Neutral Citation: [2024] UKFTT 00224 (TC)

Case Number: TC09106

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/00432

PROCEDURE - application to strike out - whether jurisdiction - Tribunal Rule 8(2)(a) - statutory scheme - KSM Henryk Zeman, Caerdav *and* Shinelock *considered – application granted - third ground of appeal struck out*

Heard on: 13 September 2023
Judgment date: 13 March 2024

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

ROBIN HOULDSWORTH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick C Soares KC and Imran Afzal of counsel, instructed by Capital Business Consultants Limited

For the Respondents: Bayo Randle, of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 6 February 2023, the respondents ("HMRC") made an application to the Tribunal to strike out the third ground of the appellant's Amended Grounds of Appeal ("Ground 3") under Rule 8(2)(a) or, in the alternative under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").

2. The appeal relates to a Closure Notice issued on 8 June 2018 in respect of the year ended 5 April 2005 ("the Relevant Tax Year") which concluded that the appellant was resident in the UK during that year and therefore chargeable to tax in the UK on certain dividends.

3. It is not in dispute that in 2005 the appellant's employer adopted arrangements whereby employees who would have been paid bonuses were awarded shares in a company which subsequently paid dividends. The amount of dividends brought into charge by the Closure Notice is £1,309,500 and the additional tax is £323,528.32.

4. I had the benefit of a hearing bundle extending to 928 pages, a Skeleton Argument for the appellant extending to 32 pages and 83 paragraphs and a Skeleton Argument for HMRC extending to 17 pages and 60 paragraphs.

5. On the morning of the hearing it transpired that HMRC had lodged a copy of section 49I Taxes Management Act 1970 ("TMA") and a copy of the decision in *Shinelock Limited v HMRC* [2023] UKUT 107 (TCC) ("Shinelock"). Neither I nor the appellant's representatives had received those so they were forwarded to us.

6. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Overview of the procedural history

7. I annex at Appendix 1 copies of the provisions of the Taxes Management Act 1970 ("TMA") upon which the parties relied.

8. In terms of section 8 TMA, on 8 November 2007, HMRC issued a notice to the appellant requiring him to file a self-assessment tax return ("SATR") for the Relevant Tax Year. The SATR was filed on 30 May 2008 and on 19 0ctober 2008, HMRC opened an enquiry into that return under section 9A TMA.

9. Correspondence ensued but, in the absence of the provision of relevant information, ultimately HMRC issued an Information Notice in terms of Schedule 36 Finance Act 2008 on 26 October 2015 and a response was provided. There then followed fruitless correspondence between HMRC and the appellant's agent. In July 2017, HMRC wrote to the appellant stating that they had had no replies from the agent since a meeting on 25 May 2016.

10. There was no response so the Closure Notice was issued on 8 June 2018 under section 28A(1B) and (2) TMA. That Closure Notice completed the enquiry. It was very brief and simply stated the conclusion that the appellant was resident in the UK in the Relevant Tax Year and thus the dividends were taxable. The consequential amendments had been made to reflect the charge to tax.

11. On 6 July 2018, under section 31 TMA, the agent then appealed the Closure Notice and sought postponement of the tax which was the subject of the amendment made by HMRC.

12. On 15 August 2019, HMRC issued a View of the Matter letter and, in terms of section 49A(2)(6) TMA, offering a review of the "matter in question" and that was accepted on 13 September 2019.

13. On 10 October 2019, HMRC issued the Review Conclusion letter ("the Review") upholding the decision to issue the Closure Notice.

14. The Notice of Appeal to the Tribunal was dated 22 January 2020 and was therefore out of time, but HMRC did not object to the late appeal so it has proceeded. The Grounds of Appeal were simply that: "The reasons for appeal are on the grounds of the fact (sic) the individual was a non UK resident for the year 2004/2005."

15. HMRC subsequently made a successful application for Further and Better Particulars.

16. On 22 December 2021, the appellant lodged the Amended Grounds of Appeal.

17. The first Ground of Appeal, which was that no valid notice had been issued under section 8A TMA, was withdrawn on 17 January 2023.

18. The second Ground of Appeal ("Ground 2") is that the appellant was not UK resident during the Relevant Tax Year.

19. Following HMRC's application for strike out of Ground 3 ("the Application"), on 22 March 2023, the Tribunal directed the appellant to lodge representations in answer and a detailed response ("the Response") was lodged on 18 April 2023.

Ground 3

20. That reads:

> "Ground 3: Abuse of Power
>
> Further/or in the alternative the Appellant had a legitimate expectation that in assessing whether he was non-UK resident for tax purposes during the year ended 5 April 2005, the Respondents would adhere to the terms of their published guidance in paragraph 2.2 of the Respondents' publication IR20".

21. The appellant then quoted paragraphs 2.2 to 2.5 of IR20 and I annex a copy thereof at Appendix 2. IR20 was the guidance published by the Inland Revenue entitled "Residents and non-residents Liability to tax in the United Kingdom".

22. It was then argued that:

(a) The appellants' circumstances during the tax year in question fell squarely within paragraph 2.2 of IR 20 for the following reasons:

(i) The Appellant left the UK on 1 April 2004 to take up a full-time contract of employment with an employer which had its international headquarters in Switzerland;

(ii) the terms of the Appellant's new contract of employment required him to work in Switzerland and internationally for a minimum of three years;

(iii) as at the time at which the Appellant left the UK his intention was to leave the UK on a permanent basis;

(iv) during the Relevant Tax Year the Appellant returned to the UK for only 75 days;

(v) the Appellant was absent from the UK for at least a whole tax year and his new employment had lasted for at least a whole tax year.

(b) The appellant was entitled to, and did, rely upon HMRC's representations in paragraph 2.2 of IR20 that they would treat the appellant as non-resident for the Relevant Tax Year; therefore the dividends would not be chargeable to UK tax.

(c) HMRC's failure to adhere to the terms of paragraph 2.2 of IR20 was a breach of the appellant's legitimate expectations and/or unreasonable in the sense identified in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 2 and/or an abuse of power on the part of HMRC.

(d) Therefore, under section 50 TMA, the jurisdiction of the Tribunal on an appeal of a Closure Notice was sufficiently broad to require the Tribunal to allow the appeal purely on the basis of legitimate expectation and/or abuse of power; reliance was placed upon the Upper Tribunal decision in *KSM Henryk Zeman SP Z.o.o.* [2021] UKUT 182 (TCC) ("Henryk Zeman").

Preliminary issue

23. In summary, in the Application, HMRC's primary argument was that the proper forum for a challenge such as that posed by Ground 3 is by means of judicial review in the High Court and the Tribunal does not have jurisdiction to consider legitimate expectation. The alternative argument was that the appellant had no reasonable prospect of succeeding on the ground that he had a legitimate expectation based on the wording of the guidance set out in IR20.

24. At the outset of the hearing, having read the Bundle, I pointed out what appeared to be not insignificant areas of factual dispute. I was concerned that if there was a dispute as to whether, on the facts, the appellant had ever been non-resident, then, to paraphrase, it would be a "chicken and egg" argument on legitimate expectation. If the appellant had never been non-resident, as averred by HMRC, he could never have had a legitimate expectation that HMRC's guidance IR20 would help him.

