrospectively legitimising any purported enquiry. That would require wording far broader than that currently in section 12D.
>
> Accordingly, there was no valid enquiry into these tax returns and therefore the purported closure notices are of no effect."

10. On 29 March 2019 HMRC referred to the fact that the Tribunal had granted the stay, and said they would reply to the email in relation to the New Ground of Appeal once they knew the position in relation to ADR. The stay expired on or shortly before 22 June 2019 and the Appellants applied for a further stay, which was opposed by HMRC.

11. On 1 July 2019 the Appellants applied to the Tribunal to add the New Ground of Appeal.

12. On 4 July 2019 HMRC informed the Appellants that they no longer opposed a further stay whilst the Appellants considered the position relation to ADR but also that, as the issue raised in the New Ground of Appeal was live in another appeal before both this Tribunal and the Upper Tribunal (the "UT"), HMRC suggested a stay behind those other appeals.

13. By email dated 9 July 2019 HMRC clarified that they were content for "all grounds" to be considered at the same hearing, ie they did not express opposition to the addition of the New Ground of Appeal. With the agreement of the Appellants, HMRC applied to the Tribunal for a stay (behind *Allam* in this Tribunal and *Rogers and Shaw* in the UT) by letter dated 10 July 2019.

14. On 29 July 2019, Judge Brooks granted a stay behind the appeal of *Rogers and Shaw* to the UT. That direction was silent as to the amendment to the grounds of appeal.

15. Following publication of the decision of the UT in *Rogers and Shaw* on 30 December 2019 (*HMRC v Rogers and Shaw* [2019] UKUT 0406 (TCC)) and this Tribunal in *Allam v HMRC* [2020] UKFTT 00216 (TC), HMRC invited the Appellants (on 11 February 2020) to withdraw the New Ground of Appeal.

16. On 16 March 2020 Mr Sternlicht (acting on behalf of all the Appellants) stated that they had decided to withdraw the Original Grounds of Appeal but would continue to pursue the New Ground of Appeal. This was communicated to the Tribunal by Mr Sternlicht on 19 March 2020.

17. Following further correspondence between the Tribunal and the parties (as to whether permission had already been granted for the addition of the New Ground of Appeal), by letter dated 18 August 2020 the Tribunal (Judge Vos) acknowledged the withdrawal of the Original Grounds of Appeal (requiring that a specific notice of withdrawal should be sent to the Tribunal and HMRC in respect of each of the "co-Appellants"), stated that the Tribunal had already accepted the New Ground of Appeal and directed Mr Sternlicht to set out the basis upon which the Appellants resisted HMRC's application to strike out the New Ground of Appeal in light of the UT decision in *Rogers and Shaw* and the passage through Parliament of the Finance Bill (a reference to what is now s103 Finance Act 2020 ("FA 2020")).

18. Mr Sternlicht responded by letter dated 27 August 2020 setting out why they considered the Tribunal should not strike out the New Ground of Appeal, and HMRC responded on 1 September 2020. There was then a further response from Mr Sternlicht on 2 September 2020.

19. Whilst there has been no formal consolidation or joinder of the appeals of the five Appellants, HMRC's application was made to strike out all five specified appeals and the hearing was to determine that application for all five Appellants.

TRIBUNAL RULES

20. Rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") sets out the circumstances in which the Tribunal must or may strike out the whole or part of proceedings. HMRC's application was made on the basis of rule 8(3)(c):

> "**8. Striking out a party's case**
>
> …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

21. The power to strike out proceedings must be exercised in accordance with the overriding objective in rule 2 of the Tribunal Rules:

> "**2. Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

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

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

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

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

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

TEST TO APPLY WHEN CONSIDERING STRIKE OUT APPLICATION

22. As noted above, the power to strike out a ground of appeal under rule 8(3)(c) must be exercised in accordance with the overriding objective.

23. The parties were agreed that when considering the application I must apply the law as it stands – if, under the current law, part of a pleaded case is bound to fail, the possibility that in future an appellate tribunal or court might take the law in a different direction does not give the case a reasonable prospect of success (*Baird Textiles Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274 at [39]). This is particularly relevant as the decision of the Tribunal in *Allam* is being appealed to the UT.

24. Furthermore, it was agreed by reference to the decision of the UT in *HMRC v Fairford Group* [2015] STC 156 at [41] that the Tribunal should consider the application in a similar way to an application under CPR 3.4 in civil proceedings. Accordingly, I must consider whether there is a realistic, as opposed to a fanciful, prospect of the New Ground of Appeal succeeding at a full hearing. A "realistic" prospect of success is one that carries some degree of conviction and not one that is merely arguable.

25. I also found the guidance from the UT in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) (at [33]) to be helpful:

> "Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.
>
> "i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

NEW GROUND OF APPEAL AND OVERVIEW OF SUBMISSIONS

26. The New Ground of Appeal is set out at [9] above. I consider the meaning of that ground below, but first it is necessary to set out the relevant legislation.

27. Sections 8 and 9A TMA 1970 provide that:

"**8 Personal return**

(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.

…

9ANotice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry") -

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed."

28. HMRC's position was that the New Ground of Appeal (which is now the only ground of appeal) has no reasonable prospect of success – the issues raised were determined in HMRC's favour in the UT decision in *Rogers and Shaw*, which is binding on this Tribunal, and in any event the point is now covered by statute, with both s103 FA 2020 and s12D TMA 1970 putting the matter beyond doubt. Any one of these three alternative arguments is sufficient for HMRC to succeed whereas at a full hearing the Appellants would need to succeed on all three arguments.

29. Mr Stone emphasised that the Appellants were not asserting that they did not receive a s8 notice (the New Ground of Appeal expressly proceeds "on the assumption that each appellant (like virtually all other taxpayers) would have been sent an automated notice to file tax returns for the 2011/12 tax year"). The burden of proof would be on the Appellants to establish that the notices to file were not valid (contrasting this with an appeal against penalties where the burden is on HMRC to establish that the penalties were validly issued, which would include establishing that notice to file was lawfully given).

30. Mr Stone submitted that the issues raised are therefore:

(1) whether a notice given by a computer rather than an officer is a valid notice; and

(2) if the notice was not valid, what is the legal effect of s12D TMA 1970 treating the Appellants' tax returns as having been made in response to a valid notice.

31. These are legal issues that do not turn on the particular facts of this case (and thus do not require evidence); they are suitable for summary determination.

32. Mr Gordon took issue not only with Mr Stone's submissions on *Rogers and Shaw*, s103 and s12D, but also on the scope of the New Ground of Appeal (including as to whether it raised only legal issues rather than factual matters that required evidence) and whether the application to strike out might be more appropriately either adjourned or proceed to deal with the legal issues as a preliminary issue.

