NCN: [2021] UKFTT 219 (TC)

TC08168

INCOME TAX AND NATIONAL INSURANCE – Sch 36 information notices - whether Tribunal has jurisdiction to decide, as part of the information notice hearing, whether the Appellant is domiciled in the UK – if yes, whether the Tribunal should exercise that jurisdiction – held, the Tribunal does not have that jurisdiction, and if that conclusion were to be wrong, the jurisdiction should not be exercised

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02289

BETWEEN

ROBERT PERLMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The hearing took place on 29 April 2021 and 5 May 2021 by video. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Mr Peter Vaines and Ms Dhanoa, both of Counsel, for the Appellant

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

DECISION

INTRODUCTION AND SUMMARY

1. Mr Perlman was born in Curaçao and has lived in the United Kingdom for at least 50 years. He claimed the remittance basis of taxation on the basis that he was not domiciled in the UK because he retained his domicile of origin in Curaçao.

2. HM Revenue & Customs ("HMRC") opened enquires under Taxes Management Act 1970 ("TMA") s 9A into Mr Perlman's self-assessment ("SA") tax returns for the years 2014-15 though to 2016-17. On 5 July 2019, HMRC notified Mr Perlman that they had decided he was domiciled in the UK and had not been entitled to claim the remittance basis. They asked informally for information and documents[1] about his worldwide income and gains, so they could make consequential amendments to his SA returns and close the enquiries.

3. Mr Perlman refused to provide that information, and on 30 April 2020, HMRC issued him with Notices under Finance Act 2008, Sch 36 ("Sch 36 Notice" or "Notice") for the years under enquiry and also for 2013-14 pursuant to the "Requirement to Correct" ("RTC") provisions in Finance (No 2) Act 2017.

4. Mr Perlman appealed the Notices to the Tribunal on the ground that the information was not "reasonably required" because he was not domiciled in the UK. In his submission, the information would only be reasonably required if HMRC had first proved he was not so domiciled. In other words, he asked for his domicile dispute with HMRC to be decided as part of the hearing against the Sch 36 Notices.

5. In HMRC's view, the Tribunal does not have the jurisdiction to decide whether Mr Perlman is domiciled as part of an appeal against a Sch 36 Notice, and even if it did have that jurisdiction, it should decline to exercise it. On 21 September 2020, HMRC applied for those two issues to be decided at a preliminary hearing ("the Application").

6. I decided the Tribunal does not have the jurisdiction to decide Mr Perlman's domicile as part of a hearing against Sch 36 Notices, but that if I were wrong in that conclusion, the Tribunal should decline to exercise the jurisdiction.

7. I came to those conclusions in summary for the following reasons:

   (1) In *Kotton v HMRC and others* [2019] EWHC 1327 (Admin) ("*Kotton*") Simler J (as she then was) considered the meaning of "reasonably required" in the context of an appeal against Sch 36 Notices issued to a third party under paras 2 and 3 of Sch 36. She held that the Tribunal's jurisdiction when deciding those appeals was "expressly limited" in that it could consider only whether the officer is carrying out "a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith", and that for information to be "reasonably required" it is necessary only that there be a "rational connection" between the enquiry and the information required by the Notice.

   (2) I agreed with Mr Purnell, HMRC's Counsel, that these *dicta* were equally applicable to first party Notices such as that served on Mr Perlman, and that the Tribunal therefore did not have the jurisdiction to decide Mr Perlman's domicile dispute as part of

[1] For brevity, in this this decision I have referred to "information" rather than "information and documents" unless both terms are required by the context

the hearing against the Notices, but only to decide whether the officer was carrying out "a genuine and legitimate investigation or enquiry" that was neither irrational nor in bad faith, and that this was akin to a supervisory jurisdiction.

(3) I also agreed with him that Sch 36 is part of a suite of statutory provisions, and cannot be construed without understanding its role and purpose within that framework. The issuance of Notices operates at a preliminary investigative stage, which may be followed by the closure of enquiries, the issuance of assessments and taxpayer appeals. It is inconsistent with that statutory framework for the substantive dispute between the parties to be decided during a hearing against a Sch 36 Notice.

(4) There is no right for the losing party to appeal a Sch 36 Notice. Thus, if Mr Vaines were to be correct that the Tribunal could decide Mr Perlman's domicile status as part of an Sch 36 Notice hearing, the losing party would have no right to appeal the resulting decision, and that would be a surprising outcome. In contrast, the lack of an appeal right following Sch 36 hearings is entirely consistent with the limited and preliminary role played by Sch 36 within the statutory framework. The appeal rights instead come into play when the taxpayer appeals HMRC's assessments following the closure of an enquiry.

(5) In *HMRC v Vodafone 2* [2016] EWCA Civ 1132 ("*Vodafone 2*"), the Court of Appeal held that the Tribunal had the jurisdiction to decide incidental points of law when deciding taxpayer applications to close an enquiry. However, for the reasons given later in this judgment, I found that the Tribunal does not have the same jurisdiction when deciding Sch 36 Notice appeals.

(6) Even if that conclusion were to be wrong:

(a) *Vodafone 2* is only authority for the Tribunal having a jurisdiction to decide incidental points of *law*. A decision on domicile is instead a complex mixed question of fact and law.

(b) In *Eastern Power Networks v HMRC* [2017] UKFTT 494 (TC) ("*EPN*") the Tribunal exercised the jurisdiction described in *Vodafone 2*. When the case came to the Court of Appeal, under reference [2021] EWCA Civ 283, Rose LJ ended her judgment by saying that the jurisdiction was to be exercised "sparingly" and that she would "firmly discourage" another Tribunal from following the route taken in *EPN*.

(7) Thus, even if were I to be wrong in my findings as to the nature and extent of the Tribunal's jurisdiction, so that it was similar (albeit more extensive) than that which applies to closure notice application hearings, that jurisdiction should be exercised sparingly. Given that a domicile dispute often involves many days of contested witness evidence, it would not be in the interests of justice for the Tribunal to exercise that occasional jurisdiction in Mr Perlman's appeal against the Notices.

BACKGROUND FACTS

8. The facts set out below were not in dispute.

9. Mr Perlman was born in Curaçao in 1943, and has been resident in the UK since at least 1967. Following a meeting with HMRC on 22 September 2017, Mr Vaines said in a Note dated 16 October 2017 that "it is clear and beyond dispute that [Mr Perlman] left Curacao many years ago and has no continuing connections with that territory or intention to return there".

