

PUMP COURT  
TAX CHAMBERS

# **Enquiries, closure notices and discovery assessments: latest case law developments**

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# Topics covered

- Giving notice of intention to enquire
- Closure notice applications
- Discovery assessments
- Scope of an appeal
- Partnership enquiries and deemed personal enquiries
- **Inverclyde** and LLPs

# Notices of enquiry

- When does a letter or other communication from HMRC count as a valid notice of enquiry?
- Why does it matter?

# Notices of enquiry

- HMRC may enquire into the return if they “give notice of their intention to do so to [the taxpayer] within the time allowed”
- Must the notice be in writing?
- Correct construction of a unilateral written notice

# Notices of enquiry - Raftopoulou

Court of Appeal in *Raftopoulou v HMRC* [2019] 1 WLR 1528:

- no particular formality is required
- but the notice must make it clear that HMRC are opening an enquiry with all the attendant statutory consequences, as opposed to merely making informal (even if time-consuming) enquiries.
- the relevant statutory provisions suggest a procedure with some degree of formality, and so the notice must alert the taxpayer to the start of a formal process.

# Notices of enquiry - Tinkler

Court of Appeal in *Tinkler v HMRC* [2019] 4 WLR 138:

- the giving of a notice of enquiry is an important step with serious and immediate consequences; it is therefore unsurprising that HMRC should refer to it as a “formal notice of enquiry”.

# Notices of enquiry – Credit Suisse

FTT decision in *Credit Suisse Securities (Europe) Ltd v HMRC* [2020] UKFTT 86 (TC):

- Procedural issue: had HMRC had given notice of their intention to enquire into CS's bank payroll tax ("BPT") return within the time allowed?

# Notices of enquiry – Credit Suisse

The BPT legislation contained no definition of “notice”.

- The parties agreed (although the FTT was not so sure) that notice could be given orally.
- But HMRC’s BPT Manual stated that a notice of enquiry into a BPT return had to be in writing.

HMRC contended that they had given notice

- (1) orally, at a meeting, alternatively
- (2) in writing, by one or other of 3 different letters to CS.

# Notices of enquiry – Credit Suisse

Held, re (1): oral notice had not been given because

- (a) a reasonable person in CS's position with its knowledge of the relevant context (including of the contents of the BPT Manual) would not expect to be given an oral notice of enquiry;
- (b) in any event, nowhere in HMRC's note of the meeting did HMRC expressly or clearly indicate their intention to enquire into the return.

Re (2): notice had also not been given by any of the letters because none of them clearly notified CS that HMRC was intending to enquire into the return. They did not use the words "enquire", "return" etc.

How had this come about?

# Notices of enquiry – service

When is notice “given to the taxpayer”?

s.115 TMA

Notice can be given by post, “*addressed at the taxpayer’s usual or last known place of residence, or his place of business, or in the case of a company at any other place prescribed by regulations made by the Board*” [but none has been prescribed].

s.7 Interpretation Act 1978

Service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

# Notices of enquiry – service

- is s.115 exhaustive? No
- does “place of residence” apply to a company? No
- can HMRC send a letter to an individual taxpayer’s last known place of residence even if they know he no longer lives there? Yes: **R (Broomfield) v HMRC** [2019] 1 WLR 1353. And the taxpayer cannot rebut the s.7 IA presumption by proving he didn’t receive it.
- can notice be given to an agent with actual or apparent authority to receive it? Yes: **Tinkler** UT (not considered by CA)
- does Form 64-8 confer such authority? No: **Tinkler** (CA)
- can notice be given to a company’s registered office pursuant to s.1139 Companies Act 2006? No: **Troy Homes Ltd v HMRC** [2020] UKFTT 174 (TC)

# Closure Notice Applications

The scope of the FTT's jurisdiction in relation to partial and final closure notices (PCNs and FCNS) has been addressed in 3 cases concerning domicile:

- **Embiricos v HMRC** [2019] SFTD 795
- **Levy's Executors v HMRC** [2019] SFTD 1045
- **Henkes v HMRC** [2020] UKFTT 159 (TC)

What discrete matters can be subject to a PCN?

Can the FTT determine questions of mixed fact and law in PCN/FCN applications and if so when is this appropriate?