33. Whilst Mr Gordon accepted that the New Ground of Appeal did not dispute receipt of a notice to file, or argue that it should have been issued by an identified officer, he did submit that this ground raised the issue of whether HMRC's processes could be "fully automated" and whether officers of HMRC had had appropriate oversight of the programming of the computers which issued the notices. The Appellants thus challenged whether the notices had been sent or issued by HMRC, and Mr Gordon submitted that this was a matter which required evidence to be adduced and thus considered by the Tribunal.

34. Mr Gordon submitted that:

(1) in order to demonstrate that there is a valid closure notice, HMRC will need to evidence compliance with s8 TMA 1970. In particular, s8 is not satisfied if the process

of requesting tax returns is fully automated. The Appellants did not accept that the notices received were from HMRC in the absence of evidence, and it was not common ground that the programming of HMRC computers would inevitably have been conducted by HMRC officers, noting in particular that the IT function within HMRC is largely contracted-out, and the staff of the sub-contractor are not officers of HMRC;

(2) the enactment of s103 FA 2020 has not had the effect of removing the need for evidence to demonstrate compliance with s8; and

(3) the enactment of s87 Finance Act 2019 ("FA 2019"), which introduced s12D TMA 1970, does not overcome HMRC's earlier failure to comply with s8 in this case.

35. In his skeleton argument of 9 November 2020 Mr Gordon stated that the Appellants recognised that the points on which they rely have been variously dismissed by two compositions of this Tribunal and are currently being considered by a third. Of the extant decisions, at least one is already listed before the UT (*Allam*). As a result, Mr Gordon asked the Tribunal to consider whether the overriding objective is best served simply by either dismissing the application and staying this appeal or adjourning the application and staying this appeal. During the hearing Mr Gordon added to these options by suggesting that it was open to me to decide that, given both parties were prepared to and indeed did set out their full arguments on the interpretation of *Rogers and Shaw*, s103 and s12D, I should treat the hearing as that of a preliminary issue, give a full decision on the questions of law (not just on the rule 8(3) test) and then leave matters of evidence to be addressed by a future hearing of the Tribunal.

36. I do not consider it appropriate to pursue those options. HMRC have applied to strike out the Appellants' appeal, this hearing was listed to determine that application, and HMRC had prepared accordingly. It may well be that, if I refuse to strike out the appeal and it proceeds to a full hearing, that there will be repetition of arguments, but nevertheless that is a feature of most strike-out applications. If I were to refuse HMRC's application and the appeal proceeds the parties can then consider whether to agree or request a stay.

37. I have carefully considered all of the submissions made by both parties, albeit that I have not found it necessary to refer to all of them in this decision.

DISCUSSION

38. The parties disagreed as to the scope of the New Ground of Appeal, and there was no application by Mr Gordon to amend that ground of appeal.

39. The New Ground of Appeal itself states that the "whole argument" turns on the need for a notice to be issued by an officer and not by computer. Mr Stone submits that the only issue raised by this ground is thus the use of a computer, and not whether the notices were issued by HMRC (ie not the process which resulted in the computer generating a notice).

40. Subsequent correspondence has included:

(1) Once the stay expired, the Appellants were asked if they wished to continue the appeal. On 16 March 2020 they confirmed to HMRC that they were dropping the substantive aspect of their appeal (ie the Original Grounds) but "for the time being" they did wish to pursue the procedural point, referring to the decisions in *Rogers and Shaw* and *Allam*, and noting they were "aware of the Budget proposal which might render the point academic" and that they would revisit the position once the final statutory working is known. The Appellants reiterated this to the Tribunal on 19 March.

(2) On 27 August 2020 the Appellants stated that they had reviewed the final version of s103 and considered it did not affect their case, stating the point they are advancing is that there cannot be any valid s8 notice unless it was issued by an officer. There is nothing in s103 that provides that the process may be fully automated.

41. There was a gap of a year between the first enunciation of the New Ground of Appeal and the responses to HMRC and the Tribunal indicating that the Appellants would for the time being pursue the appeal. The Appellants stated that they were keeping their position under review. That approach is understandable given that new legislation was making its way through the Parliamentary process. However, it is also incumbent upon the Appellants to consider if the ground of appeal that they had advanced remained (as drafted) that which they wished to rely upon.

42. I consider that the New Ground of Appeal was expressed narrowly, having regard to the five numbered points made by Mr Sternlicht and how he then captured their approach by stating that the whole argument turned on the need for a notice to be issued by an officer, and not by a computer. There is no reference to such an officer needing to be named (and Mr Gordon confirmed that no such argument was being run by the Appellants) but also no express reference to the process which involves the use of a computer. However, a computer is not used in isolation and it is not an unreasonable stretch for Mr Gordon to argue that the New Ground of Appeal challenges whether the computers were programmed by HMRC officers. When assessing the prospects of success of the arguments put by Mr Gordon on behalf of the Appellants I therefore approach the matter on the basis that the New Ground of Appeal does encapsulate a challenge not just to the s8 notices being issued by a computer, but the process which led to them being so issued.

43. When assessing whether the Appellants' appeal has a reasonable prospect of success, I bear in mind that if the appeal were to proceed to a substantive hearing the burden of proof would be on the Appellants to establish that they had been overcharged by the amendments made to their self-assessment returns by the closure notices, ie they would be required to establish that, on the balance of probabilities, there had been no valid closure notice (as there had been no valid s8 notice and thus no valid enquiry). I do not accept Mr Gordon's submission that the burden would be on HMRC to establish the underlying validity of the enquiry process. That does not accord with s50(6) TMA 1970 – if the Appellants cannot establish that they were overcharged by the assessments then the assessments stand.

Rogers and Shaw

44. Both parties referred to the decision of the UT in *Rogers and Shaw*. I set out first the relevant paragraphs for ease of reference:

> "12. The FTT gave further reasons for its conclusion that a specific HMRC officer needed to be named in the notice in the following passages of the Decision:
>
> "(12) Under paragraph 4 of Schedule 55, daily penalties for late filing can only be imposed on a taxpayer if "HMRC" have decided to impose the penalty and given notice to a taxpayer specifying the date from which the penalty is [payable].
>
> (13) In *Donaldson* (*Donaldson v HMRC* [2016] EWCA Civ 761) HMRC's case was that there was no requirement for an officer of the Board to make that decision.
>
> (14) The provisions of paragraph 4 which identify "HMRC" are to be contrasted with those of section 100 TMA 1970 which permit an "officer of

the Board" to make a penalty determination. This is a decision by a real "flesh and blood" officer, and not by HMRC as a collective body. Nor is it a computerised decision.