10. Mr Perlman claimed the remittance basis of taxation on the basis that he had a foreign domicile, namely Curaçao. HMRC opened enquires under TMA s 9A into Mr Perlman's SA returns for 2014-15 though to 2016-17. Discussions ensued between HMRC and Mr Vaines. On 13 February 2019, Mr Vaines sent HMRC calculations carried out by a chartered accountant which, on Mr Vaines' submission, showed that Mr Perlman would in fact be entitled to a tax refund were his tax position calculated on a global basis rather than on a remittance basis. However, no supporting documents from the accountant were attached to that Note.

11. Mr Bibby, the HMRC officer with conduct of the case, responded by saying that a Note stating that an accountant had come to that conclusion was insufficient to close the enquiries, pointing out that the "vast majority" of HMRC's enquiries were "into returns that have been prepared by accountants, yet it is common for us to find errors". Mr Bibby asked for more information and a meeting with Mr Perlman.

12. On 23 April 2019, Mr Vaines applied to the Tribunal for closure notices in relation to the enquiries. On 5 July 2019, Mr Bibby notified Mr Perlman that HMRC had decided he had a domicile of choice in the UK prior to the beginning of the 2013-14 tax year, and that he had therefore not been entitled to claim the remittance basis for the relevant years. Mr Bibby informally asked Mr Perlman to provide information about his worldwide income and gains so HMRC could make the consequential amendments to his SA returns.

13. Mr Perlman refused to provide that information, and on 30 April 2020, HMRC issued him with Notices under Sch 36, para 1 for the years 2013-14 through to 2016-17. The last three of the Notices related to the open enquiries, and the first was issued pursuant to the RTC provisions in Finance (No 2) Act 2017.

14. The Sch 36 Notice relating to 2013-14 required that Mr Perlman provide documents and information about non-UK investment income, trading income, property income, dividends, capital, trusts, employment and "the amount and source of any other amount that could reasonably be considered to be taxable in the UK" together with any tax paid on these income and/or gains.

15. The Notice for the other four years required Mr Perlman to provide the following, unless already supplied to HMRC as part of the ongoing enquiries:

> (1) copies of the information and documents seen by the accountant who produced the tax calculations provided to HMRC by Mr Vaines; and
>
> (2) if not already covered by the above, details of foreign income, foreign tax credit relief; income and/or gains which had been treated as not taxable in the UK, and trust income with details of the related trust.

16. On 10 July 2020, Mr Vaines notified appeals against those Notices to the Tribunal, on the basis that the information was not "reasonably required" because Mr Perlman had an overseas domicile.

17. On 12 August 2020, the applications for closure notices were withdrawn.

PRELIMINARY PROCEDURAL MATTERS

18. There were two preliminary procedural matters: the purpose of this hearing, and the Appellant's postponement application.

HMRC's Application and this hearing

19. On 21 September 2020, HMRC wrote to the Tribunal under the heading "Application for Preliminary Hearing", and the document began as follows:

> "1. HMRC respectfully requests the Tribunal to exercise its power under Rules 5(3)(e) and (f) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the 'FTT Rules') to direct that the following issues ("the Issues") be determined at a preliminary hearing, in advance of the determination of the Appellant's appeals against Information Notices in case number TC/2020/02289 ("the IN appeal").
>
> 2. The Issues are:
>
> (a) Whether in determining an IN appeal, the Tribunal has jurisdiction to determine the substantive issue of the Appellant's domicile status ("the Jurisdiction Issue")?
>
> (b) If the Tribunal does have such jurisdiction, whether or not it ought, as a matter of case management discretion, to determine in an IN appeal the substantive issue of the Appellant's domicile status ("the Case Management Issue")?"

20. HMRC next set out their reasons why the Issues were suitable for determination at a preliminary hearing, and concluded:

> "HMRC therefore requests that the Tribunal exercises its power pursuant to Rules 5(3)(e) and (f) to order that the Issues be determined at a preliminary hearing, to be listed at the earliest opportunity."

21. On 29 September 2020, Mr Vaines provided the Tribunal with a response in which he agreed there should be a preliminary hearing, but said it should not be restricted to "the narrow issue of whether the Tribunal has jurisdiction", but should decide whether Mr Perlman had a UK domicile.

22. On 22 October 2020, Judge Brookes issued Directions. Their preamble said that they had been made "having read HMRC's application, dated 21 September 2020 (the 'Application') and the appellant's response". The first direction reads:

> "The Application be listed (to be followed if appropriate by a case management hearing) as a video hearing..."

23. My understanding of that Direction was that the purpose of the preliminary hearing was to determine the Application, in other words, to decide the two Issues which HMRC had asked to be determined at a preliminary hearing. This was also Mr Vaines' understanding.

24. However, HMRC's view was that the purpose of the hearing was instead to decide *whether or not to allow HMRC's application for a preliminary hearing*. Mr Purnell explained that HMRC had come to that view because they understood Mr Vaines' response to be an objection to HMRC's application, and that the Tribunal therefore needed to hold a hearing to decide whether or not to have a preliminary hearing.

25. However, it was clear to me from Judge Brooks' Directions that he had decided to list the Application to be decided at a preliminary hearing, and had done so after reading Mr Vaines' response letter of 29 September 2021. Mr Vaines had not appealed the Directions on the grounds that the hearing should consider other matters, and HMRC had not appealed on the

basis that there was a dispute between the parties as to the ambit of the preliminary hearing which required resolution before the hearing of the Application.

26. I explained my understanding of the Directions to the parties. I noted that both parties had set out submissions on the Issues in their skeleton argument. Both Mr Vaines and Mr Purnell agreed that it was in the interests of justice to proceed with this hearing on the basis that its purpose was to decide the Issues in the Application.

The postponement application

27. This hearing was listed for 29 April 2021. On 31 March 2021, HMRC issued Mr Perlman with an assessment under the RTC legislation for the tax year 2013-14 on the basis that Mr Perlman was UK domiciled.

28. On the same day, Mr Vaines applied for this hearing to be "stayed" because HMRC had issued an assessment for 2014-15 (sic), and pending the outcome of Mr Perlman's appeal against that decision.

29. On 15 April 2021, HMRC objected to the postponement, saying that the assessment issued was for 2013-14, not 2014-15, and thus was not for any of the years under enquiry. HMRC also pointed out that income tax is charged on a tax year basis.

30. On 19 April 2021, I decided not to postpone the hearing, but gave the parties permission to make their arguments orally when the proceedings began. However, Mr Vaines withdrew the application at the beginning of the hearing.

