[2020] UKFTT 503 (TC)

TC07973

Appeal number: TC/2018/06371 & 06378; & TC/2019/03677

INCOME TAX AND NICs – benefits in kind – s114 -148 ITEPA – car benefits – whether SORN meant car was not made available.

INCOME TAX – s29TMA discovery assessment – whether discovery stale, s29(2) whether there was generally prevailing practice, whether s 29(5) applied; could a s29 assessment be made in an enquiry window

INCOME TAX- closure notice – whether letter was a closure notice, voluntary returns: whether s 21D TMA applied – effect of transitional provisions in s87(4)FA 2020 - whether s21D validated invalid enquiries.

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) TIM NORTON MOTOR SERVICES LTD **Appellants**
(2) TIMOTHY NORTON

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting by video link on 26 & 27 October 2020

Keith Gordon instruction by Jackson & Grimes Ltd, Chartered Certified Accountants, for the Appellants

Christopher Vallis for the Respondents

DECISION

1. This decision relates to: (i) an appeal by Mr Norton against "discovery" assessments and a closure notice made on the basis that a large taxable benefit in kind arose to him under Chapter 6 of Part 3 ITEPA 2003 by virtue of two cars being "made available" to him by Tim Norton Motor Services Ltd (the "Company") and (ii) an appeal by the Company against National Insurance Contribution ("NIC") determinations made on the same basis as the assessments on Mr Norton.

2. The NIC determinations were for the years 2010/11 to 2015/17. The discovery assessments were made for 2012/13 to 2016/17 with the exception of 2015/16 for which a closure notice was issued.

3. In addition to the issues relating to the application of Chapter 6, in the case of Mr Norton a number of procedural issues arise. I shall start with the car benefit issues.

A. The car benefit issue.

(i) The legislative provisions in relation to car benefits.

4. Section 114(1) ITEPA provides, so far as is relevant: -

> "(1) This Chapter applies to a car ... in relation to a particular tax year if in that year the car ...
>
> > (a) is made available ... to an employee or a member of the employee's family, ["Condition A"]
> >
> > (b) is so made available by reason of the employment ... ["Condition B"], and
> >
> > (c) is available for the employee's or member's private use ["Condition C]."

Where the Chapter applies the car is a benefit and later provisions provide for the amount of the benefit which is to be taxed. A director of a company is treated as one of its employees for these purposes (section 5 ITEPA).

5. By section 117 a car which has been made available to an employee is to be treated as made available by reason of his or her employment unless one of two exceptions apply. Neither of those exceptions is relevant in these appeals. Thus for present purposes if Condition A is satisfied, Condition B will also be satisfied.

6. I note at this stage: first, that the opening words of section 114(1) - "if in that year" rather than "during that year" – mean in my view that if Conditions A, B and C are together satisfied on one day of the tax year only, the provisions of the Chapter apply for that tax year. The possible unfairness of this approach is both indicated and mitigated by section 143, to which I shall return later.

7. The second aspect to which I would draw attention is the apparent difference between "made available" in Conditions A and B, and "available" in Condition C. This apparent difference, however, is effectively nullified by section 116 and 118. Section 116 provides that for the purposes of Chapter 6 a car is "available to an

employee at a particular time if it is then made available…to the employee or a member of the employee's family…". Section 118 also addresses private use in the particular context of Condition C; it provides:

> "(1) For the purposes of this Chapter a car ... made available in a tax year to an employee…is to be treated as available for the employee's ... private use unless in that year -
>
> (a) the terms on which it is made available prohibit such use; and
>
> (b) it is not so used."

8. The result of this is that if condition A is satisfied (by reason of the making available of the car) then condition C will be satisfied unless both of the sub paragraphs of section 118 (1) are satisfied for the relevant year; and in such a case no investigation of the difference between "making available" and "available" is required for the application of Condition C.

9. Sections 121 to 142 deal with the computation of the amount of the taxable benefit. There was no dispute about the amounts which arose by virtue of these sections. Section143 provided:

> "(1) A deduction is to be made from the amount [in the computation] if the car has been unavailable on any day during the tax year in question.
>
> (2) For the purposes of this section a car is unavailable on any day if the day -
>
> (a) falls before the first day on which the car is available to the employee,
>
> (b) falls after the last day on which the car is available to the employee, or
>
> (c) falls within a period of 30 days or more throughout which the car is not available to the employee".

10. The remaining subsections provide for a reduction in the taxable benefit pro rata to the number of unavailable days.

11. The provisions of section 143, in recognising that the Chapter applies for the tax year even though the car may not be available for the whole tax year at supports the interpretation of section 114 as switching on the charge if the car is made available even for only one day in the year, but mitigate that charge by reference to the period of actual unavailability in the year albeit in a manner which affords no relief for periods of unavailability of less than 30 days lying between two periods of availability.

12. I should also mention section 116 and 148. Section 116 provides that a car is to be treated as available to an employee at a particular time if it is then made available by reason of his or her employment to the employee or a member of his or her family. Section 148 provides for a just and reasonable reduction in the taxable benefit if a car is made available concurrently to more than one employee.

(ii) The evidence and initial findings of fact.

13. I heard evidence from Mr Norton who also provided a witness statement, I also had a bundle of correspondence.

14. HMRC provided me with a document entitled "witness statement" of Mrs Stent, the officer of HMRC who made the assessments on Mr Norton. This did not bear her manuscript signature. I was told that she had left HMRC and would not be giving evidence but that she had told Mr Vallis that she had made a witness statement. There was nothing material in this document which was not supported by other documentary evidence and I have relied upon it only to that extent.

15. I was given a similar document bearing the typed attestation of Mr Earl, the officer from HMRC who had made the NIC determinations on the company, to which the same considerations applied.

16. The company runs a Ford car dealership. It sells new cars, buys and sells secondhand cars and does some repair work. In 2001 it bought an expensive and rare Maserati, and in 2005 a Ford GT40 (a rare high performance car). Following a PAYE audit in 2016 HMRC concluded that these cars had been made available to Mr Norton for periods longer than those in relation to which a benefit in kind had been declared. They issued NIC determinations to the company for the years 2010 to 2017, and made income tax assessments for the years 2012/13 to 2014/15 and 2016/17, and issued a closure notice[1] for 2015/16. Those determinations, assessments and notices are the subjects of the appellants' appeals.

17. The company employs some 20 people. The company's directors at all relevant times were Mr Norton and his wife Gerry Norton. Mrs Norton, who is not as interested in cars as Mr Norton, deals with administration and accounting and Mr Norton deals mainly with buying and selling of cars.

18. The company's premises are in Oakland, Rutland; at those premises there would generally be 25 to 30 new cars and about the same number of used cars ready for sale. The GT40 and the Maserati were kept at those premises.

19. Mr and Mrs Norton live some 10 miles from the showroom and drive to work. The Maserati and the GT 41 are not used for such commuting.

20. The keys for the Maserati and the GT40 are kept in a locked box which in turn is kept in a locked safe in the office. Only Mr Norton had access to the locked box. Mrs Norton would not have sought access to those keys. The keys to the other 40 or so cars on the premises were kept in two key cabinets to which certain members of staff had access - depending upon their roles.

21. From a note of a telephone conversation on 24 August 2016 I find that the Maserati was kept in the back of a large garage which generally meant shuffling a number of vehicles to get it out, and that the GT40 was kept in the showroom and

[1] There is a dispute about which document was a closure notice and whether the document HMRC say is a closure notice was valid

occasionally taken to local shows (sometimes on a low loader) for advertising and promotion.

22. If it was desired to use the GT40 or the Maserati vehicle excise duty would be paid before it was used. After use a SORN (statutory off road notification) would be made.

23. The Maserati and the GT40 were insured initially on a policy which allowed only one to be used on the road at any one time, but more recently the GT40 has been separately insured and the Maserati covered by a general motor traders group policy. I understood that the insurance policy insured only one driver and that was Mr Norton.

24. Mr Norton had used the cars for the company's business on many occasions. On each of those occasions he would pay vehicle exercise excise duty in advance and check that the car he was taking had an MOT. These occasions included taking customers children to "proms", participating in Ford fairs (including one in Le Mans) and meeting with advisers to discuss the possible sale of the company's premises.

25. The GT40 bore the words "Tim Norton" on its bonnet. Mr Norton said, and I accept, that the GT40 acted as an attraction to the dealership, both when at the premises and when taken to various shows. It was a crowd puller and led to conversations and sales. Mr Norton did not make similar statements about the Maserati and the description in his witness statement of his business use of the Maserati focuses on meetings with advisers and attendance at Ford customer development events.

26. The extent and nature of the use of the two cars by Mr Norton in the period relevant to the appeals was not completely clear. There were the following pieces of evidence:

> (1) In 2002, after the acquisition of the Maserati, the company's then accountants wrote to HMRC with a query about competing P11D forms (the forms on which employers notify employees and HMRC of the amounts of taxable benefits received by the employee in a year). They said they acted for a garage which rented out vehicles and that "one of the directors occasionally uses one of the cars for private journeys". Mr Norton said that he had so used it.
>
> (2) Mr Norton regarded the cars as longer term appreciating assets. He did not want them to have a large milage. He described them as being "by far the most for business purposes" but he could not be certain that that had been their only use;
>
> (3) the company declared the benefit of the cars on Mr Norton's P11D forms:
>
> > (a) in respect of the Maserati for the years 2011/12 until 2015/16, but not for 2010/11 or 2016/17;
> >
> > (b) in respect of the GT40 for the years 2011/12, 2013/14, 2014/15, 2015/16 but not 2010/11, 2012/13 or 2016/17.

A note of a meeting on 22 March 2016 records Mrs Norton confirming to Mr Earl that Mr Norton had used the cars in the years declared, but no mention is recorded of whether that use was for private or for business purposes.

(4) In an e-mail of 18 February 2019, Mr Dewing of the appellants' accountants, Jackson & Grimes ("J&G"), said in relation to the GT40 that the declared use was not personal use but use in the promotion of the company's business. It had been mistakenly declared on the forms P11D. There were no similar statements in respect of the Maserati.

(5) A letter of 15 September 2016 from Horsepower Racing thanks Mr Norton for bringing the GT40 "to Millbrook for the Ford/Castrol event". Mr Norton said that at the event the car was displayed along with other Ford GT40s from the 1960s.

