[2018] UKFTT 660 (TC)

TC06808

Appeal number: TC/2017/5849

INCOME TAX - enquiries – jurisdiction to prevent amendments under s 28B after closure of enquiry – no – appeal struck out – consideration of appellant's case that closure notice was invalid as notice to file not issued by named officer

FIRST-TIER TRIBUNAL
TAX CHAMBER

JÖRG MÄRTIN **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 24 July 2018

The appellant in person.

J Davey QC and Mr S Chandler, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Background

1. It appeared to be accepted by both parties that the appellant made a claim to loss relief arising out of the activities of Great Marlborough LLP. HMRC's position was that in doing so he may have participated in a tax avoidance scheme, very similar to that considered by the FTT and Upper Tribunal in the various *Icebreaker* and *Acornwood* cases.

2. On 19 February 2014, HMRC opened (or purported to open) an enquiry into the appellant's 2012/13 tax return. On 15 July 2016, HMRC opened (or purported to open) an enquiry into the appellant's 14/15 tax return (filed 2 January 2016). On 15 November 2016, the appellant made an application to the Tribunal to order HMRC to close the two enquiries. On 1 March 2017, HMRC closed the enquiry into the 14/15 return without making any amendment to that tax return.

3. So far as the partnership, Great Marlborough LLP, was concerned, HMRC opened (or purported to open) an enquiry into its 14/15 tax return on 15 December 2016.

4. The Tribunal heard Mr Märtin's closure application on 22 May 2017. By decision dated 12 June 2017 and reported at [2017] UKFTT 488 (TC), I ordered HMRC to close the enquiry into the appellant's 12/13 return. I made no order in respect of the 14/15 enquiry. My decision records the reason for this as follows:

> 7. In the hearing, Mr Märtin indicated that he did not accept that the Tribunal had no jurisdiction with respect to the 14/15 enquiry. While it had been closed, with no amendments being made, the letter from HMRC dated 1 March 2017 stated that there might be amendments to his 14/15 tax return following the enquiry into Great Marlborough LLP's 14/15 tax return.
>
> 8. As I understood Mr Märtin's point, it was that he did not accept that HMRC had actually closed the 14/15 enquiry, because they had indicated that they might make later amendments. Therefore, if the enquiry was not closed, that left scope for the Tribunal to order closure.
>
> 9. However, I do not agree with Mr Märtin's premise: on the contrary, I consider that the 14/15 enquiry was closed. The letter of 1 March 2017 clearly stated that the enquiry was complete and that no amendment of the return was needed. It therefore fulfilled the requirements of s 28A(1) and (2)(a). While it did indicate that there might be later amendments to Mr Märtin's 14/15 tax return, it clearly stated that any such amendment would be as a result of the check on Great Marlborough LLP. S28B(4) TMA entitles HMRC to amend a partner's returns following an enquiry into the partnership tax return: that is a quite separate power to the one which enabled HMRC to amend a taxpayer's return after an enquiry into it. So the 14/15 enquiry was closed but there remained for Mr Märtin the possibility

> that an amendment to his 14/15 tax return made under s 28B(4). This Tribunal has no jurisdiction to prevent such an amendment being made.
>
> 10. In conclusion, I find that this tribunal in this hearing had no jurisdiction to order closure of the 14/15 enquiry as it had been closed before the hearing took place.

5. On 14 July 2017, the appellant then lodged proceedings with this Tribunal which was stated to be an appeal against a review letter dated 14 June 2017. That letter stated that there was no right to appeal the closure notice for tax year 14/15 because it made no amendment to the 14/15 tax return. However, Mr Märtin's appeal to the Tribunal was expressed to be in wider terms and could be constructed as:

> (a) an appeal against the enquiry notice which opened the enquiry into his 2014/15 tax return;
>
> (b) an appeal against the closure notice which closed that enquiry; and
>
> (c) an application that the Tribunal order HMRC not to make any future amendments to his 14/15 tax return.

6. HMRC applied to strike out the appeal; the appellant applied for HMRC to be barred from taking any part in the proceedings.