THE LEGISLATION

31. Sch 36, para 1 provides as follows

> "An officer of Revenue and Customs may by notice in writing require a person ('the taxpayer')
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

32. Para 2(1) gives HMRC power to issue "third party" notices, and reads:

> "An officer of Revenue and Customs may by notice in writing require a person--
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ('the taxpayer')."

33. Both paragraphs refer to "checking the tax position". Para 58 provides that the term "checking" includes "carrying out an investigation or enquiry of any kind". Para 64 defines "tax position", and that definition includes the following subparagraphs:

> "(1) In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards--

(a) past, present and future liability to pay any tax,

(b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

(c) claims, elections, applications and notices that have been or may be made or given in connection with [the person's liability to pay] any tax

(2)-(3)…

(4) References in this Schedule to a person's tax position are to the person's tax position at any time or in relation to any period, unless otherwise stated."

34. Sch 36, para 3 provides that both types of Notice require either (a) the agreement of the taxpayer, or (b) the approval of the Tribunal. If the latter route is followed, there are further specific requirements. Either type of Notice may be issued following a hearing held on an *ex parte* basis, ie with only HMRC present.

35. Para 21 is headed "Taxpayer notices following tax return" and reads

"(1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

(2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.

(3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of--

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

(5) In sub-paragraph (4), 'notice of enquiry' means a notice under--

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that[, as regards the person,] an officer of Revenue and Customs has reason to suspect that--

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

> (7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking[the person's position as regards any tax other than income tax, capital gains tax or corporation tax.
>
> (8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments [of tax or withholding of income] referred to in paragraph 64(2) or (2A)] (PAYE etc).
>
> (9) In this paragraph, references to the person who made the return are only to that person in the capacity in which the return was made."

36. In Mr Perlman's case, the Notices in relation to 2014-15 through to 2016-17 were issued in the course of HMRC's enquiries, and thus Condition A was met. Neither party made submissions as to whether the "reason to suspect" requirement in Condition B was relevant to the Notice issued for 2013-14. Mr Perlman's appeal against all the Notices was on the basis that the information was not 'reasonably required' under para 1, and that provision was also the focus of the Application.

37. Para 29 sets out the appeal right against a taxpayer Notice, and subpara (1) reads:

> "Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice."

38. Para 30 gives the appeal right in relation to a third party Notice, and subpara (1) reads:

> "Where a person is given a third party notice, the person may appeal against the notice or any requirement in the notice on the ground that it would be unduly onerous to comply with the notice or requirement."

39. Once the Tribunal has determined an appeal against a Sch 36 Notice, that decision is final, see Sch 36, para 6(4). Thus, a challenge can only be brought by way of judicial review.

40. Part IV of the Schedule is headed "Restrictions on Powers" and prescribes the situations when information cannot be required by a Notice. Those restrictions include documents which are not within the person's possession or power; certain personal or journalistic information; old documents; privileged communications; certain information held by auditors and/or tax advisers. Tighter restrictions apply where the taxpayer has filed a tax return (para 21) and there is a shorter timescale where the taxpayer is deceased.

THE FIRST ISSUE

41. Mr Perlman appealed against the Notices on the grounds that the information was not "reasonably required", because he was not UK domiciled. In Mr Vaines' submission, the Tribunal had the jurisdiction to decide whether he was UK domiciled as part of his appeal against the Sch 36 Notices. In HMRC's submission, the Tribunal did not have that jurisdiction.

42. Two previous Tribunal decisions have considered the same issue. In *Executors of Levy v HMRC* [2019] UKFTT 0418 (TC) ("*Levy*"), a decision of Judge Andrew Scott, the Tribunal decided it did not have the jurisdiction to decide Mr Levy's domicile. In *Henkes v HMRC* [2020] UKFTT 159 (TC) ("*Henkes*"), Judge Beare found that the Tribunal did have the jurisdiction to decide the appellant's domicile, and went on to find that Mr Henkes was UK domiciled. As already noted, there was no right of appeal against either decision.

43. Mr Purnell's primary submission was that two High Court judgments were determinative of the First Issue, namely *Derrin Brothers Properties Ltd and others v HMRC and others* [2016] EWCA Civ 15 ("*Derrin*") and *Kotton*. Mr Vaines disagreed, submitting that the cases were not relevant. I begin with *Derrin* and *Kotton*, and whether they are determinative, and then consider the parties' other submissions.

Derrin and Kotton

44. Both *Derrin* and *Kotton* concerned applications for judicial reviews of *ex parte* third party Notices issued with the approval of the Tribunal under Sch 36, paras 2 and 3.

Derrin

45. The background to *Derrin* was that the Australian Tax Office had made a request for assistance under Article 27 of the Double Tax Convention between Australia and the UK to obtain information about the claimants. HMRC applied to the Tribunal to approve third party Notices, and the Tribunal (Judge Berner) did so. The claimants sought judicial review of that decision. The application was refused by Simler J, and the claimants appealed to the Court of Appeal.

46. The Chancellor, Sir Terence Etherton, gave the only judgment with which Davis and Vos LJJ both agreed. He said at [66] that "in considering the proper interpretation of Sch 36, it is important to have in mind its background and its purpose", and continued:

> "[67] …Sch 36, like its predecessor scheme in s 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community. So far as concerns the interests of the wider community, the statutory scheme is intended to assist HMRC in its investigation of tax avoidance and tax evasion. Complex and sophisticated corporate and international arrangements are often the hallmark of schemes to avoid or evade tax and are often intended to throw a veil of obscurity over the reality of underlying transactions…
>
> [68] The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability…
>
> [69] Those considerations explain the principal features of Sch 36 relating to the service of third party notices. In the first place, Parliament has deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve. Secondly, paras 2 and 3 of Sch 36 make a clear distinction between the rights and obligations of (1) the taxpayer whose tax position HMRC wish to check, (2) the third party, and (3) any entity ('the non-taxpayer entity') whose documents or copies of whose documents are required to be produced by the third party or about whom information is sought from the third party. Common to the statutory treatment of all of them, however, is the very limited scope for objection by them to the request for production of the documents and information specified in the third party notice."

The parties' submissions and my view

47. Mr Purnell submitted that [66]-[68] of *Derrin* set out the purpose of Schedule 36 as a whole, and not simply the purpose of a third party Notice given with the approval of the Tribunal.

