Neutral Citation Number: [2022] EWCA Civ 3

Case No: A3/2021/0604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Mr Justice Adam Johnson and Upper Tribunal Judge Thomas Scott
[2020] UKUT 0370 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2022

Before:

LADY JUSTICE NICOLA DAVIES
LADY JUSTICE SIMLER
and
MR JUSTICE FRANCIS

- -

Between:

EPAMINONDAS EMBIRICOS	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Kevin Prosser QC and Barbara Belgrano (instructed by **Ince Gordon Dadds LLP**) for the **Appellant**
Akash Nawbatt QC and Sebastian Purnell (instructed by **General Counsel and Solicitors to HM Revenue and Customs**) for the **Respondent**

Hearing date: 25 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII the date and time for hand-down is deemed to be 11 January 2022 at 10.30

Lady Justice Simler:

Introduction

1. The question raised by this appeal concerns the circumstances in which an officer of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") who is enquiring into a tax return can give (or be required to give) the taxpayer a partial closure notice ("PCN"). In particular, can HMRC be required to give a PCN when the officer has completed his enquiries into a matter to which the enquiry relates, without quantifying the tax due as a result of the conclusion reached by the officer in relation to that matter? Here, the matter enquired into was whether or not the taxpayer is entitled to claim the benefit of the remittance basis of assessment as a person not domiciled in the UK in the relevant tax years.

2. The answer to this question depends upon the correct construction of section 28A of the Taxes Management Act 1970 ("TMA") (as amended by schedule 15 Finance (No.2) Act 2017). In short, the appellant, Mr Embiricos, submitted that HMRC can be required to give a PCN in these circumstances: whether the remittance basis claim is valid or not can properly be regarded as a "matter" in its own right within section 28A(1A) such that a PCN can be given to inform the taxpayer that the officer has completed his enquiries into that "matter", with the amount of tax payable being a separate "matter" in relation to which a further closure notice can be given subsequently once other issues have been resolved. On the appellant's case it is sufficient for the purposes of section 28A(2) if the officer states his conclusion that the claim is disallowed, and makes the amendments to the return "required to give effect to" that conclusion by simply removing the remittance basis claim from the return.

3. HMRC disagree. Their case in summary is that "matter" in section 28A(1A) must mean a matter in respect of which HMRC could issue a final closure notice ("FCN") if it were the only issue being enquired into. The legislative intent behind the enactment of the PCN regime is to enable HMRC and the taxpayer to achieve finality on the "matter" which is the subject of the PCN by securing the early payment of tax brought into charge. To achieve such finality, the HMRC officer's conclusion on a "matter" must enable *all* necessary amendments to a taxpayer's tax return arising from the officer's conclusion to be made, including where relevant, a statement of the amount of any tax brought into charge by the amendment. In other words, the quantum of the tax payable is not a discrete matter for the purposes of section 28A which can be the subject of a separate PCN. Rather, the amendments to the return "required to give effect to" the officer's conclusion must include a calculation of any tax payable. Where that cannot be done because HMRC do not have all relevant information, the officer cannot (and cannot be required to) issue a PCN.

4. The First-tier Tribunal (Judge Robin Vos and Helen Myerscough, "the FTT") held that HMRC did have power and could be required to issue a PCN concluding HMRC's enquiry into the validity of the remittance basis without quantifying the tax due as a result. The FTT also allowed the appellant's appeal against an information notice requiring him to provide the financial information necessary to enable HMRC to quantify the tax payable as a consequence of concluding that the appellant was domiciled in the UK in the relevant tax years (2014 to 2016) and not entitled to claim the remittance basis of assessment.

5. The FTT's decision requiring HMRC to issue a PCN concluding the remittance basis claim enquiry was reversed by the Upper Tribunal (Adam Johnson J and UT Judge Thomas Scott, "the UT") by a decision dated 6 January 2021. The UT held that HMRC could not issue a PCN in respect of the remittance basis claim without stating the amount of tax which would be due as a consequence of HMRC's conclusion that the appellant was domiciled in the UK.

6. On this appeal, the appellant challenges the UT's decision and contends that the FTT's conclusion was correct albeit for different reasons than those relied on by the FTT.

7. Kevin Prosser QC and Barbara Belgrano appeared on behalf of the appellant. Akash Nawbatt QC and Sebastian Purnell appeared for HMRC. I am grateful to all counsel for their written and oral submissions which were of the highest quality, and provided considerable assistance to me and the court.

The facts

8. The essential factual background is as follows. An individual who is not domiciled in this country may claim the benefit of the remittance basis of taxation, with the result that he or she is only liable to pay UK tax on income and gains to the extent that they are remitted to the UK. Mr Embiricos was born in Greece with a domicile of origin there. Although he was resident (or ordinarily resident) in the UK, he continued to consider himself to be domiciled outside the UK and claimed the remittance basis for the tax years 2014/15 and 2015/16.

9. The self-assessment tax returns for 2014/15 and 2015/2016 are materially identical in relation to the remittance basis claim and I will focus on the return for 2014/15 accordingly. In that return, Mr Embiricos put X in box 5 to state that he was completing supplementary pages as a person claiming to be not domiciled in the UK and claiming the remittance basis. He did not complete the "Foreign" pages for tax on overseas income and gains, where overseas income and gains would have been brought into charge had the tax return been completed on the arising basis rather than the remittance basis. On the "Residence, remittance basis etc" pages he put X answering yes to box 23 ("domiciled outside the UK and it is relevant to your Tax or Capital Gains Tax liability") and in box 27 indicated that he was born outside the UK but came to live in the UK on 6 April 1969. In box 28 he made his claim for the remittance basis. He did not tick box 29 which asked whether his unremitted income and gains for the tax year were less than £2000. In the course of argument, Mr Prosser QC accepted that it could be inferred from that answer that Mr Embiricos had overseas income and gains that he was purporting to shelter, though their quantification remained unknown.

10. Mr Embiricos was not required to, and did not, give any details of the amount of tax which would have been payable if he had not made the remittance basis claim. That is the effect of the exclusion of the usual requirement to do so in section 42(1A) TMA by section 809B(3) Income Tax Act 2007. Consistently with that provision, when the officer came to enquire into the remittance basis claim, the enquiries were limited to the validity of the claim as a preliminary question, and did not initially extend to enquiries as to quantification of the tax otherwise due.