25. After an adjournment, Mr Randle intimated that, having taken instructions, and given that there remained a dispute in relation to the facts in relation to residence, he had decided not to pursue the argument based on Rule 8(3)(c) of the Rules that Ground 3 had no reasonable prospect of success.

26. Therefore, he was pursuing only the argument on jurisdiction, ie he relied only on Rule 8(2)(a) of the Rules.

The Facts

27. Since there is only limited common ground between the parties, and to provide some context for the discussion that follows, the factual dispute can briefly be described as:-

The appellant's position

28. In the Amended Grounds of Appeal, the appellant narrated a number of "facts and matters" in support of Ground 2, and those, together with other matters referred to in the Response and in correspondence, can be summarised as follows:

(a) Having been offered a job in Switzerland in December 2003, following various negotiations, he commenced employment on 1 April 2004; he had two meetings in France and Italy on that day.

(b) On 5 April 2004 he went to North Africa for a brief holiday.

(c) On 12 April 2004 he returned to France for a meeting.

(d) He was replaced in his former UK based role by two directors who remained in place for a number of years.

(e) The appellant remained a director of a number of UK companies during the Relevant Tax Year; those appointments were a function of, and incidental to, his new employment. In that regard in the Relevant Tax Year he spent no more than 10 working days deployed on those activities and, in general, did so remotely.

(f) The appellant had a full-time overseas employment contract evidencing that it was intended that he was to work in Switzerland and internationally for three years. In that regard:

(i) He had intended to leave the UK for at least three years.

(ii) He filed a form P85 with HMRC explaining that he had left the UK.

(iii) He was required to work long hours including spending many weekends and evenings entertaining clients "around the world".

(iv) He would be required to travel regularly.

(g) The appellant had a Swiss Residency Permit, completed a Swiss tax return (and in consequence was therefore resident for Swiss tax purposes) and had a Swiss property available for his use which he argued was his home. He had a Swiss bank account, Swiss lawyers and Swiss medical registrations.

(h) The appellant was paid his salary and his discretionary bonus in Swiss francs.

(i) He states that "when properly computed" in the Relevant Tax Year he was only in the UK for 75 days. However, he also states that he visited the UK for 76 days in the Relevant Tax Year.

(j) The appellant was forced to return to live in the UK because of the impact that his employment abroad had had on his relationship with his then girlfriend, to whom he became engaged in August 2004; she lived in the UK and was later his wife.

(k) He returned permanently to the UK on 19 April 2005; he resigned from his Swiss employment.

(l) The appellant notified HMRC as to the dates when he left and returned to the UK.

HMRC's position

29. I have put in parenthesis the information HMRC relied upon in other documents but in the Review, HMRC argued that:

(a) The appellant's tax return for the Relevant Tax Year was lodged on 20 May 2008 on the basis that he was non-resident in the UK. The dividends in question were not reported in that return.

(b) Prior to the Relevant Tax Year, having been born and always lived in the UK, the appellant had been resident and ordinarily resident in the UK for tax purposes.

(c) The appellant's agent had told HMRC that the appellant had left the UK on 1 April 2004. (However, I observe that the agent's letter and the boarding pass that were produced indicate that he left the UK on 2 April 2004.) The contract of employment had been signed on 4 April 2004.

(d) On 5 April 2004 the appellant flew to North Africa for a holiday and the evidence suggests that he commenced his contract of employment in Switzerland on 13 April 2004.

(e) The remuneration in the contract of employment is stated in pounds sterling rather than Swiss francs.

(f) Although the appellant had a "home" (HMRC's use of quotations) in Switzerland the evidence shows that he spent only 34 days in that accommodation. (It was fully furnished, owned by his employer and provided to him "rent free").

(g) The only personal items in that accommodation were contained in a suitcase which he took with him from the UK. He had not hired a removal company. The remainder of his personal possessions remained in the UK. No personal effects or furniture were moved to Switzerland.

(h) The appellant retained his UK bank accounts and property. He continued to hold numerous UK directorships. No evidence has been produced to support the assertion that those directorships were incidental to his Swiss employment.

(i) Of the nine UK group companies in which he was a director and which predated the new employment contract and continued throughout and beyond the Relevant Tax Year, four of those appointments were made on 15 March 2004 just before he signed the employment contract. There were five UK companies in which he was a director which were unconnected with the group companies and those directorships continued beyond the employment contract. He was Chairman and CEO of at least two companies. No evidence had been produced to substantiate the nature of the duties involved in any of the companies.

(j) He used his home in the UK when in the UK. The appellant's car remained in the UK with no alternative vehicle acquired in Switzerland. (He kept and maintained it at his employer's UK subsidiary's secure underground car parking facilities. That company was his previous employer.)

(k) The appellant had not informed his insurance company that he had moved abroad.

(l) Between 3 April 2005 and 19 April 2005, the appellant travelled to Switzerland on 5 April 2005, returning to the UK later that day and to Germany on 12 April 2005, returning to the UK the next day. All of the other dates during that period were spent entirely in the UK. HMRC's conclusion was that the first condition in paragraph 2.2 of IR20 was therefore not met.

(m) The terms of the contract of employment required the appellant to work in Switzerland and internationally for a minimum of three years but he returned to the UK after the first year.

(n) The appellant spent 76 full days in the UK during the Relevant Tax Year compared to 16 full days in Switzerland. The appellant spent 17 days in France and 20 days in Italy. The appellant was only present in Switzerland on 39 partial days compared to 164 partial days in the UK, 55 in France and 25 in Italy. During the Relevant Tax Year the appellant travelled to Switzerland on 22 occasions compared to 85 journeys to the UK, 32 to France and 14 to Italy. The appellant was present in Switzerland at midnight only on 34 occasions out of a potential 365 compared to 157 in the UK, 44 in France and 32 in Italy. Approximately half of the weekends were spent outside of the UK.

(o) After the appellant returned to the UK in 2005 he spent most of his time in the UK.

Overview of the appellant's Skeleton Argument

30. It was argued for the appellant that:

(1) The guidance in paragraphs 2.2 and 2.3 of IR20 is very straightforward and the appellant sought to comply, and did comply, with its terms.

(2) The Supreme Court in *R (Gaines-Cooper) v HMRC* [2011] UK SC 47 ("GC") held that to determine residence as a matter of law where someone leaves the UK, it is necessary to apply a multi-factorial test which includes determining whether the taxpayer had made a clean break from the UK.

(3) Lord Wilson, at paragraph 21 of *GC,* noted, however, that HMRC had dispensed with the multi-factorial test in paragraph 2.2 of IR20 when it came to full-time overseas contracts. His Lordship stated:-

> "21 … As I will demonstrate in para 36 below, the Revenue also sought to eliminate any remaining element of doubt about the proper treatment of the full-time employee abroad by providing in the booklet that, subject to specified conditions of ostensibly simple application, he would – definitely – be treated as not resident, nor ordinarily resident, in the United Kingdom. In his case therefore, the Revenue was dispensing with the need for the multi-factorial enquiry." (Emphasis added by Mr Soares, KC in oral submissions)

(4) The appellant therefore had a legitimate expectation that paragraph 2.2 of IR20 could be relied upon without having to apply the multi-factorial test, as HMRC had dispensed with the multi-factorial enquiry through its guidance in IR20.