48. Mr Vaines asked the Tribunal to follow the approach in *Henkes* at [96]-[97], where Judge Beare noted that Etherton C had referred at [69] to "a judicial monitoring scheme", and contrasted this with appeals such as that of Mr Henkes which are "heard at an *inter partes* hearing at which both parties are represented and can make submissions". Judge Beare concluded that nothing in *Derrin* "sheds any light on the jurisdiction of a tribunal hearing an appeal against a first party notice".

49. I agree with Mr Purnell. At [66], Etherton C explicitly states that he is considering "the proper interpretation of Sch 36" and that in order to do so "it is important to have in mind its background and its purpose". His analysis of that background and purpose follows at [67] and [68], and it is only at [69] that he applies those principles to third party Notices.

50. I find that the following *dicta* from *Derrin* relate to the purpose of Sch 36 as a whole:

(1) Sch 36 represents a balance between the interests of individuals and the interests of the wider community (para 67);

(2) it is intended to assist HMRC in its investigation of tax avoidance and tax evasion (para 67); and

(3) it operates at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings (para 68).

51. Although I was not referred to *X v HMRC* [2020] UKUT 29 (TCC), a decision of Judges Richards and Scott, the Upper Tribunal ("the UT") there came to the same conclusion, saying that "the Court of Appeal was expressing general conclusions on the purpose behind the relevant provisions of Schedule 36" and that "the statements in *Derrin* as to the overall scheme of the legislation and the purpose behind it clearly command respect and in our opinion are of considerable relevance to the correct construction of Schedule 36", see [67] and [66] of *X v HMRC*.

Kotton

52. The background to *Kotton* was that the Swedish Tax Authority ("the STA") considered that Mr Kotton was resident and taxable in Sweden, and had asked for HMRC's assistance under Council Directive 2011/16/EU and Article 24 of the UK/Sweden Double Taxation Agreement. HMRC asked the Tribunal to approve a third party Notice to American Express Services Europe Ltd ("Amex"), and the Tribunal (Judge Richards) granted that approval.

53. Mr Kotton sought judicial review, on the ground that the information required by the Sch 36 Notice was not "reasonably required" by the STA for the purposes of checking whether Mr Kotton was resident in Sweden for tax purposes. Mr Kotton's counsel, Mr Simpson, submitted that in consequence HMRC had no power to issue the Notice, and the Tribunal had no power to approve it. This was thus the only issue considered by Simler J, see [9] of the judgment.

54. One of the submissions made by Mr Simpson is at 56(iv) of the judgment, and reads:

> "…part of the assessment of whether documents are 'reasonably required' involves consideration of the reasonableness of the underlying tax enquiry itself. To put it another way, the underlying tax enquiry must be reasonable in all the circumstances otherwise the documents required for that purpose cannot be reasonably required. That means that in every case in order to be satisfied of the statutory condition, the officer must satisfy himself of the reasonableness of the underlying enquiry."

55. Mr Simpson went on to submit that any reasonable HMRC Officer, having considered the material and representations made by Mr Kotton, would have decided that that the information sought was not reasonably required for the purpose of checking his tax position and his residence status in the relevant period.

56. Simler J disagreed. She said at [60]:

> "the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer."

57. She went on to say that this limited role was "unsurprising" given that Sch 36 is "directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others". After citing *Derrin,* she then said (in the same paragraph):

> "provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax."

58. She continued:

> "[61] Nor is it necessary (as Mr Simpson submits) as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.
>
> [62] Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required.
>
> [63] Fourthly and in light of those conclusions, I do not agree with Mr Simpson that the facts support a conclusion that no reasonable officer could have concluded that the information and documents are reasonably required in this case. That the STA may already have evidence that leads it to believe the Claimant was resident in Sweden for tax purposes does not mean that the AMEX information is not reasonably required. This further information may

> add support to the STA's case and be required for that reason, or alternatively it may undermine the evidence so far available leading to the conclusion that the Claimant is not tax resident in Sweden. On either basis that there is existing evidence pointing in one direction does not mean that additional evidence that may shed light on this very question is not reasonably required.
>
> [64] The submissions made by Mr Simpson on the facts seem to me to underscore that there is a real dispute as to the Claimant's correct tax residence status and that the information sought is, at least potentially, directly relevant to that dispute…
>
> [65] It is therefore irrelevant that the STA has not explained why it is now enquiring into the Claimant's residence status or said what has changed. Similarly, although the operation of the relevant CFC rules is not clearly explained by the STA in its correspondence, that too is irrelevant: as Orrick said in the 8 May 2018 letter, those rules are relevant only if the Claimant's tax residence in Sweden can be established. That is what is being checked at this stage of the investigation. In any event, the CFC rules may ultimately have no relevance at all because if the Claimant is liable to income tax in Sweden as tax resident there, he may have unlimited liability to tax on a worldwide basis (subject to double taxation issues) as Mr Simpson accepted. None of the factual points raised are knock-out blows that establish beyond dispute that the Claimant is not or cannot be tax resident in Sweden in the relevant period. Nor do the points raised on behalf of the Claimant show the investigation to be a sham or pursued in bad faith. Mr Simpson expressly disavowed any allegation of bad faith and the arguments advanced do not begin to displace the presumption that both the STA and HMRC (in providing assistance) are conducting a genuine investigation and exercising their investigation powers honestly and in good faith. "

The parties' submissions

59. Mr Purnell submitted that the "reasonably required" provision was identical as between first party and third party Notices, as were the appeal rights. Thus, ***Kotton*** was binding on this Tribunal, and if not, at least very highly relevant to the First Issue. As a result, the role of the Tribunal in deciding appeals against first party Notices was similarly "expressly limited", and was supervisory in the sense that the Tribunal's role was to consider the reasonableness of HMRC's information requests, and not whether the underlying enquiry, or their conclusions so far, were correct.

60. Mr Purnell added that the facts of the case were also very similar: Mr Kotton was arguing that it was not reasonable for the information to be provided because he was not resident in Sweden for tax purposes and Mr Perlman was arguing that it was not reasonable for the information to be provided because he was not domiciled in the UK.

