Case No: A3/2016/0670 & A3/2015/4210

Neutral Citation Number: [2018] EWCA Civ 818
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
JUDGE BERNER AND JUDGE RAGHAVAN
FTC/148/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2018

Before:

LADY JUSTICE ARDEN
and
LORD JUSTICE DAVID RICHARDS

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Between:

THE COMMISSIONERS FOR HER MAJESTY'S CUSTOMS AND REVENUE	**Appellant**
- and -	
Dr VASILIKI RAFTOPOULOU	**Respondent**

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Hui Ling McCarthy and Christopher Stone (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellant**
Michael Thomas and Emma Pearce (instructed by **the Bar Pro Bono Unit**) for the **Respondent**

Hearing dates: 6 and 7 December 2017

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Judgment

Lord Justice David Richards:

1. This appeal arises from a claim for repayment of income tax. The respondent (the taxpayer) submitted her self-assessment return for the 2006-07 tax year on 14 January 2008, which showed a liability to tax of about £18,000, which she duly paid. Believing that her income had been overstated and her deductible expenses understated, she submitted a claim for repayment on 13 October 2011. The appellant (HMRC) rejected the claim as out of time.

2. The taxpayer lodged an appeal with the First-tier Tribunal (Judge John Brooks) (the F-tT). HMRC applied to strike out the appeal on the grounds that the F-tT had no jurisdiction to consider it. Following a hearing at which the taxpayer represented herself and HMRC was represented by a hearing officer, the F-tT acceded to HMRC's application and struck out the appeal. On appeal, the Upper Tribunal (Judge Berner and Judge Raghavan) (the UT) allowed the appeal on the basis that the claim was potentially within time and remitted the matter to the F-tT to determine whether or not the taxpayer had a reasonable excuse for submitting her claim out of time. HMRC appeals to this court with permission granted by the UT.

3. Two issues arise. The first is whether HMRC's rejection of the repayment claim gave rise to a right of appeal to the F-tT under paragraph 9(1) of schedule 1A to the Taxes Management Act 1970 (TMA 1970). This turns on whether HMRC's letter rejecting the claim constituted a closure notice under paragraph 7(2) of schedule 1A. The second is whether section 118(2) TMA 1970 is capable of applying to a repayment claim made out of time, so as to permit the extension of the statutory time limit of four years for the making of such claims. The taxpayer had to succeed on both issues in order to pursue her appeal to the F-tT, and the UT held in her favour on both issues.

4. I will take each of these issues in turn, referring to the relevant legislative provisions and the relevant parts of the UT's Decision in respect of each of them.

5. The relevant facts can be shortly stated.

6. The taxpayer submitted her return for the 2006-07 tax year on 14 January 2008. She sent a letter dated 22 November 2008 to HMRC, stating that her income had been overstated and her deductible expenses had been understated and asking how she should proceed. As the UT recorded at [109], HMRC maintains that the letter had not been received. It formed no part of the taxpayer's appeal to the F-tT and the taxpayer was accordingly not permitted by the UT to raise any issue on it before them. The taxpayer made no amendment to her return under section 9ZA TMA 1970 within the permitted period of one year from "the filing date", which expired on 31 January 2009.

7. The taxpayer sent a letter dated 13 October 2011 to HMRC, in which she made a claim for overpayment relief under schedule 1AB TMA 1970 in respect of the tax year 2006-07. HMRC replied by a letter dated 9 November 2011, so far as relevant, in the following terms:

> "Thank you for your letter dated 13 October 2011. Please accept my apologies for the delay in replying.

> It is now too late to make an amendment to the return for 2006-07.
>
> From 1 April 2010 error or mistake relief under Section 33/33A TMA 1970 was replaced by overpayment relief as introduced by Schedule 1AB TMA 1970. The normal time limit for an overpayment relief claim is 4 years from the end of the relevant tax year. This means that the amendment is out of time and a repayment cannot be made.
>
> You can find further information about overpayment relief claims through our Self Assessment Claims Manual at SACM 12000 onwards, which can be accessed through our website."

8. It is common ground that the reference to "amendment" in the last line of the middle paragraph should have been to the taxpayer's request for repayment.

9. Further correspondence followed in 2013, resulting in a review by HMRC of the earlier correspondence and confirmation, in a letter dated 31 July 2013, of the decision notified in November 2011.

10. I turn therefore to the first issue, whether an appeal lay to the F-tT against HMRC's rejection of the taxpayer's claim, notified by their letter dated 9 November 2011.