(15) The provisions of section 8 TMA 1970 are more akin to section 100 TMA 1970 than to paragraph 4 of Schedule 55. In my view a particular officer must be identified in the notice as the person giving the notice to file under section 8 TMA 1970."

…

HMRC's grounds of appeal

16. With permission of the FTT, HMRC appeal against both decisions on the following grounds:

(1) The FTT had no jurisdiction, in the taxpayers' appeals against penalties imposed under Schedule 55, to consider whether a valid notice under s8 of TMA had been issued.

(2) The FTT wrongly applied a literal interpretation of s8 of TMA by concluding that it required an officer to be identified when a notice to file under s8 was issued.

(3) The FTT was wrong to conclude that s8(1) of TMA required a notice to file to be issued by a "flesh and blood" officer rather than a computer.

(4) Even if it had the requisite jurisdiction, the FTT should not have considered whether a notice under s8 of TMA was issued, or validly issued, because that was not a pleaded ground of challenge in the taxpayers' Notices of Appeal and was not, therefore, in dispute between the parties. HMRC were denied procedural fairness by the FTT considering a matter that was not in dispute.

…

HMRC's Grounds 2 and 3

31. We will deal with HMRC's Grounds 2 and 3 together as they both involve challenges to the FTT's conclusion that, for a notice to be given "by an officer of the Board", a named officer either has to sign the notice or it has to be made clear in some other way that a particular named officer was "giving" that notice.

32. In our judgment, properly construed, s8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC. Therefore, if a police constable, for example, purported to require a taxpayer to submit a tax return that would not be a lawful request under s8 (unless the police constable happened also to be an officer of HMRC). Instead, the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer.

33. The FTT considered that s8(1)(a) of TMA requires a return to be delivered to "the officer", being the same officer who gives the s8 notice and relied on this conclusion as supporting its decision that the s8 notice had to be given by an identified "flesh and 98 140 11 blood" officer. However, the statutory scheme as a whole does not justify this approach. By virtue of s2 of the Commissioners for Revenue & Customs Act 2005 ("CRCA"), the "officers" of HMRC are those staff that the Commissioners of Revenue & Customs have appointed for the purposes of exercising the Commissioners'

functions. Section 2(4) of CRCA provides that anything commenced by one officer can be continued by another. Moreover, s113(1A) of TMA provides that:

(1A) Any notice or direction requiring any return to be made under the Taxes Acts to an inspector or other officer of the Board1 may be issued or given in the name of that officer or, as the case may be in the name of the Board, by any officer of the Board, and so as to require the return to be made to the first-mentioned officer.

34. Against that background, s8 cannot be construed as requiring an identified officer to give a notice requiring a return to be given to that very officer.

35. The taxpayers invite us to draw a distinction between provisions such ass8 of TMA which permit "an officer of the Board" to give a notice and provisions such as paragraph 4(1) of Schedule 55 which permit daily penalties to be charged when "HMRC decide" that they should be. The difference in language indicates a clear distinction, the taxpayers argue, between a decision made by "HMRC" as an institution and decisions made by an individual named officer. We reject that argument, at least in the context of s8 of TMA, for essentially the same reasons we have already given. Section 5 of CRCA makes the Commissioners responsible for, among other matters, the collection of tax. Section 2 of CRCA permits the Commissioners to appoint officers of Revenue & Customs and those officers can exercise the functions of the Commissioners by virtue ofs13 of CRCA. Section 4 of CRCA provides that "the Commissioners and the officers of Revenue & Customs may together be referred to as Her Majesty's Revenue & Customs". We therefore do not see the "clear distinction" for which the taxpayers argue. On the contrary, "the Commissioners" (or "HMRC") and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax.

36. It follows that we consider HMRC's Grounds 2 and 3 are made out. We will determine how the FTT's decisions should be dealt with in the light of these errors of law after considering HMRC's other grounds of appeal.

…

Whether, applying the right test, s8 notices were given by an officer of the Board

55. In directions made on 3 September 2019, the Tribunal gave HMRC permission to adduce witness evidence to assist the Tribunal to remake the FTT's decisions if it was minded to do so. HMRC duly submitted witness statements of four HMRC officers dealing with the "end to end process" by which s8 notices were issued. The taxpayers did not challenge any of that evidence.

56. The witness statement of Officer Michelle McClure in particular demonstrated that a team consisting of HMRC officers (the "Operational Excellence Business Delivery SA team") formulates, and keeps updated, criteria for deciding which taxpayers are to be required to submit tax returns. Having formulated those criteria, HMRC's computers perform an automated scan of their database to identify taxpayers who meet the criteria. A small team of HMRC officers then manually checks a small sample of 200 cases (essentially to check that those cases meet the criteria as a high level check of the automated scan). The witness statements of Officer Elisa Simmonds

> and Officer Martin Hodge explain that HMRC themselves send notices to file in digital form and that HMRC have outsourced the function of sending out notices in hard copy form to a third party provider called "Communisis".
>
> 57. We agree with the taxpayers that HMRC's evidence does not establish that a specific, identified HMRC officer took the decision to send s8 notices to them. However, as we have explained in our discussion of HMRC's Grounds 3 and 4, the statute does not require a specific officer to be identified. The taxpayers also argued that HMRC's evidence did not even demonstrate that HMRC officers generally had authorised the giving of s8 notices (since the actual selection exercise was performed by computer and hard copy notices were physically despatched by Communisis). We reject those submissions. HMRC officers decided on applicable criteria and taxpayers meeting those criteria received s8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified. Nor does it matter that Communisis physically sent out hard copy s8 notices. The legislation does not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a s8 notice leaving the implementation of that decision to administrative staff and contractors.
>
> 58. We remake the FTT's decisions so as to conclude that s8 notices were given to both Mr Rogers and Mr Shaw by officers of the Board."

45. HMRC's position was that the issue raised by the New Ground of Appeal was the same as grounds 2 and 3 of HMRC's grounds of appeal before the UT, which had been determined in HMRC's favour, was binding on this Tribunal and therefore the New Ground of Appeal was bound to fail.

46. The New Ground of Appeal is that "For the notice to be valid, it should have been issued by an officer (and not by computer)." Grounds 2 and 3 of HMRC's grounds of appeal in *Rogers and Shaw* are (at [16]) "(2) The FTT wrongly applied a literal interpretation of s8 of TMA by concluding that it required an officer to be identified when a notice to file under s8 was issued. (3) The FTT was wrong to conclude that s8(1) of TMA required a notice to file to be issued by a "flesh and blood" officer rather than a computer."