11. By letter dated 1 December 2016, an officer of HMRC opened an enquiry into Mr Embiricos' tax returns under section 9A TMA, stating: "I only intend to look at your claim to be non-domiciled in the UK."

12. The enquiry ensued. By letter dated 10 September 2018, HMRC Solicitor's Office informed solicitors acting for Mr Embiricos that on the basis of the evidence then provided, they regarded him as domiciled in the UK for the relevant period. That view was reached without consideration of the amount of tax payable in consequence, and information in this regard was requested.

13. Mr Embiricos disagreed with the view expressed and invited HMRC to make a joint referral to the FTT to determine his domicile status as a preliminary issue. HMRC declined to do so. Thus, as the UT described it, an impasse was reached between Mr Embiricos and HMRC with Mr Embiricos wishing to challenge the validity of the conclusion reached about his domicile before providing further information as to his taxable income and gains, and HMRC insisting that this information was required to enable the tax due on the arising basis (given the domicile conclusion reached) to be calculated before a PCN could or should be issued.

14. Following further correspondence, at the request of Mr Embiricos, HMRC issued a taxpayer information notice under paragraph 1 of Schedule 36 Finance Act 2008 requiring him to provide the information which HMRC considered necessary to close their enquiries on this aspect of his returns. By application dated 1 February 2019, Mr Embiricos applied to the FTT for a direction that HMRC be required to issue a PCN in relation to the domicile and remittance basis claims for the relevant periods. He also appealed against the information notice on the basis that the information sought was not reasonably required until his domicile status had been confirmed.

15. As already indicated, the FTT acceded to the PCN application, concluding that it was capable of being issued notwithstanding the absence of any tax quantification to reflect the disallowance of the remittance claim. The UT reversed that decision.

The statutory framework

16. To better understand the rival arguments in this case, it is necessary to describe the statutory scheme for self-assessment of tax and how section 28A (as amended) fits within that scheme. (There are parallel provisions for partnership and other returns but it is unnecessary to set these out.)

17. The starting point is that, if required to do so by HMRC, an individual must make and deliver a tax return for a fiscal year to HMRC: section 8 TMA. The taxpayer must declare that the information contained in the return is correct and complete to the best of his or her knowledge, information and belief. Section 8(1) TMA is in the following terms:

> "8. Personal return
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income

> tax for that year, he may be required by a notice given to him by an officer of the Board -
>
> > (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and
> >
> > (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

18. The taxpayer's return must disclose all relevant information and correctly assess, on the basis of it, the tax due because it is the return that establishes the amounts in which the taxpayer is chargeable to income and capital gains tax for the fiscal year of assessment to which the return relates. To that end, section 9(1) TMA provides that the return under section 8 must (unless HMRC is to perform the calculation on the taxpayer's behalf) include a "self-assessment"; in other words, a calculation of the amount payable by the taxpayer by way of income and capital gains tax for the year of assessment in question. Section 9(1) provides:

> "9. Returns to include self-assessment
>
> (1) Subject to subsections 1(A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say -
>
> > (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
> >
> > (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source …"

19. Where a taxpayer does not comply with the obligation to include a self-assessment in the return, an HMRC officer has power (and in certain cases a duty) to make the assessment on the taxpayer's behalf on the basis of the information contained in the return, and send the taxpayer a copy: see section 9(3). An assessment made under section 9(3) is treated as a self-assessment and as included in the return: section 9(3A). There is power in section 9ZA for the taxpayer to amend the return within specified time limits; and HMRC may correct obvious errors in the return: section 9ZB.

20. Section 9A TMA provides power, within specified time limits, for an officer of HMRC to enquire into a section 8 return by giving notice of the officer's intention to do so. This is the enquiry power that was exercised in this case. Section 9A(4) makes clear that:

> "(4) An enquiry extends to –
>
> > (a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return, …"

HMRC may amend the self-assessment contained in the return in the course of the enquiry under section 9C. Ordinarily, a return which has been the subject of one notice of enquiry may not be the subject of another: section 9A(3). The enquiry is brought to an end by a closure notice served by HMRC pursuant to section 28A(1), which can (as a result of the amendments made in 2017) be a PCN as well as a FCN. The taxpayer may appeal against any amendment under section 9C or against any conclusion stated in a closure notice: section 31 (see below).

21. Part 3A TMA, "Referral of questions during enquiry", provides an avenue for the joint referral of questions arising in connection with the subject matter of an enquiry, but only while that enquiry is in progress. Unilateral referral of a question by one party was and remains impermissible, both before the 2017 amendments introducing PCNs and since those amendments came into force. Once an enquiry is concluded as a whole or in relation to a particular matter, there can be no reopening of the issues raised by referral of any question relating to the enquiry or the matter enquired into. Section 28ZA TMA is the operative provision and provides 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. …"

22. While proceedings on a joint referral are in progress in relation to an enquiry because the question (or questions) referred have not been finally determined by the tribunal, no PCN can be given in relation to the matter to which the question referred relates and no FCN can be given in relation to the enquiry. No application can be made for a direction to give either notice during this period. (See section 28ZD).

23. Section 28ZE deals with the effect of a tribunal's determination on a joint referral. It provides:

"28ZE Effect of determination

(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."

24. The central provision in this appeal is section 28A (TMA) (as amended) which deals with closure notices. In its current form (and as applicable here) 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."

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

"(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),

…

> (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."

26. Section 48(2) TMA provides that for appeals other than appeals against an assessment (section 48(2)(a)) and other proceedings under the Taxes Act (section 48(2)(b)) the provisions in Part 5 have effect subject to any necessary modification. In other words, in the case of an appeal against a conclusion stated in a closure notice that a loss included in the return is not allowable, if the tribunal decides that the conclusion in the PCN or FCN is wrong, then the tribunal must amend the conclusion accordingly, but otherwise the conclusion must stand good. This follows from relevantly modifying section 50 TMA which sets out the tribunal's powers on an appeal to it.

27. Section 50 (6) and (7) TMA (without any such modification) provide:

> "(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."