THE STRIKE OUT APPLICATION

Lack of jurisdiction?

7. It is logical to consider HMRC's strike out application first: it was brought primarily on the basis that the Tribunal has no jurisdiction to consider the proceedings brought by the appellant. As Rule 8(2)(a) of the FTT Rules provides that the Tribunal must strike out an appeal if it has no jurisdiction to hear it, I must consider whether the Tribunal has jurisdiction before I could make any other directions in the proceedings.

8. HMRC say the Tribunal has no jurisdiction over the proceedings for the following reasons. In so far as it is an appeal against the opening of an enquiry, HMRC say there is no jurisdiction because:

> (1) There is no right to appeal against the opening of an enquiry;
>
> (2) Even if there was such a right, Mr Märtin was out of time to do so and has not (yet) applied to HMRC to make a late appeal.

In so far as it is an appeal against the closure of the enquiry, HMRC say there is no jurisdiction because:

> (1) There is no right of appeal against a closure notice which does not amend the tax return the subject of the enquiry;

(2) In any event, it is abusive for Mr Märtin to seek to re-litigate a matter already determined against him in the earlier hearing (in particular at paragraph [9] of my decision referred to above).

9. So far as (c) was concerned, HMRC's point was that the Tribunal had no power to grant the appellant the remedy which was at the root of this appeal: HMRC's understanding was that Mr Märtin's objective in these proceedings was a ruling by the Tribunal that HMRC was unable to make any amendments to his 14/15 return. But, said HMRC, the Tribunal could not make such a ruling as s 28B(4) TMA 70 gave HMRC the power to make further amendments in certain circumstances and the Tribunal had no jurisdiction to prevent them so doing. HMRC said that the Tribunal had already stated this at [9] of my earlier decision.

(a) Appeal against opening of enquiry

(1) Right to appeal against the opening of an enquiry?

10. The rights of appeal are set out in s 31 TMA 70. That provides relevantly as follows:

> **31 Appeals: right of appeal**
>
> (1)An appeal may be brought against –
>
> (a) Any amendment of a self-assessment under s 9C of this Act…
>
> (b) Any conclusion stated or amendment made by a closure notice under s 28A or 28B of this Act ….
>
> (c) Any amendment of a partnership return under s 30B(1) of this Act…, or
>
> (d) Any assessment to tax which is not a self-assessment.

11. This section gives a right to appeal assessments or amendments to self-assessments: there is nothing in this section which gives a taxpayer the right to appeal anything else to this Tribunal. Mr Märtin does not suggest that there is any other provision which gives this Tribunal jurisdiction to hear his appeal nor am I or the representatives of HMRC aware of any other relevant provision.

12. This Tribunal is a statutory body: appeals may be brought to it only to the extent provided for by statute. There is therefore no right to appeal to this Tribunal the opening of an enquiry.

13. That that should be so is quite logical. The taxpayer is given the right to apply for an enquiry to be closed; he is also given the right to appeal an amendment made at the end of the enquiry. For what valid reason would a taxpayer need a right to appeal the opening of an enquiry? Parliament clearly intended the opening of an enquiry to be a discretionary matter for HMRC; allowing HMRC a discretionary right to open enquiries when they choose to check a self-assessment is the quid pro quo for permitting a taxpayer to self-assess tax.

14. I agree with what I said in *Spring Capital Ltd* [2013] UKFTT 41 (TC) at [32]:

> [32] There is no right of appeal against a notice opening an enquiry. This is not surprising as one is not needed: the notice of enquiry is nothing more than an opening of enquiries to check the correctness of the return…..unless and until the enquiry was closed and an amendment stated, HMRC could not take enforcement action against the [taxpayer] in respect of any tax unpaid…..
>
> [33] The opening of an enquiry does not create any liability on the taxpayer to pay any tax. What it does do is create uncertainty in his tax affairs, and his position in this respect is protected by the right to apply for a closure notice……

15. In conclusion, I am satisfied that this Tribunal has no jurisdiction to hear an appeal against the opening of an enquiry. I do not therefore need to consider HMRC's case that in any event such an appeal was out of time, but I will comment on it in interests of completeness and in case this matter goes further.