47. The UT said at [32] that s8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC - the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer." The UT considered the relevant provisions of the Commissioners for Revenue & Customs Act 2005 ("CRCA 2005") and said, at [35], the Commissioners (or HMRC) and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax. In the context of re-making the decision, the UT said it is not necessary that a specific officer is identified as having taken the decision to send a s8 notice; it is permissible to use a computer to perform the task of identifying which taxpayers meet the criteria to receive a notice (at [57]).

48. It is clear that the UT has decided that a valid s8 notice does not have to have been given by a specified officer, and that the notice may be generated automatically by a computer. However, I do not accept Mr Stone's submission that this of itself answers the New Ground of Appeal. The UT referred to the notice being given under the authority of an

officer of HMRC and, in re-making the decision, relied on unchallenged witness statements as to the processes for issuing notices in the tax year in question.

49. This raises the question of the relevance of or need for evidence. The hearing bundle included HMRC's records of an extract from Mr Sternlicht's return, a record of the date the return was submitted and Taxpayer Summary Details, setting out Mr Sternlicht's address, unique taxpayer reference and date of birth. It did not include a copy of what often appears as a "Return Summary", confirming that HMRC's records show that a s8 notice was sent to the taxpayer for that tax year.

50. Mr Stone submitted that it would be disproportionate for HMRC to be expected to produce witness evidence as to processes in every appeal (no doubt being mindful of the fact that such witnesses would be expected to be available for cross-examination). Furthermore, he submitted, the only reasonable inference to be drawn (it being absurd to suggest otherwise) is that HMRC's computers were programmed by HMRC's officers, or by contractors following the instructions of HMRC officers.

51. I was referred to the decision of this Tribunal in *Allam*, where they referred to *Rogers and Shaw* as follows:

> "28. Dr Allam's returns were made in response to automated notices issued by HMRC. The question as to whether or not returns made by taxpayers in response to automated notices met the requirements of s8 (without the need for them to be treated as returns under s8 TMA by s12D TMA) was in issue in the Rogers and Shaw case before the Upper Tribunal. The Upper Tribunal (Zacaroli J and Judge Richards) decided that a notice did not have to be given by an identified "flesh and blood" officer of HMRC in order to meet the requirements of s8 TMA; it was sufficient that the giving of the notice was under the authority of an officer of HMRC (Rogers and Shaw [32]).
>
> 29. We are bound by the decision of the Upper Tribunal in Rogers and Shaw and, in any event, we agree with it. On the basis of that decision, unless there is some other defect in the notice, a return made in response to an automated notice, such as those made by Dr Allam in this case, remains a return made under s8 TMA and the Section 12D issue does not arise. Dr Allam has not raised any other concern about the notices which were issued to him."

52. I note that in *Allam*, as is apparent from [29] cited above, the appellant had not raised any other concern about the notices which were issued to him (other than that they were automated). Whilst Mr Stone submits that the New Ground of Appeal similarly raises no other issue, that is not now the submission of Mr Gordon and as explained above I am taking a broader approach to the interpretation of that ground. The Appellants are raising another concern, namely as to the process which generated the notice. I do not therefore find *Allam* to be of assistance on this point.

53. I was also referred to *Marano v HMRC* [2020] UKFTT 199 (TC) (in which Mr Gordon had appeared for the appellant). That appeal concerned a challenge to the validity of penalties, and the "Third Issue" was whether a notice to file had to be issued by an individual officer:

> "121. Mr Gordon submitted that HMRC could only succeed on the Third Issue if they led evidence which proved that "officers have decided the criteria to be satisfied for a taxpayer to receive a s 8 notice", and no such evidence was before this Tribunal. It was not possible for the Tribunal to rely on the evidence given in *Rogers and Shaw* because that related to different taxpayers.

122. Mr Vallis said that in *Rogers and Shaw* the UT had decided that the "substantive requirement" imposed by TMA s 8 was "that the giving of a notice must have been under the authority of an officer of HMRC". It could reasonably be inferred from the evidence in the Bundle that the Notice issued to Mr Marano had been "issued under the authority of HMRC": it was issued by HMRC's computer system and recorded as having been issued by that system, and this had only happened because the computer had been programmed by HMRC staff. The notice had therefore been issued under the authority of those HMRC staff.

123. The only alternative conclusions would be that:

(1) unknown, unauthorised persons had programmed HMRC's computer system, but there was no evidence before this Tribunal which would allow it to conclude that HMRC's computer had been hacked in order to program it to produce TMA s 8 Notices; or

(2) the computer was writing its own program. It was not possible for HMRC's systems to work out for themselves, without any human intervention, to whom to send a s 8 Notice.

124. Mr Vallis added that it would be disproportionate for HMRC to be required to produce four senior policy officers at every appeal which relates to a Notice to File, in order to prove that the processes carried out by HMRC's computer system had been authorised by HMRC staff.

Discussion

125. We agree with Mr Gordon that we cannot rely on the evidence given to the UT in *Rogers and Shaw*. It is well-established that evidence given in one case cannot be relied on in another, and facts found in one appeal are not binding on another court or tribunal. That is for many reasons: there is, for example, no opportunity to cross-examine the witnesses who gave evidence in that other hearing. We can only make findings of fact on the basis of the evidence before us. We also note that Mr Rogers' and Mr Shaw's appeals both related to Notices issued for the 2015-16 tax year, so the process described by HMRC's witnesses may not have been the same in 2012-13, the year we have to consider.

126. However, we agree with Mr Vallis that the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems.

127. As the UT held in *Rogers and Shaw* in reliance on the CRCA, an "officer" of HMRC is simply any or all members of HMRC's staff "appointed for the purposes of exercising the Commissioners' functions". Section 5 of that Act is headed "initial functions" and subsection 1(a) provides that the Commissioners shall be responsible for "the collection and management of revenue for which the Commissioners of Inland Revenue were responsible" before this provision came into force. CRCA s 7 defines "former Inland Revenue matters" as "the matters listed in Schedule 1". That Schedule lists income tax and capital gains tax among many other "matters". CRCA s 9(1) provides that:

"The Commissioners may do anything which they think

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions."

128. It is clear from those provisions that a member of HMRC's staff appointed for the purposes of collecting and managing income tax and capital gains tax is

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an officerof HMRC. The term therefore includes those staff members who program HMRC's computers as part of their role in collecting and manage income tax. That programming is a necessary and/or expedient part of the exercise of their tax-collecting function.

129. We have found as facts that a full return, including a Notice to File, was issued to Mr Marano, and that its issuance and posting was recorded by HMRC's systems. The only reasonable conclusions from that evidence are that the return was issued because HMRC's system was programmed to carry out that task, and that the program was authorised by HMRC officers, as defined.

