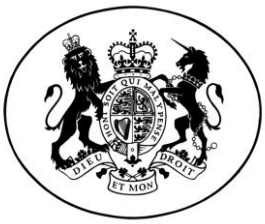
[2019] UKFTT 0236 (TC)



TC07083

Appeal number: TC/2018/03753
TC/2019/01418

PROCEDURE – application for a direction requiring HMRC to issue a partial closure notice – whether partial closure notice can be issued in relation to a taxpayer's domicile/remittance basis claim without specifying the amount of tax due – s 28A Taxes Management Act 1970 – taxpayer information notice – paragraph 1 of schedule 36 to Finance Act 2008 - whether information reasonably required to check the taxpayer's tax position prior to determination of the taxpayer's domicile

FIRST-TIER TRIBUNAL
TAX CHAMBER

EPAMINONDAS EMBIRICOS **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS
HELEN MYERSCOUGH

Sitting in public at Taylor House on 12 March 2019

James Kessler QC and Ross Birkbeck, instructed by Moore Stephens, accountants, for the Appellant

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

DECISION

Background

1. Mr Embiricos is originally from Greece but lived in the UK for many years before moving to Monaco at the end of March 2017.

2. He considers himself to be domiciled outside the UK and has claimed the benefit of the remittance basis of taxation (i.e. that he is only liable for tax on any overseas income and gains to the extent that they are remitted to the UK).

3. HMRC have opened enquiries into Mr Embiricos' self-assessment tax returns for the tax years ended 5 April 2015 and 5 April 2016 in relation to his claim to be non-UK domiciled.

4. As a result of their enquiries, HMRC have concluded that Mr Embiricos was domiciled in England & Wales during the relevant tax years.

5. Mr Embiricos wishes to appeal against HMRC's decision that he is domiciled in England & Wales but, unless HMRC agree to jointly refer the question of his domicile to the Tribunal in accordance with s 28ZA TMA, he cannot do so until HMRC issue a closure notice under s 28A Taxes Management Act 1970 ("TMA").

6. HMRC believe that they cannot issue a closure notice until they have quantified the amount of tax which would be due if they are correct about Mr Embiricos' domicile status. To this end, they have issued to Mr Embiricos a taxpayer information notice under paragraph 1 of schedule 36 to Finance Act 2008 ("schedule 36") requiring Mr Embiricos to provide the information which they believe will enable them to calculate the tax due.

7. Mr Embiricos however does not accept that it is either necessary or appropriate for HMRC to have details of his overseas income and gains before the question of his domicile is determined. He has therefore applied to the Tribunal for a direction requiring HMRC to issue a partial closure notice and has separately appealed against the information notice on the basis that the information is not reasonably required until his domicile status has been confirmed.

Facts

8. The relevant facts can be stated briefly and are not in dispute.

9. HMRC opened their enquiry into Mr Embiricos' tax return for the tax year ended 5 April 2015 on 1 December 2016. The enquiry letter stated the following:

> "**What I will be checking**
>
> I only intend to look at your claim to be non-domiciled in the UK. However, when I look at this aspect I may find that I need to extend my check. If this happens I will let you know."

10. HMRC opened an enquiry into Mr Embiricos' tax return for the tax year ended 5 April 2016 on 28 November 2017. That letter contained the following:

> "**Link with current check**
>
> As you know, I am already checking your tax return for the year ended 5 April 2015. I believe there may be inaccuracies in that tax return, and I am waiting for you to send me some information.
>
> Any inaccuracies I find may affect the figures in your tax returns for the later years. If this is the case, I will need to start checks of these years now as the time for allowing me to do so is approaching.
>
> **What I am checking**
>
> I am looking at your claim to be non-domiciled in the UK."

11. Following various rounds of correspondence, Mr Embiricos applied to the Tribunal on 13 June 2018 for a final closure notice.

12. As a result of further correspondence, HMRC wrote to Mr Embiricos' accountants, Moore Stephens, on 10 September 2018 stating that, on the evidence provided to date, HMRC took the view that Mr Embiricos was domiciled in the UK during the relevant period.

13. On 1 February 2019, Mr Embiricos applied to the Tribunal for permission to amend his original application for a final closure notice so that it was an application for a partial closure notice. The Tribunal approved this application at the hearing.

14. At the request of Mr Embiricos, HMRC issued a taxpayer information notice under paragraph 1 of schedule 36 on 1 March 2019 requiring Mr Embiricos to provide the information which HMRC believed they needed in order to close their enquiries into Mr Embiricos' tax returns. The information notice states as follows:

> "I am writing to ask you for some information. I believe this is reasonably required. This means that it is reasonable for me to ask for this so that I can check your income tax and capital gains tax position. I need it so that I may issue closure notices under s 28A Taxes Management Act 1970 for the years 2014/15 and 2015/16. I require the information to meet the requirements of s 28A(2)(b) Taxes Management Act 1970, to make the amendments to your returns necessary to give effect to my conclusion that you are domiciled in the UK during those years."

The partial closure notice application

15. We deal first with Mr Embiricos' application for a direction that HMRC should issue a partial closure notice in relation to his domicile/remittance basis claim. As will be apparent from what we have said at paragraphs [5-7] above, the key questions are:

(1) Can HMRC issue a partial closure notice without knowing the amount of tax which would be due if Mr Embiricos is unable to claim the benefit of the remittance basis.

