Case No: CO/1649/2016

Neutral Citation Number: [2017] EWHC 296 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2017

Before:

MR JUSTICE JAY

- -

Between:

R (oao WILLIAM ARCHER) **Claimant**

- and –

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

- -
- -

David Goldberg QC and Conrad McDonnell (instructed by **KPMG LLP**) for the **Claimant**
Aparna Nathan and Marika Lemos (instructed by **HMRC Solicitor's Office**) for the **Defendant**

Hearing date: 1st February 2017

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Judgment

MR JUSTICE JAY:

Introduction

1. This application for judicial review raises a point of principle regarding the effect of closure notices - given by HMRC to taxpayers pursuant to section 28A of the Taxes Management Act 1970 ("the TMA") - which fail to specify the amount of the tax HMRC contends should be paid. Further points of principle arise regarding the scope of section 114 of the TMA, in particular the ability of the court or the tribunal to correct errors in assessments and closure notices; as well as regarding the scope of the judicial review jurisdiction in the context of a system of statutory appeals.

2. For over a decade HMRC have been in dispute with Mr Archer (hereinafter referred to as "the taxpayer") in relation to two tax avoidance schemes, at least one of which was marketed by his advisers, KPMG. In 2009 the Court of Appeal determined that both schemes failed to achieve their intended purposes. After much delay, the reasons for which do not require examination, on 2nd February 2016 HMRC issued two notices ("the Closure Notices") purportedly under section 28A of the TMA. These notices did not state the amounts of tax which were payable, although officers of HMRC say that the taxpayer's relevant tax returns were amended administratively. The gravamen of the taxpayer's case is that the Closure Notices are valid and effective notices but that "they do not do what HMRC hoped they would do". This is because the Closure Notices fail to amend the taxpayer's returns in line with the prerequisites of section 28A(2)(b). It follows, contends the taxpayer, that no debt is owed by him to the Crown pursuant to section 59B(5) of the TMA, and that HMRC's decision letter dated 11th March 2016, nominally the target of these judicial proceedings, threatening to bankrupt him on the basis of such a debt is unlawful.

3. In order that this point of principle may be more fully understood, I should set out the essential factual background to this application.

Essential Factual Background

4. On 30th January 2003 the taxpayer's tax return for the year 2001/2 was submitted by KPMG to HMRC. The taxpayer claimed a loss of £18,117,284 in respect of the implementation of a scheme for Relevant Discounted Securities ("RDS"). The correlative claim for tax relief was in the sum of £7,646,635. HMRC then opened an enquiry into the taxpayer's tax return for that year.

5. On 30th January 2004 the taxpayer's tax return for the year 2002/3 was submitted by KPMG to HMRC. The taxpayer claimed a further loss of £8,297,840.75 in respect of the RDS scheme, correlating with a relief in the sum of £1,907,248.41. He also claimed an allowable loss for CGT purposes of £50,970,833 relating to the surrender of certain second-hand life assurance policies ("SHIPS"), corresponding to a relief in the sum of £5,070,904. HMRC then opened an enquiry into the taxpayer's tax return for that year.

6. In 2009 the Court of Appeal held that both these tax avoidance schemes were ineffective: as regards the RDS scheme, see Astall & Edwards v HMRC [2009] EWCA Civ 1010; and as regards the SHIPS scheme, see Drummond v HMRC [2009] EWCA Civ 608.

7. On 30th October 2015 HMRC issued Accelerated Payment Notices ("APNs") and Follower Notices ("FNs") in respect of the RDS losses, relating to both of the tax years in issue. For the tax year 2001/2, the amount said to be due was £7,246,913.60 (i.e. about £400,000 less than the amount specified in the tax return as an allowable relief); for the tax year 2002/3, the amount said to be due was £1,907,248.41 (i.e. the same amount as that specified in the tax return as an allowable relief).

8. In December 2015 and January 2016 the taxpayer made applications to the First-tier Tribunal ("F-tT") pursuant to section 28A(4) of the TMA for directions that HMRC be required to issue Closure Notices in respect of their enquiries into both tax returns. The taxpayer's argument was that, given that HMRC had sufficient certainty to issue APNs and FNs predicated on the entirety of the RDS losses being disallowable, there was now no reason why Closure Notices should not ensue.

9. On 15th January 2016 an APN and an FN were issued in respect of the SHIPS loss claimed in the 2002/3 tax return. The APN showed an amount due of £5,070,904 being the same as the amount specified by the taxpayer as an allowable relief in his return.

10. On 27th January 2016 the taxpayer submitted representations to HMRC against both of the APNs and FNs issued on 30th October 2015 in respect of the RDS losses. The taxpayer did not debate the amount specified of £7,246,913.60 in respect of the 2001/2 return but raised what HMRC characterises as a "technical argument" in respect of the 2002/3 return – although the arithmetic was not challenged as such, it was contended that HMRC were precluded from specifying an amount greater than £1,712,401.67. A similar technical argument was later to be levelled in relation to the APN and FN issued in January 2016. On my understanding of this correspondence, it was also being said that the instant case was factually distinguishable from the situations addressed by Court of Appeal authority.

11. On 29th January 2016 HMRC wrote to the F-tT to explain that the taxpayer's applications for Closure Notices would not be resisted, and that these would be issued in the near future.

12. On 2nd February 2016 two Closure Notices were issued in accordance (actual or purported) with section 28A of the TMA. Although they were dated the following day, I accept the evidence of Mrs Lynne Cook of HMRC that its system operates on that basis to allow for a short processing delay.

13. The Closure Notice relating to the 2001/2 tax year stated as follows:

> "**Information about our check of your Self Assessment tax return for the year ended 5 April 2002**
>
> I have now completed my check of your Self Assessment tax return for the year shown above. This letter is a closure notice

issued under Section 28A(1) and (2) of the Taxes Management Act 1970. Thank you for your help during my check.

I have sent a copy of this letter to your tax adviser.

My decision

Relevant Discounted Security Loss Claim

No relief is due for the loss you claimed to have sustained on a relevant discounted security. [The reasons for my conclusion reflect the decision of the Court of Appeal …]. Viewing these facts realistically, and having regard to the purpose of the relevant legislation …, no loss was made in respect of a relevant discounted security.

Other issues

Benefits in kind charges arise from the use of a gardener employed by the company £4,598 and for relocation expenses £7,602.

I am amending your return to reflect all of the above.

What to do if you disagree

If you disagree with my decision, you can appeal to us. You will need to write to us by 3rd March 2016, telling us why you think my decision is wrong. We will then contact you to try to settle this matter. If we cannot come to an agreement, we will write to you to tell you why …"

14. The Closure Notice relating to the 2002/3 tax year was in identical terms, save for the following one addition and one variation:

"**SHIPS Loss Claim**

The loss of £50,970,833 claimed in your return in respect of the surrender of non-qualifying second hand life assurance policies … is not an allowable loss for capital gains tax purposes. [The reasons for my conclusion reflect the decision of the Court of Appeal … and are based on my understanding of the material available to me].

…

Other issues

Benefits in kind charges arise from the use of a gardener employed by the company £4,563."

15. According to paragraphs 11-13 of the witness statement of Lynne Cook, the taxpayer's online tax returns were amended by her on 2nd February 2016. She has explained exactly how this was done: specifically, the losses of £18,117,284, £8,297,840.75 and £50,970,833 were removed from the relevant boxes in the tax return, and the employment benefits were increased to reflect the amounts specified in the Closure Notices (totalling £16,763). As paragraphs 13 and 15 of her witness statement explain:

> "When I amended the returns to reflect my conclusions, in each case I unchecked Box 18 of the returns and removed the figures from Boxes 18.3 and 18.6, the self-assessment calculation. Unchecking the box marked "self assessment: yes" results in a recalculation of the amount due. As a result, Mr Archer's self-assessment was replaced with an amended calculation reflecting the conclusions stated and amendments made by the closure notices. As Ms Musgrave sets out in more detail, these amended tax calculations were then automatically sent by our systems to KPMG …
>
> …
>
> After I had made the amendments to Mr Archer's self-assessment returns, I emailed the closure notices to Ms Bews at KPMG and I arranged for them to be sent by post to her as well. As Ms Musgrave states in her witness statement, as soon as I had made the amendment KPMG could have viewed the revised amount of tax outstanding for each of the years and a current version of Mr Archer's SA statement of account on the online system."