61. Mr Vaines submitted that ***Kotton*** was not a relevant authority, because it concerned a third party Notice. He relied on ***Henkes,*** where Judge Beare had found at [97] that the case provided no assistance in the context of first party Notices, and having cited paragraphs [62] to [65] of ***Kotton,*** went on to say:

> "[100] It is quite clear from this extract that Simler J was dealing with a situation where there was a clear link between the underlying investigation and the information and documents which were being sought. In other words, in that case, the investigation was into the question of the taxpayer's residence and the only question was whether the information and documents which were being sought were reasonably required for that investigation. In that situation,

> it was not appropriate for the taxpayer to seek to argue that the investigation itself was wrongly-founded. It was too early in the process for that issue to be litigated. Instead, the tax authority were entitled to ask for the relevant documents which might in due course be of considerable assistance to it in litigating the substantive question.
>
> [101] In contrast, in this case, the investigation – ie the information which is being sought – is into the worldwide income and gains of the Appellant. However, that investigation would be wholly irrelevant if the Appellant were not to have been domiciled in the UK in the tax years in question. Therefore, it is reasonable to ask if the whole basis on which the investigation is based is fundamentally flawed. Indeed, the present facts are an example of the 'knockout blows' to which Simler J referred in paragraph [65] of her decision. By implication, she was saying that, if any such knockout blow existed, then it would be appropriate to take that into account in determining the reasonability of the request."

62. Mr Purnell responded by saying that the Tribunal cannot have a limited jurisdiction when considering a third party Notice under paras 2 and 3, but an unfettered jurisdiction when considering a taxpayer Notice under para 1, and that the Tribunal in *Henkes* had failed to address the key issues of principle raised both by *Kotton* and by *Derrin.*

My view

63. I again agree with Mr Purnell. Simler J is here considering essentially the same statutory phrase as the one I am required to construe, namely the requirement that any Sch 36 Notice only contain items which are "reasonably required". She sets out the points of principle at [60]-[62], and then says that her comments on the particular facts of Mr Kotton's case are made "in the light of those conclusions".

64. I thus respectfully disagree with the analysis in *Henkes,* which focuses on Simler J's comments about the application of the principles to Mr Kotton, rather than on the principles themselves.

65. Although not formally binding on me, because the issue in *Kotton* concerned a Notice issued under para 2 rather than, as here, a Notice issued under para 1 of the Schedule, I find Simler J's analysis of the identical phrase to be very highly persuasive.

66. From the extracts from *Kotton* set out above I take the following points:

(1) The role of the FTT judge is an "expressly limited one" namely that the information or documents to be sought by a notice are 'reasonably required' for the purpose of checking the tax position of the taxpayer, or to put it another way, the Tribunal is required to consider only "the rationality of the conclusion that the information/documents are reasonably required" (para [60]).

(2) As to the underlying enquiry or investigation by HMRC "the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required" (para 62).

(3) Instead, the Tribunal has only to be satisfied that it "is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith". In other words, there simply has to be a "rational connection" between the enquiry and the information required by the Notice (paras [60] and [62]).

(4) There is no requirement for HMRC to show that " a positive liability to tax will arise or that liability will arise in a particular way" (para [61]).

67. Applying those principles to Mr Perlman's case, it follows that the Tribunal only has jurisdiction to decide whether there is a "rational connection" between the enquiry and the information required in the Notices; the Tribunal's limited jurisdiction does not extend to deciding the underlying substantive issue of Mr Perlman's domicile.

68. Those conclusions are also entirely consistent with the purpose of Sch 36 as a whole, as set out in *Derrin,* namely that it operates "at the investigatory stage" and is designed to avoid "lengthy or complex adversarial proceedings".

69. HMRC therefore succeeds on the First Issue. However, as other submissions were fully argued, and recognising that *Kotton* is not formally binding on me, I set those submissions out below, together with my conclusions.

The parties' other submissions

70. Many of these submissions concerned the Court of Appeal's judgment in *Vodafone 2* as well as *Henkes,* which relied on *Vodafone 2*. I therefore first summarise the relevant parts of both judgments, before setting out the parties' submissions and my conclusions.

Vodafone 2

71. The issue in *Vodafone 2* was not a Sch 36 Notice, but instead an application made under FA 1998, Sch 18, para 33 to close an enquiry. Those provisions concern companies; the almost identical legislation for individuals can be found at TMA s 28A. At the relevant time, para 33 read as follows:

> "(1) The company may apply to the Commissioners for a direction that an officer of Revenue and Customs gives a closure notice within a specified period.
>
> (2) Any such application is to be heard and determined in the same way as an appeal.
>
> (3) The Commissioners hearing that application shall give a direction unless they are satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a closure notice within a specified period."

72. The background to *Vodafone 2* was that HMRC considered Vodafone might fall within the Controlled Foreign Company ("CFC") legislation, and opened a statutory enquiry. Vodafone applied to the Special Commissioners for the enquiry to be closed. The Commissioners held that they could not decide whether to close the enquiry without first deciding whether the CFC legislation applied to Vodafone, and that they would therefore make a reference to the European Court of Justice ("CJEU"). HMRC appealed first to the High Court and then to the Court of Appeal on the grounds summarised at [16] of the Court' of Appeal's judgment:

> "The Revenue contend that they had reasonable grounds for not issuing a closure notice based upon their objectively reasonable view that the CFC provisions were valid and enforceable against the respondent. The respondent has never contended that the Revenue's view that the CFC provisions are valid and enforceable was not objectively reasonable. The Revenue contend that the Commissioners ought not to have made a reference because no question of Community law arises on an application under paragraph 33. The only issue under paragraph 33 was whether they were satisfied that the Revenue had

> reasonable grounds for not giving a closure notice within the specified period."

73. Arden LJ gave the only judgment, with which Mummery and Moore-Bick LJJ both agreed. She held that:

> (1) there are no words of limitation in paragraph 33 which would serve to restrict the Commissioners' role to that of scrutinising the factual investigation being performed by the Revenue (para 19);
>
> (2) there was nothing in the wording of paragraph 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice (para 21); and
>
> (3) it is difficult to see why Parliament should wish to limit the protection given to taxpayers by paragraph 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage (para 22).

Henkes

74. In *Henkes,* Judge Beare had both to decide whether to issue closure notices, and whether to allow an appeal against a Sch 36 Notice issued to Mr Henkes. At [32] he set out one of the preliminary questions he had to decide as being "whether the First-tier Tribunal is entitled to determine the question of a person's domicile in the course of considering an application for a closure notice or an appeal against [a Notice]".

75. He recognised that in *Vodafone 2* the Court had found that the Tribunal had the jurisdiction to decide incidental question of law, whereas domicile was a mixed question of fact and law. However, he held at [46] in the context of the application for closure notices:

> "As such, I think that, in terms of my jurisdiction in this case, the principle set out in *Vodafone 2* is as applicable to the mixed question of law and fact in this case as it is to a question of pure law."