28. I have not set out the terms of section 50(7A). Although the FTT regarded this subsection as highly relevant, it is now accepted that the FTT was in error in this regard, and no reliance was placed on subsection (7A) in this appeal. As explained with great clarity by Judge Andrew Scott in *Executors of R W Levy v HMRC* [2019] UKFTT 0418 (TC) ("*Levy*"), the relevant legislative history demonstrates that section 50(7A) TMA does not apply to a case where a claim is made (as here, to the remittance basis) which

does affect the tax payable for the relevant tax year. Such a case falls properly within section 50(6) and/or (7) TMA.

29. Section 59B(5) TMA (before and after amendment) provides that an amount of tax payable or repayable as a result of the amendment or correction of a self-assessment under section 28A is payable (or repayable) on or before the day specified by the relevant provisions of Schedule 3ZA. Paragraph 5 of Schedule 3ZA provides that the amount payable (or repayable) as a result of the amendment of a self-assessment under section 28A is payable (or repayable) on or before the day following the end of the period of 30 days beginning with the day on which the closure notice was given.

R (Archer) v HMRC

30. Section 28A TMA (before its amendment in 2017 enabling PCNs to be issued), read as follows:

> "28A(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either–
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.
>
> (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period."

This provision was considered by Mr Justice Jay in the High Court ([2017] EWHC 296, [2017] 1 WLR 2066) and this court on appeal, in *R (Archer) v HMRC* [2017] EWCA Civ 1962, [2018] 1 WLR 5210. Judgment in the High Court was in fact handed down in *Archer* a month before the 2017 amendments were considered in Parliament and six months before they were introduced.

31. HMRC had issued separate (final) closure notices in relation to self-assessment returns submitted by Mr Archer for tax years in which he claimed relief arising from tax avoidance schemes in which he had participated. Each notice stated that the scheme relied on for the year was ineffective and that HMRC were amending the return for the year in question to reflect that, but failed to state the amount of tax due in consequence (though online versions of the taxpayer's returns were amended by HMRC to show the increased tax). The taxpayer relied on HMRC's failure to specify the amount of tax due in contending, on judicial review, that the closure notices were defective in that they did not satisfy the requirements of section 28A(2)(b) TMA and could not be relied on accordingly.

32. Jay J accepted the taxpayer's argument. He held that the statutory scheme predicates the giving of notice of amounts (of tax) being assessed, whether by the taxpayer or HMRC. A section 28A closure notice is in the nature of an assessment by HMRC which is given effect by directly altering the taxpayer's self-assessment. Having considered a number of provisions of the TMA that supported his analysis (including sections 9(3) and (3A), 9B(3), 9ZA, 9ZB, 28B(1) to (3), 31, 50 and 59B) he held:

> "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"

33. At [69] he concluded that the requirement in section 28A(2) was to amend the return in the closure notice itself in order to give effect to the officer's conclusions. He explained that this entailed or included "*an amendment to the self-assessment which then has specific consequences not dependent on the taking of any further action by the taxpayer*", save for the ability to appeal against the amendment under section 31(1)(b) TMA. He continued, "*What is required is not merely the statement of HMRC's case as to the amount of tax due, but a statement of that amount.*" In other words, the closure notice must include an assessment of the taxpayer's liability. Finally, at [71] Jay J held that section 28A(2) is not worded so as to authorise an amendment; it is the closure notice itself which achieves the amendment.

34. The reasoning and conclusions of Jay J in relation to the correct construction of section 28A(2)(b) (as then in force) were upheld on appeal. At [22] Lewison LJ (with whom the other members of the court agreed) held:

> "22. In agreement with the judge, I consider that Mr Goldberg is right on this issue. The self-assessment that the taxpayer is required to file as part of his return must state the amount of tax for which the taxpayer is liable. One would naturally expect that an amendment to that assessment must likewise state the amended amount of tax for which he is liable. ... Section 28A (2) (b) requires the amendment of the return to be made by the closure notice itself; not merely by an officer of HMRC."

The consultation document and background to the 2017 amendments to section 28A(2)

35. Before addressing the rival arguments, it is convenient to refer to the consultation documents published by HMRC on 18 December 2014 entitled "Tax Enquiries: Closure Rules" that led ultimately to the introduction of PCNs. It is common ground that it is permissible to consider publicly available material of this kind in order to understand the background to the legislation or the mischief at which it is aimed: *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 (Lord Steyn at [5]).

36. The document proposed "*to enable HMRC to refer matters to the Tribunal with a view to achieving early resolution of one or more aspects of an enquiry into a tax return. The Government proposes that HMRC would expect earlier payment of tax in respect of the particular aspects successfully addressed by HMRC*." It is apparent that in practice, a closure notice was seen as something of a blunt instrument: in large or complex cases giving rise to different aspects of an enquiry, since a closure notice would bring the whole enquiry stage to a close, there was no mechanism (other than by joint referral of a question for determination) to bring one aspect of an enquiry to an end while continuing to pursue others.

37. The consultation examined the then current enquiry process and restrictions it placed on HMRC in resolving one or more aspects of an enquiry. It sought views on a proposal to improve the process, by enabling HMRC to achieve early resolution and closure of one or more aspects of a tax enquiry where it was not appropriate to close the whole tax enquiry, together with changes to rules governing payment, to allow earlier payment to be achieved in respect of the aspects of the enquiry successfully concluded by HMRC under the proposed power. The document said early resolution of aspects of an enquiry would improve the collection of the correct amount of tax, maximising revenue flows; any tax found to be due by the tribunal in respect of those aspects would become payable, whilst other aspects of the enquiry would remain open.

38. The thinking at the time of the consultation appears to have been that HMRC should be given a unilateral power to issue a "Tribunal referral notice" so as to refer one or more areas of dispute within a wider tax enquiry to the tribunal with a view to achieving early resolution of those aspects, with payment of any tax due either from or to HMRC within 30 days of final resolution of the aspects in issue. Safeguards were identified including that the proposed power was intended to be used sparingly in cases involving significant tax under consideration or involving issues which were novel, complex or had a wider impact, including those which included tax avoidance.

39. The consultation document identified examples of the type of cases at which the proposed power was aimed. These all involved enquiries into more than one aspect of a tax return, rather than a single aspect broken down into component parts. The ability to collect any tax found due and/or reduce the possibility of serial avoiders achieving significant cash flow advantages simply by creating complex interactions of a number of avoidance schemes was highlighted in the document as a desirable outcome.