11. The relevant statutory provisions are as follows.

12. Under paragraph 1 of schedule 1AB TMA 1970, a person who has paid an amount by way of income tax and who believes that the tax was not due may make a claim for repayment. Paragraph 3(1) provides that a claim may not be made more than four years after the end of the relevant tax year. It is common ground that in this case the period of four years expired on 5 April 2011.

13. Paragraph 1(4) of schedule 1AB provides that, among other provisions, schedule 1A TMA 1970 applies for "making and giving effect to claims under this Schedule".

14. Paragraph 4(1) of schedule 1A provides that, subject to (among other provisions) paragraph 4(3), HMRC shall as soon as practicable after a claim is made give effect to it by repayment of tax. Paragraph 4(3) provides that paragraph 4(1) does not apply where a claim "is enquired into by an officer of the Board".

15. Paragraph 5 of schedule 1A, headed "Power to enquire into claims", provides in paragraph 5(1) that an officer of the Board "may enquire into" a claim "if, before the end of the period mentioned in sub-paragraph (2) below, he gives notice in writing of his intention to do so" to the person making the claim. The end of the relevant period in this case, if the claim were made in time, was the quarter day after the first anniversary of the day on which the claim was made.

16. As originally enacted, paragraph 6 of schedule 1A conferred power on HMRC to call for documents for the purposes of an enquiry opened under paragraph 5. Paragraph 6A (introduced by the Finance Act 1998) provided for appeals against notices to produce documents. Paragraphs 6 and 6A were repealed by the Finance Act 2008 and the equivalent provisions are now contained in that Act.

17. Paragraph 7 provides for the completion of an enquiry into a claim. Paragraph 7(1) provides that an enquiry under paragraph 5 "is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions". In the case of a claim for discharge or repayment of tax, the closure notice must "either (a) state that in the officer's opinion no amendment of the claim is required, or (b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess". A closure notice takes effect when it is issued: paragraph 7(4). Within 30 days of the issue of a closure notice, HMRC must give effect to it: paragraph 8.

18. An appeal to the F-tT lies against any conclusion stated or amendment made by a closure notice, within 30 days after the date on which the closure notice was issued: paragraph 9.

19. The taxpayer's case, which was accepted by the UT, was that HMRC's letter dated 9 November 2011 constituted both notice of an enquiry under paragraph 5 (an enquiry notice) and a closure notice under paragraph 7. The taxpayer was therefore entitled to appeal to the Ft-T against the rejection of her claim as made out of time. Otherwise, it was agreed, her remedy to challenge the rejection would be by way of judicial review (and, also, it was suggested on behalf of the taxpayer, by a civil claim but this alternative was not developed in argument).

20. It was common ground before the UT, and before us, that there was no prescribed form for an enquiry notice or a closure notice. To be effective, an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be): see the judgment of this court in *HMRC v Bristol and West PLC* [2016] EWCA Civ 397; [2017] 1 WLR 2792, at [26].

21. The UT started their consideration of this issue by referring to the decision of the UT in *Portland Gas Storage Ltd v Revenue and Customs Commissioners* [2014] UKUT 270 (TCC); [2014] STC 2589 (*Portland Gas*), which concerned very similar provisions relating to a claim for repayment of stamp duty land tax. At [42], the UT in that case considered the meaning of "enquire into" a claim and said:

> "It is helpful to consider the ordinary meaning of 'enquire' and 'enquiring'. We were referred to various dictionary definitions. The words are synonymous with 'inquire' and 'inquiring' and it is clear to us that in the context in which we are considering the term, that is in relation to legislation that gives HMRC power to verify information contained in a return so as to ascertain whether the correct amount of tax has been paid, it must mean 'examine', 'investigate' or 'make an investigation into'. Another synonym would be 'scrutinise'."

22. In *Portland Gas*, HMRC had rejected a claim for repayment on the grounds that it was made out of time, and it had done so in a single letter dated 15 August 2012. As to this letter, the UT said at [44]:

> "We can see the force of Mr Choudhury's [counsel for HMRC] submission in relation to the letter of 15 August 2012 taken in isolation because it would appear that the only 'examination' that took place was to ascertain that the original return in respect of which an amendment was sought was more than 12 months before the claim was made. In other words, HMRC did not have to go beyond the face of the letter that they were sent to respond to it and in our view that is insufficient to amount to an enquiry in the context of para 12 of Sch 10 to the FA 2003."