(6) In a letter of 6 May 2016 J&G accept that the Maserati and the GT40 were only used and available for use on the dates giving rise to the amounts declared on the forms P11D;

(7) A note of a meeting held on 18 January 2017 between HMRC and Mr Dewey records that Mr Norton "still wishes to occasionally use the vehicle [the GT40] for private purposes".

27. This last point indicated to me that, despite J&G's email of 18 February 2019 there had been private use of the GT40 in at least 2015/16 and probably in 2016/17; I also thought it likely that there had been some continuity so that private use extended back before that to all consecutive years where there had been some use. But the PIIDs recorded no use in 2012/13 which broke the chain. Before that I took into consideration J&G's email and concluded that whilst private use took place in 2013/14 and subsequent years it did not occur in 2010/11 to 2012/13

28. Mr Gordon told me that it was accepted for the purposes of the appeal that in the periods for which vehicle excise duty had been paid (and which gave rise to the benefit declared on the forms P11D) the cars were available for Mr Norton's use.

29. I conclude that it is likely that:

(1) the Maserati was used by Mr Norton for personal as well as business purposes in the years 2011/11 to 2015/16 but it was not used in 2010/11 or 2016/17

(2) the GT40 was used in 2011/12, 2013/14, 2014/15, 2015/16 (because of the P11D forms) and 2016/17 (because of the letter from Horsepower Racing -see (5) above) and was not used by him in 2010/11 or 2012/13. His use in the period 2011/12 was for business purposes only but (because of the comment at [27] above) from 2013/14 to 2016/17 was also for private purposes.

30. The company's Handbook contained the following:

"Section 4 - Driving at work

> "4.1 Use of company vehicles.
>
> "It may be necessary to use a company vehicle in the course of your duties with the company. You may not use a company vehicle without the express permission of Management ... at all times all employees and officers of the company must ensure that any vehicle used is taxed unless covered for use by trade plates, has adequate insurance cover and a valid MOT if appropriate ..."

31. Mr Norton regarded these restrictions as imposing obligations on officers and employees in relation both to the work and the private use of a company car. Mr Norton told me, and I accept, that where vehicle duty had not been paid trade plates could be used where the use of the car displaying the plates was for the purposes of the company's business, but not otherwise.

(iii) The arguments - discussion

Conditions A and B

32. In the years in which that there was at least one time when a car was actually used by Mr Norton in a manner accepted or condoned by the Company it seems to me that the inevitable consequence is that the car is to be treated as having been made available to Mr Norton in that year for the purposes of section 114. As a result Condition A will be satisfied as regards those years.

33. Plainly any use of an object does not mean that it has been made available to the user - the example discussed at the hearing of hot wiring a neighbour's car and driving it away without the neighbour's consent makes that clear - but if the owner expressly or impliedly consents to the use(and there is no physical barrier to use) that is to my mind the making available of the asset. The use Mr Norton made of the cars could not have been other than with the company's consent. The cars were made available to him when he used them. And so in tax years when he used them Conditions A and B were satisfied.

34. In *Goldring v HMRC* [2001] UKFTT 232 (TC) the FTT said at [13] that the issue in that case was a simple one "it is whether the Ferrari was made available to the appellant by reason of his employment. That is not to be confused with an employee actually using a company car if required to do so in the course of his employment when such use is clearly use of the employer itself…[16] As I have indicated above, even if a director or employee does drive or use a vehicle owned by the company, that is not determinative of whether or not that vehicle has been |"made available" to him by reason of his employment or directorship."

35. I find myself in respectful disagreement on these issues. Whilst I agree that use by an employee in the business of the employer may be for some purposes treated as use by the employer, that does not in my view prevent it also from being treated as the making available of the car to the employee for the purposes of section 114. That is for two reasons. First such characterisation need not be exclusive, and second, the provisions of section 114 et seq indicate to my mind that a wide meaning of making available is intended, the effect of which is later to be cut down where the car is only used in activities of the employment.

36. Mr Gordon argues that the cars were not available when subject to a SORN declaration because use would then have been illegal. This argument arises in particular in relation to times when a car was not actually used. But when a car was actually being used by Mr Norton whether in the company's business or for private purposes (during which time it would have been taxed, MOT'd and insured), it seems to me that the car was then made available to him for the purpose of Condition A.

37. In relation to those years in which I have found that a car was not used by Mr Norton (namely the GT40 in 2010/11 and 2012/13 and the Maserati in 2010/11 and 2016/17) the question arises as to whether it was made available for use in those periods even though it was not used.

38. Mr Gordon argues that a car is not "available" (and thus cannot be said to have been "made available") when it is illegal to use it. At times when the cars were subject to a SORN, driving them on the road (other than with trade plates or to an MOT test) would be a criminal offence. It would be wrong, he says, to equate potential availability - the potential to pay excise duty to so as to make use legal - with actual availability. In this context he relies upon three cases.

39. The first is *Golding v HMRC* [2011] FTT 232 (TC). In that case a car was used either as a marketing tool or was up for sale. The judge thought it would be "artificial to regard the car, in those circumstances, as "made available" to the appellant in his capacity as an employee for his use and benefit". That, Mr Gordon says, was a common sense approach to "made available": on that basis a car whose use on the road was illegal was not made available.

40. The second case was *Elm Milk* (2006] STC 792. This case related to the provisions for the recovery of input VAT on cars purchased by a business. The relevant provisions make input tax credit dependent upon the condition (in article 7(2G)(b)) that the purchaser of the car did not intend to "make it available" for private use. This test is different from that in section 114 because it looks to intention at time of purchase rather than to what actually happens from time to time. Nevertheless, as Arden LJ accepted at [6], a tribunal would normally seek to test a provisional finding as to the intention of a person by reference to what actually took place after the original alleged attention intention was formed. That test involved, as Buxton LJ had said in *Fagomatic*, consideration of what the draughtsman meant by "make available for use" (see [20] quoting Buxton LJ) which "was an ordinary English expression deliberately different from use itself". At [22] of her judgement Arden LJ cites from Neuberger J's judgement in *Fagomatic* in which he said:

> "[41]. If an article is supplied by one person to another with no physical or legal constraint as to a particular use, then it appears to me that, as a matter of ordinary language that, the article has been "made available" for that use ... on the other hand, if the supplier provides the article under a contract which bona fide excludes the recipient from putting it to a particular use ... then there is clearly a powerful argument for saying that it has not been "made available" for such use."
>
> [Having discussed physical impediments to use he continued,]

> "[49]… I think that it is also possible that a legal impediment to private use is such that such use would be unlawful might also amount to unavailability for private use. An obvious example would be where a motorcar was insured only for business use..."

41. Later, in relation to the meaning of available in article 7(2G) Arden LJ said:

> [39] "there is no reason why a car cannot be made unavailable for private use by suitable contractual constraints, that is effective constraints".

42. The third case was *Graham v HMRC* [2011] UK FTT TC, a case which involved the same VAT context as *Elm Milk.* In that case the FTT accepted that unavailability for private use could be achieved by appropriate contractual restrictions.

43. Mr Gordon says that the presence of a SORN is an effective contractual and legal constraint which continues until duty is paid. Illegality or unlawfulness of use means that the car is not available.

44. Mr Vallis says: (1) "made available" must be given its ordinary meaning, as the tribunal held in *GR Solutions Ltd v HMRC* [2013] UKUT 278 (TC); (2) *Elm Milk* concerned different legislation and the intention to make available. Lack of intent did not mean lack of availability, and whereas a legal provision prohibition on use at the outset "might" be evidence of lack of intent to make available, it was not evidence that the car was not made available; (3) even if a legal impediments to use "might" make a car unavailable for use, in this case any impediment caused by the presence of a SORN could be easily removed and (4) the presence of a SORN and did not prevent use on private land - for example on a racetrack.

Discussion: made available- periods when not used

45. It seems to me that, although the Court of Appeal in *Elm Milk* were dealing with different legislation in which the object was to determine whether "making available" was intended at the time of purchase, that object could not be properly addressed without considering what "making available" meant. The addressing of intent at the time of purchase needs consideration of what is meant to happen in the future and whether that future included conduct consisting of "making available."

46. Thus I conclude that the approach to the words "making available" indicated by that judgement is, unless a special meaning must be attributed to them for VAT purposes, relevant to their meaning in section 114. But Arden LJ treated them as if they were part of an ordinary English expression, and to my mind the meaning she attached to that expression is as relevant in the context of section 114. I therefore accept that a physical or a legal restraint might mean that a car is not made available.

47. Both physical and legal restraints may vary in their nature and intensity. And the Court of Appeal did not say that such restraints would always preclude a car being made available but that they might do so. The more a restriction impinges on the user's ability freely to use the car, the more likely that it can be said that the vehicle has not been made available to him.

48. A car without fuel is subject to a physical restriction on its use but a person may use it by remedying the deficiency. Such a car, if free from other physical shackles, is not prevented from being available by reason of the lack of fuel, and would have been "made" available when consent to use had been given. A contractual restriction on using a car "unless notice of use given" (rather than requiring consent for use) does not, by reason of the requirement to give notice, in my view prevent the car from being available before notice is given, and as a matter of ordinary, common sense, English usage I would say that in such cases the car had been "made available" from the time when the user was told she might use the car if she gave notice, not from the time when notice was given. A statutory provision which made illegal the driving of a car without an effective silencer might prevent an ordinary car from being made available for use, but one which prohibited use unless the driver was wearing a helmet might not.

49. There was no physical restraint on Mr Norton's use of the cars but there are two candidates for a legal restraint in Mr Norton's case: (i) the first is the illegality of use on a public road without vehicle excise duty or the requirement in the company handbook that a car should not be so used (the SORN constraint), and (ii) the second is the provision in the company's handbook dealing with permission.

50. (i) *The SORN.* To my mind the restriction upon use arising from the SORN, whether it arises by virtue of a statute or the terms of the user's agreement with the company, does not prevent the car being available because it is relatively easily remedied: it does not seriously incommode the ability to use the car in an ordinary way; and if consent is given to use subject to the lifting of the SORN by the payment of vehicle excise duty, the car is made available when consent to use subject to paying the duty is given. The restriction on the use of a car while the SORN remains in place is not enough, where the potential or actual user of the car can easily remove the restriction, for one to be able to say that the car had not been made available for use by him or her before the restriction was removed.

