[2018] UKFTT 0185 (TC)

TC06426

Appeal number: TC/2016/06084
TC/2016/06085

INCOME TAX– preliminary issue – "voluntary returns" – no notice given by HMRC under s.8(1) Taxes Management Act 1970 (TMA) requiring a taxpayer to file a return - HMRC treating returns as made under s 8 TMA – enquiry commenced under s. 9A TMA – closure notice issued under s 28A TMA – whether returns made under s 8(1) TMA and therefore whether enquiry and closure notices valid – held: no - scope of care and management powers under s1 TMA and s5 Commissioners of Revenue and Customs Act 2005 (CRCA) – scope of ancillary powers under s9 CRCA

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHIVA PATEL
and **Appellants**
USHMA PATEL

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 1 and 2 February 2018, with further written submissions on 22 February and 6 March 2018

James Ramsden QC and Conrad McDonnell, Counsel, instructed by Reynolds Porter Chamberlain LLP for the Appellant

Aparna Nathan and Marika Lemos, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. Ms Shiva Patel and Ms Ushma Patel (together, "the appellants") appeal against closure notices issued by the Respondents ("HMRC") pursuant to s. 28A Taxes Management Act 1970 ("TMA") on 2 March 2016 ("the closure notices").

2. The closure notices amended the appellants' self-assessment income tax returns for the year ending 5 April 2009 ("the Returns" or "the Return" [1]) and, as a result, HMRC claim that the appellants owe additional income tax for the tax year ended 5 April 2009 ("the 2009 tax year") in the following amounts:

(1) £6,742 in the case of Ms Shiva Patel; and

(2) £1,266.60 in the case of Ms Ushma Patel.

3. By agreed Directions endorsed by the Tribunal on 2 May 2017, it was agreed that the following issue ("Ground 1") should be resolved as a preliminary issue at a preliminary hearing. The issue is whether HMRC have the power under s. 9A TMA to enquire into the Returns and whether HMRC have the power under s.28A TMA to amend the Returns in circumstances where the Returns were made and delivered by the appellants voluntarily and where the appellants have not been sent a notice to do so by HMRC under s. 8(1) TMA. Essentially, the issue before me is whether the Returns are to be regarded as returns made "under section 8… TMA" for the relevant purposes of the TMA.

The facts

4. The relevant facts were not in dispute.

5. Ms Shiva Patel and Ms Ushma Patel completed paper tax returns, in the same form as Self- Assessment tax returns used by HMRC for the 2009 tax year, and filed them with HMRC on 18 January 2010 and 29 January 2010 respectively.

6. On sending the Returns, the appellants' representatives wrote: "Our client attempted to register for self-assessment, however they were unsuccessful and hence the reason the sending a paper return."

7. There is no suggestion that the Returns were in the wrong form or format. Each Return was signed by the respective appellant as complete and correct to the best her knowledge and belief.

8. The Returns were what are known as "voluntary" or "unsolicited" returns. In other words, HMRC did not give the appellants notice pursuant to s.8(1) TMA

[1] I shall use the word "Returns" or "Return" for convenience only and without in any way prejudging the issue.

requiring the appellants to make and deliver a return for the 2009 tax year. That important fact was common ground.

9. Once the Returns had been received, HMRC processed them into their Self-Assessment System and both appellants were allocated a unique taxpayer reference number.

10. On 29 January 2010, HMRC sent letters to Ms Ushma Patel and to Ms Shiva Patel's agent which acknowledged receipt of the Returns. The letters both stated:

> "I [HMRC] will treat the form for all purposes as though you sent it in response to a notice from us requiring you to make a Tax Return by the date we received it."

11. No response was received by HMRC from the appellants or their agents to those letters of 29 January 2010.

12. In April 2010 Ms Ushma Patel amended her 2009 tax return (originally sent to HMRC on 20 January 2010) in order to reduce her liability to tax and the amendment was processed by HMRC in July 2010. The amendment was dated 30 April 2010 and was delivered to HMRC on 5 May 2010.

13. In October 2010, HMRC sent notices to the appellants purporting to be notices of enquiry pursuant to s.9A TMA and opening enquiries into their Returns. The notice in respect of Ms Ushma Patel was dated 12 October 2010 and that in respect of Ms Shiva Patel was dated 28 October 2010. The notices were sent to the appellants and to their agents. No response was received by HMRC from the appellants and no challenge to the validity of the notices was made at that time.

14. The ensuing enquiry remained open and unchallenged until 2015.

15. On 9 October 2015, Ms Ushma Patel applied to this Tribunal pursuant to s.28A (4) TMA for a direction requiring HMRC to issue a closure notice. A similar application was made on 25 November 2015 by Ms Shiva Patel. Both applications raised, for the first time, the issue of whether the Returns were returns made under s.8 TMA. On 2 March 2016, before the applications were heard by the Tribunal, Closure Notices (or at least documents purporting to be Closure Notices) were issued. These Closure Notices stated the conclusions of an officer of the Board and purported to amend the appellants' Returns to give effect to those conclusions.

16. The appellants appealed against the Closure Notices on 30 March 2016 and the appeals were notified to the Tribunal on 19 November 2016, following a statutory review by HMRC which upheld the original decisions.

17. Mr Fedigan's evidence of HMRC's practice was that HMRC would only accept a voluntary return if in the circumstances it would be of mutual benefit for both HMRC and the individual taxpayer to do so, and if the following conditions were met:

(1) The voluntary return was intended by the taxpayer to be a return filed under s.8 TMA.

(2) HMRC exercised their discretion not to issue a s.8 notice and accept the voluntary return as a return filed under s.8 TMA.

(3) There was no objection to this treatment by the taxpayer, such that the taxpayer waived any right he or she may otherwise have had to insist on the issue of a s.8 notice.

(4) There was no suggestion that the taxpayer had been compelled or coerced into filing a voluntary return by the actions of HMRC, mistaken or otherwise, such that the exercise of HMRC's discretion to accept the return would no longer be of mutual benefit to HMRC and the filing taxpayer.

The statutory provisions

18. At the times material this appeal the relevant provisions of the TMA and other relevant statutes are set out below.

Self-assessment – Taxes Management Act 1970

19. Section 7 TMA provides:

> **"Self-assessment**
>
> 7 Notice of liability to income tax and capital gains tax
>
> (1) Every person who—
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,
>
> shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable."

20. Section 8 TMA provides:

> "8 **Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> …
>
> (1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies.

…

(1D) A return under this section for a year of assessment (Year 1) must be delivered—

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

…

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

…"

21. Taxpayers may amend returns filed under s.8 TMA pursuant to S.9ZA TMA which provides as follows:

"9ZA **Amendment of personal or trustee return by taxpayer**

(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.

(2) An amendment may not be made more than twelve months after the filing date.

(3) In this section "the filing date", in respect of a return for a year of assessment (Year 1), means—

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice."

22. Section 9 TMA deals with the contents of returns under s. 8 TMA as follows:

"9 **Returns to include self-assessment**

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

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person

making the return is chargeable to income tax and capital gains tax for the year of assessment; and

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

…

(2) A person shall not be required to comply with subsection (1) above if he makes and delivers his return for a year of assessment—

(a) on or before the 31st October next following the year, or

(b) where the notice under section 8 or 8A of this Act is given after the 31st August next following the year, within the period of two months beginning with the day on which the notice is given.

