PROCEDURE *– application for final or partial closure notice – nature of tribunal's jurisdiction – whether reasonable grounds for not giving a final closure notice – yes – whether power to direct a partial closure notice in respect of domicile where tax unknown – no – appeal against information notice – whether information reasonably required for enquiry – yes*

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07233

Appeal number: TC/2018/03290
TC/2019/02369

BETWEEN

THE EXECUTORS OF MRS R W LEVY **Applicant/ appellant**

-and-

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

TRIBUNAL: JUDGE ANDREW SCOTT

Sitting in public at Taylor House, London EC1 on 15 and 16 May 2019

Mr Keith Gordon, instructed by Cubism Law, for the applicant/ appellant

Mr Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This case relates to enquiries into self-assessment tax returns submitted by Mrs Levy for the tax years 2014-15 and 2015-16. Mrs Levy, who has since died in August 2018, had made a claim in those returns to be subject to the remittance basis.

2. The effect of making a claim to the remittance basis is that, in the case of income and gains arising to the taxpayer outside the United Kingdom, the taxpayer is taxed on the income and gains only so far as amounts are remitted to the United Kingdom. That contrasts with a taxpayer who is unable to make a claim to the remittance basis. In that case the taxpayer is taxed on his or her worldwide income or gains on an arising basis: the fact that the income or gains are not remitted to the United Kingdom is of no relevance.

3. On 10 May 2018 an application was made on behalf of Mrs Levy seeking a closure notice in relation to the enquiries. As to the reasons for closing each enquiry, the application said this:

> "It has run on too long. Extensive information has been provided on the taxpayer's behalf and the enquiry is now being pursued in a vexatious fashion, solely with a view to unearthing a fact that HMRC might later seek to seize upon to assert an acquisition of a domicile of choice in the UK by the taxpayer."

4. At that time HMRC were still considering whether or not Mrs Levy had acquired a domicile of choice in England and Wales. Following the exchange of witness statements in relation to the application for the giving of the closure notice, HMRC did then reach a decision on the matter of Mrs Levy's domicile status, concluding in a letter of 29 January 2019 that, for the relevant tax years, she had been domiciled in England and Wales.

5. Nonetheless, the executors of Mrs Levy maintained the application for a closure notice and resisted the provision of information concerning income or gains arising outside the United Kingdom on the ground that it was of no relevance to HMRC as Mrs Levy had, in their view, been domiciled in the United States of America in the relevant tax years.

6. Consequently, HMRC issued an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 ("FA08") seeking the information. The notice also requested information for the tax year 2016-17 in relation to which HMRC have also opened an enquiry. HMRC are of the view that Mrs Levy was not entitled to make a claim for the remittance basis for that year. The application for the giving of a closure notice does not, however, extend to the enquiry in relation to the tax year 2016-17.

7. An appeal was brought against the information notice on 2 April 2019.

8. The solicitors acting on behalf of the taxpayer (Cubism Law) then notified the tribunal by emails sent on 18 April and 4 May 2019 that, if the application for a final closure notice were to be dismissed, the taxpayer wished, in the alternative, for the tribunal to direct that a partial closure notice be issued in respect of Mrs Levy's domicile status for the tax years 2014-15 and 2015-16. They referred to the decision of this tribunal in *Embiricos v HMRC* [2019] UKFTT 0236 in which it had been held that, in a case with facts similar to this one, the power to issue a partial closure notice in respect of Mr Embiricos's domicile existed despite the tax being unknown.

9. In the light of a forthcoming application to be made by HMRC seeking permission to bring an appeal against the *Embiricos* decision, HMRC invited the applicants to rethink their approach or agree to stay the partial closure notice issue pending the resolution of any appeal against the *Embiricos* decision. The taxpayer's solicitors pointed out that it would be

convenient to resolve all matters in one hearing, particularly as no new facts would be needed to determine the partial closure notice application and that Counsel for HMRC in this case had also acted in *Embiricos*.

10. I considered that it would be helpful to hear submissions relating to the application for the issue of a partial closure notice and, by the end of the hearing, HMRC had shifted their position to one where they were content for the partial closure notice issue to be decided. Mr Gordon, acting on behalf of the taxpayer, remained keen for all issues to be resolved. Having given the matter careful consideration, in my judgment, the right approach is to seek the final resolution of all issues and give a decision on the partial closure notice issue.

11. In the remainder of this decision I refer for simplicity to the executors of Mrs Levy as the applicant, whether or not in the particular context they are, strictly speaking, the appellant. In relevant contexts, the reference is also to be taken as referring to Mrs Levy herself.

WHETHER FINAL CLOSURE NOTICE SHOULD BE ISSUED

Relevant statutory provisions

12. In a case where a taxpayer is given a notice to file a personal tax return under section 8 of the Taxes Management Act 1970 ("TMA"), HMRC may open an enquiry into that return under section 9A(1) of that Act. An enquiry opened under that provision extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return. A personal tax return under section 8 must include a self-assessment (see the provision made by section 9 of TMA).

13. The application for the issue of a closure notice in relation to an enquiry is made under section 28A(4) of TMA. It is necessary to consider that section more fully in the context of partial closure notices. For present purposes it suffices to refer to subsections (2), (4) and (6) of that section, which are in the following terms:

> "(2) A partial or final closure notice must state the officer's conclusions and—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.
>
> (6) The tribunal shall give the direction applied for unless . . . satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period."

14. The applicant also appeals against the issue of a taxpayer notice under paragraph 1(1) of Schedule 36 to FA08. That sub-paragraph is in the following terms:

> "(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph."

15. Various expressions used in that sub-paragraph are defined elsewhere in Schedule 36. The expression "checking" is defined by paragraph 58 to include "carrying out an investigation or enquiry of any kind". The expression "tax" is defined by paragraph 63(1) to include, among other taxes, income tax and capital gains tax (see sub-paragraph (1)(a) and (b)). And paragraph 64 sets out what is meant by "tax position" but the details of the definition are not relevant to these proceedings.

16. Paragraph 29(1) confers a right on a taxpayer to whom a taxpayer notice has been given to appeal against the notice or any requirement in the notice (but the right of appeal does not apply if the tribunal has approved the giving of the notice – which is not the position in this case). Paragraph 32 contains provision about the procedure for appeals under Part 5 of Schedule 36 (and paragraph 29 is in that Part). Sub-paragraph (5) of paragraph 32 provides that, notwithstanding sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, a decision of the tribunal on an appeal under Part 5 of Schedule 36 is final.

Submissions made by the taxpayer

17. The main outcome for which Mr Gordon argued was that the tribunal should allow the appeal against the information notice and require HMRC to issue a final closure notice in relation to the enquiries. There were two strands to this.

18. The first was that, as a matter of construction of the relevant statutory provisions, the tribunal has the power, in effect, to determine the substantive domicile issue in these proceedings and the burden lies on HMRC to make out their case and they have failed to do so. Alternatively, the statutory provisions require HMRC to show that they have, as a minimum, a rational or arguable basis for their decided view on domicile and they have failed to demonstrate that. In either event, a failure by HMRC to make out their case as to Mrs Levy's domicile meant that it inevitably followed that there were no reasonable grounds for the enquiry to continue and the information was not reasonably required for the purposes of the enquiry.

19. The second was that the enquiry had simply run its course and, given the way in which it had been carried on so far, it was a disproportionate burden on the taxpayer to allow it to continue.

20. It is convenient to consider first whether Mr Gordon is right in his view that the tribunal can, and should, reach a decision on the merits of the substantive issue by reference to the evidence as adduced for the purposes of these proceedings or whether a more supervisory approach is called for.

Nature of tribunal's jurisdiction

21. Mr Gordon rested his argument in part on the fact that in *HMRC v Vodafone 2* [2006] EWCA Civ 1132 the Court of Appeal had held that a question of law could be determined in an application for a closure notice. As it was evident that the tribunal could determine issues of fact, there was no reason to think that it could not consider mixed issues of fact and law as well. The relevant statutory tests were entirely at large: there were no express limitations on what could be considered by the tribunal. Critically, it was - and this was undisputed - for HMRC to satisfy the tribunal as to whether there were reasonable grounds to continue with the enquiry. The provisions relating to information notices similarly put the burden on HMRC to demonstrate that the information was reasonably required for the purposes of the enquiry.

22. In *Vodafone 2* the Court of Appeal upheld the decision of the High Court (Mr Justice Park) that a question of law could be determined in an application for a closure notice under paragraph 33 of Schedule 18 to the Finance Act 1998 ("FA98") and that a reference could, therefore, be made to the Court of Justice of the European Communities (ECJ) to determine that issue.

23. In order to understand the relevance of the statutory provisions considered in *Vodafone 2* (a case concerning corporation tax) to the present proceedings, it should be noted that the provisions of paragraph 33 of Schedule 18 to FA98 are in all material respects to the same effect as the provisions of section 28A(4) to (6) of TMA.

24. The case of *Vodafone 2* concerned the compatibility of the United Kingdom's rules on controlled foreign companies (CFCs) with European law. The Inland Revenue had opened an enquiry into the company's corporation tax return on the grounds that a Luxembourg company was a CFC of Vodafone and the profits of the Luxembourg company should have been apportioned to it. Vodafone resisted the provision of information to the Inland Revenue unless formally requested to do so. The compatibility of the United Kindgom's CFC provisions had already been referred to the European Court in another case (*Cadbury Schweppes*) and the company's view was that the CFC provisions were unenforceable.

25. The company applied to the Special Commissioners for the issue of a closure notice under paragraph 33 of Schedule 18 to FA98. The question arose in the course of the proceedings as to whether the Commissioners had power to determine a question of law and, in particular, whether they could refer a matter to the ECJ. The Inland Revenue submitted that, for the purposes of applications for closure notices, all that mattered was their view as to the law or the reasonableness of their view.

26. The Special Commissioners disagreed. They decided to make a reference to the European Court immediately so that it could be heard together with the previous reference (*Cadbury Schweppes*). If the CFC provisions were unenforceable, there could be no reasonable grounds for the enquiry to continue.

27. The High Court agreed with the decision of the Commissioners. At [37] of its judgment Park J held:

> "If the reasonableness of the grounds for not issuing a closure notice depends on a question of law which the Commissioners can decide, surely the right course is for them to decide it. Or at the very least it must be open to them to decide it."

28. The mere fact that the issue might need to be referred to the ECJ for its resolution was an irrelevance. That was simply the mechanism for deciding the legal question. He considered that the result was not unreasonable, unworkable or disruptive. He dismissed a concern that applications under paragraph 33 of Schedule 18 to FA98 could be used to bring enquiries prematurely to an end. At [43] of his judgement he commented as follows:

> "Paragraph 33 is meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal. The Special Commissioners can, I believe, be relied upon to spot cases where the procedure is being abused and to give short shrift to applications in such cases."

29. The Inland Revenue appealed but the appeal was dismissed by the Court of Appeal. Lady Justice Arden (as she then was) gave a judgement with which Lord Justice Moore-Blick and Lord Justice Mummery agreed. At [18] Lady Justice Arden referred to the main point made by the Inland Revenue that there was no power under paragraph 33 of Schedule 18 to FA98 for the Commissioners to "determine incidental questions of law". Lady Justice Arden continued:

> "[19] If the Revenue are right on this point, it would mean that the Commissioners' role under paragraph 33 is to be satisfied that the Revenue have reasonable grounds for not giving a closure notice within a specified period so that they can continue with their factual investigation. But there are

> no words of limitation in paragraph 33 which would serve to restrict the Commissioners' role to that of scrutinising the factual investigation being performed by the Revenue.
>
> [...]
>
> [21] Paragraph 33 on its face, however, would seem to confer on the Commissioners a power to do anything that the Commissioners reasonably consider necessary to enable them to be satisfied as to the matters required by that paragraph. That interpretation also promotes the effectiveness of paragraph 33, which it may be presumed Parliament wished to achieve. On that basis it is legitimate to put the question in the following way, that is to ask whether there is anything in the wording of paragraph 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice. [...]
>
> [22] [...] it is difficult to see why Parliament should wish to limit the protection given to taxpayers by paragraph 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage. It would mean that the taxpayer would have to resort to judicial review."

30. Lady Justice Arden then considered the quite different question as to the exercise of the Commissioners' power to determine incidental questions of law. On that question she held as follows at [25]:

> "There are likely to be cases where it is not possible to say that a point of law raised by a taxpayer needs to be, or can be, determined before a closure direction application under paragraph 33 is determined. It will be a matter that the Commissioners will have to consider in the light of the facts surrounding the particular application before them. [...] In the present case the Commissioners took into account that the burden on the taxpayer of investigating the facts would be considerable (paragraph 113 of the decision of the Commissioners). I agree that that is a relevant consideration in a decision whether to determine a preliminary point of law before dealing with a paragraph 33 application."

31. Lady Justice Arden also dismissed at [26] an argument by the Inland Revenue to the effect that jurisdiction under paragraph 33 of Schedule 18 to FA98 to determine incidental points of law would render otiose paragraph 31A of that Schedule (a mechanism for both parties to agree to submit questions to the Special Commissioners for determination):

> "The two provisions do not cover the same ground. A point of law for the purposes of paragraph 33 would have in general to be so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way. This will not always be the case under paragraph 31A."

32. In my view, a number of propositions can be taken from the Court of Appeal's decision in *Vodafone 2*, namely:

> (1) paragraph 33 of Schedule 18 to FA98 has no words of limitation relating to the way in which the tribunal should approach the question as to whether HMRC have reasonable grounds to continue with an enquiry: if it is necessary to determine a question of law, the tribunal is free to do so;

(2) that operates in conjunction with "situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact": the same protection to the taxpayer to seek a closure notice in relation to those situations should apply to ones where a view of the law is unfounded;

(3) the facts surrounding the particular application before the tribunal will have to be considered and a relevant consideration will be whether determining a point of law would mean that a considerable burden on the taxpayer of investigating facts would be lifted; and

(4) a point of law that falls to be determined in the proceedings for the application would, in general, have to be so fundamental as to be capable of bringing the enquiry to an end.