(2) If so, have HMRC shown any other reason why the Tribunal should not direct them to issue a partial closure notice.

Self-assessment, closure notices and appeals

16. If required to do so by HMRC, an individual must complete a tax return and send it to HMRC (s 8 TMA).

17. That return must include a self-assessment of the amount of income tax and capital gains tax payable for the year in question (s 9 TMA).

18. HMRC may enquire into anything contained in the return, or required to be contained in the return, including any claim or election included in the return (s 9A TMA).

19. Whilst an enquiry is in progress, HMRC and the taxpayer may jointly refer to the Tribunal for its determination any question arising in connection with the subject matter of the enquiry (s 28ZA TMA).

20. An enquiry is completed when HMRC issues a closure notice under s 28A TMA. Until the enactment of Finance (No. 2) Act 2017 on 16 November 2017, this comprised a single closure notice finalising all aspects of an enquiry.

21. However, Finance (No. 2) Act 2017 introduced the concept of a partial closure notice which enables any matter to which the enquiry relates to be completed, whilst HMRC's enquiries into other matters may continue. The amendments to s 28A apply not only to enquiries opened on or after 16 November 2017 but also to any enquiry which is in progress immediately before that date (paragraph 44 of schedule 15 to Finance (No. 2) Act 2017). The current version of section 28A TMA is as follows:

> "**28A Completion of enquiry into personal or trustee return or NRCGT return**
>
> 28A(1) This section applies in relation to an enquiry under section 9A(1) or 12ZM of this Act.
>
> 28A(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.
>
> 28A(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.

28A(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.

28A(3) A partial or final closure notice takes effect when it is issued.

28A(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.

28A(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)).

28A(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.

28A(7) In this section '**the taxpayer**' means the person to whom notice of enquiry was given.

28A(8) In the Taxes Acts, references to a closure notice under this section are to a partial or final closure notice under this section."

22. A taxpayer has the right to appeal against any conclusion stated or amendment made by a closure notice (whether a final closure notice or a partial closure notice) (s 31(1)(b) TMA).

23. Where an appeal is made to the Tribunal, the Tribunal has power to increase or reduce an assessment or to allow or disallow (to any extent) a claim or election (s 50 TMA).

Can HMRC issue a partial closure notice without amending Mr Embiricos' self-assessment

24. Mr Kessler's submissions were both succinct and straightforward.

25. His primary submission is that Mr Embiricos' domicile/remittance basis claim is a separate "matter" to which HMRC's enquiry relates within s 28A(1A) TMA and that it is clear that HMRC have completed their enquiries into that matter as they have stated that they consider Mr Embiricos to be domiciled in the UK during the relevant period.

26. Moving on to the requirements of s 28(2) TMA, Mr Kessler argued either that HMRC's conclusion in relation to Mr Embiricos' domicile does not require any

immediate amendment to his tax return or, alternatively, that the only amendment which is required to give effect to that conclusion is to remove the "X" from the boxes on the tax return which state that Mr Embiricos is domiciled outside the UK and which make the claim for the remittance basis of taxation.

27. In particular, Mr Kessler says that there is no need to amend Mr Embiricos' self-assessment at this stage as the quantification of the tax due, should it be established that Mr Embiricos was in fact domiciled in the UK, is a separate "matter" for the purposes of s 28A TMA.

28. In support of his arguments, Mr Kessler referred to the consultation paper which was issued by HMRC prior to the introduction of the partial closure notice regime (entitled "Tax enquiries – closure rules") and which, he said, gave some insight as to the purpose for which the partial closure notice regime was introduced.

29. The first policy objective which he drew attention to was the need for more flexibility in order to reduce the amount of time taken to settle enquiries. Paragraphs 1.1 and 1.3 of the consultation paper contain the following:

> "1.1 Where taxpayers have complex tax affairs, the existing tax enquiry processes … can be inflexible and enquiries can take a long time to settle. The enquiry rules currently prevent the formal resolution of one issue without closing the whole enquiry into the return unless both parties agree to refer an issue to the Tribunal.
>
> 1.3 … 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 … and current legislation on the enquiry process were introduced."

30. Mr Kessler also relied on paragraphs 3.5 and 3.7 of the consultation document to show that the clear intention of the proposals was to allow discrete matters to be dealt with one by one.

31. As a further point, although he did not go so far as to suggest that the Tribunal Rules could be used as an aid to the interpretation of legislation, Mr Kessler suggested that the overriding objective in Rule 2 of the Tribunal Rules and, in particular, dealing with cases in a way which is proportionate to the anticipated costs, seeking flexibility and avoiding delay might reflect general principles of construction to which the Tribunal should have regard.

32. Mr Kessler also observed that, in his experience, it has in the past been common practice for the Tribunal to be invited to determine a taxpayer's residence or domicile status prior to any quantification of the tax due.

33. Finally, in relation to the previous decisions of various courts and tribunals in relation to closure notices referred to by HMRC, Mr Kessler submitted that these authorities were irrelevant as they are all cases which deal with closure notices under

the previous regime (i.e. what would now be called a final closure notice) and therefore have no application to the proposed issue of a partial closure notice.