(3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case—

(a) make the assessment on his behalf on the basis of the information contained in the return, and

(b) send him a copy of the assessment so made;

…

(3A) An assessment under subsection (3) above is treated for the purposes of this Act as a self-assessment and as included in the return."

23. Section 9A TMA sets out HMRC's power to enquire into a tax return and provides:

"9A **Notice of enquiry**

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

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

(b) within the time allowed."

24. Finally, as regards closure notices issued at the end of an enquiry, s. 28A TMA provides:

"28A **Completion of enquiry into personal or trustee return**

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

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

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.

…

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

25. Section 118 TMA provides the definition of a "return" as follows:

"118 **Interpretation**

(1) In this Act, unless the context otherwise requires—

"return" includes any statement or declaration under the Taxes Acts,"

Collection and management powers

26. Section 1 TMA provides as follows:

"1 **Responsibility for certain taxes**

The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—

(a) income tax,

(b) corporation tax, and

(c) capital gains tax."

27. Section 5 Commissioners for Revenue and Customs Act 2005 ("CRCA") provides as follows:

" 5 **Commissioners' initial functions**

(1) The Commissioners shall be responsible for—

(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,

(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and

(c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.

(2) The Commissioners shall also have all the other functions which before the commencement of this section vested in—

(a) the Commissioners of Inland Revenue (or in a Commissioner), or

(b) the Commissioners of Customs and Excise (or in a Commissioner).

(3) This section is subject to section 35.

(4) In this Act "revenue" includes taxes, duties and national insurance contributions."

28. Section 51(3) CRCA provides as follows:

> " A reference in this Act, in an enactment amended by this Act or, subject to express provision to the contrary, in any future enactment, to responsibility for collection and management of revenue has the same meaning as references to responsibility for care and management of revenue in enactments passed before this Act."

29. Section 9 CRCA provides:

> "9 **Ancillary powers**
>
> (1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions.
>
> (2) This section is subject to section 35."

Application to amend HMRC's statement of case

30. In December 2017, HMRC applied to amend their Statement of Case. The appellants objected to this application and, pursuant to directions of Judge Richards on 11 January 2018, the application fell to be dealt with by me at the beginning of the hearing.

31. Essentially, HMRC applied to refine and expand their legal arguments broadly to the effect that HMRC was entitled to treat the appellants' Returns as made under s. 8 TMA.

32. Having heard argument by both parties on the point, I decided to allow HMRC's application. It seemed to me that the points raised were essentially points of law and did not require further evidence. On that basis and because the appellants' had adequate notice of the points proposed to be raised by HMRC, I considered that in order to deal with this preliminary issue fairly and justly HMRC should be allowed to amend their statement case. In the event, Mr Ramsden QC, appearing with Mr McDonnell, for the appellants was able fully to deal with the additional matters raised in the amended statement of case.

Construction of s.8 TMA

Submissions in summary

33. An important issue in this appeal concerns the meaning of the phrase "a return under section 8 [TMA]". The phrase is significant because s.9A TMA permits HMRC to enquire into "a return under section 8 [TMA]. If the Returns were not returns "under section 8" then it followed that HMRC could not open an enquiry under s.9A.

If there was no enquiry under s.9A, then HMRC could not issue a closure notice under s.28A because s.28A(1) provides:

> "An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions."

Thus, if there was no valid enquiry under s.9A there could be no valid closure notice under s. 28A. In essence, HMRC did not dispute this analysis.

34. Ms Aparna Nathan, appearing with Ms Lemos, for HMRC, contended instead that the Returns were returns "under s.8". Mr Ramsden argued that the Returns were not returns "under s.8" and that, accordingly, there was no valid enquiry under s.9A and, consequently, there could be no valid closure notice under s.28A.

35. It was, as I have said, common ground that HMRC had not given the appellants a notice within s.8(1). It was also common ground that in cases where a s.8(1) notice had been delivered there could be penalty consequences for a taxpayer who did not comply with it.

36. Ms Nathan argued that s.8 gave HMRC a discretion to issue a s.8 notice (s.8(1): "may be required"). The statute did not prescribe the parameters within which that discretion had to be exercised. There was no duty on HMRC to give a notice. The purpose of a s.8 notice was to oblige the taxpayer to make a return containing information that was reasonably required "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year" (see *De Silva & Anor, R (on the application of)v Revenue and Customs* [2017] UKSC 74 at [12] *per* Lord Hodge). Clearly, Ms Nathan submitted, where the taxpayer had submitted a voluntary return containing all the relevant information that would be a relevant factor in the exercise of HMRC's discretion.

37. Ms Nathan contended that where a taxpayer provided a voluntary return which contained the information required for the statutory purposes referred to above, that return was a "return under s.8 [TMA]". Such a return gave effect to the statutory purposes referred to in the introductory wording of s.8(1) and the only aspect that was not engaged was the obligation to comply with a notice.

38. Ms Nathan noted that nothing in the TMA prevented HMRC from treating a voluntary return, which contained the necessary information, as being a return under s.8. The legislative framework was silent as to the validity or otherwise of voluntary returns. It was obviously the intent of Parliament when drafting s.8 TMA to ensure that there was a mechanism by which a voluntary return (of which there were over 450,000 each year) should be treated as a return under s.8 TMA. A purposive construction of s.8 TMA should therefore be adopted to achieve the obvious intention of Parliament.

39. If a return was a return under s.8 then, as Ms Nathan explained, there were certain consequences. First, an enquiry could be opened under s.9A (this included the

12 month time limit in which a notice of enquiry could be given). Secondly, a valid s.29A closure notice could be given. Thirdly, the protections afforded to a taxpayer in respect of a discovery assessment under s.29 TMA would apply. Finally, a taxpayer could make amendments to their returns under s9ZA TMA.

40. If a voluntary return was not treated as a return under s.8, Ms Nathan observed that HMRC would be obliged to issue a s.8 notice; in other words, the taxpayer would be asked to supply the same information twice. Obviously, this would be inconvenient and inefficient.

41. By contrast, according to Ms Nathan, if the appellants' analysis was accepted none of the above consequences – which were mutually beneficial to the taxpayer and HMRC – would follow. Thus, for example, a taxpayer could not amend a return and HMRC could not enquire into a return; the taxpayer would lose the protections usually afforded by the TMA. A construction that produced such a strange statutory result was one that should be rejected.

42. Ms Nathan submitted that the language of s.8 TMA was consistent with HMRC's interpretation. No additional words needed to be read in. However, if words had to be "read into" s.8 in order to achieve the results intended by Parliament, Ms Nathan cited the decision of the Court of Appeal in *Pollen Estate Trustees Co Ltd v HMRC* [2013] EWCA 753 and the authorities referred to therein in support of such a course of action.

43. Thus, if it were necessary to insert language into s.8 to give effect to Parliament's intention, Ms Nathan suggested the following amendments to the language of s.8:

> "8 **Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may, ***or may*** be required by a notice given to him by an officer of the Board ***to***—
>
> (a) ~~to~~ make and deliver to the officer, a return containing such information as may reasonably be required ***for the purpose set out above*** ~~in pursuance of the notice~~, and
>
> (b) ~~to~~ deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

44. Ms Nathan argued that a voluntary return did not merely constitute a notice of liability to tax under s.7 TMA alone. It was possible, in her submission, that the voluntary return could fall within both s.7 and s.8 so that the two provisions could work in tandem.