16. I will need to return to this evidence because the taxpayer does not accept it. He does not believe that any amendments were made to his returns on 2nd February 2016, and he denies that KPMG were sent the amended tax calculations in early February or at all.

17. Noting this factual dispute, I should at this stage address the basic arithmetic. I undertook this before the hearing started, just in order to see what ensued. The aggregate of the three amounts specified in the APNs is £14,225,066.01. According to the witness statement of Ms Emma Musgrave, interest is easily calculable and, as at 10th March 2016, totalled £8,553,963.32. Thus, the total sum due (without prejudice to the taxpayer's argument that no statutory debt had arisen) was £22,779,029.33 plus the sum of £16,763[1] to reflect the employment benefits specified in the Closure Notices. On the other hand, HMRC's Statement of Account as at 10th March 2016 (as reflected in its letter of the following day threatening bankruptcy) recorded the total tax due as being £22,541,746.78. On my reckoning, accordingly, there was a discrepancy of £237,282.55 on HMRC's own figures.

[1] Paragraphs 41-44 of the witness statement of Laura Blessed appear to dispute these modest amounts. On the other hand, paragraph 23 of the witness statement of Heather Bews states that these "minor" matters are not in dispute. I must proceed on the basis that they are not in issue.

18. Shortly before the lunch adjournment, I asked Ms Aparna Nathan for HMRC to explain this discrepancy. When she returned at 2pm, she was able to reconcile the figures with reference to electronic documents which were available to HMRC online and have been included in the trial bundles. The short point is that care must be taken to reflect tax overpayments made by the taxpayer more than a decade ago (on the basis of his self-assessments, which wrongly included the RDS and SHIPS relief) and which were repaid to him by HMRC. Once these are properly reflected, as well as the employment benefits which I have already mentioned, the apparent discrepancy vanishes.

19. On 2nd March 2016 KPMG sent emails to HMRC stating that, by reason of the fact that the Closure Notices did not state an amount of tax due, they did not effectuate valid amendments to the taxpayer's tax returns and/or the self-assessment was not amended. Consequently, so the argument ran, there was no amount of tax due, and nothing which could form the subject-matter of an appeal.

20. On 10th March 2016 HMRC disputed KPMG's analysis. In particular, it was said that the Closure Notices complied with the requirements of section 28A of the TMA because they stated the officer's conclusions with sufficient particularity, there was no obligation to state an amount of tax due in the notices themselves, and:

> "… the Closure Notices amended Mr Archer's returns: they say that "I am amending your return to reflect all of the above" and the returns were accordingly amended. Both you and Mr Archer were served with amended tax calculations by HMRC as a result of these amendments."

Finally, the point was made that the taxpayer should have appealed the Closure Notices under section 31 of the TMA.

21. On 11th March 2016 HMRC issued the taxpayer with a letter warning of bankruptcy action if the sum of £22,541,746.78 was not paid within 7 days. Attached to the letter was a Statement of Account itemising this alleged indebtedness. The statement included what is described as a "SA Balancing Charge" for 5th April 2002 in the sum of £6,665,174.74. This does not correspond to the sum of £7,646,635 mentioned under paragraph 4 above although I would imagine that the discrepancy is explained by the SA payments on account and the taxpayer's previous overpayments. Similarly, the sum of £1,907,248.41 (see paragraph 5 above) is not reflected, at least in its precise terms, in the "SA Balancing Charge" for 5th April 2003, although the sum of £5,070,904 does appear.

22. On 15th March 2016 KPMG sent a letter to HMRC stating that neither they nor the taxpayer had received an automatic amended tax calculation as a result of the amendment.

23. On 18th March 2016 KPMG sent an email to HMRC regarding the letter dated 11th March. There then followed a telephone conversation between Ms Bews of KPMG and Ms Musgrave of HMRC the contents of which are disputed.

24. On 21st March 2016 KPMG wrote to HMRC to explain the taxpayer's position regarding the threatened bankruptcy action, namely that no sum was assessed in the Closure Notices and, accordingly, no debt was due for payment.

25. On 22nd March 2016 KPMG received a Self-Assessment Statement dated March 2016 (no more precise date appears on the document, although interest has clearly been calculated to 10th March) in the total sum of £24,453,502.70. The difference between that amount and £22,541,746.78 may be explained by the fact that other tax years have been included; and nothing turns on this. This statement differs somewhat from the Statement of Account attached to the letter dated 11th March 2016 in that more detail is included. That said, I note that the same figures of £6,665,174.74 and £5,070,904 appear on this document.

26. On 29th March 2016 Kerr J granted interim relief on the taxpayer's without notice application, restraining HMRC from issuing a statutory demand in relation to the sum in dispute.

Disputed Matters

27. The taxpayer does not accept Mrs Cook's evidence that his online tax returns and related self-assessments were amended on 2nd February 2016. In this regard, the following matters were drawn to my attention:

    (1) Mrs Cook has exhibited a number of documents, with a blue background, showing the original versions of the salient boxes in the tax returns and what she describes as the amended versions. None of these documents is dated.

    (2) On 15th March 2016 Ms Musgrave emailed "Business User Support" (within HMRC) stating that the taxpayer's statement was amended on 10th February 2016 (i.e. not 2nd February) and that "the SA system is showing that a statement was generated on 10th March 2016" (i.e. not 2nd February). Given that the taxpayer and KPMG were saying that they had not had an up to date statement of account, or Tax Calculation and Revision Notice[2], from HMRC, confirmation was sought by Ms Musgrave that "a statement was definitely issued and if so on what date". On 21st March Business User Support informed Ms Musgrave that "[a]s the statement was only issued on 10th March 2016, and this was looked at on the 17th, the statement wouldn't have had time to get to the customer". Business User Support did not examine the position before 10th March 2016, but (in my view unhelpfully) this department was not asked to.

    (3) On 21st March 2016 Ms Musgrave asked Business Support "whether there were any issues with the amendments being issued from SA, these were done on 10th February as part of the issuing of closure notices. Having read the SAM [internal guidance] we have assumed that any amendment that is made to SA will generate an amendment being issued". Eventually, on 4th May 2016, Ms Musgrave received a reply to her email. This stated that the author was not aware of any

[2] Neither a Statement of Account nor a Tax Calculation and Revision Notice is the same as a self-assessment. The former reflects a taxpayer's liabilities over all tax years; the latter relates to a specific tax year. On my understanding, Tax Calculation and Revision notices are not visible by taxpayers on the online system.

issues (which I infer to be technical issues) with amendments being issued back in February, and confirmed that HMRC's systems were set up automatically to generate a Tax Calculation and Revision Notice in these circumstances. However, HMRC have no specific record on the computer file of this having taken place; and, according to paragraphs 37 and 38 of the witness statement of Ms Laura Blessed, KPMG's Tax Centre of Excellence has no record of any hard copy communication from HMRC having being received.

(4) HMRC's Statement History, giving a Statement date of 10th March 2016, does state that the figure of £6,665,174.74 (see paragraph 21 above) was an "adjustment from SA return 2nd February 2016" (see the first entry for 31st January 2003). On the other hand, the figure of £5,070,904 is not given an adjustment date. The taxpayer relies on the "enquiry amendments" made on 9th and 26th February in relation to 31st January 2005, but these relate to different tax years and are immaterial.

(5) According to Ms Blessed, on 26th February 2016 she received an email from HMRC attaching a Closure Notice for the tax year 2003/4. Unlike the previous Closure Notices, it stated that Mrs Cook had amended the taxpayer's return to reflect the amount payable, specified in the notice as being the sum of £834,335.80. The letter also stated that the taxpayer owed £24,124,842 but gave no further particulars.

(6) In the light of this email, Ms Blessed informs the Court that on 26th February 2016, and regularly thereafter, she checked her client's online Self-Assessment record "to look to see if there was any change". Her internal email dated 26th February made clear that her checks on that day had revealed nothing which showed how and why £24M was due. A screenshot taken by her on 10th March shows the same state of affairs. It was only on 14th March that she could see for the first time the Statement of Account dated 10th March 2016. Both screenshots are in evidence.

(7) Ms Blessed has not provided screenshots of her client's online self-assessment record which is within the "view account" section of the website. She says that it is not normal practice for KPMG to do so. However, her evidence is clear that she did check the "view account" section at regular intervals, and that it "looked normal (nothing unusual was showing)".

