[2014] UKUT 0270 (TCC)

Appeal number: FTC/123/2013

STAMP DUTY LAND TAX – jurisdiction of the First-tier Tax Tribunal – whether Respondents made a decision giving rise to a right of appeal – yes – paragraphs 6, 12, 23, 24 and 35 Schedule 10 Finance Act 2003 – appeal allowed

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PORTLAND GAS STORAGE LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Judith Powell

Sitting in public in London on 29 April 2014

Michael Thomas, Counsel, instructed by Field Fisher Waterhouse, solicitors, for the Appellant

Sadiya Choudhury, Counsel, instructed by the Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. The Appellant ("Portland") appeals against a decision ("the Decision") of the First-tier Tribunal (the "FTT") released on 15 July 2013 striking out Portland's appeal under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules"). The appeal was struck out on the grounds that the FTT lacked the jurisdiction to hear Portland's substantive appeal as there had been no appealable decision by the Respondents ("HMRC").

2. The main substantive issue in these proceedings is whether Portland, within the statutory time limit, amended a land transaction return made in respect of an agreement for lease which it had entered into so as to trigger a repayment of stamp duty land tax ("SDLT"). Portland contends that HMRC issued a closure notice in response to Portland's amendment and such issue gives rise to an appealable decision under paragraph 35(1)(b) of Schedule 10 to the Finance Act 2003 ("FA 2003"). In the alternative, Portland contends, if HMRC's response did not amount to a closure notice then the FTT has power to direct one under paragraph 24 of that Schedule which Portland can then appeal. Portland also contends that the FTT erred in law in determining the substantive time limit issue and used this determination as part of its reasoning to determine the jurisdiction issue. HMRC contends that no closure notice was issued neither is there power for the Tribunal to direct one to be issued and consequently there is no appealable decision within paragraph 35 of Schedule 10 FA 2003. HMRC also contends that the FTT did not determine the time limits issue nor did this form part of its reasoning on the jurisdiction issue.

Relevant Legislation

3. Paragraph 12A of Schedule 17A FA 2003 provides so far as relevant as follows:

> (1) This paragraph applies where in England and Wales or Northern Ireland
>
> (a) an agreement for lease is entered into, and
>
> (b) the agreement is substantially performed without having been completed.
>
> (2) The agreement is treated as if it were the grant of a lease in accordance with the agreement …..beginning with the date of substantial performance..
>
> (3) …
>
> (4) Where sub-paragraph (1) applies and the agreement is (to any extent) afterwards rescinded or annulled or is, for any other reason not carried into effect, the tax paid by virtue of sub- paragraph (1) shall (to that extent) be repaid by the Inland Revenue".

4. Paragraph 6 to Schedule 10 FA 2003 provides:

> "6 (1) The Purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2) The notice must be in such form and contain such information as the Inland Revenue may require.

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date *[of the original return]"*

5. Paragraph 12 of Schedule 10 gives HMRC power to enquire into a land transaction return in the following terms:

"(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry") –

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months -

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser)

…"

6. Paragraph 13 of Schedule 10 sets out the scope of any such enquiry in the following terms:

"(1) An enquiry extends to anything contained in the return, or required to be contained in the return, that relates –

(a) to the question whether tax is chargeable in respect of the transaction, or

(b) to the amount of tax so chargeable.

This is subject to the following exception.

(2) If the notice of enquiry is given as a result of an amendment of the return under paragraph 6 (amendment by purchaser) –

(a) at a time when it is no longer possible to give notice of enquiry under paragraph 12, or

(b) after an enquiry into the return has been completed,

the enquiry into the return is limited to matters to which the amendment relates or that are affected by the amendment."

7. Paragraph 23 of Schedule 10 makes provision for the issue of a closure notice following completion of an enquiry as follows:

"(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either –

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued."

8. Paragraph 24 of Schedule 10 gives the FTT power to direct that a closure notice be given in the following terms:

"(1) The purchaser may apply to the tribunal for a direction that the Inland Revenue give a closure notice within a specified period.

(2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2) (b) of that Act).

(3) The tribunal hearing the application shall give a direction unless satisfied that the Inland Revenue have reasonable grounds for not giving a closure notice within a specified period."