76. He gave reasons for this conclusion at [52]:

> "I can see no distinction in principle between the threshold question of law which was in issue in *Vodafone 2* and the threshold mixed question of law and fact which is in issue in the present proceedings. In both cases, there is a question which, once determined by the relevant court or tribunal, produces a binary answer and…is capable of bringing the proceedings to a close. Moreover, in both cases, it is a question which the relevant court or tribunal, as a specialist tax court or tribunal, is perfectly capable of answering."

77. At [58], also in the context of closure notices, Judge Beare described domicile as "a threshold binary question" which, was "so fundamental as to be capable of bringing the enquiry to an end".

78. When he moved on to considering Sch 36, he held that the Tribunal had the same jurisdiction to determine incidental questions of law in relation to Sch 36 Notices as it had in relation to closure notice applications, saying at [88] that there was "nothing express" in the

wording of the Schedule which restricted the jurisdiction to decide incidental questions of law. He added at [89]:

> "I can therefore see no reason why…the First-tier Tribunal cannot itself address and determine the threshold question of domicile before considering the questions set out in paragraphs 15(3) and 15(4) above [whether the information was reasonably required] in the light of that determination. After all, in this particular case, the question of the Appellant's domicile is all that is needed in order to determine the answers to those questions. If he is not UK-domiciled, then the information requested is palpably not reasonably required and there is obviously no reason to suspect that any of the circumstances in paragraph 21(6) of Schedule 36 exists, whilst both tests are clearly passed if he is UK-domiciled."

79. He concluded at [93]:

> "…I can see nothing in the language set out in the relevant provisions of Schedule 36 to suggest that the First-tier Tribunal in an appeal against an IN [Information Notice] should not be able to determine the domicile of the appellant, as a threshold question in relation to whether requested information or documents are reasonably required or in relation to the reasonableness of the Respondents' view that one or more of the conditions in paragraph 21(6) is satisfied, as opposed merely to considering, in that context, whether the Respondents' views on the appellant's domicile are reasonable."

Mr Vaines' submissions

80. Mr Vaines submitted that:

(1) HMRC have taken the view that Mr Perlman has a domicile of choice in the UK. Whether this is correct or not needs to be resolved in order to decide whether there are reasonable grounds for the Officer's decision to issue the Notices. He said that the information and documents in the Notices will be reasonably required "if and only if" HMRC prove that Mr Perlman is UK domiciled, which was a mixed question of fact and law.

(2) The analysis in *Henkes* was entirely correct and should be followed. In particular:

(a) there were no words in Sch 36 to limit the Tribunal's jurisdiction, which was fully appellate;

(b) in Sch 36 appeals, the Tribunal had the same jurisdiction to decide incidental points of law as it had in closure notice application cases; and

(c) the jurisdiction extended to matters which were mixed questions of fact and law, such as domicile.

(3) A person retains his domicile of origin unless it is proved that it has been replaced by a domicile of choice, see *Dicey, Morris and Collins* at Rule 7. It is HMRC which have the burden of showing that this has happened, and HMRC had to prove this was the position before they can reasonably demand the information set out in the Notices.

(4) This was the position whether or not HMRC normally had the burden of showing that information was reasonably required: Mr Vaines recognised that the Tribunal has taken different views on where the burden of proof lies in Sch 36 appeals, see *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 231 (TC) and *Joshy Matthew v HMRC* [2015] UKFTT 0139 (TC). However Mr Vaines said that "nothing much turns on this" in the

context of this hearing, and confirmed that he was not basing any part of his case on an argument that HMRC had the burden of proof in all Sch 36 cases.

Mr Purnell's submissions

81. Mr Purnell did not dispute that the Tribunal has the jurisdiction to decide incidental points of law when considering whether there are reasonable grounds for not giving a closure notice, but said that the Tribunal does not have the same jurisdiction in relation to appeals against Sch 36 Notices.

82. He submitted this was clear, firstly, when one considered the legislative purpose of Sch 36:

(1) He said that those provisions must be construed in the context of the overall legislative scheme. As Etherton C said in *Derrin* at [68] and Simler J said in *Kotton* at [60], the provision of information under Sch 36 is a preliminary investigatory stage. In contrast, the closure of a statutory enquiry marks the end of HMRC's enquiries into a return, after which the taxpayer has the right to appeal to the Tribunal. This can be seen, for example, in *Bristol and West plc v HMRC* [2016] EWCA Civ 397, where the Court of Appeal said at [35]:

> "We reject any notion that the closure of the inquiry and the expression of HMRC's conclusions arising from it can be belittled as a mere procedural pause. Closure marks an important stage at which the inquiry (with HMRC's attendant powers and duties) ends, HMRC is required to state its case as to the amount of tax due, in the closure notice itself, following which its power to amend the assessment is limited to such amendments."

(2) Sch 36 and the closure notice provisions considered in *Vodafone 2* therefore have different purposes: one is preliminary, and one brings to an end the HMRC enquiry process.

(3) Mr Vaines' submission that the Tribunal has the jurisdiction to decide the substantive issue in dispute at the Sch 36 Notice stage would cut across that statutory framework, deciding the key issue in dispute before the conclusion of the enquiry.

(4) For example, if Mr Vaines was right, it would have far-reaching implications for all sorts of cases. Mr Purnell gave an example:

(a) Mr A provides services via a company ("the Company") of which he is the only director and shareholder.

(b) HMRC thinks Mr A might be within the personal services legislation ("IR35") and the Company should thus have applied PAYE to his deemed earnings

(c) they issue the Company with a taxpayer Notice to obtain copies of contracts with agents and end users;

(d) the Company considers Mr A was outside IR35 and that it is therefore not reasonable to provide the contracts;

(e) the Company appeals the Sch 36 Notice on that basis;

(f) the Tribunal would have to decide whether IR35 applied at the preliminary Notice stage, rather than by way of an appeal against an assessment.

(5) Instead, the position was as set out by Jay J in *R (oao Archer) v HMRC* [2017] EWHC 296 (Admin), who said that, before making a closure notice:

> "HMRC are entitled to know the full facts relating to a taxpayer's tax position so that it can make an informed decision whether and what to assess. Without these, HMRC cannot frame the closure notice to comply with its duty to make it as helpful to the taxpayer as is possible or appropriate in the circumstances."