40. The consultation closed for comments on 12 March 2015 and HMRC published a summary of responses. There was "*overwhelming disagreement*" with the suggestion that HMRC should be able to use the proposed legislative change to make unilateral referrals. Suggestions made included whether "*the determining factor in closing an aspect should be the ability to quantify the tax. It was also considered that the appeal and payment processes needed to be given further consideration*." In a section headed "Next steps", the document made clear that HMRC proposed to proceed on the basis that there was a need to provide a "partial closure provision" and to develop a number of alternative models in order to identify the optimum model.

41. On 5 December 2016 the Autumn Statement set out proposals, including in relation to amending the closure of tax enquiries legislation, "*to provide HMRC and customers earlier certainty on individual matters in large, high risk and complex tax enquiries*". In a Policy Paper published on the same date, the "Policy Objective" of the new

legislation was stated to be to "*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*" and would "*help customers to more effectively plan their cash flow through earlier certainty and result in earlier payment to the Exchequer of tax due*". The Policy Paper explained:

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

42. The Finance (No. 2) Bill 2017 was introduced on 14 March 2017. The Explanatory Notes to it at clause 123 and schedule 26, paragraph 51 explained:

> "As a safeguard, where HMRC issues a Partial Closure Notice and makes an amendment to the tax return, taxpayers will be able to appeal against, and apply for postponement of, any tax arising from the amendment to the tribunal".

43. In fact, the Bill was not enacted in the Finance Act 2017. Instead, the proposed change was made (in materially the same terms) by schedule 15 to the Finance (No.2) Act 2017, which (among other things) amended sections 28A and 28B TMA (completion of enquiry into personal or trustee return and partnership return respectively) and paragraph 32 of schedule 18 to the Finance Act 1998 (completion of enquiry into company tax return). The Bill was introduced on 6 September 2017. Royal Assent was given on 16 November 2017.

44. In terms of the light shed by these materials on the purpose of the statutory PCN introduction, in agreement with the UT, it seems to me to be clear that while a plain purpose of the changes was to make the enquiry process more efficient and flexible for both HMRC and the taxpayer by enabling early resolution of one or more aspects of an enquiry while other matters continue to be investigated, there was another equally important purpose. This was to provide greater finality by early resolution of discrete matters at the enquiry stage, and thereby accelerate the payment and collection of tax. The fact that the taxpayer can invoke a PCN does not detract from this purpose. It is also significant that rather than enable unilateral referrals of questions for determination, the closure notice scheme was amended to enable PCNs to be issued closing an enquiry into a "matter". Likewise, the consultation materials indicate that the primary target of the proposals was the inability to conclude discrete areas of dispute in multiple open enquiries, rather than being aimed at enabling resolution of separate constituent elements of an enquiry into a single aspect.

The decisions below

45. The FTT considered that Mr Embiricos' domicile and claim to the remittance basis were together capable of being a "matter" for the purposes of section 28A(1A), being

contained in the return and a "specific issue in itself". The FTT held that the PCN regime was a fundamental change and that section 28A(2)(b) was intended to work differently in the context of PCNs. It held that the only amendments required to be made to the appellant's returns in order to give effect to HMRC's conclusions set out in the PCN were those which:

> "63. … 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"

Putting the point another way, the FTT held that an amendment is not "required" "*if the potential amendment is itself dependent on something which is capable of constituting a separate "matter" for the purposes of s28A(1A) TMA. Such an amendment will only be required once HMRC has reached their conclusions in respect of the subsequent matter*."

46. On that basis, the FTT concluded that HMRC could issue a PCN reflecting the conclusion on domicile and the disallowance of the remittance basis claim during the relevant period, by amending the tax returns simply to remove the remittance basis claim in each case. Quantification of the tax due on the arising basis was "completely separate" and would represent a separate "matter" in respect of which the enquiry would remain open and a further (final) closure notice could be given in due course. The FTT recognised that this conclusion gave a wide interpretation to the PCN regime, but considered this reflected Parliament's intention in introducing the PCN regime. It distinguished *Archer* on the basis that FCNs are a form of assessment, and brought an end to all of HMRC's enquiries into the tax return. As an assessment, the FCN had to state the amount of tax due. The PCN regime was "a fundamental change" intended 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.

47. The FTT went on to consider section 28A(6) TMA and determined that HMRC had not shown reasonable grounds for not issuing the PCN sought by reference to the need to obtain all relevant and necessary information to quantify the tax due on Mr Embiricos' foreign income and gains on the arising basis. The FTT emphasised that the domicile question and the amount of tax due were completely separate, and there was no overlap between the two. It rejected the argument that HMRC needed to know what tax was due to determine what resources to devote to any ongoing enquiry. It accepted that if the domicile dispute proceeded separately that would delay the collection of information about Mr Embiricos' overseas income and gains, but that had to be balanced against the cost and delay to Mr Embiricos if forced to agree the potential tax liabilities before the validity of the domicile conclusion was resolved. The FTT ordered HMRC to issue a PCN within 30 days of the date of its decision.

48. I note that HMRC sought to appeal the "reasonable grounds" decision contending that the FTT ignored or failed properly to consider various relevant factors and took account of an irrelevant consideration, namely the cost and delay Mr Embirico would likely suffer. Permission on this ground was refused (by Judge Raghavan, sitting in the UT, by a written decision dated 24 July 2019) and reference was made to observations of this court in *Proctor & Gamble UK v HMRC* [2009] EWCA 407 on a "reasonable

grounds" appeal as follows: *"...it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error (for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test) it is not for the appeal court or tribunal to interfere*."

49. On HMRC's appeal to the UT, the UT summarised HMRC's case in the following terms:

> "(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".

50. The UT relied on a purposive construction of section 28A as a whole, viewed in its statutory context, taking account of the manner of implementation of the PCN code and the consequential weight to be afforded to the judgments in *Archer*. The UT held that these factors supported HMRC's position and led to the conclusion that the FTT had reached the wrong conclusion that a PCN could be issued which denied the appellant's claim to the remittance basis without specifying the amount of any tax due in consequence of that conclusion.