33. Applying those propositions to the circumstances of this case, none of them, in my judgment, provide much assistance to Mr Gordon. Indeed, the way in which the Court of Appeal approached the enquiry in the normal case as one where HMRC were conducting enquiries into facts that were "unfounded" might be said to point in the opposite direction, suggesting, as it does, that the relevant test of reasonableness is set at a level where the facts show an "unfounded" investigation. Moreover, the ratio of the case is, clearly, addressed to the issue as to whether the tribunal had jurisdiction to determine points of law and, for that purpose, to make references to the Luxembourg court for a preliminary ruling. That is evident from the detailed reasoning of the Court of Appeal but is also clearly stated at [2] of their judgment. In these proceedings, there is no material dispute about the law. The dispute is about the application of the law to the particular facts of the case. And *Vodafone 2* was not concerned with such a case.

34. In making his submissions on the nature of the tribunal's jurisdiction Mr Gordon in fact concentrated more on the decision of this tribunal in *Eastern Power Networks plc and others v HMRC* [2017] UKFTT 0494 (TC), which had considered and applied the *Vodafone 2* test. An appeal against that decision was heard by the Upper Tribunal in February 2019 and, as at the date of this hearing, the Upper Tribunal's disposition of the appeal was awaited.

35. In that case, the applicants sought a closure notice in relation to enquiries focused on claims to consortium relief. The issue was whether consortium relief was available and, if it was, its amount [40]. HMRC sought information that, in their view, was reasonably required for the purposes of, among other statutory provisions, sections 144 and 146B of the Corporation Tax Act 2010. Of relevance to the issues was the construction of the so-called December Voting Agreement (the DVA), which, in the view of the applicants but not of HMRC, was a question of law and not fact [110]. The applicants submitted that the provision of further information on the reasons for entering into the DVA were irrelevant to its legal effect.

36. The tribunal held at [189] that "the factual context is sufficiently well established to enable the legislation to be applied to it". At [190] the tribunal identified as the "crux of this matter" whether "the legal point or points are fundamental to the determination of the enquiry" in the sense that they would "enable me to conclude either that HMRC did have reasonable grounds for continuing the enquiry, or alternatively, that they did not".

37. In the case of section 144 of the Corporation Tax Act 2010, the tribunal commented at [218] that "the provisions [...], on their face, require a mechanical application of a series of tests to a series of prescribed relationships between the link company and the claimant company". As the tribunal considered that the DVA was a question of law [219], the tribunal concluded that HMRC did not reasonably require further information about it. However, as HMRC had a settled view on the meaning of the section and the "proper place for that view ...

to be tested is in any substantive appeal", the tribunal declined to decide the issue in order to dispose of the closure notice application.

38. The tribunal took a different view, however, in relation to section 146B of the Corporation Tax Act 2010. The tribunal concluded that whether or not a set of arrangements was within subsection (3) of that section was "fundamental to the enquiry" (because the tribunal had determined that there were no other reasonable grounds for its being continued). In the applicants' view, purpose was not relevant to that issue; but HMRC were of the opposite view.

39. Accordingly, the tribunal held that if the tribunal decided the question of law, it would determine the application for the closure notice. At [233] it then concluded "that this is one of those rare cases where the Tribunal not only has jurisdiction to decide the law, but can and should do so".

40. The tribunal proceeded to reach the conclusion that section 146B of the Corporation Tax Act 2010 did not apply to the arrangements. Accordingly, it held that HMRC could not reasonably require information about the purposes of the arrangements and could not rely on the need for that information to oppose the issuing of a closure notice.

41. There is, in my judgment, nothing in the decision of this tribunal in *Eastern Power Networks* that assists Mr Gordon. If it is of any relevance to these proceedings, it is simply as confirmation that deciding points of law in the context of an application for a closure notice is a rarity. But, as I note above, what is in dispute in this case is not the law but the application of the law to the facts. It is also of note that in *Eastern Power Networks* [189] "the factual context is sufficiently well established to enable the legislation to be applied to it" (see [189]). That is not the case here.

42. Mr Gordon also drew my attention to the decision of this tribunal in *Michael Hegarty & Flora Hegarty v HMRC* [2018] UKFTT 774 (TC). In that case the tribunal had to consider whether information could be reasonably required by an information notice in a case where it could be used only if the discovery provisions of section 29(4) of TMA were engaged, in particular that deliberate conduct on the part of the taxpayer could be established. However, there was no evidence of deliberate conduct. The tribunal considered that in such a case the provision of the information would be "futile as nothing could be done with the information the supply of which is compelled by the notice" [152] and at [155] that "it cannot be reasonable to make a futile enquiry" [155].

43. If indeed the facts are such that a line of enquiry is futile in the sense that there is no possibility of a person's liability to tax being affected by the enquiry, then I would agree that HMRC would not have reasonable grounds for continuing with the enquiry. That is, on analysis, no different from the position in *Vodafone 2*. If the CFC provisions fell to be disapplied, there was no legal basis on which Vodafone could be subject to tax on the profits of an overseas group company. This is simply a question of asking, in a particular case, whether there are reasonable grounds for an enquiry to continue or whether information is reasonably required for the purposes of the enquiry. The key question is what is "reasonable".

44. What is reasonable will, in my judgment, depend on the stage and nature of the enquiry. At the beginning of a fact-finding investigation, HMRC may know relatively little. It is inherent in the context of an enquiry or an investigation that it will not always be known where it will lead to or whether an emerging fact will affect an analysis already adopted. In an enquiry it will often be the case that the well-known saying of Mr Gradgrind ("Facts alone are wanted in life") will have greater salience than it might have in the classroom. A tax analysis can shift, and can shift radically, with small variations in facts. In *WHA Ltd v HMRC* [2013] UKSC 24 Lord Reid said at [26] that "decisions about the application of the VAT system are highly

dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another." Although that was a comment made about VAT, it seems to me that much the same can be said about income tax or corporation tax. In any event, it can certainly be said about a domicile enquiry.

45. That does not mean, however, that absolutely anything goes. It is, in my judgment, obvious that, uncertain as the facts may be and uncertain as a possible legal analysis may be in relation to those (uncertain) facts, the statutory provisions relating to enquiries, and connected flows of information for the purposes of enquiries, do not confer on HMRC a free hand to enquire into anything and everything that a taxpayer has done (or, indeed, omitted to have done). There has to be, at the minimum, the possibility of the enquiry leading to more or less tax becoming payable by the taxpayer. That was the very reason why the CFC issue was so critical in the *Vodafone 2* case.

46. That is, though, simply to state that HMRC must have reasonable grounds for continuing with the enquiry. In this case, I would accept that, in determining whether that is so, it is relevant to consider the reasonableness of decisions that HMRC have already made that will, in turn, inexorably lead to further questions that are *wholly* premised on the previous decisions.

47. So, in relation to these proceedings, I would agree with Mr Gordon that, in order to determine whether there are reasonable grounds for the enquiry to continue, there will be occasions (and this is one) where it is appropriate to consider whether the previous HMRC decision – in this case the decision as to Mrs Levy's domicile – is one for which HMRC have reasonable grounds.

48. But the question whether HMRC have reasonable grounds for their view as to Mrs Levy's domicile is a very different question from (in effect) determining the merits of the substantive issue. In my judgement, in relation to the domicile issue at this stage of the enquiry, the only thing that HMRC need to show is that they have a genuine case that, realistically, has some merit.

49. In adopting that approach, I have considered it helpful to consider, by analogy, the case of *Pumhaven Ltd v Williams (Inspector of Taxes*) [2002] EWHC 2237 (Ch) in which the High Court (Park J) considered the postponement provisions contained in section 55 of TMA. That section provides for the payment of a disputed amount of tax in an appeal to be postponed pending the determination of the appeal. Subsection (6) of that section provides that the amount postponed "shall be the amount (if any) in which it appears ... that there are reasonable grounds for believing that the appellant is overcharged to tax". Park J considered what was meant by 'reasonable grounds'. As to that, he said this:

> "[10] [...] I agree with Mr Prosser that the phrase 'reasonable grounds for believing that the appellant is overcharged to tax', taken as a whole, does not require the commissioners to conduct a mini-trial of what will be the main appeal.
>
> [11] [...] It is always dangerous to paraphrase statutory words, but I think that the sense of the subsection is that the commissioners do not have to decide, or form a view on the balance of probabilities, whether the taxpayer has been overcharged. They have to form a view on whether the taxpayer has reasonable grounds for arguing that he (or it) has been overcharged.
>
> [24] [...] [Mr Prosser] believed, rightly in my view, that the hearings of postponement applications ought to be short and ought not to go into the arguments in depth. What is required is to say enough to show that the argument is a genuine one and could realistically have some merit.

> [39] [...] There is scope for an argument not to be palpable nonsense but still to stop short of affording reasonable grounds for believing that the taxpayer may have been overcharged."

50. That decision was not addressed, of course, to the meaning of "reasonable grounds" in section 28A(2) of TMA but I do consider that it supports my analysis. As with postponement applications, section 28A(2) cannot, in my view, be read as requiring the tribunal to decide on the balance of probabilities whether the conclusions in the closure notice as to domicile are met. A more supervisory approach is called for.

51. In my judgment, a similar analysis is also applicable to information notices given under paragraph 1 of Schedule 36 to FA08. Whether the information is "reasonably required" for the purposes of an enquiry at a stage where a concluded decision as to an issue has been reached by HMRC will, in appropriate cases, require the tribunal to consider whether the concluded decision is a genuine one that, realistically, can be said to have some merit. In the case of notices given under paragraph 1 of Schedule 36 to FA08, it is, in my judgement, relevant to consider the fact that the determination by the tribunal of an appeal against the notice is to be "final and conclusive" (see paragraph 32(5) of Schedule 36 to FA08). The absence of further appeal rights is consistent with the nature of the statutory question to be determined by the tribunal, namely a supervisory and not a merits-based one.

52. My analysis is supported by the reasoning of the Court of Appeal in *R (on the application of Derrin Brother Properties Ltd and others) v HMRC* [2016] EWCA Civ 15 and the reasoning of Mrs Justice Simler in the High Court's decision in *Alexander Kotton v HMRC and others* [2019] EWHC 1327 (Admin). Both cases concerned a judicial review of third party notices under Schedule 36 to FA08 given by HMRC to assist the Australian tax authorities (in the case of *Derrin*) and the Swedish tax authorities (in the case of *Kotton*).

53. In *Derrin* the Court of Appeal analysed, in general terms, the purpose of Schedule 36 to FA08. As the case was concerned with complex avoidance arrangements entered into by overseas persons, the court focused on cases of avoidance or evasion (something of no relevance to this case). At [69] of the judgment of Sir Terence Etherton (with which Lord Justice Davis and Lord Justice Vos agreed) it was noted that:

> "The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise."

54. Sir Terence Etherton went on to note at [69] that "Parliament has deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve".

55. It seems to me that, in the context of taxpayer notices given under paragraph 1 of Schedule 36 to FA08, the purpose of the statutory scheme is also to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for taxpayers to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. Similarly, there is no right of appeal against the taxpayer notice: this represents a deliberate choice by Parliament, in the words of Sir Terence Etherton, to choose "a judicial monitoring scheme rather than a system of adversarial appeals".

56. In *Kotton* it was submitted by the appelleant that, if documents could have no relevance to the underlying tax issue relevant to the investigation by the Swedish tax authorities (the residence of the claimant in Sweden), the documents could not be "reasonably required" for the purpose of checking the claimant's tax position [55(i)]. It was also submitted that it was not

reasonable for those authorities to have opened an enquiry into the claimant's residence status in the first place and it therefore followed that the information could not be reasonably required for the purpose of checking whether the claimant was resident in Sweden [55(iii)] (because unless the enquiry was reasonable any documents required for it could not be reasonably required). It is to be noted that these submissions share certain similarities with those put forward by Mr Gordon in this case.

57. Mrs Justice Simler rejected those submissions. She observed at [59] that:

> "The Schedule 36 scheme differentiates between the recipient of a third party notice and the taxpayer whose tax position is being checked but common to the treatment of each of them is the limited scope for objecting to a third party notice. There is no appeal on the merits and it is not open to the taxpayer or third party recipient to challenge a notice on its merits."

58. At [60], she noted that the statutory scheme "is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued" and went on to observe that:

> "provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax."

59. And at [62] she stressed the fact that the test was whether the HMRC officer was justified in concluding that the information or documents were reasonably required for checking the tax position of the taxpayer before going on to hold that:

> "Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation."

60. It is also necessary to consider whether Mr Gordon's construction of the statutory rules would produce an efficient and effective tax administration system in a way that Parliament intended.

61. Mr Purnell submitted that, if Mr Gordon were right, the result would be that this tribunal would determine, at an interlocutory stage, whether Mrs Levy was entitled to make a claim for the remittance basis but that such a determination could not bind another tribunal determining the underlying substantive tax issue. In addition, on Mr Gordon's case, it would follow that the tax calculations would have to be done on a 'best judgment' basis. HMRC could seek to impose as high a charge as a reasonable estimate would allow and then put the burden on the taxpayer to displace the estimate. But, equally, it might underestimate the tax, which might result in the taxpayer disputing the principle but accepting the quantum. Either which way it produced a system that was not one intended by Parliament.

62. I agree with Mr Purnell that the results he describes are not what Parliament has intended.

63. It seems to have been accepted by both Mr Purnell and Mr Gordon that, as Mr Gordon had articulated his submission, any decision on the closure notice application would not bind a future tribunal that was determining an appeal against a closure notice. That would be the case despite the possibility that (1) the tribunal hearing the closure notice application might have heard full argument on the law, and (2) the tribunal might have made full findings on the facts on the basis of each party providing full evidence. Before turning to the case law on which this view appears to have been based, I would, however, observe that matters are not necessarily

as simple as that. There could be appeals on points of law on matters arising from the closure notice application (including, of course, appeals based on *Edwards v Bairstow* grounds), and the judgments on those appeals would bind this tribunal.