(5) For the avoidance of doubt, the appellant should succeed in the appeal whether he can rely on paragraph 2.2 of IR20 or on the multi-factorial test. However, the former is clearly the more straightforward to satisfy.

(6) In *Daniel v HMRC* [2014] UKFTT 173 (TC) ("Daniel"), the Tribunal had had to consider whether the taxpayer in question was non-resident by applying IR20; thus the Tribunal does have jurisdiction.

(7) It is well established that the test to be applied when deciding whether the Tribunal has jurisdiction to consider public law grounds, such as legitimate expectation, is to be found in these quotations from paragraphs 34 and 84 of *Henryk Zeman*:-

> "34… The promotion of the rule of law and fairness means that the taxpayer should be entitled to defend himself by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, unless that entitlement is excluded by the relevant statutory regime. That is a question of construing the relevant statutory language".
>
> and
>
> 84 … the critical question in this case (see *Beadle* at [44]) is whether the relevant statutory scheme expressly or by implication excludes the ability to raise the public law defence of legitimate expectation….".

(8) Therefore, the starting point is that the Tribunal does have jurisdiction to consider legitimate expectation unless the relevant statutory scheme expressly or impliedly excludes it.

(9) At all stages of the enquiry and appeals procedure the issue of whether the appellant met the conditions in IR20 was explicitly considered.

(10) In particular, IR20 was expressly considered in some detail in the Review and therefore was one of the "matters in question".

(11) Accordingly, the statutory scheme does not exclude legitimate expectation, not least because the statutory internal review procedures "expressly require the Tribunal to consider public law principles when interpreting IR20, paragraphs 2.2 and 2.3".

(12) The overriding objective in Rule 2 of the Rules requires the Tribunal to hear Ground 3 with the other issues and that would avoid, as the Upper Tribunal in *Henryk Zeman* had explained at paragraph 82 "duplication, delay and injustice".

Overview of HMRC's Skeleton Argument

31. HMRC contend that on a proper consideration of the case law the Tribunal has no jurisdiction to consider Ground 3. The Tribunal has no jurisdiction unless the legislation expressly makes provision for public law grounds to be considered.

32. The Court of Appeal in *Beadle v HMRC* [2020] EWCA Civ 562 ("Beadle") determined that where the venue for challenge of an enforcement decision is a statutory tribunal it should be assumed to include a right to challenge on public law grounds unless the provisions giving rise to the right to appeal excludes such a challenge (paragraph 44). However, at paragraph 45 the Court of Appeal argued that express words in statutory scheme should not necessarily be looked at in isolation when considering whether public law grounds should be excluded. That might be the implication "when the relevant statutory scheme is construed as a whole and in light of its context and purpose…".

33. Mr Randle argued that in *Henryk Zeman* the Tribunal indicated that similar logic must apply in circumstances where the appellant is technically a claimant as, in substance, they are defending an enforcement action by HMRC.

34. Having said that, he then relied upon the later cases of *Caerdav Ltd v HMRC* [2023] UKUT 00179 (TCC) ("Caerdav") and *Hoey v HMRC* [2022] EWCA Civ 656 ("Hoey") for the proposition that the starting point is that appeal grounds concerning public law arguments should be pursued in judicial review proceedings rather than in the Tribunal unless the statutory context indicates otherwise.

35. He quoted from *Hoey* at paragraph 132 where the Court of Appeal said:

> "The question of jurisdiction can only be determined by reference to the particular statutory scheme in question that governs the tax tribunal's jurisdiction."

36. He pointed out that the Upper Tribunal in *Caerdav* had cited with approval the decision in *HMRC v Noor* [2013] UKUT 71 (TCC) ("Noor") which had confirmed that the Tribunal had no judicial review function. He argued that that had also been approved in *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 ("MIS").

37. His interpretation of paragraphs 20 and 21 of *MIS* was that the Court of Appeal:

> "went further by indicating that, in circumstances where the legislation did not expressly provide for it, it was 'highly improbable' that parliament intended the FTT to have jurisdiction to consider legitimate expectation….".

38. Accordingly, the Tribunal has no jurisdiction to consider legitimate expectation unless expressly provided for in the legislation. It had been pointed out at paragraph 51 in *Caerdav* that *MIS* had not been considered in *Henryk Zeman,* so, to the extent that *Henryk* Zeman suggested otherwise, it was wrongly decided.

39. The statutory language upon which *Henryk Zeman* turned was permissive and not mandatory because in that case HMRC had had a discretion. There is no such discretion in the statutory provisions relating to residence (sections 334 and 335 Income and Corporation Taxes Act 1988 ("ICTA") or in the relevant provisions of the TMA (sections 28A, 31 and 50). I annex at Appendix 3 the text of those ICTA provisions.

40. He relied upon paragraph 97 in *Alway Sheet Metal v HMRC* [2017] UKFTT 198 (TC) ("Alway").

41. He too referenced *GC* but arguing that the Supreme Court had not disapproved the Special Commissioners' finding that they should "apply the law rather than the guidance".

42. Lastly, he referred to *Hankinson v HMRC* [2009] UKFTT 384 (TC) ("Hankinson") at paragraph 26 where the Tribunal had said:

> "26. The statutory and common law relating to residence and ordinary residence fall within our jurisdiction, but the application of the guidance and practice set out in IR20 does not."

but he acknowledged that in the later case of *Daniel* the Tribunal had said, in the context of alleged negligent behaviour, at paragraph 9 that the Tribunal "would not normally be able to allow an appeal on the basis that an appellant had met the conditions for establishing non-UK residence set out in HMRC's publication IR20."

The statutory scheme

43. I have set out the procedural history and the sections of the TMA that are relevant in this appeal.

44. The Application was predicated upon the basis that in residency cases, HMRC does not have a discretion in that:

(a) Section 334 ICTA is expressed in mandatory terms stating that a taxpayer "shall" be assessed to tax if resident in the UK, and

(b) Neither sections 28A nor 50 TMA indicate that there is any element of discretion.

45. As I have noted at paragraph 39, HMRC also relied upon section 31 TMA.

46. Whilst it was accepted for the appellant that section 334 ICTA states that an assessment is mandatory if a taxpayer is resident in the UK, section 128 Finance Act 195 is expressed in equally mandatory words in that a taxpayer who is not resident shall not be charged to tax.

47. There is no statutory definition of residence albeit, as Mr Randle pointed out, there are some statutory provisions relating thereto. Mr Soares pointed to Lord Wilson at paragraph 13 of *GC* where he said that in the absence of such a definition taxpayers and their advisers had to turn to case law and "importantly" HMRC guidance.

48. Mr Soares argued that because the concept of residence was "vague" there must be a fundamental discretion both in deciding whether or not the appellant was UK resident and then whether to assess in terms of the statutory scheme.

49. Mr Afzal later argued that residence does not exist in the abstract. The "matter under appeal" in terms of section 31 TMA was the amount of tax "due" and IR20 goes to the issue as to whether the dividends were taxable and thus the tax due.

