[2020] UKUT 0370 (TCC)

Appeal number: UT/2019/0080

PROCEDURE – partial closure notice in relation to HMRC enquiry – can a partial closure notice be issued in relation to a taxpayer's claim to the remittance basis without specifying the amount of tax due – no – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

EPAMINONDAS EMBIRICOS **Respondent**

TRIBUNAL: MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 7 October 2020

Akash Nawbatt QC and Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

James Kessler QC and Ross Birkbeck, instructed by Moore Family Office Limited, for the Respondent

DECISION

1. HMRC appeal against the decision of the First-tier Tribunal (the "FTT") reported at [2019] UKFTT 236 (TC) (the "Decision"). The appeal raises an important point concerning the issue by HMRC of a partial closure notice in respect of an enquiry into a taxpayer's tax return.

2. HMRC opened enquiries into the claim by Mr Embiricos in his self-assessment tax returns for the years ended 5 April 2015 and 5 April 2016 that he was domiciled outside the UK and entitled to the remittance basis of taxation. HMRC having concluded as a result of their enquiries that he was domiciled in the UK, Mr Embiricos sought a closure notice from HMRC for those years so that he would be able to appeal against HMRC's decision. HMRC considered that they could not issue a closure notice until they had quantified the amount of tax which would be due if the remittance basis was denied. To that end, HMRC issued Mr Embiricos with an information notice request. The FTT held that the legislation concerning partial closure notices did not require that HMRC had quantified the amount of tax due. Such a notice could, and should, be issued stating HMRC's conclusion as to domicile and amending the returns so as to withdraw the remittance claim. The FTT further concluded that, assuming its decision on this point was correct, Mr Embiricos' appeal against the information notice was allowed.

3. With the permission of the FTT, HMRC appeal against the FTT's decision that the partial closure notice did not need to specify the amount of tax due, and could and should be issued simply denying the taxpayer's claim to benefit from the remittance basis.

Background: Closure Notices

4. It is helpful to set the scene with a brief description of the reasons behind the introduction of the legislation regarding partial closure notices ("PCNs"). What follows relates to the income tax and capital gains tax liabilities of individuals.

5. HMRC have a statutory right to enquire into a self-assessment tax return made by an individual taxpayer. To that end, HMRC also have specific powers to obtain relevant information and documents during an enquiry. While an enquiry is in progress, HMRC and the taxpayer may jointly refer to the FTT for determination any question arising in connection with the subject matter of the enquiry.

6. Before the introduction of the PCN regime, the legislation provided that an enquiry which had been opened by HMRC was completed when HMRC issued a "closure notice", informing the taxpayer that HMRC had completed their enquiries into that return. The notice had to either state that no amendment of the return was required, or make the amendments of the return required to give effect to the conclusions of the HMRC officer. The code sought to balance HMRC's rights to obtain information and progress an enquiry with the right of a taxpayer to seek finality to a prolonged enquiry process. That was achieved by providing a right for the

taxpayer, on certain terms, to apply to the FTT for a direction requiring HMRC to issue a closure notice for the period under enquiry. The tribunal was obliged to make that direction unless it was satisfied that there were reasonable grounds for not doing so.

7. Broadly, the issue of a closure notice marked the end of the enquiry stage for that period of assessment, and the beginning of the taxpayer's rights of appeal.

8. The difficulty was that a closure notice was something of a blunt instrument. In practice, HMRC might enquire into several aspects of a taxpayer's return for a particular period. HMRC might, for instance, enquire into a large claim for losses arising under a tax avoidance scheme and a much smaller, unconnected claim to deduct business expenses in the taxpayer's trade. Since a closure notice would end the enquiry stage for that period, there was no mechanism (other than by the joint referral for determination of a question to the FTT) for HMRC or the taxpayer to achieve or seek from the tribunal closure of one aspect of those enquiries but not the others.

9. In order to address this problem, in December 2014 the Government initiated a consultation process. In due course, this led to the introduction in 2017 of amendments to the legislation to distinguish two types of closure notice, namely a partial closure notice and a final closure notice. The provisions now state that "any matter to which the enquiry relates" is completed when HMRC issue a PCN informing the taxpayer that the officer "has completed his enquiries into that matter". The enquiry itself is completed when HMRC issues a final closure notice, informing the taxpayer that all enquiries have been completed. The machinery described above remains otherwise largely unchanged.