(2) Did Mr Märtin fail to apply for permission to appeal late?

16. HMRC's review decision letter was dated 14 June 2017; Mr Märtin lodged his appeal on 24 July 2017, some 10 days after the expiry of the 30 day appeal period. However, his notice of appeal did not refer to its lateness and in particular did not request leave to appeal out of time. This appears to be because Mr Märtin did not accept his appeal was late: it may be that he counted the 30 days from receipt of HMRC's letter rather than from the date on which it was sent.

17. HMRC's case is that Mr Märtin's appeal was late and therefore invalid under Rule 20(4) because it did not contain a reasoned application for him to be allowed to submit it out of time. The Tribunal therefore had no jurisdiction to admit the appeal.

18. Mr Märtin did not accept his appeal was late, and his position was that if it was late, HMRC were unable to raise the point because (a) the Tribunal had effectively accepted his appeal out of time by requesting HMRC to provide their statement of case and (b) HMRC were too late to raise the issue now.

19. Mr Davey pointed out that HMRC raised the issue of lateness in their Statement of Case which was, in his view, the earliest point in time at which they could have raised it.

20. My view is that the appeal was late by 10 days for the reasons given by HMRC. The Tribunal's failure to notice that the appeal was late did not amount to acceptance of the appeal under Rule 20(4): there had been no judicial decision to that effect. HMRC were at liberty to take a point on jurisdiction which had not been spotted by the Tribunal. It could not be said HMRC were too late to do so when they raised the issue in their statement of case.

21. Having said that, the Tribunal, in the interests of justice and avoiding unnecessary duplication of appeals, was likely to consider an application for an extension of time

made after the appeal was lodged. I would be reluctant to strike out the appeal without giving Mr Märtin the opportunity to make and justify such an application. But this is besides the point as I have already decided to strike out the appeal against the opening of the enquiry.

(b) Appeal against closure notice

(1) Right to appeal a closure notice which makes no amendment?

22. Having concluded that, in so far as the appeal was an appeal against the opening of the enquiry, it should be struck out, I move on to consider whether, in so far as it is an appeal against the closure notice, it should be struck out.

23. As I have said, the rights of appeal are in s 31 TMA 70. S 31(b) gives a taxpayer the right to appeal against '[a]ny conclusion stated or amendment made by a closure notice under s 28A or 28B of this Act'. The closure notice in this case made no amendment to Mr Märtin's tax return and so there is no amendment against which to appeal; but could it be said that, in stating that no amendment would be made, the closure notice was stating a 'conclusion', and therefore s 31(1)(b) gives Mr Märtin the right to appeal against that conclusion?

24. There is some merit in such a construction of s 31(1)(b) because, if stating a conclusion was exactly the same thing as making an amendment, why should s 31(1)(b) use both expressions; moreover, s 28A (the section under which enquiries are closed) makes a distinction between stating a conclusion and making an amendment. All enquiries require a conclusion to be reached: s 28A(1) ('An enquiry …is completed when [HMRC]…states his conclusions.'); but that conclusion can be that no amendment is required: s 28A(2)(a).

25. Nevertheless, I am sure that s 31 TMA should not be read in that fashion Legislation should not be interpreted literally if a literal interpretation is absurd. It is absurd for the legislation to be read as giving a taxpayer a right of appeal against a conclusion that his tax return was correct. The taxpayer made the tax return: he was under an obligation to ensure it is correct. Assuming he still believes his tax return was correct, he needs no right of appeal against a conclusion which agrees with him. And if he no longer thinks his return correct, he has the right to amend it (s 9ZA and s 9B TMA). He does not need a right of appeal against a conclusion that the return does not need amending.