23. Commenting on this paragraph, the UT in the present case said at [89]:

> "We are not bound by this observation of the tribunal; the remarks in this respect were *obiter* as the tribunal found that later correspondence did amount to an enquiry. With respect to that experienced tribunal, we cannot agree with them on this point. The conclusion reached by that tribunal seems to us to pay insufficient regard to the synonym for the act of enquiry which the tribunal itself had noted, namely that of 'scrutinise'. It would also in our judgment have the unfortunate, and counter-intuitive, result of giving rise to different conclusions as to whether there had been an enquiry depending on the level of information provided by the taxpayer."

24. Although it does not much matter, because the UT is not bound by their previous decisions, I do not agree that the comments in *Portland Gas* at [44] were *obiter*. The UT in that case decided that the letter of 15 August 2012 was not notice of an enquiry, and it was as much part of their Decision as that the later correspondence did give notice of an enquiry.

25. The UT in the present case took the view that it "cannot be right that the more information a taxpayer discloses to HMRC (thereby giving HMRC less need to enquire about it) the less likely that it is that the taxpayer will be able to appeal to the FTT, but will instead be reliant on other remedies such as judicial review". This would give rise to "a perverse incentive" to taxpayers to hold back information so that HMRC would have to open an enquiry to obtain it. Recognising that the taxpayer who provided full information would have a remedy by way of judicial review, the UT continued at [91]:

> "Whilst judicial review may be an adequate remedy, it is not, in contrast to an appeal to the FTT, one that is specifically contemplated or provided for by the legislation. In our judgment, a construction that recognises the existence of a specific right of appeal in respect of conclusions reached by HMRC on a claim is to be preferred to one that denies such a appeal right, even if other remedies not provided by the statute might be available."

26. At [93], the UT drew three conclusions from *Portland Gas*. First, the opening of enquiries and their closure do not require any particular formality. Second, the term "enquire" bears "its natural and ordinary meaning" which includes "to scrutinise".

Third, the enquiry notice must make clear to the taxpayer that HMRC had opened an enquiry. It may be helpful to comment at this stage on these three points. The first is uncontroversial. The second, the meaning of "enquire into" in paragraph 5, is the subject of discussion later in this judgment. The third must be read in the light of what this court said in *HMRC v Bristol and West PLC* at [26], referred to above, decided after the UT gave their Decision.

27. At [94], the UT acknowledged that the enquiry notice and the closure notice perform important functions for the protection of taxpayers. The well-informed or well-advised taxpayer will know that, with the opening of the enquiry, HMRC enjoys statutory powers to call for documents and that the taxpayer will have the right to require the enquiry to be completed within a reasonable time (sch 1A, para 7(5) - (7)). The issue of the closure notice starts the time for appealing against the conclusions stated in it or the amendments made by it.

28. The UT went on to consider whether a single document, in this case the letter dated 9 November 2011, could constitute both an enquiry notice and a closure notice. They concluded that this was permissible at [97] – [99]:

> "97. While on the face of it the legislation accommodates the typical case where there is a period of time in between the opening and closing of an enquiry, there is no provision for a minimum length of time for the enquiry. Indeed, HMRC is, subject to applications to the tribunal by the taxpayer, in control of the enquiry and the use of their enquiry powers. If the taxpayer considers that HMRC has closed an enquiry prematurely and disagrees with the result he may appeal the conclusion stated, amendment or decision in the closure notice as appropriate. If the taxpayer regards HMRC's enquiry as having taken too long, he may apply to the FTT for a direction for a closure notice to be issued. If it were correct that there needed to be some minimum period of time in between the opening and closure of a notice then it might be expected that the legislation would either set this out or provide a mechanism for specifying a minimum period. To the contrary, by providing for an enquiry to be brought to an end by a closure notice, including one issued following an application to the FTT, the legislation is expressly contemplating an otherwise indeterminate period for the enquiry.
>
> 98. We conclude therefore that the legislation does not preclude from its scheme the situation where the opening and closure of an enquiry follow in immediate succession. Nor is there any bar on the notice of enquiry and the concomitant closure notice being in the same document. Neither party is prejudiced: the taxpayer may appeal if they do not accept the result, HMRC are not obliged, except by direction of the FTT, to issue a closure notice within any particular period. The provisions on enquiry refer to the officer notifying his intention. We do not consider that this requires that the notification of intention must precede the actual scrutiny.