# Closure Notice Applications - PCNs

The FTT in *Embiricos* and *Levy's Executors* reached conflicting views on whether the issue of someone's domicile could be the subject of PCN – yes and no respectively.

Relevant statutory provisions in s.28A(1A) and (2) TMA 1970:

*"Any matter to which the enquiry relates is completed when an officer of [HMRC] informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter."*

*"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."*

# Closure Notice Applications - PCNs

Key question is whether a PCN in respect of a “matter” needs to be quantified – the FTT in *Levy’s Executors* said that it must (as per *Archer* in respect of FCNs).

FTT in *Levy’s Executors* also held that it had no power to determine questions of mixed fact and law (unlike issues of pure law as per *Vodafone 2*). Rather the FTT just needed to be satisfied that the view taken by HMRC on such questions was a “genuine case”.

# Closure Notice Applications - Henkes

Case concerned a closure notice application heard alongside an information notice appeal

- Taxpayer arguing that Tribunal had jurisdiction to determine domicile on closure notice application (HMRC resisting this).
- Held that (contrary to **Levy's Executors**) that FTT did have jurisdiction on question of mixed fact and law.
- Tribunal found that it did have jurisdiction but subject to discretion, discretion should be exercised on the same basis as a preliminary issue (as set out in **Wrottesley**).
- Found that determination would bind parties on subsequent closure notice.
- The FTT decided to exercise its discretion and found, contrary to the taxpayer's case, that the taxpayer had acquired a UK domicile of choice.

# Closure Notice Applications

Appeal in UT in **Embiricos** being heard in UT in October 2020. **Levy's Executors** going no further and position for **Henkes** is unclear. Depending on eventual outcome:

- Potential to bring forward “preliminary issues” either by way of PCN (**Embiricos**) or substantive determination by FTT (**Henkes**) and bring enquiry to earlier conclusion and avoid cost of resolving all issues.
- Possible unilateral alternatives to the joint reference procedure in s.28ZA TMA 1970/para 31A Sch 18 FA 1998?

# Discovery Assessments: Staleness

- “Staleness” established by the UT in **Pattullo v HMRC** [2016] STC 2043 as recognising that an assessment could lose its “newness” if there were a significant delay between the discovery and the making of an assessment”
- **Hargreaves v HMRC** [2019] UKFTT 0244 (TC) – delay between at least November 2004 and January 2007 rendered assessment for £84m stale.
- Point raised of its own motion by the FTT in **Jafari v HMRC** [2019] UKFTT 692 (TC).
- FTT in **Marano v HMRC** [2020] UKFTT 199 (TC) accepted that bound to treat staleness as a recognised concept but made it clear at paras 84-85 that it believed that the law had taken a “wrong turning”.
- **Beagles** in the CA is stayed pending **Tooth** being heard in the Supreme Court (permission granted 9 January 2020).

# Discovery Assessments: information

- Test in s.29(5) TMA 1970/para 44 Sch 18 FA 1998/para 30(3) Sch 10 FA 2003
- The FTT found in **Carter & otrs v HMRC** [2020] UKFTT 179 (TC) that information was provided to HMRC for the purposes of the “hypothetical officer” test even though it was sent to a “Rapid Data Capture Centre” as opposed to address set out in HMRC guidance.
- Issue caused by the lack of a “white space” in SDLT return.
- No need for information to “clearly alert” to be available to hypothetical officer.
- Tribunal rejected argument that sending information to RDCC was deliberate attempt to conceal information. Held that this was the correct address for the submission of returns.

# Discovery Assessments: carelessness

- What is carelessness? – see s.118(5) TMA 1970 “reasonable care”.
- Who is a person acting on a taxpayer’s behalf? UT in ***Hicks v HMRC*** [2020] STC 254 favoured formulation in earlier FTT case of ***Taube*** [2010] UKFTT 473 (TC), namely not a mere adviser – must take steps that taxpayer could themselves take – e.g. completing/filing a return, corresponding with HMRC, providing documents and information to HMRC and seeking external advice on behalf of taxpayer.
- Use of a “one-man band” tax adviser with no prior knowledge of area of tax law and not able to form independent view. Not careless for accountant to rely on counsel’s opinion but it was careless not to investigate question of trading expenditure left open by counsel’s opinion.
- Standard accountant held to was to that of “reasonable competent tax adviser giving advice to taxpayer on matter”.