9. Paragraph 35(1) of Schedule 10 sets out the matters in respect of which a right of appeal to the FTT arises in respect of SDLT matters as follows:

"(1) An appeal may be brought against –

(a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during an enquiry to prevent loss of tax)

(b) a conclusion stated or amendment made by a closure notice

(c) a discovery assessment

(d) an assessment under paragraph 29 (assessment to recover excessive repayment) or

(e) a revenue determination under paragraph 25 (determination of tax chargeable if no return delivered)."

10. Section 83(2) FA 2003 makes provision for certain documents, including notices, not to be ineffective by reason of mistake, provided certain conditions are satisfied. It provides:

"Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective –

(a) for want of form, or

(b) by reason of any mistake, defect or omission in it,

if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed."

The Part of FA 2003 to which this refers is Part 4, which makes provision for SDLT, and which includes section 78, the provision that gives effect to Schedule 10.

Relevant Facts

11. The FTT made short findings of fact in paragraphs 4 to 7 of the Decision as follows:

> "4. The Appellant, Portland Gas Storage Limited ("Portland"), entered into an agreement for the grant of a lease on 11 April 2008 with the intention that the lease attached to the agreement would be completed.
>
> 5. Prior to the agreement for lease being completed and any lease being formally granted Portland took possession of the land the subject of the agreement for lease and began to pay rent. That was an act of substantial performance of the agreement for lease and as such Portland became liable to file a return and account for Stamp Duty Land Tax. It filed its SDLT return and paid SDLT of £168,122.
>
> 6. The lease, which it was anticipated would have been executed pursuant to the agreement of 11 April 2008, was not completed as originally agreed. A Deed of Variation was entered into on 1 June 2012 by the same parties as had entered into the original agreement for lease. By this deed the extent of the land to be demised and the annual rent payable were agreed to be reduced. The rent which had originally been agreed at £1,500,000 plus VAT was reduced to £706,400 plus VAT. On the same day a lease recognising those changed terms was executed.
>
> 7. Following the variation of the terms of the original agreement for lease and the execution of the lease as so varied, Portland sought to amend its land transaction return and reclaim some £68,408 of the SDLT it had paid."

12. The amendment to the return and claim for repayment was, as later referred to by the FTT in the Decision, contained in a letter dated 18 July 2012 written by Portland's solicitors to HMRC who rejected the claim in a letter dated 15 August 2012. HMRC gave two reasons for their decision. First, HMRC stated that as the amendment to the return had been made more than 12 months after the filing date *"it is not now possible to make an amendment to the return."* Secondly, HMRC stated that paragraph 12A(4) of Schedule 17 FA 2003 did not apply on the basis that *"any variation after [the date of substantial performance] to reduce the rents and the area of demise do [sic] not affect the calculation or entitle the purchaser to a repayment of tax"*.

13. There was additional correspondence following HMRC's letter of 15 August 2012 that was not put before the FTT but which was contained in the agreed bundle of documents put before us. The parties agreed that it was appropriate that our decision took account of this correspondence and accordingly we make findings on it as follows.

14. On 23 August 2012 Portland's solicitors wrote to HMRC, contending that the twelve month time limit did not apply because paragraph 12A(4) of Schedule 17A FA 2003 by allowing repayment where an agreement is "afterwards" (without a time limit specified) "for any … reason not carried into effect" (as was the case here, it was contended because of the amendment) then the "except as otherwise provided" language in paragraph 6(3) of Schedule 10 operated so as to disapply the twelve month time limit.

15. HMRC acknowledged this letter on 6 September 2012 stating:

> "I note you wish to proceed with your claim under Schedule 17A paragraph 12A FA 2003.
>
> Would you please note that I am seeking advice from our policy team regarding the time limit for making a claim under this legislation.
>
> On receipt of their advice I will issue a full response to your letter."

16. It therefore appears to us that HMRC had, by this letter, clearly indicated that it had kept an open mind on the issue at this stage pending the receipt of policy advice.

17. HMRC therefore wrote to Portland's solicitors again on 5 November 2012 having taken internal legal advice. The letter concluded:

> "In our solicitors view, the wording within paragraph 12A(4) does not amount to an exception to the time limit in paragraph 6(3). In fact it makes no reference to a time limit in which to amend the return at all. One can only draw from that that the time limit will be subject to the criteria set down in the relevant provisions allowing for the amendment of returns.
>
> As paragraph 12A(4) does not offer an alternative provision to the time limit within paragraph 6(3) and the filing date for your clients return was more than 12 months before the letter of claim it can no longer be amended and the claim under paragraph 12A(4) cannot be accepted."