34. In this context, although Mr Kessler acknowledged that the amendments made to s 28A(2) TMA are relatively minor (just the insertion of a reference to a "partial or final closure notice" in place of a reference to a "closure notice", he submitted that the section must be construed as a whole, that the introduction of the partial closure notice regime is a significant change to s 28A TMA and that the requirements of section 28A(2) TMA must be interpreted in the light of this.

35. For example, looking at the decision of the High Court and the Court of Appeal in *R (Archer) v HMRC* [2017] EWHC 296 and [2017] EWCA Civ 1962, a case on which Mr Purnell placed a great deal of reliance (see below), Mr Kessler made the point that the conclusion reached by both courts was very much based on the fact that the issue of the closure notice marked the end of HMRC's enquiry and that this is why it was necessary for the closure notice to state the revised amount of tax due. In the case of a partial closure notice, HMRC's enquiries into matters not dealt with by the partial closure notice will continue and, he submits, there is no reason why those other matters should not include the quantification of the tax. This could then be the subject of a further partial closure notice or a final closure notice which would, in accordance with s 28A(2)(b) amend the taxpayer's self-assessment contained in the return.

36. The main thrust of Mr Purnell's submissions was that, based on the authority of *Archer*, HMRC cannot issue a closure notice (whether final or partial) without stating the revised amount of tax payable by the taxpayer. As Mr Embiricos has so far refused to provide HMRC with the information required to calculate those tax liabilities, he says that there are reasonable grounds for HMRC not to issue a partial closure notice.

37. Although s 28A TMA has been amended as a result of the introduction of the partial closure notice regime, Mr Purnell makes the point that there has been no significant change to the requirement in s 28A(2)(b) TMA requiring HMRC to make the amendments to the taxpayer's return which are required to give effect to the conclusions set out in the relevant closure notice, whether this is a partial closure notice or a final closure notice. On this basis, he submits that the decision in *Archer* is binding on the Tribunal and must be followed.

38. The result of this, says Mr Purnell, is that if HMRC were to issue a partial closure notice concluding that Mr Embiricos was domiciled in the UK at the relevant time but which, as suggested by Mr Kessler, does not make any amendments to his tax return or only changes the boxes where he says he is non-domiciled and claims the remittance basis of taxation but does not state how much tax is due as a result of the remittance basis not being available, this would not satisfy the statutory requirements and could be challenged by the taxpayer.

39. Looking more closely at what HMRC's enquiry relates to, Mr Purnell's view is that it is an enquiry into Mr Embiricos' claim to benefit from the remittance basis of taxation; it is not an enquiry into his domicile status in isolation. On this basis, HMRC's conclusion in relation to Mr Embiricos' domicile is simply one part of a single enquiry. Mr Purnell submits that it is not possible to carve out the issue of

domicile as a separate "matter" for the purposes of s 28A(1A) TMA. Instead, the "matter" is the remittance basis claim and the tax payable as a consequence of that claim not being allowed. The remittance basis claim and the tax payable are, he says, inextricably linked and cannot be treated as two separate matters.

40. Mr Purnell also made the point that, if Mr Kessler's submissions were right, the same principles would apply to any "all or nothing" question so that it would always be possible to split the resolution of the point of principle from the quantification of the tax which may be payable a result. He suggests that this cannot be taken to have been Parliament's intention without very clear wording.

41. In support of this, he refers to an extract from the decision of the High Court in *Hallamshire Industrial Finance Trust Limited v Inland Revenue Commissioners* [1979] 1 WLR 620. The court in that case decided that an assessment made by the Inland Revenue (as it then was) was required to state the amount of tax payable. The judge, Browne Wilkinson J said at [625H]:

> "Yet the Crown argues that it would fully have discharged its functions of assessing and giving of notice of assessment without specifying any amount of tax payable, merely by stating the facts which would enable someone skilled in tax matters to compute the tax which the Crown is going to demand … In my judgement the words of the statute would have to be very clear to force the court to this conclusion."

42. It is clear in our view that the purpose of the partial closure notice regime is to make the enquiry process more efficient and flexible both for HMRC and for the taxpayer by enabling a matter on which a conclusion has been reached to be dealt with by way of appeal or otherwise whilst other matters continue to be investigated.

43. We think this is apparent from the revised scheme of s 28A TMA itself since it now specifically allows "any matter to which the enquiry relates" to be completed by the issue of a partial closure notice once HMRC have completed their enquiries into that matter (s 28A(1A) TMA) without reliance on the consultation document which Mr Kessler referred us to.

44. No submissions were made by either party as to the extent to which the Tribunal can or should have regard to such documents in interpreting legislation although no objection was made by Mr Purnell to Mr Kessler's reliance on the consultation document even though Mr Purnell did not refer to the document himself.

45. In any event, we note that the Upper Tribunal have relatively recently confirmed (albeit obiter) that a court may consider publicly available background material in order to understand the background to the legislation or the mischief at which it is aimed (see *Christianuyi Limited & Others v HMRC* [2018] UKUT 10 (TCC) at [25]).

46. As we have said, we do not think it is necessary to refer to the consultation document. However, it is helpful to see that the extracts referred to by Mr Kessler support our conclusion based on the legislation as to the purpose of the partial closure notice regime.

47. Although Mr Purnell did not make any submissions in relation to the consultation document, we do note that all of the examples contained in the consultation document relate to enquiries where HMRC are enquiring into more than one aspect of the tax return (see, for example, Annex C) and do not deal with the possibility that an enquiry in relation to one aspect of a taxpayer's return might be broken down into two or more distinct "matters", as is the case here.