26. In any event, the absurdity of having a right to appeal against a conclusion that his tax return does not need to be amended is illustrated by the fact that Mr Märtin does not wish to change HMRC's conclusion that his return did not need amending. He brings his appeal because he objects to the statement in the same letter that HMRC might later amend his return under s 28B(4)(a), following closure of the partnership enquiry (see [9] of my earlier decision cited above).

27. So even if I concluded that he had right to appeal the conclusion at the end of the enquiry that no amendment was necessary, I would still strike out these proceedings

in so far as it sought to appeal that conclusion because it is quite apparent that he agrees with that conclusion. He does not think that his 14/15 return should be amended.

Right to appeal statement in closure notice that an amendment might be made under a separate legislative provision?

28. He thinks that HMRC's conclusion that his return required no amendments should be final. What Mr Märtin really seeks is an order that, contrary to the statement in the letter which closed the enquiry, HMRC is not entitled to make any further amendments to his 14/15 tax return.

29. But was that statement any part of the closure notice? It was contained in the same letter as the statement that the enquiry would be closed with no amendments, but was it a part of the closure notice, or merely additional information given to the taxpayer?

30. While it is not explicitly stated, it seems obvious that an enquiry under s 9A is to check the correctness or otherwise of a tax return. This is because (as per s 28A) the conclusion of an enquiry is either that the return does not need amending or that it does. A return could only need to be amended if it failed to achieve its purpose which (as per s 8(1)) is to '[establish] the amounts in which a person is chargeable to income tax and capital gains tax for the year of assessment…..' In other words, a return should only be amended if it was wrong.

31. It follows that a closure notice under s 28A is a conclusion on whether or not the return was correct (and did not need amending) or incorrect (and did need amending). Any other conclusion or statement in the same letter was not a conclusion within s 28A and therefore not something which could be appealed under s 31.

32. In other words, the additional statement in the letter (that nevertheless HMRC might later amend the return under a separate power) was not a part of the closure notice; it was merely in the same letter. HMRC were no doubt trying to be helpful by seeking to avoid Mr Märtin being given the mistaken impression that closing his 14/15 enquiry meant that his tax return for that year was beyond revision by HMRC. Be that as it may, the statement formed no part of the closure notice and cannot be appealed under S 31 TMA.

33. It would be pointless to have a right of appeal against such a statement anyway: the law is what the law is and whatever HMRC choose to say about it cannot affect that.

(2) Appeal is abusive as the tribunal has already reached the same conclusion?

34. That conclusion makes it unnecessary for me to consider HMRC's case that it was an abuse of the law for Mr Märtin to seek to re-litigate a matter already determined in this Tribunal. Nevertheless, I do so in brief for sake of completeness.

35. Strictly, the question of abuse does not appear to be a matter of jurisdiction, although it is clear an appeal can be struck out when it is an abuse of the Tribunal process.

36. In this case, I determined the matter which is the real subject of this appeal in [8-9] of my previous decision where I clearly stated that the Tribunal had no jurisdiction to prevent HMRC making an amendment to his 14/15 return under its powers contained in s 28B. Mr Märtin is wasting HMRC's and the Tribunal's time in seeking to re-litigate this matter. It is an abuse of process and would justify the appeal being struck out were it not already struck out on the basis of lack of jurisdiction in any event.

(c) Jurisdiction to order HMRC not to make further amendment under s 28B?

37. As I have said, Mr Märtin's objective in bringing the appeal is a declaration that HMRC cannot make any further enquiries into or amendments of his 14/15 tax return. He accepted that his reason for coming before the Tribunal was that the closure notice for 14/15 did not give him certainty and finality in his 14/15 tax affairs. His position was that was contrary to Parliament's intent.

38. I do not agree with him. Firstly, the Tribunal is a statutory body and only has the powers Parliament has conferred on it. There is no power to make a declaration nor power to prevent HMRC making amendments under s 28B before they have done so. That by itself is enough to dispose of these proceedings.

39. Secondly, in any event, he is wrong to say that it is contrary to Parliament's intention for HMRC to make an amendment under s 28B after closing an enquiry without amendment under s 28A. On the contrary, the legislation on its face gives HMRC the right to enquire into and amend a partnership tax return and then to subsequently amend the partners' tax returns in line with the amendments to the partnership tax return. HMRC can do this whether or not there is an open enquiry into the partners' tax returns.