64. The view that the later tribunal would have a free hand rests, I think, on the so-called *Caffoor* principle following the decision of the Privy Council in *Caffoor v Income Tax Commissioner* [1961] AC 584. That case concerned the application of issue estoppel in the particular context of the assessment to tax for the year 1949/50 of the income of a trust established in Ceylon. For issue estoppel to arise the same question must previously have been determined by a judicial decision that was a final decision of a court of competent jurisdiction between the same parties (or their privies): see [152] of *Littlewoods Retail Limited and others v HMRC* [2014] EWHC 868 (Ch).

65. In *Cafoor* the issue was whether the determination for the year 1949/50 conclusively determined assessments for later years where the question was the same as that determined for 1949/50, namely whether a statutory exemption applied. The Privy Council determined that it did not have that effect: what was determined was the correct amount of tax for the year 1949/50 and it was only the assessment for that year (and no others) that had been determined. As was noted by Henderson J (as he then was) at [174] in *Littlewoods*:

> "it is not so easy to explain why an estoppel is still incapable of arising even where, as part of its determination for the earlier year, the court or tribunal has decided a question, whether of fact or law, which is in all material respects identical to one which arises in the subsequent year".

66. Nonetheless, the *Cafoor* principle remains good law and I would respectfully agree with the further comments by Henderson J as to the "graphic illustration" of its reach in the case of *King v Walden* [2001] STC 822 and how Jacob J "evidently" found its application in that case to be "startling" [178] and [180]. In that case, Mr King argued that an earlier decision upholding an assessment on the grounds of wilful neglect or default was not binding in relation to associated determinations of interest and penalties. Jacob J agreed with Mr King that he could contest (again) the question of wilful default or neglect for the relevant years and also contest (again) the amounts of tax held on which the interest ran. It was only the amount of income assessable for the years in question that could not be contested.

67. As Henderson J recognised at [203] of *Littlewoods*, the *Cafoor* principle is ultimately a principle of statutory interpretation. In the case before this tribunal the issue is simply what is meant by HMRC having reasonable grounds to resist what, in their view, would be a premature close to an enquiry or whether the information that they seek is reasonably required for the purposes of the enquiry. A construction that positively invites the determination of what, in substance, are the same issues in multiple tribunal proceedings is, in my judgment, plainly not within the statutory system enacted by Parliament. In my view, the words of Lord Bingham in *Johnson v Gore* [2002] AC 1 in a case dealing with abuse of process (which is, analytically, a close relative of issue estoppel) are apt:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

68. In addition, the suggestion that Parliament has established a system which, by reference to statutory provisions that are by definition focused on the investigation of a case by HMRC, leads to cases being litigated on inferences and estimates where the taxpayer is in full

possession of the facts is a startling one and is, in my judgment, inconsistent with long-standing features of the tax system.

69. In a decision of this tribunal in the case of *Steven Price v HMRC* [2011] UKFTT 264 (TC Judge Mosedale put things in these terms:

> "10. [...] HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts [...]
>
> 11. If Miss Brown were correct that HMRC have no reasonable grounds to refuse to issue a closure notice where they have not yet been provided with all the relevant information about the scheme [...] because they can make an assessment in any event, [..] [t]his would in effect compel HMRC to issue assessments based on far less than the full facts and be unable to obtain those unless and until HMRC obtained a disclosure order in proceedings."

70. I would respectfully agree with those sentiments.

Law relating to acquisition of domicile of choice

71. In order to understand the further submissions made by Mr Gordon it is necessary to summarise the relevant principles relating to the acquisition of a domicile of choice.

72. The core principles are set out in the 15th edition of *Dicey, Morris & Collins on The Conflict of Law* at Chapter 6, Section 2: B in rules 10 and 11 as follows:

> "Rule 10: Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise.
>
> Rule 11: Any circumstance which is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice in that country [...]."

73. The nature of the intended permanent residence was set out by Lord Westbury in *Udny v Udny* (1869) LR 1 Sc & D 44:

> "There must be a residence freely chosen, and not prescribed or dictated by external necessity, such as the duties of office, the demands of creditors, or relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

74. And in *Re Fuld's Estate* (No3) [1978] P 675 Scarman J (as he then was) said this:

> "If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, eg the end of his job, the intention required by law is lacking; but if he has in mind only a vague possibility, such as making a fortune ... or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law."

75. The requirement to consider any circumstance that is evidence of a person's residence or intention to reside in a country permanently or indefinitely includes declarations of intention by the person who is the subject of a domicile dispute (often referred to as "the propositus") but the weight to be given of such declarations will be variable. In that connection, *Dicey* records the present law in these terms:

> "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by carefully considering the persons to whom, the purposes for which, and the circumstances in which they are made and they must however be fortified and carried into effect by conduct and action consistent with the declared expressions."

76. HMRC says much the same in their guidance at RDRM22320 in a passage that seems to me to be an accurate assessment of the position:

> "Statements of intention have to be considered in the context of all the evidence relevant to establishing an individual's intentions. Mere statements are generally less important than actual conduct and may carry little weight if the statement does not correlate with actions taken."

77. In addition, it is clear that:

(1) the domicile of origin is said to be "more tenacious" than other forms of domicile ([33(i)] of *Kelly v Pyres* [2018] EWCA Civ 1368);

(2) the burden of proof is, in this case, on HMRC in seeking to establish that Mrs Levy has lost her domicile of origin; and

(3) the standard of proof is the ordinary civil standard but "cogent and clear" evidence is needed ([33(ii) of *Kelly*).

78. There was no real dispute between the parties about the relevant principles relating to the acquisition of a domicile of choice. What was the principal source of contention was the application of the relevant legal principles to the facts of the case. Not only were many facts in dispute but there was significant disagreement between the parties as to the proper inferences to be drawn from such facts as were agreed.

79. This seems to me to bear out the observation by Scarman J in *Re Fuld* that "a detailed analysis and assessment of facts" is required in each case. Scarman J amplified those thoughts as follows (in a passage immediately following the one quoted above):

> "But no clear line can be drawn; the ultimate decision in each case is one of fact – of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities."

80. In their own guidance HMRC make much the same points. Perhaps of most relevance to this case is what is said at RDRM22320:

> "A wide range of evidence has to be examined in evaluating intention. No single act or circumstance is determinative; all facts, including apparently trivial ones, have to be considered. Factors vary in significance in different areas and within the factual context of any given case. [...] All facts have to be taken into account and should be taken together."

Findings of fact

81. I was provided with a bundle of documents prepared by HMRC as well as one prepared by Cubism Law, who were solicitors acting for the applicant. The main difference between the two is that the Cubism Law bundle included further information in relation to complaints made to HMRC about the conduct of two of their officers. I deal with that further information at [100] to [109] below.

82. Mr Archer, an officer of HMRC, had given two separate witness statements and also gave oral evidence. He was cross-examined by Mr Gordon. Mr Dempsey of Cubism Law had given

two separate witness statements. He also gave oral evidence on behalf of the applicant relating to Mrs Levy's cognitive ability. His evidence was not challenged.

83. In addition to Cubism Law, Mrs Levy had employed the services of Expatax Limited as her tax agent.

84. I make the following findings of fact in relation to the time leading up to the application of the closure notice to the tribunal in May 2018:

(1) Mrs Roxanne Levy was born in the United States of America in 1937 and remained a US citizen until her death on 19 August 2018;

(2) she moved to London on 1 January 1973 to live with Mr Lenonard Rosoman, who was her partner at the time and whom she married in 1994;

(3) Mr Rosoman died on 21 February 2012;

(4) Mrs Levy had a residence in London from 1973 until her death (a period of 45 years);

(5) on 22 January 2016 Mrs Levy submitted a self-assessment return for the tax year 2014-15 in which she stated that she was resident in the United Kingdom (and had been resident there in at least 12 of the preceding 14 tax years) and in which she made a claim for the remittance basis as a result of having a domicile outside the United Kingdom;

(6) HMRC opened an enquiry into that return on 13 December 2016 informing Mrs Levy that the focus would be on her domicile status seeking information on it by 17 January 2017;

(7) the deadline for the provision of that information was then extended, at the request of Expatax Limited, to 15 February 2017 and then further extended to 28 February 2017;

(8) in the meantime, on 24 January 2017 Mrs Levy had submitted a self-assessment return for the tax year 2015-16 in which she stated that she was resident in the United Kingdom (and had been resident there in at least 17 of the preceding 20 tax years) and in which she made a claim for the remittance basis as a result of having a domicile outside the United Kingdom;

(9) HMRC also opened an enquiry into that return on 12 December 2017 informing Mrs Levy that HMRC were checking her domicile status;

(10) as there had been no substantive response (by the extended deadline of 28 February 2017) to the request for information made in the letter of 13 December 2016, an information notice was issued by HMRC under paragraph 1 of Schedule 36 to FA08 on 1 March 2017 requiring information to be given to HMRC by 10 April 2017 relating to the possibility that Mrs Levy had acquired a domicile under the law of England and Wales as a domicile of choice;

(11) the information notice of 1 March 2017 referred in its Schedule to information and explanations about "your client";

(12) Expatax responded to that notice, on behalf of Mrs Levy, on 31 March 2017 answering that, as Mrs Levy had no clients, the response to each of the requests was "not applicable";

(13) as a result of that response and recognising that, strictly speaking, it was a full response to the notice, a further information notice was issued by HMRC on 19 April 2017 correcting that mistake but seeking the same substantive information;

(14) a response to that notice was provided by Expatax, who were acting on behalf of Mrs Levy, on 23 May 2017;

(15) HMRC then wrote to Expatax on 19 July 2017 seeking further information by 28 August 2017 and Expatax sought (by a letter dated 23 August 2017) an extension to 30 September 2017;

(16) a further information notice was issued by HMRC under paragraph 1 of Schedule 36 to FA08 on 19 September 2017 (which did not refer to the requested extension);

(17) Expatax responded substantively to that information notice on 18 October 2017 concluding with the following suggestion:

> "We would suggest that, this correspondence having gone on over many months ... the time has now arrived ... for a closure notice to be issued, and we invite you to take that step. We would suggest that 30 November 2017 would be an appropriate timescale within which HMRC could consider and issue a closure notice.";

(18) HMRC wrote to Expatax on 19 December 2017 seeking further information by 16 February 2018 and the letter:

> (a) acknowledged the wide-ranging nature of the enquiry noting, in particular, that questions regarding Mrs Levy's health, healthcare and mobility "will be intrusive and in more depth than a more 'routine/standard' HMRC enquiry" but that "the very nature of domicile enquiries means that more personal detail and information is required to enable us to arrive at the correct decision", and
>
> (b) recorded HMRC's view that Expatax's response of 18 October 2017 was the first time that they considered HMRC had been provided with sufficient detail to progress the enquiry (with the further questions in the letter of 19 December 2017 aimed at doing just that – progressing the enquiry further);

(19) Expatax responded in a letter of 4 January 2018 suggesting that (instead of a response by 16 February 2018) a more reasonable target for responding would be 16 March 2018; and

(20) Expatax then handed over the responsibility of handling the HMRC enquiry to Cubism Law, who responded substantively to HMRC's letter in a letter of 5 March 2018, which ended:

> "The time for closure has come. Please issue closure notices within 21 days, failing which the relevant application will be made to the Tribunal."

85. As mentioned above, Cubism Law did then apply to the tribunal for a closure notice on 10 May 2018.

86. After the application was made to the tribunal for a closure notice, Mr Archer wrote on 11 October 2018 to Mr Dempsey (Cubism Law) explaining why he considered that he was not yet in a position to come to a conclusion on Mrs Levy's domicile position.

87. For the purposes of the closure notice application Mr Archer gave a witness statement on 1 November 2018 in which he re-iterated his view that he needed more information. His witness statement set out information which, in his view, pointed for or against:

(1) a conclusion that Mrs Levy had formed an intention to remain permanently or indefinitely in the United Kingdom; and

(2) a conclusion that she had a clearly foreseen and reasonably anticipated contingency for leaving the United Kingdom but was prevented from doing so by factors outside her control, namely her health.

88. Among the information considered by Mr Archer was information relating to:

(1) the family and social network of Mrs Archer in the USA and in the United Kingdom, including information relating to the residence and citizenship of Mr Rosoman;

(2) other connections to the USA such as the time spent by Mrs Levy and Mr Rosoman in the USA, particularly in Long Island where Mr Rosoman had painted;

(3) the fact that Mrs Levy was a citizen of USA and had not applied for citizenship of any other country;

(4) travel of Mrs Levy to the USA, including at times of her marriage to Mr Rosoman and times after his death;

(5) the real and other property owned, at the time of her death, by Mrs Levy in the United Kingdom and in the USA (including a permanent residence in London in which she had lived for 29 years, another nearby London property and an apartment in Florida, which was rented out on a seasonal basis);

(6) the arrangements for medical care in the United Kingdom and in the USA;

(7) the nature of Mrs Levy's illness and the extent to which it affected her ability to travel or her ability to make decisions; and

(8) the plans that Mrs Levy had to leave the United Kingdom and move to the USA and the extent to which those plans could be evidenced.

89. In addition, Mr Archer noted that, if he were to conclude that Mrs Levy was not entitled to the remittance basis, he would not have sufficient information to calculate the increased amount of tax (if any) due. In particular, at the time (1 November 2018), the only information that Mr Archer said he had that would assist was Mrs Levy's 2015 US tax return.

90. On 30 November 2018 Mr Dempsey wrote to HMRC. In addition to enclosing his witness statement, Mr Dempsey commented on some points made by Mr Archer in his witness statement and gave responses to the further questions asked by Mr Archer in his letter of 11 October 2018.

91. On 2 January 2019 Mr Dempsey emailed to Mr Archer copies of four powers of attorney that had been signed by Mrs Levy on 1 June 2012, 27 September 2012, 26 August 2016 and 6 March 2017. The powers of attorney were of two different types: (1) a health care proxy in the USA, and (2) a registered English Lasting Power of Attorney.