> 99. One particular point in this regard does, however, call for some explanation. Under paragraph 5 of Schedule 1A, the power to enquire into a claim is exercised by an officer of HMRC by giving notice of that officer's intention to do so. Of itself, that might suggest that such a notice must be prospective. We do not consider that such a literal construction is appropriate. Paragraph 5 is concerned with the giving of notice. That will necessarily follow after the intention to enquire into the claim has been formed. It may also follow some, and possibly some considerable, consideration or scrutiny of the available materials. The notice of intention is simply that. It may be prospective, but it equally may be – indeed it is more likely to be – retrospective in the sense that the officer may already have engaged in elements of enquiry before the notice is given. There is no requirement that HMRC must give notice before scrutinising or otherwise turning their minds to the claim; the only requirement is that the notice itself must be given within a certain period."

29. At [102], the UT addressed the question whether their decision amounted to saying that every conclusion expressed by HMRC will be taken to have an embedded enquiry in it, so giving rise to an appealable decision. Their answer was that it "will always be a question of fact as to whether HMRC have enquired into a claim", but where a conclusion has been stated and an amendment in substance made, it is likely to be exceptional that there has not been an "enquiry" giving rise to a right of appeal.

30. Turning to the letter of 9 November 2011, stating that the claim was out of time and a repayment could not therefore be made, the UT held at [105] that the "substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero". This conclusion could have been arrived at only by an enquiry into the claim and "by notifying Dr Raftopoulou of the result of that enquiry, the officer was at the same time giving notice of the intention formed prior to that scrutiny of enquiring into the claim".

31. On this appeal, Mr Thomas and Ms Pearce on behalf of the taxpayer submit that the decision of the UT on this issue should be upheld for the reasons given by the UT. They submit in particular that the court should lean against a construction that would lead to a non-appealable decision and that judicial review was not an appropriate remedy where HMRC rejected a claim as out of time. Three reasons were advanced for the inadequacy of judicial review in this context. First, orders for costs could and regularly were made against the losing party in judicial review proceedings, unlike before the F-tT. Second, determination of the challenge might raise disputed issues of fact, for which judicial review proceedings are ill-suited. Third, the specialist tax tribunal is the right forum for the determination of tax cases. They submitted that any rejection of a claim involves an enquiry and a closure notice, as otherwise there could be no appeal to the F-tT.

32. I will note the submissions of Ms McCarthy and Mr Stone on behalf of HMRC as I consider the decision and reasoning of the UT.

33. In my judgment, the correct starting point for determining whether an enquiry into a claim has been opened is a consideration of the terms, context and purpose of the provisions of schedule 1A.

34. Those provisions suggest a procedure with some degree of formality and suggest also a procedure with a beginning, a middle and an end. Paragraph 5 empowers, but does not oblige, HMRC to "enquire into" a claim for repayment. This may be contrasted with replying to a claim received from a taxpayer, having first read it and considered its contents. An officer may only enquire into the claim if, within the specified time, "he gives notice in writing of his intention to do so". Although the contents of the notice are not prescribed, it must be clear from the notice that the officer intends to enquire into the claim. As earlier noted, the opening of an enquiry has significant statutory consequences, including the right of HMRC to call for documents for the purpose of its enquiry.

35. Likewise, the requirements of paragraph 7 of schedule 1A as to the issue of a closure notice and as to its contents serve to underline the nature of the enquiry process. The notice must (i) state that the officer has completed his enquiries, (ii) state his conclusions, and (iii) amend the claim as the officer concludes to be necessary or state that no amendment is required. In *HMRC v Bristol and West PLC*, this court said at [35]:

> "Closure marks an important stage at which the enquiry (with HMRC's attendant powers and duties) ends, HMRC is required to state its case as to the amounts of tax due, in the Closure Notice itself, following which its powers to amend the assessment is limited to such amendments as will give effect to those conclusions. These provisions contain requirements of real potential value to the taxpayer, hence its right under paragraph 33 to seek a direction that HMRC issue a Closure Notice."

36. The UT said at [103] that it will always be a question of fact whether HMRC have "enquired into" a claim. I do not consider that to be correct. There can be no enquiry into a claim without HMRC giving the notice required by paragraph 5. Whether the letter or other communication in question gave the necessary notice depends on whether it would be read by a reasonable recipient in the position of the taxpayer as doing so. The same is true of any document said to be a closure notice. These are questions of law.

37. In my judgment, the letter dated 9 November 2011 did not demonstrate that HMRC had conducted an enquiry into the taxpayer's claim under schedule 1A, or had ever intended to do so. In terms, all that the letter stated was that HMRC had read the claim and decided, simply by reference to its date and the expiry of the applicable four-year period on 5 April 2011, that it was out of time. Nowhere does the writer of the letter state or indicate that he intends to enquire into the claim or that he has completed his enquiries nor does he state any conclusions resulting from his enquiry or amend the claim. The UT's view at [105] that the "substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero" is, with respect, driven by their view that the letter showed that HMRC had conducted an enquiry, rather than by anything on the face of the letter. In my view, a reasonable person in the position of the taxpayer would not read the letter as stating that her claim had been reduced to zero but that, rather than considering the substance of the claim, it had been rejected as out of time.