40. This is clear on the face of the legislation and makes sense. A partner must reflect his share of the partnership profit as reported on the partnership tax return. I presume that this is what Mr Märtin did and I presume for that reason the enquiry into his tax return was closed without any amendment to his tax return. But HMRC clearly have concerns whether the partnership return was correct: they have opened an enquiry into it. If they subsequently amend that return, the legislation permits them to make the consequential changes to the partners' tax returns. Such changes may result in an increased tax liability on Mr Märtin.

41. He complains that he cannot obtain finality: but that is not quite true. There is a mechanism for the taxpayer (as defined) to apply to the FTT for closure of a partnership enquiry: s 28B(5). 'The taxpayer' is defined as the person to whom the notice of enquiry was given. The notice of enquiry must be given to the partner who made the tax return: that should be the nominated partner. The evidence suggests

that was a company called Basinghall; in any event, Mr Märtin does not suggest he is the nominated partner.

42. So it seems – although I do not decide this – that if Mr Märtin is not the nominated partner he cannot apply for closure of the partnership enquiry. However, it seems to me that if Mr Märtin's position within the partnership is such that he cannot influence whether an application for closure of the enquiry is made by the nominated partner, then that is a matter for him and a result of his choice to enter the partnership on those terms.

43. I comment in passing that, for the reasons explained above, even if the statement to which Mr Märtin objects could be appealed, it could not be successfully appealed as the statement is correct. Closing a s 9A enquiry under S 28A does not prevent a later amendment under s 28B.

44. I also comment in passing that if HMRC do amend Mr Märtin's 14/15 tax return following the closing of the enquiry into the partnership of which he was a member, Mr Märtin will have the right to appeal that amendment under s 31(1)(b) as it will be an amendment made under s 28B. That will be his opportunity to challenge the validity of any amendment to his return. While this Tribunal has no jurisdiction to prevent such an amendment being made, it would have jurisdiction to overturn such an amendment on appeal if it could be shown to be wrong.

45. I conclude that this Tribunal has no jurisdiction to consider an appeal against a conclusion reached at the end of an enquiry that no amendment is required to the taxpayer's tax return. It also has no jurisdiction to entertain an appeal against the statement in the closure letter that HMRC might later be able to amend the return under s 28B, because such a statement was not a 'conclusion' of the enquiry as referred to in s 28A. In any event such an appeal would be without merit as the statement was patently correct.

46. The effect of what I have said above is that this appeal must be struck out as the Tribunal has no jurisdiction to entertain it. I do not need to consider whether in addition it should be struck out as it lacking merit nor do I need to consider whether, if it had not been struck out, HMRC ought to be barred from participation in the appeal. However, for the sake of completeness, and in case this matter goes further, I will state my views on these matters.

Absence of merit?

47. HMRC's secondary grounds on which they applied for the proceedings to be struck out was on the basis that the proceedings had no reasonable prospect of succeeding. This was on the basis that the appellant could not succeed in his case that the enquiry notice was invalid because:

> (1) In so far as the appellant relied on the notice of enquiry referring to the '2015 tax return', even if this was technically erroneous, such an error could not invalidate the enquiry notice; in particular, in making this

assertion, the appellant erroneously relied on the FTT decision in *Mabbutt* [2016] UKFTT 0306 (TC) which had been overturned by the Upper Tribunal on appeal;

(2) Even if the appellant was right to say that he did not need to file a tax return for 14/15 (a statement with which HMRC did not agree), HMRC were entitled to enquire into any return which was submitted to them.

Does an error in the letter opening the enquiry invalidate the enquiry?

48. The letter which opened (or purported to open) the enquiry into Märtin's 14/15 tax return was dated 15 July 2016. It said:

> 'I am in receipt of your completed 2015 tax return…..I am writing to inform you that I am opening an protective enquiry into this return…..'