50. It is common ground that the appeal was made to the Tribunal in terms of section 49G TMA and that section 49I TMA defines the "matter in question" as being the "matter to which an appeal relates" for the purposes of sections 49A to 49H TMA.

51. An area of dispute between the parties is what that might be. I will revert to that.

52. Mr Afzal pointed out that section 49I does not define the subject matter of an appeal to HMRC in terms of section 31 TMA. Section 31 relates to an appeal of a Closure Notice or an amendment made thereby, and of course in this case there was an amendment which brought the tax into charge.

53. The appellant specifically and particularly relies upon the internal review procedure. That was created by Article 3 and Schedule 1 Paragraphs 5, 30 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order SI 2009/56 with effect from 1 April 2009.

54. As can be seen, Mr Soares and Mr Afzal placed considerable reliance upon the terms of the Review arguing that consideration of IR20 was central to HMRC's decision and therefore was one of the matters in question; hence my narrative at paragraph 29 above.

55. In terms of the TMA, in oral submissions, Mr Soares focussed upon Sections 9A, 31, 49A and 49E.

56. It was argued for the appellant that:

(a) Section 9A(4) mandates HMRC to consider "anything" required to be contained in the return.

(b) Following the issue of the Closure Notice and the amendment, section 31 TMA gave the appellant the right to appeal "any" conclusion stated or amendment made by the Closure Notice.

(c) Section 49A(2)(b) TMA, which is the offer by HMRC of a review of the matter in question, is a discretionary provision. In this case the matter in question is IR20 and the conclusion reached was that it was not satisfied.

(d) Section 49E(2) states that the nature and extent of the review are to be what appears appropriate to HMRC in the circumstances and HMRC chose to consider IR20.

(e) Accordingly since section 49G(4) TMA provides that the Tribunal must determine the matter in question, therefore I must have jurisdiction to consider IR20 and public law issues have not been expressly or impliedly excluded in the statutory scheme.

57. Mr Randle's starting point was that section 28A(2) made it explicit that the Closure Notice <u>must</u> state the conclusion and make the amendment. It does.

58. Section 31 TMA then permits a taxpayer to appeal that mandatory conclusion and/or amendment to HMRC and, if there is a review, then the taxpayer can "notify the appeal" to the Tribunal in terms of section 49G(4) TMA. The Tribunal will then determine the matter in question. The appeal is that which was appealed to HMRC, ie the conclusion in the Closure Notice and/or the amendment which is, of course, the tax due. Section 50(6) and (7) TMA then permit the Tribunal to reduce or increase the assessment (amendment) or it remains "good".

Discussion and analysis

59. Some of the arguments advanced were less straightforward to resolve than others.

60. I had no hesitation in rejecting the argument for the appellant that I should have in mind Rule 2 of the Rules when adjudicating on jurisdiction. The central question as to whether the Tribunal does or does not have jurisdiction is the subject of a binary decision which must be addressed and determined at the hearing of a strike out application. Either the Tribunal has jurisdiction, or it does not: *HMRC v Woodstream Europe Ltd* [2018] UKUT 398 (TCC) at paragraphs 15 and 16.

61. At paragraph 12 of the Application, HMRC referred to *Daniel v HMRC* [2014] UKFTT 173 (TC) ("Daniel") where Judge Nowlan and Mrs Farquharson had said that the Tribunal "would not normally be able to allow an appeal on the basis that an appellant had met the conditions … set out in … IR20", albeit there were exceptional circumstances where IR20 could be considered.

62. However, the appellant argued that in fact *Daniel* was authority for the proposition that the Tribunal will entertain a case based on IR20. Certainly in that appeal, as it states at paragraph 123, "Everything in the present case revolves around a fair interpretation of the terms of IR20 …". It did. However, that was not because the Tribunal was deciding upon residence but rather it was considering whether or not there had been "negligent conduct". For the appellant to succeed in that case, he would have had to have been able to establish that he had a tenable view that he had satisfied the tests in IR20. I do not accept that *Daniel* is of any assistance in this appeal.

63. I do accept the argument that Lord Wilson used what Mr Soares described as "very strong" and "very emphatic" language at paragraph 21 of *GC* when describing IR20. However, I do not accept that, as a *sequitur,* I should find that every taxpayer, including the appellant, should be able to rely upon IR20. That is a very broad assertion indeed.

64. Quite apart from anything else, in that paragraph, Lord Wilson stated that a multifactorial inquiry was not required in a particular taxpayer's case. However, at paragraph 45 he found that for an "ordinarily sophisticated taxpayer" reading IR20, the general requirements in the guidance "demanded - and might well in practice generate - a multifactorial evaluation of his circumstances on the part of the Revenue albeit subject to appeal".

65. Further, it should be noted that those observations were made in a context where the taxpayers had sought judicial review of determinations that they were UK resident for tax purposes. Those appeals were dismissed.

66. Mr Randle is entirely correct in saying that the Supreme Court in *GC* had not disapproved the Special Commissioners' approach which had been to apply the law rather than the guidance. Indeed, at paragraph 80, Lord Mance not only stated that but said that the decision of the Special Commissioners was "full and very clearly reasoned".

67. Mr Soares and Mr Afzal argued that "It is clear that *KSM Henryk Zeman* is sound law and has been followed in subsequent cases" with Mr Afzal going so far as to say that *Shinelock* was a red herring. I will revert to *Shinelock.*

68. Firstly, the comments of the Upper Tribunal in *Henryk Zeman* in relation to jurisdiction are *obiter dicta* and therefore are not binding on me. Further, there is no evaluation of the language adopted in the statutory scheme with which I am concerned.

69. In *Henryk Zeman* the appeal related to section 73(1) VATA which is a "may" provision, not a "shall" provision. The appeal was made under section 83(1)(p) VATA which did not *ex facie* appear to oust the Tribunal's jurisdiction. The Tribunal noted that the scope of section 83(1)(p) VATA is wider than that of section 83(1)(c) VATA.

70. Section 73 VATA is a discretionary, and to best judgment, matter. The amendment (assessment) in this appeal was neither discretionary nor to best judgment. Certainly it turned on whether or not the appellant was UK resident, but that is a matter for proof in the substantive appeal, but if he was, and it is for him to prove that he was not, then there is a liability to tax.

71. Although it is a First-tier Tribunal decision and therefore only persuasive, I agree with Judge Amanda Brown KC and Mrs Sonia Gable in *Drinks and Food UK Ltd v HMRC* [2023] UKFTT 00979 (TC), which dealt with a different statutory scheme, where they argued at paragraphs 143 to 146 that:-

> "143. …Finally, and in light of the Court of Appeal decision in *David Beadle v HMRC* [2020] EWCA Civ 562, (Beadle) and subsequent decisions of the Upper Tribunal, it is not clear that the decision [*Henryk Zeman*] is soundly reached.

144. In *Beadle* the Court of Appeal confirmed that the tax tribunals have no inherent judicial review jurisdiction but concluded that in the context of an enforcement decision (i.e. a decision to assess for tax or penalty) there is a presumption that a taxpayer will be able to challenge the decision on public law grounds save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme. In the context of enforcement action the question will be whether the statutory scheme in question excludes the ability to raise a public law defence in proceedings which are dependent on the validity of the underlying administrative act (see paragraph 44 in particular).