(6) Judge Mosedale made a similar statement in *Stephen Price v HMRC* [2011] UKFTT 624 (TC) at [10], a passage later approved by Judge Sinfield in *Andreas Michael* [2015] UKFTT 0577 (TC) at [29] and by other Tribunal judges:

> "HMRC is entitled to know the full facts related to a person's tax position so that they can make an informed decision whether and what to assess. It is clearly inappropriate and a waste of everybody's time if HMRC are forced to make assessments without knowledge of the full facts. The statutory scheme is that HMRC are entitled to full disclosure of the relevant facts: this is why they have a right to issue (and seek the issue of) information notices seeking documents and information reasonably required for the purpose of checking a tax return (see Schedule 36 of Finance Act 2008)."

(7) In Mr Perlman's case, the enquires remain open because HMRC do not have the information necessary to amend his self-assessments. It is not possible to close an enquiry without quantifying the tax due, as was clearly stated in *Archer* [69] and [72]; Jay J's conclusion on that point was upheld when the case reached the Court of Appeal see [2017] EWCA Civ 1962 at [22].

83. Mr Purnell said that the correct position was also clear from the structure of Sch 36 because:

(1) there is no right of appeal against the Tribunal's decision on an appeal against a Notice. Thus, if the Tribunal were to find that Mr Perlman was UK domiciled, he would be unable to appeal to the Upper Tribunal against that determination. Mr Purnell submitted that it would be inconsistent with the overall statutory framework for the taxpayer (or HMRC) to be deprived of all appeal rights in relation to the substantive matter in dispute; and

(2) the Tribunal was wrong in *Henkes* to hold that Sch 36 contains "no words of limitation". Instead, Part IV sets out numerous specific restrictions on the use of HMRC's powers (see §40), none of which requires HMRC to show that the officer's view was technically correct in order that the Sch 36 Notice be validly issued.

My conclusions

84. I agree with Mr Purnell, for the reasons he gives. In particular:

(1) I entirely endorse his submissions that Sch 36 cannot be read in isolation, but instead forms part of a suite of provisions which also including enquiry powers, assessments and appeal rights.

(2) The jurisdiction in relating to Sch 36 Notices is thus not the same as the jurisdiction confirmed by *Vodafone 2.*

(3) This is also clear from the lack of an appeal right after a Sch 36 judgment; there is no similar restriction when the Tribunal makes a closure notice decision.

85. Even were Mr Vaines to be correct that the jurisdiction is the same as that described in *Vodafone 2*, the Court of Appeal only held that the Special Commissioners (now the Tribunal) had the jurisdiction to determine "incidental points of **law**". Although in *Henkes* the Tribunal

decided that the position was the same in relation to mixed questions of fact and law, such as domicile, there is no higher authority for that conclusion. It is also not consistent with *Vodafone 2,* where the Special Commissioners did not decide any contested facts, see the Schedule to their decision at para 6.

86. I add only the few points set out below in order further to explain why I have not accepted Mr Vaines' other submissions.

Appellate jurisdiction?

87. A person in receipt of a Sch 36 Notice can appeal on various grounds, for instance, on the basis that the documents are "old", because they are not in his possession or power, or because an authorised officer has not given a required authority. The Tribunal's jurisdiction in relation to Sch 36 generally is thus appellate.

88. However, as Mr Purnell said, where a person appeals on the basis that the information is not "reasonably required", this is a challenge to the reasonableness of the officer's view, and the jurisdiction in deciding an appeal made on that ground is akin to supervisory. In other words it can only be set aside if the officer acted irrationally. There is no jurisdiction to decide whether the officer's view was *correct*. That is the function of the Tribunal deciding the substantive appeal against any eventual assessment

89. There are parallels in other parts of the tax system. For example, in *John Dee v HMRC* [1995] STC 941, the Court of Appeal considered the nature of the Special Commissioners' jurisdiction in an appeal against HMRC's decision to require security for VAT under the Value Added Taxes Act 1983 ("VATA") s 40. Neill LJ, giving the only judgment with which Roch and Hutchinson LJJ both agreed, held that the Tribunal had an appellate jurisdiction, saying (his emphasis)

> "Counsel for the company was clearly right to emphasise that the function of the tribunal is an appellate function. Section 40(1) of the 1983 Act makes provision for an *appeal.*"

90. Neill LJ went on to say that "it is clear from s 40 itself that the decisions from which an appeal may lie cover a wide field" and "it is true that there is no express provision in Sch 8 to the 1983 Act or elsewhere in the 1983 Act governing the powers of a value added tax tribunal on an appeal under s 40", before concluding that "it is necessary in each case to examine the nature of the decision against which the appeal is brought". He then said that when deciding appeals against an HMRC decision taken in reliance on VATA s 40, the Tribunal's function was to "consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight" – in other words, akin to a supervisory jurisdiction.

91. The same approach is apposite here: it is necessary to consider "the nature of the decision against which the appeal is brought". Mr Perlman is appealing against the officer's decision that the information was reasonably required, and the nature of the jurisdiction is similarly akin to supervisory because only the rationality of the decision can be challenged: see also Simler J in *Kotton* at [60] and [62], cited above.

92. Mr Vaines' focus on the legal principle that domicile of origin persists unless and until it is changed is thus not the relevant issue. As long as a HMRC officer has a rational basis for believing that Mr Perlman may be UK domiciled, HMRC do not have to prove, in the course

of the hearing challenging the Sch 36 Notice, that the officer's view of Mr Perlman's domicile is *correct*.

Conclusion on the First Issue

93. For the reasons set out above, HMRC succeed on the First Issue.

THE SECOND ISSUE

94. However, in case I am wrong in that conclusion, so that the Tribunal does have the jurisdiction to decide the substantive issue between the parties as part of the hearing against the Sch 36 Notices, I have gone on to consider the Second Issue. This was set out earlier in this decision, but is repeated here for ease of reference:

> "If the Tribunal does have such jurisdiction, whether or not it ought, as a matter of case management discretion, to determine in an IN appeal the substantive issue of the Appellant's domicile status."

Mr Purnell' submissions

95. Mr Purnell said that, if the Tribunal did have jurisdiction to decide Mr Perlman's domicile during the appeal hearing against the Sch 36 Notice, the Tribunal should decline to exercise that jurisdiction. He reiterated many of the points made in relation to the First Issue, including submissions that a Sch 36 Notice was a preliminary matter and in relation to which there were no appeal rights.