49. At the time of that letter, Mr Märtin had completed some months earlier a self-assessment online for the tax year 14/15. It is clear that he had not filed a self-assessment tax return for 15/16 at that time because in October 2016 he wrote to HMRC objecting to the receipt of a notice to complete a tax return for 15/16.

50. The legislation provides as follows:

> **S 9A notice of enquiry**
>
> (1) An officer of the Board may enquire into a return under s 8…of this Act if he gives notice of his intention to do so….
>
> (a) to the person whose return it is…..

51. No other provisions of the Act set out any formalities which must be complied with in order to open an enquiry: so the opening is effective as long as the taxpayer is given notice of the enquiry into the return.

52. Mr Märtin's position was that no such notice was given as the purported notice merely referred to 'your completed 2015 tax return' when there was no such thing as a 2015 tax return.

53. HMRC's position was that Mr Märtin's case on this had no reasonable prospect of success because it was not arguable that the letter did not open an enquiry into the tax return for 14/15; but even if it was, it was not arguable that s114(1) TMA would not apply to rectify the error in the year.

Is it arguable that the letter did not constitute the opening of an enquiry?

54. The Upper Tribunal in *Mabbutt* [2017] UKUT 289 (TCC) ruled that the test for whether a letter opened an enquiry was:

> '[45]….whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry in to a particular tax return.'

55. HMRC's position was that, as at the date of the letter, the appellant's most recent tax return was the only one which covered a part of 2015 (the 15/16 one not having then been filed), a reasonable taxpayer must have understood that the letter of enquiry related to the tax return for the year 6 April 2014 to 5 April 2015 which was filed in late 2015.

56. In so far as relevant, the evidence would tend to support HMRC's case, as Mr Märtin's reply of 12 August 2016 read:

> '…You mentioned that are 'in receipt of [my] completed 2015 tax return'. I assume you are referring to my tax return for tax year 2014/15.'

57. I agree with HMRC that, applying the test set out in *Mabbutt*, there is no reasonable prospect of a Tribunal concluding that the letter of 15 July 2016 was not a proper notice of enquiry into Mr Märtin's 14/15 tax return.

58. Mr Märtin relies on the First Tier Tribunal's conclusion in that a notice of enquiry must state the correct date, and is invalid if it does not do so, even in circumstances where in fact the date error caused no confusion: [36]. However, the Upper Tribunal expressly overturned the FTT's decision on this: see [77] and [93]. Under the UK's common law system of precedent, that means that the FTT is bound to follow the Upper Tribunal decision and must treat the FTT's decision in *Mabbutt* as wrong in law.

Is it arguable that s 114 would not apply to rectify the error?

59. S 114(1) TMA deems notices issued under the Taxes Acts to be valid despite 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….'

60. The decision of the Upper Tribunal in *Mabbutt* was that a mistake in the date of the tax year was a 'minor clerical error which …could have left a reasonable recipient taxpayer in no doubt as to what was intended…..' and the letter was therefore in substance and conformity with the Taxes Acts.

61. Again I agree with HMRC that, applying the test set out in the Upper Tribunal decision in *Mabbutt*, there is no reasonable prospect of a Tribunal concluding that the error in the letter of 15 July 2016 would not be rectified by s 114(1) TMA. Mr Märtin's reliance on the overturned FTT decision in *Mabbutt* is mistaken: that decision was wrong in law and cannot be followed by the FTT hearing his appeal. His attempt to distinguish it by saying the error in date was more serious in this case is not convincing: it was objectively and subjectively obvious to which tax return the letter referred.

62. Another proposition put by Mr Märtin was that HMRC could not rely on s 114 because the letter was erroneous and misleading in implying that there was enquiry into the partnership at that time when in fact there was not. As I understood it,

HMRC accepted that the letter was erroneous to that extent due to officers mistakenly being under the impression an enquiry had been opened into the partnership. However, this error cannot invalidate the opening of the enquiry into the appellant's own return, as it was not strictly any part of the opening of the enquiry and in any event did not mislead over the crucial question of whether an enquiry was being undertaken into Mr Märtin's 14/15 return.