38. I agree with the approach taken by the UT in *Portland Gas* to the equivalent letter in that case, dated 15 August 2012. In that case, a claim for repayment of SDLT was made in a letter dated 18 July 2012. HMRC replied on 15 August 2012, rejecting the claim on two grounds, one of which was that it was out of time. The taxpayer's solicitors replied, taking issue with the time limit point, to which HMRC replied that they were taking advice from their policy team and would revert once it was received. There was further correspondence and communications in November 2012 which concluded with a letter dated 23 November 2012 from HMRC, confirming their original position.

39. I have earlier cited the passage at [44] in the Decision in *Portland Gas* in which the UT decided that the letter dated 15 August 2012 did not give notice of an intention to enquire into the claim or otherwise evidence an enquiry. As the UT said at [45], no reference had been made by or on behalf of the taxpayer to the time limit and therefore at that stage "HMRC had no argument before it that would cause it to examine the claim in any further detail beyond establishing that the claim was made more than twelve months before it was submitted". However, the UT concluded that HMRC's subsequent actions demonstrated that it had opened an enquiry, the question being essentially one of degree. HMRC does not accept that the UT was correct as regards these subsequent actions, but that raises further questions which do not fall for decision on this appeal. Ms McCarthy correctly submitted that the decision in *Portland Gas* as regards the letter dated 15 August 2012 supports HMRC's case as regards the letter dated 9 November 2011 in the present case. As I have said, I consider that the UT was correct in their approach to the letter dated 15 August 2012.

40. In my judgment, in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so. On the facts of this case, it is unnecessary to go further and consider what additional actions on the part of HMRC would constitute an enquiry. As earlier mentioned, HMRC does not accept that the UT was right in *Portland Gas* to hold that HMRC's subsequent actions did constitute an enquiry. I express no view on that question.

41. Ms McCarthy submitted, and I agree, that the UT in the present case misdirected themselves by treating "enquire into" as denoting no more than "scrutinise" in the widest sense of that word. I doubt the wisdom of searching for a substitute word for the phrase "enquire into" used in the legislation and then testing the facts by reference to the substitute word. Most words have shades, or a spectrum, of meaning and "scrutinise" is no exception. By concluding that HMRC had "scrutinised" the taxpayer's claim in the sense of reading it carefully and paying attention to its date as against the statutory time limit, the UT has moved away from the phrase "enquire into" and disengaged it from its statutory context.

42. I agree with Ms McCarthy's submission that paragraph 3(1)(a) of schedule 1A, which empowers HMRC by notice to the claimant to "amend the claim to correct any obvious errors or mistakes in the claim (whether errors of principle, arithmetical mistakes or otherwise)", is inconsistent with the UT's approach in this case. Such amendments may be made before an enquiry is opened but not while an enquiry is in progress: paragraph 3(2).

43. The approach of the UT is also at odds with the position explained by Auld LJ in *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193; [2004] STC 544 at [31] – [32]. A distinction was drawn, in the context of self-assessment returns, between "light monitoring" by HMRC and the exercise of its statutory power of enquiry under section 9A TMA 1970. Reference was further made to "an intermediate and possibly time-consuming scrutiny, *whether or not in the form of an enquiry under s 9A*" (emphasis added). There is a distinction between informal enquiries and the opening of an enquiry into a claim under paragraph 5 with its attendant statutory powers.

44. The UT began their discussion of this issue by pointing to the consequences, in terms of the means of challenge open to a taxpayer, if they were to accede to HMRC's case. They pointed also to what they characterised as a perverse incentive to taxpayers, to minimise the information provided to HMRC in support of a claim, thereby making an enquiry more likely and giving the taxpayer the advantage of a right of appeal to the F-tT. The reasoning that follows seems directed to avoiding this result.