130. As Mr Vallis said, the alternative would be that HMRC's computer system had been either (a) programmed by persons other than HMRC staff, or (b) programmed without any human intervention. There is no evidence that HMRC's computer system had been hacked, and it is not reasonable or credible to find that in 2013 HMRC's computer system was being controlled by some sort of artificial intelligence, capable of deciding its own parameters without the need for a human being to program it."

54. There was some evidence before the Tribunal in *Marano* as to the issuance of the s8 notice, which included confirmation that the notice had been issued by HMRC's computer system and was recorded as having been issued by that system.

55. I note that the guidance in *First De Sales* is that in hearing an application for a strike out I should not conduct a mini-trial; however, I have heard full submissions from both parties on the interpretation and application of the decision of the UT in *Rogers and Shaw* (as well as on s103 and s12D).

56. It is accepted by the Appellants that notices to file were issued to them by HMRC's computer. I can take account of the evidence that can reasonably be expected to be available at a full hearing, and in that regard expect that HMRC would be able to produce a Return Summary confirming this. The question is then, as posed in *Marano*, whether HMRC officers approved and authorised the issuance of notices to file in 2011-2012, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the notices be recorded within HMRC's computer systems. The burden of proof is on the Appellants, and I consider it fanciful to suppose that the Appellants would be able to establish that this had not been the case, particularly having regard to the alternatives being those as set out at [130] of *Marano*. I consider that the New Ground of Appeal has no reasonable prospect of success.

Section 103 FA 2020

57. Mr Stone submits that, if there had been any doubt after the decision of the UT in *Rogers and Shaw*, the introduction of s103 FA 2020 puts the matter beyond doubt in any event. Section 103 provides:

"**103 HMRC: exercise of officer functions**

(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to

taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).

(2) Accordingly, it follows that HMRC may (among other things) –

(a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return);

(b) amend a return under section 9ZB of that Act (correction of personal or trustee return);

(c) make an assessment to tax in accordance with section 30A of that Act (assessing procedure);

(d) make a determination under section 100 of that Act (determination of penalties);

(e) give a notice under paragraph 3 of Schedule 18 to FA 1998 (notice to file company tax return);

(f) make a determination under paragraph 2 or 3 of Schedule 14 to FA 2003 (SDLT: determination of penalties).

(3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or, where the function is conferred on an officer of a particular kind, an officer of that kind).

(4) In this section -

"HMRC" means Her Majesty's Revenue and Customs;

references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment.

(5) This section is treated as always having been in force."

58. The Interpretation Act 1978 defines Her Majesty's Revenue and Customs as follows:

> ""Her Majesty's Revenue and Customs" has the meaning given by section 4 of the Commissioners for Revenue and Customs Act 2005."

59. The relevant provisions of CRCA 2005 are then as follows (setting out s4 ahead of s2 as they make best sense when read in this order):

> "**4. "Her Majesty's Revenue and Customs"**
>
> (1) The Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs.
>
> …
>
> **2 Officers of Revenue and Customs**
>
> (1) The Commissioners may appoint staff, to be known as officers of Revenue and Customs.
>
> (2) A person shall hold and vacate office as an officer of Revenue and Customs in accordance with the terms of his appointment (which may include provision for dismissal).
>
> (3) An officer of Revenue and Customs shall comply with directions of the Commissioners (whether he is exercising a function conferred on officers of Revenue and Customs or exercising a function on behalf of the Commissioners).

> (4) Anything (including anything in relation to legal proceedings) begun by or in relation to one officer of Revenue and Customs may be continued by or in relation to another.
>
> (5) Appointments under subsection (1) may be made only with the approval of the Minister for the Civil Service as to terms and conditions of service.
>
> (6) Service in the employment of the Commissioners is service in the civil service of the State.
>
> (7) In Schedule 1 to the Interpretation Act 1978 (c. 30) (defined expressions) at the appropriate place insert—
>
> ""Officer of Revenue and Customs" has the meaning given by section 2(1) of the Commissioners for Revenue and Customs Act 2005.""

60. Mr Stone submits that giving a s8 notice is something "capable of being done by an officer of Revenue and Customs by virtue of a … an enactment relating to taxation". By s103(1), HMRC may carry out that function by use of a computer. By s103(5), it has always been the case that a notice to file can be given by using a computer. Thus far, I agree.

61. However, Mr Stone's submission was couched in terms of "HMRC viewed corporately" or "HMRC as a body". That is not how the provision is framed. "HMRC" as defined may give a s8 notice, and that definition in s103(4) (following through the Interpretation Act 1978 to s2 and s4 CRCA 2005) is the Commissioners and staff appointed by them.

62. Section 103 therefore confirms that a s8 notice may be given by any staff of HMRC and that they may use a computer to do so.

63. Mr Gordon submitted that s103 does not sanction a wholly automated process, drawing attention to the significance of this provision being retrospective. I accept that s103 leaves open a potential issue as to whether a notice which has been issued by a computer was issued by HMRC, or done by HMRC using the language of s103(1). That is a matter on which evidence may be adduced. In the present instance, and having regard to the burden of proof being on the Appellants, it is not plausible to expect that the Appellants could establish that the notices which they accept were received were not issued on the instructions of the staff of HMRC.

64. This is the second reason that the New Ground of Appeal has no reasonable prospect of success.

Section 12D TMA 1970

65. Section 12D TMA 1970 was introduced by s87 FA 2019 and is relied upon by HMRC as a third reason why the New Ground of Appeal is bound to fail. Section 12D provides:

> "**12D Returns made otherwise than pursuant to a notice**
>
> (1) This section applies where—
>
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
>
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
>
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.
>
> (2) For the purposes of the Taxes Acts—

(a) treat a relevant notice as having been given to the person on the day the relevant return was delivered, and

(b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).

(3) "Relevant notice" means—

(a) in relation to section 8 or 8A, a notice under that section in respect of the relevant period;

(b) in relation to section 12AA, a notice under section 12AA(3) requiring the person to deliver a return in respect of the relevant period, on or before the day the relevant return was delivered (or, if later, the earliest day that could be specified under section 12AA).

(4) In subsection (1)(a) "purported return" means anything that—

(a) is in a form, and is delivered in a way, that a corresponding return could have been made and delivered had a relevant notice been given, and

(b) purports to be a return under the relevant section.

…"

66. Section 87(3) FA 2019 provides that "The amendments made by this section are treated as always having been in force." Such amendments include the introduction of s12D.