# Discovery Assessments: carelessness

- Unusual in that UT overturned FTT on mixed question of fact and law – held only one possible conclusion open to FTT.
- Found also that taxpayer would have been careless if had not taken advice from accountant.
- However, UT commented that carelessness not straightforward to make out where full disclosure is made but taxpayer knows that there is a risk that the scheme will not work as intended.
- Position of Montpelier also considered. Not acting on behalf of Mr Hicks when selling the scheme. Less clear whether Montpelier acting on behalf of Mr Hicks in providing disclosures for return but not resolved since these disclosures themselves were not careless.

# Scope of an appeal

Court of Appeal has addressed this question in two recent cases

- **Clark v HMRC** [2020] STC 589 – a discovery assessment case
- **Investec Asset Finance Plc v HMRC** [2020] EWCA Civ 579 – an enquiry case

# Scope of an appeal - Fidex

Previously the Court of Appeal in *Fidex* had provided a clear summary of the test for closure notice:

- “(i) The scope and subject matter of an appeal are **defined by the conclusions** stated in the closure notice and by **the amendments required to give effect to those conclusions**.
  
- (ii) What matters are the conclusions set out in the closure notice, **not the process of reasoning** by which HMRC reached those conclusions.
  
- (iii) The closure notice **must be read in context** in order properly to understand its meaning.
  
- (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT **to support the conclusions** set out in the closure notice.”

# Scope of an appeal - Clark

**Clark** concerned a s.29 TMA 1970 discovery assessment:

- Facts concerned a transfer from a SIPP to a new pension scheme (LML Pension). Principal employer of LML Pension was Cypriot company LML which entered into purported contract with taxpayer
- Taxpayer surrendered benefits under LML Pension and so scheme made payment to LML who in turn paid a BVI co who in turn lent to taxpayer
- HMRC discovery assessment focused on payment from LML Pension to LML but it turned out that transfer from SIPP to LML Pension gave rise to a resulting trust for the SIPP since the LML Pension was void for uncertainty. This did not, as held by the CA, prevent it from constituting a "payment" for the unauthorised payments regime. So taxpayer argued that HMRC discovery assessment was incorrect due to a focus on the wrong payment.

# Scope of an appeal - Clark

CA (Henderson LJ leading judgment) held:

- Scope of the assessment defined by subjective discovery of the officer. Worth noting that this different from a closure notice which has to be objectively construed.
- *Fidex* applied by analogy and found that discovery was wide enough to encompass both transfers.
- One would imagine that the “context” of a discovery assessment is narrower since no enquiry correspondence. But what about internal HMRC documents?
- Henderson LJ focused on the fact that the quantum of both transfers were the same but obviously this will not always be the case. Is this important? If different could HMRC be expected to make multiple discovery assessments in the alternative (see **IRC v Wilkinson** [1992] STC 454).

# Scope of an appeal - Investec

CA had to grapple with situation where CN set out HMRC's primary case but covering letter set out HMRC's case in the alternative:

- Alternative case gave rise to an increased quantum. Taxpayers accepted had notice and no procedural unfairness.
- FTT held at para 117 that circumstances may demonstrate that subject matter is broader than particular conclusion and adjustment.
- CA approved FTT reasoning and said that appellate court should not interfere with appraisal
- CA appears to return to a test that the subject matter of the appeal will be based on the **subject matter of the closure notice or enquiry** as opposed to **the conclusions** of the closure notice.