45. Ms Nathan also referred to the decision of *IRC v Nuttall* [1990] 1 WLR 631 at 643 ("*Nuttall*"). In that case, the taxpayer argued that the Inland Revenue had no

power to enter into back duty agreement settling the taxpayer's past tax liabilities. The Court of Appeal rejected that argument and Bingham LJ said at 643 E:

> "It would seem to me extraordinary, and also regrettable if the revenue could not achieve by agreement that which it could undoubtedly achieve by coercion."

46. By analogy, Ms Nathan submitted that HMRC should be able to agree to treat a voluntary return as a return under s.8 rather than to compel the making of a return by issuing a notice under s.8(1).

47. Next, Ms Nathan referred to the decision of the Court of Appeal in *W H Cockerline & Co v IRC* (1930) 16 TC 1, ("*Cockerline*") where the issue related to a tax called excess profits duty and whether, on the particular facts, "all questions as to [the taxpayer's] liability in respect of duty … have, in the opinion of the Commissioners, been finally determined". The taxpayer had been the subject of an enquiry in relation to the duty and other taxes. On his behalf it had been agreed that substantial further sums were due, which were paid, and later a large sum was paid in settlement of a claim for penalties. There had been no assessment for the additional sums of tax, nor any equivalent demand in respect of penalties. Nevertheless the Commissioners served notice that all questions had been finally determined. The taxpayer appealed against the notice. The taxpayer submitted that the sums paid by way of additional tax could not properly have been paid without an assessment, and that it was wrong that there should be any inroad "upon the rights of the subject that there should be any sum ever accepted from the subject in discharge of a liability in respect of which there had not been the assessment or paper imposing the assessment served upon him". Lord Hanworth MR rejected that argument, as did Slesser LJ, who at page 26 observed in terms that it was open to the Crown and a subject to come to an effective agreement as to the sum to be paid without the formality of an assessment. Romer LJ also agreed.

48. Ms Nathan argued that *Cockerline* was authority for the proposition that it was possible to dispense with the statutory machinery in appropriate cases, particularly by agreement. In the present case, she contended that the appellants had submitted the Returns intending for them each to be treated as a return under s.8 and had not objected to this treatment until 2015. The appellants had opted out of the usual statutory route and had acquiesced in the Returns being treated as s.8 returns.

49. Mr Ramsden submitted that ss. 8, 9A and 28A provided a rigid statutory code for enquiries. In particular, each step taken by HMRC required a notice to be given to the taxpayer.

50. First, a notice to file a return, under s.8 TMA, required a return to be filed and it determined the due date for that return. If a notice had been given and a return was not filed by the due date, the taxpayer could become liable to penalties.

51. Secondly, a notice of enquiry under s. 9A TMA commenced an "enquiry" and allowed HMRC later to issue a closure notice under s28A TMA. An enquiry must be completed by a closure notice issued within time (normally 12 months after the filing

of a s.8 return) and, if no notice of enquiry was issued in time, then there could be no valid enquiry.

52. Thirdly, a closure notice terminated an enquiry but it could also charge tax by amending the return.

53. It followed, therefore, in Mr Ramsden's submission, that without the requisite statutory notice under s.8, there would be no corresponding statutory effects.

54. Because no notice to file a return was given pursuant to s. 8(1) TMA there was no relevant statutory time limit for the appellants to file any returns (and no possibility of a penalty for not filing a return). Mr Ramsden submitted that neither Return filed with HMRC was: "a return containing such information *as may reasonably be required in pursuance of the notice*" within the meaning of s.8(1)(a). Indeed, Mr Ramsden's argument was that the Returns could not be returns "containing such information as may reasonably be required in pursuance of the notice", because in the case of each appellant there was no notice.

55. Similarly, Mr Ramsden submitted that in each case the Return submitted by each appellant was not a "return under this section" within the meaning of s.8(2) TMA.

56. It followed, therefore, that neither of the Returns was "a return under section 8 or 8A of this Act" for the purposes of s.9(1) or s.9A(1) TMA.

57. Mr Ramsden referred to the provisions relating to corporation tax which corresponded with s.8 TMA. These were found in paragraph 3 Schedule 19 Finance Act 1998 ("paragraph 3"). The provisions were very similar and the main difference was that the filing date free corporation tax return was 12 months from the end of the relevant accounting period (whereas for individuals it was 31 January following the end of the tax year, in the case of online returns).

58. These corporation tax provisions were considered by this Tribunal in *Bloomsbury Verlag GmbH v Revenue and Customs Commissioners* [2015] UKFTT 660 (TC) (Judge Gammie CBE QC and Mr Presho) ("*Bloomsbury")*. In that case a foreign company had belatedly notified HMRC of its liability to tax in the UK. HMRC had issued notices to file returns for certain accounting periods but had not issued a notice to file a return for 2003. The company filed a "voluntary" return for the period ended 30 December 2003. The 2003 return declared a trading loss, for which the company in later returns claimed relief against the profits of those later periods. HMRC sought to deny loss relief, on the basis that the loss had not been established in a statutory return, because the 2003 return was filed voluntarily and not pursuant to any notice under paragraph 3. The First-tier Tribunal ("FTT") upheld HMRC's submission on this point. At [85], the FTT defined the issue in the following terms:

> "Did the Company submit a valid Company Tax Return that was effective to quantify for carry forward to future periods the 2003 trading losses given that HMRC had issued no notice to the Company

> under paragraph 3 requiring it to submit a Company Tax Return for that period?"

59. HMRC in *Bloomsbury* argued that the company's 2003 return was either not a statutory return at all, or it was filed out of time, so that in either case there was no statutory self-assessment of the loss the 2003. It followed, as HMRC argued in that case, that there was no quantified loss of the 2003 for which relief can be claimed in later periods. The company argued that nothing in the legislation prevented it from filing a voluntary return. The FTT determined the point in favour of HMRC, concluding that a "voluntary" return was not a return with any statutory consequences (although the appeal was ultimately determined in the company's favour on other grounds).

60. At [101]-[104] the FTT said:

> "[101] …A company's obligation to deliver a return and self-assess tax depends upon it receiving notice from HMRC to that effect. In the absence of such notice para 2 places the company under a duty to notify an officer of HMRC that it is chargeable. The expression 'chargeable to tax' has no fixed meaning and takes its meaning from the context (see *Barnes v Revenue and Customs Comrs* [2014] EWCA Civ 31 per Vos LJ at [38]). In the present context it must mean 'within the charge to corporation tax' and not that there are in fact profits to be charged to tax for the period.
>
> [102] Once the company has fulfilled its duty to give notice, it then rests with an officer of HMRC (acting in accordance with departmental policy and within the legitimate bounds of HMRC's care and management powers) to require delivery to him of a company tax return with the prescribed information for the specified period. This is reflected in the introductory language of CT600 which refers explicitly to form CT603, the notice to deliver a tax return. While HMRC may publish the form of the return and details of the information that the company must ordinarily provide, nothing in paras 2–5 suggests that a company can initiate the Sch 18 procedure except by notifying HMRC that it is chargeable to tax for an accounting period.
>
> [103] The Company, of course, puts the matter the other way: in other words, it says that there is nothing in Sch 18 to suggest that it *cannot* submit a return without any requirement under para 3 to do so. Its *duty* to submit a return only arises if HMRC have given a notice requiring the company to do so. Furthermore, the Company says that HMRC's admission that it operates a policy in certain circumstances (such as the present) of not requiring a return plainly suggests that a company should be entitled to submit voluntarily a company tax return if Parliament's express intention of allowing relief for past trading losses to be taken into account in producing the right measure of future taxable profits is not to be frustrated.
>
> [104] The Company has not persuaded us, however, that Sch 18 allows for a company to make a 'voluntary' return. Its duty is to notify liability and that is contrasted with the discretion then given to HMRC to require the company to deliver a return. It is not just that para 3(1)