Could HMRC validly enquire into Mr Märtin's 14/15 tax return?

63. Mr Märtin's case was that the enquiry into his 14/15 return was invalid because HMRC had no right to enquire into his 14/15 return as they had had no right to require him to make a return for 14/15.

64. HMRC's case was that this was not reasonably arguable because HMRC were entitled to enquire into any return which was submitted, whether or not submitted in response to a valid notice to file; and further HMRC were entitled to require a non-resident liable to UK tax to file a UK tax return.

65. Mr Märtin accepted that he had received a notice to file for 14/15; a letter from him dated 30 December 2015 acknowledged this: his position was that the notice to file was not valid because (a) he was not a UK resident at the time it was issued and (b) – a point raised for the first time in the hearing - the notice to file was defective as it was issued by a computer and not a named HMRC officer.

66. His next point was that it followed that, because his 14/15 return was not a valid return, HMRC would be unable to amend it under s 28B.

67. So the questions appeared to be:

(a) Did HMRC issue a valid notice to file to Mr Märtin if at the time he was neither resident nor domiciled in the UK;

(b) Did HMRC issue a valid notice to file to Mr Märtin when it was computer generated?

Jurisdiction to issue a non-resident/non-domiciled with a notice to file?

68. HMRC's position was that they were entitled to issue a notice to file to anyone who was liable to UK tax. S 6 ITOYA charges a non-resident to tax on profits of a trade to the extent that the trade is carried on in the UK. HMRC's position is that in 14/15 Mr Märtin was in receipt of profits from the trade of the partnership which was carried on in the UK.

69. I heard no evidence on this. Although at some point Mr Märtin had accepted in writing that the partnership was managed in the UK, he resiled from that in the hearing. Hearing no evidence on the point, I was not in a position to decide whether Mr Märtin had any UK tax liability in 14/15.

70. Mr Märtin's further new point was that in any event, whether or not he was liable to UK tax, UK law did not permit a person not resident in the UK to be served with notices under the Taxes Act. For this proposition, he relied on the case of *Jimenez* [2017] EWHC 2585 (Admin). That case was concerned with whether Parliament intended the power for HMRC under Sch 36 FA 2008 (to issue notices requiring taxpayers to provide information to verify their tax position) to extend to taxpayers not resident in the UK. The Administrative Court held that it did not:

> [61] In short, in my judgment the application of (i) the *Masri* principle, and (ii) the approach that Parliament is presumed to have intended to act in accordance with international law, and so not to offend against the sovereignty of another state, found the conclusion that Schedule 36 does not provide a power to give the taxpayer notice that was given to the Claimant in Dubai and so the Revenue should not have given it, the First-tier Tribunal should not have approved it and it should be quashed.

Mr Märtin's case is that the same logic applies here: there are penalties set down in the Taxes Act for failure to comply with a notice to file. Therefore, Parliament cannot (he says) have intended notices to file to be issued to non-resident as that would offend against the international law that states should not legislate to control the actions of persons resident in another state.

71. However, this argument was not foreshadowed in the lengthy documents provided before the hearing and that deprived Mr Davey of the opportunity to make any proper response. In the absence of full argument on this important and complicated issue of law, I do not see that there is any point in me expressing any view on it bearing in mind I have in any event struck out the appeal.

Is a notice to file issued automatically by a computer invalid?

72. For this proposition Mr Märtin relied on the case of *Khan Properties* [2017]

> [23] In my view the requirement in s 100(1) TMA is for a flesh and blood human being who is an officer of HMRC to make the assessment, that is to decide to impose the penalty and give instructions which may be executed by a computer (s 113(1D) TMA).

> [24] That officer should be named in the notice otherwise the recipient will not know to which officer to address the appeal as required by s 31A(1)(c) TMA.