48. We do not however consider that this shows that there was an intention to limit the changes so that they would only permit a complete resolution of a particular aspect of an enquiry rather than allowing the resolution of one matter which forms part of an enquiry into a single aspect of the return. The key message of the consultation document (which is borne out by the legislation) is the desire to provide flexibility in order to deal with enquiries more efficiently.

49. It follows from this that s 28A should not be interpreted in an unduly restrictive manner as the result of this would be to frustrate the intention of Parliament in introducing the partial closure notice regime.

50. As noted above, there was some disagreement as to whether the "matter" which HMRC have been enquiring into is Mr Embiricos' domicile or his claim to benefit from the remittance basis of taxation. Mr Kessler referred to the enquiry letters which both clearly identify HMRC's focus as being "your claim to be non-domiciled in the UK".

51. There is no definition of what constitutes a "matter" for the purposes of s 28A(1A) but there is no doubt in our minds that, as a matter of ordinary language, the question of Mr Embiricos' domicile is capable of being such a matter. It is a specific issue in itself. As a result of Mr Embiricos putting a cross in the box on the tax returns stating that he is domiciled outside the UK, it is also something "contained in the return" which HMRC are entitled to enquire into in accordance with s 9A(4)(a) TMA.

52. Having said this, we do not think that there is in practice any difference in this case whether the matter in question is Mr Embiricos' domicile or whether it is his claim to benefit from the remittance basis of taxation. The reason for this is that, it seems to us inevitable that, having concluded that Mr Embiricos was domiciled in the UK during the relevant period, HMRC would, were they to issue a closure notice, be required to amend Mr Embiricos' tax return to remove the remittance basis claim in accordance with s 28A(2)(b) TMA as there is no suggestion that there is any other reason why the remittance basis claim could otherwise be allowed.

53. The real question therefore is whether s 28A(2)(b) also requires a partial closure notice concluding that Mr Embiricos was domiciled in the UK at the relevant time to state the amount of tax which HMRC believe to be due in the absence of the availability of the remittance basis of taxation.

54. We accept that *Archer* (both in the High Court and in the Court of Appeal) makes it clear that, under the previous regime, a closure notice is not valid unless it states the amended amount of tax for which the taxpayer is liable as a result of HMRC's conclusions. It is however clear that the starting point for the decision in *Archer* was that the closure notice brought to an end all of HMRC's enquiries into the

taxpayer's tax return and that it was therefore a form of assessment (albeit an amendment to the taxpayer's self-assessment). The decision was that, being an assessment, it had to state the amount of tax due. There was no discussion in *Archer* as to whether the closure notices did or did not have to amend Mr Archer's self-assessments (which is the question in this case). Instead, this requirement was assumed and the question was whether the closure notices had validly amended his self-assessments.

55. This is apparent from the decision of Jay J in the High Court where he says [at 55]:

> "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."

56. That this was the approach of the Court of Appeal can also be seen from the judgment of Lewison LJ where he says at [22] that:

> "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."

57. The focus in both courts therefore was not on whether the closure notice was, or was not, required to include an assessment but on whether that assessment (or amendment to the taxpayer's self-assessment) was valid given that the closure notice did not itself include a calculation of the amount of tax due.

58. The partial closure notice regime is a fundamental change. It is no longer the case that HMRC must issue a single closure notice bringing all of its enquiries to an end and, if appropriate, amending the taxpayer's self-assessment (which, as *Archer* confirms, can only be validly done if the taxpayer is told how much tax is now due). Instead, HMRC is entitled (and can be required) to issue a partial closure notice in respect of a distinct matter. The enquiry into the tax return remains open and other matters to which the enquiry relates can be concluded by further partial closure notices or by a final closure notice.

59. The question in this case is whether, in these circumstances, the requirement in s 28A(2)(b) for HMRC to make the amendments of Mr Embiricos' return which are required to give effect to their conclusion that he was not domiciled in the UK requires HMRC, in order to issue a valid partial closure notice, to amend his self-assessment and state the amount of tax due.

60. Another way of looking at this is whether the quantification of Mr Embiricos' tax liability can, as suggested by Mr Kessler, be treated as a separate "matter" for the purposes of s 28A(1A) TMA which would then enable HMRC to issue a further closure notice (whether partial or final) in respect of this particular aspect of their enquiry.

61. We discuss below whether, if it is right that a partial closure notice does not at this stage need to amend Mr Embiricos' self-assessment, it would be appropriate to

direct HMRC to issue such a notice. One of the points made by Mr Kessler in that context related to the difficulty of quantifying the amount of tax due. This could, for example, include questions as to the extent of Mr Embiricos' liability to tax in respect of the income and gains of overseas trusts and companies in which he has an interest. Given the complexity of the rules which determine an individual's liability to tax in respect of such entities, it may well be the case that there are disagreements between Mr Embiricos and HMRC as to the application of these rules.

62. Had Mr Embiricos completed his tax returns on the basis that he was in fact domiciled in the UK and had such a disagreement arisen as a result of HMRC's enquiries into his tax returns, there seems no doubt that such a disagreement would be a "matter" in respect of which HMRC would be entitled to issue a partial closure notice under s 28A TMA.