> envisages that 'an officer may by notice require (if it is necessary to do so) a company to deliver a return'. The notice dictates what flows from that requirement: in particular, what the taxpayer must provide and the period of assessment in issue. The fact that Parliament has placed in HMRC's hands (consistent with their role in these matters) a 'discretion' whether or not to require a return is not an invitation to HMRC to exercise that discretion in an arbitrary or unfair manner and does not provide them with a mechanism for indirectly denying taxpayers the benefit of reliefs to which they would otherwise be entitled. The fact is that the Company was significantly late in notifying its liability for 2003. It is that factor rather than any policy on HMRC's part to deny the Company the benefit of its trading losses that has produced this outcome. In this respect we can see no reason to interpret Sch 18 just so as to resolve the Company's problem for 2003 when the structure and language of the Schedule is otherwise. Barling J's remarks at para [45] in *Higgs* are equally applicable in this case, save in this case in favour of HMRC's interpretation of the legislative provisions."

61. At [96] the FTT noted the similarities between the income tax regime provided for in the TMA and the corporation tax regime provided for in Schedule 18 Finance Act 1998:

> "[96] Given that ITSA and CTSA are subject to separate legislative regimes, the position under one does not automatically dictate the position under the other. Nevertheless, where the relevant features of the two regimes correspond it would be surprising to reach a different conclusion on their relevant effect. At least, one would expect to be able to detect in the administrative policy as it applies on the one hand to individuals and income tax and on the other hand to companies and corporation tax, some distinct policy reason why Parliament might have legislated to produce different administrative outcomes."

62. Mr Ramsden submitted that the appellants could not "waive" the statutory requirement for a s.8 notice and thereby transform documents which were not statutory returns pursuant to statutory notices under s.8(1). If the returns were not statutory returns made under s.8 TMA, no waiver or consent or other action on the part of the taxpayer could alter that position.

63. Mr Ramsden referred to *Revell v HMRC* [2016] UKFTT 97 (TC) (Judge Herrington and Ms Debell) ("*Revell*") in which the FTT considered the application of s.28C TMA, which allowed HMRC to issue a notice of determination of tax for a year in a case where HMRC issued, pursuant to s.8(1) TMA, a notice to complete a tax return but the taxpayer failed to file a return. The FTT found, on the facts of that case, that HMRC had not issued a s.8 TMA notice because the notice had, in summary, been sent to the wrong address. Therefore, the s.8 notice had not been served on the taxpayer in compliance with the TMA (at[30]-[33]).

64. Eventually, in March 2014, the taxpayer submitted a return form for the tax year 2008/09 with a view to displacing the s.28C determination. That attempted return was out of time to be a statutory self-assessment and no s.8 notice had been validly served.

Nonetheless, HMRC argued in that case that the return form submitted in March 2014 could be treated as a "voluntary" return so that the taxpayer could be said to have "waived" the s.8 notice requirement. Thus, Mr Ramsden submitted, the issues in *Revell* were similar to those in the present appeal and he drew attention to [35]-[38] of the decision in that case.

65. At [35]-[39], the FTT said:

> "35. HMRC observe that they receive approximately 350,000 unsolicited returns each year, largely from PAYE taxpayers who do not need to complete a self-assessment but who are seeking a repayment. They quote what they say is long-standing advice from their solicitors as follows:
>
> 'In my view that which is intended to be a return, whether paper or electronic and is in an appropriate form may properly be regarded as a statutory return. I appreciate that the statutory scheme puts an obligation on the taxpayer to make a return arise [sic] only once he receives a notice which requires him to do so. But in any case in which an unsolicited return has been received, the better view, as it seems to me, is that the taxpayer has waived the formal notice step.'
>
> 36. On the basis of that advice, it appears that HMRC's policy is that it treats an unsolicited return for all purposes as if it were in response to a notice to make a return by the date HMRC received it. In support of this view, they refer to *Giles Davis v HMRC* (2011), a decision of this Tribunal. That case concerned a penalty assessment made in respect of an error on an unsolicited return which HMRC contended was careless. HMRC had opened an enquiry into the return under s 9A TMA and pursuant to a closure notice amended the return to include an additional liability for tax.
>
> 37. It appears that although the Tribunal refer to sections 7, 8, 9, 9A and 28 A TMA it provided no analysis of those sections and in particular did not consider whether the return in question was a return falling within s 8 and consequently did not consider either whether the enquiry was a valid enquiry and the closure notice was a valid closure notice. The point was never argued and the Tribunal appears simply to have assumed the validity of the process that had been followed. Consequently, aside from the fact that such a decision is not binding on this Tribunal in any event, as the points were never argued the decision cannot be regarded as authority for HMRC's position.
>
> 38. We reject HMRC's analysis of the position. In our view the wording of the relevant sections is absolutely clear and provide no basis for the submission that by making an unsolicited return the taxpayer has waived the requirement for a notice under s 8. The legislation makes no provision for such a waiver to be effective. If Parliament had meant the submission of a voluntary return to amount to a waiver of the requirement to give notice then it could have said so.
>
> 39. As far as the determination notice is concerned, in our view it is clear that there was no legal basis for it. Section 28C TMA only applies where "a notice has been given to any person under s 8 …" As our finding is that no notice was given to Mr Revell in respect of the

> 2008/2009 return pursuant to s 8 there can be no valid determination under s 28C."

66. The FTT continued at [41]-[43]:

> "41. As mentioned above, HMRC treated the determination as having been superseded when Mrs Carter on behalf of Mr Revell filed a self-assessment on 4 March 2014. However, it follows from our finding on the status of the determination that it was not in fact superseded for two reasons. First, it was not validly made therefore there was no determination to supersede. Secondly, the statute provides that it is superseded by a "self-assessment made under s 9..." Such a self-assessment can only be made in a return delivered pursuant to s 8 TMA and, as we have found, the return concerned in this case was not delivered following a request validly made pursuant to s 8.
>
> 42. In our view the correct analysis of the position is that the return that Mr Revell made is in fact to be characterised as a notice of liability to income tax pursuant to s 7 TMA rather than a self-assessment return at all. Had the time limit in s 34 TMA not then expired it would have been open to HMRC to issue a request for a self-assessment return pursuant to s 8 TMA in response to the information submitted by Mr Revell but in the absence of that opportunity it is hard to see how what he filed could be characterised as a return made pursuant to a request under s 8. The examples HMRC gave in their submissions would it appear be dealt with in this manner, that is in response to a request for repayment HMRC would ask the taxpayer to complete a return and that request would bring into play sections 8, 9 A and 28A. Insofar as that course of action was not possible, because for example the expiry of limitation periods, then it may be possible for a discovery assessment to be made pursuant to s 29 TMA so HMRC are not entirely without tools to deal with the situation.
>
> 43. Therefore it seems to us that in this case HMRC must accept the consequences of having failed to give notice as required by s 8 TMA and then being unable to issue a valid request for a self-assessment return because of expiry of the time limit in S 34 TMA. The consequence is that there is no opportunity to open an enquiry and the only route available to them would have been the making of a discovery assessment, had the statutory conditions for such an assessment been satisfied.
>
> 44. We therefore conclude that both the notice of enquiry and the closure notice issued to Mr Revell which are the subject of this appeal were invalid. Accordingly, the assessment to income tax made in respect of the 2008/2009 tax year must be discharged."