73. Mr Märtin's case was that s8 required an individual named officer to serve a notice to file as it required the notice to be given by

> '….an officer of the Board'

74. This was a new point: Mr Davey did not have the opportunity to respond.

75. The notice to file was in the bundle: it was not signed nor did it refer to an HMRC officer by name. As to who or what caused it to be issued the only information that can be gleaned is:

> 'Issued by
>
> SELF ASSESSMENT
>
> HM REVENUE AND CUSTOMS'

76. Again this was an important point on which I did not hear full argument and so it seems pointless for me to comment as I have struck out these proceedings. Mr Märtin is not prevented from raising this issue: it is just this is not the time for it. He may raise this issue (if he chooses) if at some point HMRC do amend his 14/15 return and he chooses to appeal that amendment.

Appellant's application to bar HMRC

77. The appellant's application to bar HMRC seemed to be based on various propositions, as follows:

> (1) HMRC did not file a proper statement of case;
>
> (2) HMRC did not file their statement of case and/or strike out application by the due date;
>
> (3) HMRC's case as disclosed by statement of case does not have a reasonable prospect of success.

78. In the hearing, the appellant did not appear to pursue any of these points; he asked instead for HMRC to be barred because of 'prejudicial delay' but did not explain what he meant.

79. None of these complaints appear justified. At an earlier stage in these proceedings he had objected to HMRC's application to file their statement of case 41 minutes late; that application was allowed on the papers and cannot form the basis of striking out HMRC now. There is no due date for the filing of a strike out application. The statement of case was, in my view, a clear explanation of the position HMRC has taken in this hearing.

80. Mr Märtin is a litigant in person. He has filed voluminous applications with the Tribunal. They are not particularly easy to understand.

81. It is clear he is aggrieved but much less clear that any grievance is justified. In the hearing he complained that the UK's tax year is not a calendar year which causes him complications as he also has to complete a Swiss tax return which covers a calendar year: while I can see the complications, it was Mr Märtin's choice to reside in the UK for a period and to become a member of a UK trading partnership and thereby render himself liable to the UK tax regime. In so far as he is lawfully subject to UK tax, he cannot complain that he dislikes the UK system of collecting tax.

82. In conclusion, had I not struck out these proceedings in any event, I could not see any basis on which to bar HMRC from participation in them.

Objective of the proceedings

83. Mr Märtin's position is one of flawed logic: his case put in writing before the hearing included the statement that the closure notice should have been unconditional because the notice to file was invalid because he was not liable to file a UK tax return; this proposition is quite wrong for a number of reasons.

84. Firstly, the closure notice was unconditional in the sense that it closed the enquiry into his tax return with no amendment being made. The statement by HMRC that the closure of the enquiry was without prejudice to the possibility of amendments one day being made under s 28B was a statement that formed no part of the closure notice; it was merely an explanation intended to warn the taxpayer that the law provided that, despite the closure notice, his tax return might not be final.

85. In any event, as explained many times before this Tribunal has no power to order HMRC not to make an amendment to his tax return under s 28B: its power (on an appeal) is to consider the correctness in law of any such amendment once made.

86. Secondly, if he was right that the notice to file was invalid, then it follows that his tax return was not a s 9 tax return; it would therefore follow that HMRC could not enquire into it and could not issue a valid closure notice. So if he is right the notice to file was invalid, the conclusion would be that the Tribunal had no jurisdiction to order closure of the 'enquiry' as there could be no valid enquiry.

87. But he is not cut off from arguing his case that the notice to file for 14/15 was invalid: he will be entitled to put his case that it was invalid if and when HMRC amend his 14/15 return and he lodges an appeal against any such amendment. But he cannot argue it now, however much he desires finality in his tax affairs. If he wishes to make HMRC close the enquiry into the partnership return, he should either (a) apply to the Tribunal to close that enquiry – although I make no determination of whether he has the right to do so despite not being the nominated partner and/or (b) contact the partnership to persuade the nominated partner to lodge a closure application with the Tribunal.

88. 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.

BARBARA MOSEDALE

TRIBUNAL JUDGE
RELEASE DATE: 02 October 2018

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on **14 November 2018**.