10. In relation to the legislation prior to the 2017 amendments, the requirement for a closure notice to state HMRC's assessment of the amount of tax due has been confirmed by the decision of the Court of Appeal in *Regina (Archer) v HMRC* [2017] EWCA Civ 1962. We discuss below the relevance of that decision to the issue in this appeal.

Relevant legislation

11. If required to do so by HMRC, an individual must make a tax return and send it to HMRC: section 8 Taxes Management Act 1970 ("TMA"). That return must include a self-assessment of the amount of income tax and capital gains tax payable for the year in question: section 9 TMA. HMRC may enquire into anything contained in the return, or required to be contained in the return, including any claim or election included in it: section 9A TMA.

12. The critical provision in this appeal is section 28A TMA, which deals with final and partial closure notices. It provides as follows:

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

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—

(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or

(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and—

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

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

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

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

(5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

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

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

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

13. Section 31 TMA deals with rights of appeal and (so far as relevant) provides as follows:

(1) An appeal may be brought against—

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

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

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

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

(2) If an appeal under subsection (1)(a) above against an amendment of a self-assessment is made while an enquiry is in progress in relation

to any matter to which the amendment relates or which is affected by the amendment none of the steps mentioned in section 49A(2)(a) to (c) may be taken in relation to the appeal until a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued.

14. Section 50, which deals with the procedure on appeals, provides (so far as relevant) as follows:

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

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

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

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

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

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

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

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

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

the assessment or amounts shall be increased accordingly.

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

15. At any time before the closure of an enquiry, the taxpayer and HMRC may jointly refer certain questions to the FTT for determination, under section 28ZA TMA. This states as follows:

28ZA Referral of questions during enquiry

(1) At any time when an enquiry is in progress under section 9A(1) or 12AC(1) of this Act in relation to any matter, any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination.

(2) Notice of referral must be given—

(a) jointly by the taxpayer and an officer of the Board,

(b) . . .

(c) to the tribunal.

(3) . . .

(4) More than one notice of referral may be given under this section in relation to an enquiry.

(5) For the purposes of this section the period during which an enquiry is in progress in relation to any matter is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued.

(6) In this section "the taxpayer" means—

(a) in relation to an enquiry under section 9A(1) of this Act, the person to whom the notice of enquiry was given…

Background and the FTT's decision

16. An individual who is non-domiciled may claim the benefit of the "remittance" basis of taxation, with the result that he is only liable for UK tax on any overseas income and gains to the extent that they are remitted to the UK.[1] Mr Embiricos considered himself to be domiciled outside the UK and claimed the remittance basis for the tax years 2014/15 and 2015/16 in his tax returns.

17. A claim for the remittance basis does not, as is usually the case for claims in a tax return, require the taxpayer to quantify the amount of the claim: that is the effect of the exclusion of the usual requirement in section 42(1A) TMA by section 809B (3) Income Tax Act 2007.

18. HMRC opened enquiries into both returns in relation to Mr Embiricos' claim to be non-domiciled. HMRC subsequently informed him that they had concluded that he was domiciled in the UK during the relevant period. Mr Embiricos initially applied to the FTT for a final closure notice, which was amended to become an application for a PCN. Following correspondence, at the request of Mr Embiricos HMRC issued to him a taxpayer information notice under paragraph 1 of Schedule 36 Finance Act 2008 ("Schedule 36") requiring him to provide the information which HMRC considered they needed in order to close their enquiries.

19. HMRC would not agree to a joint referral of the question of Mr Embiricos' domicile to the FTT under section 28ZA TMA. HMRC considered that they could not issue the PCN sought by Mr Embiricos until they had obtained sufficient information to quantify the amount of tax which would be due if they were correct that he was domiciled in the UK.

[1] The claim is made under section 809B Income Tax Act 2007.

20. Mr Embiricos applied to the FTT for a direction that HMRC be required to issue a PCN for the relevant periods, and appealed against the information notice on the basis that the information sought was not reasonably required until his domicile status had been confirmed.

21. Thus, the present situation is the result of an impasse between Mr Embiricos and HMRC. Mr Embiricos wishes to challenge the conclusion reached as to his domicile before providing further information as to his taxable income and gains. HMRC say that although a mechanism exists under section 28ZA TMA which might have allowed that to happen, it requires HMRC's agreement and they have not provided it. Accordingly, the further information must be provided, say HMRC, so that the tax due on the basis of their conclusion can be calculated. Any challenge must come later, once the financial consequences of the conclusion are known.