18. However, this letter was not the end of the dialogue between the parties. It would appear that Portland's solicitors engaged HMRC over the issue in a telephone call on 8 November 2012 which led HMRC to confirm its conclusion in a letter dated 23 November 2012, on what appeared to be the focus of the discussion namely whether the amendment to the agreement amounted to the original agreement "not being carried into effect" and thus within the scope of paragraph 12A(4) of Schedule 17A. HMRC concluded its letter as follows:

> "I regret I am not able to agree with your reading of paragraph 12A (4). The agreement between the parties was carried into effect when the lease was granted. Although the terms were varied the transaction provided for in the contract did complete. In my opinion "not carried into effect" widens the scope of the provision to include any agreement that is not annulled or rescinded, but will never complete for any other reason for example on the death of one of the parties to the agreement.
>
> I therefore do not agree that the SDLT1 return should be amended in accordance with your letter 18 July 2012."

19. It would appear that it had by then been accepted by Portland that this was the end of the debate with HMRC on the issues as Portland had, presumably on the basis of the telephone conversation on 8 November 2012, on 20 November 2012 filed a notice of appeal in respect of HMRC's decision, although the notice referred to the relevant decision of HMRC as having occurred on 15 August 2012. Portland's solicitors indicated in the notice of appeal that after that date they regarded themselves as having notified their appeal to HMRC, as they believed was envisaged by HMRC's guidance in advance of notifying the appeal to the FTT, but hedged their position by stating that the appeal was made within the 30 day statutory time limit as it was made within 30 days of HMRC's then latest letter of 5 November 2012 in reply to Portland's "appeal to HMRC".

The Decision of the FTT

20. In paragraph 18 of the Decision the FTT records that it is refraining from making any comment as to Portland's substantive case on the correct interpretation of paragraph 12A(4) of Schedule 17A and that it was dealing purely with the question as to whether it had jurisdiction to hear the appeal.

21. The FTT identified in paragraphs 28 and 29 of the Decision two propositions put forward by Portland Gas to found its contention that the FTT has jurisdiction to consider the substantive issue in this case as follows:

(1) There is statutory authority based on the provisions of paragraph 35(1) and 24 of Schedule 10; and

(2) The FTT has an inherent jurisdiction to resolve disputes between the taxpayer and the Revenue.

22. On the first proposition, the FTT rejected Portland's contention that HMRC's consideration of the letter of 18 July 2012 amounted to an enquiry on the part of HMRC into the return pursuant to paragraph 12 of Schedule 10, which was concluded by its letter of 15 August 2012 rejecting the claim and thus giving rise to an appealable decision under paragraph 35(1)(b) to Schedule 10, such letter amounting to a closure notice.

23. The FTT's reasoning on this issue was set out in paragraph 37 to 39 of the Decision.

24. In paragraph 37 the FTT stated:

> "The suggestion implicit in the argument advanced by counsel for the Appellant is that any decision made or act done by the Revenue or omitted to be done by it is amenable to review by the Tribunal as it is the subject *de facto* of an enquiry despite the absence of any of the statutory requirements for the commencement of an enquiry."

25. In paragraph 38 of the Decision the FTT found that HMRC had not sought to initiate nor had it engaged in, an enquiry "under sub-paragraph (1) of paragraph 35 of the Act" [sic]. It therefore concluded in paragraph 39 of the Decision as follows:

> "Consequently and logically consistent with the above view, the Tribunal is also unprepared to accept that it has any power to compel the Revenue to issue a closure notice under paragraph 24 of Schedule 10 of the Act. There has been no notice of enquiry and there cannot therefore have been any enquiry. It follows that as there has been no enquiry there can be no closure notice."

26. On the second proposition, the FTT rejected the following contentions made on behalf of Portland, as summarised in paragraphs 40 to 43 of the Decision as follows:

(1) that the Tribunal was the proper forum for the determination of disputes between the Revenue and the taxpayer" (paragraph 40);

(2) that the "Tribunal should be jealous to protect its jurisdiction in this specialist field" (paragraph 41);

(3) that it is an extremely unattractive proposition that if HMRC is correct on the jurisdiction question but wrong on the time limits issue then the taxpayer has no remedy before the Tribunal (paragraph 42); and

(4) if the Tribunal did not have jurisdiction to hear the substantive appeal there was no other readily amenable forum for the matter to be heard (paragraph 43).