28. Ms Musgrave and Mrs Cook have challenged the taxpayer's evidence, in particular the evidence of Ms Blessed. I have read their witness statements with care. In short, Mrs Cook is adamant that she amended the online tax returns and consequent self-assessment calculation on 2nd February 2016, and that these amendments were visible to the taxpayer and, in particular his advisers, from their "side" of the online system. Mrs Cook also rightly points out that KPMG have been somewhat diffident about the quantum of tax at stake. Paragraph 8 of Ms Blessed's witness statement refers to an amount "likely to be over £20M", but the simple calculations I have been able to undertake for myself puts the figure closer to £22.5M. The discrepancy I originally noted in HMRC's own figures does not justify the vagueness of Ms Blessed's evidence.

29. I have naturally considered whether I may properly resolve the factual disputes which exist between the parties, which (for the avoidance of any doubt) I may encapsulate as follows: (1) did Mrs Cook amend the taxpayer's online tax returns and self-assessments on 2nd February 2016, (2) (as a related matter) if she did, were such amendments visible to the taxpayer and KPMG before 14th March 2016, and (3) did KPMG receive the Tax Calculation and Revision Notice? The resolution of factual disputes is not ordinarily carried out in judicial review proceedings, particularly where cross-examination has not been ordered. Further, I am not ignoring HMRC's submission that, in any event, the taxpayer should have brought a timeous appeal under section 31 of the TMA (in that forum factual disputes may more readily be resolved after hearing oral evidence). Finally, an inference is certainly capable of being drawn that KPMG waited as long as possible, until 2nd March 2016, before informing HMRC that it believed that the Closure Notices were defective.

30. On the other hand, and subject always to the point on section 31 of the TMA which I will need to address at a later stage, there is no jurisdictional bar to the Court resolving factual disputes if it considers that it should. I have reminded myself of Mr Fordham's lengthy review of the authorities at section 17.3 of his Judicial Review Handbook, (6th edition). As Mr Fordham footnotes, section 17.3 in the 5th edition of his work was relied on by McCombe J in R (K and AC Jackson & Son) v DEFRA [2011] EWHC 956 (Admin), paragraph 57. In my judgment, the days have long since passed when the Administrative Court, or its predecessor, accepted the version of events advanced by a Defendant unless it was frankly implausible. The issue may fairly be resolved on the documents, applying the probabilistic standard albeit recognising the incidence of the burden of proof in civil proceedings. Moreover, the issue may fairly be resolved in these particular circumstances without my disbelieving any of the various witnesses.

31. In my judgment, it is more likely than not that (1) Mrs Cook's amendments to the tax returns and the self-assessment *were* carried out on 2nd February 2016, (2) the Tax Calculation and Revision notice was either not generated by the system or was not received by KPMG shortly thereafter or at all, (3) Mrs Cook's amendments were visible online under the "view account" section of the website at all material times after 3rd February 2016, and (4) the "Statement History" section of the website did not include a statement of account which included the £22.5M in dispute until 24 hours or so after 10th March 2016 (being the date of that statement). My reasons for coming to these conclusions are as follows.

32. First, it is necessary for these purposes to look more carefully at the witness statements of Mrs Cook and Ms Musgrave. At tab 99 of the bundle appears a Self-Assessment statement dated 10th March 2016 which clearly shows what are described as amendments created on 2nd February 2016. A number of amendments have been created, included amongst these being the key items – in the sums, respectively, of £6,665,174.74 and £5,070,904. Ms Musgrave accepts that this statement appears in the form available in the bundle only on HMRC's internal systems, but she is clear that the same information appeared - within 24 hours or so of 2nd February 2016 – on the taxpayer's SA online account, as seen from his perspective. This must be a reference to the "view account" section I have previously mentioned.

33. It is true that HMRC have not been able to produce the taxpayer's SA online account for February 2016. I appreciate that the account is constantly updated but the

wherewithal must exist to create, or recreate, what was visible to the taxpayer on any particular date. The account for 28th October 2016, which is available, does not assist, because HMRC has placed the taxpayer's account on hold pending the resolution of this litigation.

34. Secondly, Ms Musgrave is clear that the "tax year overview" on the online account for 2001/2 shows approximately £7.3M due, and that the "breakdown of tax" (once clicked) shows £6,665,174.74 for that year. Furthermore, clicking on "balance payment (adj.) for tax year 2001/2" shows an "adjustment for tax return on 2/2/16" in the self-same amount. This document has been made available to the Court: see tab 126 of the bundle. Paragraph 15 of Ms Blessed's statement accepts all of this, but speculates that "it seems possible – in particular if this was a manual entry – that the entry could have been given that description although in fact made or completed on a different date". In my judgment, there could be no conceivable reason for antedating the computer record save to attempt to mislead the taxpayer and the Court; and I find that Ms Cook has not done this. I also note Ms Musgrave's evidence that it would not be possible to effect a manual entry in this way.

35. Thirdly, I am not satisfied that Ms Blessed's evidence draws a sufficient distinction between the "view account" and "statement history" sections of the website. Given that on 26th February 2016 she was aware that HMRC were now saying that over £24M was due from her client, I find it slightly surprising that she did not take screenshots of the "view account" pages. Her assertion that these "looked normal" is somewhat vague. On the other hand, I accept Ms Blessed's evidence that the taxpayer's statement history, to reflect the Statement of Account dated 10th March 2016, was not visible the following day. The witnesses are agreed that it takes in the region of 24 hours for these amendments to work through the system. Furthermore, I was told during the hearing that it takes up to 45 days for new Statements of Account to be created after amendments: this tallies with the latter having been made on 2nd February.

36. Finally, albeit not without a measure of hesitation, I am not satisfied on the balance of probabilities that KPMG received any Tax Calculation and Revision Notice in early February 2016; or, indeed, at any stage until 22nd March 2016. The emails exhibited to Ms Musgrave's witness statement suggest that there was no "glitch" in the system (to use her word), but I am slightly surprised that she did not ask the relevant department to check whether a relevant notice was created and/or had been sent out before 10th March. No explanation has been given for this omission. HMRC must have the means to interrogate its computers to answer questions of this nature.

37. I have reached the foregoing conclusions despite being satisfied that Mrs Cook can have no clear recollection of what she did, or did not do, on 2nd February 2016 (she does not say that she has such a recollection – she is extrapolating her probable actions from the computer record). Furthermore, I am satisfied that her standard practice would have been to follow HMRC's own Enquiry Manual, EM3850, which states in terms that a closure notice must specify the amount of tax due consequent upon the conclusions reached. Mrs Cook followed the manual, and what I infer to have been her standard practice, on 26th February but does not explain why she did not do so on 2nd February. I do not draw the inference that Mrs Cook's failure to pursue her standard practice, and HMRC's policy, in relation to the Closure Notices was matched by a failure to amend the tax returns etc. online. I note that she used the

present continuous ("I am amending your return") rather than the perfect tense ("I have updated") which she deployed in relation to the Closure Notice dated 26th February. The exact sequence of events may not be wholly clear, and these grammatical points have limited force; but I am satisfied that she would not have used this language had the return not been amended at around this time.

The Statutory Framework

38. The key provision under scrutiny in these proceedings is section 28A of the TMA, which provides in material part as follows:

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

It is to be noted that the TMA as originally enacted did not contain an analogous provision. Section 188 of the Finance Act 1994 inserted section 28A into the TMA with effect from 1996/7. Its different wording will be examined subsequently. The current version of section 28A was substituted for that introduced by section 188 by section 88(1) of the Finance Act 2001.

39. Section 28A must be understood and construed within the relevant statutory scheme. For present purposes I can summarise the position without setting out in this judgment large passages of statutory text:

(1) Section 8: the obligation to file a personal (tax) return, together with such information as HMRC may expressly require and any accounts, statements and documents that relate to the information contained in the return. Since 2007, the taxpayer has filed his returns online, and earlier returns have been uploaded onto the digital system.

(2) Section 9(1): the obligation to include a self-assessment within the section 8 return, being an assessment both of the amounts chargeable to tax and the amount

payable in tax. By sub-section (3), in the event that the taxpayer does not discharge this obligation, HMRC may make the assessment on his behalf, and send him a copy of it (whereupon, pursuant to sub-section 3A, it forms part of the self-assessment).

