[2020] UKFTT 465 (TC)

TC07940

PROCEDURE – whether a "decision letter" was appealable – whether it was a "closure notice" – whether it amended discovery assessments – interlocutory hearing to determine what was under appeal to the Tribunal – directions issued for Statement of Case

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2019/02037; TC/2020/01394; TC/2020/01368

BETWEEN

MICHAEL PARKER **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

This interlocutory hearing took place on 21 October 2020. It was held remotely using the Tribunal video platform. A face to face hearing was not practical given the restrictions imposed by coronavirus legislation.

Mr McDonnell of Counsel, instructed by the Appellant, for the Appellant

Mr Bracegirdle, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents.

DECISION

Summary

1. HM Revenue and Customs ("HMRC") issued Mr Parker with assessments, closure notices and penalty decisions for 2003-04 through to 2012-13. This was a case management hearing to establish which HMRC decisions were under appeal so that the case could proceed to a substantive hearing.

Why the hearing was required

2. The main reason why difficulties arose was because Mr Hagen, the HMRC officer who had responsibility for Mr Parker's case, issued a letter headed "Decision Letter", which:

(1) purported to amended discovery assessments previously issued for 2003-04 through to 2006-07, increasing the amount of tax;

(2) said he "will be closing" 2007-08, 2008-09, 2010-11 and 2011-12 and setting out the amendments for each of those years;

(3) setting out the quantum of the related penalties; and

(4) telling Mr Parker he had the right to appeal "those decisions".

3. Mr Hagen additionally issued a discovery assessment for 2012-13 and penalty assessments for 2003-04 to 2007-08 under Taxes Management Act 1970 ("TMA") s 95. Mr Parker appealed all the assessments and amendments on various technical grounds, and also on the basis that they were "on any possible view, wrong and grossly overstated".

4. After Mr Hagen's retirement, HMRC asked the Tribunal to stay Mr Parker's appeals on the basis that they had not yet issued any closure notices, or penalties for years after 2006-07. Mr Parker consented to the stay, and HMRC then issued closure notices and penalties. A few days after sending the closure notice amendments to Mr Parker, HMRC sent different notices to his accountant, showing lower figures. Despite numerous letters from Mr Parker, HMRC would not confirm that Mr Hagen's letter had no legal effect, or explain the legal basis on which discovery assessments and/or closure notices could be amended after being issued.

5. I issued directions for a case management hearing, including a requirement that HMRC provide a submission setting out their view of the position for each of the years in question, together with the legal basis under which any assessment or closure notice had been amended after issuance. Before the hearing took place, HMRC carried out a statutory review of their closure notice amendments and penalties. The review decision increased the quantum of some of the closure notice amendments compared with those provided to Mr Parker's accountant.

6. HMRC did not comply with the Tribunal's direction to provide a submission setting out their position for each of the years, together with the legal basis for the decisions they had made. Shortly before the hearing, HMRC changed their litigator, and less than two days before the hearing was due to start, Mr Bracegirdle provided his speaking notes, plus a detailed schedule setting out HMRC's position. Both the notes and the schedule were extremely helpful.

My findings and the remaining open issues

7. In relation to the assessments/closure notices I confirm that the position is as set out on Mr Bracegirdle's schedule in respect of all years, other than:

(1) 2004-05, where there may be a small typographical error: the assessment shows £1,108,245 compared to £1,108,291 on Mr Bracegirdle's schedule;

(2) 2007-08, 2008-09, 2010-11 and 2011-12 where there are two possibilities. One is that the figures on Mr Bracegirdle's schedule are correct. The other is that Mr Hagen's letter was itself a closure notice; and

(3) 2008-09 and 2011-12, where HMRC provided two different figures to accompany the closure notices, and are now asking the Tribunal to confirm a third amount.

8. I have given the parties permission to raise further arguments on points (2) and (3) above at the substantive hearing.

9. The position was more straightforward in relation to the penalties. I agree that the figures under appeal are those shown on Mr Bracegirdle's schedule, with one possible exception. Mr Hagen issued TMA s 95 penalties for 2007-08, but HMRC (a) reduced that penalty to nil on the basis that there was no valid closure notice for that year, and (b) subsequently issued another penalty after they had issued the "new" closure notice. The parties have permission at the next hearing to put forward submissions as to the validity of that new penalty.

Mr Bracegirdle's schedules

10. Mr Bracegirdle said HMRC would be asking the Tribunal to exercise its jurisdiction under TMA s 50 to reduce some of the assessments and penalties under appeal, and to increase one of the penalties. He set out the tax assessed, and HMRC's current view, as follows:

		Original	Current view
2003-04	Assessment	£508,856	£101,658
2004-05	Assessment	£1,108,291	£127,045
2005-06	Assessment	£246,382	£52,677
2006-07	Assessment	£145,787	£109,273
2007-08	Closure Notice	£121,708	£121,559
2008-09	Closure Notice	£99,552	£58,752
2009-10	Assessment	£402,070	£100,171
2010-11	Closure Notice	£144,997	£93,997
2011-12	Closure Notice	£152,881	£102,281
2012-13	Assessment	£82,877	£61,627
			£929,040

11. In relation to the penalties, his schedule showed the following figures:

		Original	Current view
2003-04	TMA s 95	£55,911.00	£55,911.00
2004-05	TMA s 95	£69,874.00	£69,874.00
2005-06	TMA s 95	£28,972.00	£28,972.00
2006-07	TMA s 95	£60,100.00	£60,100.00
2007-08	TMA s 95	£66,939.00	£66,857.00
2008-09	FA 07, Sch 24	£30,691.48	£30,725.72
2009-10	FA 07, Sch 24	£56,173.30	£51,441.91
2010-11	FA 07, Sch 24	£60,081.67	£55,287.48

2011-12	FA 07, Sch 24	£68,252.29	£62,647.42
2012-13	FA 07, Sch 24	£43,065.20	£37,746.54
			£519,563.07

Costs and onward directions

12. At the end of the hearing, Mr McDonnell made an oral application for Mr Parker to be paid the costs associated with this hearing, on the basis that it had only been necessary because of HMRC's unreasonable behaviour.