51. *(ii) The need for Management permission.* If the passage in the handbook applied to make use unlawful without Management consent, it would have been a legal restriction on use. But it would cause the cars not to be made available only if it was what Arden LJ called an "effective restraint". If this provision applied to Mr Norton's use of the cars I do not believe that it was an effective constraint. I think it highly likely that Mrs Norton agreed or would agree to or acquiesced in his decisions to use the cars so that any restraint imposed by this provision would not be effective.

52. I conclude that even in periods when they were not used, the cars were made available for use by Mr Norton.

53. Thus Condition A (and so also Condition B) was satisfied in each relevant year.

Condition C.

54. In relation to a year where Condition A is satisfied Condition C will be satisfied unless:

(1) the terms on which the car is made available prohibit private use, and

(2) it was not so used.

55. In relation to the issue of availability I have found that the provision in the handbook did not impose an effective constraint and therefore did not prevent the cars from being available to Mr Norton (whether for business or private use). The issue in Condition C is different: it is whether those terms imposed on Mr Norton a prohibition on private use.

56. Mr Gordon argues that, even if it can be said that a car was made available to Mr Norton, the terms in the company handbook show that private use was prohibited. Thus in tax years in which there was no private use, no taxable benefit arises.

57. Mr Vallis argues that this section of the company's handbook has nothing to say about private use: it is concerned, he says, with with matters which take place "at work…in the course of [a company employee's] duties with the company". Further he says that the nature of the clause in the handbook is one which provides for the terms of use rather than prohibiting use: it provides that "any vehicle used" must be taxed.

58. Mr Gordon says that Vinelot J in *Gilbert v Hemsley* 1981 55TC 419 at para 65 accepted that a prohibition had to be an express and legally enforceable ban on private use such that private use would be a breach of those terms, but he held that a statement to an employee that he was "not expected" to use the car for private purposes was capable of meaning "you are expected not to use the car for private purposes", and, in turn, those words were a polite way of saying "you are not to use" the car. Mr Gordon says that the words of the handbook are stronger than "expected".

59. There are two limbs of the quoted clause in the handbook which might provide a prohibition: the first is the restriction on use without permission, the second is the requirement that any vehicle which is used should be taxed, MOT'd and insured.

60. *First*, the need for permission. I accept that the words of the handbook are under the heading 'driving at work' but it seems to me that no employee reading them would have thought that the company permitted free personal use of its cars. The conditions attaching to personal use would surely be understood by virtue of this passage as being stricter than those applicable to business use. Even if the words "you may not use a company vehicle without permission of Management" must be construed, because of the heading under which they come, as referring to only use at work, it could not have been understood that no prohibition on private use of company vehicles was intended. Either such a prohibition was within the meaning of those words, and thus an express prohibition, or it was such an obvious corollary of their presence that it could properly be called a prohibition.

61. I therefore conclude that as between an employee and the company the terms on which any car was made available prohibited private use unless the express permission of Management was given.

62. Did such prohibition extend to use by a director? Or is the need for "permission from Management" nullified by the fact that the director was part of Management?

63. I have come with some hesitation, to the conclusion that the promulgation of the passage in the handbook did impose a duty on a director not to use the property of the

company for private purposes without permission from the board (or another director), and that thus that there was a prohibition on the use of any company car for private purposes and that prohibition would apply to the use of such a car by Mr Norton unless such permission were given either generally or for a specific occasion.

64. I come to this conclusion in part because the later reference in the passage in the handbook to "employees and officers of the company" indicates that the paragraph is intended to refer to directors as well as employees, and in part because I read the clause in the context of a director's fiduciary duties to the company.

65. (During the hearing I became concerned that a conclusion that the Maserati and the GT40 had been made available to Mr Norton would also mean that the other 40 or so cars on the forecourt had been made available to him and unless the conditions in section 118 were satisfied he would be liable to what in the circumstances would be an unfair and anomalous tax charge. I am comforted in relation to my conclusion in the antepenultimate paragraph that such a charge would not arise unless in fact Mr Norton did use the cars for private use.)

66. But I have found that the Maserati was used for private purposes for many years. I believe it must have been so used with the knowledge and consent of Mrs Norton. That consent, which must have been given in a general form at an early stage, meant that all later availability was not on terms which prohibited personal use.

67. I have also found that it was likely that Mr Norton's use of the GT40 from 2013/14 to 2016/17 encompassed private use as well as business use, and again I think it likely that Mrs Norton consented to, or acquiesced in such use. As a result in those years private use was not prohibited.

68. In relation to 2010/11 to 2012/13 I concluded that there was no private use of the GT40. Thus there was unlikely to have been consent to such use. Therefore there was a prohibition on private use in those years.

69. *Second*, in relation to the requirement that an officer of the company must ensure that any vehicle was taxed, I think that Mr Vallis is right. This is not a prohibition on use but a requirement of use. Use of a car without tax is not a breach of a prohibition on use but a breach of the obligation to ensure the car is taxed when it was being used.

70. As a result I find that Condition C is satisfied for all years in relation to the Maserati and in relation to the GT40 for 2013/14 to 2016/17.

Section 143.

71. The reduction in the charge provided for by section 1443 applies where Conditions A, B and C are satisfied but there is a period of unavailability. My conclusions in relation to the availability of the cars in years when they were not used apply also in relation to the years in which they were used, and mean that there was no period when the cars were not available to Mr Norton. As a result section 143 has no application.

Conclusion: Car benefit

72. The result is that the relevant benefits in kind arise in relation to the Maserati for all relevant tax years and for the GT40 for 2013/14 to 2016/17.

B Procedural issues.

73. These affect Mr Norton only.

74. The issues arise against the background of the regime for assessment in TMA. In outline that regime operates as follows.

75. Section 8 Taxes Management Act 1970 ("TMA") permits an officer of HMRC to require a taxpayer to make a tax return within a specified time. Where a taxpayer submits a return a self-assessment will be made by him as part of that return or by HMRC on his behalf. Section 9A TMA permits HMRC to open an "enquiry" into a return if they do so within 12 months of receiving the return or, if the return is late, a little longer. The period in which they may open an enquiry is usually called the "enquiry window". Once an enquiry is underway HMRC may seek information and documents from the taxpayer. When the enquiry is finished HMRC have to give a "closure notice" and make amendments to the self-assessment to reflect the conclusions of their enquiry.

76. Section 29 provides a separate route to assessment by permitting the making of a "discovery assessment".

77. Different issues arise (i) in relation to the section 29 "discovery" assessments and (ii) in relation to the closure notice(s).

(i) The Discovery assessments

78. Section 29(1) provides:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-
>
> > (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
> >
> > (b) that an assessment to tax is or has become insufficient, or
> >
> > (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax"

79. In this decision I use the term "insufficiency" for the matters which must be discovered to trigger the ability to make an assessment under this section.

80. HMRC made "discovery" assessments upon Mr Norton under this section for 2012/13, 2013/14, 2014/15 and 2016/17 but not 2015/16 (as to which see later). Mr Norton contends that these assessments were invalid for three reasons:

> (1) he says that the assessments were made insufficiently promptly after the inspector discovered the insufficiency of tax: they were “stale”;
>
> (2) he says that in relation to 2016/17 the requirements of section 29(5) TMA were not met; and
>
> (3) he says that the protection offered by section 29 (2) is available in relation to each assessment.
>
> .

(1) Staleness.

(a) Findings of Fact

81. The assessments fro 2012/13 to 2014/14 were made on 20 March 2017; that for 2016/17 was made on 30 November 2018.

82. On 22 March 2016 HMRC conducted an NIC and PAYE audit on the Company. At this meeting HMRC's officer, Mr Earl, asked about the P11D returns for Mr Norton which declared benefits in respect of the Maserati and the GT40; Mrs Norton explained that the cars were insured for a full annual period and provided evidence of the road tax and SORN declarations backing the periods of use which formed the basis of the P11D returns. Mr Earl said he thought that the benefits in kind legislation might operate by reference to availability rather than use. He said he would research the matter.

83. On 30 March 2016 Mr Earl wrote to Mrs Norton. He said that, having reviewed the legislation and guidance, the lack of road tax was not "specifically stated as not [I do not think that he intended this “not”.] being a reason for considering a vehicle to be available". He concluded that the two cars were available throughout each year and the benefit should be based on that availability. He sought the company's comments.

84. On 6 May 2016 the company's accountants, J & G, replied citing the policy in the company manual and the practice of making a SORN when the cars were not used.

85. On 8 June 2016 Mr Earl sent the accountants his computation of the NI liabilities which arose from the two cars in the light of his opinion that the cars were available to Mr Norton for the whole of each relevant tax year. (I note that in the same letter he addresses the benefit of certain other vehicles provided to Mrs Norton and says that he will pass the matter on to his colleague Mrs Stent for income tax enquiries. No such statement was made in relation to Mr Norton.).

86. On 26 June 2016 J & G wrote to Mr Earl asking him to reconsider the issue of availability in the light of their belief that when SORNed the cars were not available for Mr Norton's use.

87. On 24 August 2016 Mr Earl phoned J & G and said that he would need to clarify that HMRC's interpretation of the car benefit legislation matched his own.

88. Notes of conversations on 3 and 12 October 2016 record that Mr Earl sought a copy of the company handbook and that a meeting was arranged to speed things up.

89. One 27 October 2016 Mr Earl telephone J & G to chase for a date for the meeting. He said he had decided to contact a PAYE specialist for advice.

90. On 2 December 2016 Mr Earl chased Mr Ewing to settle a meeting date. Mr Earl added that Mrs Stent would be opening an enquiry into Mr Norton's returns in the near future.

91. On 7 December 2016 there were discussions with a view to settlement. Mr Earl said that he could not guarantee that Mrs Stent would not issue protective assessments in the meantime.

92. On 18 January 2017 there was a telephone conversation between Mr Earl and Mr Dewing about settlement of the company's NIC liabilities and the personal tax in liabilities and Mr Norton.

93. In a further telephone conversation about settlement on 24 January 2017 Mr Earl said that Mrs Stent would be opening an enquiry the following week.