Arguments of the parties before the FTT

22. As to the argument that a PCN could be issued without amending Mr Embiricos' self-assessment to show the tax due, the case put forward by Mr Kessler and Mr Birkbeck (who also represented the taxpayer before the FTT) was, as the FTT put it, "both succinct and straightforward"[2]. Under section 28A(1A) TMA, the domicile/remittance claim was a separate "matter" to which HMRC's enquiry related. HMRC had clearly completed their enquiries into that separate matter, because they had stated their conclusion that he was domiciled in the UK. In relation to the amendment of the return required by section 28(2), either no immediate amendment was required, or the only amendment needed was to remove the "X" from the box stating that Mr Embiricos claimed the remittance basis. The claim for domicile/the remittance basis was a separate "matter" to the amount of tax due for the purposes of section 28A, and therefore appropriate to be the subject of a PCN. This approach was supported by the materials issued during the consultation process preceding the 2017 changes to the legislation. It was also consistent with the overriding objective under the FTT rules. The decision in *Archer* was restricted to final closure notices, and had no application to PCNs.

23. HMRC, on the other hand, relied heavily on *Archer* as establishing that HMRC could not issue a closure notice, whether final or partial, without amending the return to state the amount of tax payable. HMRC needed further information, as requested in the Schedule 36 notice, to quantify the tax payable if the claim to the remittance basis was denied. It was not possible to carve out the issue of domicile or the remittance claim as a separate "matter" for the purposes of section 28A(1A). The remittance basis claim and the amount of tax payable as a result of that claim being disallowed were inextricably linked, and not two separate matters. Splitting out any underlying point of principle from the tax payable cannot have been Parliament's intention in enacting the PCN provisions.

[2] At [24].

The FTT's decision

24. The FTT determined that the purpose of the PCN regime was to make the enquiry process more efficient and flexible by enabling a matter on which a conclusion had been reached to be dealt with (by way of appeal or otherwise) while other matters continued to be investigated: [42]. The consultation document supported that conclusion: [46]. Section 28A "should not be interpreted in an unduly restrictive manner as the result of this would be to frustrate the intention of Parliament": [49].

25. The FTT considered that Mr Embiricos' domicile was capable of being a "matter" for the purposes of section 28A(1A) "as a matter of ordinary language". It was a "specific issue in itself": [51]. As to the amendments to the returns required by section 28A(2), these did 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": [63].

26. In relation to *Archer*, the FTT distinguished that decision on the basis that final closure notices were considered in that case to be a form of assessment, and that the PCN regime was "a fundamental change": [54] to [58].

27. The FTT concluded that HMRC could issue a PCN denying Mr Embiricos' claim to the remittance basis and amending the return to remove that claim. There was no requirement that the amount of tax thereby brought into charge be stated. The exercise of quantifying the tax was a completely separate "matter" in respect of which the enquiry for the relevant period would remain open and a final closure notice could be given in due course: [66].

28. The FTT went on to consider section 28A(6) TMA and determined that there were no reasonable grounds for not issuing the PCN sought. It ordered HMRC to issue a PCN within 30 days of the date of the Decision: [96].

29. The FTT then considered Mr Embiricos' appeal against the Schedule 36 notices issued by HMRC. It concluded that, since HMRC had already determined the "matter" in respect of which the PCN had been ordered to be issued (namely domicile/the remittance claim), it needed no further information in relation to that matter and so the appeal was allowed: [100]. Helpfully, the FTT recorded that, if, however, its conclusion as to the construction of the PCN legislation was wrong, then the information requested in the notices would be reasonably required by HMRC, and the appeal against the notices would be dismissed: [126].

This appeal

30. Before summarising HMRC's grounds of appeal, we note that shortly after the release of the Decision a differently constituted FTT reached the opposite conclusion in relation to the issue in this appeal. The decision in *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 418 TC ("*Levy*") contains an extremely thorough analysis by Judge Andrew Scott[3] of his reasons for concluding that a PCN cannot be issued

[3] The relevant section of the decision covers some 90 paragraphs.

without specifying the amount of tax due. Since those reasons were adopted by HMRC in this appeal, we discuss them below.

31. HMRC submit that the FTT erred in concluding that a PCN could be issued which denied Mr Embiricos' claim to the remittance basis without specifying the tax thereby arising. In summary, the arguments raised by Mr Nawbatt were as follows:

(1) A PCN is a form of closure notice, and falls to be considered as part of the closure notice code. One consequence of this is that the FTT was wrong to conclude that the reasoning and conclusions in *Archer* did not apply in respect of a PCN.