(3) Section 9A: power in HMRC to initiate an enquiry into a taxpayer's return. This power was properly exercised in the instant case.

(4) Section 9ZA: ability of the taxpayer to amend his tax return by giving notice.

(5) Section 29: ability of HMRC to make an assessment of tax due "in the amount, or further amount, which ought in … their opinion to be charged …", subject to the fulfilment of conditions.

(6) Section 31: an appeal to the F-tT may be brought against "any conclusion stated or amendment made by a closure notice under section 28A … (amendment by Revenue on completion of enquiry into return)" (see s.31(1)(b)). The time limit for bringing an appeal is 30 days.

(7) Section 50: F-tT's powers on appeal. These include powers to reduce a self-assessment (sub-section (6)) as well as to increase it (sub-section (7)).

(8) Section 59B: crystallising amounts due as a statutory debt. Sub-section (5) applies *inter alia* to "an amount of tax which is payable … as a result of the amendment … of a self-assessment under … section 28A", and by virtue of paragraph 5 of Schedule 3ZA to the TMA, is a period of 30 days.

(9) Section 113(3): "Every assessment … notice of assessment … or other document required to be used in assessing … tax shall be in accordance with forms prescribed from time to time by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual". It was not suggested that HMRC has any prescribed form for closure notices.

(10) Section 114(1): "An assessment … or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or to be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding". Further, by sub-section (2), mistakes as to the amount of tax charged do not invalidate an assessment.

40. *If* the Closure Notices in the instant case were effective to amend the taxpayer's returns and self-assessments for the tax years 2001/2 and 2002/3, or *if* section 114 operates so as to rectify the errors in these notices, then the total sum of £22,541,746.78 was due and owing as at 11th March 2016 pursuant to the combined effect of section 59B(5) and paragraph 5 of Schedule 3ZA. This is because (a) more than 30 days have elapsed since the date of issue of the notices, and (b) the taxpayer cannot be heard to dispute quantum in these proceedings, that matter being one which should have been raised in an appeal to the F-tT.

41. On the other hand, *if* the Closure Notices were ineffective to amend the taxpayer's returns and self-assessments for the relevant years, and section 114 cannot operate to rectify errors in the notices, then the effect of section 267(2)(b) of the Insolvency Act 1986 is that no relevant indebtedness arose under section 59B(5) on 11th March 2016. This is because section 267 applies only to a liquidated sum payable "either immediately or at some certain, future time".

42. The parties referred me to relevant authority which I propose to discuss below.

The Rival Contentions in Outline

43. The core argument advanced by Mr David Goldberg Q.C. for the taxpayer was that the Closure Notices issued on 2nd February 2016, although compliant with section 28A(1) of the TMA and therefore valid and effective to that extent, failed to give effect to the officer's conclusions by making the amendments to his client's returns required by sub-section (2)(b). Section 28A requires the making of an assessment – albeit one which amends the taxpayer's self-assessment made many years previously – and it is a minimum prerequisite of any assessment to tax by HMRC that it informs the taxpayer of his liability in a known or fixed sum (see Hallamshire Industrial Finance Trust v IRC [1979] 1 WLR 620 and 627).

44. It is clear, submitted Mr Goldberg, that the Closure Notice itself did not amend the taxpayer's return. The form of words "I am amending your return" is insufficient – as the point is advanced in his Skeleton Argument, "no amount of construction of the Closure Notices can build them into a statement of how much Mr Archer is said to owe HMRC: there is just nothing in the Notices about that at all". Furthermore, the mandatory requirement of section 28A(2)(b) is not elevating form over substance because the whole regime of the TMA requires certainty and the fixing of exact amounts.

45. Anticipating HMRC's arguments in riposte, Mr Goldberg submitted, first, that section 114 of the TMA cannot cure the defect, because it cannot operate to fill an essential precondition that has been left out; secondly, that the taxpayer is not required to pursue a statutory appeal, because the F-tT cannot determine as a matter of law whether the Closure Notices established a statutory debt entitling HMRC to threaten bankruptcy proceedings, and, furthermore, there was no "assessment" capable of being appealed; thirdly, that HMRC cannot rely on extraneous material (such as the APNs and the FNs) to satisfy the requirements of section 28A(2)(b); and, fourthly, that in any event, a close examination of the evidence bearing on the period 2nd February - 11th March 2016 shows that "what HMRC were doing to frame a claim against Mr Archer is wholly unclear".

46. Finally, submitted Mr Goldberg, the upshot of his submissions being correct is that HMRC must be deemed to have closed their enquiries into his client's returns for the tax years 2001/2 and 2002/3, and it is now impossible to open a further enquiry under section 9A.

47. The core argument advanced by Ms Nathan for HMRC in her attractively presented address was that the Court should refuse to entertain this application for judicial

review because the taxpayer should have appealed the Closure Notices under section 31 of the TMA. There is broad jurisdiction in the F-tT to adjudicate on the validity of such notices.

48. Without prejudice to her objections as regards forum, jurisdiction or discretion, Ms Nathan submitted that the Closure Notices were valid because they complied with the requirements of section 28A of the TMA: in particular, they set out the officer's conclusions that the losses were denied in their entirety, and they made amendments to the taxpayer's returns for the relevant tax years. Ms Nathan submitted that section 28A contained no stipulation that the Closure Notices state in terms the amount of tax due; and, furthermore, HMRC's witness evidence demonstrates that the relevant tax returns were in fact amended. It was contended that the case of Hallamshire is distinguishable because it was decided before the self-assessment regime came into existence. Further, submitted Ms Nathan, it was clear that once the taxpayer was made aware of HMRC's conclusions on the points at issue, namely that his tax avoidance schemes were completely ineffective to create the losses in question, he also well knew the amounts he had to pay. It is inconceivable that KMPG were, or had been, unable to advise him as to this.

49. In the alternative, submitted Ms Nathan, the requirements of section 28A(2)(b) were satisfied because a reasonable person in the position of the taxpayer would have known what amount was due: see HMRC v Bristol & West [2016] EWCA Civ 397, at paragraphs 24-27.

50. If necessary, Ms Nathan submitted, HMRC could rely on section 114 of the TMA to rectify any technical errors in the Closure Notices. These were not "gross errors" because on the facts of the present case there could be no question of the taxpayer being deceived or misled as to the amount of tax due.

51. Finally, submitted Ms Nathan, if the Court were to hold that it is a fundamental requirement of section 28A(2)(b) that the Closure Notices should state the amount of tax due, and that this omission cannot be cured by section 114, then the upshot must be that the Closure Notices are invalid. In short, they are nullities, and there is nothing to preclude the issuance of further, valid Closure Notices.

Discussion and Conclusions

Where to begin?

52. As is often the case in the law, it is necessary to select the correct starting-point. Should it be the submission of Ms Nathan that I must decline jurisdiction, or should I begin with Mr Goldberg's submission that the Closure Notices did not amend the tax returns (and, connectedly, the self-assessments included within the returns), such being a condition precedent to the crystallisation of the statutory debt under section 59B(5)? Autologic Holdings Plc v IRC [2006] 1 AC 118 is authority for the proposition that assessments must be appealed to the F-tT, and that it is an abuse of process to litigate by ordinary action. However, Autologic predicates an assessment, and Mr Goldberg's core submission is that there has been none. Ms Nathan's riposte is that the Closure Notices contained amendments to the return, or at the very least

purported amendments, in which circumstances section 31 of the TMA applies – either alone or in conjunction with section 114. To my mind, *if* Ms Nathan were right, not merely would she be so on one or other of the substantive points, but she would also be so on the abuse of process point. However, it is not obvious to me that she *is* right; and in my judgment her submission cannot be taken as a preliminary issue. It seems to me that I must begin by examining Mr Goldberg's submissions on section 28A to see where they lead.