92. In consequence of the further information provided on 30 November 2018 and 2 January 2019 (including Mr Dempsey's witness statement), Mr Archer considered that he now had sufficient information to reach a decision on Mrs Levy's domicile. He explained in a letter of 29 January 2019 how he had reached the view that Mrs Levy had acquired a domicile of choice in England and Wales. Mr Archer referred to a number of matters, including:

(1) the free choice made by Mrs Levy to move to the United Kingdom in 1973 a place in which she lived for the remainder of her life;

(2) her marriage to a British citizen (Mr Rosoman) during which no details had been given of any contingency Mrs Levy had for leaving the United Kingdom;

(3) Mrs Levy's social connections in the United Kingdom; and

(4) a lack of evidence that Mrs Levy had a clearly foreseen and reasonably anticipated contingency to bring her residence in the United Kingdom to an end doubting, in particular, that her health had prevented her from leaving and pointing to the absence of concrete steps to move to her apartment in Florida (such as adapting the apartment to her needs).

93. At the end of Mr Archer's letter under the heading "Next steps" he said this:

> "Following the provision of the income and gains figures, and on the assumption that no further information or documents are required to check those figures, I will be in a position to issue the closure notices the executors have applied for within 40 days of receiving the figures. I would therefore ask that you withdraw your application to the FTT and provide the figures requested so that the matter may be brought to a close."

94. Mr Archer asked for those figures to be provided by 28 February 2019.

95. Mr Dempsey emailed HMRC on 27 February 2019 stating that the information would not be provided as it was not reasonably required as Mrs Levy was domiciled outside the United Kingdom.

96. HMRC responded to the email by the issue on 28 March 2019 of an information notice under paragraph 1 of Schedule 36 to FA08 seeking information on Mrs Levy's worldwide income and gains relevant to the tax years 2014-15, 2015-16 and 2016-17.

97. In a second witness statement dated 18 April 2019, Mr Archer explained why he was unable to make the amendments of the return necessary to give effect to his conclusion that Mrs Levy was not entitled to the remittance basis. After pointing out that Mrs Levy would, on that basis, be liable to tax on her worldwide income and gains (irrespective of whether amounts had been remitted to the United Kingdom), he said:

> "At this time the only information on Mrs Levy's worldwide income and gains I have is her US tax return for the period 1 January 2015 – 31 December 2015. There is also information contained in the IHT 400 which I received a copy of on 4 March 2019 which I can draw some inferences from. These documents do not provide sufficient information on the sources of Mrs Levy's income and gains, or sufficiently reliable information on the UK taxable amounts of the same, for me to make accurate amendments."

98. It was submitted on behalf of the applicant that the HMRC enquiry had been vexatious and the conduct of their officers had been unacceptable. So far as complaints in relation to the conduct of HMRC's staff are concerned, the applicant was keen for material to be placed before me in support of its application. Indeed, there was a separate bundle prepared by Cubism Law addressed to that very issue. I have considered that bundle and set out below the salient facts.

99. There were three elements to the general complaint made on behalf of the applicant about HMRC's conduct.

100. First, there was a complaint set out in a letter of 23 May 2017 from Expatax about a telephone call on 13 April 2017 between an HMRC officer (Mr Archer) and Expatax following its response of 31 March 2017 (see [84(12)] above) to the information notice sent at the beginning of that month. Among other things, the complaint focused on the officer's tone and manner. HMRC responded to that complaint on 25 July 2017: they did not uphold it. A second review was requested, and, in a letter of 13 November 2017, HMRC upheld the original finding that the complaint should not be upheld. In essence, HMRC were of the view that the letter of 31 March 2017 from Expatax was not helpful in moving the case forward and no criticism

could be made of Mr Archer's attempt to progress the enquiry. The different parties to the telephone call had different views on Mr Archer's tone and manner.

101. Second, there was a complaint made in a letter of 12 October 2017 about the conduct of another HMRC officer, Mr Foley. The information notice sent by HMRC on 19 September 2017 had not referred to the request for an extension. In addition, the notice had been sent to Mrs Levy when it was said that HMRC knew that she was an elderly lady and that Expatax were acting as her agent. Both these facts were said to breach the taxpayer's charter. The letter continued that "we regret to say that the conduct of this case gives indications of a pattern of bullying behaviour". HMRC responded to this complaint in a letter of 13 November 2017 explaining why they were unable to uphold the complaint. HMRC noted that there was no requirement to contact a taxpayer before issuing an information notice and that sending one to the taxpayer was in accordance with internal guidance even if an agent had been appointed.

102. Third, Cubism Law wrote to HMRC on 2 July 2018 bringing to their attention the results of Cubism Law's "web search" in relation to Mr Foley and, in particular, some offensive material contained on his Facebook page. The material was seemingly posted by Mr Foley in his private capacity. Cubism Law wanted to know why, by reference to that material, HMRC considered it appropriate to employ Mr Foley, noting that they intended to set out before the tribunal all aspects of HMRC's conduct towards Mrs Levy, including its deployment "of the likes of Mr Foley". The letter sought an explanation as to the manner in which HMRC had conducted the enquiry and why HMRC considered that it did not involve multiple breaches of the Equality Act and of HMRC's operational guidance in relation to disability. Finally, it put HMRC on notice of a possible claim against them by or on behalf of Mrs Levy for personal injury and ended with a reference to a desire to avoid the further costs of dealing with "this aggressive fishing expedition".

103. HMRC responded in full in a letter of 24 July 2018 dismissing the points made by Cubism Law. They recorded that they had carried out an extensive review in relation to Mr Foley and were not upholding that aspect of the complaint. In relation to the handling of the enquiry, they summarised the position in these terms: "the available evidence in this case shows me that we have sought to gain information from you and your client in line with our guidance and policies. I have found no evidence to support your view that we have breached the Equality Act 2010 or our own operational guidance".

104. That response did not satisfy Cubism Law. The following events ensued:

(1) Cubism Law wrote separate letters to each member of HMRC's Board on 4 September 2018 referencing their letter of 2 July and requesting that each member responds to "us in clear and simple "Yes" or "No" terms whether HMRC stands over the conduct indicated, and supports the named individual, a Mr Foley", seeking a substantive response by close of business on 28 September 2018;

(2) Cubism Law sent a chasing letter on 2 October 2018 to which HMRC responded on 29 October 2018 by saying that they had replied on 24 July 2018 about the conduct issue and "we have nothing further to add about it";

(3) various emails followed between Cubism Law and HMRC in which Cubism Law enquired whether the relevant correspondence had been put before the members of HMRC's Board resulting in a response from HMRC of 23 November 2018 saying that the matter had been dealt with through their complaints process and the correspondence had not been provided to each member of the Board;

(4) Cubism Law responded in an email of 5 December 2018 in which they noted that the "admission" to withhold correspondence from the Board "may have involved the

commission of offences under, inter alia, the Post Office Act" and asking for the email to be treated as a subject access request made on behalf of the executors of the estate of Mrs Levy;

(5) on 4 January 2019 Cubism Law then wrote to each member of HMRC's Board enclosing the 4 September letter and including at the beginning of the letter under the heading "Notice" the following (in bold):

> "**This letter and its enclosures were sent within two envelopes: an outer envelope addressed to the above-named and marked "Strictly Private & Confidential – for the Attention of the Named Addressee only", and within that an inner envelope in the same terms. If you have opened either envelope and you are not the above-named addressee, you should ensure that this letter and its enclosures are handed to the above-named addressee. Failure to do so may constitute commission of a criminal offence**."; and

(6) Sir Jonathan Thomson, Chief Executive and Permanent Secretary of HMRC, responded to this letter on 28 January 2019 in the following terms:

> "In our letter to you of 24 July 2018, we told you that we had looked into your concerns about a member of our staff under our complaints process, but we did not uphold your complaint.
>
> Since then, you have continued to request that the contents of your complaint are shown to our Board. We have reviewed your letter and the circumstances of the complaint. We have correctly followed our complaints process, and I agree with our decision. I have no further comment to make on the matter."

105. If Sir Jonathan Thomson was hoping that his statement that he had no further comment to make would put an end to the correspondence, he was very much mistaken. On 30 January 2019, Cubism Law responded by seeking an answer to the question it asked in their letter of 4 September 2018 about where HMRC stood in relation to Mr Foley's postings on Facebook.

106. HMRC responded on 8 February 2019 trying again: "we have given you our response to your correspondence about Mr Foley and we have nothing further to say on the matter" and "we will not correspond further with you about this matter". Again, Cubism Law emailed Mr Thompson on 11 February 2019 asking for a response to the "yes"/ "no" question asked in their letter of 4 September 2018. So far as I am aware, there has been no response to that email.

107. Cubism Law followed with a request to HMRC made on 12 March 2019 under the Freedom of Information Act 2000 seeking information on the annual salary and any bonus for Sir Jonathan Thomson, Mr Archer and Mr Foley.

108. An email was then addressed to Sir Jonathan Thomson on 11 April 2019 referring to a published report into HMRC's conduct in relation to an unconnected matter that had referred to his conduct as "disgraceful" and "shameful". Mr Dempsey continued:

> "That came as absolutely no surprise to me, as your conduct mirrors precisely your disgraceful conduct in this case.
>
> Mr Thomson, you should do the decent thing, and resign immediately."

109. A further email was then sent on 2 May 2019 to Sir Jonathan Thompson noting that there had been no response to the email of 11 April 2019 before going on to say:

> "Your conduct, including your refusal to say anything in response to direct questioning about the statements made by HMRC employee Vanian Foley, are likely to be referred to in open Court at a FTT hearing on 15/16 May, and therefore my email today amounts in effect to a final opportunity for you to

answer the question and to distance yourself and HMRC from Mr Foley's behaviour."

Discussion

110. I have dealt above with Mr Gordon's submission as to the nature of the tribunal's jurisdiction. In my judgment, the law requires me to assess, in circumstances where HMRC have reached a considered decision as to domicile that inevitably leads to further enquiries, whether HMRC's considered decision is a genuine one that, realistically, has some merit.

111. Mr Gordon submitted that there was no rational basis for HMRC's view on domicile. He rehearsed the arguments on behalf of the taxpayer already made to HMRC, for instance the fact that Mrs Levy had retained a US citizenship and passport and that, in Mr Gordon's submission, the only matter preventing her return to the USA was her second husband's illness and then her own illness, which was an external restraint that did not affect her contingency. I would, on the information before me, accept that this is a credible position for the taxpayer to adopt. But I also have no doubt at all that the position as put forward by HMRC and referred to above is a genuine one that, realistically, has some merit. I have set out above a number of factors that might lead to a conclusion that Mrs Levy had acquired a domicile of choice in England and Wales. Taken together, those factors disclose, in my judgment, a reasonable case for HMRC's view as to Mrs Levy's domicile.

112. As such, I would reject the first strand of Mr Gordon's submissions. The second strand related to the (alleged) disproportionate nature of the enquiry.

113. In making his submission that it would be a disproportionate burden on the taxpayer to allow the enquiry to continue, Mr Gordon drew the attention of the tribunal to cases where it had been argued that there had been a protracted enquiry or an enquiry had been subject to undue delay (for example, *Eclipse Film Partners No 35 LLP v HMRC* [2009] STC (SCD) 293 at [17]) or where proportionality and the burden on the taxpayer were in issue (for example, *Jade Palace Limited v HMRC* [2006] STC (SCD) 419 at [40]). In addition, Mr Gordon submitted that the longer the enquiry went on the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified (see, for example, *Eclipse Film Partners*, and *Jade Palace* at [42] to [43]). I would accept that, in determining whether HMRC have reasonable grounds to continue with the enquiry, these are, in principle, relevant matters to consider.

114. Those cases were referred to in a helpful summary of the relevant principles applicable to determining an application for the issue of a closure notice set out by Judge Sarah Falk (as she then was) at [15] of the judgment in *Beneficial House (Birmingham) Regeneration LLP and Stanley Dock (All Suite) Regeneration v HMRC* [2017] UKFTT 801 (TC). In addition to the above matters on which Mr Gordon relies (and which are referred to at [15(1) to (3)] of that judgment), it is relevant to note what Judge Falk said at [15(5) and (6)], namely:

> "(5) If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate: see for example *Steven Price*, and also *Andreas Michael v HMRC* [2015] UKFTT 577 (TC). The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case: *Frosh*.
>
> (6) The Supreme Court's comments on the subject of closure notices in *HMRC v Tower MCashback LLP* [2011] UKSC 19, [2011] 2 AC 457 are highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice is performing

> an important public function in which fairness to the taxpayer must be matched by a "proper regard for the public interest in the recovery of the full amount of tax payable", although where the facts are complicated and have not been fully investigated the "public interest may require the notice to be expressed in more general terms" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In *Frosh* the Upper Tribunal commented at [49] that a closure notice in broad terms is "not the norm" and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable."

115. It is, in my view, necessary to remember the stage at which the current enquiry is at. HMRC have already reached a view on domicile: in a very real sense, the initial application for a closure notice has yielded a success for the applicant. The continuation of the enquiry is simply to determine the amount of tax. It is clear - and I do not think that this was disputed by the taxpayer - that HMRC do not have sufficient information to allow them to determine what tax is due for the relevant tax years if Mrs Levy was not entitled to make a claim to the remittance basis for those years.

116. In the absence of that information, it will, inevitably, be difficult, if not impossible, to determine for how long it would be appropriate for the enquiry to continue to resolve any issues that may arise. It may be the case that no further issues arise, and, if that is the case, Mr Archer has already indicated in his letter of 29 January 2019 that he would be in a position to issue a closure notice within 40 days of receiving the information. But significant issues may arise, which might mean the enquiry needs to continue for a further period. The reasonable length of that further period would, at this time, be inherently unknowable.