(2) "Matter" in section 28A(1A) must be construed in context to mean a matter in respect of which HMRC could issue a final closure notice.

(3) The language used in section 28ZA in relation to joint referrals is wider than that in section 28A, and that reflects a deliberate choice on the part of the draftsmen of the two provisions.

(4) The FTT's decision has the practical result that a taxpayer can, by applying for a PCN, force the premature determination of something which might otherwise have been potentially capable of determination as a preliminary issue at the appeal stage. This approach brings forward a mechanism appropriate to an appeal to the stage when an enquiry is still being carried out, which cannot have been the intention of Parliament.

(5) As set out in *Levy*, the route chosen by the draftsman to introduce the PCN provisions, namely amending the then existing closure notice provisions, strongly suggests that a PCN should, absent express provision, be subject to the same statutory requirements as a final closure notice.

(6) In relation to the purpose of the PCN provisions, which is relevant to their construction, the consultation process indicates that the changes were designed to produce greater certainty for taxpayers and HMRC, and to accelerate the payment of tax due in relation to the aspect of the individual's tax return under enquiry. The FTT's decision would not further those purposes.

(7) For the reasons set out in *Levy*, the FTT's conclusion that the statutory appeal rights in the TMA were available in relation to a claim for the remittance basis was wrong. The absence of an appeal right in relation to a PCN which denied such a claim but without quantifying the tax due was a further indication that the FTT's construction of the PCN provisions must be wrong.

32. Mr Kessler reiterated his submissions before the FTT which we have summarised above. He stated that any abuse of section 28A by the unnecessary fragmentation of a single dispute into multiple "matters" could be avoided because under section 28A(6) the FTT has a wide discretion to refuse to order HMRC to issue a PCN if it was satisfied that there were "reasonable grounds" for not issuing the notice. In any event, the fact that the FTT's approach would not produce unworkable results was demonstrated by the statutory right which existed until 2008 to refer a dispute as to

domicile for early determination. Finally, submitted Mr Kessler, both the reasoning and conclusion in *Levy* were entirely wrong.

Discussion

33. A central issue in this appeal is whether Mr Embiricos' claim to the remittance basis was a separate "matter" to which HMRC's enquiry related, such that a PCN could be issued in respect of it by simply amending the return to remove the claim but without specifying the tax due as a result. That is not the only issue, because it is also necessary to determine whether such a PCN would satisfy the requirement in section 28A(2) that the notice must make the amendments to the return "required to give effect" to the officer's stated conclusions.

34. We have considered the relevant background materials; the amendments made to the legislation to introduce the PCN regime; appeal rights in relation to PCNs; the relevance of statements made in *Archer*; section 28ZA, and the practical consequences of the FTT's interpretation. All these factors, in our view, inform the process of statutory construction which must be carried out.

Background materials

35. This tribunal may consider publicly available material[4] in order to understand the background to legislation or the mischief at which it is aimed. That material cannot take precedence over the clear meaning of the words used, and the material must have been reasonably available to the public in general: *Christianuyi Ltd & Others v HMRC* [2018] UKUT 10 (TCC) at [25].

36. We were referred to a number of documents issued during the consultation process in relation to the PCN proposals which began in late 2014. These included a consultation paper issued by HMRC entitled "Tax enquiries - closure rules" and the summary responses to it, and the Government's Policy Paper of the same name dated 5 December 2016. Initially, it was proposed that only HMRC would have the right to issue a PCN, but the vast majority of responses in the consultation sought some reciprocal right, and this was reflected in the legislation. The Policy Paper summarised the policy objective and background to the proposal as follows:

> **Policy Objective**
>
> The measure will give HMRC and its customers greater certainty about tax owed on individual discrete matters without having to wait for all matters in a tax enquiry to be resolved. It will make it harder for individuals to delay proceedings and will level the playing field so that all customers are treated equally and fairly. For example, a customer who uses multiple avoidance schemes will be treated in the same way as a customer with less complex affairs. In addition the measure will

[4] Parliamentary material is subject to particular rules: *Pepper (Inspector of Taxes) v Hart* [1993] 1 AC 593.

> help customers to more effectively plan their cash flow through earlier certainty and result in earlier payment to the Exchequer of tax due.
>
> **Background to the measure**
>
> The measure was announced at Autumn Statement 2014 and consulted on 18 December 2014. The consultation proposed a power for HMRC to close discrete aspects of a tax enquiry. As summarised in a responses document published on 28 September 2015, customers requested a reciprocal power on the basis of fairness. The government will provide customers with the right to ask for a PCN.