45. Of course, the consequences of any particular interpretation of a statutory provision is a relevant consideration in determining the proper construction of the provision. But, the starting point should be the language of the provision and its context and purpose, all of which in my view point decisively away from the UT's conclusion. The result, that a challenge to a straightforward rejection of a claim as out of time would be by way of judicial review and not by appeal to the F-tT, is incapable of being described as absurd or as so unlikely as to require a different interpretation of schedule 1A. There are many decisions taken by HMRC that can be challenged only by judicial review. Contrary to Mr Thomas' submissions, this is not in the present context an inadequate remedy. Addressing his reasons for submitting that it was: first, costs are in the discretion of the court or tribunal hearing the judicial review; second, if any issue of fact should arise, the court or tribunal hearing the challenge has all necessary powers to deal with evidence; third, given the number of decisions made by HMRC from which no appeal to the F-tT lies, it is wrong to say that all tax-related matters should be heard by the specialist tax tribunals, but in any event many of the applications for judicial review of HMRC's decisions are transferred to and heard by the Upper Tribunal.

46. As to the perverse incentive anticipated by the UT, with respect I regard it as highly improbable that a taxpayer seeking a repayment of tax would deliberately give inadequate information with a view to encouraging HMRC to open a formal enquiry. Most taxpayers will be aiming to obtain a repayment as quickly as possible and will provide the information needed to achieve it.

47. I am also unable to accept the UT's decision that the letter dated 9 November 2011 could serve as both a notice under paragraph 5 and a closure notice under paragraph 7. As I have earlier remarked, the natural reading of the provisions suggests a process which is opened by a notice to the taxpayer, followed by the enquiry itself and ends with the closure notice containing those matters and statements required by paragraph 7.

48. Paragraph 5 requires an HMRC officer to give "notice in writing *of his intention*" to enquire into a claim. This language envisages that the notice will precede the enquiry and certainly will precede the closure of the enquiry. An enquiry cannot be completed

while the officer is still in the position of intending to carry it out. The UT accepted at [99] that the terms of paragraph 5 might suggest that the notice must be prospective but they did not consider that "such a literal construction [was] appropriate". The officer may well have considered and scrutinised the available materials before giving the notice, and therefore the notice is more likely to be retrospective than prospective "in the sense that the officer may already have engaged in elements of enquiry before the notice is given". The UT continued: "There is no requirement that HMRC must give notice before scrutinising or otherwise turning their minds to the claim; the only requirement is that the notice itself must be given within a certain period."

49. While I agree with much of what the UT said in the passage just quoted, I draw the opposite conclusion from it. It must be right that HMRC does not open an enquiry without considering, even "scrutinising", available materials. Clearly an officer of HMRC must turn his mind to the claim in hand before opening an enquiry. This shows that there can and will be consideration before the decision is taken to open an enquiry, not that the enquiry starts with such consideration. The statute is clear: once a decision is taken to open an enquiry, the HMRC officer must give notice to the taxpayer of *his intention* to enquire into the claim. Under the scheme of these provisions, the notice precedes the enquiry under paragraph 5 and alerts the taxpayer to the start of a formal process with its attendant statutory powers available to HMRC.

50. I conclude therefore that HMRC's letter in this case could not serve both as a notice under paragraph 5 and as a closure notice under paragraph 7. I find it difficult to think that the same document could ever serve as both but, as not every circumstance can be foreseen, I do not express a concluded view.

51. I would therefore reverse the decision of the UT on this issue and hold that there was no enquiry and no closure notice in this case, with the result that no appeal to the F-tT lay against the rejection of the claim as out of time, and that the F-tT was right to strike out the appeal.

52. It is appropriate nonetheless that this court should consider the issue arising under section 118(2) TMA 1970. Not only has it been fully argued before us, and potentially has ramifications well beyond this case, but the UT's decision on it formed part of the ratio of its overall Decision and if we hold in HMRC's favour on the issue, it will also form part of the ratio of our decision.

53. On the face of it, the taxpayer's claim made in her letter dated 13 October 2011 was plainly out of time. Paragraph 3 of schedule 1AB TMA 1970 specifies a period of four years which, in this case, expired on 5 April 2011 and there is no provision which specifically permits an extension to this period. On consideration of the taxpayer's application for permission to appeal to the UT, Judge Berner identified section 118(2) as a possible source of a power to extend time for a claim.

54. Section 118(2) provides:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything

> required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

55. The UT noted three propositions advanced on behalf of HMRC with which Mr Thomas on behalf of the taxpayer did not disagree. First, section 118(2) has two parts, separated by a semi-colon. Only the second part is directly relevant to the present case, but the first part may be relevant to the proper construction of the second part. Second, the purpose of the first part is to deal with cases where HMRC have extended time pursuant to their collection and management powers, for example by allowing payment by instalments, with the result that penalties cannot be imposed if the act in question is performed within the extended period. Third, the second part is broader in its application. It is not expressly limited to cases of time limits but can apply when there has been a complete failure to do something.