117. It is by no means clear to me in these circumstances that, even if HMRC had conducted an enquiry up to this point that had been disproportionate, much weight ought to rest on that fact in determining whether the enquiry should continue. To require the enquiry to conclude within a specified period would be to make a guess on the length of period that was reasonable. Even assuming a disproportionate enquiry, it would not be right in my view to require HMRC to conclude it by a time that had been plucked from the air. If that period was too short, it might well lead to the closure notice specifying the wrong figures. Bearing in mind that HMRC are charged by Parliament, on behalf of the public as a whole, with collecting the right amount of tax, it is not obvious why such a course should be followed.

118. Nonetheless, I consider below whether, in any event, the applicant has made out its contentions that the enquiry has been disproportionate.

119. In the course of seeking to demonstrate that there was no rational basis for HMRC's case, Mr Gordon also submitted that Mr Archer's evidence demonstrated a "distorted" approach to domicile enquiries, with HMRC's views on domicile based on the "flimsiest" of premises, confirming the taxpayer's long-held concerns that the enquiry was not only a "fishing expedition" but a "vexatious" one. In this connection, Mr Gordon sought to emphasise how the shortcomings of the approach to the enquiry had been demonstrated by the change of approach from October 2018 to January 2019. In essence, his point was that HMRC decided that they were in a position to make a decision on Mrs Levy's domicile by reference to: (1) the four powers of attorney as disclosing evidence of Mrs Levy's mental capacity; (2) the witness statement of Mr Dempsey of 30 November 2018 made for the purposes of the closure notice application, which had failed to bring any more evidence to light that would be indicative of a domicile in England and Wales; and (3) Mr Dempsey's letter of 30 November 2018, which had provided further information in relation to some of HMRC's enquiries. None of these were, in

Mr Gordon's submission, capable of rationally affecting HMRC's conclusions and, if anything, were evidence of Mrs Levy's having retained her US domicile.

120. I do not accept that submission. It might be said that the change of approach shows that HMRC might have reached their views earlier or that, on further consideration of substantially the same evidence, they had simply concluded that they now had enough evidence to make a decision. It might also be said that they had just changed their mind. It seems to me that, in relation to each of the three factors referred to by Mr Gordon, HMRC were entitled to consider the factors and place some weight on them: that is not to say that any one of those matters was, or should have been, determinative but is simply to note that it did constitute further evidence of a kind that HMRC properly needed to take into account. Put another way, HMRC knew more about the case in January 2019 than in October 2018, including the extent to which further information from the taxpayer would, or would not, be forthcoming. It seems to me that HMRC were approaching the domicile issue in full recognition of the fact-sensitive nature of a domicile enquiry. Throughout his evidence, Mr Archer was at pains to point out that he needed to consider the totality of the evidence in the round. He cannot be faulted for taking that approach, which is, plainly, the right one.

121. Much of the thrust of Mr Gordon's submissions under this strand of his case was not, however, on the change of stance but on making good a general point that, in light of the length of the enquiry, the volume of information sought, the oppressive nature of the enquiry and the sense of entitlement of HMRC officers who showed greater concern to protect 'one of their own' rather than a vulnerable lady, the enquiry had to stop. In his submissions and cross-examination of Mr Archer, Mr Gordon focused on the following:

(1) the lack of continuity in the officers conducting the enquiry leading to information being missed and the prolongation of the enquiry;

(2) the lack of experience of those officers, including the fact that the most senior person was Mr Archer, who had "only" two years of experience in domicile matters and whose views on domicile did not "come up to scratch";

(3) the fact that Mr Archer accepted that he asked for information (not under Schedule 36 to FA08) when the requirements of that Schedule might not be met (so that the information was not reasonably required for the purposes of the enquiry);

(4) the search by HMRC for a 'golden nugget' to demonstrate domicile in England and Wales (rather than the proper approach of seeking out relevant facts and weighing them neutrally without a preconceived disposition one way or the other);

(5) the sense of entitlement shown by Mr Archer in asking for information in cases where he was not legally entitled to it (a reference to the March 2017 information notice and the need to reissue it);

(6) the lack of sensitivity in the way that HMRC had dealt with Mrs Levy and, in particular, the failure to adapt their processes to reflect her vulnerability; and

(7) the incident of August/September 2017 involving Mr Foley and the fact that, more generally, it was entirely inappropriate for such a person to be "let loose" on a vulnerable taxpayer and Mr Archer's explanation as to why Mr Foley did not continue to work on the case (to protect him from Mr Dempsey (Cubism Law)) reinforced the view that the approach to the enquiry had lost all sense of proportionality.

122. In my view, there is no merit in any of these points and they fall significantly short of making good the submission that the enquiry was a disproportionate one.

123. As to (1) and (2), they simply reflect the way in which HMRC efficiently use their resources. My consideration of the evidence does not lead me to think that the fact that different officers have been involved has in any way materially lengthened the enquiry. And, in my view, there is no substance in the criticism of the way in which Mr Archer has approached the enquiry. He has, in my judgment, asked appropriate questions and remained doggedly fixed on uncovering all relevant evidence. There is nothing that I have seen or heard that can reasonably be taken as suggesting that Mr Archer's views on domicile do not come up to scratch, a point that is, in my view, supported to some extent by the fact that the technical specialists in HMRC were asked for their input into the case and have apparently endorsed the conclusion as to domicile.

124. As to (3), this cannot bear the weight that Mr Gordon seeks to put on it. In context and properly understood, Mr Archer's statement in cross-examination was simply an acknowledgement of the undoubted position that HMRC can ask information to be provided without resorting to statutory compulsion and that, when they did so, they were not necessarily subjecting their requests to a statutory requirement that did not apply.

125. As to (4), this is, in my judgment, not borne out by the evidence, including the consistent way in which Mr Archer explained in his cross-examination that he was taking, rightly in my view, a holistic view of the evidence. I think that this point is understood better in the wider context that HMRC were on a "fishing expedition" in this particular case and indeed more generally. But HMRC's particular focus on domicile enquiries at a particular time, something that they are perfectly entitled to do in discharge of their responsibility to manage and collect income tax and capital gains tax under section 1 of TMA, was hiding in plain view: it was the very reason given in the letter of 13 December 2016 opening the enquiry into Mrs Levy's tax return. And the fact that HMRC said to the taxpayer's agent that over a hundred information notices had been given at the time as the one sent to Mrs Levy on 1 March 2017 without anyone else responding in the way that Expatax had was, I think, further acknowledgement of that.

126. As to (5) to (7), these seem to me to be a restatement of the grounds of complaint referred to above. In my view what was said about them in HMRC's letters of 13 November 2017 and 24 July 2018 is a more than adequate response. In particular, the story set out at [100] to [109] above seems to me to have no material relevance to the question before me, namely whether, at this stage of the enquiry, it should be concluded. In any event, it falls very significantly short of constituting evidence of a disproportionate enquiry. In my judgment, there is no evidence of oppression or an enquiry without merit. Rather, the evidence points to the careful, considered and patient way in which HMRC dealt with the substantive issues and complaints about their staff. HMRC cannot, in my view, be faulted for the way in which they responded to an escalating series of complaints. Similarly, I think that Mr Archer resisted a difficult cross-examination in a dignified and appropriate manner.

127. I also consider that HMRC were right to say in their letter of 19 December 2017 that the taxpayer had only recently begun to engage with the enquiry in a constructive way. HMRC's actions in the enquiry have, in my view, been reasonable ones and have been taken without undue delay.

128. I reject, therefore, the second strand to Mr Gordon's submission.

129. In my view, HMRC have reasonable grounds to continue with the enquiry. The application for a final closure notice is refused.

130. For completion I should record that Mr Gordon also made a submission that, if the appeal against the information notice were refused, the tribunal should nonetheless require a closure notice to be given by HMRC within 30 days of the receipt by them of the information. He

referred to this tribunal's decision in *Beneficial House* as an example of such a decision. Indeed it is; but the facts were very different from this case.

131. As explained at [116] and [117] above, it would be an exercise in pure conjecture to order a closure notice to be given within a specified period with no firm, or indeed any, foundation for determining what period to specify. In effect, the taxpayer is saying: "we will give you the information and then, even though this will be the first time that you have seen it, you must conclude all your enquiries within 30 days". I do not consider that this would be an appropriate course to take in this case and I reject it.

PARTIAL CLOSURE NOTICE

Introduction

132. The applicant also applied for the issue of a partial closure notice requiring HMRC to "close" the enquiry now so far as relating to the domicile issue. It would only be if HMRC were successful in establishing that Mrs Levy had acquired a domicile in England and Wales that the enquiry would then move on to determining the additional tax that would be due for the relevant tax years. Partial closure notices are a recent addition to the tax code, introduced by Finance (No2) Act 2017 ("F(No2)A 17"). In HMRC's view there is no power to give a partial closure notice in relation to the domicile issue where the amount of tax is unknown. The initial question here is whether they are right.

133. Certainly, this tribunal in *Embiricos* did not think so. The facts of *Embiricos* have certain similarities to the facts of this case. Mr Embiricos was originally from Greece but had lived in the United Kingdom for many years. He claimed to be domiciled outside the United Kingdom and had made claims in his tax return for the remittance basis. HMRC opened enquiries and concluded that he was domiciled in England and Wales. They issued a notice under paragraph 1 of Schedule 36 to FA08 requiring Mr Embiricos to provide information so that they could determine the amount of tax payable on his overseas income that had not been remitted to the United Kingdom. Mr Embiricos considered that request was neither necessary nor appropriate and, in addition to appealing against the information notice, applied to the tribunal for a direction to issue a partial closure notice to 'close' the domicile issue (with any information relating to the amount of the tax on hold pending the resolution of the domicile issue).

134. In *Embiricos* the tribunal was of the view that Parliament's intention in enacting the provisions on partial closure notices was to enable enquires "to be dealt with more flexibly and potentially more efficiently" (see [67]). In the light of Parliament's intention as so described "there is no doubt in our minds that, as a matter of ordinary language, the question of Mr Embiricos' domicile is capable of being [a matter to which the enquiry relates]", and, accordingly, the tribunal found in favour of Mr Embiricos on the principle of the availability of the power to issue a partial closure notice.

135. Mr Gordon was content to rely on the reasoning in *Embiricos* to support his case but also submitted that there were occasions where a closure notice could be given that did not have an immediate impact on the tax payable by a taxpayer. He gave the example of the carrying forward of a trading loss made in one year for use against trading profits of a subsequent tax year. In that case, if HMRC sought to disallow the loss, the resulting closure notice would not be in the form of an assessment to tax for the year of the loss. He also suggested that section 50 of TMA would not be engaged in that case.

136. In response Mr Purnell relied, not surprisingly, to a large extent on the submissions that he had made to the tribunal in *Embiricos*.

137. I have given very careful consideration to the decision of this tribunal in *Embiricos* but I have come to the opposite conclusion. In my judgment, it is clear that there is *no* power under

section 28A of TMA for HMRC to issue a partial closure notice in respect of a "matter" that is said to consist of a determination of Mrs Levy's claim for the remittance basis at a time when the tax effect of the determination is unknown.

138. I reach that conclusion principally by reference to a consideration of section 28A of TMA in the light of other relevant provisions of TMA and the manner in which Parliament gave effect to the concept of a partial closure notice in F(No2)A 17, noting that it did so at a time when, applying normal principles of statutory interpretation, it can be taken to be aware of the decision by the High Court in *Archer* (discussed more fully below) on the meaning of section 28A(2) of TMA. In my judgment, "matter" in section 28A of TMA must be understood in the wider context of the provision made by that Act, including the provisions relating to appeals in section 50 of TMA and joint references by the taxpayer and HMRC under section 28ZA of TMA for a determination of questions arising in connection with the subject-matter of an enquiry.

139. In addition, I have had regard to the relevant contextual background, notably the consultation document and connected material relating to the introduction of partial closure notices, which, in my judgment, support the view that I have reached of the meaning intended by Parliament in referring to a "matter" in section 28A of TMA.

Relevant statutory provisions

140. Section 28A of TMA contains the provisions dealing with final or partial closure notices. That section provides as follows:

> "**28A Completion of enquiry into personal or trustee return**
>
> (1) This section applies in relation to an enquiry under section 9A(1) . . . of this Act.
>
> (1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.
>
> (1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—
>
> (a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
>
> (b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.
>
> (2) A partial or final closure notice must state the officer's conclusions and—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A partial or final closure notice takes effect when it is issued.
>
> (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.
>
> (5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

(6) The tribunal shall give the direction applied for unless . . . satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period.

(7) In this section "the taxpayer" means the person to whom notice of enquiry was given.

(8) In the Taxes Acts, references to a closure notice under this section are to a partial or final closure notice under this section."

141. It is important to set that section in its statutory context. Other relevant provisions of TMA are contained in sections 31, 50, 59B and Schedule 3ZA.

142. Section 31 confers rights of appeal on taxpayers and (so far as relevant) provides as follows:

"(1) An appeal may be brought against—

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

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

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

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

(2) If an appeal under subsection (1)(a) above against an amendment of a self-assessment is made while an enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment none of the steps mentioned in section 49A(2)(a) to (c) may be taken in relation to the appeal until a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued."

143. Section 50 deals with the procedure on appeals and (so far as relevant) provides as follows:

"(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment . . .;

(b) that any amounts contained in a partnership statement . . . are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

> (7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.."

144. Finally, section 59B and Schedule 3ZA deal with, among other cases, the question as to when an amount of tax payable as a result of the amendment of a self-assessment becomes payable.

145. So far as relevant, section 59B(5) provides:

> "(5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—
>
> (a) section 9ZA, 9ZB, 9C or 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or
>
> (b) [...],
>
> is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act."

146. In the case of the matters set out in section 59B(5), the relevant provision of Schedule 3ZA is paragraph 5, which provides as follows:

> "5 (1) This paragraph applies where an amount of tax or an amount on account of capital gains tax is payable or repayable as a result of the amendment of a self-assessment [. . .] under section 28A of this Act (amendment of return by closure notice following enquiry).
>
> (2) The amount is payable (or repayable) on or before the day following the end of the period of 30 days beginning with the day on which the closure notice was given."