67. Unsurprisingly, Mr Ramsden submitted that the reasoning in *Revell* equally to the present appeal.

68. In order to assess tax for the 2009 tax year, Mr Ramsden argued that HMRC should have either:

(a) issued an assessment pursuant to s.29 TMA, but noting that HMRC were now out of time to do so; or

(b) issued the appellants with statutory notices pursuant to s.8 TMA for the 2009 tax year following receipt of the Returns submitted (whether in exercise of HMRC's collection and management powers, or on the basis of the forms filed by the appellants constituted notification of liability under s.7 TMA, see *Revell* at [42]). Following the issue of such s.8 notices, the appellants could have submitted the same forms but this time as statutory returns pursuant to s.8.

69. As for the future, since September 2017, HMRC now had a third option available to them, viz to make a Simple Assessment under s.28H TMA.

70. Ms Nathan sought to distinguish *Bloomsbury* and *Revell*, noting that neither decision was binding upon me. As regards *Revell*, Ms Nathan submitted that it was correctly decided on the facts i.e. the unsolicited return filed by the taxpayer in that case could not have been accepted by HMRC as a voluntary return filed pursuant to a s.8 notice. As regards *Bloomsbury*, Ms Nathan submitted that that case turned on the fact that the return in question was out of time – it was for that reason that the return was not a valid return.

71. Furthermore, to the extent that *Bloomsbury* and *Revell* could not be distinguished, Ms Nathan noted that HMRC's power to accept voluntary returns as returns filed pursuant to s.8 was an issue which was not fully argued and the decisions were therefore *per incurium*. The decisions did not consider HMRC's care and management powers under s.1 TMA and ss. 5 and 9 CRCA. Alternatively, Ms Nathan submitted that the decisions in *Bloomsbury* and *Revell* were wrong.

Post-hearing submissions

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

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

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

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

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

"29. Firstly, is Schedule 55 engaged if, in respect of a return under Section 8(1)(a) TMA no notice to deliver such a return is given to the appellant? In our view the answer is that Schedule 55 is not so engaged.

30. We say this for a number of reasons.

31. The first is that on the words of the statute, there is a clear link between a notice to be given to a taxpayer by HMRC, and the obligation on the taxpayer (in response thereto) to deliver a tax return to HMRC. The use of the word "may" in Section 8(1) has given us pause for thought. However, we do not believe that this means that HMRC have a discretion as to whether to serve such a notice on a taxpayer. Nor that there is also a residual or parallel regime which obliges a taxpayer to submit a return under Section 8(1)(a) even if HMRC have not given him a notice. ("May") simply means that if a taxpayer is given such a notice, he must file a return.

32. If Parliament had intended that the obligation to deliver a Section 8(1)(a) return was an absolute obligation, irrespective of whether HMRC had required a taxpayer to do so, there seems to be no reason why there should be any reference to a notice requirement at all.

33. It is of course the case that a taxpayer has an obligation to notify chargeability under Section 7 TMA. But any such notification is notification under Section 7 and is (obviously) not a return under Section 8(1)(a). And failure to notify under Section 7, whilst it might bring with it penalties of some sort, does not bring with it penalties under Schedule 55. There is no reference to Section 7 TMA in the table in paragraph 1(5)(b) of Schedule 55.

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

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

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

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

> 38. What then is the position when a taxpayer is given no notice to file but still files a return. In those circumstances, can Schedule 55 apply? In our view no. Slightly oddly, if a taxpayer submits a return, notice for which he was never given, then the statutory pre-requisite for a return under Section 8(1)(a) is unfulfilled and thus Schedule 55 has nothing to bite on.
>
> 39. This may be a reasonably commonplace situation. Many individuals and their agents file electronic returns or download paper returns which are then filed through the post. And many will do so, spontaneously, knowing that they or their client has a source of income which needs to be returned. Having filed that return, we have no doubt that, if it is late, HMRC will impugn them under Schedule 55 for penalties.
>
> 40. But to get home on this, it is our view that HMRC must also prove that notice had been given to the taxpayer to deliver that return. Without such notice, then notwithstanding that a return has actually been filed, Schedule 55 cannot bite because any such return is not made pursuant to Section 8(1)(a). It has not been made in response to the requisite notice."

76. At [43]-[47] the FTT also discussed whether the use of a *pro forma* tax return downloaded from HMRC's website should be construed as the taxpayer having been given a s.8(1) TMA notice to file a tax return. The FTT concluded that it should not – a conclusion which was not questioned by HMRC in their letter to the Tribunal of 22 February 2018.

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

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

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

80. A downloaded *pro forma* tax return:

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

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

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

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

Discussion of construction of s.8 TMA

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

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

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

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

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

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

86. Furthermore, the use of the word "may" ("[the taxpayer] *may* be required by a notice given to him") in s.8(1) provides no assistance to HMRC. The use of the modal auxiliary verb "may" plainly confers on HMRC a discretion whether to issue a notice

under s.8(1).[2] They are not bound to issue a notice in every case. HMRC may decide not to issue a notice to a taxpayer because, for example, that individual's income tax liabilities could be fully collected under the PAYE system. But the fact that HMRC has not, for whatever reason, issued a notice to a taxpayer does not mean that a voluntary return submitted by the taxpayer becomes a return under s.8.

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

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

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

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

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

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[2] Insofar as the FTT might be taken to have suggested otherwise in *Wood* at [31], I respectfully disagree.

90. Ms Nathan's suggested revision of s.8 TMA (see paragraph 43 above) plainly demonstrated the difficulty which HMRC faced in these appeals when confronted with the statutory language.

91. But it is only in rare cases that a court should be tempted to go beyond the application of the actual words used by Parliament. In *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800 ("*Royal College of Nursing"*) at 822 Lord Wilberforce said:

> "[T]here is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, 'What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?', attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

92. Ms Nathan referred to the decision of the Court of Appeal in *Pollen Estate Trustee Co Ltd and another v HMRC* [2013] STC 1479. In that case an interest in land was acquired by a bare trustee on behalf of a charity and another non-charitable joint purchaser. The relevant exemption from VAT the charities read "A land transaction is exempt from charge if the purchaser is a charity…." The Court of Appeal held that the provision could be read as follows: "A land transaction is exempt from charge [*to the extent that*] the purchaser is a charity …."

93. Lewison LJ said at [48]-[49]:

> "48. Thus exemption would be available to the extent that the purchaser is a charity and to the extent that the conditions are met. This reading would have the consequence that a land transaction is partially exempt, but only to the extent of a charity's interest….
>
> 49. Despite [HMRC's] objections it seems to me there is a sufficient "policy imperative" to justify the reading I favour. I believe that it is also consonant with the approach of Lord Nicholls in *Inco Europe*. We are not Parliamentary draftsmen; and it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language. In substance what this means is that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided share held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problems. In my judgment this reading is necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities. There has been no principled reason advanced why a charity should be exempt from SDLT in the situations to which I have referred …; but not be entitled to any relief at all on its proportionate undivided share in a jointly acquired property. Not to afford a charity relief in such circumstances would, in my judgment, be capricious."