145. In the case of *The Executors of David Harrison (Deceased) and others v HMRC* [2021] UKUT 273 (TCC) (Harrison) the Upper Tribunal confirmed that in the context of an enforcement decision a challenge on public law grounds was permissible unless the statutory scheme precluded such a challenge. However, in the context of other (non-enforcement) decisions of HMRC clear words are required within the statutory language to permit the taxpayer to challenge the reasonableness of HMRC's decision on appeal. The UT considered that there was no strong presumption against the FTT having power to consider public law arguments in a non-enforcement appeal; rather it was a question of statutory construction (see paragraphs 34 – 36).

146. The Upper Tribunal has affirmed that position in *Caerdav Ltd v HMRC* [2023] UKUT 179 (TCC)."

72. Before moving on to *Caerdav,* it is worth pointing out that at paragraph 36 of *Harrison* the Upper Tribunal indicated that it "overstates matters" to say that the Tribunal does not have the power "to consider public law arguments to the effect that HMRC have exercised discretion wrongly, with that strong presumption being rebutted only with clear words or necessary implication". It is "simply a matter of statutory construction".

73. Both parties had referred to paragraphs 152 and 153 of *Caerdav* but since paragraph 151 references *MIS,* upon which Mr Randle also relies, it is appropriate to quote all three paragraphs, namely:-

"151. …The starting point as to the FTT's jurisdiction to consider legitimate expectation arguments is as correctly recorded by the FTT at [196] in the arguments on behalf of HMRC:

196. Further, Mr Duffy argues that the matter is, in any event, covered by the Court of Appeal authority *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 ("*MIS*") which was not considered in *Henryk. MIS* concerned whether section 84(10) VATA enabled *MIS* to advance a legitimate expectation claim in the context of appeals to the First-tier Tribunal rather than by way of judicial review. The Court of Appeal considered *Noor* at [19] where Newey LJ said:

"19. Secondly, the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do

so, it could be suggested that the assessment depended on a prior decision that could be impugned on public law grounds.

20. That would be a very surprising result. In *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998, the UT (Warren J and Judge Bishopp) held, departing from views expressed by Sales J in *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), [2010] STC 686, that "the right of appeal given by s 83(1) [of the VATA] is an appeal in respect of a person's right to credit for input tax under the VAT legislation" and that the FTT did "not have jurisdiction to give effect to any legitimate expectation which [the taxpayer] may be able to establish in relation to any credit for input tax" (paragraph 87). The UT observed:

> "a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83 (paragraph 87.)"

In the UT's view, a number of features "point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the FTT in relation to appeals under s 83 of the VATA 1994" (paragraph 78). The UT noted that the Tribunals, Courts and Enforcement Act 2007 conferred a judicial review function on the UT but not the FTT (paragraph 29) and that the approach Sales J had favoured would have conferred a very extensive judicial review jurisdiction on the FTT "without any of the procedural safeguards, in particular the filter of permission to bring judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject" (paragraph 76). The UT also cited this passage from the judgment of Nicholls LJ in an income tax case, *Aspin v Estill* [1987] STC 723 (at 727):

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) <u>depending on the statutory provisions under consideration.</u> (Emphasis added)

153. Thus, the statutory context is key, as the UT in *Henryk* explains".

74. I have added emphasis because whether or not there is jurisdiction in any case turns on the language of the relevant legislation and the nature of HMRC's act or discretion; hence the conflicting arguments about discretion or the lack thereof. At paragraphs 154 and 155 of

Caerdav, the Upper Tribunal went on to point out that, as the Upper Tribunal in *Henryk Zeman* had found, there is a discretion inherent in section 83(1)(p) VATA when read together with section 73 VATA, as it must be. However, there is no discretion conveyed by section 83(1)(c) VATA.

75. Before turning to the statutory context, I address Mr Randle's argument about *MIS.* The quotation from the Upper Tribunal in *Caerdav* does not include paragraph 21 of *MIS* but the First-tier Tribunal did quote it. It reads:

> "21. Mr Ramsden did not attempt to persuade us that the UT was wrong in *Noor*. Were, however, his contentions as to the ambit of section 84(10) of the VATA well-founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims. The jurisdiction would, moreover, have been conferred through a provision introduced in response to the *Corbitt* decision (viz. section 84(10)) ("by the back door", as Miss Mitrophanous would say), rather than under section 83, the main appeals section. Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review (see CPR 54.4 and 54.5). It is highly improbable that Parliament intended this when it enacted what has now become section 84(10)."

76. I accept the argument that paragraphs 20 and 21 of *MIS*, when read together, might go as far as Mr Randle suggests, ie that where there is no express provision it is highly improbable that Parliament intends the Tribunal to have jurisdiction to consider legitimate expectation. However, I caveat that by saying that not only is it nevertheless possible but the level of improbability would depend on the statutory provision(s) in question. *MIS* was considering a different statutory provision to those with which I am concerned. In that case, where it was dealing with "prior decisions", it would have indeed have been highly improbable. I do not think that it is a statement of general application.

77. It is not for me to find that, in that context, *Henryk Zeman* was wrongly decided. *MIS* simply was not considered. Mr Randle's *MIS* point was not argued for the appellant in that case presumably since the argument there was that the statutory scheme did make express provision.

78. Lastly, on *MIS,* I observe that at paragraph 24 the Upper Tribunal stated:

> "24. ….A decision as to whether, for example, it was "oppressive to enforce that liability" (to quote from the judgment of Nicholls LJ in *Aspin v Estill*) would, it seems to me, appropriately be the subject of judicial review proceedings rather than an appeal to the FTT."

I say that because, in essence, the appellant in this appeal is arguing that it would be oppressive to apply a multi-factorial approach, being the statutory position, rather than rely on IR20.

79. Many of the cases to which I was referred related to the statutory scheme in the VATA and not the TMA. Although it is a First-tier Tribunal decision, and therefore of persuasive authority only, Mr Randle relied on Judge Richards, as he then was, at paragraph 87 of *Alway Sheet Metal* [2017] UKFTT 198 (TC) ("ASM"). Judge Richards pointed out that the Tribunal's jurisdiction had to be determined by reference to the statutory provisions governing the appellant's appeal "as the Tribunal is a creature of statute with no inherent jurisdiction". I agree and, in any event, that appeared to be common ground.

80. However, I record the point to give context because Judge Richards went on to state that that where an appellant had appealed to HMRC in terms of section 31 TMA, the Tribunal's

powers on an appeal thereafter are set out in section 50 TMA and he discussed section 50 TMA (see paragraphs 82 and 89 below).

81. At paragraph 95 he found that the relevant principles are set out in the Upper Tribunal's decision in *Noor* at paragraph 87 which reads:-

> "In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax….In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the administrative court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s83."