13. I was unable to decide that application, because under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") costs applications must be made in writing. However, I decided it would be helpful to both parties if I set out in some detail the procedural steps which preceded the hearing, on the basis of the evidence available to me.

14. Directions for the onward progress of this appeal are at the end of this decision.

The procedural history of the case

15. On 12 December 2009, HMRC opened an enquiry into Mr Parker's 2007-08 self-assessment ("SA") tax return. They subsequently opened enquiries into his SA returns for 2008-09, 2010-11 and 2011-12.

16. On 25 March 2011, HMRC issued discovery assessments for the years 2003-04 through to 2006-07. Mr Parker appealed those assessments to HMRC on 31 March 2011. On 24 May 2012, HMRC issued a discovery assessment for the 2009-10 tax year. Mr Parker appealed this to HMRC on 18 June 2012.

17. On 19 October 2018, Mr Hagen issued a letter setting out the amounts he considered were due from Mr Parker for each of the years 2003-04 through to 2011-12, together with HMRC's view of the penalties which should be charged. Although headed "view of the matter letter", it did not offer Mr Parker a review under TMA s 49C.

18. On 21 February 2019, Mr Hagen issued a further letter to Mr Parker. This was headed "Decision Letter". It said that Mr Hagen:

(1) had "now decided to issue assessments and closure notices in accordance with the computations for each year detailed below to begin the formal process of concluding the enquiries";

(2) in relation to the years for which discovery assessments had already been issued, he was going to "amend" those assessments, increasing the tax payable;

(3) for years where there was an open enquiry, these "will be closed by way of a Closure Notice and Revenue amendment";

(4) in relation to 2012-13, where there was no extant enquiry or discovery assessment, he was "attaching computations of the additional tax and interest";

(5) in relation to 2003-04 through to 2007-08, penalties of £281,876 (after mitigation) were due, because Mr Parker had acted "with the clear intention of deceiving HMRC";

(6) penalties "in the region of £636,071" after mitigation were due for the later years on the basis that Mr Parker's behaviour was "deliberate".

19. The Decision Letter ended with the heading "What to do of you do not accept these decisions" (my emphasis), and the text then said:

> "You have the right to request a Statutory Review and/or appeal the tax assessments to the Tribunal and I would refer you to the guidance in the attached leaflet HMRC1 which explains what you should do if you disagree with a HMRC decision.
>
> You should let me know your intentions and/or any further representations by Friday 22/03/2019 if you want a statutory review. You can then defer making an appeal until the outcome of the review is communicated to you. Alternatively you can appeal the assessments directly to the Tribunal and again how to do this is explained in the leaflet."

20. The Tribunal was not provided with the version of the HMRC1 which was attached to the letter, but as there has only been one subsequent edition of that guidance, which was issued to address difficulties caused by the pandemic, I have assumed that the core paragraphs remained the same. Under the heading "tell us now if you disagree" it says:

> "When we make a decision which you can appeal against, we'll write and tell you. We'll also explain how we arrived at the decision and tell you about your rights of appeal. If you do not agree with the decision, write and tell us straightaway if you can, but always within 30 days of the decision."

21. Under the heading "appealing to the tribunal" it says

> "If you do not want a review, or you do not agree with the review conclusion, you can appeal to a tribunal…To appeal to the tribunal you must normally write to the Tribunals Service within 30 days of our decision letter".

22. In relation to 2012-13, a discovery assessment dated 19 February 2019 was either attached to the Decision Letter or sent to Mr Parker separately.

23. On 5 March 2019, Mr Parker's accountant wrote to Mr Hagen. This letter was not in the Bundle but was referenced in Mr Parker's later correspondence. I have inferred from that correspondence that it informed HMRC that Mr Parker was appealing the Decision Letter and the 2012-13 assessment.

24. On 22 March 2019, Mr Hagen issued a penalty assessment charging penalties of £281,873 under TMA s 95 for the years 2003-04 through to 2007-08. On 27 March 2019, Mr Parker appealed to HMRC against the penalties.

25. On 29 March 2019, he sent a Notice of Appeal to the Tribunal, attaching the Decision Letter. His appeal was registered as TC/2019/02037**.** He stated that:

> (1) he was appealing the assessments for 2003-04, 2004-05, 2005-06, 2006-07, 2009-10 and 2012-13 both as originally made and as amended in the Decision Letter, on the bases that;
>
> > (a) the conditions in TMA s 29 were not met in relation to the assessments and/or the amendments, and/or they were stale; and
> >
> > (b) HMRC do not have the power to amend a discovery assessment once issued;

(2) he was appealing the assessment for 2012-13 on the basis that it was outside the relevant time limit;

(3) he was appealing closure notices and related HMRC amendments to his SA returns set out in the Decision Letter for 2007-08, 2008-09, 2010-11 and 2011-12;

(4) all the assessments and amendments were "on any possible view, wrong and grossly overstated"; and

(5) he was appealing all penalties.