63. This demonstrates to us that, unlike the previous closure notice regime, the requirement in s 28A(2)(b) TMA is intended to work differently in the context of a partial closure notice. In our view the only amendments which HMRC must make to a taxpayer's return in order to give effect to the conclusions set out in a partial closure notice are those which necessarily follow from those conclusions but do not include any amendments which are themselves a separate matter requiring further investigation and in respect of which a further closure notice (whether partial or full) could be given.

64. To put it another way, an amendment to a taxpayer's tax return is not one which (in the words of s 28A(2) TMA) is "required" if the potential amendment is itself dependent on something which is capable of constituting a separate "matter" for the purposes of s 28A(1A) TMA. Such an amendment will only be required once HMRC have reached their conclusions in respect of the subsequent matter.

65. That is not to say that HMRC could not make amendments to a taxpayer's tax return in a partial closure notice even if those amendments were themselves capable of constituting a separate matter if they have the information and have carried out the enquiries necessary for them to do so. However, the fact that HMRC are not yet in a position to address those other matters would not in our view invalidate a partial closure notice which did not therefore state any conclusions or make any amendments in respect of them.

66. Our conclusion therefore is that HMRC could issue a partial closure notice concluding that Mr Embiricos was domiciled in the UK during the relevant period and that, as a result, his return should be amended to remove the claim to the remittance basis of taxation. This would not be invalidated by the fact that the partial closure notice does not go on to quantify the overseas income and gains on which Mr Embiricos would be taxed and to state the amount of tax due in respect of those income and gains. Instead, that exercise would represent a separate matter in respect of which the enquiry would remain open and in respect of which a further closure notice could be given in due course.

67. We recognise that this conclusion gives a wide interpretation to the partial closure notice regime. However, we believe that this is in accordance with

Parliament's intention in introducing the partial closure notice regime as it enables enquiries to be dealt with more flexibly and potentially more efficiently.

68. We have considered what the position would be if the boot is on the other foot; so that it is HMRC who wish to issue a partial closure notice in respect of a particular aspect of an enquiry without amending the taxpayer's self-assessment and quantifying the amount of tax due. In these circumstances, the taxpayer would, if he disagrees with HMRC's conclusions, be required to appeal against the conclusions set out in the closure notice but may not want to pursue that appeal without knowing how much tax is due.

69. It is however likely that, in circumstances where HMRC have issued a partial closure notice setting out their conclusions on a point of principle, this will enable a taxpayer to work out reasonably accurately how much tax is likely to be due. Alternatively, if the taxpayer has provided HMRC with the information which would enable them to calculate the amount of tax due, the taxpayer could apply for a closure notice in respect of this aspect of the enquiry as well. We do not therefore believe that this suggests that Parliament intended that a partial closure notice could not be given in these circumstances.

70. Although it was not a point raised by either party, we have also considered what power the Tribunal has to determine an appeal against a conclusion stated in a partial closure notice where that closure notice does not itself amend the taxpayer's self-assessment.

71. It is clear from s 31(1)(b) TMA that a taxpayer has a right to appeal against any conclusion stated by a closure notice. However, moving on to the Tribunal's powers in respect of such an appeal, we must look at s 50 TMA. As mentioned above, this deals with increasing or reducing an assessment and allowing or disallowing a claim or election. As far as we can see, there is nothing in TMA which sets out what the Tribunal's powers are in relation to an appeal against a conclusion in a closure notice where the effect of that conclusion (or of any amendment which is made as a result of the conclusion) is not to increase or reduce an assessment or allow or disallow a claim or relief.

72. It may be that the result of this is that a partial closure notice is only valid if the conclusion or any amendment to the return which is made as a result of the conclusion changes the taxpayer's self-assessment or disallows a claim or relief. This is not however a point which we need to decide in this particular case as HMRC's conclusion that Mr Embiricos was domiciled in the UK during the relevant period means that they should amend his tax return to disallow the claim under s 809B Income Tax Act 2007 for the remittance basis of taxation. Section 50(7A) TMA very clearly confers power on the Tribunal to allow or disallow the claim on an appeal against the closure notice.

73. Our preliminary view is that, if the closure notice does not amend the taxpayer's self-assessment and does not disallow a claim or relief (for example, if HMRC's conclusion related to a taxpayer's residence status rather than his domicile status), the fact that this is still an appealable decision in accordance with s 31(1)(b) TMA means that the Tribunal must have power to determine the relevant question in the same way

as it is required to determine any question which is the subject of a joint referral under s 28ZA TMA (see s 28ZA(1) TMA). However, we make no decision on this point.

74. In particular, we do not think this issue impacts on the question we have to decide which is whether HMRC is able to issue a partial closure notice which does not quantify the amount of tax due or on our conclusion that HMRC may do so. We leave open the question as to whether HMRC is able to issue a partial closure notice which does not amend the taxpayer's self-assessment and does not disallow a claim or relief.

75. We must now move on to consider whether, in the light of our conclusion, we should direct HMRC to issue a partial closure notice.

Should HMRC issue a partial closure notice

76. Although we have decided that it would be possible for HMRC to issue a partial closure notice which does not quantify the amount of tax due and make an appropriate amendment to Mr Embiricos' self-assessment, we still have to consider whether HMRC have reasonable grounds for not issuing a partial closure notice. HMRC accept that they have the burden of showing that such reasonable grounds exist.