27. The FTT's reasoning was set out in paragraph 45 of the Decision as follows:

> "The decision to reject the proposed amendments to the original SDLT filing was a decision which the Revenue had no option but to make. The 12 months time limit was specified by the legislation and must be taken as an expression of Parliament's intention to strictly limit claims to repayment of SDLT in this way. To suggest that this is unfair let alone "barbaric" is to misunderstand the essential nature of the provision. There are many examples of legislation which includes strict time limits. If the limits are exceeded they will operate to exclude the relevant claim. That may be characterised, as Mr Thomas has done, as being equivalent to saying "tough" but that does not in any way alter the effect of those provisions."

Issues to be determined

28. Mr Thomas does not dispute that the jurisdiction of the FTT in this case must be founded on a purposive interpretation of paragraph 35(1) of Schedule 10. He accepts that the FTT can only exercise the jurisdiction given to it by statute, and in relation to SDLT matters that jurisdiction is exhaustively provided by paragraph 35(1).

29. Mr Thomas also accepts that there are only two bases on the facts of this case that jurisdiction could be accepted. The first basis would be if there has been "a conclusion stated or amendment made by a closure notice" within paragraph 35(1)(b). The second basis would be that on the assumption that no closure notice has been issued, then HMRC could be directed to issue one under paragraph 24 to Schedule 10.

30. Mr Thomas made no submissions that the FTT had any inherent jurisdiction to resolve disputes between the taxpayer and HMRC. He states that the FTT had wrongly characterised his submissions as summarised in paragraph 26 above and dealt with in paragraphs 40 to 43 of the Decision, as having been made on this basis. He says that his submissions were made in support of his contention that paragraph 35(1) (that is the statutory jurisdiction conferred on the FTT) should be interpreted broadly. Having been shown Mr Thomas's skeleton argument as placed before the FTT, we agree. It is therefore clear to us that the FTT approached Mr Thomas's submissions on the wrong premise.

31. That being so it appears to us that we can determine the issues in this appeal by answering the following questions:

(1) Did HMRC's response of 12 August 2012 or any of its later letters show that it had opened an enquiry into the amended return;

(2) If so, did any of those letters amount to a closure notice giving rise to a right of appeal under paragraph 35(1)(b); or

(3) If none of those letters amounted to a closure notice did any of them give rise to the right to ask the FTT for a direction that a closure notice be issued with the consequence that an appealable decision would thereupon arise under paragraph 35(1)(b) of Schedule 10?

Discussion

32. Our starting point is that we accept Mr Thomas's submission that we should not give paragraph 35(1) (b) a narrow construction and that it should be construed against the underlying philosophy that the FTT is the body in whom Parliament has vested the jurisdiction to deal with disputes between the taxpayer and HMRC as to the correct amount of tax to be paid. We accept that if we were to find that the FTT had no jurisdiction to deal with the time limit point then the result is that Parliament has allowed HMRC alone to determine whether the statutory time limit with regard to the amendment of a stamp duty land tax return has been complied with and that determination cannot be challenged in the FTT. The only course of action in those circumstances would appear to be an application against HMRC for judicial review, which is a somewhat blunt and costly instrument for resolving an issue of this nature, with similar issues in relation to other taxes being resolved on a regular basis in the FTT.

33. We do, however, accept that ultimately the FTT only has such jurisdiction that Parliament has through the relevant statutory provisions conferred on it and there can be anomalies where certain decisions can possibly through oversight fall through the net. There can be other situations where it is clear from the legislation that Parliament

did not intend there to be a right of appeal, and in those circumstances it is not for this Tribunal to "fill in the gaps" by giving a strained construction to clear language regardless as to whether the failure to give an appeal right appears to be an oversight or not.

34. Ms Choudhury referred us to section 83 of the Value Added Tax Act 1994, which in a similar fashion to paragraph 35 of Schedule 10 FA 2003 sets out a list of decisions (lengthy in that case) in respect of which an appeal can lie, the clear scheme of the legislation being that if the decision does not come within any of the specified categories no appeal lies. Ms Choudhury referred us to observations of the VAT and Duties Tribunal in *Olympia Technology Ltd v Revenue and Customs Commissioners (No.3)* VTD 19784) as follows:

> "The tribunal is not in the position of an umpire in a game of cricket to whom a bowler appeals for a catch. The tribunal exists to adjudicate on a dispute following a ruling or determination by Customs … in order for the tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83."