26. The Tribunal advised Mr Parker that if he had a penalty decision letter, he should send in a separate Notice of Appeal and attach that letter. On 16 April 2019, Mr Parker filed a second Notice, attaching the penalty decision letter issued on 22 March 2019, and asking that it be joined to the one he had already filed. This appeal was registered by the Tribunal under reference TC/2019/02577.

27. On 12 April 2019 and 22 May 2019 respectively, the Tribunal informed the parties that both appeals had been classified as complex and directing HMRC to provide Statements of Case within 60 days of each respective date.

28. At some point in April, Mr Hagen retired and was replaced as case officer by Mr Stuart Mee. On 17 May 2019, Mr Mee wrote to Mr Parker saying that:

(1) the only appealable decisions HMRC had made were:

(a) the discovery assessments for 2003-04 to 2006-07;

(b) the TMA s 95 penalty assessments for those years; and

(c) the discovery assessment for 2009-10.

(2) No closure notice had been issued for the 2007-08 year, and the related penalty notice issued would be reduced to nil.

(3) He would now:

(a) issue closure notices for 2007-08, 2008-09, 2010-11 and 2011-12

(b) issue a discovery assessment for 2012-13;

(c) issue penalties under Sch 24 for 2008-09 to 2012-13 on the basis of deliberate behaviour.

(4) In relation to 2007-08 "the penalty will be charged again" following the issue of a closure notice.

29. Pausing there, Mr Bracegirdle accepted that Mr Mee had overlooked the fact that a discovery assessment for 2012-13 had already been issued on 21 February 2019

30. On 20 May 2019, Mr Foxwell, a litigator in HMRC's Solicitor's Officer, applied to the Tribunal for the appeals to be stayed for two months. His covering letter said that "matters have become very confused procedurally and some remedial work is necessary to allow for efficient use of the appeals process". The text of the stay application itself said that that the new case officer had "found numerous procedural shortcomings which needed to be addressed"; that Mr Parker had "mistakenly tried to appeal a pre-decision letter issued by HMRC in February 2019"; the only appealable decisions were the discovery assessments for 2003-04 to 2006-07; and that closure notices and assessments were now being issued for the other years. Mr Parker did not object to that stay and it was granted.

31. On 27 June 2019, Mr Mee wrote to Mr Parker, saying that he was attaching the closure notices for 2007-08, 2008-09, 2010-11 and 2011-12. In this decision, for simplicity, I have called these "the closure notices" but the use of that term does not imply any finding that the enquiries were closed as a matter of law by these notices, rather than by the Decision Letter.

32. Mr Parker received the closure notices on 3 July 2019; his copies were accompanied by tax calculations dated 25 June 2019. On the following day, his accountant Ms Mullins received copies of the same closure notices, but for three of the four years, these were accompanied by lower calculations of the tax HMRC said was due, which were dated 4 July 2019. No copies of the documents sent to Mr Parker or to Ms Mullins were provided to the Tribunal for this hearing.

33. On 9 July 2019, Mr Foxwell applied to the Tribunal for a further stay, substantially repeating his earlier application, but adding that final tax assessments and penalty assessments had been issued. In fact, the penalties were not issued until 6 August 2019, see below.

34. On 10 July 2019, Mr Parker appealed to HMRC against the closure notices, and including an appeal against the penalties referred to in Mr Foxwell's letter, which he had not yet received. He also said:

> "If you are now saying that the Decision Letter dated 21 February 2019 did not have any specific impact on me and I did not need legally need to appeal it, please can you confirm that clearly…it will obviously help to simplify things if one of my appeals can be taken off the table."

35. Following some further correspondence between the parties which was not before the Tribunal, Mr Parker emailed Mr Foxwell and Mr Mee on 31 July 2019, confirming he had appealed all assessments and closure notices received; noting again that he had not yet received the penalties referred to in the earlier correspondence, and asking again for confirmation that the "there was nothing to appeal" in the Decision Letter. He objected to Mr Foxwell informing the Tribunal that he had "mistakenly appealed a pre-decision letter", pointing out that the Decision Letter had told him he had to appeal within 30 days, and "if there is any mistake here, it is HMRC's mistake in that letter, not mine".

36. On 6 August 2019, HMRC finally issued penalties for years 2007-08 through to 2012-13. On 28 August 2019, Mr Foxwell wrote to the Tribunal, saying HMRC had now issued the final assessments, including penalty assessments, and that Mr Parker had appealed them to HMRC.

37. The Tribunal asked the parties to clarify the position about the extant appeals, and on 24 September 2019, Mr Parker said he was unable to do so until HMRC had confirmed whether the Decision Letter contained any appealable decision.

38. The file was referred to me. I decided a preliminary hearing was required to clarify which decisions were under appeal. On 23 October 2019, I issued directions which, *inter alia,* required HMRC to produce a bundle of documents ("Documents Bundle") by 20 November 2019. This was to be divided by tax year, and for each of the years in question, to set out:

(1) the earliest assessment or closure notice, together with the decision letter or letters explaining the assessment/closure notice; and

(2) each HMRC amendment to that assessment or closure notice, together with the letter(s) explaining why the amendment had been made.

39. I also directed that by the same date HMRC provide a submission ("the Submission"):

(1) setting out for each of the years in question, the sums which HMRC now says are due from Mr Parker, divided between tax and penalties;

(2) explaining the legal basis on which (i) closure notices have been amended and/or (ii) discovery assessments have been amended; and

(3) either additionally or in the alternative, to explain whether HMRC was asking the Tribunal to come to a conclusion which was different from that in the closure notices/assessments on the basis of TMA s 50.