77. Mr Purnell maintains that HMRC is entitled to have the full facts before issuing a partial closure notice. He referred the Tribunal to the decision of the First-Tier Tribunal in *Steven Price v HMRC* [2011] UKFTT 624(TC) and, in particular, the comments of the Tribunal at paragraphs [10-12]:

> "10. We did not agree with Miss Brown. Although the cases show that where the full facts are not known, HMRC are *entitled* to issue estimated assessments (eg see the case *T Haythornthwaite & Sons Ltd* CA 1927 11 TC 657) and are, as stated by the Supreme Court above, entitled to issue closure notices in broad terms, HMRC are not bound to do so. On the contrary 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: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008).
>
> 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 (putting aside the issue whether the request for information was belated) because they can make an assessment in any event, this would mean HMRC do not reasonably require the information for the purpose of checking the tax return. This 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.
>
> 12. This is clearly not the proper interpretation of the legislation. The taxpayer is not given a right to keep back facts or documents material to the correctness of his tax return. HMRC are entitled to them if they are reasonably required for checking a tax return. And if such relevant documents are not forthcoming (subject potentially to whether they were requested timeously), HMRC have reasonable grounds for not issuing a closure notice."

78. Mr Purnell also argued that HMRC are entitled to consider what secures the best return for the Exchequer. If it turns out that, even if Mr Embiricos was domiciled in the UK during the relevant period, there is a relatively small amount of tax at stake, they may take a view that it is not an effective use of resources to litigate the domicile question.

79. Although Mr Purnell accepts that the cost of providing information about Mr Embiricos' overseas income and gains may be substantial, he suggested that it may be insignificant relative to the amount of tax which could be due. If Mr Embiricos is saying that the cost of providing the information is disproportionate to the amount of tax which might be due, this is something which HMRC should be told about but which currently they do not know.

80. Mr Purnell also drew attention to the overriding objective in Rule 2 of the Tribunal Rules. He submits that requiring HMRC to litigate the domicile question and only to obtain information about Mr Embiricos' overseas income and gains if HMRC are successful, will simply lead to additional cost and delay as it is likely to be several years before the domicile issue is resolved and it will then be more difficult and time consuming to obtain the relevant information.

81. Mr Kessler on the other hand takes a view that it would be a waste of time and money to require Mr Embiricos to provide details of his overseas income and gains prior to a determination as to whether he was in fact domiciled in the UK.

82. The Tribunal had the benefit of a witness statement provided by Mr Embiricos' accountant, Francis Moore which was not challenged by HMRC. This discloses that Mr Embiricos has already incurred £150,000 of professional fees in relation to HMRC's enquiry into his domicile. Mr Moore estimates that it would cost between £30,000 - £40,000 to provide the initial information requested by HMRC. However, he anticipates that there would then be a protracted period during which the scope of any liabilities would need to be discussed with HMRC. He was unable to say how long this would take or how much it would cost. In his view, a year and £40,000 would not be unusual. Discussions continuing for five years and fees in excess of £100,000 would not, he says, be out of the question.

83. A further point made by Mr Kessler is that any such enquiries into Mr Embiricos' overseas affairs would be intrusive, particularly bearing in mind that any subsequent hearing of an appeal by the Tribunal would be in public.

84. In relation to this, Mr Kessler made the point that non-domiciliaries are not required to provide any details of their overseas income and gains. He referred to s 809B(3) Income Tax Act 2007 which specifically disapplies s 42(1A) TMA. The combined effect of these provisions is that, on a claim by a non-domiciliary for the benefit of the remittance basis of taxation, the claim does not need to quantify the amount of tax involved.

85. Mr Kessler also referred to a letter written by Dave Hartnett, the then acting Chairman of HMRC, on 12 February 2008 in the context of the proposed changes to the regime for the taxation of non-domiciliaries which were then under discussion and where he says that:

> "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;"

86. Mr Kessler also referred to Article 8 of the European Convention on Human Rights (right to respect for private life). However, he clarified that he was not suggesting that HMRC's request for information about Mr Embiricos' overseas income and gains did not comply with the convention but that this was just part of the picture of confidentiality which Mr Embiricos was entitled to expect in relation to his overseas affairs.

87. Although Mr Kessler submitted that the previous authorities dealing with closure notices were not relevant in the context of partial closure notices, he did refer to the comment of Park J in *HMRC v Vodafone 2* [2006] STC 483 at [43] that the closure notice regime:

> "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 specialist Tribunal."

88. Mr Kessler argued that protection would not be provided to Mr Embiricos if he is required to provide tax calculations before the question of his domicile can be determined by the Tribunal.

89. As far as Mr Purnell's reference to *Price* is concerned, Mr Kessler notes that the Tribunal in that case is only suggesting that HMRC are entitled to full disclosure of the "relevant" facts and only if the information is "reasonably required".

90. Turning to the suggestion that HMRC need to know how much tax is at stake in order to decide whether it is worth litigating, Mr Kessler says that HMRC should be able to work out for themselves that the amount is not insignificant given that they know that Mr Embiricos has already spent £150,000 in legal fees on the domicile enquiry and has instructed leading counsel to present his case in respect of the application for the partial closure notice.

91. HMRC have reached a conclusion that Mr Embiricos was domiciled in the UK during the relevant period. The only question is whether it is reasonable for them to insist on knowing how much tax is due before they issue a closure notice.