94. On 25 January 2017 Mrs Earl wrote to J&G including an updated schedule of the company's NI liability. In that letter he says that he regarded the settlement offer in relation to Mr Norton's income tax liabilities as inadequate and that if it was not increased HMRC would pursue formal discussions and assessments for the Maserati and the GT40.

95. On 7 February 2017 Mr Dewing sent a holding response to Mr Earl.

96. On 21 March 2017 Mr Earl told Mr Dewing that Mrs Stent would be issuing protective assessments.

97. Over the next year there followed further discussions about the nature and applicability of Chapter 6, the applicable value of the cars and a settlement amount.

98. In Mrs Stent's witness statement it is said that she opened an enquiry into Mr Norton's 2015/16 tax return on 27 January 2017 following the information received from Mr Earl. On 20 March 2017 she wrote to Mr Norton saying that the discovery assessments had been issued but that as discussions were going on collection had been suspended. I accept those actions were done on those dates.

99. Mrs Stent's witness statement does not say when she was first informed by Mr Earl of his findings although it indicates that she knew of them by 27 January 2017. Mr Earl's correspondence with J & G first makes mention of Mrs Stent's enquiry into Mr Norton's return on 2 December 2016. I conclude that Mrs Stent was likely to have known of Mr Earl's views and of his calculations of the amounts of the benefits in kind by late November 2016.

(b) The parties' arguments.

100.Mr Gordon relies upon: (i) the decision of the Court of Appeal in *HMRC v Tooth* [2019] STC 1316 in which the Court of Appeal accepted the statement in *HMRC v Charlton* [2013]STC 866 that all that was required for a "discovery" was that it had newly appeared to an officer that there was an insufficiency in an assessment and (ii) the Upper Tribunal's statement in *Tooth* that newness does not relate to the conclusion reached by the officer but to the conclusion itself, and that if an officer has concluded that a discovery assessment should be issued, but for some reason assessment was not made within a reasonable period thereafter "it might, depending upon the circumstances, be the case that the conclusion would lose its essential newness by the time of the assessment".

101.Mr Gordon notes that in *Charlton* the Upper Tribunal found that an eight month delay was acceptable because it was for the good reason of waiting for a final determination of a point by the Supreme Court. He notes that in *Patullo* v HMRC [2016] S TC 2043, Lord Glennie accepted that "on any view" in the circumstances of that case a delay of 18 months would have made the discovery is stale.

102.Mr Gordon said that the discovery that Mr Norton's self assessments betrayed an insufficiency of assessed tax because the full benefit in kind had not been recognised was made at the latest on 30 March 2016 when Mr Earl came to the conclusion, having reviewed the legislation, that the reported P11D benefits in kind were insufficient; there was nothing fresh in the following 12 months before the assessment was made. He says that by the time Mrs Stent came on the scene the discovery had already gone stale.

103.Mr Vallis does not accept that there is any requirement implicit in section 29 that an assessment must be issued before a discovery goes stale, but he accepts that this tribunal is bound otherwise by the decision of the Court of Appeal in *Tooth*.

104.Mr Vallis says that the relevant discovery was that made by Mrs Stent between the winter of 2016 and the assessment on 20 March 2017; thus it could not be said that her discovery had gone stale. And, even if the discovery had been that of Mr Earl, the actions which he took between 30 March 2016 and 20 March 2017 were sufficient to preserve the quality of newness. He cites [91] in *Armstrong v Haire* [2020] UK FTT 0296 (TC) where the tribunal said:

> "essentially the concept of "staleness" in respect of a discovery is one which is intended to protect the taxpayer against inaction by HMRC - that is where a discovery is made and HMRC "sit on it and do nothing for a number of years" ... and that it would only be in the most exceptional circumstances that a discovery would become stale."

105.He also cites *Merano v HMRC* [2020] UK FTT at 194 where the tribunal declined to find that the discovery was stale because throughout the relevant period HMRC had liaised regularly with the taxpayer's agent, and was being told that the return would soon be filed. The FTT had held that newness would be lost only in exceptional circumstances and that that case did not come within the exceptional category.

(c) Discussion.

106. If the validity of the assessment is to be judged by reference to the discoveries of Mrs Stent, then I do not consider, in the circumstances of continuing negotiation, that her delay between late November 2016 and 20 March 2017 meant that the matter had gone stale.

107. In *Tooth* the Upper Tribunal at [79(6)] considered the position where the same discovery might be said to have been made by two officers: -

> "(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery."

108. I think that "first" in the last line should be "second".

109. It is therefore appropriate to consider whether Mr Earl made a discovery of an insufficiency of assessed tax in relation to Mr Norton and whether or when that discovery went cold.

110. Mr Earl's correspondence concerns principally the national insurance liability of the company, but through the gateway of section 114 et seq. It is plain that he comes to the conclusion that income tax had been underdeclared as well as national insurance contributions becasue he discusses a settlement involving both NIC from the company and additional income tax from Mr Norton. In late June 2016 he sent a computation of the NIC liability based on figures for the amount of benefit he argued arose under section 114. Those computations did not set out the additional income tax liability but left me in no doubt that Mr Earl had come to the view that there was an income tax insufficiency - a view he later communicated with his computations (as later adjusted) to Mrs Stent.

111. Thus there were some 9½ months between Mr Earl's newly coming to the conclusion that there was an insufficiency and the making of the assessments for 2012/13 to 2014/15 under section 29. Without more that would seem to me to be time for the discovery to become stale, but in that period he discussed the legislation, and the proper make up of the amounts, and settlement. Mr Earl did not sit on his hands and do nothing after June 2016; on the contrary he took steps to confirm his analysis in response to J & G's arguments, chased for replies and further information and pursued settlement negotiations. This was not a case with the taxpayer was prejudiced or could have been prejudiced by delay on the part of HMRC. His discovery did not go stale.

112. The assessment for 2016/17 was made on 20 November 2018. If Mr Norton's return was submitted on or about 31 January 2018 the there was a perid of about 9 ½ months between its delivery and the assessment. But before an officer could make a discovery that there was an insufficiency of tax assessed on that return, the return would have to find its way to an officer dealing with Mr Norton's or the Company's

affairs. There was not evidence before me as to when this happened, but I take notice of the fact that a great many returns are made on or close to the 31 January deadline, and that as a result it was unlikely that Mr Norton's return would have come to the attention of Mrs Stent or another such an officer for several months. In such circumstances it does not seem to me that the discovery of the insufficiency in that return went stale.

113. I conclude that the discoveries for the years of the discovery assessments were not allowed to go cold. I conclude that the making of the assessments was within the powers conferred by section 29(1).

(2) section 29(5).

114. Mr Gordon advances two arguments by reference to this provision:

(a) that the conditions required by s 29(5) to be satisfied were not satisfied, and

(2) that section 29 does not permit assessments to be made in an enquiry window.

(a) the requirements of section 29(5)

115. The power given to an inspector by section 29(1) to make an assessment is subject to subsections (2) and (3). Subsection (3) provides that where a taxpayer has delivered a return for the relevant tax year he shall not be assessed unless one of the two conditions and set in subsections (4) and (5) is satisfied. Subsection (4) applies if the insufficiency was brought about carelessly or negligently; and HMRC do not allege such in this case. Subsection (5) provides:

"(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given-

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if-

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim …

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above-

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes-

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; "

116.In relation to 2012/13, 2013/14 and 2014/15 Mr Gordon accepted that the condition in (5) was satisfied, but he argued that it was not satisfied in relation to 2016/17.

117.A hypothetical officer is, by (6) and (7), treated as having before her all documents relating to the enquiry into a return and the previous two years' returns. Mr Gordon says that the matters which were revealed to HMRC in the 2015/16 enquiry were such that at the time when an officer ceased to be able to enquire into the 2016/17 return she could reasonably have been expected to have been aware of the insufficiency of tax in the 2016/17 self-assessment.

118.There was no direct evidence as to when Mr Norton's 2016/17 return was submitted, but given that he had J&G to help him I think it is likely was submitted by 31 January 2018. That means that the period in which an enquiry into that return could have been made expired on 31 January 2019.

119.No enquiry was opened into the 2016/17 return. Thus the question is what information is the hypothetical officer to be treated as having at 31 January 2019 when the enquiry window closed. The notice of assessment for 2016/17 is dated 20 November 2018. That was over two months before the enquiry window closed. But the test in section 29(5) is to be applied at the date the enquiry window closed, not the date of the assessment.

120.Mrs Stent opened an enquiry into Mr Norton's 2015/16 tax return on 27 January 2017. Her letter noted that Mr Norton was in discussion with Mr Earl and she did not require further information at that time. Earlier I have concluded that she knew of Mr Earl's views by late November 2016. In a letter of 20 March 2017 Mrs Stent says that the information obtained by Mr Earl suggests that the car benefits for 2012/13 up to 2015/16 were underreported. She says that she had raised assessments for 2012/13 up to 2014/15 and amended the return for 2015/16.

121.The computations of the NIC liability of the company in relation to the cars which Mr Earl sent to J&G on 8 June 2017 covered the years 2010/11 to 2014/15; those sent on 25 January 2017 cover in addition 2015/16; those sent on 14 May 2018 (and I believe on 5 November 2018) cover 2016/17 on as well. Mr Earl's section 8 decision notices cover the period up to 2017 and are dated 1 June 2018.

122.I conclude that at the time the enquiry window closed it is likely that Mr Earl and Mrs Stent knew of the insufficiency in Mr Norton's 2016/17 return. But the test in section 29(5) relates, not to actual knowledge, but to what a hypothetical officer could reasonably be expected to know on the basis of the prescribed sources.

123.Mr Vallis says that section 29(6)(c) does not avail Mr Norton: he says that the information furnished to Mr Earl was not furnished "for the purposes of enquiries into" Mr Norton's return, but for the purpose of Mr Earl's investigation of the company's national insurance contributions and possibly PAYE liabilities.

124.It seems to me that the limitation in section 29(6)(c) to information or documents "furnished by the taxpayer to the officer" means that information supplied by Mr Earl to Mrs Stent does not fall within the scope of the matters of which the hypothetical officer could reasonably have been expected to have been aware.