67. Mr Stone submits that whilst HMRC's position is that the s8 notices received by the Appellants were valid, even if this were not the case then this does not invalidate the subsequent notice of enquiry under s9A. Section 12D "potentially applies both to returns that have been made where no notice has been issued (i.e. voluntary returns) and to returns which are made in response to a notice which does not meet the requirements of s8 TMA" (as per the Tribunal in *Allam* at [20]). The effect of s12D is to treat historic returns which were not made in response to a valid notice under s8 TMA 1970 as having been made in response to a relevant notice and so made under s8 for the purposes of s9A TMA 1980 (as per *Allam* at [53]).

68. Mr Gordon accepted that s12D has the effect of retrospectively validating all tax returns (whenever made) which were not previously considered valid because they were not in response to a valid s8 notice, thus providing taxpayers with the finality and protections that, strictly, they did not previously have. However, he submitted that this retroaction does not extend to the validation of enquiries that were previously invalid.

69. Both parties referred me to the decision of this Tribunal in *Allam*, the relevant paragraphs of which are below:

"34. The issue before the Tribunal went to the scope of that deeming rule. In summary, Mr Gordon, for Dr Allam, says that the deeming rule in s12D is limited: it only treats the returns made by Dr Allam as made under s8 TMA; it does not extend to treating the enquiry notices which were issued by HMRC in relation to the first and second appeals as having been issued in relation to returns made under s8 TMA. Ms Choudhury, for HMRC, says that the deeming rule is sufficiently broad to treat the enquiry notices as having been issued in relation to returns made under s8 TMA.

…

The relevance of Parliamentary material

39. The first is the question as the extent to which it is permissible to rely on Parliamentary material to inform the process of statutory construction. Mr Gordon referred the Tribunal to two pieces of supporting material in relation to the passage of the Finance (No. 3) Bill 2018 through Parliament. The first was the Explanatory Notes to Clauses for the Bill and in particular the notes to clause 86 which contained what became s87 FA 2019. Those notes contain the following passage at [23] to [25]:

23. Some tax returns are delivered each year "voluntarily" to HMRC by taxpayers, i.e. they are delivered before HMRC has given a statutory notice requiring the return to be delivered. HMRC has historically operated a policy of accepting such voluntary returns and has charged or repaid tax based on them, opened enquiries into them if necessary, and generally has treated them as valid tax returns for all purposes. If HMRC did not accept voluntary returns, it would have to ignore the information sent and formally ask taxpayers to resend the same information, which would cause delays and inconvenience both to taxpayers and HMRC.

24. In April 2018, the First-tier Tribunal ruled that this policy was not supported by the law. HMRC has appealed this decision. If this finding were to be upheld by a higher court, it would mean that all voluntary returns, and steps taken by HMRC or taxpayers in reliance of them, were invalid.

25. To put the matter beyond doubt and confirm the longstanding policy, this retrospective and prospective legislation makes clear that it is lawful for HMRC to have accepted as statutory returns, the voluntary returns already received and to continue to accept them as such in the future.

40. The second piece of Parliamentary material to which we were referred was the Hansard report of the Finance Bill Committee debates on the relevant provisions of the Finance (No. 3) Bill 2018. In those debates, in response to various proposed amendments, the Minister (Mel Stride) said this (Hansard, Finance (No. 3) Bill 2018, Ninth Sitting, 11 December 2018, columns 346-347):

"HMRC receives about 600,000 voluntary tax returns each year. They are voluntary because they are made without any requirement or request from HMRC to do so. People in businesses send them in because they want either to pay tax or to make tax repayment claims. HMRC has always accepted those returns and treated them like any other return. This policy is helpful for taxpayers who send in returns because they are concerned that their affairs are not up-to-date. If HMRC did not accept voluntary returns when a taxpayer sent in a return, it would have to formally ask them for a return, and they would need to refile it.

…The purpose of the clause is not to change existing practice but to give it legal certainty. Reporting on its impact is therefore unnecessary as there will be no change in either practice or revenue."

41. The circumstances in which Parliamentary material can be admitted on a question of construction are limited. It can usually only be admitted if it can be brought within the principle of *Pepper v Hart* [1993] AC 593. That case imposed narrow conditions for the admissibility of such material. They were summarized by Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Limited* [2001] to AC 349 (at 391D-E) as follows:

In *Pepper v. Hart*, the House (Lord Mackay of Clashfern L.C. dissenting) relaxed the general rule which had been understood to preclude reference in

the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp. 640B, 631D, 634D).

42. In our view, the statements to which our attention has been drawn do not meet those criteria. We doubt that the first condition is met in that the legislation is not, in our view, ambiguous or obscure, nor does it lead to any absurdity. We address this point below (at [63] to [77]). But, in any event, we do not consider that the third condition is met. The effect of the statements in these materials in relation to the point at issue – namely the extent of the deeming provision in s12D(2) – is not clear. The statements to which we have been referred do little more than reiterate the background to the statutory provisions, they do not address the specific point that arises in this appeal.

43. There may be a separate question as to whether the material may be admissible to show the general purpose of the legislation. However, we do not need to address that question in this case. In our view, the purpose is clear from the legislation itself and from the general legislative background; it was to codify the previous policy of accepting voluntary returns and to do so both prospectively and retrospectively. The materials to which we have been referred appear to support that conclusion, but they are not of any significant assistance in resolving the matters in issue in this appeal.

The scope of a deeming provision

44. The second specific issue that we should address is the question of the extent of any deeming provision such as that in s12D TMA.

45. The leading authority is the case of *Marshall v Kerr* [1994] STC 638. In that case, the House of Lords rejected a contention by the appellant, Mrs Kerr, that a deeming provision in s24(7) of the Finance Act 1965 which treated assets bequeathed to her by her husband as acquired by a legatee, a Jersey trust company, applied to treat Mrs Kerr as not having held the assets at all for the purposes of whether or not she should be regarded as a settlor of the relevant trusts. In doing so, Lord Browne-Wilkinson referred (at page 649c-e) with approval to the leading judgement of Peter Gibson J in the Court of Appeal in the same case ([1993] STC 360 at page 366d) where Peter Gibson J said:

"For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

46. Although the House of Lords reversed the decision of the Court of Appeal in that case, it did so on the basis of different arguments raised before the House of Lords that had not been raised before the Court of Appeal. Lord Browne-Wilkinson expressly endorsed the principles set out by Peter Gibson J. We will therefore follow the same approach.

Application of those principles in this case

47. We must first identify the purpose of the provision. Our starting point is the words of the legislation. From those words, it is clear to us that the purpose of the provision is to give effect to the longstanding practice of HMRC accepting voluntary returns and treating those returns as having been made pursuant to a notice under s8 TMA and to do so both prospectively and retrospectively.

48. If we assume that a return made in response to an automated notice is not, without reference to s12D, a "return under s8 TMA", then the parties agree that the requirements of s12D(1) are met in relation to each of the relevant returns and that s12D is in point.