96. Mr Purnell also relied on *Eastern Power Networks v HMRC* [2021] EWCA Civ 283 ("*EPN*"). The background was that HMRC had opened enquiries into EPN, which applied to the Tribunal to close the enquiries under TMA s 28A. The Tribunal Judge (Judge McKeever) had exercised the jurisdiction described in *Vodafone 2,* and decided a disputed point of law relating to consortium relief. The parties appealed and cross-appealed to the UT against her judgment, and the Appellants subsequently appealed to the Court of Appeal, which upheld the UT's decision.

97. At the Court of Appeal, Rose LJ gave the only judgment, with which Dingemans and Richards LJJ both agreed. She ended by commenting on the Tribunal's decision to exercise its jurisdiction to decide the issue of law (Mr Purnell's emphases):

> "[54] The *Vodafone* case was a very particular instance where the legal issue was not simply one among many issues that was raised by the construction of anti-avoidance legislation. It was, as Arden LJ said, a point that was so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way: [26]. In my judgment**, the jurisdiction to decide an incidental point of law in an application for a closure notice direction is useful, as the *Vodafone* case shows, but only if the discretion to exercise it is used sparingly**….
>
> …
>
> [56] **The approach adopted in this application has also required the tribunals and this court to apply the statutory provision in the absence of any clear findings of fact about the scheme as a whole and without any agreed statement of facts**. We raised with the parties at the hearing what would have been the position if the FTT had decided that the arrangements did potentially fall within section 146B and the Appellants had later brought a substantive appeal before the FTT against the amendment of their returns. **What would be the status of the FTT's decision on this legal point when**

> **the same issue came to be debated in the substantive appeal once all the facts were known**? **The discussion quickly ran into the choppy waters of legal precedents and issue estoppel**.
>
> [57] **I would therefore firmly discourage the FTT from embarking on the kind of hearing that occurred here**. **There is a separate route by which a taxpayer can challenge an information notice served by HMRC if it regards the notice as disproportionate or unfair**. The jurisdiction conferred on the tribunal to direct HMRC to issue a closure notice is not generally a suitable vehicle for deciding points of law in the course of an enquiry such as the present."

98. Mr Purnell said that although *Vodafone 2* had found that the Tribunal has the jurisdiction to decide incidental points of law when deciding or not to direct the closure of an enquiry, it was plain from Rose LJ's comments that the Tribunal should exercise that jurisdiction "sparingly" given that "embarking on this kind of hearing" was "firmly discouraged". He submitted that a Tribunal hearing an appeal against a Sch 36 Notice should similarly refuse to determine the substantive dispute between the parties as part of that hearing.

99. He also noted Rose LJ's reference to the lack of clear findings of fact, and emphasised that domicile decisions involved a complex matrix of law and fact. By way of example, he reminded the Tribunal that the first-instance hearing of *Gaines-Cooper v HMRC* [2007] STC (SCD) 23 took eleven days, during which the appellant gave evidence for six and a half days.

100. In addition, Mr Purnell pointed out that HMRC had no information about Mr Perlman's worldwide income and gains, other than assertions that if provided, they would give rise to claims for tax losses. He reiterated that it was not in the public interest for HMRC to have to commit to a lengthy and complicated hearing about Mr Perlman's domicile, before they had been provided within any information about quantum. He also made submissions about *HMRC v Embiricos* [2020] UKUT 0370 (TCC), but in view of my conclusions I have not found it necessary to consider those points.

Mr Vaines' submissions

101. Mr Vaines' submissions were as follows.

(1) The principle question at heart of Mr Perlman's appeal against the Sch 36 Notices is whether he is domiciled in the UK, and on the assumption that the Tribunal has the relevant jurisdiction, it would not be fair or just to decline to exercise it, and refuse to decide that issue.

(2) If the Tribunal were to refuse to decide the issue of Mr Perlman's domicile; and also refuse his Sch 36 appeal, so that the information had to be provided; and the Tribunal panel which later heard the substantive appeal decided that Mr Perlman was not UK domiciled, he would have provided information to HMRC which self-evidently had never been reasonably required, and that would be unfair and unjust.

(3) *EPN* was not a relevant authority, because it dealt with a completely different substantive issue in the context of closure notice applications, and Mr Perlman was not seeking a closure notice.

My view

102. I again agree with Mr Purnell for the reasons he gives. Mr Vaines' submission that it would be unfair and unjust to refuse to exercise the jurisdiction because it would prevent Mr Perlman from putting forward his key argument as to why the Sch 36 Notices are not reasonably

required, fundamentally misunderstands the purpose and scope of those provisions, as set out earlier in this decision. It would, however, be unfair and unjust to decide Mr Perlman's domicile by exercising a jurisdiction which gave the losing party no appeal rights, so that his only route of challenge would be by way of judicial review, a much higher hurdle than obtaining permission to appeal on a point of law to the UT.

103. I found his submission that *EPN* should be disregarded, difficult to reconcile with his position on the First Issue, namely that the Tribunal's jurisdiction in relation to Sch 36 Notices followed from the Court of Appeal's judgment in *Vodafone 2*.

104. In *EPN* the Court of Appeal followed *Vodafone 2* in accepting that the Tribunal *has* the jurisdiction to decide incidental points of law when hearing closure notice applications, but strongly warned against the exercise of that jurisdiction. If (contrary to my conclusions earlier in this decision) Mr Vaines were to be correct and the Tribunal has a similar jurisdiction in relation to Sch 36 Notices as in relation to closure notice applications, it is clear from *EPN* that the jurisdiction should rarely be exercised.

105. There is nothing about Mr Perlman's case which would take it outside that general rule. On the contrary, deciding Mr Perlman's domicile status in the course of the Sch 36 hearing would engage exactly the points of difficulty identified by Rose LJ, namely the requirement to make extensive findings of fact and the need to navigate the "choppy waters" of the issue estoppel which would arise were the Tribunal to decide that Mr Perlman had retained his domicile of origin, but HMRC nevertheless issued assessments on the basis that he was UK domiciled.

DECISION, APPEAL RIGHTS AND DIRECTIONS

106. For the reasons set out above, I find that the Tribunal does not have the jurisdiction to decide whether Mr Perlman is UK domiciled as part of the hearing of his appeal against the Sch 36 Notice. If I were to be wrong on that, so that the Tribunal does have the jurisdiction, it would not be in the interests of justice for that jurisdiction to be exercised.

107. 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.

108. By the later of 28 days after the date for applying for permission to appeal, or 28 days after the final resolution of any appeal against this decision, Mr Perlman is to confirm whether he is continuing with his appeal against the Sch 36 Notice. The proceedings are stayed until that date.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 22 JUNE 2021