125.Mr Gordon says that J&G's letter to Mrs Stent of 30 March 2017 refers to the adjustments she says she made to the 2015/16 assessment and the discovery assessments made for the previous years: it therefore was information sent to HMRC for the purposes of the 2015/16 enquiry That letter is expressly a reply to her letter of 20 March 2017; the existence of that letter may thus be reasonably inferred within s29(6)(d)(i), and that letter refers to information received from Mr Earl and so she must be taken to have been aware of all that Mr Earl told her. That would include his computation of the taxable benefits in kind, and that in turn should, when taken together with Mr Norton's return, have made a hypothetical officer aware of the insufficiency.

126.It seems to me that this argument founders on the words of s29(6)(c). Those words limit the information to be treated as available to the officer to information in (and with) the return and information "produced or furnished by the taxpayer to the officer" for the purposes of an enquiry (the lack of a comma after "produced" indicating that production by the taxpayer is indicated). But I do not think that J&G's letter of 30 March 2017 can be said to have been furnished for the purpose of Mrs Stent's enquiry: it simply refers to her letter, indicates a wish to appeal and acknowledges suspension of collection. That to my mind is not furnishing information for the purpose of the enquiry in to 2015/16. As a result s29(6)(d)(i) has nothing to

bite on which could bring Mr Earl's knowledge into the hypothetical oficer's deemed outlook.

127.Mr Gordon says that if the 2015/16 enquiry was not closed until 29 April 2019 (as HMRC assert and Mr Norton contests – see below), then all the information provided for the purposes of the 2015/16 enquiry between 27 January 2017 and the earlier of (i) 29 April 2019, the closure date (after which no further information would have been supplied "for the purposes of " the 2015/16 enquiry) on this hypothesis, and (ii) the date the 2016/17 enquiry window closed (s 29(5)(a)) was available to the hypothetical officer. Mr Norton's 2016/17 return was, as I have found, submitted on or before 31 January 2019. That means that the information provided for the purpose of the enquiry into 2015/16 fell within s29(6)(c) up to 29 January 2019 at the latest.

128.I have however no evidence of further such information having been provided.

129.I conclude that section 29(5) did not prevent the 2016/17 assessment.

(b) Can a section 29 assessment be made in an enquiry window?

130.In what follows I use "enquiry period" to mean the period between the delivery of a tax return and either (i) the closing of an enquiry window if no enquiry was opened, or (ii) if an enquiry was opened, the closure of the enquiry.

131.As I have noted above, the assessment form 2016/17 was made on 20 November 2018 before the enquiry window closed on 31 January 2019 without an enquiry having been opened.

132.Mr Gordon notes that section subsections (5) to (7) all relate to matters after a return has been made and that section 29(5) requires consideration of what information was available to the officer at a time when the enquiry period closed. That provision he says makes no sense if a section 29 assessment can be made during an enquiry or an enquiry window. The provision must be interpreted as proscribing a discovery assessment before the close of the enquiry window or of the enquiry. The object of the provisions in TMA was to provide a separate assessment mechanics for(i) matters arising in an enquiry period and (ii) those arising afterwards.

133.In this context he relies upon *Lee v HMRC* [2008] SPC 715 where the Special Commissioner said, at paragraphs 7 and 8:

> "Section 28A applies only to valid enquiries under section 9A. It does not apply to other forms of investigation. In particular, it does not apply to investigations related to the potential use of section 29 TMA (assessment where loss of tax discovered). It is worth noting that section 29 makes provision to avoid an overlap between investigations linked with that section and section 9A enquiries. This emphasises that the two are separate. Section 29(3) to (7) limits the powers of an Officer under that section where the taxpayer has delivered a return under section 8. One limit is that the section 29 powers can only be used after either the "window" under section 9A has passed in respect of that tax return or the Officer has closed an enquiry into that tax return: section 29(5).

134.Mr Vallis says that section 29 does not proscribe the making of a discovery assessment during an enquiry period. He draws my attention to *Hankinson v HMRC* [2011] EWCA Civ 1566 at [27 and 28] where Lewison LJ said in relation to section 29:

> 27. The Upper Tribunal put the point as follows (§ 23):
>
> > "The phrase "he shall not be assessed", as it is used in s 29, means "he shall not be validly assessed". Accordingly, if one or both of the conditions is fulfilled, the assessment is valid; if neither of them is fulfilled, the assessment is invalid. The subjective opinions of the assessing officer or the Board about fulfilment of the conditions have no part to play in the operation of s 29. We consider this to be the only conclusion consistent with sub-s (8): the subject matter of an appeal is whether or not either of the conditions is fulfilled, without any form of qualification. If neither is fulfilled, the assessment should not have been made and will be invalid. And that is so whether the officer had formed the view that the conditions were fulfilled (and turns out to be wrong) or whether he has not considered them at all. The protection for the taxpayer in either case is his right of appeal under sub-s (8)."
>
> 28. I agree . I agree also with the FTT's alternative way of putting the point (§ 97):
>
> > "We think that the words "the taxpayer shall not be assessed under that sub-section" in s 29(2) and the corresponding words "he shall not be assessed under sub-section (1) above" in s 29(3) do not mean that the officer is precluded from making a discovery assessment in the first instance; the words provide a means of testing whether the safeguards set out in s 29(2) to (5) preclude the assessment from taking effect in the taxpayer's particular circumstances…"

135.*Hankinson* concerned the question of whether a discovery assessment was valid only if the inspector had considered the operation of subsections (4) and (5). Although this judgement expressly described the operation of the enquiry system, there was no consideration of the argument Mr Gordon advances. It cannot, I think, be said that the passage Mr Vallis quotes is determinative of the issue.

136.However, I agree with Mr Vallis that there is nothing express in the words of section 29 which indicate Mr Gordon's conclusion.

137.I accept that usually one would expect HMRC to avail itself of the power to open an enquiry rather than making an assessment. The condition in section 29(5) gives rise to some difficulty if an assessment is made during an enquiry window because the condition relates to the knowledge of the inspector when that window closes, which would in such a case be determined at a time after the issue of the assessment and between the time of issue of the assessment and the closure of the window new

information may be gleaned from the prescribed sources which could at that time of the closure of the window make the inspector aware of the deficiency. And if an enquiry is opened the period for the receipt of additional information would be extended still further. Thus if a discovery assessment is made during the enquiry window or during an enquiry the consideration of the legality of the assessment must be postponed until the window or enquiry has closed.

138.That would permit the retrospective voidance of an assessment made during the window if a taxpayer notifies the inspector in writing with the information which would enable him to come to the conclusion which gave rise to the assessment (see s 29(6)(d)(ii). That may present HMRC with procedural problems and may make it more difficult for a tribunal to deal with and in an appeal against a discovery assessment before the end of the relevant window, but the difficulty visited upon HMRC will be one of their own making because they could have opened an enquiry or given a partial closure notice during an enquiry, and the tribunal will in my view be able to manage an appeal to take account of the timing issues. It does not seem to me that the difficulties created are such that it is necessary to construe section 29 as prohibiting assessment within the relevant window or as imposing conditions in addition to those described by Lewison J.

139.I conclude (in respectful disagreement with the Special Commissioner in *Lee*) that the fact that the assessment was made during the enquiry window at a time when an enquiry could have been opened does not invalidate that assessment.

(3) section 29 (2) generally prevailing practice.

140.A taxpayer is not to be assessed under section 29 if his return was made on the (mistaken) basis of, or (mistakenly) in accordance with, practice generally prevailing at the time the return was made.

141.I have recorded a letter whichi was sent by the company's advisers to the Inland Revenue in 2002 asking for guidance as to how to work out the benefit of the Maserati for tax purposes. The Inland Revenue replied:

> "…You state that a vehicle is used occasionally for private journeys by one of the directors. This would suggest that the vehicle, or one of several vehicles, must be available for the director's private use. As I am sure you are well aware, this in itself is all that is required for a car benefit to arise under section 157 ICTA 1988.
>
> "…The taxable benefit would therefore be calculated by reference to the availability of the vehicle in question. Unless there are any specific times when the director does not have the vehicle available for his private use then the benefit will be based on a full year's availability. Otherwise the benefit charge may be arrived at on a pro-rata basis as appropriate."

142.On the basis of this reply Mr Gordon says that the company declared (and Mr Norton returned) benefits calculated only by reference to the periods in Mr Norton had actually used the cars. (It seems to me that this was, at best, a very optimistic view of this letter.)

143. In 2007 HMRC made a PAYE inspection and no issues were raised in relation to the reporting of the benefit of the Maserati.

144. In 2001 an article in *Taxation* magazine reported an appeal to the General Commissioners against an Inland Revenue decision that a car was available to a director. The director, after suffering a heart attack, had given instructions to amend the car insurance to third party, fire and theft only, and had surrendered his driving licence. The taxpayer's argument was that in these actions he had made the car unavailable. The General Commissioners allowed the appeal. There was no further appeal by the Inland Revenue.

145. Mr Gordon notes that the Revenue did not appeal the decision and he says that that suggested that this was because they had changed their practice on the meaning of "made available" in (the predecessor of) section 114, so that treating a car as not being available when vehicle excise duty had not been paid was consistent with that policy (and so was like driving without a licence).

146. When Mr Earl wrote to the company on 8 June 2016 he said:

> "It is my contention from the records seen that both vehicles have valid MOT certificates and were insured for Mr Norton's use at all times, and that whenever Mr Norton has chosen to use either vehicle, he has obtained the appropriate road tax to enable this use, presumably by the online method which is more or less instantaneous.
>
> For this reason, it is my opinion that both vehicles have been and remain available for Mr Norton's private use at all times."

147. Mr Gordon says that the clear implication of this passage is that Mr Earl recognised that if use was illegal (because of his example lack of of insurance and MOT) the car was not available, and this reflected the generally prevailing practice at that time.

148. Taking these matters together Mr Gordon argues that they show that at the time of Mr Norton's returns there was a generally prevailing practice that if it was illegal to use a car, the car would not be treated as available and so as not made available.

149. In *HMRC v Household Estate Agents Ltd* [2008] STC 2045, Henderson J considered the effect of words similar to those in section 29(2) in paragraph 45 schedule 18 FA 1998. He held that the burden of proof lay on the taxpayer, and in relation to the meaning of "practice generally prevailing" he said this at [58]:

> "Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike : compare the decision of the Special Commissioners (Dr A N Brice and Mr John Walters QC) in Rafferty v HMRC [2005] STC (SCD) 484 at paragraph 114.)"