56. Put very shortly, HMRC submitted that the second part of section 118(2) was limited to acts which a taxpayer was required to perform, i.e. pursuant to mandatory provisions under TMA 1970, while the taxpayer submitted that it applied also to any time limit or other provision applicable to a step which a taxpayer was permitted but not required to take under TMA 1970. Thus, on the taxpayer's construction, it applied to the time limit of four years applicable to the making of a repayment claim under schedule 1AB.

57. In their Decision at [55] the UT correctly noted that at the heart of the issue was the proper construction of the words "required to be done" in the second part of section 118(2) and that the starting point was to give them their ordinary and natural meaning (in their context, I would add). In their view, the ordinary and natural meaning of the words was such that the second part applied "in the case of something which, although of itself a voluntary act, is nonetheless required to be done within a time limit if it is to have the consequence which it is intended to have". At [57] they expressed the view that it is "no stretch of language to say that a claim, if a taxpayer chooses to make one, 'is required to be done' within a certain time limit". There was nothing in section 118(2) which indicated that it was confined to mandatory acts or that it did not apply to requirements attached to the voluntary exercise by taxpayers of rights under TMA 1970.

58. The UT accepted that there were limits to what may count as something "required to be done", considering that the essence was that there was a consequence for failure to do that thing, which might be a financial penalty but was not limited to it. There was no limitation, whether express or as a matter of construction, on the nature of the consequence.

59. The UT rejected HMRC's submission, supported by the F-tT's decision in *Ames v HMRC* [2015] UKFTT 0337 (TC), that the express reference in the first part of section 118(2) to "anything required to be done within a limited time" and the absence of any reference in the second part to a time limit indicated that the second part was not directed to time limits, but simply to a failure to perform a mandatory act. They also rejected the submission that section 118(2) could not have the effect of positively deeming a late claim to have been made in time, rather than simply deeming that there had not been a failure to do something.

60. The UT also rejected HMRC's submission that express provisions for the extension of time limits elsewhere in TMA would be rendered otiose by the UT's preferred construction of section 118(2). In those cases, the particular provision would apply to the exclusion of the general extension for which section 118(2) provided. They were also content to accept that, as HMRC was a "person", section 118(2) might arguably be relied on by HMRC in an appropriate case to extend the time within which HMRC had to take a step.

61. The UT accordingly concluded at [68] that, in the case of a claim for repayment of tax under schedule 1AB, if "the taxpayer has a reasonable excuse for not filing such a claim within the time limit, and has made the claim without unreasonable delay after the excuse ceased, then s 118(2) deems the taxpayer to not have failed to comply with the time limit and therefore deems the claim that has been filed to have been filed within the relevant time limit".

62. On behalf of the taxpayer, Mr Thomas and Ms Pearce supported the decision of the UT on this issue for the reasons given by the UT. In large part, Ms McCarthy and Mr Stone relied on the submissions advanced on behalf of HMRC before the UT.

63. As earlier stated, I agree with the UT that the critical words that have to be construed are "anything required to be done". The starting point is to consider the ordinary and natural meaning of those words in their context.

64. Even without attending too closely to the context, I take a different view to the UT as to the natural and ordinary meaning of the critical words. As it seems to me, they ordinarily cover mandatory acts, rather than the conditions attached to the voluntary exercise of rights. To be valid, a repayment claim must be made within four years of the end of the relevant tax year, but there is no requirement imposed on a taxpayer to make a repayment claim within four years or at all. I would not disagree with the UT that it is no stretch of language to say that if a taxpayer chooses to make a claim, it "is required to be done" within a certain time limit, but that is not to say that the ordinary meaning of the unqualified words "anything required to be done" extends to the performance of a condition for a valid claim.

65. The immediate linguistic context of those words is important. There are, in my judgment, two significant features of the terms of section 118(2). First, it is in my view significant that the first part refers to "anything required to be done *within a limited time*". If the purpose of the second part included the extension of time, it is surprising that the drafter included no similar words in that part.