The outline submissions made on this appeal

51. For Mr Embiricos, Mr Prosser initially contended that the word "matter" in the expressions "any matter to which the enquiry relates" and "enquiries into that matter" in section 28A(1A) bears its ordinary meaning, namely a subject that is being dealt with or considered, or subject matter. However, in light of section 28ZA(1), which distinguishes between "any matter" and "any question arising in connection with the subject matter of the enquiry", not every question arising during an enquiry is a "matter" within the meaning of section 28A. Moreover, since by virtue of section 9A an enquiry extends to "anything contained in the return, or required to be contained in the return, including any claim or election included in the return", he submitted that a question arising in connection with the subject matter of the enquiry is only a "matter" within the meaning of section 28A if it is, or is required to be, contained in the return. Thus for example, if the taxpayer's return includes a remittance basis claim in the return, the question whether the claim is allowable is a "matter" within section 28A(1A), but by contrast, a question arising in connection with that "matter", such as the validity of the taxpayer's marriage before 1974, is not itself contained (or required to be contained) in the return, so that question is not itself a "matter" within section 28A(1A). However, it could always be the subject of a joint reference under section 28ZA, if the parties agree.

52. Mr Prosser submitted that this interpretation of "matter" is consistent with section 28A(2), in that the return can be amended to give effect to a conclusion that the claim is not allowable, by simply removing the claim from the return. By contrast, the return cannot be amended to give effect to a conclusion about the validity of the taxpayer's marriage. Moreover, on this interpretation, the amount of tax payable if the claim is disallowed is a separate "matter" in its own right. This is not only because the claim is unquantified but also because the tax payable is a subject matter which of itself is, or is required to be, contained in the return, and the return can be amended to give effect to a conclusion about the amount of tax payable. As for section 28A(2)(b), where an officer has completed his enquiries into the claim, and has concluded that it must be disallowed, he can make the amendments of the return "required to give effect to" that conclusion, by simply removing the unquantified claim from the return. An amendment of the tax payable is not "required" to give effect to that conclusion. Indeed, it is only when the officer has completed his enquiries into the tax payable, which may depend on the outcome of other questions which have not yet been considered let alone resolved, that he will be in a position to state his conclusion about <u>that</u> matter, and to give effect to <u>that</u> conclusion by amending the return accordingly. It followed from this interpretation that if and when the officer concludes that the claim must be disallowed, at that stage he has the power, which he may be directed to exercise, to issue a PCN, even though he is not yet in a position to reach a conclusion about the amount of tax payable. That can be the subject of a further PCN or a final closure notice.

53. Mr Prosser submitted that this interpretation gives flexibility to the enquiry procedure, enabling matters to be resolved, and litigation to be conducted, more efficiently. In particular, matters can be litigated without having to secure agreement between the taxpayer and HMRC, a prerequisite for using the referral procedure under section 28ZA. Nor does it give rise to a risk of the PCN procedure being misused since the procedure can only be used in relation to a "matter" which does not include every question arising in relation to the enquiry. Officers of HMRC will exercise judgment

and common sense in distinguishing between those questions which are "matters" and those which are not. As for a PCN instigated by a taxpayer, this requires a successful application to the tribunal for a direction under section 28A(4), and by virtue of section 28A(6) the tribunal need not give the direction applied for if it is satisfied that there are "reasonable grounds" for not issuing the PCN. No doubt Parliament properly relied on the tribunal to use its judgment and common sense here, not only so as to distinguish between those questions which are "matters" and those which are not, but also to ensure that an officer is not required to issue a PCN where he reasonably wishes to enquire into a "matter" as part and parcel of a broader, ongoing, enquiry. Further, the fact that section 28ZA exists to enable any "question" arising during an enquiry to be litigated by means of a joint reference to the tribunal does not undermine the above interpretation. First, because the section 28ZA procedure is inflexible insofar as it requires taxpayer and HMRC to agree before a "matter" can be brought to litigation. Secondly, because the joint referral procedure is not rendered redundant: it is available to litigate any question which is not itself a "matter", provided that the parties agree to do so.

54. Mr Nawbatt QC for HMRC maintained the arguments he advanced before the UT, continuing to place reliance on the judgments in *Archer*, the consultation documents and the full and thorough analysis of this question reflected in the decision of Judge Andrew Scott in *Levy*. In very short summary, he maintained that "matter" in section 28A(1A) must be construed in context to mean a matter in respect of which HMRC could issue a FCN. The legislative intent behind the enactment of the PCN regime is to enable HMRC and the taxpayer to achieve finality on the "matter" which is the subject of the PCN by securing the early payment of tax brought into charge. To achieve such finality, HMRC's conclusion on a "matter" must enable it to make all of the necessary amendments to an individual's tax return which arise from its conclusion, including a statement of the amount of any tax brought into charge by the amendment (see section 28A(2) and *Archer* (CA), correctly understood). There is no power to issue a PCN at a time when the tax effect of a particular conclusion is unknown.

55. Moreover, a claim to the remittance basis of taxation is a claim for a certain basis of taxation to apply and is therefore inextricably linked to the amount of tax payable. The claim does not exist in a vacuum. If HMRC conclude that the remittance basis does not apply then the claim must be removed and the worldwide income and gains which are taxable must be quantified, as the closure notice (final or partial) must make all of the consequential return amendments to give effect to the conclusion that the appellant is not entitled to the remittance basis of taxation.

Discussion and conclusions

56. Although I was initially attracted by the apparent simplicity and logic of the arguments advanced by Mr Prosser, I have come to the conclusion that HMRC's submissions are correct and should prevail.

57. I start with the statutory scheme of the TMA. The changes made to it in 2017 were limited to those necessary to introduce the PCN and to create a FCN in consequence. The essential elements— a self-assessment, 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 materially the

same as it was prior to amendment. This was not a fundamental change as the FTT held.

58. The scheme requires every taxpayer to make a self-assessment of the amounts chargeable to income and capital gains tax and the amounts payable in tax for a year of assessment (sections 8 and 9), the focus being the tax due and payable in the fiscal year. If there is no enquiry, the self-assessment itself determines the amount payable in tax and becomes final a year after the deadline for its delivery (so for the 2014/15 return, the deadline was 31 January 2016 and the assessment would have become final on 31 January 2017 absent an enquiry) subject only to a discovery assessment under section 29 TMA.

59. If there is an enquiry under section 9A, its purpose is to determine whether any amendments to the return are required in order to assess tax not assessed, make good an insufficiency of tax, reduce a relief claimed etc. In other words, the focus of an enquiry is on what is (or is required to be) contained in the return in order to assess the correctness of the calculation of tax payable in the self-assessment. The effect of an enquiry notice is that until the enquiry is closed by a closure notice (and a further 30 days after that) HMRC can amend the self-assessment made by the taxpayer to reflect what the HMRC officer considers to be the correct figure.