94. Lewison LJ's reference to the speech of Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 at 115 where Lord Nicholls said:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. …
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

95. It seems to me that it would be wholly inappropriate for this Tribunal to attempt to redraft the terms of s.8. The self-assessment compliance code contained in the TMA has been carefully crafted by Parliament and many provisions require or refer to "a return under section 8" TMA in order to operate. I shall give a few examples (all within the TMA):

(1) If a return has been made under s.8 by a taxpayer, HMRC are empowered to open an enquiry into that return under s.9A TMA, but there are (s.9A(2)) time limits in which HMRC must open that enquiry. Those time limits depend on the time when "the return" (i.e. the return under s.8) was delivered.

(2) A person who has been required by a notice under s.8 to deliver a return is under an obligation to preserve records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period (s.12B(2A) TMA).

(3) Section 28A TMA provides that an enquiry under s.9A(1) is completed when an officer of the Board informs the taxpayer that he has completed his enquiries and stated his conclusions (a closure notice). The operation of s. 28A is, however, dependent on a valid enquiry being opened under s.9A.

(4) Section 29(2) provides that where a taxpayer has made a return under s.8 the taxpayer shall not be assessed in respect of an error or mistake if the return was made on the basis of or in accordance with practice generally prevailing at the time it was made.

(5) In addition, a taxpayer who has made a return under s.8 cannot be assessed unless one of two conditions is fulfilled: broadly, either that the taxpayer has been fraudulent or negligent or that the HMRC officer could not have been reasonably expected, on the basis of the information made available

to him, to be aware of the insufficiency of tax contained in the return (s.29(4) and (5)). I note that information made available to an officer is defined, *inter alia*, by s.29(6) to include information contained in the taxpayer's "return under section 8".

(6) Section 29(7) deems, for the purposes of s.29(6), the return under s.8 to include returns for the two immediately preceding chargeable periods.

(7) Section 42(11) applies Schedule 1A of the TMA to any claim or election which is made otherwise than by being included in a return under s.8.

96. In addition, as the decision in *Wood* illustrates, penalty provisions can also turn on whether a return under s.8 has been delivered.

97. To apply all of those provisions in circumstances where a taxpayer's return was *treated* by HMRC as being a return under s.8 seems to me to involve judicial legislation rather than interpretation. It also involves a policy judgment as to exactly how voluntary returns should be treated. I was informed that many voluntary returns are made in order to claim an overpayment of tax. It may well be, in those circumstances, that Parliament might decide that a different and more streamlined treatment of such returns was appropriate or, alternatively, that the returns should be treated in exactly the same way as those as made under s.8. That is a decision for Parliament but not for me.

98. It is, therefore, apparent that the TMA self-assessment compliance code places particular emphasis on returns being made "under s.8". It is only once a return is made under s.8 that a number of statutory rights and obligations arise. Giving a notice under s.8(1) is a formal step which creates a formal legal obligation to submit a return. The making of a return in response to that legal obligation created by a s.8(1) notice is also a formal step which has the formal legal consequences, some of which I have described. It is, therefore, clear to me that Parliament intended that these formal consequences should only flow in cases where a taxpayer has submitted a return after being required to do so by a notice given under s.8(1).

99. Accordingly, I reject HMRC's submissions on the construction of s.8 TMA and conclude that each Return was not a "return under section 8" TMA.

100. I accept that this may be an inconvenient conclusion. However, whilst the voluntary returns submitted by the appellants were not returns made under s.8 TMA they could, as the FTT noted in *Revell* [42], be characterised as a notice of liability to tax pursuant to s.7 TMA. Subject to the time limits contained in s.34 TMA, it is then open to HMRC, on receipt of a voluntary return, to issue a notice under s.8(1) requiring the taxpayer to make a return (effectively a resubmission of the voluntary return).

The exercise of collection and management powers – s.1 TMA s. 5 CRCA

Submission in summary

101. HMRC are entrusted by s.1 TMA and s.5 CRCA with the collection and management of taxes.

102. Ms Nathan submitted that HMRC's decision to treat voluntary tax returns as made under s.8 TMA was a lawful exercise of their wide managerial discretion. It was made on the grounds of pragmatism in the collection of tax. Ms Nathan referred to the judgment of Lord Hoffmann in *R v HMRC ex parte Wilkinson* [2005] UKHL 30 at [20]-[21]. Even if a voluntary return was not strictly a "return under" s.8 TMA HMRC's decision to treat such a return as made under that provision was taken in circumstances where the Taxes Acts were silent on the proper treatment of voluntary returns. Ms Nathan described this as an "interstice" which HMRC were permitted to fill in the exercise of their powers.

103. If the position were otherwise, Ms Nathan argued, HMRC would, upon the receipt of a voluntary return, need to consider whether the return constituted a notification of liability within s.7 TMA. If so, they would most probably issue a s.8 notice to the taxpayer requiring the taxpayer to make a s.8 return. This would involve the taxpayer submitting the same or substantially similar material to HMRC and to do so on the same self-assessment tax return. This constituted a duplication of effort and a drain on the resources of HMRC. In the present case HMRC were, by virtue of the appellants' voluntary returns, in receipt of the information required to be submitted for the purposes of s.8. This wasteful duplication of effort, Ms Nathan contended, was obviated by HMRC's decision to treat voluntary returns as returns made under s.8 TMA.

104. Ms Nathan accepted that HMRC's wide care and management powers had to be exercised in accordance with public law. Nonetheless, in this case, HMRC's exercise of their discretion to treat the Returns as s.8 returns afforded the appellants the protection of various provisions of TMA. Thus, HMRC's exercise of its discretionary management powers was in harmony with the spirit of the TMA.

105. Mr Ramsden, however, submitted that nothing in the care and management powers of HMRC, entrusted to them by s. 1 TMA and s. 5 CRCA permitted HMRC to deem a voluntary return to be one submitted in response to a notice under s.8 (1) TMA. HMRC's care and management powers did not permit HMRC to do more than a statute permitted but, instead, allowed HMRC to do less than a statute might require.

Discussion of the exercise of HMRC's collection and management powers

106. The collection and management powers of HMRC were originally contained in the Inland Revenue Regulation Act 1890 which provided in s.1(2) that the "Commissioners shall have all necessary powers for carrying into execution every Act of Parliament relating to inland revenue…." As already explained, HMRC's present-day collection and management powers are found in s.1 TMA and s.5 CRCA, the terms of which are set out above.

107. The scope of these powers was described by Lord Hoffmann in *R v HMRC ex parte Wilkinson* [2005] UKHL 30 at [20]-[21].

> "[20] Section 1 of TMA gives them what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 636 as
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> 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.'
>
> [21] *This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time.* The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under section 1 of TMA. *It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women*." (Emphasis added)

108. I think it is clear from Lord Hoffmann's comments that HMRC's collection and management powers are circumscribed and cannot be used to overrule matters for which Parliament has expressly provided. They do not give HMRC *carte blanche* to dispense with express statutory requirements.

109. The discretion inherent in HMRC's duty of management was also considered by Lord Wilson in *R (on the application of Davies and another v Revenue and Customs commissioners; R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* [2011] STC 2249, in the Supreme Court, cases which concerned published Revenue guidance on the meaning of "residence" and "ordinary residence". At [26] Lord Wilson said:

> "The primary duty of the Revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: see s1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (see *R (on the application of Wilkinson) v IRC* [2005] UKHL 30 at [21], [2006] STC 270 at [21], [2005] 1 WLR 1718 per Lord Hoffmann), it is lawful for the Revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: see *IRC v National Federation of Self-Employed and Small*

> *Businesses Ltd* [1981] STC 260 at 268, [1982] AC 617 at 636 per Lord Diplock. In particular the Revenue is entitled to apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute."