She referred to examples of appeals which were struck out as not being within section 83 (or its predecessor) including *Strangewood Ltd v CCE* (1988) VTD 2599 (unreported), where the VAT Tribunal concluded that it did not have jurisdiction to hear an appeal even though HM Customs & Excise (as it then was) had deliberately failed to make an appealable decision and *Oldhams Leisure Group Ltd v CCE* [1992] STC 332, where the appeal was struck out insofar as it concerned the liability to VAT on a supply that had not yet been made.

35. We accept that these authorities show that the relevant statute conferring jurisdiction on the Tribunal cannot be construed so widely that the Tribunal is regarded as having jurisdiction to hear appeals against decisions by HMRC that do not fall within the words of the statute in question. Nevertheless, in our view there is nothing in the authorities to preclude us construing the words in question so as to give them a broad rather than narrow construction where to do so will result in the whole of the dispute between the parties relating to the correct amount of tax to be charged being resolved by the body on whom the prime responsibility for determining such disputes has been conferred.

36. Against that background, we turn to the question as to whether the correspondence shows that HMRC had opened an enquiry into the amended return.

37. We deal first with Ms Choudhury's submission that the FTT having made a clear and unequivocal finding that HMRC had not opened an enquiry and as there had been no enquiry, there could be no closure notice (see paragraphs 38 and 39 of the Decision), it is not open to the Upper Tribunal to reverse this finding unless it can be shown that a reasonable Tribunal properly directed in law could not have made it: see *Edwards v Bairstow* [1956] AC 14.

38. We reject that submission for two reasons. First, the question as to whether the steps that HMRC took in response to the claim amounted to an "enquiry" as that term

is used in paragraph 12 of Schedule 10 FA 2003 is a question of law. It was therefore incumbent upon the FTT to direct itself as to what elements were necessary to constitute a "notice of enquiry" and apply the resulting legal analysis to the facts in question. In this case, the FTT seems to have assumed that no "enquiry" was in progress (see paragraph 31 of the Decision) and that the statutory requirements for the commencement of an enquiry were absent (see paragraph 37 of the Decision) but the FTT gives no reason as to why it came to the conclusion, as it did in paragraph 38 of the Decision, that there had been no enquiry.

39. Secondly, the FTT did not have the benefit of the later correspondence we have seen following HMRC's letter of 15 August 2012. The FTT cannot be criticised for that because it was not shown the later correspondence, but the parties have agreed that it is relevant to the issue and we have admitted it and have been able to carry out a fuller fact finding exercise than the FTT was able to.

40. Paragraph 12(1) of Schedule 10 has two elements which need to be satisfied. First, HMRC must "enquire" into a land transaction return (the effect of which in our view is to create an "enquiry") and secondly they must give notice of their intention to do so to the taxpayer within the "enquiry period".

41. Portland's contention is that by corresponding with Portland as it did HMRC had opened an enquiry. Mr Thomas submits that it is perverse to have decided that HMRC can determine that an amendment to a self-assessment return is incorrect without having enquired into it because by reaching that conclusion HMRC is inevitably saying that it has enquired into the correctness of the amended return. Mr Thomas submits that by writing to Portland and rejecting the amendment to its return HMRC was giving notice that it disagreed with the amended return and this inevitably involves a prior investigation of the correctness of the self-assessment.

42. 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". Ms Choudhury suggests that it means "an act of asking for information".

43. There is no question in this case that HMRC did not undertake an enquiry in this case by asking Portland for information so that it could verify the return. Ms Choudhury submitted that HMRC did not conduct, nor need to conduct, any "investigation or examination" or even "ask for information" before sending its letter of 15 August 2012 in response to Portland's claim. The letter merely expressed HMRC's conclusion that the claim could not be accepted because it was out of time and this conclusion did not require HMRC to open an enquiry into the return as the date of amendment was evident from Portland's letter.

44. We can see the force of Ms Choudhury's 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 paragraph 12 of Schedule 10 FA 2003.

45. We also observe that Portland's solicitors' letter of 18 July 2012 made no reference to the question of the time limit; it simply made an amendment to the return and sought a repayment claim. At that stage therefore 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.