37. In terms of any light shed by these materials on the purpose of the PCN regime, the FTT concluded that the clear purpose was to make the enquiry process more efficient and flexible for both HMRC and the taxpayer by enabling a concluded matter to be dealt with by way of appeal or otherwise whilst other matters continued to be investigated: [42]. While the FTT did not think it necessary to refer to the consultation document, it considered that the extracts referred to by Mr Kessler supported this conclusion: [46].

38. We agree that the materials indicate that this was one of the purposes of the PCN proposals. However, we accept Mr Nawbatt's submission that another purpose clearly evident from the materials was to provide greater finality by early resolution of discrete matters at the enquiry stage, and thereby to accelerate tax payable to the Exchequer. In *Levy*, the tribunal found support in this for reaching the opposite conclusion to the FTT in this case: *Levy* at [139]. Therefore, on a balanced view we consider that something to support each party's interpretation can be found in the background materials. Mr Kessler accepted as much.

39. There is nothing in the background materials which directly addresses the issue in this appeal. However, it is noteworthy that all the examples given of problems with the then existing system involve multiple open enquiries into areas of dispute which are clearly discrete. None of them concern separate constituent elements of an enquiry into a single aspect. While we do not consider that too much should be drawn from this, it does indicate that the latter situation was not seen as the primary target of the proposals.

Introduction of the PCN rules: the old and new section 28A

40. As it was before the FTT, the heart of HMRC's case is that, while a PCN is something new it is still a closure notice, with the consequence that the pre-existing legislative framework for closure notices and the decision in *Archer* should inform the conclusion in this appeal.

41. In assessing the strength of this argument, it is in our view important to give weight to the route chosen by Parliament to introduce the PCN regime. The necessary changes were introduced by the Finance (No 2) Act 2017. They took effect by way of amendments to section 28A.

42. Before the PCN changes, section 28A(1) read as follows:

> (1) An enquiry under section 9A(1) or 12ZM 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.

43. This was amended to state as follows:

> (1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter.
>
> (1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—
>
> (a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
>
> (b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

44. It will be seen that the changes are limited to those necessary to introduce the PCN and the consequential creation of a final closure notice. The essential elements—an enquiry, and a notice stating that the officer has completed his enquiries which marks the completion of the enquiry stage—are unaltered. The requirement for the officer to state his conclusions is moved to the new Section 28A(2).

45. The version of section 28A(2) in force before the amendments was as follows:

> (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.

46. The amended version stated:

> (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.

47. As we have seen, the requirement in the present version for the officer to state his conclusions was also found in the previous version, in section 28A(1). It is therefore evident that paragraphs (a) and (b) of subsection (2) remained the same. No distinction is drawn in section 28A(2) between the two types of closure notice.

48. In relation to section 28A(3), the only change was to replace "a closure notice" with "a partial or final closure notice". Importantly, both types of notice are expressed to "take effect" when issued.

49. Section 28A(8) as amended is consistent with the status of a PCN as a closure notice, stating that references in the Taxes Acts to a closure notice under the section are to a final or partial closure notice.

50. So, the method chosen by Parliament to introduce the PCN regime was not to create a new set of provisions, or to adapt the section 28ZA joint referral mechanism[5]. Rather, it was to amend the existing closure notice rules in section 28A, and to amend them only so far as necessary. This gives rise, in our opinion, to an inference that PCNs were intended to operate, and be subject to the same restrictions, as closure notices. As section 28A(8) makes plain, a PCN is a closure notice for the purposes of the Taxes Acts.

Appeals against PCN amendments where no tax quantified

51. Section 31(1)(b) TMA provides that an appeal may be brought against "any conclusion stated or amendment made by a closure notice under section 28A…of this Act". This would include a right of appeal against a conclusion stated by a PCN. Section 50 TMA (set out at [14] above) deals with the powers of the tribunal on hearing appeals. Any appeal against an amendment to a return made by a closure notice would fall to be dealt with under these powers. Subsections (6) and (7) contain powers for the tribunal to reduce or increase the amount of an assessment.