92. Originally, their case was simply that they had no power to issue a partial closure notice if they did not know the amount of tax due. Indeed, no other reason is given in their statement of case or in Mr Purnell's skeleton argument for objecting to the issue of a partial closure notice.

93. The issue of Mr Embiricos' domicile and the question of the amount of tax which would be due if it turns out that he was domiciled in the UK at the relevant time are completely separate. There is no reason to suppose that there is any overlap between the facts and the evidence which would need to be considered in relation to Mr Embiricos' domicile and those which would need to be examined in order to reach a conclusion as to the amount of tax payable.

94. We do not accept Mr Purnell's suggestion that, in this case, HMRC need to know the precise amount of tax due in order to decide what resources should be devoted to the enquiry and/or any subsequent appeal. They will already have a certain amount of information from their own enquiries and, as Mr Kessler suggests, there are clear inferences they can draw from Mr Embiricos' own approach to the dispute.

95. We accept that, if the domicile dispute proceeds as a separate matter, this will delay the collection of any information about Mr Embiricos' overseas income and gains for the relevant tax years should HMRC succeed in establishing that Mr Embiricos had become UK domiciled. However, as pointed out by Mr Kessler, this must be balanced against the cost and delay which will be suffered by Mr Embiricos if he is forced to agree the potential tax liabilities before the domicile dispute can be heard by the Tribunal. We do not therefore consider that this point carries much weight as there will be a delay in relation to one aspect of the overall enquiry whatever decision we make.

96. Section 28A(6) TMA requires the Tribunal to give the direction applied for unless satisfied that there are reasonable grounds for not issuing the partial closure notice. Taking into account all of the factors presented to us, we are not satisfied that there are reasonable grounds for refusing the application for a partial closure notice in respect of HMRC's conclusion in relation to Mr Embiricos' domicile status and the consequent effect on his claim for the remittance basis of taxation. We therefore direct HMRC to issue a partial closure notice in respect of this matter within 30 days of the date of this decision.

Taxpayer information notice

97. As previously mentioned at paragraph [14], HMRC have, at the request of Mr Embiricos, issued a taxpayer information notice under paragraph 1 of schedule 36 requiring Mr Embiricos to provide the information HMRC think they need in order to calculate the tax due on the basis that he was domiciled in the UK during the relevant tax years and was not therefore entitled to claim the remittance basis of taxation.

98. Paragraph 1 of schedule 36 permits HMRC to require a taxpayer to provide information or documents which are reasonably required by HMRC for the purpose of checking the taxpayer's tax position.

99. Mr Kessler and Mr Purnell agreed that if the Tribunal came to the conclusion that it was possible for HMRC to issue a partial closure notice without amending Mr Embiricos' self-assessments and directed HMRC to issue such a notice, the appeal against the information notices should succeed as the information would not be "reasonably required" for the purposes of checking Mr Embiricos' tax position pending final determination of his domicile status.

100. As we have concluded that HMRC should give a partial closure notice in relation to domicile and the consequent remittance basis claim, we therefore allow the appeal against the information notice.

101. However, in case we are wrong on the partial closure notice point, we consider whether Mr Embiricos' appeal against the information notice should be allowed on the assumption that no partial closure notice is possible at the current time given that HMRC do not have the information necessary to quantify the amount of tax due.

102. Mr Kessler submits that, even in these circumstances, it would not be reasonable for HMRC to require Mr Embiricos to provide the information which they have requested.

103. His reason for this is that HMRC can and (he says) should agree to make a joint referral to the Tribunal of the question of Mr Embiricos' domicile status under s 28ZA TMA.

104. Mr Embiricos has requested HMRC to agree to a joint referral. In a letter dated 21 December 2018, HMRC have rejected this request, saying the following:

> "**Joint referral**
>
> HMRC do not agree to a joint referral under s 28ZA TMA 1970 as they do not consider this would be appropriate in this case. A joint referral may save time and costs where the disagreement between the parties is on a point of law or some other narrow discrete issue.
>
> However, domicile cases are usually highly fact sensitive and likely to be evidence-heavy relative to other appeals before the Tribunal. In HMRC's view, the joint referral procedure is therefore inappropriate in this case."

105. Mr Kessler described this response as "preposterous". There are, in his view, significant benefits in determining the question of domicile before starting to investigate the quantum of any tax liabilities and no significant disadvantages in doing so. The benefits of course are the savings in terms of cost and time referred to above.

106. As to this point, Mr Purnell submits that the information is plainly reasonably required in order to check Mr Embiricos' tax position if it is correct that HMRC cannot issue a partial closure notice without stating the amount of tax due.

107. Whilst Mr Purnell accepts that HMRC could agree to a joint referral under s 28ZA, he explained that the reason HMRC do not consider this appropriate is that a joint referral under s 28ZA should be approached in the same way as a consideration as to whether a particular aspect of an appeal should be heard as a preliminary issue. This, he says, would normally be a short point of law where no significant findings of fact are required.

108. In support of this, Mr Purnell referred to the decision of the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 (TCC). After reviewing the authorities, the Upper Tribunal summarised [at 28] the key principles to consider in deciding whether a matter should be heard as a preliminary issue as follows:

> "(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
>
> (2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.
>
> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
>
> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way – (3)(a) above.
>
> (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.
>
> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
>
> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

> (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly."