# Scope of an appeal - Investec

However this appears to “row-back” from Kitchin LJ’s analysis in **Fidex** of the earlier case law in terms of Moses LJ’s use of the term “subject matter of the enquiry”:

*“44. I do not for my part consider that Moses LJ intended by the use of this phrase in some way to expand the permissible scope and subject matter of an appeal against a conclusion stated or an amendment made by a closure notice beyond that contemplated by Henderson J. Nor do I understand the Supreme Court to have sanctioned any such expansion. Moses LJ was, I think, doing no more than explaining that the closure notice must be considered in context and in light of the enquiry that preceded it. Furthermore I would reject any suggestion that Moses LJ was in any doubt about the statutory provisions in issue.”*

# Partnership notices

If an HMRC officer enquires into a partnership return under s.12AC (1) TMA, then by s.12AC(6):

*“the giving of notice of enquiry shall be deemed to include the giving of notice of enquiry under s.9A...or under para 24 sch 18 FA 1998”*

- Does s.12AC(6) apply even if the time allowed for the giving of a notice of enquiry into the partner’s return has expired?

# Partnership notices

- What if the partner's return has already been enquired into?
- s.9A(3)/para 24(5): "a return which has been the subject of one notice of enquiry may not be the subject of another except..."
- In **R (Reid & Emblin)** [2020] STC 622, HMRC argued that this only precludes multiple actual enquiries, but the UT did not have to consider this. Are HMRC correct?

# Partnership notices

- Is the deemed enquiry limited to partnership aspects of the partner's return?
- HMRC's Enquiry Manual: "the deeming provision does not mean that other non—partnership aspects of a partner's own personal return are automatically under enquiry. The non-partnership aspects...can only be enquired into if a separate enquiry is opened." Correct?
- s.9A(4)/para 25: "An enquiry...extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return...But this is subject to the following limitation [not relevant]"

# Partnership notices

If an HMRC officer gives a closure notice under s.28B TMA completing the enquiry into the partnership return, and makes an amendment to the partnership return, then by s.28B(4):

*“the officer shall by notice to each of the partners amend the partner’s return...so as to give effect to the amendments of the partnership return”*

# Partnership notices

- Can a partner appeal against a s.28B(4) notice on the ground that the notice is a closure notice of the deemed enquiry?
- **R (Amrolia) v HMRC** [2020] STC 877: No, the only remedy against a s.28B(4) notice is judicial review. And since it is not a closure notice, the decision of CA in **R (Archer) v HMRC** [2018] WLR 5210 (closure notice must state on its face the amount of tax due) doesn't apply to a s.28B(4) notice.

# Partnership notices

- Per Henderson LJ: *"The deemed enquiry into each partner's individual return will remain open, if need be, following the giving of a notice under s28B(4)... "if need be" because in many cases the officer giving the notice will make consequential amendments to the partner's self-assessment which are sufficient to deal with all remaining points in issue and leave no scope for any possible further enquiry. In cases of that nature, the notice will have the same practical effect as a closure notice"*
- Consider this.

# Partnership notices

## Point (1)

- The partner can always insist on being given a “real” closure notice under s.28A TMA/para 32 completing the deemed enquiry.
- Must that notice include a conclusion/amendment to the same effect as the s.28B(4) notice, thereby giving the partner a right of appeal? No

# Partnership notices

## Point (2)

- But suppose an individual partner discovers that his return overstates his liability in relation to a non-partnership aspect: until there is a “real” closure notice, the deemed enquiry remains open.
- Assuming that the deemed enquiry is not limited to partnership aspects of the return, then the partner may be able to persuade HMRC to give a closure notice amending his return to correct the overstatement.

# Partnership notices

## Point (3)

- Or suppose the partner is a company, and wishes to make or withdraw a group relief or capital allowances claim: the time limit to do so is 30 days after the enquiry is completed: Sch 18 paras 74 and 82.

# LLPs and enquiries

If a partnership return is submitted in respect of an LLP on the basis that it is carrying on business with a view to profit and therefore is a partnership, and HMRC wish to enquire into the return, can they do so under s.12AC TMA, or must they do so under Sch 18 FA 1998 i.e. on the basis that the LLP is a company?

# LLPs and enquiries

**HMRC v Inverclyde Property Renovation LLP** [2020] UKUT 161 (TCC) held, s.12AC TMA because

- (i) the TMA is part of the Income Tax Acts, and
- (ii) HMRC are entitled to enquire on the assumption that the LLP is carrying on business with a view to profit, and even if and when they conclude that it is not, that will not invalidate the enquiry notice.

And see clause 101 of the Finance Bill, adding a new retrospective s.12ABZAA.

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