40. On the same date, I consolidated Mr Parker's two appeals under reference TC/2019/02037. As a result, the second appeal reference TC/2019/02577 fell away, as that appeal was merged with the earlier appeal. I also decided that the appeal should be reclassified as standard rather than complex.

41. On 11 November 2019, Mr Foxwell emailed the Tribunal, saying that the only HMRC decisions currently before the Tribunal were the discovery assessments issued for 2003-04 to 2006-07 and asking for "clarity as to what the Tribunal expects". He added that he assumed the Tribunal wanted him to send the Documents Bundle and the Submission to Mr Parker.

42. On 19 November 2019, HMRC applied for an extension of time until 19 December 2019 to comply with the directions about the Documents Bundle and the Submission, because Mr Foxwell had had to take unexpected leave for family reasons.

43. On 26 November 2019, Mr Parker objected to that application, saying that HMRC had been dealing with his case for over ten years, and "ten years should surely be enough time for HMRC to get the case ready for anything", and because his health was suffering as a result of the continuing stress caused by this prolonged process.

44. On the same date, 26 November 2019, Mr Foxwell refreshed the application, saying he had provided the Documents Bundle which would be sent to Mr Parker later that week. On 28 November 2019, HMRC sent Mr Parker the Documents Bundle.

45. That correspondence was referred to me, and I issued further directions on 2 December 2019. These fixed the hearing date as 31 March 2020, and directed that HMRC provide Mr Parker and the Tribunal with the Submission by 14 January 2020, so allowing extra time. I also gave Mr Parker permission to provide any further documents and a response to the Submission. I pointed out to Mr Foxwell that the purpose of the hearing was to determine *whether* HMRC had issued appealable substantive and/or penalty decisions for the years 2003-04 to 2012-13, and if so, the quantum of those assessments/penalties. In order to resolve that issue, the Tribunal therefore needed the documents which HMRC had been directed to provide. I also added this paragraph:

> "For the avoidance of doubt, neither party is to put forward reasons why any of HMRC's decisions/closure notices/penalties are correct or otherwise. The purpose of the preliminary hearing is to establish whether HMRC have made appealable decisions for any or all of the years 2003-04 to 2012-13. It is not to decide wither any such decisions are correct. That will be the purpose of the substantive hearing."

46. On 26 November 2019, Mr Foxwell informed the Tribunal that HMRC had issued a "view of the matter" letter for "all of the later years and assessments and penalties which Mr Parker has not yet escalated to the Tribunal". On 4 December 2019 he emailed again, saying that on 2 December 2019, Mr Parker had appealed the closure notices and penalties and asked for a statutory review, which HMRC expected to have completed these by mid-January 2020, and that "there seems little point in making submissions for any of the years subject to the impending review, at least until after the review is complete, as matters may be varied or cancelled". He suggested that the hearing listed for 31 March 2020 may no longer be necessary "once the review is concluded and all years escalated to the Tribunal".

47. That correspondence was referred to Judge Williams, who confirmed that HMRC were to comply with the directions issued on 2 December 2019. Mr Foxwell responded on 6 January 2020, saying he had not received those directions; that the review decision would now be issued by 21 February 2020, and reiterating his view that there was no point in providing the Submission when the review was in progress, and that afterwards the hearing "is likely to become unnecessary" because Mr Parker could appeal the review decision to the Tribunal.

48. On 15 January 2020, the Tribunal wrote to Mr Parker asking if he agreed that the Submission be delayed until the conclusion of the HMRC review. On 28 January 2020, Mr Parker said he was content with that extension of time. On 14 January 2020, the Tribunal allowed HMRC's application granting an extension until "no later than" 21 February 2020. On 17 January 2020, Mr Foxwell replied, saying that the review would be completed by that date, but further time would then be needed to draft the Submission.

49. The review was concluded on 18 February 2020, and ran to 15 pages with two appendices It considered the closure notices for 2007-08, 2008-09, 2010-11 and 2011-12, together with the penalties for those years and the penalties for two of the discovery assessment years, namely 2009-10 and 2012-13. The review officer's figures for two of the closure notice amendments were higher than that in the figures provided to Ms Mullins, Mr Parker's accountant, see §33; all other amounts were the same or lower than those previously notified. The two higher amounts were:

(1) for 2008-09, where the statutory review figure was £58,752.20, compared to the £58,631,05 provided to Ms Mullins; and

(2) for 2011-12, where the statutory review figure was £102,281.50, compared to the £99,800.50 provided to Ms Mullins.

50. On 2 March 2020, Mr Foxwell wrote to the Tribunal with an "update". This began "HMRC believe that the case management hearing…is no longer necessary", and continuing:

> "HMRC believe that having accepted the review, Mr Parker is no longer confused as to which assessments and penalties have been raised and for which years, nor is he contending that he had effectively escalated those earlier years to the Tribunal already."

51. Mr Foxwell said that there was "little point" in providing the Submission as the review letter "effectively makes the [directed] submissions" for the later years and asked "what is the purpose of any such [case management] hearing now".