49. On that assumption, s12D(2) treats a notice under s8 TMA as having been given to Dr Allam on the day the relevant return was delivered and treats the relevant return as having been made in pursuance of that notice and, accordingly as if it were a return under s8 TMA . This deemed state of affairs is to be treated as existing "For the purposes of the Taxes Acts".

50. Section 12D is treated by s87(3) FA 2019 "as always having been in force". So it applies both retrospectively and prospectively.

51. For example, in relation to Dr Allam's return for the 2011-12 tax year which was made on 13 November 2012, the effect of s12D(2) is to treat a notice under s8 TMA as having been given to Dr Allam on that date, 13 November 2012, and the return as having been made pursuant to that notice so that it is a "return under s8 TMA" for the purposes of the Taxes Acts. There is no dispute between the parties about this conclusion.

52. The dispute arises when one seeks to apply the deeming provision in s12D to s9A TMA. Section 9A permits an officer of HMRC to enquire into a "return under s8 TMA" if he or she gives notice of his or her intention to do so. Ms Choudhury says that it is a natural consequence of treating the return made by Dr Allam on 13 November 2012 as a return under s8 TMA that the enquiry notice issued by HMRC on 5 November 2013 should be treated as an enquiry into a return under s8 TMA for the purposes of s9A so meeting the requirements of that section. Mr Gordon says that the deeming does not go that far; the effect of the deeming provision is more limited and does not extend to treating an enquiry notice retrospectively as meeting the requirements for issue which it did not meet at the time at which it was issued.

53. We agree with Ms Choudhury on this issue. It seems to us that, on a proper construction of s12D TMA and s87(3) FA 2019 , the deeming rule in s12D should apply to treat historic returns (i.e. those made before 12 February 2019) which were not made in response to a notice under s8 TMA as returns made in response to a "relevant notice" and so as made under s8 TMA for the purposes of s9A TMA.

54. Our reasons are set out below.

55. First, in our view, this is the ordinary and natural meaning of the words in s12D TMA and s87(3) FA 2019.

56. The deeming rule (in s12D) is expressed (by s87(3) FA 2019) to apply retrospectively and to do so "for the purposes of the Taxes Acts".

57. Mr Gordon accepts that the deeming rule applies to treat an historic return, which was made in response to an automated notice, as a return made under s8 TMA for the purposes of other provisions of the Taxes Acts. For example, Mr Gordon accepts that s12D should apply to treat an historic return which was not made pursuant to a notice under s8 TMA, as a return made under s8 TMA for the purpose of s29(3) TMA, which confers upon a taxpayer certain protections against a "discovery assessment" under s29(1) TMA where the taxpayer "has made and delivered a return under s8 TMA". He also accepts that the deeming rule in s12D should apply to treat a taxpayer as having made a return under s8 TMA for the purpose of paragraph 21 Schedule 36 Finance Act 2008, which confers upon a taxpayer certain protections against the issue of an information notice where the taxpayer has "made a tax return… under s8 TMA".

58. The only distinction that Mr Gordon makes between such provisions and s9A TMA is that these provisions operate to the benefit of the taxpayer. We cannot discern any such distinction in the words of the legislation.

59. Second, in our view, this interpretation is consistent with the policy and purposes of the Act.

60. The FA 2019 provisions are, as we have mentioned, clearly designed to give effect to the longstanding practice of HMRC in accepting voluntary returns and treating such returns as valid for the purposes of the Taxes Acts. The reason for doing so is to provide certainty both to taxpayers and to HMRC that the results of the process of assessment in relation to those historic returns – of which the making and delivery of a return forms part - will be respected. That aim can only be fully achieved in respect of historic returns if it also gives effect to the results of assessments that have been made following the delivery of those returns and so must encompass the enquiry and closure process by which those assessments are made.

61. Third, in our view, this is a natural consequence of the deeming provision.

62. The delivery of a return is part of a process of assessment, which includes the issue of a notice to make a return, the delivery of a return, enquiry into the return and the issue of a closure notice. The retrospective validation of delivery of a return is part of the retrospective validation of the entire process. In accordance with the guidance given by Peter Gibson J in *Marshall v Kerr* as endorsed by Lord Browne-Wilkinson in the same case, we should treat as real the consequences "inevitably flowing from… [the] deemed state of affairs".

Does this interpretation give rise to "injustice or absurdity"?

63. Finally, we do not accept that this interpretation gives rise to injustice or absurdity, which is not within the scope of the fiction.

64. Mr Gordon raised three aspects of the rules which, on his view, would give rise to absurdities if this interpretation were to be adopted.

65. The first was that, on this interpretation, not all enquiries into historic returns would be retrospectively treated as valid. He gave an example of a return received by HMRC on 1 February 2012 in respect of the 2010-11 tax year. If that return had been made in response to a notice under s8 TMA, it would be have been filed after the filing date for that tax year and so HMRC

would have until 30 April 2013 to open an enquiry into that return (s9A(2)(b)). If the return was not made in response to a notice within s8 TMA, it would now be treated by s12D as having been made pursuant to a "relevant notice" issued on the same date. As a result, the return would be treated as being made on or before the filing date and so an enquiry notice under s9A would have to be issued on or before 1 February 2012 in order to be valid (s9A(2)(a)). If HMRC had issued an enquiry notice on 30 April 2013, it would be treated as invalid because it was not issued within the 12 month enquiry period. He contrasted that position with a return for the 2010-11 tax year which was delivered on 31 January 2012 (i.e. on the normal filing date), where an enquiry notice would be treated as invalid if the enquiry was not opened on or before 31 January 2013. The effect was therefore to put taxpayers who filed their returns late (i.e. after the normal filing date for the relevant tax year) in a better position than those who filed their returns on or before the normal filing date.

66. Whilst in one sense this might be regarded as an anomaly, we do not regard it as an absurdity which calls into question the scope of the deeming provision. The deeming rule seeks to validate returns that have been made otherwise than in response to a notice under s8 TMA. It does so by treating the return as having been made pursuant to a notice which is treated as having been issued on the same day as the date on which the return was made (referred to as a "relevant notice"). We suspect that it adopts this mechanism because it is designed primarily to deal with the case of truly "voluntary returns" – namely those which have been made by taxpayers who have not received any form of notice from HMRC (whether valid or defective) – and not cases where a taxpayer has received a notice of some sort from HMRC but it failed to meet the requirements of the relevant section (here, s8 TMA).