150. In *Rafferty,* where the applicability if section 29(2) had been at issue, the Commissioners had said at [114]:

> "We construe section 29(2) as a protection to the taxpayer from an assessment where the Revenue have changed their mind on a doubtful point in a sense adverse to the taxpayer. It would in our judgment go too far to construe it, as Mr Goldberg urged us to do, as a bar on the Revenue from raising a discovery assessment in particular circumstances where they had not publicly adopted a practice. We agree that a practice generally prevailing has to be a practice, or agreement, or acceptance over a long period whereby the Revenue agreed or accepted a certain treatment of sums in particular circumstances."

151. In *Boyer Alan Investment Services Ltd v HMRC* [2012] UK FTT 558, a case relating to section 29(2), Judge Berner gave further consideration to the elements identified by Henderson J in *Household Estate Agents.* He said:

> (1) to be ascertainable required that the practice was not inchoate and that it be sufficiently precise and devoid of uncertainty in its application [34];
>
> (2) although a published statement of practice was the paradigm of an ascertainable practice, it was possible for a practice to be ascertainable if settled, defined and agreed between, or communicated between, taxpayers or otherwise sufficiently identified to the outside world [35];
>
> (3) a published practice was likely to be capable of being regarded as having become generally prevailing over a shorter period than one merely established in practice [36];
>
> (4) an internal practice of HMRC would not be generally prevailing until it could be identified with reasonable clarity and precision by taxpayers [37];
>
> (5) that quality of clarity and precision must be present in the understanding of HMRC and taxpayers alike [38];
>
> (6) in order for the practice to be "generally" prevailing it must have been adopted by HMRC and generally, but not universally, by the taxpayer community [38];
>
> (7) the practice would not be settled if it was not applied in a consistent manner.

152. I do not consider that the difference in context between Sch 18 FA98 and section 29(2) TMA indicates that a different meaning should be given to generally accepted practice in the two provisions– and Henderson J's reference to *Rafferty* indicates that he too thought they had the same import. The paraphrase in *Rafferty* and the more detailed exposition in *Boyer* seem to me to reflect the requirements to be satisfied before this provision can prevent an assessment. And, for the reasons given by Henderson J, I find that the burden of proof in showing that the conditions for the relief are met falls on he who asserts their satisfaction, namely the taxpayer.

153. In this case I do not think that the material produced by the Appellants meets the test:

> (1) the *Taxation* article did not clearly evidence a precisely articulated practice of the Revenue: it was uncertain why no appeal had been made, it

was not clear that there had been acceptance of a practice under which any legal impediment to use precluded availability;

(2) the 2001 reply from the Revenue to the accountant's query did not in terms accept that availability was precluded by unlawfulness of use; indeed the terms of the reply left open the question of when the director would have the vehicle available;

(3) the fact that no problem had been identified in the 2007 PAYE audit would only be evidence of some form of practice if there were evidence that the use of the cars had been considered. There was not such evidence. Even if there had been such evidence it would not indicate that a practice was generally applied. And there was no evidence that the practice was applied by taxpayers more generally; and

(4) Mr Earl's letter of 8 June 2016 says expressly that he considers that lack of vehicle excise duty does not preclude availability. It is not possible to reconcile that with any form of acknowledgement that there was a practice by virtue of which illegality of road use always precluded availability or that a SORN would do so.

I conclude that section 29(2) does not avail Mr Norton

(ii) the 2015/16 closure notice.

154. In relation to 2015/16 Mr Gordon contends that there was no valid enquiry and no legitimate closure notice. Any purported closure notice should be set aside. He so contends for the following reasons:

(1) a closure notice may be issued only if an enquiry has been opened (section 28A TMA);

(2) an enquiry may be opened only if the taxpayer has made a return "under section 8 TMA" (section 9A TMA);

(3) a return is made under section 8 TMA only if the taxpayer is required to make one "by notice given to him by an officer of the Board", and

(4) no such notice was shown by HMRC to have been given.

155. This argument is complicated by the later enactment of section 87 Finance Act 2019 and section 103 Finance Act 2020, both of which have some retrospective effect. I shall start with the position that would have obtained if these two provisions had not been enacted.

156. It *Patel & Patel v HMRC* the FTT held that a return sent to HMRC otherwise than in response to section 8 notice (a "voluntary return") did not engage the provisions enabling enquiries and penalties because those provisions were expressly dependent upon a "return made under section 8".

157. Section 8 refers to a notice given to the taxpayer "by an officer of the Board". Following a number of decisions of the FTT which held that a notice under section 8 had to be given by a flesh and blood officer (so that where it was not shown it was so

given the purported notice did not have effect), the Upper Tribunal held in *HMRC v Rogers* [2020] STC 220 that:

> "Properly construed, s 8 TMA did not impose a requirement that an officer of the Board was identified in the notice as the giver of the notice. Rather, it imposed a substantive requirement that the *giving of a notice had to have been under the authority of an officer of HMR*C. The requirement was that whoever required the notice to be given, whether identified or not, had the status of an HMRC officer. The statutory scheme did not justify the approach that a s 8 notice had to be given by an identified 'flesh and blood' officer. [my italics]

158. In proceedings in which HMRC's position depends upon a section 8 notice having been so given, the burden will be on HMRC to show that such is the case. In relation to the penalty provisions the Upper Tribunal said in *Rogers*:

> **[50]** It follows that, if HMRC fail to provide any evidence at all to the effect that a s 8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.
>
> **[51]** Where HMRC have given some evidence that a s 8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s 8 notice. Evidence to the effect that HMRC's systems record a s 8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s 8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Edwards v Revenue and Customs Comrs* [2019] UKUT 131 (TCC), [2019] STC 1620 if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s 8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s 8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so.

159. That was in relation to whether or not a section 8 notice had been served, but clearly the same conclusions apply to the issue of whether the notice was in fact given by or under the authority of an officer. In this appeal on HMRC provided a copy of a print out bearing HMRC's logo which contained inter-alia the following:

> "tax year: 2015/16 ...

return issued date: 06/04/2016;

... date of receipt: 30/12/2006 ..."

but contained no record of the involvement of any HMRC officer.

160. Although he casts some doubt on the accuracy of the document Mr Gordon does not say that no notice was received by Mr Norton, but he says that HMRC have not shown that the notice was given "under the authority of an officer of HMRC". This he says HMRC could surely have done by producing a witness statements from an officer who said, for example, "I instructed someone to program the computer so that notices were sent to people like Mr Norton". Without such evidence how was the tribunal to find that the programming was not done on the whim of a contractor who was not an officer, or that the dispatch of the notice was intended, rather than being the result of a software malfunction or mistake made by such a contractor?

161. Mr Vallis argued that the record of the notice must mean that someone in HMRC authorised its issue: HMRC would not allow, he said, the system to record what had not been authorised. He accepted that the record of the date of issue was a bit dodgy since "06/04/" was shown as the date the return was sent for almost all such records, when it was the case that returns were in fact sent out in batches on dates after 6 April, but that did not prevent it from being evidence of authorisation by an officer. He referred me to *Paul* at [81] where the judge addressed the issue of whether there was evidence to show that notices had been issued by HMRC rather than someone else (or someone else's computer) and said:

> "This is a difficult point but on balance I reject this argument. I am satisfied on the evidence that the notices were issued "by HMRC". Ms Wilton exhibited to her supplemental witness statement the microfiche records showing the notices had been issued to the appellant. *Rogers & Shaw* was concerned with wider issues which no longer apply following the enactment of section 103. Following the enactment of section 103 it would be excessive, as inferred by the appellant, that HMRC should each time a section 8 notice is challenged be required to produce evidence as to the ownership of the computer generating section 8 notices. In my view the notices were generated "by HMRC" as required."

162. That was in the context of section 103, to which we shall return later, but Mr Vallis asks me to apply the same approach in this appeal. HMRC should be trusted he says.

163. I have sympathy with the reasons set out in that decision, but I do not think that it is a fair approach If a relevant factual assertion is not challenged then, in general ,it may not be unfair to make a finding of a necessary fact on the basis of very weak evidence, but where the matter is challenged it is not excessive to require persuasive evidence before reaching a conclusion. Fairness between a taxpayer and HMRC is not achieved by saying that one party does not have to provide convincing evidence prove that something is likely to be true when the onus is on them to do so, when the other party would have to do that in relation to something else. The fact that in other cases the same proof would be required is, as between the parties to an appeal, not relevant.

164. In this case the notice of appeal said that so far as any closure notice was concerned HMRC were put to strict proof to demonstrate that there was a "valid s9A notice in relation to a return made under TMA s8". It seems to me that that language puts in to question the validity of any such notice as well as its service. In my view it creates an onus on HMRC to show some evidence which permits the conclusion that it is likely that the notice was issued under the authority of an officer.

165.I agree with Mr Gordon. The document produced by HMRC did not dispel the doubts he cast on the matter required to be proved. I find that it was not shown that the notice was issued under the authority of an officer of HMRC.

166.As a result, ignoring at this stage section 87 and 103, I find that no section 8 notice was shown to be given, no enquiry could therefore have been opened, and any purported closure notice was of no effect.

Section 103.

167.Mr Vallis seeks to avoid this conclusion by relying on section 103 FA 2020. This provides:

> **103 HMRC: exercise of officer functions**
> (1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).
>
> (2) Accordingly, it follows that HMRC may (among other things)—
> (a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return);
> …
> (3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or, where the function is conferred on an officer of a particular kind, an officer of that kind).
>
> (4) In this section—
> "HMRC" means Her Majesty's Revenue and Customs;
> references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment.
>
> (5) This section is treated as always having been in force.
>
> (6) [contains transitional provision not relevant to this appeal]"

168.Mr Vallis says that as a result of the retrospective nature of this provision there is no requirement in relation to the section 8 notice for 2015/60 that it should have been given by an individual officer; the only requirement is that HMRC, as opposed to some other authority, gave it. That could involve the use of a computer. Given that the

printout summary records the issue of the notice it is clear that the notice was given by HMRC.