52. Mr Parker spoke to Mr Foxwell on the phone the following day. He explained why he disagreed with Mr Foxwell, and also asked that "sensible discussions on settlement" should

take place between him and HMRC. He followed up that conversation with an email to Mr Foxwell, in which he said that he was "more confused than ever" and that:

> "the real problem appears to be that HMRC has still not answered my questions explaining how they believe HMRC can change closure notices after they've been issued. Whilst…you informed me that [the review officer] has the authority to make these changes, I am struggling to see under…the laws of the United Kingdom, how previously determined matters can simply be changed.
>
> Can I ask you please once again to put this explanation in writing. In the meantime, with the greatest respect, following our discussion the direction hearing is still required…I do not accept that the booked hearing cannot take place as planned. I understand that you would need to take a couple of days to prepare for this and that you feel it is not a good use of time at the moment. However, I do not accept that matters cannot move forward."

53. On 4 March 2020, Mr Foxwell emailed the Tribunal, reiterating his view that no hearing was required. On 6 March 2020, the Tribunal asked Mr Parker for his view. On 11 March 2020, Mr Foxwell emailed again, saying it was not clear that the hearing was going ahead, and that he was:

> "attaching HMRC's submissions for the years 2003/04 to 2006/07 as required by the original directions. The submissions for the later years are per the review conclusion."

54. However, Mr Foxwell's submissions did not address the matters the Tribunal had directed were to be included. Instead, they dealt with the substantive issues in dispute. Similarly, the review conclusion letter to which Mr Foxwell made reference also concerned only the substantive issues and did not constitute compliance with the Tribunal's directions.

55. On 11 March 2020, Mr Parker wrote to the Tribunal, saying that his position was that the hearing "was still required" because HMRC had not provided the Submission. He said:

> "I do not know whether I am supposed to be appealing against the original discovery assessments, or the amendments/replacements which HMRC say they made in their [review] letter…this will obviously be relevant to questions of the legal validity of the steps taken by HMRC, the date of the steps and the time limits in the law. There may also be questions of the 'staleness' of discovery assessments…as I see it, the purpose of the 31 March hearing is to give clarity on these points, so I know what I am appealing, the dates of the assessments I am appealing and what the issues are, going forwards. I can then prepare for my appeal…I would ask that the hearing on 31 March 2020 please proceed."

56. He said he had repeatedly asked HMRC to confirm:

> "whether they now agree that [the Decision Letter] was not a legal decision and there was nothing in it for me to appeal…it is still unclear whether HMRC agree that: I have not had a proper or satisfactory response."

57. He also pointed out, entirely correctly, that the submissions provided by Mr Foxwell did not address the points required by the Tribunal's directions. On 16 March 2020, the Tribunal confirmed the hearing would go ahead.

58. On 18 March 2020, Mr Parker filed two further Notices of Appeal with the Tribunal. The first was registered as TC/2020/01368, and was against the closure notices dated 27 June

2019; he attached the review decision of 18 February 2020. The second was against the penalty notices issued on 6 August 2019, also covered in the review decision.

59. On 23 March 2020 the hearing was cancelled because of the pandemic. On 30 March 2020, the parties were asked for their views as to "the most appropriate" manner of going forwards. On 6 April 2020, Mr Foxwell responded, saying that "HMRC do not believe the hearing is necessary" and "the Appellant has not explained why he believes the hearing is still necessary". He added that the Bundle was "up to 800 pages" and said "it is not currently possible to get these into electronic format".

60. Mr Parker replied on the same day. He said "my position is that this preliminary hearing is still **required**" (his emphasis). He provided a summary of the points made in his letter of 11 March 2020, and said that HMRC's failure to comply with the Tribunal's directions "puts me in an impossible position now in preparing my case". He told the Tribunal and HMRC he would be instructing a barrister for the hearing.

61. On 22 June 2020, Mr Foxwell informed Mr Parker and the Tribunal that he was retiring on 1 July 2020. On 29 June, Judge Kempster asked Mr Parker to explain why he had filed the two further appeals, and whether they were relevant to the case management hearing. Mr Parker replied on 31 July 2020 with a detailed explanation as to what had happened and confirming that the hearing was still required because there was uncertainly as to what had been assessed and what was now under appeal. In particular he said that HMRC had still not clarified the status of the Decision Letter, and continued:

> "Judge Redston issued her directions in October 2019 and ordered an initial hearing to clarify the issues in the appeal because it was extremely unclear what the 21 February 2019 decision actually decided, and because HMRC were not giving me a straight answer in correspondence. Her directions to HMRC also…require[d] HMRC to make a written submission 'explaining the legal basis on which (i) closure notices have been amended and/or (ii) discovery assessments have been amended'. As far as I can see, HMRC have not made that submission, at least not properly and not in a way which answers my question. HMRC have been trying to duck out of doing that and I hope the Tribunal will not let them. That is the main reason why I believe the initial hearing ordered by Judge Redston is still required…
>
> The outcome I am looking for, in appeal TC/2019/2037, is either a clear admission from HMRC, or a clear decision from the Tribunal, that (A) there was no lawful way for HMRC to amend and increase an earlier discovery assessment and potentially also (B) there was no other appealable decision against me in the 21 February 2019 letter."

62. On 10 August 2020, Judge Kempster confirmed the hearing would go ahead by video and would encompass the two new appeals as well as the existing appeal. He directed that HMRC file and serve "indexed, searchable and hyperlinked" pdf copies of the documents and authorities bundle "at least 21 days before the hearing".

63. The hearing was listed for Wednesday 21 October 2020 with a test hearing on Wednesday 14 October 2020. On 24 September 2020, HMRC informed Mr Parker and the Tribunal that Mr Bracegirdle would be the litigator.