67. That having been said, the scope of s12D is clearly not limited to voluntary returns. It applies in any case where "no notice under the relevant section" has been given to the taxpayer. That wording is apt to apply to cases where HMRC has issued some form notice which fails to meet the requirements of the relevant section (in this case, s8 TMA) as well as cases where HMRC has issued no form of notice at all. The parties have accepted – on the assumption that an automated notice is not a notice under s8 TMA – that s12D will apply to returns made in response to automated notices.

68. For taxpayers who file truly voluntary returns, it would clearly have been inappropriate retrospectively to apply the extended period for the issue of an enquiry notice in s9A(2)(b) TMA as they would have received no communication from HMRC which would prompt them to make a return. The fact that some taxpayers who may have filed returns in response to notices which did not meet the requirements of the relevant section may as a result benefit from a delay by HMRC to issue an enquiry notice does not to our minds give rise to an injustice or absurdity sufficient to demonstrate that the statutory fiction should not be extended to s9A. It simply puts those taxpayers in the same position as those who have filed truly voluntary returns. If, on the other hand we were to interpret s12D so as to limit its application to cases where the deeming rule operates to the benefit of the taxpayer – as suggested by Mr Gordon – that would, in our view, undermine the purpose of the provision, which, as we have said, is to give effect to HMRC's longstanding practice of accepting voluntary returns.

69. The issue does not arise in Dr Allam's case. His returns were filed before the normal filing date for the relevant tax years.

> 70. The second issue raised by Mr Gordon was that the transitional rules in s87(4) FA 2019 would give rise to capricious results.
>
> 71. In his skeleton argument, Mr Gordon gave examples of two sets of circumstances in which our preferred interpretation would, in his submission, give rise to such results. At the hearing, however, his submissions focussed on one example.
>
> 72. In summary, Mr Gordon says that if the statutory fiction in s12D TMA is extended to s9A TMA there would have been a "perverse incentive" on HMRC to keep enquiries open until after 29 October 2018. This argument assumes that relevant HMRC staff may have been aware in advance of the introduction of s12D TMA and would have taken steps to defer the closure of open enquiries so as to deprive the taxpayer of the opportunity to make an appeal against a decision in a closure notice or an application for judicial review in respect of such a decision (and so prevent taxpayers from relying upon the transitional rule in s87(4) FA 2019).
>
> 73. We reject this submission. There is no evidence that relevant HMRC staff were made aware of the possible introduction of s12D TMA. The transitional rule preserves the ability of taxpayers to rely upon an argument that a relevant return was not made under s8 TMA because it was a voluntary return or because it was made in response to a notice which did not meet the requirements of s8 TMA in cases where the argument was made as a ground of appeal or a ground for judicial review on or before the date on which the introduction of s12 TMA was announced in the Budget. That seems to us to be an equitable approach.
>
> 74. A third issue to which Mr Gordon refers is that our preferred interpretation of s12D TMA renders s87(5)-(8) FA 2019 nugatory.
>
> 75. Sub-sections (5) to (8) of s87 FA 2019 contain powers for the Treasury to make regulations to amend various provisions in tax legislation or s12D TMA itself in connection with the introduction of digital reporting requirements. In our view, the provisions are not relevant to the matters under appeal. We reject this submission.
>
> 76. For these reasons, in our view, on a proper construction of s12D TMA and s87(3) FA 2019, even if the returns made by Dr Allam for the 2011-12 tax year and the 2013-14 tax year were not made in response to a notice under s8 TMA , the deeming rule in s12D should apply to treat those returns made in response to a "relevant notice" and so as made under s8 TMA for the purposes of s9A TMA .
>
> 77. It follows that, even if the Upper Tribunal had dismissed HMRC's appeal in *Rogers and Shaw*, we would have reached the conclusion that the relevant enquiry notices and the closure notices issued at the completion of those enquiries should be regarded as valid. We would have dismissed this ground of appeal."

70. I have cited extensively from the decision of the Tribunal in *Allam* above for the simple reason that I completely agree with this reasoning.

71. Mr Gordon (unsurprisingly) criticised this decision as not having addressed what he said was the key point as to how a s9A notice can be deemed to have been given in the absence of any express deeming provision (compared to what he described as the careful deeming of earlier stages). I disagree. The decision in *Allam* is carefully reasoned. The deeming of earlier stages (ie the language in s12D(2) which treats a relevant notice as having been given and the return as having been delivered in pursuance of that notice) was required

to set up the position that there was a valid s8 notice and a return delivered in time in response to that notice. Thereafter, nothing further needed to be said – the statute had deemed there to be a return delivered for the relevant year of assessment, and the consequences set out elsewhere in the Taxes Acts would then apply accordingly having regard to the principles set out in *Marshall v Kerr*, as explained in *Allam*. There is no need for the statute to go further than this.

72. Furthermore, there is no concern with the legislation being retrospective in this respect. In *R (on application of APVCO 19 Ltd) v HMRC* [2015] EWCA Civ 648 the Court of Appeal concluded that legislative changes relating to SDLT had not deprived the appellants of any possessions for the purposes of article 1 of protocol 1 ("A1P1") of the European Convention on Human Rights. It was acknowledged that unpaid tax can be a possession within A1P1, but being deprived of an argument that unpaid tax is due is not protected.

73. I am mindful that *Allam* was a substantive hearing in which the appellant needed to satisfy the Tribunal on the balance of probabilities, whereas I am concerned with HMRC needing to establish that the New Ground of Appeal has no reasonable prospect of success. The hurdle is undoubtedly different (and higher for HMRC in this instance).

74. In the present case, the returns were received by HMRC on 28 January 2013. The legislation was treated as in force on that date (s87(3)). On the assumption that the Appellants are correct that no valid s8 notice had been given, s12D applied (s12D(1)); the return is treated as having been delivered pursuant to a s8 notice given on that date (s12D(2)). Therefore, on 28 January 2013 and all subsequent dates, there was a return given in response to a valid s8 notice. The necessary consequence of this is that when the s9A notice of enquiry was subsequently given, that was a notice of enquiry into a return that was treated as having been made under s8. The s9A notice was therefore valid, so were the enquiry and the closure notice.

75. I have noted in the context of my consideration of *Rogers and Shaw* and s103 that some evidence is required. My conclusions on the interpretation and application of s12D are significant because no evidence of fact is required other than the agreed fact that the Appellants had delivered a return for a year of assessment and HMRC have treated the return as a return made and delivered in pursuance of a relevant notice.

76. Section 12D provides a complete answer to the New Ground of Appeal, which stands no reasonable prospect of success.

CONCLUSION

77. For the reasons given above, I am satisfied that the New Ground of Appeal stands no reasonable prospect of success. Accordingly, HMRC's application is allowed and the Appellants' appeals are struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

78. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 14 December 2020