Matters to be stated in a final or partial closure notice: section 28A(2)(b) TMA

147. Section 28A(2) of TMA requires a final or partial closure notice to state the officer's conclusions, and, if he or she considers that amendments to the return are required, make the amendments of the return "required to give effect to his conclusions". The meaning of that provision was considered by the Court of Appeal in *Regina (Archer) v HMRC* [2017] EWCA Civ 1962. The concept of partial closure notices was not in force at the times relevant to the decision made by the court.

148. In *Archer* HMRC had issued separate closure notices in relation to two self-assessment returns submitted by Mr Archer for two tax years claiming relief arising from avoidance schemes to which he was a party. Each notice stated that the scheme relied on for the year was ineffective and that HMRC were amending the return for the year to reflect that fact. However, the notice failed to state the amount of tax which was due although the online versions of the taxpayer's returns *were* amended by HMRC to show the increased tax.

149. The taxpayer contended that the closure notices did not satisfy the requirements of section 28A(2)(b) of TMA: HMRC had not set out the amount of tax due and, therefore, had failed to amend the returns as required by the statutory provisions.

150. A judicial review was brought before the High Court. The proceedings also included a consideration of whether, if the closure notices were defective, they could be saved by the application of section 114(1) of TMA but that is not is relevant to the proceedings before me.

151. The High Court (Jay J) accepted the taxpayer's submission that the closure notices did not comply with the statutory requirements. At [43] of his judgment of 21 February 2017 *(Regina (Archer) v HMRC* [2017] EWHC 296 Admin) Jay J records the core argument submitted by Mr Goldberg QC that section 28A requires the making of an assessment and "it is a minimum prerequisite of any assessment to tax by HMRC that it informs the taxpayer of his liability in a known or fixed sum (see *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] 2 All ER 433 at 438, [1979] 1 WLR 620 at 627)". In the instant case Mr Goldberg QC submitted that the form of words "I am amending your return" was insufficient: there was no way in which that could be read as identifying how much Mr Archer was said to owe in tax to HMRC [44]. He also submitted that this was not to elevate form over substance "because the whole regime of the TMA requires certainty and the fixing of exact amounts" [44].

152. Having set out those submissions made by Mr Goldberg QC and those made in response by HMRC, Jay J continued:

> "**[53]** Mr Goldberg's case is simple and straightforward .... The Closure Notices must make the amendments to the returns. It is true that s 28A(2) does not state in terms that a Closure Notice must *itself* set out the *amount* of tax said to be due, but Mr Goldberg's submission was that this is implicit in the overall statutory scheme, as well as being consonant with the policies and objects of the TMA. On Mr Goldberg's argument, a Closure Notice is the formal document which amends the return, as well as the self-assessment included within the return. The appeal under s 31 is against what the Closure Notice contains, including the amendments to the return, being in the nature of assessments. HMRC's alteration of the return and the self-assessment online is consequential or adjectival [...].
>
> **[54]** In my judgment, Mr Goldberg's submissions are correct. My reasons, which largely reflect his arguments, are as follows.
>
> **[55]** First, the statutory scheme predicates the giving of notice of amounts (of tax) being assessed, whether by the taxpayer or HMRC. This notice requirement applies to (1) returns, (2) amendments to returns, (3) assessments, (4) amendments to assessments, (5) self-assessments, and (6) amendments to self-assessments. For these purposes, albeit not for all purposes, there is no distinction between any of these categories. Ms Nathan drew my attention to the decision of Patten J (as he then was) in *Morris v Revenue and Customs Comrs* [2007] EWHC 1181 (Ch), (2007) 79 TC 184 (at [31]–[35]). This drew a distinction between assessments by HMRC and self-assessments by the taxpayer in the different context of the time limits under ss 34 and 36 of the TMA. This distinction has no application here. A s 28A closure notice is in the nature of being an assessment by the Revenue which is given effect to by directly altering the taxpayer's self-assessment."

153. Jay J considered that a number of provisions of TMA supported his analysis, including sections 9(3) and (3A), 9B(3), 9ZA, 9ZB, 28B(1) to (3), 31, 50 and 59B. He then went to hold at [57]:

> "In the light of the above, the natural and ordinary meaning and effect of 'a closure notice must … make the amendments of the return required to give effect to his conclusions' within s 28A(2) is that (i) the amendment to the return is in the nature of an assessment by HMRC which is achieved by amending the return including the self-assessment contained within it, and (ii) the amendment(s) must be set out in the closure notice; in other words, be notified to the taxpayer in that manner. All assessments within the TMA share this last attribute."

154. Having referred to various authorities cited to him as the second reason for accepting Mr Goldberg QC's submissions (see [59] to [67]), Jay J then referred at [69] to the requirement to amend the return in these terms: "what is required is not merely the statement of HMRC's case as to the amount of tax due, but a statement of that amount." Finally, at [70] Jay J held that his construction of section 28A of TMA "also accords with the policies and objects of the TMA which are to ensure certainty, finality and transparency".

155. The Court of Appeal upheld the judgment of Jay J as to the requirements of section 28A(2)(b) of TMA. At [22] of the judgment Lewison J held as follows:

> "In agreement with the judge, I consider that Mr Goldberg is right on this issue. The self-assessment that the taxpayer is required to file as part of his return must state the amount of tax for which the taxpayer is liable. One would naturally expect that an amendment to that assessment must likewise state the amended amount of tax for which he is liable. [...] Section 28A (2) (b) requires the amendment of the return to be made by the closure notice itself; not merely by an officer of HMRC."

The new power to issue closure notices

156. The proposal for partial closure notices was included as Schedule 26 to the Finance Bill that was introduced into the House of Commons on 14 March 2017. However, once enacted, the Finance Act 2017 did not include that Schedule. It had been excised from the Bill as part of the fall-out from the announcement of the General Election in the summer of that year. It did not, though, have long to wait before it was finally enacted. It formed Schedule 15 to the post-election Finance Bill that was introduced into the House of Commons on 6 September 2017. Royal Assent was given to that Bill on 16 November 2017.

157. At the time that the pre-election Finance Bill was introduced into the House of Commons on 14 March 2017, the High Court had given its judgment in *Archer* (21 February 2017). By the time the post-election Bill was introduced on 6 September 2017 (where the provisions were substantively unchanged from the pre-election version of the Bill), the judgment had been available for over six months.

158. It might be thought to be a self-evident truth that Parliament might be taken to be aware of what the law was before it changes it, particularly if the change is to apply an existing statutory provision to a new circumstance.

159. However, the position has been helpfully confirmed by the courts. At paragraph 20.1.37 of *Craies on Legislation* (9th edition), it says this under the heading "Presumption of correct law":

> "In construing legislation the courts will "assume that the legislature knows the existing state of the law".
>
> This assumption as an aid to construction can be seen at work in a number of leading cases on statutory interpretation."

160. The above quotation was of dicta of Lord Blackburn at [526] in the decision of the House of Lords in *H Young & co v The Mayor and Corporation of Leamington Spa* (1883) 8 App Case 517.

161. The assumption, therefore, is that Parliament was aware of the High Court's decision in *Archer* when considering the provisions for partial closure notices.

162. In making the amendments of section 28A of TMA to give effect to the new partial closure notice regime, Parliament operated, in part, by way of amendments to subsection (2) of that section. Where, as here, Parliament has chosen to operate by way of textual amendment, the approach to be adopted is considered by *Bennion on Statutory Interpretation* (see section

6.7 on page 201 of the 7th edition) to be authoritatively stated by Hobhouse LJ in *Inco Europe Limited v First Choice Distribution (a firm)* [1999] 1 All ER 820 where he said this at [823]:

> "In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute. However, in certain circumstances it may be necessary to look at the amending statute as well. This involves no infringement of the principles of statutory interpretation; indeed it is an affirmation of them. The expression of the relevant parliamentary intention is the amending Act. It is the amending Act which is the operative provision and which alters the law from that which it had been before. It is the expression of the parliamentary will as to what changes in the law Parliament wishes to make."

163. The version of section 28A(2) of TMA before F(No2)A 17 was in these terms:

> "(2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions."

164. And the version afterwards was in these terms:

> "(2) A partial or final closure notice must state the officer's conclusions and—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions."

165. The requirement in the current version of subsection (2) for the officer to state his conclusions was not, of course, a new requirement: in the previous version of section 28A it appeared in subsection (1) itself.

166. It can readily be seen that paragraphs (a) and (b) in each version of subsection (2) of section 28A are the same (and were in this form when considered by the High Court in *Archer*).

167. An obvious inference to draw from this approach is that the provisions in relation to partial closure notices were intended to work in the same way as they had done in relation to what are now final closure notices. Not only were subsection (2)(a) and (b) of section 28A drafted in a way that did not distinguish between the two types of closure notice, other material provisions of TMA were also constructed on the same basis. Indeed, subsection (8) of section 28A now provides that any reference in the Taxes Acts to a closure notice under section 28A is to a partial or final closure under that section.

168. In the case of the amendments made to subsection (3) of section 28A, the only change was to replace "A closure notice" with "A partial or final closure". Importantly, in both versions (before and after F(No2)A 17), the notice (whether partial or final) was expressed to "take effect" when issued. The fact that both types of closure notice are expressed to "take effect" from the day on which they are issued is relevant. There is, in my judgment, no meaningful sense in which a stepping stone in reaching a yet to be determined tax outcome can properly be described as taking effect.

169. The High Court in *Archer* identified a number of provisions in TMA that underscored how a closure notice was in the nature of an assessment to tax. The focus of Jay J in that case was on the notification of the liability to the taxpayer. A similar point can be made in relation to the proposition that a closure notice is a document that itself "takes effect" from the moment it is issued: the natural meaning of those words is that the notice is one that has a substantive tax effect. The tax effect of a closure notice (partial or final) is borne out by considering the following provisions of TMA all of which were amended to accommodate partial closure notices (see paragraphs 3, 4 and 14 of Schedule 15 to F(No2)A 17):

(1) section 9B(3) deals with amendments of a return by a taxpayer during an enquiry and deals in terms with a case where an amendment affects the amount of tax payable ensuring, as one would expect, that in an enquiry the amendment "takes effect" when the closure notice is issued;

(2) section 9C deals with so-called "jeopardy assessments" by HMRC and makes it clear that, in a case where there is an enquiry "in relation to any matter", the assessment may be made to make good a deficiency in tax "so far as it relates to the matter"; and

(3) section 29 deals with discovery assessments with subsection (5) including a proposition in relation to a case where a partial closure notice was issued as regards "a matter" to which the situation in subsection (1) relates, namely a situation where a loss of tax has been discovered.

170. It is also instructive to consider section 50 of TMA. That provision was not amended by F(No2)A 17 when partial closure notices were introduced by Schedule 15 to that Act. Section 50 of TMA sets out the power of the tribunal on hearing appeals against amendments of tax returns made by closure notices.

171. In *Archer*, Jay J referred to subsections (6) and (7) of that section, commenting at [56(7)] that "it is clear from the language of both these subsections that the assessment is being reduced or increased, as the case may be". The only other provision of that section that confers powers on the tribunal that is relevant to an appeal against amendments made by a closure notice is subsection (7A), which is in these terms:

> "(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good."

172. In *Embiricos* this tribunal considered that, in the context of an appeal against a partial closure notice, this subsection was applicable to the remittance basis claim made by Mr Embiricos. That is not, in my judgment, a function performed by subsection (7A). In order to understand subsection (7A) it is necessary to consider the circumstances in which it was first inserted into section 50 of TMA and how it has ended up in its current form. Schedule 19 to the Finance Act 1996 ("FA96") contained provision which, as described by the section that introduced it (section 133), "for purposes connected with self-assessment, further amends provisions relating to claims and enquiries." One of the changes made to the operation of the self-assessment regime was to amend section 9A of TMA so as to extend matters subject to an enquiry to any claim or election included in the return (see paragraph 2 of Schedule 19 to FA96). In consequence of that extension, the operation of the closure notice provisions contained in section 28A of TMA was adjusted. A new subsection (4A) was inserted by paragraph 4(2) of Schedule 19 to FA96. That subsection provided as follows:

> "If-

> (a) any claim or election is included in the return,
>
> (b) the officer is of the opinion that the claim or election should be disallowed in whole or in part but that its disallowance to the extent he thinks appropriate would not require any amendment of the taxpayer's self-assessment, and
>
> (c) [...],
>
> the officer shall [...] give notice to the taxpayer of the extent to which he is disallowing the claim or election."

173. An express right of appeal against a disallowance (in whole or in part) contained in a notice under section 28A(4A) was conferred by an amendment of section 31 of TMA: see paragraph 6(1) of Schedule 19 to FA96.

174. It was in that context that section 50 was amended by the insertion of a new subsection (7A) in these terms:

> "If, on appeal, it appears to the Commissioners that a claim or election specified in a notice under section 28A(4A) of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that appears to them appropriate, but otherwise the decision in the notice shall stand good."

175. It is also of note that amendments were made mirroring this approach to Schedule 1A to TMA, which dealt with claims or elections not made in a return: see paragraphs 9 and 10 of Schedule 19 to FA96.

176. A number of things are, in my judgment, plain from this: the case with which section 50(7A) of TMA was dealing was, by definition, a case where the disallowance of a claim or election in a return would *not* in itself produce a tax effect for the tax return for the tax year in question. An example would be a case where a claim was being made for a loss to be carried forward to the next year. The provision was not intending to deal with a case where a claim or election was included in the return where its disallowance *did* affect the tax payable for the tax year. That case would simply be an instance falling within subsection (6) or (7) of section 50.

177. The relevant provisions were amended by Schedule 29 to the Finance Act 2001 ("FA01"). That schedule simplified the self-assessment regime. In the system that applied before FA01 there was a two-stage process. The first stage was the completion of the officer's enquiries by informing the taxpayer of the officer's conclusions as to: (1) the amount of tax which should be contained in the self-assessment, and (2) the claims and elections into which he had enquired. The second stage took place *after* the conclusion of those enquiries. That involved the amendment of the self-assessment by the taxpayer under section 28A(3) or by the officer under section 28A(4). In either case, the focus was on the tax payable for the year in question: the aim was to make good any deficiency or eliminate any excess in the amount of tax due. As mentioned above, subsection (4A) dealt with cases where the disallowance of a claim or election did not require amendment of the self-assessment.