The Section 28A Issue

53. Mr Goldberg's case is simple and straightforward, and it was very neatly presented. The Closure Notices must make the amendments to the returns. It is true that section 28A(2) does not state in terms that a Closure Notice must *itself* set out the *amount* of tax said to be due, but Mr Goldberg's submission was that this is implicit in the overall statutory scheme, as well as being consonant with the policies and objects of the TMA. On Mr Goldberg's argument, a Closure Notice is the formal document which amends the return, as well as the self-assessment included within the return. The appeal under section 31 is against what the Closure Notice contains, including the amendments to the return, being in the nature of assessments. HMRC's alteration of the return and the self-assessment online is consequential or adjectival, no more (and no less) than the implementation of the amendments made in the Closure Notice (without for one moment accepting Mr Goldberg's submissions, Ms Nathan did use the noun "implementation" in this context during the course of her oral argument). Thus, a distinction must be drawn between what a closure notice does (or must do), and the administrative steps taken by HMRC to give effect to it.

54. In my judgment, Mr Goldberg's submissions are correct. My reasons, which largely reflect his arguments, are as follows.

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

56. For instance:

    (1) Section 9(3) requires HMRC to send a copy of their assessment (in the case of a non-compliant taxpayer) to him. This is done on behalf of the taxpayer and is treated as part of his self-assessment (section 9(3A)); but the taxpayer must be notified.

(2) Section 9B enables HMRC to amend a return during a section 9A enquiry. Sub-section (3) deals with the giving of effect to such amendments. Section 9B(3)(a)(i) states in terms, albeit in its particular context, that amendments are "contained in the [closure] notice". Further, this provision refers to these amendments being as formulated in the closure notice. Mr Goldberg did not draw my attention to this provision although it was in the bundle. He would have wished to place emphasis on the preposition "in".

(3) Sections 9ZA and 9ZB permit the taxpayer to amend his return in stipulated circumstances: the amendment is effected by giving notice to HMRC.

(4) Section 28B(1) - (3), which applies to partnership returns, matches section 28A. However, there is also a requirement that the officer notify the individual partners of amendments to their returns: such amendments are effected by the giving of that notice.

(5) Section 29 permits the making of discovery assessments. These must be in writing, and notified to the taxpayer.

(6) Section 31 confers a right of appeal against a whole range of decisions (usually assessments) made by HMRC. Section 31(1)(b) confers an appeal right against "any conclusion reached or amendment made by a closure notice". Three points arise. First, the amendment is made by the notice itself. Secondly, the notice must be a document. This lends weight to a construction of section 28A which holds that the amendment to the return must be in the Closure Notice. Thirdly, section 31(1)(a) – (d) draws no real distinction between "assessments" (sub-paragraphs (a), (c) and (d)) and "amendment(s) to the return" (sub-paragraph (c)).

(7) Section 50 is the procedural provision dealing with the F-tT's powers on appeal. In a case where section 28A(2) has been properly complied with, the F-tT may either reduce the amount "overcharged by a self-assessment" (sub-section (6)) or increase it (sub-section (7)). It is clear from the language of both these sub-sections that the assessment is being reduced or increased, as the case may be.

(8) The heading to section 59B is: "assessments other than simple assessments". It seems to me that the amendments to self-assessments under sub-section (5) are regarded as falling within the category of amendments.

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

58. Ms Nathan relied on the previous versions of section 28A of the TMA which have different wording. Section 28A was first inserted into the TMA by section 188 of the Finance Act 1994, and minor amendments were made in the Finance Act 1998. Schedule 29 to the Finance Act 2001 repealed these provisions. Ms Nathan points out that section 28A(5), as originally enacted, provided that the notice completing an

officer's enquiries had to state "his conclusions as to the amount of tax which should be contained in the taxpayer's self-assessment". Ms Nathan's submission was that this wording required the spelling out of an amount. No such requirement is to be found in the current version of section 28A. In my judgment, these points carry little weight. In particular, the scheme of the original section 28A was different to the post-2001 version in that HMRC made no amendments to the return in the closure notice itself and the taxpayer could within 30 days of the section 28A(5) notice amend his self-assessment to reflect HMRC's conclusions. The current version, including a new section 28A(2), predicates the making of an assessment by HMRC. I therefore read the old section 28A(5) as being the analogue to the new section 28A(1), and not the new section 28A(2).

59. My second reason for favouring Mr Goldberg's submissions on this issue is that in my view the weight of authority supports him. My attention was drawn to the following cases.

60. In Hallamshire Browne-Wilkinson J (as he then was) held that in order to be valid, a tax assessment had to include a statement of the tax payable. This was in the context of the *ancien régime* of tax assessments being made by HMRC and not by the taxpayer, and Ms Nathan was astute to draw my attention to Auld LJ's exposition of the current statutory scheme in Langham (Inspector of Taxes) v Veltema [2004] STC 544 (CA), paragraphs 3-4 in particular. In my judgment, Hallamshire cannot provide a conclusive answer to Ms Nathan's argument that it is the section 28A closure notice which amends the return (without stipulating in what amount); but it is a strong pointer to its incorrectness. In my view, the current regime may be all about self-assessment by the taxpayer rather than executive action by the Crown, but in the present context of section 28A it is HMRC who is deciding what should be paid.

61. My attention was drawn to Spring Salmon & Seafood Ltd v HMRC, both in the F-tT ([2013] UKFTT 320 (TC)) and in the Upper Tribunal ([2014] UKUT 0488 (TCC)). In that case the closure notices included the assessments under appeal.

62. In Wong Yau Lam t/a Sunlight Takeway Meals v HMRC [2016] UKFTT 0659 (TC)), the focus of the appeal was section 28B(4) of the TMA. This, as I have already noted (see paragraph 56(4) above) includes a requirement that the individual partners be notified of HMRC's amendments to their returns. On my understanding, no such amendments were made in Sunlight Takeway Meals, either by the closure notice or otherwise. The F-tT held that compliance with sub-section (4) was not a precondition to the validity of the closure notice (see paragraphs 25-27). Instead, the closure notice took effect under sub-section (3) if it met the requirements of sub-sections (1) and (2) (see the first sentence of paragraph 26). The closure notice had in fact satisfied section 28B(2) because the amendments to the partnership return were included in it. It is true that the F-tT was not required to examine what the position would have been had it not done so.

63. In Fidex Ltd v HMRC [2016] STC 1920, the Court of Appeal's focus was Schedule 18 to the Finance Act 1998 and closure notices issued against companies. Paragraph 32 of Schedule 18 requires a closure notice to state HMRC's conclusions; it does not require the amendment to the return. Paragraph 34 gives the company 30 days in which to amend its return to accord with those conclusions. Again, it is noteworthy,

albeit not determinative, that the closure notice under consideration in that case specified the revised corporation tax loss.

64. Bristol & West Plc v HMRC [2016] STC 1491 shared a similar corporate context. The issue in that case was how a closure notice, which erroneously stated that no amendments were required, should be interpreted. My attention was drawn to paragraph 24(v) of the judgment of Briggs LJ, which provides:

> "Having issued a closure notice, HMRC have no power to amend the relevant tax return otherwise than to give effect to the conclusions stated in the closure notice: see para 34(2)(b)."

In my judgment, this passage avails neither party before me. The structure of Schedule 18 of the Finance Act 1998 differs from that of the TMA in that our statute requires HMRC to amend the return at the same time as it issues the closure notice, not later.

65. Of greater saliency for present purposes is paragraph 35 of Briggs LJ's judgment, which provides:

> "We do not doubt that the conclusion of the enquiry and the expression of HMRC's conclusions in a closure notice leaves open for future debate, negotiation and settlement the final outcome as to the extent of the taxpayer's tax liability. But we reject any notion that the closure of the enquiry and the expression of HMRC's conclusions arising from it can be belittled as a mere procedural pause. Closure makes an important stage at which the enquiry (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 as will give effect to those conclusions. These provisions contain requirements of real potential value to the taxpayer …" [emphasis supplied]

66. Briggs LJ was examining paragraph 32 of Schedule 18 which requires HMRC to "state their conclusions". It may be seen that this broadly matches the wording of section 28A(1). Briggs LJ was therefore holding that paragraph 32 includes an obligation on HMRC to state their case as to the amount of tax due. My first impression was that this reasoning availed Mr Goldberg's overall argument because, construing just section 28A(1) and not going any further, HMRC are required to include within their conclusions in the closure notice itself a statement of the amount of tax due. However, Mr Goldberg did not seek to support my preliminary view: there is, he submitted, a difference between specifying an amount and stating a case as to amount. The latter is less prescriptive, and leaves room for reasonable inferences being drawn. I did not understand Mr Goldberg to be disclaiming reliance on Briggs LJ's dictum that the conclusions must be within the closure notice itself.