169.Mr Gordon says "HMRC" is not an amorphous concept but is defined by virtue of section 5 and Schedule 1 Interpretation Act1978 by virtue of section 4 Revenue and Customs Act 2005. Those provisions are as follows:

> **Commissioners for Revenue and Customs Act 2005**
>
> 4 "Her Majesty's Revenue and Customs"
>
> (1) The Commissioners and the officers of Revenue and Customs may together be referred
> to as Her Majesty's Revenue and Customs.
>
> (2) The Welsh title of the Commissioners and the officers of Revenue and Customs
> together shall be Cyllid a Thollau Ei Mawrhydi.
>
> (3) In Schedule 1 to the Interpretation Act 1978 (defined expressions) at the appropriate
> place insert—
>
> ""Her Majesty's Revenue and Customs" has the meaning given by section 4 of the Commissioners for Revenue and Customs Act 2005."

> **Interpretation Act 1978**
>
> "5. Definitions
>
> In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that schedule."

170.Mr Gordon says that, in short "HMRC" means the Commissioners and officers of HMRC: human resources. The process of the issue of a section 8 notice must remain the subject of human supervision.

171.Mr Vallis argues that a contrary intention appears in section 103, and that what is meant by "HMRC" in section 103 is HMRC as a body corporate and that may take the place of an individual officer in any relevant provision.

172.In *Wyatt Paul v HMRC* TC/2018/2850 the tribunal said:

> 73. It is common ground that the requirement in *Rogers & Shaw* that "whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer" (*Rogers & Shaw* at [32]) is overridden by section 103 Finance Act 2020 in that section 103 provides that any function to be carried out by an officer "may be done by HMRC (whether by means involving the use of a computer or otherwise)".

> 74. The appellant seeks to limit the application of section 103 by reading into the requirement that the function "may be done by HMRC" as still requiring human intervention, that is to say individuals in HMRC, not necessarily officers. I disagree. The natural meaning of the wording in section 103 is to allow something to be done by HMRC as a body, including automating processes that previously required something to be done by an officer of HMRC, being in the current appeal the issue of section 8 notices. Provided that process is carried out "by HMRC" (which, without exploring the limits of artificial intelligence, must necessarily involve human intervention to programme the computer to issue the notices on the occurrence of certain events) it is valid, even without the identifiable authority of an identifiable human.

173. It seems to me that the words in parentheses in this passage are, for the reasons which follow, its logical destruction.

174. I prefer Mr Gordon's view of the effect of section 103 because I see no contrary intention in that section. But even if Mr Vallis is right, the question remains: what evidence is there that the notice was issued by or under the authority of HMRC? Mr Vallis exhibits the print out, but that does not answer the question: under what authority was the action recorded in it taken? It records merely that an action was taken. Even the issue of whether the document is an HMRC record is unclear – as any recipient of spoof emails bearing HMRC's logo and offering tax refunds will know. Bodies corporate act through people. HMRC as a body corporate can only do something if some one or more individuals puts it in chain. The question which requires evidence is whether a person or persons of HMRC authorised the system which created the record and the issue of the notice apparently recorded in it.

175. The evidence before me - the return summary - does not in my view provide evidence of such supervisory authority. It fails to meet the concerns expressed above. Accordingly, I do not consider that section 103 avails Mr Vallis.

Section 87 FA 2019 (section 12D TMA 1970).

176. This introduced a new section, 12D, into TMA. Its object was to legitimise HMRC's practice of treating voluntary returns as having been made pursuant to a notice under section 8. Section 12D was introduced with retrospective effect but is subject to transitional provisions in subsection (4) to which I shall return later.

177. Section 12D provides that:

"(1) This section applies where-

> (*a*) a person delivers a purported return (the relevant return) under section 8, 8A or 12AA (the relevant section) for a year of assessment or other period (the relevant period),

(*b*) no notice under the relevant section has been given to the person in respect of the relevant period, and

(*c*) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.

(2) For the purposes of the Taxes Acts-

(a) treat a relevant notice as having been given to the person on the day the relevant return was delivered, and

(b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).

[subsections (3) and (4) define purported notice and relevant notice square]

178. Mr Vallis argues that if Mr Norton's 2015/16 return was not shown to have been made under section 8 because no valid section 8 notice was shown to have been given, then section 12D saves the day: it treats the return as made under section 8 with the result that an enquiry could be opened - and was opened - and any closure notice issued in relation to such an enquiry was valid and effective.

179. Mr Gordon says that whilst in section 12D validates a voluntary return, it does not retrospectively validate a purported enquiry into such a return which was opened before section 87 was enacted (12 February 2019). He says that by deeming a section 8 notice to have been served Parliament has from that date allowed enquiries to be opened prospectively into such voluntary returns, but stopped short of turning previous correspondence into a legitimate enquiry/closure notice. Parliament's choice of language - deeming a section 8 notice to have been given rather than deeming the return to have been in response to such a notice indicates that the deeming effect was intended to be limited simply to validating the voluntary return. He points to anomalies which he says the rise if section 12D is construed to have the effect that a previously ineffective purported enquiry is converted into a lawful one.

180. This argument was rejected by the FTT in *Allam v HMRC* [2020] UK FTT 26 (TC), which Mr Gordon told me is being appealed to the Upper Tribunal.

181. I agree with the reasoning and conclusions of the FTT in that case and, in the light of the forthcoming appeal to the Upper Tribunal, no purpose would be served by setting them out in detail here. But Mr Gordon made a number of comments on that decision which I should address.

182. The first related to the FTT's conclusions in [53] and 76] of its decision. The FTT, having considered the approach to deeming provisions and the relevance, context and content of Parliamentary material, said at [53] that section 12D:

"should apply to treat...returns...made before 12 February 2019 which were not made in response to a notice under section 8 TMA as returns made in

> response to [such a notice] and so as made under section 8 TMA for the purposes of section 9 a TMA."

183.The FTT then [54 to 62] set out its three reasons for that conclusion, namely, that such: was the ordinary and natural meaning of the words, assisted with the purpose of the provision and was a natural consequence of the deeming provision. Finally [63 to 76] it considered three anomalies which the appellant had argued arose on that interpretation. It then concluded at [76] that:

> "the deeming rule in section 12D should apply to treat [the voluntary returns as] made in response to a relevant notice and so as made under section 8 TMA for the purposes of section 9A TMA.

184.Mr Gordon says that the language of the conclusions in [53] and [76] misses the point: there is a difference between treating a voluntary return made before 12 February 2019 as made under section 8 so that after 12 February 2019 an enquiry may validly be started, and the wider interpretation of treating such a return as made under section 8 so that an unlawful enquiry made before 12 February 2019 is to be treated as valid. The FTT's conclusions are apposite only to the first interpretation.

185.I do not think that this is a fair reading of the decision. The conclusion that [53] follows a paragraph in which the second wider interpretation is described, and the conclusion at [53] is plainly to my mind intended to affirm that interpretation as may be seen from the reasons which follow. Likewise the conclusion that [76] follows a discussion of anomalies which were said to rise if the wider interpretation were adopted and is plainly meant to affirm that wider interpretation.

186.The second leg of Mr Gordon's attack on the decision in *Allam* relates to the anomalies or absurdities that he says will arise if the wider interpretation is adopted. The existence of such anomalies or absurdities flowing from the consequences of a deeming provision make an interpretation which extends to those consequences untenable unless it lies within the purpose of the deeming provision.

187.Mr Gordon's first example is of a voluntary tax return submitted on 1 January 2009 in respect of which HMRC purported to open a section 9A enquiry on 25 January 2009. That enquiry would have been invalid. The wider interpretation of section 12D would validate that enquiry. And thus the enquiry he says, would be found to be open 10 years after the event. That he says could not have been intended.

188.Mr Gordon contrasts that situation with a voluntary tax return submitted on 1 January 2019 in relation to which HMRC purported to open an enquiry on 25 January 2019 (before 12 February 2019 the day on which section 12D came into force). The enquiry would have been invalid, but from 25 January 2019 HMRC would be able lawfully to open an enquiry if they did so before 1 January 2020. There he says no injustice arises.

189.To my mind the situation in the 2009 example is precisely what was intended. In all likelihood, the "purported" enquiry would have continued for perhaps a few years and resulted in a closure notice, perhaps adjusting up, or down, the self-assessed tax. The wider interpretation treats that adjustment as effective confirming what it is likely that all the parties thought at the time. That is not an absurd result.

190. Mr Gordon's second example (which was also considered by the FTT in *Allam* [65 to 66]) relates to the provision in section 9A which, if the return is late, extends enquiry window to the end of the quarter one year after the return is made.

191. Under this provision a return made pursuant to a valid section 8 notice on 31 January 2019 may be subject to an enquiry within 12 months, but one made late, on 1 February 2019, will be subject to enquiry up to 30 April 2020 (section 9 (2)(b)). But the effect of section 12D is that a voluntary return is never late (because it is delivered on the same day as the section 8 notice is treated as being delivered). Thus the enquiry window for a voluntary return is always only 12 months long. As a result an enquiry purported to be opened into a voluntary return after the expiry of 12 months (but within the extended period) would be (and will remain) invalid.

192. This result he says cannot have been intended if Parliament had wanted in section 12D to validate enquiries rather than simply returns. He says it also means that "late filers would be treated more favourably than prompt filers".

193. I accept that the legislation has the effect that enquiries opened in the extension of the window are invalid. But opening an enquiry in such a period is dependent on the return being late, and a voluntary return is never made late because no legislative time limit was applicable at the time it was made. That is consistent with the provision in section 12D that the notice under section 8 is deemed to be given on the day the return is received - a recognition that the return was not late. It does not therefore seem to me that either this example points away from a Parliamentary intention to validate section 9A enquiries or gives rise to anomalies favouring "late" filers.

194. I conclude that in applying the deeming of section 12D "for all purposes of the Taxes Acts" the intention and the effect of the provision was to validate enquiries into section 9A voluntary returns that were opened before 12 February 2019 and within the window which would have been applicable at the time for a return made in accordance with a section 8 notice. As a result it validates the results of such enquiries.

195. Therefore if section 12D applies the opening of the enquiry into Mr Norton's 2015/16 return and any consequent closure notice were valid.