60. An enquiry, or aspect of an enquiry under section 9A is brought to an end by a closure notice, whether a FCN or a PCN. In either case, there are two express statutory requirements of a closure notice. The first, under section 28A(1), is that the officer must "state his conclusions". The second, under section 28A(2), is that the 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. This is not a case where no amendment was required so section 28A(2)(b) was required to be satisfied.

61. The statutory scheme draws no distinction between PCNs and FCNs, whether in section 28A(2) or at all. In both cases it is the closure notice that must achieve the amendments of the return that are required. To similar effect, section 28A(8) now provides that any reference in the Taxes Acts to a "closure notice" under section 28A is to a partial or final closure notice under that section, with no distinction drawn between the two. Like the UT, the inference I draw from these provisions, and the route chosen by Parliament to introduce PCNs as part of the closure notice code (and not by way of referral of a question for determination), is that PCNs were intended to operate in the same way and be subject to the same restrictions as what are now final closure notices (FCNs).

62. Section 28A(3) was not amended in any material respect, save to provide that a PCN (just like a FCN) "takes effect when it is issued". This is consistent with both notices being in the nature of an assessment by HMRC which take effect directly by altering the taxpayer's self-assessment. Both have (or are capable of having) substantive tax effects when issued, either in the year of the return being enquired into, or in another tax year. For example, as Mr Nawbatt submitted, if the PCN disallowed a capital loss, the loss might never have been used anyway, but the PCN refusing the loss would still take effect when it was issued as it would remove the possibility of the loss ever being used, even though there may be no tax effect on the enquiry year. In other words, the PCN (like an FCN) is a form of assessment with specific consequences that are not dependent on the taking of any further action by HMRC or the taxpayer. In turn,

liability to pay under section 59B(5) arises from an amendment to a self-assessment: not merely an amendment to a return. By virtue of section 59B(5) and paragraph 5 of schedule 3ZA TMA, the amount payable (or repayable) as a result of the amendment of the self-assessment under section 28A is payable (or repayable) on or before the day following the end of the period of 30 days beginning with the day on which the closure notice (both partial and final) was given.

63. That a closure notice (whether partial or final) has a substantive tax effect is also borne out by the amendments made to other provisions in the TMA to accommodate partial closure notices. For example (see amendments in paragraphs 3, 4 and 14 of Schedule 15 to Finance (No.2) Act 2017) section 9B(3) dealing with amendments of a return by a taxpayer during an enquiry, was amended to provide in terms that where an amendment affects the amount of tax payable, the amendment "takes effect" when the "PCN is issued in relation to the matters to which the amendment relates …"; section 9C dealing with so-called "jeopardy assessments" by HMRC during an enquiry, was amended to make clear that, in a case where there is an enquiry "in relation to any matter", the assessment may be made to make good a deficiency in tax "so far as it relates to the matter"; and section 29(5) dealing with discovery assessments in a case where a PCN was issued as regards "a matter" to which the situation in section 29(1) relates, namely a situation where a loss of tax has been discovered, was amended.

64. Section 28A(2) and (3) can be contrasted with the different (joint referral) mechanism afforded to taxpayers and HMRC under section 28ZA, and in particular section 28ZE dealing with the effect of a tribunal's determination of a question referred to it under section 28ZA. Unlike a closure notice which has effect when issued, section 28ZE provides that a determination is binding, and must be taken into account by an officer in reaching his conclusions on the enquiry and in formulating any amendments of the return (and these will be reflected in the closure notice that brings the enquiry to an end). The determination does not have immediate consequences independent of further action. Rather, it is expressly treated in the same way as a decision on a preliminary issue in an appeal, and is a stage prior to a closure notice, whether partial or final.

65. I return to the words of section 28A(1A) and the meaning of the word "matter" in the expressions "any matter to which the enquiry relates" and "enquiries into that matter". I accept that as a matter of ordinary language, a remittance basis claim is capable of being a "matter" arising in the course of an enquiry. But ultimately neither side suggested in this court that the word "matter" in section 28A(1A) simply bears its ordinary meaning, subject matter or issue. I agree. The meaning of this protean expression must be more limited having regard to the statutory scheme and context in which it appears. That is reinforced by the distinction drawn by section 28ZA(1) between "any matter" and "any question arising in connection with the subject matter of the enquiry", which makes clear that not every question arising during an enquiry is a "matter" within the meaning of section 28A.

66. Mr Prosser submitted that the context for this consideration is a section 9A enquiry extending to "anything contained in the return, or required to be contained in the return, including any claim or election included in the return". But even he accepted some further limitation is necessary in addition to being contained or required to be contained in the return, and in writing suggested that whether or not something is a "matter" is to be determined by the application of "judgment and common sense". In oral submissions, he contended that an issue could only be a "matter" (for closure notice

purposes) if contained (or required to be contained) in the return and it is "the object of consideration in its own right". On this interpretation, the amount of tax payable if the claim is disallowed is a separate "matter" in its own right both because the remittance basis claim is itself unquantified and also because the amount of tax payable is a subject matter which itself is, or is required to be, contained in the return, and the return can be amended subsequently to give effect to a conclusion about the amount of tax payable. Accordingly, where an officer has completed his enquiries into the claim, and has concluded that it must be disallowed, he can make the amendments of the return "required to give effect to" that conclusion, by simply removing the unquantified claim from the return. An amendment of the tax payable is not required to give effect to that conclusion. Indeed, it is only when the officer has completed all his enquiries into the tax payable, that he will be in a position to state his conclusion about that matter, and to give effect to that conclusion by amending the return accordingly.

67. Leaving aside the vagueness (acknowledged by Mr Prosser) in the criterion of being an object of consideration in its own right, and the inherent subjectivity and consequent uncertainty in determining what is and is not such an object, in practice I do not consider that this operates as any real qualification of the word "matter" in this context.