67. I have given Mr Goldberg's concession careful consideration. Ms Nathan did not make any submissions on paragraph 35 of Briggs LJ's judgment given what she had heard fall from Mr Goldberg's lips in oral argument. Ultimately, though, I have

concluded that Mr Goldberg is correct, and that I must be grateful to him for causing me to avoid regrettable error. At paragraph 26 of his judgment, Briggs LJ addressed the extent to which a closure notice fell to be construed according to its black letter. He explained that the issue was the correct interpretation of the notice, "as it would be understood by a reasonable person in the position of its intended recipient". Thus, in my view Briggs LJ was not holding that in all cases it is incumbent on closure notices under Schedule 18 to spell out the amount of tax said to be due. There will be situations in which the taxpayer may reasonably be expected to infer the amount from information available to him and "the relevant objective contractual scene". Indeed, in straightforward cases it will be obvious from the conclusions what the resultant tax amounts to.

68. At this stage I should return to the wording of section 28A(5) as applicable in 1998 ("state[s] his conclusions as to the amount of tax …"). It is apparent that this rather chimes with Briggs LJ's construction of paragraph 32 of Schedule 18 to the Finance Act 1998, with its less specific wording. I think that it must follow from the above that even the wording of the old section 28A(5) did not go quite so far as to require HMRC to state in terms the amount of tax they were claiming was payable. This point clearly cuts both ways, but it is a further reason for disagreeing with Ms Nathan's submission that there is a material difference between the old wording of section 28A(5) and the current wording of the section, at least in terms of sub-section (1).

69. In any case, the question arises whether the situation differs under the current wording of section 28A (c.f. paragraphs 32 and 34 of Schedule 18) because of section 28A(2). In my judgment, it does. The requirement, which did not exist before, is to amend the return - in the closure notice itself - to give effect to the officer's conclusions. This amendment entails, or includes, an amendment to the self-assessment which then has specific consequences not dependent on the taking of any further action by the taxpayer, save (and critically) the ability to appeal the amendment under section 31(1)(b). What is required is not merely the statement of HMRC's case as to the amount of tax due, but a statement of that amount.

70. My construction of section 28A fully accords with HMRC's own internal guidance which uses mandatory language. It also accords with the policies and objects of the TMA which are to ensure certainty, finality and transparency. I asked Ms Nathan whether HMRC were in a position to contradict KPMG's evidence that they had never previously seen a closure notice which did not state the amount of tax said to be due. Her answer indicated that they were not. I infer that it is HMRC's almost invariable practice to stipulate the amount, and that exceptions arise only when mistakes are made.

71. Ms Nathan sought to persuade me that the wording in the Closure Notices, "I am amending the return", serves to amend the return, and is therefore within section 28A(2). I cannot agree. The Closure Notices reveal no such amendments on their face, and if that is what the sub-section requires I cannot see how wording which does not so state can make a difference. Indeed, this wording is entirely consistent with the officer amending the computerised returns and self-assessments, which I have found did occur on 2nd February 2016. This is separate administrative action, in the form of the implementation of something that should have taken place but did not. Further, section 28A(2) is not worded so as to authorise an amendment; it is the closure notice itself which achieves the amendment.

72. For all these reasons, I hold that Mr Goldberg's submissions are correct on his first, and main, substantive issue. Section 28A of the TMA requires that a closure notice itself amend the taxpayer's return by stating the amount of tax due: in other words, assess the taxpayer's tax liability.

Section 114

73. The next question which must be addressed is whether section 114 of the TMA can save the error. In order to answer that question accurately, it is necessary to be precise as to how the issue arises for judicial determination at this stage of the analysis. More specifically, one needs to be clear as to how HMRC are asking me to deploy this section in these proceedings.

74. It should be recalled that, thus far, the only issue I have addressed is the true construction and application of section 28A. I have not yet addressed Ms Nathan's objection that the taxpayer should have appealed. I have reached the point that the Closure Notices were defective in that they did not contain amendments to the returns, and (perforce) consequential amendments to the self-assessments. Section 59B(5) of the TMA fixes HMRC's claim to an existing debt only on the basis that there has been an amendment of a self-assessment under section 28A. I have found that there has not been one. It follows that there could be no relevant debt for the purposes of section 59B(5) *unless* section 114(1) may be recruited to save the error (using shorthand parlance).

75. To be more precise, section 114(1) does not "save errors". What it provides in essence is that any purported assessment or other proceeding shall not be "deemed to be void or voidable" if certain conditions are met. Mr Goldberg did not advance submissions about the language I have just highlighted. His submission was simpler. His point was that for present purposes the focus of the enquiry must be "an assessment" at the start of the sub-section, and that there has not been any such assessment at all. It follows, so his submission runs, there is nothing to which section 114(1) may attach.

76. Ms Nathan's riposte to this submission was that the correct target for judicial consideration is not "an assessment" but "other proceeding", which latter term is apt to accommodate a closure notice. She pointed out that we do have the Closure Notices; and, moreover, that it is the taxpayer's case that these are notices within section 28A(1). Ms Nathan relied on Court of Appeal authority in support of her argument that section 114(1) is wide enough to be deployed in relation to the legal effect of the Closure Notices.

77. I cannot accept Ms Nathan's submissions on this specific issue. At this stage of the analysis, the only question is whether there exists a section 59B(5) assessment to found the taxpayer's liability. The correct approach moves straight from section 28A through to section 59B(5) and then to section 114. Ms Nathan's "other proceeding" point is only relevant to the separate issue of whether the taxpayer should have brought a section 31 appeal, and I will need to consider it at that stage but not now.

78. So, the question arises whether section 114(1) is capable of operating in a situation where – if my conclusions about section 28A are correct – there has been no relevant

assessment. I agree with Mr Goldberg that the sub-section may apply only where there has been an assessment. It is not a matter of seeking to identify "gross error", or considering substance in preference to form; the issue is existential.

79. However, unlike Mr Goldberg I do not propose to stop there. It seems to me that I must proceed to consider Ms Nathan's submission that the officer made "purported amendments" in the Closure Notice. Ms Nathan's submission on this aspect fell under a different rubric, but that does not preclude me from addressing it now. Indeed, I am fully satisfied that I should, because section 114(1) uses the verb "purports".

80. If Mr Goldberg is correct in his overarching submission that this is a public law case, fit for judicial review rather than statutory appeal, I consider that I must analyse this case using familiar public law tools. Two familiar public law principles apply. The first is that a presumption of validity applies, and that terms such as "void", "voidable" and "nullity" may confuse: see Lord Diplock in Hoffman-La Roche v DTI [1975] AC 295, at 366A-B. The second is that a statutory term of art such as "determination" (or, as here, "assessment" or "other proceeding") cannot include a *purported* determination vitiated by public law error: see Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147. The relevant passages in the Opinions of Lords Reid and Wilberforce are too well known to require direct citation.

81. There has been difficulty in the past in reconciling these two principles. They work in complete harmony. In the absence of a properly constituted challenge, the general rule is that the decision continues to have legal effect, even if (had such a challenge been brought) it was vitiated by error. Once seized of such a challenge, the effect of the court's ruling, if legal error is held to exist, is that the decision at issue is held to have no effect.

82. All these things having been said, I consider that an issue does arise as to whether the effect of section 114(1) is to preclude Anisminic-type arguments. This was not part of Ms Nathan's forensic armoury, but I raised the issue with Mr Goldberg and he was able to address it. He submitted that such arguments could be made. In my judgment, they cannot. The purpose of section 114(1) is to set out a self-contained statutory code to deal with errors or other "want(s) of form". It is clear from the first two lines of the sub-section that it is apt to cover purported assessments, and the sub-section states in terms that these shall not be quashed, or declared void or voidable, in certain specified circumstances. In my view, if these circumstances apply, an assessment should be treated as legally valid notwithstanding that it may be possessed of Anisminic-type error. To hold otherwise would be to re-write the sub-section.