64. At the test hearing, I told Mr Bracegirdle that I had not yet received the electronic bundles or the Submission. Mr Bracegirdle said that electronic bundles had not been prepared because the documents bundle contained 700 pages, and because a paper bundle had

been filed and served for the original hearing in March. I pointed out that HMRC had been able to supply electronic bundles of much greater size for other appeals. Mr Bracegirdle said he would investigate what could be done. Separately, Mr Parker said he wanted to take this opportunity of telling HMRC that he would be seeking costs if he succeeded at the substantive appeal, on the basis that HMRC had behaved unreasonably, and pointing out that he had tried to settle the matter.

65. The following day, Thursday 15 October 2020, HMRC filed and served copies of the documents bundle and the authorities bundle, together with a supplementary bundle containing other related material. The documents bundle was structured in accordance with my directions, on a year by year basis, but only the supplementary bundle was bookmarked and searchable. Neither contained the two new Notices of Appeal or Mr Parker's grounds of appeal against the closure notices and the penalties, despite Judge Kempster having directed on 10 August 2020 that the hearing was to consider all three appeals. Fortunately Mr Parker was able to email copies of his Notices of Appeal to Mr McDonnell, and I had separately received copies from the Tribunals Service.

66. On 16 October 2020, at my direction, the Tribunal asked Mr Bracegirdle whether the Submission was in the bundles, as I had been unable to locate it. On Friday 16 October 2020, Mr Bracegirdle said HMRC accepted that the directions had not been followed, and that no Submission had been prepared. However, he assured the Tribunal that he would be able to address the points which should have been in the Submission at the hearing, and offered to file and serve a copy of his speaking notes. By return, I confirmed that would be helpful, and asked that they be sent out as soon as possible to assist the Tribunal, as well as Mr Parker and Mr McDonnell, to prepare for the hearing.

67. The speaking notes were filed and served on Monday 19 October 2020 at 11am together with a helpful one page summary of HMRC's current view as to decisions under appeal and the amounts now being sought from Mr Parker. The notes therefore arrived less than two working days before the hearing on Wednesday 21 October 2020. They were extremely helpful and provided a clear explanation as to the figures which HMRC were now saying were under appeal, and the amounts they were now seeking from Mr Parker.

The legislation

68. I set out below the provisions which deal with the issuance of assessments; the issuance of closure notices; the statutory time limits for assessments and the jurisdiction of the Tribunal to amend an assessment. They are cited only so far as relevant to the issues considered at this hearing.

Assessments

69. TMA s 30A is headed "assessing procedure", and includes the following:

> "(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> (2) ….
>
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.
>
> (4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts."

Closure Notices

70. TMA s 28A is headed "Completion of enquiry into personal or trustee return" and reads:

> "(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."

Time Limits

71. The legislation on time limits for assessment was changed by Finance Act 2008, s 118 and Sch 39(1) and (7). Until 1 April 2010, TMA s 34(1) and s 36(1) read as follows (emphasis added):

> "**34 Ordinary time limit of six years**
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates."
>
> **36 Fraudulent or negligent conduct**
>
> (1) An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates."

72. With effect from 1 April 2010, these two subsections read (again, emphasis added):

> "**34 Ordinary time limit of 4 years**
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
>
> **36 Loss of tax brought about carelessly or deliberately etc**
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person; …

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

73. Since the hearing, I have reviewed the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009. My reading of that Order is that all assessments/closure notices issued after April 2010 in relation to tax years 2008-09 or earlier are subject to the new time limit provisions.

74. On that reading, I have set out in the final section of this judgment, the time limit issues which appear to be in issue. However, the parties have permission at the substantive hearing to make submissions as to the time limits which apply to the assessments and/or closure notices which are under appeal.

The jurisdiction of the Tribunal

75. The relevant provisions of TMA s 50 read:

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

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

(b) …; 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-assessment6

(b) …; or

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

the assessment or amounts shall be increased accordingly.

(7) …

(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly."

76. This provision therefore gives the Tribunal the jurisdiction to reduce or increase both a discovery assessment and an HMRC amendment to a self-assessment.

The position overall

The discovery assessments

77. The legal position is that where HMRC have issued a discovery assessment, it cannot be amended other than in accordance with the provisions of the Act, see TMA s 30A(1) set out above.

78. HMRC issued discovery assessments for 2003-04 through to 2006-07 on 25 March 2011, and a discovery assessment for 2009-10 on 18 June 2012. These were thus issued well before the Decision Letter, which was dated 21 February 2019.

79. In the Decision Letter, Mr Hagen said he had "decided to issue assessments" for the higher amounts set out in that Letter, and to "amend" the assessments previously issued. He did not explain under what statutory power he was issuing new discovery assessments and/or amending those which had already been issued.

80. Despite Mr Hagen's statement that he was going to issue assessments, the only one he actually issued was that for 2012-13, a year where there was no previous assessment. He also said he was amending the existing assessments, but did not issue any separate document in order to do so. Mr Bracegirdle accepted that the Decision Letter itself did not operate to amend those assessments. .

81. I therefore find that the assessments under appeal are:

(1) those for 2003-04 through to 2006-07 which were issued in 2011 and appealed to HMRC on 31 March 2011;

(2) that for 2009-10, which was issued on 24 May 2012 and appealed to HMRC on 18 June 2012; and

(3) that for 2012-13, which was issued on 19 February 2019 and appealed to HMRC on 5 March 2019.

82. On 29 March 2019, these appeals were notified to the Tribunal under TMA s 49D, which does not have a 30 day time limit.