68. For example, as Mr Nawbatt submitted, both the domicile and residence pages of the tax return ask a number of specific questions that are capable of being the object of consideration in their own right. For domicile, boxes 25 and 26 ask additional questions (including the date when the taxpayer's domicile changed if he or she had a domicile of origin in the UK). For residence, a series of questions are asked at boxes 8 to 12 that are relevant to the application of the statutory residence test. HMRC might say in relation to residence that: (i) residence in the UK in the previous three years means the taxpayer is resident on the facts of a particular case; and/or (ii) the taxpayer's days spent in the UK made him resident; and/or (iii) the ties the taxpayer had to the UK in the relevant period make him resident. Each of the answers given could potentially determine the taxpayer's residence status and be separately challenged by HMRC as "an object of consideration in its own right". On this analysis, HMRC would have the power to give separate PCNs in relation to each of matters (i) to (iii). The taxpayer would then have no choice but to resist each PCN. Alternatively, the taxpayer could apply to the tribunal for a direction under section 28A(4) for a PCN for each of the separate matters and by virtue of section 28A(6) the tribunal must give the direction applied for unless satisfied that there are "reasonable grounds" for not issuing the PCN.

69. Mr Prosser relied heavily on the "reasonable grounds" defence available to HMRC in these circumstances, as the safeguard against obvious abuse in this regard. He contended that Parliament is properly relying on the tribunal to use its judgment and common sense here, not only so as to distinguish between those questions which are "matters" and those which are not, but also to ensure that an officer is not required to issue a PCN where he reasonably wishes to enquire into a "matter" as part and parcel of a broader, ongoing, enquiry. But this safeguard would not prevent HMRC issuing serial PCNs if an officer chose to do so, exercising his own subjective judgment and good sense in distinguishing between those questions which are "matters" and those which are not.

70. As for a PCN instigated by a taxpayer, it is not clear to me on what basis the "reasonable grounds" safeguard would operate in determining whether a discrete claim in the return presented by a taxpayer as an object of consideration in its own right and so a "matter",

would justify a direction to issue a PCN in relation to that matter. This case is a good example of how different tribunals might take different views about what constitutes "reasonable grounds" in such a case, leading to uncertainty, with discretionary decisions of this kind not easily susceptible to appeal. Certainty of outcome for the taxpayer and HMRC would, in either case, be delayed, possibly significantly. Moreover, this interpretation is inconsistent with the references in the consultation documents to the PCN being a rare or sparingly used power. Mr Prosser's construction is also inconsistent with the policies and objects of the TMA of "certainty, finality and transparency" (see *Archer* at [70]).

71. Moreover, while Mr Prosser accepted that "any question arising in connection with the subject matter of the enquiry" and therefore capable of being referred to a tribunal under section 28ZA is different to and wider than "matter", the construction he advanced significantly blurs the distinction between the two, and has the potential to make the joint referral mechanism redundant in practice. For understandable policy reasons, Parliament limited the scope for preliminary issues to be determined during tax enquiries by introducing the joint referral mechanism in section 28ZA TMA. This was extended when the PCN legislation was introduced to enable questions arising in connection with any open enquiry matter to be jointly referred to the tribunal for determination while the enquiry into that matter is in progress: see section 28ZA(5)(b). However, although a proposal for sole referrals (though only at HMRC's instigation) was expressly consulted upon, no other relevant amendments were made to section 28ZA, and this was not the avenue chosen by Parliament to amend this statutory scheme. There is no doubt that the non-domicile and remittance basis claim could have been the subject of a joint referral under section 28ZA as a question which could have been determined as a preliminary issue without the need to assess the amount of tax due in consequence at that stage. But both parties' consent was required.

72. In these circumstances, it is difficult to see why a parallel mechanism for resolving the same discrete question, but on a unilateral basis at the taxpayer's instigation and subject only to the consent of the tribunal, was or would have been introduced, still less on a basis that would mean that the decision would "take effect" on the issue of the PCN.

73. Moreover, a conclusion removing a taxpayer's entitlement to claim the remittance basis without quantifying the tax thereby brought into charge does not provide any finality as regards the substantive tax effect of that conclusion. Separating the two issues out in this way has the potential to prejudice HMRC's collection powers through permitting delay in providing documents and information relating to quantification. It also has the potential to prevent HMRC from continuing to enquire into the quantification issue until the conclusion of any appeal against the PCN has finally been resolved.

74. It seems to me that the better view, that has regard to the language used and purpose of section 28A seen in its statutory context, taking account of the existence of section 28ZA, together with the legislative means by which PCNs were introduced, and giving weight to the judgments in *Archer*, is, as Mr Nawbatt submitted, that an issue can only be a "matter" for the purposes of section 28A(1A) if – were it the only issue being enquired into – HMRC could issue a valid FCN in respect of it. This respects the legislative scheme that treats PCNs and FCNs without distinction. It is consistent with a PCN (like a FCN) "taking effect" when issued, in circumstances where it is difficult to see how a conclusion on the validity of a claim without determining the tax consequences and making an assessment, can be described as "taking effect" rather than

viewed as something to be taken into account when amending the assessment. It achieves the greater finality sought by this legislative amendment by early resolution of one or more discrete matters at the enquiry stage, together with accelerating payment of any tax due in consequence of the matter determined. And it avoids the unnecessary fragmentation of a single dispute into multiple "matters" that would frustrate the purpose of the statutory scheme.

75. Whether or not this analysis is correct, (and it may be that a "matter" is more easily recognised, particularly once the requirements of section 28A(2) are considered, than it is capable of being defined), I have no doubt that in this case the "matter" for the purposes of section 28A(1A) is the appellant's claim to benefit from the remittance basis of taxation. Mr Embiricos' domicile is relevant to and is a constituent element of that "matter" within the meaning of section 28A(1A). However, the real question is what a section 28A(2)(b) compliant PCN was required to address in order for the enquiry into that matter to be closed and a valid PCN issued. Was it sufficient for the PCN to disallow the remittance basis claim by amending the tax return to delete it; or was an amended tax calculation also required in order to give effect to the officer's conclusion?

76. The remittance basis is not a claim to relief, but a basis of assessment. It informed the approach taken to the self-assessment in the appellant's tax return. If, contrary to the approach he adopted, the appellant was in fact UK domiciled in the relevant tax years, there are no circumstances in which he was or could be eligible for the remittance basis. Consequently, rejection of the remittance basis claim leads inevitably to the conclusion that he is and must be assessed to tax on the arising basis in the tax years concerned. Unless, as a matter of fact, Mr Embiricos had no foreign income and gains to bring into charge for each fiscal year in question, his self-assessment for each year would have had to bring into charge the foreign income and gains on the arising basis.