66. Second, the deeming effect of the second part is of central importance. It does not deem anything to have been done, either within a time limit or at all. It provides only that the person in question shall be deemed "not to have failed to do it". It relieves the person of the consequences of failing to do the thing, which in the context of the TMA 1970 is a financial penalty, but does not go further and provide the benefits of having in fact done the thing which the person has failed to do. I do not accept Mr Thomas' submission that it is the necessary corollary of a provision that a person is deemed not to have failed to do an act that he is deemed to have done that act. The one does not necessarily lead to the other, particularly where the consequences of the two are potentially very different, as is the case where a deemed non-failure will avoid a penalty, but a deemed performance will secure a benefit. As Peter Gibson J

(giving the only reasoned judgment of this court) said in *Marshall v Kerr* (1995) 67 TC 56 at 79, when considering the correct approach to the construction of deeming provisions, "because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents *inevitably* flowing from or accompanying that deemed state of affairs, unless prohibited from doing so" (emphasis added).

67. Looking at the context of TMA 1970 as a whole further supports, in my judgment, the construction of section 118(2) for which HMRC contends. Although many of the mandatory requirements formerly contained in TMA 1970 have been re-enacted in other legislation, it still contains a number of such provisions. Section 118(2) has a clear purpose to serve in relieving taxpayers of the consequences of failing to comply with those requirements in circumstances where the conditions for the application of the deeming provisions of the sub-section apply.

68. TMA 1970 also contains a number of time limits, including those in schedule 1AB. In some cases, those time limits are coupled with provisions enabling them to be extended. The UT suggested that in such cases the general effect of section 118(2) would cede to the conditions of the particular provision in question. That is a sensible reading of such provisions if it is assumed that section 118(2) has the general effect of extending time. However, it fails to take account of the improbability of specific time extension powers and a general time extension provision co-existing in the same enactment when the general provision contains no clear indication that it is indeed to take effect as a time extension provision. In other words, the presence of the specific provisions tells against section 118(2) having any time extension function at all. If section 118(2) had been intended to have this effect, it is likely in my judgment that it would have been clearly stated.

69. If the construction upheld by the UT were correct, they accepted as arguable that the second part of section 118(2) would apply also to HMRC. Neither the UT nor Mr Thomas on this appeal rehearsed any grounds for saying that it would not apply to HMRC, although Mr Thomas stressed that in practice it would rarely be open to HMRC to invoke it. In my view, it is in the highest degree improbable that Parliament intended section 118(2) to work in favour of HMRC in this way. It is another consideration pointing away from the conclusion of the UT.

70. I accept the submission of Ms McCarthy and Mr Stone that Parliament has set down in the self-assessment system carefully defined time limits for enquiries, assessments and claims which balance the need to give finality and certainty to taxpayers and the Exchequer, with the need to provide sufficient flexibility to ensure fairness in the system. It has created a specific statutory procedure for the extension of certain of those time limits where it has considered it appropriate. The UT's construction cuts across this balance without a clear warrant for doing so in the section.

71. We were informed by Ms McCarthy that the researches of HMRC have failed to come across any decision in which section 118(2), enacted 48 years ago, has previously been given the meaning attributed to it by the UT. While I accept, as the UT said in their Decision at [67], that "Novelty is no bar to the section having a wider application than many may have assumed in practice to date", it gives pause for thought.

72. In my judgment, for the reasons given above, I consider that the UT misconstrued the effect of the second part of section 118(2) and that on this ground also their Decision should be set aside.

73. It follows that the F-tT was right to decide that it lacked jurisdiction to hear the taxpayer's appeal, which should therefore be struck out. There are two grounds for this conclusion. First, the claim was made out of time, and accordingly could not be the subject of an enquiry leading to a closure notice against which an appeal to the F-tT would lie. Second, there was in any event no enquiry into the claim and therefore no appealable closure notice.

74. I would therefore allow the appeal, set aside the UT's order and reinstate the F-tT's order striking out the taxpayer's appeal.

75. Before the UT, as before us, the taxpayer was represented by counsel instructed on a pro bono basis. We are very grateful to Mr Thomas and Ms Pearce for having taken the case on this basis, presenting their submissions in a clear and effective way and providing great assistance to the court in our consideration of the issues.

76. Having succeeded before the UT, the taxpayer applied for an order for payment in respect of her pro bono representation. In a further decision dated 13 November 2015 ([2015] UKUT 0630), the UT held that it did not have power to make such an order. The taxpayer was given permission to appeal against this decision. While the power to make such orders is clear in respect of proceedings in the civil courts (see section 194 Legal Services Act 2007), no equivalent clearly expressed power exists in relation to proceedings before the Upper Tribunal. The question whether such power exists is one of real practical importance. In the light of the result of this appeal, no question can arise of such an order now being made in favour of the taxpayer in this case. In my judgment, resolution of this issue should await a case where it has a practical effect on the outcome, rather than being decided as, in this case, an academic issue.

Lady Justice Arden:

77. I agree.