The closure notices

83. The position is less clear with the years which were under enquiry, namely 2007-08, 2008-09, 2010-11 and 2011-12.

84. TMA s 28A provides that an enquiry is completed when an HMRC officer "by notice (a 'closure notice') informs the taxpayer that he has completed his enquiries and states his conclusions" and that notice must also "make the amendments of the return required to give effect to his conclusions".

85. The main question is whether the Decision Letter was itself a closure notice, or whether separate documents headed "closure notice" were required. In *HMRC v Bristol & West* [2016] EWCA (Civ) 397 at [24], Briggs LJ said it was common ground that:

> "There is no prescribed form for a Closure Notice…but it is essential to the validity of such a Closure Notice that the document (or perhaps documents) relied upon should both state that HMRC has completed their enquiry, and state their conclusions"

86. Mr Hagen said at the beginning of the Decision Letter that he had "now decided to issue...closure notices for each of the years in accordance with the computations for each year detailed below to begin the formal process of concluding the enquiries". He set out the figures for each year, and in relation to each, said "the inquiry will be closed by way of a closure notice and a revenue amendment in the amount of £[figure]". At the end of the letter he said that he was "attaching computations of the additional tax" and under the heading "What to do of you do not accept these decisions", told Mr Parker that he had "the right to appeal the tax assessments to the Tribunal" and the right to request a statutory review, and he attached HMRC1. It is therefore arguable that the Decision Letter was itself a closure notice

87. However, I have no concluded view on this point. I agreed with the parties that it would be fair and just for them to have the opportunity to make related submissions at the substantive hearing. It is possible, of course, that they may decide that it makes no difference. But there may be an interaction with the penalty for 2007-08 (see §93) and/or there may be issues as to the scope of a closure notice, or other matters. For the purposes of this interlocutory judgment, I have made my decision in the alternative, pending such further submissions.

88. If the closure notices for 2007-08, 2008-09, 2010-11 and 2011-12 *are* contained within the Decision Letter, this was appealed to HMRC on 5 March 2019 and notified to the Tribunal on 29 March 2019. If the closure notices are those issued by HMRC on 27 June 2019, they were appealed to HMRC on 10 July 2019 and notified to the Tribunal on 18 March 2020, following the review decision.

89. There was one further issue related to the closure notices. As noted earlier in this decision, on 27 June 2019, Mr Mee wrote to Mr Parker, saying that he was attaching the closure notices for 2007-08, 2008-09, 2010-11 and 2011-12; Mr Parker received copies on 3 July 2019 accompanied by tax calculations dated 25 June 2019. On the following day, Ms Mullins received copies of the same closure notices, but for three of the four years, they were accompanied by lower figures for the tax HMRC said was due; these calculations were dated 4 July 2019. Neither set of documents were provided to the Tribunal for this hearing, and this issue may of course fall away once their actual wording is seen and considered.

90. However, it is open to Mr Parker to submit at the substantive hearing that it was Ms Mullins, rather than Mr Parker, who was provided with "the amendments of the return required to give effect to [the officer's] conclusions" as required by TMA s 28(2)(b). That submission may be of relevance in relation to:

(1) the year 2008-09, where HMRC are asking the Tribunal to confirm the statutory review figure of £58,752.20 compared to the £58,631,05 in the document provided to Ms Mullins; and

(2) the year 2011-2, where HMRC are asking the Tribunal to confirm the statutory review figure of £102,281.50 compared to the £99,800.50 in the document provided to Ms Mullins.

The penalties

91. The penalties for years 2003-04 through to 2007-08 were imposed under TMA s 95. TMA s 100(1) provided that:

> "an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of

> the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."

92. Mr Hagen issued penalty assessments for each of those years on 22 March 2019; they were appealed to HMRC on 27 March 2019 and notified to the Tribunal on 29 March 2019.

93. As already noted, on or soon after 17 May 2019, Mr Foxwell reduced the penalty for 2007-08 to nil, and a new penalty for the same year was issued on 27 June 2019. This was appealed by Mr Parker on 10 July 2019 and notified to the Tribunal on 18 March 2020. The parties have permission to make further submissions at the substantive hearing as to the validity of this replacement penalty.

94. The penalties for the later years were charged under FA 2007 Sch 24. Para 13(2) of that Schedule provides that these penalties are to be "treated for procedural purposes in the same way as an assessment to tax". They were issued on 6 August 2019; Mr Foxwell confirmed on 28 August 2019 that Mr Parker had appealed them to HMRC, and they were notified to the Tribunal on 18 March 2020.

95. I also considered whether the Decision Letter itself contained penalty assessments, but decided it did not. TMA s 100(1) requires that the officer "set" the penalty "at such amount as, in his opinion, is correct or appropriate". Mr Hagen said he was giving his "preliminary view" and Mr Parker could still reduce the figures in that Letter by "telling, helping and giving access". It follows that the penalties had not been "set" by Mr Hagen. However, for completeness I record that Mr Parker appealed against the penalty figures set out in the Decision Letter on 5 March 2019, and notified that appeal on 29 March 2019.

The assessment/closure notice position for each of the years

96. This part of the decision sets out my conclusions as regards the assessment or closure notice which is under appeal before the Tribunal. In relation to many of the years, the amount in the assessment/closure notice which is under appeal is higher than that which HMRC now consider to be due, and Mr Bracegirdle confirmed that HMRC will be asking the Tribunal at the substantive hearing, using the jurisdiction given by TMA s 50, to confirm these lower amounts and not the sums originally assessed. Mr Parker may also argue that some or all of the discovery assessments were "stale" and/or out of time.