82. Lastly, at paragraph 97 of *ASM*, which Mr Randle described as being a key paragraph, Judge Richards stated that:

> "There is no material difference between the right of appeal set out in s31 of TMA 1970 … and that set out in s83(1)(c) of the Value Added Tax Act 1994. All the statutory provisions confer a right of appeal against specified HMRC decisions and none makes any reference to matters other than the statutory provisions dealing with the taxes concerned. If Parliament did not intend s83(1)(c) to give the Tribunal jurisdiction to consider matters other than a person's right to credit under VAT legislation, I see no reason why Parliament could have intended it to consider, on an appeal under s31 of TMA 1970 … questions of … legitimate expectation which go beyond the relevant statutory provisions. If anything, the provisions of s50(6) and s50(7) of TMA 1970 make this even clearer in the context of this appeal than it was in the VAT appeal being considered in *Noor*, as those sections emphasise that the Tribunal's focus should be on the amount of the assessments being made and leave no room for a consideration of whether considerations of legitimate expectation … prevent HMRC from making the assessments".

83. As I have indicated at paragraph 74 above, in both *Caerdav* and *Henryk Zeman,* the Upper Tribunal found that section 83(1)(c) was limited in scope.

84. Mr Randle went on to refer to Judge Fairpo's decision in *Saxton 4X4 Limited v HMRC* [2019] UKFTT 9 (TC) stating that she had endorsed Judge Richards' reasoning. What she did do was to state at paragraph 23 that she agreed with Judge Richards that "there is no material difference in the rights of appeal". I agree with both Judges.

85. Although it is an old case, section 50 TMA was also a focus of attention in *Aspin v Estil* [1987] STC 723 and at paragraph 47 in *Henryk Zeman* the Upper Tribunal noted that the Court of Appeal had found that, at first instance, the jurisdiction "was only to see whether the assessment had had been properly prepared in accordance with statute" and that the remedy was judicial review. At paragraph 48 the Upper Tribunal noted that:-

> "In *Aspin*, given the limitation in section 50…it is not surprising that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation".

86. As can be seen, it was argued for the appellant that because there was no statutory definition of residence that must import some concept of discretion on the part of HMRC. It is not as simple as that. For example, in the context of whether someone is self-employed for tax purposes, HMRC have produced guidance and both HMRC and taxpayers look at what are known as the "badges of trade" and those are not conclusive. Case law is also relevant but what

it comes down to is whether a taxpayer is liable to tax or not. That is a question of fact, as each case turns on its own facts as is the case with residence.

87. As Lord Dunedin pointed out in *Whitney v Commissioners of Inland Rev*enue [1925] UKHL TC 10 88 "Liability does not depend on assessment….But assessment particularises the exact sum which a person liable has to pay".

88. Whilst I note Mr Soare's argument that "residence" is a vague concept, I do not accept that that imports into the statutory scheme any discretion in relation to assessment. The assessment arises once liability has been established and in this case it is as a result of the Closure Notice and section 50 TMA gives the Tribunal power only to reduce or increase it.

89. I note the appellant's argument at paragraph 44(6) of the Skeleton Argument that section 50 TMA was not relevant to the question of reliance on IR20 because it was only the final stage in the appeals procedure ie after the Review which had looked at IR20 in detail. However, I agree with Judges Richards and Fairpo that that section is very relevant. It is an integral part of the statutory scheme.

90. Mr Randle relied on paragraphs 40, 57 and 64 of *Shinelock*. In that appeal the Upper Tribunal set out at paragraph 40 the relevant statutory framework which was sections 49B, C, E, F and G and I and section 50 of TMA.

91. Of course *Shinelock* was dealing with entirely different facts and a different area of tax law but I do not accept Mr Afzal's argument that *Shinelock* is a "red herring". Those provisions of the TMA are the same provisions with which this appeal is concerned.

92. At the heart of the arguments for the appellant are the assertions that not only is IR20 "the matter in question" in this appeal but that it is so because the Review referred to it at length (which it did) and that the statutory review provisions in the TMA expressly require the Tribunal to consider public law principles (essentially because the Review considered IR20).

93. I observe that the Upper Tribunal recorded at paragraph 44 of *Shinelock* that it had been argued for the appellant before the First-tier Tribunal that the correspondence after the Closure Notice was issued was relevant to the meaning of "the matter in question", that alternatively the Review Conclusion Letter had widened the scope of HMRC's view of the matter and that section 50 TMA was irrelevant; not dissimilar arguments to those advanced in this instance. Those arguments were not accepted.

94. At paragraph 57 of *Shinelock* the Upper Tribunal considered and approved their decision in *Daarasp & Another v HMRC* [2021] UKUT 87 (TCC) ("Daarasp") pointing out that that decision had set out ten principles which could be drawn from the leading authorities in relation to the issue of "the matter in question" in a Closure Notice. It is the case that those appeals came to the Tribunal with neither appellant having requested a statutory review. There was a statutory review in *Shinelock.*

95. Of the ten principles only numbers (1) - (3), (6) and (8) - (10) were quoted in *Shinelock* but, for completeness, I include all ten. I have added some emphasis for the reasons set out below.

96. The ten principles are –

> (1) There is no obligation on the officer to set out or state the reasons which have led him to his conclusion(s). What matters is the conclusion that the officer has reached upon the completion of his investigation, <u>not the process of reasoning by which he has reached those conclusions</u>: *Tower MCashback* at [15]; *Fidex* at [45]. This means that, on any appeal, the conclusions in the closure notice may be justified by reasons that were not

articulated either at the time the closure notice was issued or during the enquiry that preceded it.

(2) It follows that when justifying a conclusion that has been reached by the officer and stated in the closure notice, reasons other than those in play at the time of the closure notice may be relied upon to justify it. On any appeal, the FTT will form its own view on the law, without being restricted to what HMRC state in their conclusion or the taxpayer states in the notice of appeal. Either party can change its legal arguments, but such changes in argument cannot be used as an ambush, and the FTT must be astute to prevent this, by using its case management powers: *Tower MCashback* at [15], [18].

(3) That does not, however, mean that an appeal against a closure notice opens the door to a general roving inquiry into the return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return (as well as the overriding question of fairness): *Tower MCashback* at [15].

(4) How the conclusions of a closure notice are framed will very much depend upon the nature of the issues arising in relation to the enquiry. Lord Walker said this in *Tower MCashback* at [18]: “This should not be taken as an encouragement to officers of the revenue to draft every closure notice that they issue in wide and uninformative terms. In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms…” See, also, *Fidex* at [41].

(5) It is desirable that the statement by the officer of his conclusions should be as informative as possible: *Tower MCashback* at [83]; *Fidex* at [42]. Furthermore, notices are given at the conclusion of an enquiry, and must be read in context. It will be rare for a notice to be sent without some previous indication during the enquiry of the points that have attracted the officer’s attention: *Tower MCashback* at [84]; *Fidex* at [42], [45]; *Lavery* at [37]. That said, a narrowly drawn closure notice – properly construed – cannot be widened by reference to the scope of the enquiry which preceded it: *Lavery* at [34].