83. Although I cannot accept Mr Goldberg's submission as high as it was advanced, I can accept a less ambitious version of it. If Ms Nathan were able to persuade me that the officer made a *purported* assessment in the Closure Notices, in other words, an assessment in some shape or form however erroneous, misconceived or non-compliant, I would conclude that it fell within the term "an assessment" in section 114(1); and I would then have to consider the remainder of the sub-section. However, Ms Nathan cannot persuade me of that. The form of words "I am amending the return" is not a purported assessment (or amendment). It is not an assessment which is capable of falling within the opening words of section 114(1) at all. The situation is not enhanced from HMRC's perspective by observing that the computer return was simultaneously amended. This would only assist if there were anything in being

which could be implemented. There is a distinction between categorical errors, which have existential consequences, and errors of law, which (for these purposes) do not alter the fundamental character of an administrative action. The error here is qualitative, not quantitative, and in my judgment outwith the scope of the subsection.

Should the Taxpayer have appealed?

84. I now come, no doubt far too late in the day according to her preference, to Ms Nathan's submission that the taxpayer should have appealed the Closure Notices. This requires an examination of what would, or should, have happened on a hypothetical appeal which we know was never brought. If, *pace* Ms Nathan's submission, the F-tT would have declined jurisdiction on any appeal by the taxpayer, her objection leads nowhere. If, on the other hand, the F-tT would have entertained the appeal, notwithstanding the errors in the Closure Notices, it seems to me that her objections would be irrefutable because Autologic applies.

85. I should deal at the outset with two red herrings. The first is Mr Goldberg's submission that the taxpayer could not be expected to use the appeal route because his complaint is that HMRC's decision dated 11th March 2016 is based on a mistaken premise, namely that a debt was due. The answer to that submission is that, if the taxpayer should have appealed the Closure Notices, it would be an abuse of process to argue that the decision letter is unlawful. Mr Goldberg cannot circumvent the appeal requirement by seeking to assail something different. The second is that there is a procedure under the Insolvency Act 1986 for statutory demands to be challenged, and it was open to the taxpayer to exercise it. The answer to this objection is that Ms Nathan did not submit that I should refuse to entertain this judicial review claim on that basis. In my view, she was right to take that stance on the facts of this case, and I therefore say no more about it.

86. Ms Nathan's first submission under this rubric was that a purported assessment is appealable. She drew my attention to the reasoning of the Upper Tribunal Chamber President, Warren J, in Spring Salmon & Seafood Ltd, which was to the effect that even a closure notice issued in the absence of a statutory precondition (e.g. a section 9A enquiry – and, in that case a Schedule 1A enquiry) could be challenged in appellate proceedings. In my judgment, this authority does not assist: there is a distinction between a notice which lacks a condition precedent set out in a separate statutory provision but is otherwise compliant with the terms of section 28A, and one which possesses a gaping hole.

87. Her second submission was that section 114(1) applies to this situation because the focus should be on "other proceeding" (i.e. the Closure Notices) rather than on "an assessment".

88. It was at this stage in Counsels' arguments that I felt that they were speaking at cross purposes. Mr Goldberg appeared to be adhering to his submission that section 114(1) simply could not apply because the issue was the existence of an underlying assessment for the purposes of section 59B(5). He could not accept that the issue might involve consideration being given to what would or should have happened before the F-tT had his client appealed. On the other hand, although Ms Nathan was

clearly submitting that the real question for these present purposes was the scope of the term "other proceeding", she did not make it crystal-clear that her question arose in the specific context of whether appeal rights should have been exercised. Whether I am being unfair to either or both Counsel may engender perceptions of judicial inflexibility but at the end of the day is irrelevant. I must continue to ask myself whether section 114 could and should have been deployed by the F-tT to cure the omissions in the Closure Notices which I have identified.

89. I was taken by Mr Goldberg to two authorities under section 114(2) of the TMA. However, the present case concerns section 114(1), and in that regard two authorities are pertinent: the decision of Henderson J (as he was then) in Pipe v HMRC [2008] STC 1911, and the decision of the Court of Appeal in Donaldson.

90. At paragraph 51 of his judgment in Pipe, Henderson J said this:

> "In my judgment there is nothing in the authorities, properly understood, which contradicts this analysis. If the case were one where HMRC had to rely on section 114(1) to cure the defect in the Penalty Notices, I would agree with Mr Conolly that the mistake was of too fundamental a nature to fall within the scope of that subsection. It was indeed a gross error, and one that, viewed objectively, might have been misleading, because it could have led the recipient to believe that an earlier determination had been made by the Commissioners in or before April 2004, and that such earlier determination had either not been notified at all or the notification had gone astray. If the Penalty Notices were the documents which founded liability to the penalties, there would be much to be said for the view, echoing Slade LJ in Baylis v Gregory, that specifying the correct dates is something HMRC must get right. However, Baylis v Gregory, as I have already pointed out (see paragraph 30 above), was not a decision on section 114(2) at all, and the language of section 114(2)(b) is clear and unqualified. The force of the words "any variance" is that no variance of any description between the notice and the determination is to invalidate the determination. I accept that there may come a stage where the error or discrepancy in question is so fundamental in character that it could not properly be described as a "variance" at all; but in my judgment a mistake about dates of the type made in the present case gives rise to a "variance" within the ordinary and natural meaning of that word."

Strictly speaking, this passage is *obiter*, but it is to be noted that it was expressly approved by Lord Dyson MR at paragraph 28 of his judgment in Donaldson.

91. At paragraph 29 of Donaldson, Lord Dyson MR held as follows:

> "In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked

> out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice. I do not, therefore, need to consider the further argument advanced by Mr Vallat based on section 114(2) of TMA."

92. In Donaldson, the issue was whether HMRC's non-compliance with paragraph 18(1)(c) of Schedule 55 to the Finance Act 2009 was an error which could be cured by section 114(1). The Court of Appeal held that it could. The error was not fundamental; it went to form rather than substance; the taxpayer was not misled; he could work out the correct date without difficulty.

93. The issue arising in the present case is more complex. In the first instance it is necessary to determine exactly how the sub-section would operate on a section 31(1)(b) appeal. That appeal would be against "any conclusion stated or amendment made by a closure notice under section 28A". It follows that, strictly speaking, the appeal is not against the Closure Notices; it would be against the relevant contents of those notices. Even so, on this hypothetical section 31(1)(b) appeal the section 114(1) issue would be: should the F-tT cure the notices by supplying additional content? This is because the F-tT would be looking at those notices in order to determine the substance and scope of the appeal; these would be the key documents under scrutiny.

94. I have no doubt but that a closure notice is some "other proceeding" for the purposes of section 114(1) (see the breadth of section 113(3)) and Mr Goldberg did not submit otherwise. Furthermore, I agree with Ms Nathan that focusing on "other proceeding" rather than "assessment" serves to broaden the potential scope of the curative power under the sub-section. This is because Mr Goldberg's existential point becomes less potent. True, there is no relevant "assessment"; but at least there is some "other proceeding", albeit it is defective.

95. There are a number of reasons which militate in favour of according section 114(1) a wide range in these circumstances. First of all, let me posit an entirely straightforward case, where the officer gives a clear conclusion on a simple point, fails in his closure notice to amend the return, but the taxpayer may very readily understand how much he ought to be paying. There seems no obvious reason why section 114(1) should not apply to cure the notice on an appeal to the F-tT. In this hypothetical case the defect could in one narrow sense be described as "fundamental", and contrary to "the intent

and meaning of the Taxes Acts", inasmuch as a statutory precondition to validity does not exist; although no one has been misled and the error is technical. I prefer an analysis which suggests that the issue is one of fact and degree. Secondly, and relatedly, I should revert to Briggs LJ's point that objective contractual principles should apply. How would a reasonable taxpayer understand the notice? In my example of an entirely straightforward case, the taxpayer would understand the consequences of HMRC's conclusions without the need for expert advice. Yet, if Mr Goldberg's objections were merited, even in this very simple hypothetical case there would be no power under section 114(1) to cure the defect.

96. I would not be prepared to hold that there could be no circumstances in which section 114(1) may be deployed to save a defective closure notice, even one which omits an essential statutory ingredient such as an assessment. The real question which arises is whether, in the circumstances of the present case, the omission is simply too significant and/or fundamental to be capable of salvation.