52. However, as the FTT noted, neither subsections (6) or (7) appear to apply where, as in this case, the effect of issuing the PCN would not be to increase the amount of tax assessed, because HMRC do not have the information to quantify the tax arising on denial of the (unquantified) remittance claim. The FTT was clearly troubled by this, and discussed at [71] to [74] whether the tribunal would lack power in respect of an appeal against an amendment made by a PCN which, as in this case, did not quantify the resultant tax. If it would, then that would suggest that such an amendment was not intended by the legislation to be permitted. However, the FTT concluded that subsection (7A) "very clearly confers power on the Tribunal to allow or disallow the [remittance] claim on an appeal against the closure notice": [72]. Subsection (7A) states as follows:

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

53. In *Levy*, the tribunal concluded that subsection (7A) did not perform the function which the FTT in this appeal thought it did. Rather, tracing the history of the powers in subsection (7A) from their introduction in 1996, through an extremely detailed

[5] The consultation process states that this option was raised, but it appears not to have been discussed further.

analysis[6] Judge Andrew Scott concluded that in fact subsection (7A) caters for a situation where a claim or election is disallowed in one tax year but the tax adjustments relate to another year. The judge considered that the fact that Parliament did not amend section 50 TMA when PCNs were introduced supported the view that the tribunal's appeal powers remained confined to dealing with adjustments to amounts of tax assessed.

54. We consider that the applicability of section 50(7A) to a situation where no tax is quantified as a result of a PCN is a difficult question, and, for reasons which will become apparent, we have not found it necessary to determine it in this appeal. We think it would be appropriate for that to await an appeal where the issue is dispositive.

Archer

55. As we have observed, the issue in this appeal is not determined solely by the scope of the term "matter" in section 28A(1A). By virtue of section 28A(2), any closure notice, including a PCN, must "make the amendments of the return required to give effect to [the officer's] conclusions". The meaning of that requirement was considered by the High Court and Court of Appeal in *Archer*, in relation to the legislation prior to the introduction of PCNs.

56. That case concerned closure notices which failed to state the amount of tax due as a result of amendments to the taxpayer's returns to deny relief from certain avoidance schemes. The taxpayer sought judicial review on the basis, inter alia, that the notices were defective as they failed to satisfy section 28A(2). The High Court[7] (Jay J) accepted the taxpayer's argument that section 28A required the making of an assessment and "it is a minimum prerequisite of any assessment to tax by HMRC that it informs the taxpayer of his liability in a known or fixed sum"[8]. He stated, at [55] of the decision:

> **…** the statutory scheme predicates the giving of notice of amounts (of tax) being assessed, whether by the taxpayer or HMRC. This notice requirement applies to (1) returns, (2) amendments to returns, (3) assessments, (4) amendments to assessments, (5) self-assessments, and (6) amendments to self-assessments. For these purposes, albeit not for all purposes, there is no distinction between any of these categories. Ms Nathan drew my attention to the decision of Patten J (as he then was) in *Morris v Revenue and Customs Comrs* [2007] EWHC 1181 (Ch), (2007) 79 TC 184 (at [31]–[35]). This drew a distinction between assessments by HMRC and self-assessments by the taxpayer in the different context of the time limits under ss 34 and 36 of the TMA. This distinction has no application here. A s 28A closure notice is in the nature of being an assessment by the Revenue which is given effect to by directly altering the taxpayer's self-assessment.

[6] Paragraphs [172] to [184] of *Levy*.

[7] At [2017] EWHC 296.

[8] Quoting *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] 2 All ER 433, at 438.

57. Jay J considered that numerous provisions of the TMA supported his view, and concluded, at [57]:

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

58. The Court of Appeal upheld Jay J's analysis and conclusion. At [22] of the Court's decision, Lewison J stated as follows:

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

59. The FTT considered *Archer* at [54] to [58] of its decision. Its conclusions were as follows:

> 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.
>
> …
>
> 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.

60. On this basis, the FTT concluded that *Archer* had no application to PCNs, in view of the "fundamental change" to the legislation which they represented.

61. We consider that this conclusion was flawed, in a number of respects.

62. First, it takes no account of the manner in which Parliament chose to enact the PCN regime, discussed above. The regime was implemented as a modification to, and as part of, the existing regime for closure notices. That gives rise to an inference that existing law in relation to closure notices will apply, unless there is an indication to the contrary.

63. In relation to the weight to be attached to *Archer*, this point takes on additional significance because the High Court decision in that case had been published several months before the draft proposals which implemented the PCN changes were introduced in Parliament and approved by it.[9] Parliament should be assumed to have been aware of the decision in *Archer* in making the PCN changes: see the dicta of Lord Blackburn that "we ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law" in *H Young & Co v The Mayor and Corporation of Royal Leamington Spa* (1883) 8 App Case 517, at 526. The FTT should therefore have taken into account that Parliament was aware of *Archer* but chose to do nothing in the legislation to address or clarify the effect or relevance of that decision in relation to PCNs.