110. Also, in *Southern Cross Employment Agency Ltd v Revenue & Customs* [2014] UKFTT 88 (TC) (Judge Berner and Mr Jenkins) this Tribunal discussed the collection and management powers of HMRC in the following terms:

> "64. Ms Simor submitted that HMRC cannot settle a case (or make a payment in response to a voluntary disclosure) where HMRC has no liability to the taxpayer. She argued that it would be a manifestly unlawful exercise of HMRC's powers for it to make a payment to a taxpayer in order to avoid litigation in circumstances where it did not believe that the taxpayer had even an arguable entitlement to that money or that there was any risk that the tribunal would find such an entitlement.
>
> 65. We do not accept that argument, either as a matter of principle or by reference to the facts of this case. On the question of principle, it is clear that the discretion of HMRC in the exercise of their powers of management is a wide one, albeit bounded by their primary duty to collect taxes that are properly due. Concessions may be made that result in non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return. That has been shown to be the case, not only in relation to concessions, but more generally in the case of back duty agreements, again provided that HMRC do not agree to take a smaller sum for tax than is lawfully due on the information available to them. HMRC may, however, make a decision in the exercise of their management functions as to the extent of the information they can reasonably expect to get and then make an agreement on that basis as to the tax payable. Although HMRC have no power to refrain from collecting tax which is due, it does have the power to compromise where the actual tax recoverable has not been quantified."

111. I respectfully agree with the Tribunal's description of HMRC's collection and management powers. Moreover, I consider that those comments (particularly those in [65] correctly describe the effect of the decision of the Court of Appeal in *Cockerline* where it was held that it was open to the Crown and a subject to come to an effective agreement as to the sum to be paid without the formality of an assessment.

112. It seems to me, however, that HMRC's powers in relation to extra-statutory concessions and back duty agreements are very different from the issue in the present appeal. As I have already said, the self-assessment compliance provisions contained in the TMA dealing with returns, records, enquiries and closure notices etc comprise a carefully drafted set of interlocking provisions. In my view it is not open for HMRC to dispense with the requirement that it must serve a notice under s.8(1) in order for a taxpayer's return to be a return "under s.8". This is an express statutory requirement that cannot be waived by the exercise of HMRC's discretion. I acknowledge that in

many cases, particularly where a voluntary return is filed in order to obtain a repayment, HMRC's practice of treating the return will give rise to little controversy or difficulty. But in other cases, such as the present appeal, that is not so. It seems to me that the appellants are entitled to require that HMRC comply with the requirement to give a notice under s.8(1) as an antecedent condition to the exercise of HMRC's power to open an enquiry under s.9A.

113. In her submissions, Ms Nathan placed considerable reliance on the comments of Bingham LJ in *Nuttall*, see [45]-[46] above, to the effect that HMRC should be able to achieve by agreement what they could otherwise be able to achieve by coercion. Whilst I do not doubt that that may be true in many cases, I think it is necessary to have regard to the particular provision in question rather than simply to extend Bingham LJ's aphorism to the limits of its logic and apply it in all cases and in all contexts.

114. In *Nuttall* an agreement had been reached, at the conclusion of a back duty investigation, under which the taxpayer undertook to pay certain sums. The first sum due was paid but not the rest. HMRC sued the taxpayer for the agreed sums. He resisted the claim on the basis that it was *ultra vires* HMRC. The Court of Appeal held that this defence was not justified. Parker LJ said at page 200 of the report:

> "It is pointed out that there are two specific powers there to compound proceedings, but there is no such specific power in the case of the tax itself. They apply only to interest and to penalties. But a power to compound proceedings for a penalty, whether before or after judgment, or at any stage, or in respect of culpable interest, appears to me to permit an agreement whereby the Revenue on some terms are prepared to release their undoubted power to enforce interest and penalties. If they choose in the exercise of their duties of care and management to say 'we will release you from the penalties and the culpable interest to which you may otherwise be exposed on condition that you pay us a sum in respect of past tax', that appears to me to be a compounding of the proceedings. There is included in it, of course, a release from further proceedings for the tax. But if that be the way that, in the judgment of the Revenue, they can best collect the tax and the penalties for the benefit of Her Majesty, I can see no reason why they should not. Indeed the matter may in the end be as simple as this. If there is a power to enforce there must also necessarily be a power for good consideration to accept some lesser sum. The Revenue of course have no power to refrain from collecting tax which is due, but these agreements are all made in a situation where the actual tax recoverable has not yet been quantified. The liability is in existence but the machinery which is involved in the collection and enforcement has not yet run its course, either at all or only partly."

115. Ralph Gibson LJ and Bingham LJ agreed. The latter said this, at page 205:

> "It would seem to me extraordinary, and also regrettable, if the Revenue could not achieve by agreement that which it could undoubtedly achieve by coercion. The submission that it could not, as counsel for the taxpayer acknowledges, runs counter to the habitual

> practice of the Revenue recognised by the recent Royal Commission without query or criticism. But counsel fairly points to the fact that although the legislation expressly authorises the Revenue to mitigate and compound claims for penalties and default interest, it does not expressly authorise the Revenue to compromise claims for back duty save where an assessment has been made and appealed against.
>
> I would prefer, if necessary, to accept this legislative omission as an anomaly of drafting than be compelled to a result I regard as offensive to good sense and subversive of the beneficial present practice. But there is, I think, no anomaly. The power to make agreements with taxpayers for the payment of back duty, even in the absence of assessment and appeal, is in my view a power necessary for carrying into execution the legislation relating to Revenue within the meaning of section 1 of the 1890 Act [Inland Revenue Regulation Act 1890]. It is, of course, a power to be exercised with circumspection and due regard to the Revenue's statutory duty to collect the public revenue. But if in an appropriate case the Revenue reasonably considers that the public interest in collecting taxes will be better served by informal compromise with the taxpayer than by exercising the full rigour of its coercive powers, such compromise seems to me to fall well within the wide managerial discretion of the body to whose care and management the collection of tax is committed. Such informal compromise deprives the taxpayer of the *locus poenitentiae* provided by section 54(2), and the right to re-open assessments under section 33, but it protects him against exercise of the Revenue's more draconian enforcement powers (e.g. under sections 61 and 65) and often, as here, against further liability for penalties and default interest. I have no hesitation in holding such an agreement, properly made, to be binding. There is accordingly, in my opinion, no arguable defence to the present claim."

116. That case established, consistently with *Cockerline*, that HMRC in the exercise of its collection and management powers could reach a binding agreement with a taxpayer under which sums were payable and could be enforced, even though no assessment had been issued in respect of the amounts agreed to be paid.

117. In my judgment there is no parallel between *Nuttall* and the present appeal. Section 8(1) TMA contains a specific statutory requirement to the effect that HMRC must give a taxpayer notice to file a return. It is, as I have explained, a requirement off which many other provisions of the self-assessment compliance (and tax penalty) code pivot. Unless that notice is given any return filed by the taxpayer cannot be a return "under section 8" for the purposes of s.9A TMA. Parliament has expressly imposed that condition. That is not, in my view, a statutory requirement with which the parties can waive or dispense with by agreement.