(6) It is not appropriate to construe a closure notice as if it were a statute: *Fidex* at [51]; *Lavery* at [28]. The ordinary rules of construction apply to closure notices, and the question of construction is a mixed question of fact and law: the identification of the relevant circumstances and context in which the document is to be construed is a question of fact, whilst the meaning of the document – construed within that context, as found – is a question of law: *Lavery* at [36]. Essentially, when approaching the question of construction, it is appropriate to consider how the reasonable recipient of the notice, standing in the shoes of the taxpayer, would have construed it: *Lavery* at [42].

(7) The issue of a closure notice represents an important stage in closing the officer’s enquiry. In *Bristol & West*, the Court of Appeal stated at [35]: “We do not doubt that the conclusion of an inquiry and the expression of HMRC’s conclusions in a closure notice leaves open for further 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 inquiry and the expression of HMRC’s conclusions arising from it can be belittled as a mere procedural pause. Closure marks an important stage at which the inquiry (with HMRC’s attendant powers and duties) ends, HMRC is required to state its case as to the

amount of tax due, in the closure notice itself, following which its power to amend the assessment is limited to such amendments as will give effect to those conclusions…" Indeed, the closure notice marks the beginning of a series of "precisely timed stages" whereby the return is amended and/or the closure notice challenged by way of appeal: *Bristol & West* at [36]. In particular, the jurisdiction of the FTT – to which any appeal is made – is fixed by the terms of the closure notice: *Lavery* at [19]; *Investec* at [70]. Furthermore, the scope of the closure notice and the matters arising out of any appeal of closure notice are matters for the FTT, and an appellate court should be slow to interfere with the FTT's decision unless it is clearly outside the scope of the statutory provisions: *Investec* at [71].

(8) "[T]he matter to which the appeal relates" for the purposes of section 49I(1)(a) must be the [conclusion and/or] the amendment and either the conclusion or the amendment is therefore the "matter in question" which the FTT is required to determine by section 49I(1) of the Taxes Management Act 1970. That then restricts the ambit of the appeal at the conclusion of which the FTT may decide that there has been an overcharge or an undercharge and so make a reduction or an increase in the assessment pursuant to section 50(6) or (7) of the Taxes Management Act 1970 as appropriate. There is a limit on the jurisdiction of the FTT which is not simply a matter of ensuring procedural fairness. Any purported exercise by the FTT of a broader power to consider matters beyond that would be an error of law: *Investec* at [70].

(9) The authorities do not support a narrow construction of the key phrase in section 49I of the Taxes Management Act and they establish that the FTT is the appropriate stage at which the scope of "the matter in question" in the appeal is to be determined. The FTT is a specialist tribunal and an appellate court should not interfere with that decision unless it is clearly outside the scope of the statutory provisions. There are likely to be boundary issues whatever the test to be applied. Those issues are much more likely to be problematic and time-consuming if a narrow view is adopted. Such a construction of the provisions would simply multiply the number of appeals: *Investec* at [71].

(10) There are other checks and balances in the legislative scheme designed to protect the taxpayer. Those protections are the time limit imposed on HMRC in opening an enquiry, the fact that only one enquiry can be opened into any one tax return and the ability of the taxpayer to seek a direction for the issue of a closure notice. A narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer. The "venerable principle" – that taxpayers should pay the right amount of tax – is also an important underlying factor in any tax matter. Proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here: *Investec* at [72].

97. In passing I observe that in *Daarasp* at paragraph 24 the Upper Tribunal made it clear that although there is a nexus between the conclusions in a Closure Notice and the consequential amendments implementing the conclusions, the two are distinct.

98. The Closure Notice was very brief and the decision was to the effect that it had been concluded that the appellant was UK resident for the year ended 5 April 2005 and that the dividends received by the appellant were liable to UK tax. The officer amended the tax return in line with her decision to the effect that the total tax due was £326,402.46. There was no reference to IR20.

99. The arguments prior to, and at, the hearing had focussed on the Review. In their Statement of Case at paragraph 14 HMRC stated that:-

> "The Closure Notice was issued on 8 June 2018, bringing the tax due on dividends received into charge. A covering letter was included with the Closure Notice informing the Appellant that, contrary to how he had self-assessed in his tax return, HMRC considered him to be resident in the UK for the tax year 2004-2005."

100. That is consistent with the appellant's apparent understanding of the Closure Notice which can be seen from paragraphs 2 and 3 of the Amended Grounds of Appeal which read:-

> "2. By the Closure Notice the Respondents informed the Appellant that they had completed a purported enquiry into the Appellant's tax return for the year ended 5 April 2005 and purported to amend the Appellant's tax return to include an additional amount of taxable income for the year in question in the amount of £323,528.32.
>
> 3. The Closure Notice indicates that the additional amount of taxable income was included on the basis that the Respondents had concluded that the Appellant was UK resident during the year ended 5 April 2005 and was therefore liable to UK income tax in relation to certain dividends received…"

101. In this instance, in terms of section 31(1)(b) TMA the appellant is undoubtedly appealing the amendment which is the assessment of tax due in the sum of £323,528.32. The conclusion that the appellant was UK tax resident is also appealed.

102. The simple fact is that, as the original Notice of Appeal indicated (see paragraph 14 above), the appellant understood that the issue was whether or not he was UK resident in the Relevant Tax Year. IR20 is not mentioned in the Closure Notice and it may or may not have featured as a reason for the conclusion that the appellant was UK resident.

103. In his reply submissions Mr Afzal argued that the Review had not broadened the scope of "the matter in question" because it must have been considered when arriving at the conclusion in the Closure Notice. That argument is met by the first three principles in *Daarasp* which apply.

104. It is clear that HMRC complied with the terms of section 28A TMA and concluded that the appellant was non-resident and the officer made the consequential amendment. That is what was appealed to HMRC in terms of section 31(1)(b) TMA. It is clear from the eighth principle enunciated in *Daarasp* (see emphasis in paragraph 96(8) above) that that was the matter in question at that stage.

105. Messrs Soares and Afzal argued that the appellant had exercised its discretionary right in terms of section 49A(2) TMA and that the Review had complied with the provisions of section 49E TMA (and in particular sections 49A (2) and (4)) with HMRC deeming it appropriate to consider IR20 in detail. They argue that the "matter in question" was not restricted to the conclusion and amendment in the Closure Notice ie the provisions of section 31(1)(b) TMA.

106. Mr Soares had focussed at some length on the terminology in the Review and the references to IR20. The Skeleton Argument was in large part predicated on the terms of the Review and what HMRC had considered.

107. Mr Randle placed particular reliance on paragraph 64 of *Shinelock* which reads:

> "To the extent that the FTT additionally considered … that the scope of 'the matter in question' could be altered by the subsequent review process, we would disagree. The scope of the closure notice was to be determined, in context, at the time it was issued on

> the basis of the understanding of a reasonable recipient standing in the shoes of the taxpayer. Subsequent discussions …might conceivably be relevant as shedding light on the nature of such an understanding at that time [of the Closure Notice] but they would not retrospectively extend the scope of the matter in question".

108. Whilst I certainly accept, as is argued for the appellant, that section 49I does not, and cannot define section 31 TMA nevertheless I agree with Mr Randle that it does refer to section 49A which, in subsection (1) states that the section applies where a notice of appeal has been given to HMRC. That can only be in terms of section 31 TMA and the subject matter of that appeal is limited thereby to the conclusion and/or amendment in the Closure Notice. That is the matter to which the appeal relates.