46. However, in our view HMRC's subsequent actions following receipt of Portland's solicitors' letter of 23 August 2012 do demonstrate that it opened an enquiry into the return. In particular, HMRC's letter of 6 September 2012 notes that Portland wished to proceed with its claim and therefore it notified Portland that it was seeking policy advice on the time limit in the light of Portland's arguments. It is therefore clear that at that stage HMRC had determined to examine the claim in further detail. In our view the further steps that it took, namely to seek legal advice on the arguments raised by Portland, did amount to an enquiry within the ordinary meaning of that term. In essence, the question is one of degree and in our view the further steps taken indicate the undertaking of an "examination", "investigation" or "scrutiny" of the return.

47. That being so, has HMRC given notice of their intention to enquire into the return as required by paragraph 12 of Schedule 10? In our view the indication in HMRC's letter of 6 September 2012 that they were seeking further advice and would respond on receipt of that advice is sufficient for that purpose. This finding is consistent with the decision of the FTT in *Cooltinney Developments Limited v HMRC* [2011] UKFTT 252 (TC). That case considered whether a mistake in what was clearly intended to be a notice of enquiry rendered it invalid. In construing the requirements of section 83(2) FA 2003 the FTT concluded at [31] to [33] as follows:

> "In applying the first of these tests we need to consider what it is that is to be regarded as the notice. What para 12, Sch 10 requires is that HMRC "give notice" of their intention to enquire into a land transaction return. It does not say give a notice. There can be no assumption therefore that the notice be comprised in a single document, nor, where more than one document is sent to the purchaser, that any one of those documents should be regarded as *the* notice. The notice in these cases was given by means of the collection of documents sent to the purchaser.
>
> On that basis we find that the notice given by HMRC to each of the Appellants on 18/19 August 2008 was substantially in conformity with Part 4 FA 2003. No formality is prescribed for the notice, and there are no specific provisions for what it must contain. The only

> requirement is that it gives notice of the intention to enquire into a land transaction return. Whilst there was an error in the letter sent to each appellant, the copy of the letter sent by HMRC to the Appellant's adviser, and COP 25, both contain the necessary reference to land transaction returns, and contain information about the process.
>
> As regards the second test, we find that the requirement that the intended effect be reasonably ascertainable is apt to apply an objective test. One that basis, having regard to what Lord Steyn said in *Mannai* (at p 767G), "[the] issue is how a reasonable recipient would have understood the notices". But one does not, in context of s 83(2), have regard only to a hypothetical reasonable recipient. It is necessary to consider, therefore, the characteristics of the recipient, its own knowledge (or lack of it) and the overall factual context in considering what the intended recipient could reasonably have been expected to have understood from the notice."

48. In our view this reasoning is clearly based on the principle that a notice of enquiry need not be in any particular form, the only requirement being that it gives notice of an intention to enquire into a land transaction return. In our view the letter of 6 September 2012 achieved that. In our view consistent with the policy in section 83(2) FA 2003, a communication should be regarded as giving notice of an intention to enquire provided the intended effect is reasonably ascertainable by the person to whom it is directed. In our view Portland would clearly ascertain from HMRC's letter that there was an intention to enquire further into the return in the light of the further submissions made by Portland's solicitors.

49. We therefore answer the first question we posed in paragraph 31 above in favour of Portland.

50. With regard to the second question, on the basis that the letter of 15 August 2012 did not in our view give notice of an enquiry it could not constitute a closure notice.

51. However, in our view either the letter of 5 November or 23 November may be regarded as constituting a closure notice. We have expressed the answer in the alternative for the following reasons. The letter of 5 November 2012 was clearly intended to be a final expression of HMRC's views on the issue and it recorded the results of what we have found to be its enquiry, namely the advice it received from its legal team. On that basis in our view it met the requirements of paragraph 23(1) of Schedule 10 in that it informed Portland that HMRC had completed their enquiries and it stated HMRC's conclusions. With regard to paragraph 23(2) of Schedule 10 it stated in effect that no amendment was permitted to the original return because of the time limit, a conclusion which would fall within sub-paragraph (a) of that provision. Alternatively, the notice had in effect amended the amended return so as to reduce the amount claimed to zero, a conclusion which would fall within sub-paragraph (b) of the provision. In our view the reasoning in *Cooltinney* is equally applicable to the form of a closure notice; no formality is prescribed for the notice.