64. Second, the FTT distinguished *Archer* partly on the basis that there was no discussion in the case of the issue in this appeal, namely whether it was necessary for the closure notices to amend the assessments. In fact, that issue is discussed in detail, at [53] to [72] of the High Court decision and [18] to [31] of the Court of Appeal decision.

65. Third, while it is correct that a PCN, unlike the closure notice in *Archer*, does not operate as a form of assessment which completes the enquiry, it does not follow that the detailed analysis of the TMA provisions carried out by Jay J, and the principles he derived in relation to closure notices, as endorsed by the Court of Appeal, must be irrelevant. The FTT should have considered the extent to which that analysis and those principles might carry across to PCNs, recognising the differences between the two types of closure notice.

Early resolution of issues at the enquiry stage: Section 28ZA

66. The FTT discussed section 28ZA in relation to Mr Embiricos' appeal against the information notices, but not in its consideration of the issue in this appeal. However,

[9] The detailed chronology is set out at [156] and [157] of *Levy*.

we consider that it is instructive to consider and contrast section 28ZA with the construction of the PCN provisions found by the FTT.

67. Section 28ZA was enacted in 2001. It applies when an enquiry is in progress, and allows a question to be referred to the tribunal for its determination. The effect of such a determination is provided for by Section 28ZE TMA, which states as follows:

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

68. So, a determination under section 28ZA is treated in the same way as the determination of a preliminary issue in an appeal. A section 28ZA determination does not "take effect" when it is issued, as does a closure notice by virtue of Section 28A(3), bur rather it must be "taken into account" by HMRC in formulating any amendments of the relevant return.

69. In considering whether the PCN rules should be construed so as to facilitate the ability of a taxpayer who claims to be non-domiciled to insist on that threshold issue being determined at the enquiry stage, without having to agree the tax at stake, in our view it is highly relevant that Parliament has provided a mechanism to do that since 2001, in section 28ZA. That mechanism was extended in the PCN legislation to cover enquiries into "matters", with the enquiry into that matter being brought to an end by a PCN in respect of it: section 28ZA(5)(b). It was common ground that Mr Embiricos' domicile status could have been subject to a referral under section 28ZA.

70. Of course, a referral under section 28ZA requires the consent of both the taxpayer and HMRC. That will disadvantage the taxpayer where, as in this case, HMRC do not consent. In other cases, however, a unilateral right might be open to abuse, by *either* party, and could create delay, so the need for a referral to be joint is what Parliament has judged to be an appropriate compromise.

71. The result, in section 28ZA, is a mechanism which may be imperfect, but which is workable and reflects an understandable policy approach.

72. That which is capable of referral under section 28ZA is wider than that which may be the subject of a PCN. Subsection (1) states as follows:

> (1) At any time when an enquiry is in progress under section 9A(1) or 12AC(1) of this Act in relation to any matter, any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination.

73. Mr Kessler invited us to conclude that it did not matter that Section 28A(1A) and Section 28ZA used different language. There was no implication to be drawn from that that the question of domicile, considered separately from the tax involved, could be referred under section 28ZA but could not be the subject of a PCN application. It did not follow, in other words, that "any question arising in connection with the subject-matter of the enquiry" was different to or wider than "matter".

74. We do not accept this submission. The language used in section 28ZA is clearly apt to encompass a discrete question which may be determined as a preliminary issue, without any need to assess at that stage the amount of tax in question. The draftsman should be assumed to have chosen the wording in section 28ZA deliberately. Indeed, since subsection (1) begins by referring to an enquiry in relation to "any matter", if Mr Kessler were correct the draftsman would simply have said that when an enquiry was in progress in relation to any matter, that matter could be referred to the tribunal for its determination.

75. This is relevant to the purposive construction of section 28A(2) because the FTT's conclusion has the effect that the PCN provisions would operate as a *unilateral* version of section 28ZA, albeit subject to the approval of the tribunal, making the latter mechanism in practice largely redundant.

76. We consider it highly unlikely that Parliament can have intended in enacting the PCN provisions that there should be two parallel mechanisms for dealing with the same problem, but with only one of them requiring the consent of both parties. It would be even more surprising if the method which could be instigated unilaterally by the taxpayer, subject only to the consent of the tribunal, resulted in a decision which "takes effect" on issue of the PCN, whereas a determination under the joint referral mechanism would produce only a determination to be taken into account by HMRC.