178. In addition to moving to the single step of the closure notice amending the return, the changes made by the FA01 included the repeal of subsection (4A) from section 28A of TMA and, in the light of that repeal, a consequential amendment was made to the opening words of section 50(7A) of TMA. The consequential amendment was merely identifying the mechanism by which the disallowance would be given. In my judgment, Parliament did not intend for subsection (7A) of section 50 to reach beyond the class of case for which it was originally enacted, namely a case where the disallowance was of a claim or election that did *not* require

an amendment of the taxpayer's self-assessment. That remained capable of being dealt with by section 50(6) or (7) of TMA.

179. That this is the way in which Parliament intended the modified self-assessment regime to work is also borne out, in my judgment, by the amendments made to Schedule 1A to TMA. As mentioned above, the provisions of that Schedule mirrored the provisions of sections 28A, 31 and 50(7A) before the changes made by Schedule 19 to FA01. They were then amended by that Schedule to reflect the simplified approach. However, both before and after the changes, there remained a clear contrast between claims or elections with an immediate tax effect and claims or elections without such an effect: see paragraph 7(2) and (3) of Schedule 1A. Paragraph 7(3) provides that it applies in the case of a claim "that is not a claim for discharge or repayment of tax". An HMRC officer may disallow the claim "wholly or to such extent as appears to the officer appropriate". An appeal may be brought against any such disallowance under paragraph 9(1)(b) of Schedule 1A, and paragraph 9(5) sets out the powers of a tribunal in dealing with the appeal. That sub-paragraph is in materially the same form as section 50(7A) of TMA. In other words, the two sets of provisions (claims in a tax return and those outside a return) conferred the same set of powers on the tribunal.

180. It is also clear that the way in which HMRC operate the self-assessment regime is consistent with this analysis. So, in their Enquiry Manual, at EM3832 it requires an officer to "state your conclusions, including your conclusions about any claims or elections that do not affect the self-assessment" and at EM3835 it says that "your conclusions should include the extent to which any claims or elections included in the return should be disallowed even though they would not require any amendment to the taxpayer's self-assessment, for example losses carried forward".

181. All of this explains why section 50 of TMA takes the form that it does. In the typical case an HMRC enquiry will lead to an alteration in the amount of tax payable by the taxpayer for the tax year for which the return was made. In such a case, following *Archer*, a closure notice must amend the self-assessment included in the return so as to identify, in terms, the amount of tax that falls due. An amendment of a self-assessment return for a year might well include a disallowance by HMRC of a claim made by the taxpayer that affects the amount of the tax due for that year: an example of this would be a disallowance of a claim made in the return for the remittance basis. There is no distinction between the two cases. In either case, HMRC must proceed by identifying the amount of tax that is payable. The increased amount of tax is payable in accordance with section 59B of and Schedule 3ZB to TMA. It can be subject to an appeal made by the taxpayer. In determining the appeal, it is section 50(6) or (7) of TMA that determines the tribunal's powers.

182. It does not follow, however, that, in all cases where there is an enquiry, the result of the enquiry is an amendment of the return that has a tax effect for the year for which the return is made. As explained above, HMRC has power to enquire into claims or elections in the return (or, under Schedule 1A to TMA, outside the return), and it is clearly the case that those claims or elections include ones that have, or are capable of having, a substantive effect for a future tax year. As a result of section 42(1A) of TMA, claims or elections for a relief, an allowance or a repayment of tax must quantify the amount. If a taxpayer makes a claim for a loss to be carried forward and HMRC disallow the claim (whether wholly or to any other extent), HMRC must amend the return (if the claim is made in the return) and the taxpayer may bring an appeal. The powers of the tribunal in dealing with that appeal are found in subsection (7A) of section 50 of TMA.

183. The points made by Mr Gordon about amendments of returns in the case of losses carried forward do not, therefore, assist his case. The amendments in question are those that are capable

of having a substantive tax effect and, when made by way of a claim or election, are clearly contemplated by section 50(7A) of TMA. A final closure notice could disallow a claim for a loss to be carried forward to a future year, and so can a partial closure notice. That has no bearing on a case where, as part of a self-assessment made for a tax year, the taxpayer makes a claim (such as a claim for the remittance basis) that is directed at the tax calculation for that year.

184. In my judgment, the reason that Parliament did not amend section 50 of TMA when partial closure notices were introduced is because Parliament intended that the powers in subsections (6), (7) and (7A) of that section were to be a complete code for all appeals against amendments of assessments made by HMRC following enquiries, irrespective of whether a final or partial closure is issued.

Partial closure notices and references to tribunal

185. The HMRC enquiry in this case is an enquiry into Mrs Levy's claim for the remittance basis and, for the purposes of section 28A(2) of TMA, the "matter" is, in my view, the determination of that claim: a partial closure notice must make the amendments of the return that are required to give effect to the conclusion and those amendments must include any increase in the amount of tax that is payable.

186. In reaching that determination, it may well be the case – indeed, in complex cases, it will often be the case – that other findings will have to be made. As Mr Purnell noted at [40] of *Embiricos*, it cannot have been Parliament's intention that each of those other findings could be subject to partial closure notices and consequent litigation.

187. Imagine a case where a taxpayer asserts that he has made a trading loss of £100 in a tax year in relation to which he seeks to obtain tax relief for the year of the loss (where the relief was available only to persons carrying on a trade). HMRC might make a number of separate challenges any one of which might result in a reduction (including to nil) in the amount of relief available for the loss. HMRC might say that: (1) the taxpayer was not carrying on a trade; (2) the calculation of the profits has not been made in accordance with generally accepted accounting practice and, if it had, there would be no loss or it would be of a lesser amount; (3) an anti-avoidance provision is engaged so that some or all of the loss is disallowed; or (4) items should be disallowed because they were not wholly or exclusively incurred for the purposes of the trade (assuming one were being carried on).

188. In a case such as that, in my judgment, elements (1) to (4) are merely part of the required analysis to determine what part (if any) of the loss is allowable and it is that determination that is the "matter" for the purposes of any partial closure notice. The contrary view would, it appears, rest on each of (1) to (4) being *capable* of being a separate section 28A(2) "matter". I am not sure how these "matters" are capable of being distinguished from any question that might arise in an enquiry such as a person's domicile or residence status.

189. I say "capable" of being a matter because it would seem to be acknowledged that this would be the case only if the matter were of a type that could be readily identified by way of an amendment of a tax return. That itself is something of a curiosity, particularly as the contents of a tax return are left entirely in the hands of HMRC (see section 113(1) of TMA). A critical aspect of the whole system of tax administration would rest on, as it were, the happenstance of the ability to reconcile a technical point taken by HMRC with a particular box that featured in a taxpayer return. This might be the case if the "matter" in question affects the calculation of an amount that is simply stated in a box in the return. No amendment could be made of that box in that case unless the revised amount was known.

190. There was a submission on behalf of the taxpayer in *Embiricos* that it might be possible to deal with this sort of case by HMRC not amending the return. I cannot accept that this is an outcome that was intended by Parliament. The "no amendment" situation is, in my view, plainly addressed at a case where HMRC agree that the tax liabilities of the taxpayer are properly reflected in the tax return subject to the enquiry so that no amendment of the return is required.

191. Returning now to my example above, the interpretation adopted in *Embiricos* of the effect of section 28A(2) of TMA is that HMRC would have the power to give separate partial closure notices in relation to each of matters (1) to (4), one after the other. If that is so, the taxpayer would have no choice but to resist each of the four partial closure notices. Alternatively, the taxpayer could apply to the tribunal for a partial closure notice for each of the separate matters. I recognise that, in my example, matter (1) might be a knock-out blow but the others are not necessarily so.

192. Certainty of outcome for the taxpayer and HMRC would, in either case, be delayed, and, in some cases, delayed very significantly. HMRC might, in at least some cases, be incentivised to drag things out to apply pressure on the taxpayer to concede. Equally, HMRC might have to resist successive applications for the issue of a partial closure notice in an attempt by the taxpayer to kick the proverbial can down the road. No doubt, the tribunal might root out obvious cases of abuse; but that would not necessarily be an easy task, particularly when there is a right of appeal against the partial closure notice. Indeed, a taxpayer might succeed on each of matters (1) to (3) before failing on matter (4) so that, overall, HMRC were successful.

193. It is hard to see how such a regime is consistent with the policies and objects of TMA of "certainty, finality and transparency" (see [70] of the High Court's judgment in *Archer*).

194. A contrast can be drawn with the provision made by Parliament for questions arising in an enquiry to be referred to the tribunal under section 28ZA of TMA. A referral can be made only if both parties agree to the reference, and it is, in my judgment, precisely to avoid the difficulties that I have set out above that explains the necessity for the referral to be a joint one.

195. Section 28ZA(1) of TMA provides as follows:

> "(1) At any time when an enquiry is in progress under section 9A(1) [...] of this Act in relation to any matter, any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination."

196. That subsection was amended in consequence of the new partial closure notice regime (see paragraph 10(2) of Schedule 15 to F(No2)A 17) so that the reference to an enquiry being in progress was to an enquiry being in progress "in relation to any matter": the reason for that amendment was to provide a link to the definition in subsection (5) of an enquiry being in progress "in relation to any matter" so that, once a partial closure notice "closed" that matter, no question could then be referred under section 28ZA in respect of it. However, what is, in my judgment, significant is that Parliament has drawn a clear distinction between an enquiry "in relation to any matter" and questions arising "in connection with the subject-matter of the enquiry". Unless those expressions were intended to identify different concepts, it is hard to understand why section 28ZA is now framed as it is. Further (bright) light is also shed on the issue by considering the effect of a tribunal determination under that section.

197. It is agreed in this case that a referral under section 28ZA could encompass a determination about Mrs Levy's domicile status. It is no surprise that one of the consequences that flows from the focus in section 28ZA on questions arising in connection with the subject-matter of the enquiry is that the determination does <u>not</u> "take effect" in a way that can then be

challenged in subsequent appeals. Rather, the effect of the determination is provided for by section 28ZE of TMA, which says this:

> "(1) The determination of a question referred to the tribunal under section 28ZA of this Act is binding on the parties to the referral in the same way, and to the same extent, as a decision on a preliminary issue in an appeal.
>
> (2) The determination shall be taken into account by an officer of the Board—
>
> (a) in reaching his conclusions on the enquiry, and
>
> (b) in formulating any amendments of the return required to give effect to those conclusions.
>
> (3) Any right of appeal under section 31(1)(a), (b) or (c) of this Act may not be exercised so as to reopen the question determined except to the extent (if any) that it could be reopened if it had been determined as a preliminary issue in that appeal."

198. It is plain, therefore, that the determination is to be treated in the same way as a preliminary issue in an appeal. That reflects the nature of the question being asked. It is also significant that the determination is one that is to be "taken into account" by HMRC in formulating any amendments of the return. Such an approach would, in my view, be apt in the resolution of an issue such as a taxpayer's residence or domicile.

199. It is, in my view, significant in determining Parliament's intention in enacting Schedule 15 to F(No2)A 17 that Parliament applied, without distinction, the existing provisions relating to closure notices to the new partial closure notices and did not follow, as it plainly could have, the section 28ZA approach that would have been far more apt if it had intended partial closure notices to operate in relation to components in an analysis leading to a tax outcome. The obvious thing to have done if that were its intention would have been to alter section 28ZA so that the right to refer was exercisable unilaterally by each party.

Extra-statutory material

200. In the House of Lords case of *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 Lord Steyn held at [5] that a court can consider Explanatory Notes as an admissible aid to construction in so far as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". Because the starting point in an exercise of statutory construction is that the language "conveys meaning according to the circumstances in which it was used", the context "must always be identified and considered before the process of construction or during it".

201. In my view, it is clear that the same approach should be taken in relation to all of the published documents leading to the introduction of the system for partial closure notices. Indeed, Lord Steyn at [5] of *National Asylum Support* had already observed that other pre-parliamentary aids (such as Government green or white papers) were in principle already treated as admissible. The seventh edition of *Bennion on Statutory Interpretation* cites at section 24.9 a number of authorities for the proposition that consultation documents and the like "may be relied upon, at least for the purpose of determining the context or the mischief at which the legislation is aimed". That seems to me to be an accurate statement of the current law.

202. Power was conferred on HMRC to issue partial closure notices by way of amendment of TMA made by Schedule 15 to F(No.2)A 17. The journey to the enactment of that Schedule started, however, almost three years earlier with the publication on 18 December 2014 of a consultation document entitled 'Tax Enquiries: Closure Rules'.

203. That consultation document began by observing in [1.1] that the existing rules could be inflexible and enquiries could take a long time to settle. In particular, it noted that the rules operated so as to prevent "the formal resolution of one issue" without closing the whole enquiry subject to a referral by both parties of the issue to the tribunal. Consequently, it proposed to "improve" the enquiry process by enabling HMRC (but not the taxpayer) to achieve early resolution and closure of one or more aspects of a tax enquiry. This was not intended, however, to be a power routinely used: on the contrary, the consultation was to ask views about the "type of cases the proposal would target" and, in that context, suggested "potential safeguards surrounding the use of the new power". Paragraph [1.2] ended by stating that the proposal "also includes changes to rules governing payment, to allow earlier payment to be achieved in respect of the aspects of the enquiry successfully concluded by HMRC under the proposed power". It is worth noting that this proposal is stated as a proposition of general application.

204. The introduction also included at [1.3] the following:

> "This government has taken significant strides to make the UK's tax system one of the most modern and competitive in the world. As part of its ongoing modernisation of the administration of the tax regime, the Government now proposes to modernise the enquiry process, to make it more flexible, in response to the complex nature of contemporary tax affairs. This complexity had not been fully foreseen at the time that Self Assessment for both IT and CT and current legislation on the enquiry process were introduced."