52. Had therefore there been no further contact between the parties in our view an appeal could have been made under paragraph 35 of Schedule 10 on the basis of that letter constituting a closure notice. However, there was further contact in that there was a further telephone conversation on 8 November 2012 which led to HMRC's final letter of 23 November 2012. In that letter HMRC engaged with Portland's solicitors regarding the applicability of paragraph 12A to Schedule 17A. That engagement might therefore be said to evidence further enquiries on HMRC's part before coming to a final decision, thus constituting this final letter a closure notice within the meaning of paragraph 23 of Schedule 10. In any event, as we have seen, Portland had by this stage filed their notice of appeal on 20 November 2012.

53. We therefore conclude on the second question set out in paragraph 31 above either by virtue of the letter of 5 November 2012 or that of 23 November 2012 Portland received a closure notice in respect of the enquiries made into Portland's amended return following HMRC's letter of 6 September 2012. On that basis Portland had a right of appeal against the conclusion reached by HMRC pursuant to paragraph 35(1) (b) of Schedule 10.

54. Ms Choudhury submitted that the effect of the interpretation of the letters in question that we have adopted would be that on every occasion that HMRC responds to an enquiry on a land transaction return it will be deemed to have opened an enquiry and there must be a clear intention shown on the part of HMRC to open an enquiry.

55. As far as intention is concerned, as we have found there is no degree of formality required to constitute the opening of an enquiry. The question is purely one of substance: do the steps taken by HMRC amount to the opening of an enquiry? It must also be clear to the taxpayer from what HMRC say that an enquiry is being undertaken. As to the argument to the effect that this interpretation opens the floodgates to all responses to taxpayers' questions amounting to an enquiry, the present case concerned a specific application to amend a land transaction return on clearly specified grounds so that the circumstances in which correspondence might constitute notice of an enquiry and a closure notice should in practice be carefully circumscribed by reference to the circumstances being dealt with.

56. In light of our conclusions on the first two questions we posed in paragraph 31 above it is not necessary to deal with the third question, namely whether Portland had the right to ask for a closure notice if none of the previous correspondence amounted to the opening of an enquiry or a closure notice. We would however, have found it impossible to construe the legislation as giving rise to a right to a closure notice in the absence of an open enquiry. On this point we agree with Ms Choudhury that the wording of paragraph 23 of Schedule 10 makes it clear that a closure notice is a document that informs the taxpayer that HMRC have completed their enquiries so that if there has been no enquiry under paragraph 12 to Schedule 10 it follows that there can be no closure notice.

Conclusion

57. It follows from our conclusions on the questions we posed in paragraph 31 above that we find that the Decision involved an error of law on the part of the FTT. In those circumstances sections 12(2) to (4) of the Tribunals, Courts and Enforcement Act 2007 apply, which provide as follows:

> "(2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either –
>
> (i) remit the case to the First-tier Tribunal with direction for its reconsideration, or
>
> (ii) re-make the decision
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also –
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal –
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate."

58. In this case, in fairness to the FTT, we have taken a different view based on the correspondence that was not available to the FTT and which we have admitted on this appeal.

59. Based on the additional findings of fact we have made in the light of that correspondence we therefore set aside the decision of the FTT and remake it so as to dismiss the application to strike out the appeal.

60. As we are remaking the decision strictly speaking we have no power to make directions as to the constitution of the FTT to hear the substantive appeal or make further procedural directions in respect of the appeal.

61. The matter must therefore return to the FTT for a substantive hearing of the arguments advanced by Portland as to why the twelve month time limit does not apply. Mr Thomas submitted in this appeal that paragraph 45 of the FTT's decision, quoted in paragraph 27 above, shows that in essence the FTT decided the jurisdiction issue against it by determining the substantive issue.

62. We do not believe that paragraph 45 of the Decision goes as far as Mr Thomas suggests. Nevertheless, although as we have indicated, we do not have specific powers to direct the composition of the FTT panel to hear the substantive hearing, which is a matter for the President of that Tribunal, in order to remove any concern on Portland's part, the President may wish to consider whether the substantive hearing should take place before a differently constituted tribunal.

Disposition

58. The appeal is allowed

TIMOTHY HERRINGTON **JUDITH POWELL**

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 17 June 2014