97. The issue is not clear-cut. On the one hand, the Closure Notices make it clear that HMRC are rejecting the whole of the taxpayer's claims for relief. The taxpayer is a sophisticated businessman who has the benefit of high-powered advice. The APNs and the FNs explained HMRC's position very clearly, and the taxpayer did not place any of the amounts (*qua* figures) in dispute. Even setting to one side the point that I have found that the figures and sufficient of the methodology would have been visible in the "view accounts" section of the website, KPMG could have done the arithmetic for themselves. Instead, they waited until almost the last possible moment before raising their objections on the notices. On the other hand, this was not a simple case: it had taken many years to resolve (unconscionably long, in my view), and KPMG were continuing to raise other technical arguments in their replies to the APNs.

98. I assured Mr Goldberg during the hearing that I would not permit myself to be swayed by any opinion as to his client's behaviour. That continues to be the case. The taxpayer's tax avoidance schemes have failed, and he knows it. He knows too from the conclusions in the Closure Notices that the schemes have failed *tout court*. I repeat that I am not impressed by KPMG's contention that they believed that the tax due was likely to be in excess of £20M. If I can do the sums using a pocket calculator, and can arrive at a figure which is adrift by a mere £237,000, so could they. In fact, they could do much better because they knew the amount of the overpayments to the nearest penny, these being on the system. Although the Closure Notices did not condescend to the detail of KPMG's technical arguments directed to the APNs, HMRC were saying that the whole of the losses claimed were being disallowed.

99. Moreover, it must be relevant to the section 114(1) question that HMRC did amend the taxpayer's computer returns on 2nd February 2016, that these amendments were consistent with the conclusions set out in the notices, and these were visible to the taxpayer online. The fact that the Tax Calculation and Revision Notice would have been made available at any stage upon request is not a factor which I can take into account in the context of section 114(1), but had I found that this notice was in fact received by KPMG shortly after 2nd February 2016, the taxpayer's case on the section 114(1) would have been flimsy. For the reasons I have given, I do not find that its non-receipt can make all the difference. Nor, for the avoidance of doubt, would it matter if, owing to a technical "glitch", the amendments were at all material times invisible on the taxpayer's "side" of the online system. I have firmly concluded that

Mrs Cook made amendments on 2nd February 2016 which were consistent with her conclusions set out in the Closure Notices (see paragraphs 32-33 above).

100. It is no answer, in my judgment, that the taxpayer protests that he could not have issued a notice of appeal against assessments which did not exist. I fully understand that he wished to appeal assessments, but there was nothing to preclude him from issuing notices of appeal under section 31(1)(b) which sought to assail HMRC's conclusions. I should emphasise that it was not Mr Goldberg's submission that these conclusions were defective or non-compliant with section 28A(1). In my judgment, although the conclusions were brief, they were sufficient to enable the taxpayer to understand where he stood with HMRC. If my analysis as to the scope of section 114(1) is right, the taxpayer should have been aware that the F-tT would on his appeal have amended the Closure Notices to remedy the omission.

101. Ultimately, I am driven to conclude that Ms Nathan's submissions on this issue are well-founded, and that the F-tT, on a hypothetical appeal under section 31(1)(b), would and should have deployed section 114(1) to cure the defects in the Closure Notices. It follows – albeit as an end-point in the analysis and not as a starting-point – that the taxpayer should have appealed the conclusions in the notices, and that this application for judicial review cannot proceed, it being an abuse of process.

Alternative Analysis

102. Ms Nathan submitted in the final alternative, if all else failed, that if the Closure Notices are invalid and cannot be saved by section 114(1), there would be nothing to prevent HMRC serving further closure notices in the future. In my view this alternative submission should only be considered on the footing that I may be wrong about section 114(1).

103. Mr Goldberg's valiant riposte to this submission was advanced on a number of levels. Ultimately, his points were that section 28A(1) was the key provision which closed the enquiry (it has been properly fulfilled), that section 28A(2) is not fundamental to the validity of the notices, and (or put another way) section 28A(2) "contains a condition subsequent as to effectiveness, not a condition precedent to validity".

104. I cannot accept Mr Goldberg's submissions. Given the terms of section 28A(3), there can be no intelligible distinction between that which is precedent and subsequent. I agree with the analysis of the F-tT in Sunlight Takeaway Meals that both sub-sections (1) and (2) are preconditions to the validity of a closure notice (see paragraph 26 of its decision): in other words, that no distinction falls to be drawn between them. These preconditions cannot be notionally decoupled. I appreciate that this observation has the tendency to enhance the taxpayer's case on section 114(1), but in that regard I have already taken it into account. In any event, the taxpayer is caught on a variant of Morton's fork. If he is right about section 114(1), the Closure Notices are invalid and cannot be cured; the section 9A enquiry continues; and there is nothing to prevent the enquiry being concluded under section 28A at some future date. If I am right about section 114(1), the issue does not arise because he has already lost. (There is a mild irony in my invoking Morton's fork in a tax case, particularly in circumstances where

I am using it against the taxpayer, rather than as a criticism of the conduct and practices of HMRC.)

105. Ms Nathan observed that Mr Goldberg's case possesses a Janus-faced quality in this regard, and I feel that her classical allusion was well directed. I do not interpret her as suggesting that he was being two-faced; rather, that he was trying to have his cake and eat it. The fact remains that Mr Goldberg has chosen to bring these proceedings in the Administrative Court, and I must apply ordinary public law principles to the issues. Anisminic does not apply to section 114(1), but it does apply to Mr Goldberg's argument that HMRC find themselves stymied.

106. I have mentioned a variant of Morton's fork because its twin prongs are not equally sharp, and some use this metaphor to describe two inconsistent arguments which are equally specious. The taxpayer loses either way but one defeat may not be quite as bad as the other. If I had reached a different conclusion on the principal issues, this application for judicial review would have succeeded but HMRC would have been able to issue fresh closure notices. These could have been appealed in due course, and KPMG's technical points on the APNs considered by the F-tT. But, my decision on the principal issues means that there is now no possibility of an appeal, and the taxpayer must pay up. Albeit tempting, it would be supererogatory for me to express any view on these technical points which, were I to be overturned by the Court of Appeal, might live to fight another day.

Disposal

107. I am dismissing this application for judicial review on the basis that the taxpayer had an effective right of appeal which he should have exercised. In reaching that conclusion, I have upheld Mr Goldberg's submissions on section 28A(2) of the TMA but – in this particular context - have rejected them on section 114(1).

108. If the last of these conclusions were incorrect, I would have granted the judicial review application on the basis that no statutory debt had arisen under section 59B(5) of the TMA as at the date of the decision under challenge. But, I would also have held that there was nothing to prevent HMRC issuing further closure notices under section 28A of the TMA.

Case No: CO/1649/2016

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Mr Justice Jay

21st February 2017

In the matter of an application for Judicial Review

THE QUEEN on the application of
WILLIAM ARCHER

Claimant

Versus

THE COMMISSIONERS FOR
HM REVENUE AND CUSTOMS

Defendants

ORDER

UPON HEARING Counsel for the Claimant and for the Defendants

IT IS ORDERED

1. The Claimant's application for judicial review is dismissed.

2. Permission to appeal to the Court of Appeal is refused.

3. Any appeal to the Court of Appeal must be brought by Notice of Appeal (seeking an application for permission to appeal to that court) filed no later than 4pm on Tuesday 14th March 2017.

4. The Order of Kerr J dated 29th March 2016 be discharged.

5. The Claimant is to pay the Defendants' costs of and occasioned by the application.

OBSERVATIONS

I am persuaded by the Claimant that he has a real prospect of success in the Court of Appeal on my approach to s.114 of the TMA in relation to the hypothetical appeal the Claimant did not bring but in my view should have brought (see paragraph 101 of the judgment). This was the most difficult issue in the case, as I recognised in my judgment.

However, the Claimant must lose one way or the other. He has completely failed to persuade me that he is not having his cake and eating it. I have mentioned Morton's fork having unequally sharp prongs, but the Claimant will need to persuade the CoA that, even if he is right about s.114 and any hypothetical appeal, he should not be paying the entirety of the tax in dispute. The Claimant's argument that HMRC would be precluded from serving further closure notices is without merit.

It follows that it would be inappropriate to order interim relief in this case, and I have discharged the Order of Kerr J. If the Claimant wishes to takes this case further, he should nonetheless pay the tax due. In the event that (a) he wins on the s.114 point in the Court of Appeal, and (b) manages to secure a modest reduction of his tax liability on any appeal he might bring against further closure notices, HMRC would repay the balance. There is no injustice here: the Claimant says that he has the money.

Dated: 21st February 2017