109. Although Mr Afzal urged me to consider *Shinelock* to be a "red herring", not only do I disagree but I agree with the Upper Tribunal at paragraph 64 in *Shinelock.* The scope of the "matter in question" is limited to the conclusion and amendment included in the Closure Notice. The eighth principle in *Daarasp* then makes it clear that the Tribunal's jurisdiction is restricted, in terms of section 50 TMA, to deciding whether or not the appellant has been overcharged to tax.

110. The statutory scheme with which this appeal is concerned is not the same as that considered in *Henryk Zeman.* Both *Caerdav* and Shinelock are relevant to consideration of this issue.

111. In summary, the appeal provision in this statutory scheme, namely section 50 TMA is not dissimilar to section 83(1)(c) VATA and in particular relates to the amount of the amendment resulting from the conclusion in the Closure Notice. It is not a discretionary provision.

DECISION

112. For the reasons set out above, Ground 3 is struck out and the Application is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

113. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th MARCH 2024

Appendix 1

The Statutory scheme

The relevant provisions of the TMA are:

1. Section 9A reads:-

"**9A Notice of Enquiry**

(1) An officer of the Board may enquire into a return under sections 8 or 8A of this Act if he gives notice of his intention to do so (notice of enquiry) –

(a) to the person whose return it is ("the taxpayer"),
(b) within the time allowed.

…

(4) An enquiry extends to –

(a) Anything contained in the return, or required to be contained in the return, including any claim or election included in the return …".

2. Section 28A(1B) and (2) read:–

"**28A Completion of enquiry into personal or trustee return**

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice") –

(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and –

(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. Section 31(1)(b) reads:-

"**31 Appeals: right of appeal**

(1) An appeal may be brought against –

…

(b) any conclusions stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return) …".

4. Section 49A reads:-

"**49A Appeal: HMRC review or determination by Tribunal**

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case –

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B).
(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the Tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the Tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).”

5. 49B TMA reads:-

“**49B Appellant requires review by HMRC**

(1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.

(2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.

(3) HMRC must review the matter in question in accordance with section 49E.

(4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—

(a) the appellant has already given a notification under this section in relation to the matter in question,
(b) HMRC have given a notification under section 49C in relation to the matter in question, or
(c) the appellant has notified the appeal to the tribunal under section 49D.

(5) In this section “relevant period” means—

(a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or
(b) such longer period as is reasonable.”

6. Section 49C TMA reads:-

“**49C HMRC offer review**

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC’s view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC’s view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resolve from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if –

(a) HMRC have already given a notification under this section in relation to the matter in question,
(b) the appellant has given a notification under section 49B in relation to the matter in question, or
(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question."

7. Section 49E insofar as relevant reads:-

"**49E Nature of review etc**

(1) This section applies if HMRC are required by sections 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2) HMRC must, in particular, have regard to steps taken before the beginning of the review –

(a) by HMRC in deciding the matter in question, and
(b) by any person seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

…"

8. Section 49G, insofar as relevant, reads:-

"**49G Notifying appeal to Tribunal after review concluded**

(1) This section applies if –

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E.

…

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question …".

9. Section 49I reads:-

"**49I Interpretation of sections 49A to 49H**

(1) In sections 49A to 49H—

(a) "matter in question" means the matter to which an appeal relates;
(b) a reference to a notification is a reference to a notification in writing.

10. Section 50 reads:-

"**50 Procedure**

(1)-(5) …

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

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

(b) that, … any amounts contained in a partnership statement are excessive; or
(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

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

(a) that the appellant is undercharged to tax by a self-assessment …
(b) that any amounts contained in a partnership statement … are insufficient; or
(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

…

(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

(11) But subsection (10) is subject to –

(a) sections 9 to 14 of the TCEA 2007,
(b) Tribunal Procedure Rules, and
(c) the Taxes Acts."

Appendix 2

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Working abroad

2.2 If you leave the UK to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet **all** the following conditions

- your absence from the UK and your employment abroad both last for at least a whole tax year
- during your absence any visits you make to the UK
  - total less than 183 days in any tax year, **and**
  - average less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years – see paragraph 2.11. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself for a member of your immediate family, are not normally counted for this purpose.)

…

2.3 If you meet all the conditions in paragraph 2.2, you are treated as not resident and not ordinarily resident in the UK from the day after you leave the UK to the day before you return to the UK at the end of your employment abroad. You are treated as coming to the UK permanently on the day you return from your employment abroad and as resident and ordinarily resident from that date.

If there is a break in full-time employment, or some other change in your circumstances during the period you are overseas, we would have to review the position to decide whether you still meet the conditions in paragraph 2.2. If at the end of one employment you returned temporarily to the UK, planning to go abroad again after a very short stay in this country, we may review your residence status in the light of all the circumstances of your employment abroad and your return to the UK.

If you do not meet all the conditions in paragraph 2.2, you remain resident and ordinarily resident unless paragraphs 2.9 – 2.10 apply to you. Special rules apply to employees of the European Community (see paragraph 2.15).

2.4 The treatment in paragraph 2.3 will also apply if you leave the UK to work full-time in a trade, profession or vocation and you meet conditions similar to those in paragraph 2.2.

Meaning of full-time

2.5 There is no precise definition of when employment overseas is 'full-time', and a decision in a particular case will depend on all the facts. Where your employment involves a standard pattern of hours, we will regard it as full time if the hours you work each week clearly compare with those in a typical UK working week. If your job has no formal structure or no fixed number of working days, we will look at the nature of the job, local conditions and practices in the particular occupation to decide if the job is full-time.

If you have several part-time jobs overseas at the same time, we may be able to treat this as full-time employment. That might be so if, for example, you have several appointments with the same employer or group of companies, and perhaps also where you have simultaneous employment and self-employment overseas. But if you have a main employment abroad and some unconnected occupation in the UK at the same time, we will consider whether the extent of the UK activities was consistent with the overseas employment being full-time.

Appendix 3

Sections 334 and 335 Income and Corporation Taxes Act 1988

"334 Commonweath citizens and others temporarily abroad

Every Commonwealth citizen or citizen of the Republic of Ireland –

(a) shall, if his ordinary residence has been in the United Kingdom, be the assessed and charged to income tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad, and

(b) shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains, whether they arise from property in the United Kingdom or elsewhere, or from any allowance, annuity or stipend, or from any trade, profession, employment or vocation in the United Kingdom or elsewhere.

335 Residence of persons working abroad

(1) Where –

(a) a person works full-time in one or more of the following that is to say, a trade, profession, vocation, office or employment; and

(b) no part of the trade, profession or vocation is carried on in the United Kingdom and all the duties of the office or employment are performed outside the United Kingdom;

the question whether he is resident in the United Kingdom shall be decided without regard to any place of abode maintained in the United Kingdom for his use.

(2) Where an office or employment is in substance one of which the duties fall in the year of assessment to be performed outside the United Kingdom there shall be treated for the purposes of this section as so performed any duties performed in the United Kingdom the performance of which is merely incidental to the performance of the other duties outside the United Kingdom."