118. In the recent decision of the Upper Tribunal in *Tinkler v HMRC* [2018] UKUT 0073 (TCC) (Judges Berner and Sinfield) the question at issue was whether HMRC had given the taxpayer a valid notice of its intention to open an enquiry into the taxpayer's return under s.9A TMA. The Tribunal held that a valid notice had indeed been given to the taxpayer. In the alternative, HMRC argued that the taxpayer was in any event estopped from denying that a s.9A enquiry had been validly opened by

reason of the conduct of his accountants. HMRC relied on the accountants' acknowledgement in correspondence of receipt of the copy notice of enquiry and that there was an open enquiry. Although not necessary for its decision, the Tribunal disposed of this argument in the following terms:

> "56. During the hearing we put it to the parties that the ratio of *Keen v Holland* [[1984] 1 WLR 251] appeared to be that estoppel by convention cannot override the specific protection afforded by an Act of Parliament. We raised the question whether section 9A of the TMA might provide such protection…. It seems to us that, like the Agricultural Holdings Act 1948 which was the subject of *Keen v Holland*, it not possible for HMRC and taxpayers to agree that the time limits in section 9A of the TMA shall not apply or should be extended. Immediately following the passage from *Keen v Holland* quoted by Briggs J above, Oliver LJ observed:
>
> 'Once the protection attaches, the jurisdiction to grant possession is exercisable only subject to the statutory provisions and it is a little difficult to see how the parties can, by estoppel, confer on the court a jurisdiction which they could not confer by express agreement.'
>
> 57. We consider that Oliver LJ's comments apply with equal force to section 9A of the TMA. This leads us to conclude that the principle of estoppel by convention does not operate to preclude a taxpayer from relying on the protection of the notice and limitation period provisions in section 9A. We do so for two reasons. The first is that the basis of the principle of estoppel by convention is that the parties agree to act on an assumed state of facts or law which is erroneous. Where there can be no agreement, there can be no estoppel by convention even if one or both parties operate under a mistaken assumption. *HMRC and taxpayers cannot amend or disapply the provisions of section 9A by agreement and so to permit or require them to do so by estoppel by convention would be illogical when there is no conventional basis for such an estoppel*. The second reason is that, even if we are wrong and the parties could modify the application of section 9A by agreement, we agree with Oliver LJ in *Keen v Holland* that it could not be said to be unconscionable for the taxpayer to choose to rely on the protection which the statute specifically confers upon him." (emphasis added)

119. In the present appeal, Ms Nathan did not seek expressly to advance an argument based on the doctrine of estoppel by convention. Nonetheless, and recognising that *Tinkler* concerned the delivery of a notice to the taxpayer informing him that an enquiry had been opened under s.9A TMA, it seems to me that, by analogy, it is not possible for a taxpayer and HMRC to agree that a return in respect of which no notice has been given under s.8(1) TMA can be a return "under s.8" TMA. The rights and obligations which flow from a return "under s.8" arise by virtue of statute and not by agreement and require a s.8(1) notice to have been delivered to the taxpayer.

120. In any event, I do not consider that there was any agreement on the part of the appellants that the Returns should be treated as returns under s.8 TMA. At the most, it seems to me that there was passive acquiescence in or a failure to object to such treatment. It is true that in April 2010 Ms Ushma Patel amended her 2009 tax return

(originally sent to HMRC on 20 January 2010) in order to reduce her liability to tax but that amendment did not explicitly acknowledge that either the original return or its amendment was a return under s.8 TMA.

121. It follows therefore that I reject HMRC's submission that their powers under s.1 TMA and s.5 CRCA authorised HMRC to treat the Returns as returns made under s. 8 TMA.

The exercise of ancillary powers under s.9 CRCA

Submissions in summary

122. In the alternative, Ms Nathan relied on s.9 CRCA as authorising HMRC to treat a voluntary return as a return under s.8 TMA and, in her words, as "clothing" HMRC's practice in respect of voluntary returns (as explained in Mr Hedigan's evidence) with the force of law.

123. According to Ms Nathan, s.9 was a broad enabling provision which permitted HMRC, in order to fulfil their functions, to take any steps (consistent with their public law duties) which were necessary, expedient, incidental or conducive. Section 9 CRCA prescribed no form and set no limitations on the manner in which HMRC were to exercise their powers. Thus, where a policy or practice of HMRC was adopted in order to fill a legislative "interstice", s.9 CRCA gave it statutory force and effect.

124. Mr Ramsden advanced much the same arguments as he did in relation to s.1 TMA and s.5 CRCA. Mr Ramsden submitted that s.9 CRCA did not confer on HMRC a power to deem facts to exist which were different from the actual facts.

Discussion of the exercise of ancillary powers under s.9 CRCA

125. I find it impossible to conclude that s.9 CRCA confers on HMRC the sweeping powers for which Ms Nathan argued. No authority was cited for such a dramatic and, to my mind, somewhat disturbing submission.

126. Section 9 CRCA provides:

> " **Ancillary powers**
>
> (1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

127. The first point to note is the heading of the provision which refers to "ancillary powers". If the proposition is that HMRC can deem a voluntary return to be a return under s.8 TMA then I would not regard that as a power which was ancillary or incidental to HMRC's more general and specific powers (e.g. the general power of care and management contained in s.5 when read with s.51 (3) TMA) . Moreover, the power for which Ms Nathan argued would be exercisable merely on the basis (no

doubt subject to public law constraints) that HMRC "think" that the conditions in (1)(a) and (b) are satisfied. It does not, in terms, rely upon the consent or agreement of the taxpayer being obtained.

128. Secondly, the "functions" referred to in s.9 are primarily (but not exclusively) those contained in in the preceding ss.5-8 CRCA, most particularly s.5 CRCA.[3] If, as I have decided, the collection and management functions of HMRC mentioned in s.5 CRCA do not authorise HMRC to treat a voluntary return as being a return under s.8 TMA, it is hard to see how a power which is ancillary to those functions could have any greater effect.

129. Thirdly, although neither party referred me to them, the Explanatory Notes to the Commissioners for Revenue and Customs Bill 2005 suggest a more restricted purpose for s.9 CRCA. Explanatory Notes are always admissible in order to shed light on the mischief at which a particular statutory provision was aimed. The Explanatory Notes in relation to s.9 provide:

> "65.This section provides the Commissioners with ancillary powers to do anything necessary in connection with the exercise of their functions or incidental business. Examples are:
>
> - the gathering of information relating to the exercise of their functions;
> - establishing advisory bodies;
> - entering into agreements;
> - acquiring and disposing of property; and
> - promoting, or assisting in the promotion of, publicity about the tax system."

130. Although the ancillary powers listed are simply examples and are by no means exhaustive, I think they give a much better flavour of the type of incidental or ancillary powers that Parliament would have had in mind when it came to enact s.9 CRCA. Certainly, none of the examples would suggest that s.9 CRCA would have the effect that HMRC's practice of accepting voluntary returns as returns made under s.8 TMA (even though no notice to file a return had been given under s.8(1)) was, as Ms Nathan put it, "clothed with the force of law."

Decision

131. I therefore decide this preliminary issue in relation to Ground 1 in favour of the appellants.

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[3] Section 51 (2) states: "In this Act (a) "function" means any power or duty (including a power or duty that is ancillary to another power or duty), and (b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred (i) by or by virtue of this Act, or (ii) by or by virtue of any enactment passed or made after the commencement of this Act."

Rights of Appeal

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

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 5 APRIL 2018