77. In fact it is common ground that Mr Embiricos had foreign income and gains in each fiscal year. In those circumstances, an amendment that simply removed the claim to the remittance basis in the return did not comply with the express requirements in section 28A(2)(b) and did not give effect to the domicile conclusion. In order to comply with section 28A(2)(b) a PCN was required to state the officer's conclusion that the remittance basis is disallowed *and* make the amendments of the return required to give effect to this conclusion by amending the return to bring into charge the relevant foreign income and gains, with a calculation (or assessment) of the income and capital gains tax payable for each year of assessment in question. In other words, where the conclusion on the validity of the matter enquired into has computational consequences for the tax return and self-assessment contained within it, the PCN must give effect to the conclusion by amending the taxpayer's self-assessment (here by bringing the income and gains into charge and assessing the tax payable in consequence). This achieves the desired early resolution and finality in relation to a discrete aspect of an enquiry, enabling earlier payment to be made consequent on the amendments to the self-assessment made by the PCN to give effect to the officer's conclusion.

78. This analysis does not mean that a PCN must always make amendments to the return by specifying the tax payable in order to give effect to the officer's conclusion, irrespective of the nature and effect of the officer's conclusion. Plainly, the amendments necessary will depend on the matter in issue and on the officer's conclusion. If the officer's conclusion does not have computational consequences

because it does not affect the self-assessment for the year or the tax-payer in question, then there is no amendment required to be made by the PCN to the calculation of tax due in the self-assessment. For example, there may be a claim to carry forward a loss to a future year that is made in the tax return but has no computational consequences for the fiscal year to which the return relates. A closure notice could simply disallow the loss claim by amending the return to disallow or remove it, whether it is a FCN or a PCN. That prevents the taxpayer from using the loss in a later year but has no substantive tax effect for the current fiscal year. However, such a case is quite different from a case like this, where the claim made by the appellant as part of his self-assessment, was directed at the tax calculation for that fiscal year. In this case the amendment required by section 28A(2)(b) to give effect to a conclusion disallowing the claim necessarily includes a calculation of the tax due in consequence.

79. The examples relied on by Mr Prosser in writing do not advance his case, as Mr Nawbatt submitted. Mr Prosser relied on *Trustees of Trevor Smallwood Trust v HMRC* as an example of a situation where a closure notice did not include an amendment to the tax payable by the trustees. It is true that the trustees' return was amended to give effect to the conclusion in the closure notice by including the full amount of the chargeable gains, but without specifying the amount of tax due. However, that was because the conclusion was that the resulting tax was payable by the settlor, and not the trustees. In fact, on the same day that HMRC issued a closure notice to the trustees, a closure notice was issued to the settlor, amending his return to show the tax payable as a consequence of the amendment giving effect to the officer's conclusion: see paragraph 2 of the FTT decision which records "Mr Smallwood, as settlor appeals against a closure notice issued by the Revenue on 31 January 2005. The closure notice amended Mr Smallwood's return so as to show an amount of £6,818,390 as chargeable gains and tax of £2,727,356 as due." Similarly, in *Tower MCashback*, the tax due consequent on the officer's conclusion was payable not by the LLP but by the individual partners.

80. Likewise, the hypothetical example given by Mr Prosser of the taxpayer who has used two mass-marketed tax avoidance schemes, one purporting to generate losses which can be set against his income, the other an EBT scheme whereby he purports to receive loans in lieu of taxable earnings, does not support his case. Mr Prosser submitted that the taxpayer's tax return would include the losses, and the earnings sheltered by the losses, and would disclose his use of the two avoidance schemes. If the officer enquiring into the return concluded that the loss scheme did not work so that the losses are not allowable, he could issue a PCN to that effect, with a view to resolving the validity of the loss scheme. On his case, whether the taxpayer has indeed made losses, or whether the claim must be disallowed, can properly be regarded as a "matter" within section 28A(1A), with the amount of tax payable being a separate "matter" in relation to which a further closure notice can be given at a later stage when the EBT issues have also been resolved. He submitted that the officer can give a PCN which complies with section 28A(2)(b) by stating his conclusion that the losses have not been made or that the claim must be disallowed, and he can also make the amendments of the return "required to give effect to" his conclusion simply by removing the losses or the claim from the return.

81. I disagree. The EBT and loss scheme are discrete, unrelated matters which – if each was the only open matter – would be capable of being the subject of a FCN. In such a case, in order to comply with section 28A(2)(b), the officer must amend the return to

remove the losses claimed and bring the sheltered income into charge by amending the return to this effect and making the assessment of tax due in consequence. This gives proper effect to the PCN conclusion on the validity of the loss scheme. The PCN cannot determine the final liability to tax because this will depend on resolution of the EBT issue, but that does not prevent an assessment being made of the tax due in consequence of the loss claim being denied. When the EBT issue is resolved, the FCN must amend the return to reflect the officer's conclusion on the validity of the EBT and the consequences of that conclusion for the overall assessment to tax. The loss and EBT scheme issues could be addressed in reverse order with conclusions reached in a PCN about the validity of the EBT and the tax assessment consequences of that conclusion for the return. That the PCN could not determine the final tax liability until the validity and tax assessment consequences of the loss scheme have also been addressed does not undermine the conclusions I have reached as to what is required to comply with section 28A(2)(b) TMA in this case.

82. Here, having concluded that Mr Embiricos was domiciled in the UK in the relevant tax years and so was not entitled to the remittance basis of taxation in those tax years, HMRC could not give effect to that conclusion without the information necessary to determine his worldwide income and gains in the relevant fiscal year on the arising basis, and without making all amendments to the returns for those tax years required to give effect to their conclusion, including an assessment of the amount of tax consequently brought into charge. Without that, a valid PCN could not be issued in accordance with the statutory requirements in section 28A(2)(b) TMA.

Conclusion

83. For all these reasons I have concluded, in agreement with the UT, that HMRC do not have the power to issue a PCN in respect of Mr Embiricos' domicile and remittance basis claim without specifying (assessing) the increased tax due in consequence of that conclusion. I would dismiss the appeal accordingly.

Mr Justice Francis

84. I agree.

Lady Justice Nicola Davies

85. I also agree.