109. Mr Purnell also took issue with Mr Kessler's argument that there would be no significant disadvantage in hearing the domicile issue before collecting the information about the potential tax liabilities. As referred to above, a contrary view is that the consequent delay in collecting the information about the overseas income and gains could prejudice the availability of that information.

110. Mr Kessler accepts that a preliminary issue would normally be an issue of law but argues that each case must be considered on its own facts. He also points that, although *Wrottesley* was a case about domicile, it is very different from the current case. In *Wrottesley*, the appellant wanted the Tribunal to determine his domicile of origin as a preliminary issue before having a full substantive hearing in relation to his actual domicile at the relevant time. Unsurprisingly, the Tribunal took the view that splitting the determination of domicile in this way did not make sense.

111. Mr Kessler points out that, in this case, the preliminary issue is Mr Embiricos' domicile status and that this is a completely separate issue from the quantification of the tax which would be due if it turns out that he was UK domiciled. The domicile determination may dispose of the matter and render an investigation into Mr Embiricos' overseas income and gains unnecessary.

112. Mr Purnell's main point however is not whether or not it is right for the domicile issue to be heard as a preliminary issue. It is that it is an abuse of process for Mr Embiricos to use the appeal against the information notice was a way of, in effect, forcing HMRC to make a joint referral under s 28ZA TMA.

113. The reason for this is that HMRC has complete discretion as to whether or not to agree to a joint referral under s 28ZA TMA. The taxpayer has no right of appeal to the Tribunal should HMRC decline to agree to a joint referral. HMRC's decision could potentially be challenged in judicial review proceedings but that is a separate matter outside the authority of the Tribunal.

114. Mr Kessler referred us to the decision of the Tribunal in *Spring Capital Limited v HMRC* [2016] UKFTT 232 (TC). Although it was in a different context, the Tribunal referred with approval at [41] to the definition of an abuse of process put forward by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC529 which he said at [536C]:

> "concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

115. Mr Kessler submits that, far from Mr Embiricos' appeal against the information notice being an abuse of process, it is HMRC who are guilty of an abuse of process by refusing to agree to a joint referral under s 28ZA TMA.

116. If it is right that HMRC can only issue a partial closure notice which quantifies the amount of tax due, there cannot be any doubt that information enabling HMRC to calculate that tax is reasonably required by HMRC for the purpose of checking Mr Embiricos' tax position.

117. We agree with Mr Purnell that a taxpayer cannot use an appeal to the Tribunal against an information notice to effectively force HMRC to agree to a joint referral under s 28ZA TMA. We think that this would be manifestly unfair to HMRC and is therefore an abuse of process. If Mr Embiricos wishes to challenge HMRC's refusal to make a joint referral, he should bring an action for judicial review.

118. The question therefore as to whether or not HMRC should agree to a joint referral and what factors should be taken into account in deciding whether a particular point should be heard as a preliminary issue do not therefore arise.

119. We would however observe that it is not at all clear to us why HMRC consider that the question of domicile should not be determined as a preliminary issue before the quantification of the tax liabilities is addressed. It seems to us that this would be a much more efficient and cost effective way of proceeding for both parties.

120. Whilst Mr Purnell stated in argument that he was not aware that HMRC had ever made a joint referral in a domicile case previously, we do note that in one of the most well-known cases on residence and domicile, *Gaines-Cooper v HMRC* [2007] S.T.C. (SCD) 23, the question of Mr Gaines-Cooper's domicile and residence status was heard as a preliminary issue (although not, it appears, under the joint referral procedure in s 28ZA TMA). This does however demonstrate that issues of domicile and residence are perhaps in a special category and that determining those questions as a preliminary issue may well be appropriate, even taking into account the principles set out by the Upper Tribunal in *Wrottesley*.

121. Having said this, our conclusion is that if HMRC are only able to give a partial closure notice which states the amount of tax due assuming they are right in their conclusion that Mr Embiricos was domiciled in the UK during the relevant period, the information set out in the information notice is reasonably required and Mr Embiricos' appeal against the information notices would fail.

Conclusion

122. Whilst a partial closure notice may amend a taxpayer's return, unlike a final closure notice, or a closure notice under the previous regime, it does not, in order to be valid, have to amend the taxpayer's self-assessment. It does not therefore have to state the amount of tax which would be due based on the conclusions in the closure notice. Instead, the quantification of the tax due may be treated as a separate matter in respect of which a further closure notice can be given.

123. On this basis, HMRC have not shown reasonable grounds as to why the Tribunal should not direct HMRC to issue a partial closure notice.

124. The Tribunal therefore directs HMRC to issue a partial closure notice stating their conclusion in respect of Mr Embiricos' domicile and amending his tax return to withdraw the remittance basis claim within 30 days of the date of this decision.

125. Mr Embiricos' appeal against the information notice is allowed as the information contained in that notice is not reasonably required pending determination of Mr Embiricos' domicile.

126. If we are wrong in concluding that HMRC should issue a partial closure notice, Mr Embiricos' appeal against the information notice is dismissed and the information notice and the requirements in it are confirmed.

Appeal rights

127. This document contains full findings of fact and reasons for the decision. There is no right of appeal against the Tribunal's decision in relation to the information notice (paragraph 32(5) of schedule 36). Any party dissatisfied with the Tribunal's decision in relation to the application for a direction requiring HMRC to issue a 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 09 APRIL 2019