Practical consequences of the FTT's decision

77. It follows from the FTT's conclusion that if "matter" is to be given such a wide construction, there may be multiple findings required to be made in the course of progressing an enquiry into a transaction or claim which could each be made the subject of a series of PCNs. For example, in an enquiry where a taxpayer has entered into a partnership film scheme and claimed loss relief, there could be separate PCNs issued in respect of (1) whether the partnership was trading, (2) whether it was trading with a view to profit, (3) whether the losses had been properly calculated, (4) whether a particular anti-avoidance provision was engaged, and (5) whether certain items of expenditure should be disallowed as not being trading expenses.

78. Such a series of notices could either be issued by HMRC of its own volition, or at the request of the taxpayer with the consent of the tribunal.

79. Mr Kessler accepted that in principle this would follow from the FTT's analysis. He countered the concern that this would result in an unworkable and potentially prolonged process with three arguments.

80. First, he pointed out that the position which HMRC described as unworkable is in fact that which applied for many decades until 2008. Until that date, it was possible under section 42 of the Income Tax (Earnings and Pensions) Act 2003 and predecessor legislation to refer to HMRC for decision a dispute as to ordinary residence or domicile, and to appeal against that decision.

81. Second, it is well-established that the FTT may determine questions of fact or law as preliminary issues.

82. Third, if a taxpayer was considered by HMRC to be fragmenting a dispute unreasonably into multiple "matters" and seeking PCNs for each, then the FTT could simply refuse to issue the direction sought by the taxpayer, exercising its unfettered discretion under section 28A(6) to conclude that there were "reasonable grounds" for not issuing the notice.

83. We are not persuaded by Mr Kessler's arguments. The pre-2008 provisions dealing with disputes as to domicile were restricted to ordinary residence and domicile. While this appeal concerns domicile, if the FTT's interpretation is correct, the PCN rules have effectively revived that right, but extended it to any dispute on any question arising in an enquiry. The right for the FTT to determine a matter as a preliminary issue is exercised primarily at the appeal stage, and, in any event, is not a mechanism which either party can utilise without the approval of the FTT as matter of its case management discretion, and subject to the principles set out in *Wrottesley v HMRC* [2015] UKUT 637 (TCC). Finally, we consider that the "reasonable grounds" which might justify refusal of a taxpayer's application under section 28A(6) are primarily directed towards assessing the adequacy of the information available to HMRC. It is not evident what criteria would properly apply to determine whether a discrete question presented as a "matter" by the taxpayer was being so presented unreasonably.

Conclusions

84. Mr Kessler pointed out that a claim for the remittance basis does not need to specify the amount of the claim, and it was clearly understood and intended that taxpayers claiming the remittance basis would not need to disclose their overseas income and gains. However, that does not mean that HMRC are not entitled to seek information in enquiring into a remittance claim. Indeed, the effect of the FTT's decision in this case is that HMRC would be forced to issue a PCN, but unable to obtain the information they assert to be necessary to quantify the tax at stake.

85. We accept that, as a matter of language, domicile or a claim to the remittance basis is capable of being a "matter" arising in the course of an enquiry. Viewed in isolation, the word "matter" is undoubtedly protean in nature. However, even Proteus

yielded up his secrets when he was captured and held fast[10], so it is necessary to fasten down the legislation and determine whether the FTT's wide construction of it was correct.

86. This requires a purposive construction of section 28A as a whole, in its statutory context, taking account of the manner of implementation of the PCN code and the consequential weight to be afforded to *Archer*. For the reasons set out above, in disagreement with the FTT we consider that process of construction supports HMRC's position in this appeal. We also consider that Parliament cannot have intended the PCN provisions to operate in parallel with the long-standing mechanism in section 28ZA for joint referral of a question at the enquiry stage, but as a unilateral right, subject to the approval of the tribunal.

87. We conclude that the FTT reached the wrong conclusion, and HMRC's appeal must be allowed.

Disposition

88. The appeal by HMRC is allowed. At [126] of its decision, the FTT directed that, in that event, Mr Embricos' appeal against the information notices was dismissed, and there is no appeal against that decision[11].

Signed on original

MR JUSTICE ADAM JOHNSON
JUDGE THOMAS SCOTT

RELEASE DATE: 6 January 2021

[10] By Menelaus according to Homer and by Aristaeus according to Virgil.

[11] Paragraph 32(5) of Schedule 36.