Does section 12D apply - the transitional provisions in section 87(4).

196. Subsections 87(3) and (4) provide: -

> "(3) The amendments made by this section are treated as always having been in force.
>
> (4) However, those amendments do not apply in relation to a purported return delivered by a person if, before 29 October 2018—
>
> > (a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and

(b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18."

197. HMRC say that Mr Norton cannot rely on section 87(4) because he did not make an appeal against a closure notice before 29 October 2018, and that if there is a document which could be construed as such an appeal it does not meet the conditions in subsection (4). They say the relevant closure notice was issued on 29 April 2019.

198. Mr Gordon says that the closure ntoice was issued on 20 March 2013 and an appeal made on 30 March 2017

199. In order to address the effect of these provisions and those arguments I must make some further findings of fact. I find that:

(1) Mr Norton's 2015/16 return was received by HMRC on 30 December 2016.

(2) Mrs Stent said she was opening an enquiry into the return on 27 January 2017.

(3) On 20 March 2017 Mrs Stent wrote to say that information obtained by Mr Earl "suggested" that the declared benefit was incorrect. She continued:

> "I have recalculated your client's tax liability using a revised figure in relation to car benefits and this has resulted in additional tax being due.
>
> "In order to protect the position of HM Revenue & Customs, I have raised an assessment for the tax years ended 5 April 2013 to 2015 and *amended the tax return for the year ended 5 April 2016*. [my italics]
>
> "I have ... informally suspended collection ...".

(4) On 30 March 2017 Mr Dewey of J & G wrote to HMRC and said "I wish to lodge an appeal against ... the adjustment for the tax year 2015/16".

(5) On 5 October 2018 the tribunal received a notice of appeal from Mr Norton in which ground of appeal number 2 was:

> "2. So far as any closure notice is concerned HMRC are put to strict proof to demonstrate that there was a valid section 9A notice in relation to a return made under section TMA section 8."

(6) HMRC's statement of case dated 10 January 2019 indicated (at paragraph 24) that HMRC contended that they correctly issued a section 8 notice and are "perplexed by the suggestion that they did not have the right to enquire".

(7) On 18 February 2019 Mr Dewing e-mailed HMRC and said in the last paragraph of his letter:

"furthermore, we have been advised of a new argument which we wish to employ in relation to the 2015/16 year. We wish HMRC to demonstrate the enquiry was validly opened ... [we believe] the tax return was submitted in response to an automated notice ... [and was] voluntary ... we do not consider a section 12D has the effect of retrospectively validating a non-existent enquiry."

(8) On 29 April 2019 Mrs Stent wrote to Mr Norton saying

"I have now completed my check of your self-assessment. This letter is a final closure notice under section 28.

"... my decision ... the amount you declared was understated ... I have amended your tax return in line with my decision."

(9) On 7 May 2019 Mr Norton sent the tribunal a (second) notice of appeal in which ground 1 was: -

"HMRC are put to strict proof to demonstrate that the purported closure notice corresponds with a valid section 9A notice which in turn relates to a return made in reply to a notice given by an officer under TMA section 8."

200. In his skeleton argument Mr Gordon says (paragraphs 58(e) to (g)) that as HMRC's statement of case did not fully address the section 8 ground of appeal, a clarification was sought on 18 February 2019. I take this to refer to (7) above; he says that the point was raised again on 22 March 2019: I could not find this in the bundles; and that in a response of 29 March 2019 (at SB/A20) HMRC newly asserted that the 20 March letter was not a closure notice: I did not find this response there in the bundles. I accept, however, that these steps took place.

201. HMRC now assert that the letter of 29 April 2019 was the closure notice for the 2015/16 enquiry. They did not originally think so – their statement of case reveals that they, like the taxpayer appeared to, thought that Mrs Stent's letter of 20 March was the closure notice for the enquiry.

202. The questions which arise from this are: -

(i) was Mrs Stent's letter of 20 March 2017 a closure notice? If it was then the appeal against it was made on 30 March 2017 or 5 October 2017 and section 87(4)(a) is satisfied because the appeal was made before 29 October 2018; and

(ii) if it was a closure notice (so that the 5 October 2017 notice of appeal was an appeal against it), was there a ground of appeal that "the purported return was not a return under section 8 ... TMA 1970 ... because no relevant notice was given" so that section 87(4)(b) would be satisfied.

203. If the answer to both these questions is "yes" then the effect of section 87(4) is that section 12D TMA is to be ignored. If on the other hand, Mrs Stent's letter of 20 March 2017 was not a closure notice, then her letter of 29 April 2019 was one. In that case the appeal, having been made on 7 May 2019, would not satisfy section 87(4)(a) and section 12D will apply.

(i) Was the 20 March 2017 letter a closure notice?

204.Section 28A TMA provides that an enquiry is completed when an officer informs the taxpayer by a closure notice that she has completed her enquiries. Section 28A(2) provides that the closure notice must "make the amendments of the return required to give effect to [those] conclusions". In *Raftopoulou v HMRC* the Court of Appeal said that a closure notice was part of a formal procedure and must "(i) state that the officer has completed his inquiries, (ii) state his conclusions, and (iii) amend the claim as the officer concludes to be necessary or state that no amendment is required."

205.A closure notice triggers the ability of a taxpayer to appeal and starts the clock running for an appeal. If no appeal is made it may trigger an additional tax liability of the taxpayer. It is important that such a notice is recognisable; the formalities of section 28A enable it to be so.

206.I am not persuaded that Mrs Stent's letter of 20 March 2017 satisfies these requirements. I accept that otherwise than by a closure notice (or notice under section 9C, which plainly this was not) an officer cannot amend a self-assessment and that the letter clearly indicates that an amendment is being made. But I do not think that there can be read into her words the necessary formality of saying that her enquiry was at an end and that she had reached her conclusions. In particular her use of the word "suggested" did not indicate a final conclusion. If Mrs Stent thought she was giving a closure notice or was attempting to do such, she failed.

207.Section 114 TMA provides:

> "(1) An assessment… or other proceedings which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed or declared to be void or voidable by reason of any want of form, or be affected by reason of any mistake, defect or omission therein if the same is in substance and affect in conformity with, or according to the intent and meaning of the Taxes Acts…|"

208.Mr Gordon says that if the letter of 20 March 2017 was wanting in form, section 114 will save the day because the letter purported to be a closure notice. He says that the Court of Appeal in *R(oao Archer) v HMRC* [218] STC38 made clear that minor deviations from the statutory scheme would not invalidate a closure notice: section 114 imported an objective test which was whether a reader of the letter, equipped with the knowledge of the taxpayer would have concluded that it was intended to be a closure notice. In this case there was: an open enquiry, and a dispute about the taxability of a benefit in kind. The letter, encompassing as it did the section 29 discovery assessments made it clear that Mrs Stent had made up her mind about those issues and, as a consequence, had decided to amend Mr Norton's self assessment too. To the observer equipped with such knowledge the letter purported to be a closure notice. It was not enough to say that, because the writer did not expressly say that it was a closure notice or that she had completed her enquiries, the letter did not purport, or seem to be a closure notice or convey that to the mind of such an observer.

209.In *Archer* the question was whether a letter which called itself a closure notice, said that the officer had completed his enquiries, set out briefly his decisions on the

disputed matters, explained what to do if the taxpayer disagreed and said that the return was being amended, but did not set out the amount of tax which was due as a result, was a closure notice. The Court of Appeal accepted that the failure to specify the amount of additional tax payable prevented the notice from complying with the relevant provision, but held that section 114 validated the notice. In those circumstances, where Mr Archer had previously been aware of the sums which would be due, and knew as a result of the letter where he stood with HMRC, section 114 applied to validate the notice ([37,38]).

210. Given the concomitant assessments for the other years, I think it is clear that this notice let Mr Archer know where he stood – in the sense that it was clear that HMRC had reached a decision and that an amount of extra tax was payable by refernce to the benefit of the cars. In that sense the letter may have purported to be a closure notice. But section 114 saves the notice only if it was "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". The provisions indicate, and the intent and meaning, of the Taxes Acts in relation to a closure notice are, that it is an important procedural event – one which thereafter limits HMRC's ability to make further adjustment or enquiries and starts time running for the taxpayer to make an appeal – and that therefore it should be a clear statement that that time had arrived. The letter of 20 March 2017 does not provide such a clear statement, and in that respect does not comply in substance with the intent of the Taxes Acts. Accordingly it is not saved by section 114.

211. Therefore the (second) closure notice issued on 29 August 2019 closed the enquiry and the appeal against it was made on 7 May 2019. The condition in section 87(4)(a) is not satisfied.

(ii) Was the requisite ground of appeal stated?

212. This is relevant only if I am wrong in my conclusion above.

213. At an earlier case management hearing HMRC formally conceded this point but in any case in my view it was. The putting of HMRC to proof that there was a valid section 9A notice in relation to a return made under section 8 to my mind carries the clear message that the validity of any purported section 8 notice is put into question.

214. I do not think that Mr Dewing's email of 18 February 2019, in referring to "a new argument" affects the nature of the ground of appeal. Not only in my view is that ground to be divined only from the notice and matters which preceded it, but it is not clear that the new argument was not formulated prior to the giving of the notice of appeal.

Conclusions: 2015/16

215. I conclude that section 87(4) does not stop section 12D from applying and that as a result the 2015/16 closure notice of 29 April 2019 is valid.

Conclusions on Procedural issues

216.I find that the discovery assessments for 2012/13, 2013/14, 2014/15 and 2016/17 were validly made and not invalidated by section 29(2). I find that the 2016/17 assessment was not invalidated by section 29(5). I find that the enquiry into the 2015/16 return was closed on 29 April 2019 and that as a result section 12D applies to validate the enquiry and the closure notice/

Overall Conclusions

217.I dismiss the company's appeal in relation to the years 2013/14 onwards and allow it to the extent only of the charge in respect of the GT40 for the years before that.

218.I dismiss Mr Norton's appeal in relation to the assessments or closure notice for the years 2013/14 onwards, and allow it to the extent of the charge in respect of the GT40 only for the years before that.

219.I adjourn the appeals for the parties to agree the figures. If they cannot agree either one of the may apply for the appeal to be reconvened.

Rights of Appeal

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

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 14 DECEMBER 2020