205. It seems to me that this particular paragraph sheds little, if any, light on the nature of the proposals. It is somewhat in the nature of a sales pitch. The first sentence sets the scene in a way that is intended to reflect positively on the government. The reference to "modernisation" is, in my view, a value judgment that tells one little of the substance of the proposal. And a claim that the proposal makes the administration of the tax regime "more flexible" is simply a truth if, as I think it should be, it is taken to mean that it confers a power on HMRC that did not previously exist. This was, however, a passage that was referred to by this tribunal in *Embiricos* as supporting its view of Parliament's intention.

206. Chapter 2 of the consultation document set out the background to the proposal. It noted at [2.4] that in long-running enquiries many taxpayers made a payment on account or entered into a contract settlement as a result of the enquiry to date. But that approach was not adopted by all taxpayers and in some cases the result was protracted enquiries. It was noted later in the consultation document (at [3.5]) that a joint referral to the tribunal was often not the answer: "this process requires mutual consent of the parties, and can in some cases lead to the taxpayer adopting a tactic of refusing to progress matters in order to ensure that the dispute remains open, and tax remains unpaid, for as long as possible".

207. It was in Chapter 3 that the current problems and constraints were set out. At [3.2] it noted that part of the problem concerned complex cases involving significant sums of tax or issues which were novel or had wider impacts, for example transfer pricing disputes or issues connected to double taxation relief. The paragraph went on to note that, despite taking a collaborative approach, the resolution of the issues might take a number of years "during which time HMRC is usually unable to collect the tax that might be due", citing a particular case where over £150 million could not be collected.

208. The other main concern was with those taxpayers who were party to one or more avoidance schemes. At [3.8] it was noted that the accelerated payment regime (Chapter 3 of Part 4 of the Finance Act 2014) had removed the previous cash-flow advantage enjoyed by users of tax avoidance schemes but that regime was not of universal application. The paragraph went on to note the following:

> "So there remains a cash-flow advantage in other cases and, without mutual agreement to refer to the Tribunal, HMRC is required to close the whole enquiry in order to be able to litigate one aspect. This also results in tax due to the Exchequer remaining unpaid for long periods of time. Therefore there is a clear need to resolve areas of dispute efficiently and expediently."

209. It is of note that the focus here is, clearly, on the payment of tax earlier than would otherwise be the case. The scope of the proposal was summarised at [4.7]: the power would be targeted "narrowly at cases or issues involving significant tax under consideration or involving issues which are novel, complex, or have a wider impact, including certain of those which can include tax avoidance". In case there was any doubt that the proposal was a limited one, it then went on to say that "the power would not apply to the majority of tax enquiries and therefore would be limited in its use".

210. The proposal put forward as a solution to these issues was contained in Chapter 4. At [4.1] it was said that any tax found to be due by the tribunal in respect of the aspects of the enquiry "closed" early would become payable. The proposal was for an HMRC case worker to seek approval for senior officer authorisation to issue what was termed a "Tribunal referral order", which put the taxpayer on notice that HMRC would be applying to the tribunal for a determination of the particular aspects of the enquiry. That determination would be subject to appeals on points of law, and if HMRC were ultimately successful (following any appeal), a "Tribunal referral closure notice" would be issued and "it is envisaged that the same consequences for payment of tax would flow from a "Tribunal referral closure notice" as there would be from a full closure notice". The idea was that the Tribunal referral closure notice would be, largely, an administrative matter that reflected the outcome of the litigation on the Tribunal referral order. That is most clearly seen at [4.11] of the consultation document, which said this: "there will be no right of appeal against the "Tribunal referral closure notice" (that puts the tax into charge following the final decision) unless it fails to reflect the final outcome of the litigation". Again, it is clear that the focus is on cases where an amount of tax can be determined.

211. Having set out this proposal at [4.2], the next paragraph of the consultation document referred to cases where there was, in fact, no dispute about "the tax treatment of a specific issue" but the issue could not be "closed" whilst the enquiry considered other issues. As to these cases, the consultation document noted that "the changes proposed here would offer a remedy to this scenario - HMRC would apply to the Tribunal to close the issue, the tax treatment of which is no longer in dispute and the tax would become payable - but there may be more efficient routes to the same outcome."

212. Finally, Chapter 4 dealt with so-called jeopardy assessments (section 9C of TMA). It began by noting that "currently, when a tax enquiry is closed, the taxpayer's self-assessment is amended and any additional tax brought into charge". It then went on to make a proposal to extend the jeopardy amendment provisions to cover the resolution of a specific issue.

213. Chapter 5 of the consultation document made what were, in effect, consequential changes to the "joint referral" route. There is no comment made about the possibility of amending the relevant provisions to allow a unilateral referral by HMRC.

214. On 28 September 2015 HMRC published a summary of responses to the consultation document. It appears from that summary that consultees were well aware that the focus was on the early payment of tax. Indeed, some of the responses made suggestions that were premised on that fact. So, at [1.5] it was noted that respondents had made suggestions regarding how the process might work in practice, including "whether the determining factor in closing an aspect should be the ability to quantify the tax". That was amplified at [2.40] where it was noted that

"it was suggested setting a minimum monetary limit of potential tax lost before consideration of applying for use of this new power" and how a further comment suggested the power should only be used where tax at risk exceeded £2 million.

215. However, the main thrust of the comments made by consultees concerned the fact that HMRC could use the new power unilaterally (with nothing similar for the taxpayer). There was "overwhelming disagreement" with this aspect of the proposal [1.4].

216. And, in the light of that overwhelming disagreement, the proposal was changed into its current form. The change in approach was announced at Autumn Statement 2016 (5 December 2016), which set out a number of proposals that would be given effect in the next available Finance Bill. Under a heading "Policy Objective" that announcement described the measure in these terms:

> "The measure will give HMRC and its customers greater certainty about tax owed on individual discrete matters without having to wait for all matters in a tax enquiry to be resolved. It will make it harder for individuals to delay proceedings and will level the playing field so that all customers are treated equally and fairly. For example, a customer who uses multiple avoidance schemes will be treated in the same way as a customer with less complex affairs. In addition the measure will help customers to more effectively plan their cash flow through earlier certainty and result in earlier payment to the Exchequer of tax due."

217. Once again, it is clear that the payment of tax was front and centre stage.

218. In case there was any doubt about this, the announcement went on to give the following explanation about how the proposed measure would work (with PCN being an abbreviation for partial closure notice):

> "A PCN will almost always be followed by HMRC making an amendment to the tax return that may mean more tax is payable. Customers will have a right of appeal to the FTT to both the PCN conclusions and the amendment to a tax return. Customers will also be able to apply for postponement of any of the additional tax payable where they think it is excessive. Tax repayments arising from a PCN need not automatically be repaid, e.g. where tax is due in respect of other issues not covered by the PCN."

219. The Explanatory Notes to each Finance Bill (before and after the 2017 general election) contained the same commentary about partial closure notices. There was little real explanation about the provisions but, as part of the background note, it was noted at [51] that "as a safeguard, where HMRC issues a Partial Closure Notice and makes an amendment to the tax return, taxpayers will be able to appeal against, and apply for postponement of, any tax arising from the amendment to the tribunal". That again puts payment of tax squarely at the forefront of the policy.

220. The background documents that I have described in some detail above appear to me fully to support my analysis as to the meaning of "matter" in section 28A(2) of TMA. The focus of the policy documents was on allowing partial closure notices to be given in a narrow range of cases with the early recovery of tax the evident purpose.

Conclusion

221. For the reasons given above, in my judgment, HMRC do not have the power to issue a partial closure notice in respect of Mrs Levy's domicile without specifying the increased amount of tax.

SHOULD HMRC ISSUE A PARTIAL CLOSURE NOTICE

222. Finally, I consider whether, if I am wrong that HMRC do not have the power to issue a partial closure notice in respect of Mrs Levy's domicile status without also calculating the increased amount of tax due, HMRC nonetheless have reasonable grounds for not issuing a partial closure notice in those terms.

223. I start by noting that, in this case, the taxpayer already has the information that HMRC needs to complete the picture. It was agreed at the hearing that this could be provided by the applicant within 14 days of being required to do so. Indeed, it was initially said that it could be provided in two days. That is in sharp contrast with the case of *Embiricos* where the provision of the information was said to be a difficult, expensive and time-consuming operation.

224. Without sight of the information, HMRC are not in a position to know what more work is necessary to determine the final tax outcome. As Mr Purnell submitted in *Embiricos*, it may be that once HMRC knows the tax under consideration it might take the pragmatic decision in exercise of its power to collect and manage income tax and capital gains tax (see section 1 of TMA) not to pursue the tax (although I expect that is relatively unlikely in this case). As things stand, though, HMRC do not know for certain one way or the other how much tax is at stake.

225. Mr Purnell also submitted that it might take a significant amount of time to resolve the domicile issue during which time there is a risk that the information required to determine the amounts of tax might cease to be available. That could, for example, arise as a result of the approach to data retention (including electronic data retention) adopted by third parties. I consider that there is force in this submission.

226. I have considered the fact that enquiries into Mrs Levy's overseas affairs might be considered intrusive, particularly as any hearing to determine her tax liabilities will be in a public forum. In that connection, I have also considered the fact that, as an exception to the normal rules, a claim by a person for the remittance basis does not require the quantification of the tax involved. That is the result produced by the disapplication by section 809B(3) of the Income Tax Act 2007 of the requirement in section 42(1A) of TMA to quantify the claim.

227. Mr Gordon also seeks to rely on the comments made by Mr Hartnett, as acting Chairman of HMRC, in a letter of 12 February 2008 that is available to the public. That letter was issued during the consultation on the Government's plans to alter the tax rules on residence and domicile.

228. The purpose of the letter was explained in the opening paragraph: "there are 4 issues that have been raised, where I want to make clear what the Government's intention has always been and how it will be set out in the legislation to be brought forward". Before then dealing with those four issues on the second page of the letter, Mr Hartnett reiterated the fact that the Government's intention "will be set out in the legislation to be brought forward" and then described the first of the four issues in these terms:

> "those using the remittance basis will not be required to make any additional disclosures about their income and gains arising abroad. So long as they declare their remittances to the UK and pay UK tax on them, they will not be required to disclose information on the source of the remittances".

229. It seems to me that this statement was, indeed, set out in the legislation. It is simply a description of what became section 809B(3) of the Income Tax Act 2007. In my view, the passage quoted above cannot, properly viewed in its context, reasonably be taken to be saying any more than that. It is, plainly, *not* saying that the mere fact that a person makes a claim for remittance basis means that no further enquiry can be made of the claim to check whether the person satisfies the preconditions for the claim. The reference to persons "using the remittance

basis" clearly means persons properly entitled to use the remittance basis. Any other view would be absurd.

230. I do not consider that the provision made by Parliament in enacting section 809B(3) of the Income Tax Act 2007 has given some form of preferential treatment to those claiming the remittance basis so as to affect (to their advantage) the way in which HMRC should conduct their enquiries.

231. I also do not consider that there is any other statutory basis for affording greater protection to the confidentiality of the affairs of those claiming the remittance basis. The law protects taxpayer confidentiality in the most general of ways (see section 18 of the Commissioners for Revenue and Customs Act 2005) but it also confers powers on HMRC to carry out investigations to secure that the right amount of tax is paid by all taxpayers. It is a fundamental part of the system that, if a judicial authority has to determine a dispute affecting those matters, the dispute will be heard in public. That is the case for any tax dispute. In my view, there is nothing special about a dispute relating to persons claiming the remittance basis.

232. In reaching the value judgment required by the statutory test, I am satisfied that HMRC do have reasonable grounds for not issuing a partial closure notice. In reaching that conclusion, I have had regard, in particular, to the fact that the information has already been obtained by the taxpayer and that any delay in its provision carries with it a risk that any subsequent enquires made by HMRC relating to it might be hindered by the inability to access information or documents that would be reasonably required for the purposes of the enquiry.

233. As stated above, I do not consider that it is relevant to consider confidentiality issues in this case. But, in case that involves an error on my part, I have further considered whether, taken together with the other matters referred to above, it would affect my conclusion if I did have regard to confidentiality issues. Having also considered those issues, I am satisfied that they do not affect my conclusion. On either approach, I am satisfied that – assuming that HMRC have power to issue a partial closure notice – there are reasonable grounds for HMRC not to issue one relating to Mrs Levy's domicile without specifying the tax payable.

APPEAL AGAINST THE TAXPAYER NOTICE ISSUED UNDER PARAGRAPH 1 OF SCHEDULE 36 FA08

234. In the light of my judgment that HMRC have reasonable grounds for not issuing a final or partial closure notice, I consider that the appeal against the notice issued by HMRC on 28 March 2019 under paragraph 1 of Schedule 36 to FA08 fails. The very reason why the enquiry should continue is to allow HMRC to determine what tax is payable. Consequently, information to be provided for that purpose is reasonably required for the purposes of the enquiry.

235. I dismiss the appeal against the information notice. It was agreed at the hearing that the information could be provided to HMRC within 14 days of the release of this judgment. The information notice falls to be complied with as if that were the date referred to in the notice for the provision of the information to HMRC.

DISPOSITION

236. For the above reasons, my decision is that:

(1) HMRC have reasonable grounds for not issuing a final closure notice: the application for the issue of such a notice is dismissed;

(2) there is no power for HMRC to issue a partial final closure notice in this case but, if the power does exist, HMRC have reasonable grounds for not issuing one: the application for the issue of a partial closure notice is dismissed; and

(3) the appeal against the issue of the notice under paragraph 1 of Schedule 36 to FA 2008 is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

237. This document contains full findings of fact and reasons for the decision.

238. There is no right of appeal against the tribunal's decision in relation to the information notice (see paragraph 32(5) of Schedule 36 to FA08).

239. Any party dissatisfied with this decision of the tribunal so far as relating to the application for a full or partial closure notice 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.

JUDGE ANDREW SCOTT
TRIBUNAL JUDGE

Release date: 26 June 2019