Tax year 2003-04

97. HMRC issued a discovery assessment on 25 March 2011 for £508,856.12. HMRC will ask the Tribunal to confirm the lower amount of £101,658.52.

98. The discovery assessment was made more than six years after the end of the tax year in question, and so at the substantive hearing HMRC will have the burden of showing that Mr Parker acted "deliberately".

Tax year 2004-05

99. HMRC issued a discovery assessment on 25 March 2011 for £1,108,245.10 (not the £1,108,291 shown on Mr Bracegirdle's schedule). At the substantive hearing, HMRC will ask the Tribunal to confirm the lower amount of £127,045.

100. The assessment was made slightly less than six years but more than four years after the end of the tax year in question. At the substantive hearing HMRC will have the burden of showing that Mr Parker acted "deliberately" or "carelessly".

Tax year 2005-06

101. HMRC issued a discovery assessment on 25 March 2011 for £246,382, but will ask the Tribunal to confirm the lower amount of £52,677.

102. The assessment was made less than six years but more than four years after the end of the tax year in question. Thus, the statute places on HMRC the burden of showing that Mr Parker acted "deliberately" or "carelessly".

Tax year 2006-07

103. HMRC issued a discovery assessment on 25 March 2011 for £145,787. HMRC will ask the Tribunal to confirm the lower amount of £109,273.

104. The assessment was made less than four years after the end of the tax year in question, so within the "ordinary" time limit.

Tax year 2007-08

105. The enquiry into this year was opened on 1 December 2009. On 21 February 2019, Mr Hagen issued his "decision letter". If the enquiry was closed by that letter, the amount under appeal is £326,637.

106. If, in the alternative, the enquiry was not closed until 27 June 2019 when HMRC issued the closure notice, the amount under appeal is £121,708.

107. In either event, HMRC now say that they will be asking the Tribunal to confirm a figure of £121,559, which is lower than either of the two possible assessment amounts.

Tax year 2008-09

108. If the enquiry was closed by the Decision Letter, the amount of the assessment under appeal is £323,041. If the enquiry was closed when HMRC issued the closure notices, the amount under appeal is £99,552. HMRC will ask the Tribunal to confirm a sum of £58,752. As noted above, this is slightly higher than the figure provided to Ms Mullins of £58,631.05.

Tax year 2009-10

109. HMRC issued a discovery assessment on 24 May 2012 for £402,070.90. HMRC will ask the Tribunal to confirm the lower amount of £100,171. The discovery assessment was made less than four years after the end of the tax year in question, so within the "ordinary" time limit.

Tax year 2010-11

110. If the 2010-11 enquiry was closed by the Decision Letter, the amount of the assessment under appeal is £144,972. If the enquiry was closed on 27 June 2019 when HMRC issued the closure notices, the amount under appeal is slightly higher at £144,997. However, HMRC will ask the Tribunal to confirm a reduced amount of tax due, being £93,997.

Tax year 2011-12

111. If the 2011-12 enquiry was closed by the Decision Letter, the amount of the assessment under appeal is £156,630. If the enquiry was closed on 27 June 2019 when HMRC issued the closure notices, the amount under appeal is slightly lower at £152,881. HMRC will ask the Tribunal to confirm a reduced amount of tax due, being £102,281. Again, as noted above, this is slightly higher than the £99,800.50 notified to Ms Mullins.

Tax year 2012-13

112. HMRC issued a discovery assessment on 19 February 2019 for £82,877. HMRC will ask the Tribunal to confirm the lower amount of £61,627.

113. The assessment was made than six years after the end of the tax year in question, so HMRC have the burden of showing that Mr Parker's behaviour was "deliberate".

The penalties

114. As noted above, penalties have been issued for 2003-04 to 2007-08 under TMA s 95, and for 2008-09 through to 2012-13 under FA 2007, Sch 24.

115. Penalties for years 2003-04 to 2007-08 were issued on 22 March 2019. The amounts and make up of these penalties are set out at page 702 of the documents bundle provided for the hearing. There was no dispute about the quantum of these figures and it is not necessary for me to set them out here.

116. Penalties for years 2008-09 through to 2012-13 were issued on 6 December 2019. The details of these penalties are set out at page 21 of the documents bundle; again, there was no dispute as to the quantum of these figures.

Costs

117. At the end of the hearing, Mr McDonnell applied for Mr Parker to be paid his costs associated with this hearing, on the basis that it had been necessary because HMRC had acted unreasonably.

The Tribunal Rules

118. Rule 10 of the Tribunal Rules includes the following:

> (1) The Tribunal may only make an order in respect of costs..—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; . . .
>
> (c) if—
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or…
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
>
> (3) A person making an application for an order under paragraph (1) must—
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

(5) …

(6) The amount of costs…to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed…."

Application to this hearing

119. It is clear from Tribunal Rule 10(4) that Mr Parker can apply for costs without waiting till the end of the substantive hearing. However, Rule 10(3) requires that he must make a written application for those costs, together with a schedule of costs. The Tribunal's normal practice is also to give HMRC an opportunity to respond to that application.

120. I am thus unable to determine the oral application made at the end of the hearing. It is a matter for Mr Parker whether he wants to remake that application in written form.

Appeal rights

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

Directions

122. I direct as follows:

(1) Mr Parker's appeals under references TC/2020/01368 and TC/2020/01394 are consolidated with appeal reference TC/2019/02037.

(2) HMRC are to provide a Statement of Case to both the Tribunal and Mr Parker by 60 days from the date of issue of this decision.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 13 NOVEMBER 2020