All or nothing

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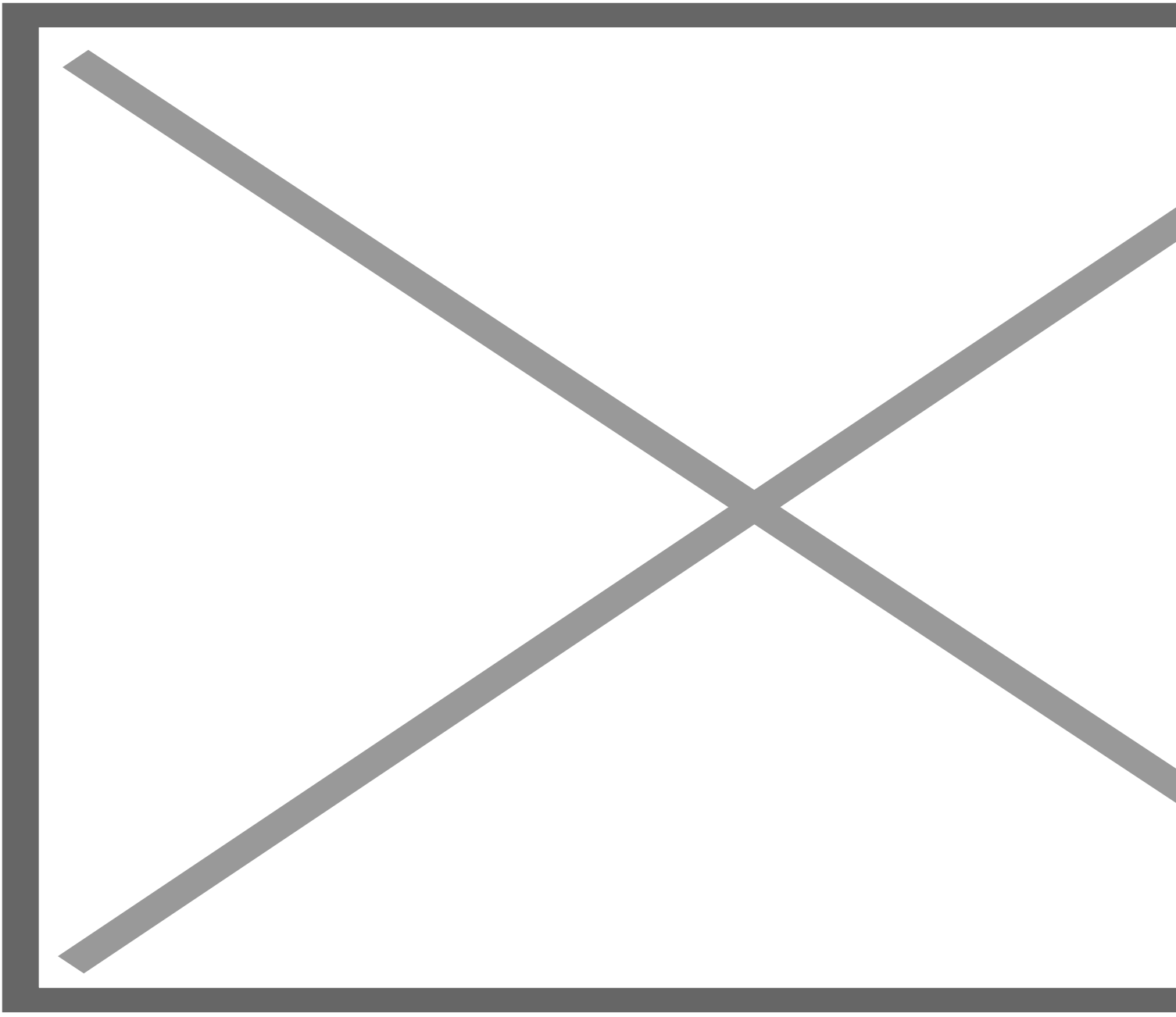

01 September 2019

Rebecca Sheldon reviews a judgment on when a partial closure notice can be issued

Key Points

What is the issue?

This case considers whether the quantification of the tax due was a separate ‘matter’ than that of domicile for the purposes of issuing a partial closure notice.

What does it mean to me?

By determining that a partial closure notice could be issued on one part of the same aspect of a tax return, this should make the process more efficient and flexible.

What can I take away?

The consequences of this decision are wide ranging. In theory, wherever there is a preliminary issue in a case, such as residence or domicile, taxpayers can now seek a partial closure notice to speed the process along. However, HMRC has been granted permission to appeal.

Judge Robin Vos and Helen Myerscough recently found in favour of the taxpayer in *Embiricos v Revenue and Customs Commissioners* [2019] UKFTT 236 (TC) (‘*Embiricos*’), a case concerning when a partial closure notice can be issued. Permission to appeal has been granted.

Facts

Mr Embiricos considered himself to be non-UK domiciled (being originally from Greece but having lived in the UK for many years, before moving to Monaco in 2017). As a result, he had claimed the remittance basis of taxation. HMRC opened enquiries into Mr Embiricos’s self-assessment returns for the years ending 2015 and 2016 and concluded that his domicile was instead England and Wales for the relevant years.

Issue

Mr Embiricos wished to appeal against HMRC’s decision concerning his domicile; however, unless HMRC had agreed to jointly refer the question of his domicile to the tribunal (Taxes Management Act (TMA) 1970 s 28ZA), he would not be able to do so until a closure notice had been issued by HMRC under TMA 1970 s 28A.

HMRC, however, had refused to issue a closure notice until the amount of tax which would be due if it was correct regarding Mr Embiricos’s domicile was quantified, on the basis of the Court of Appeal decision in *R (Archer) v HMRC* [2017] EWCA Civ 1962 (‘*Archer*’). Instead, it issued a taxpayer information notice under Finance Act 2008 Sch 36 para 1, demanding that Mr Embiricos give HMRC an account of his worldwide income and gains for the years under enquiry.

The taxpayer’s position was that this would be an unnecessary waste of time and money if he was proved correct on the domicile question. Mr Embiricos therefore applied to the tribunal for a partial closure notice, with a separate appeal against the information notice (as it was Mr Embiricos’s case that the information was not reasonably required before the domicile issue was determined).

Could a partial closure notice be issued?

In determining the partial closure notice issue, the tribunal held that the key questions are: firstly, can HMRC issue a partial closure notice without knowing the amount (allegedly) due; and secondly, is there any reason why not to do so in the circumstances?

Mr Kessler QC's submissions, described as both 'succinct and straightforward', were that Mr Embiricos's domicile and consequent remittance claim were a separate matter to which HMRC's enquiry relates within TMA 1970 s 28A(1A). HMRC had completed their enquiries because they had concluded that Mr Embiricos was domiciled in the UK during the relevant period.

It was further argued that HMRC's conclusions did not require any immediate amendment to Mr Embiricos's tax return (or alternatively, that the return could be amended if the 'X' from the box which states he is non-UK domiciled to claim the remittance basis could be removed). The quantification of the tax due was a separate 'matter' for TMA 1970 s 28 purposes.

Mr Kessler QC noted HMRC's consultation paper prior to the introduction of partial closure notices at paras 1.1 and 1.3 (the need for more flexibility to settle enquiries more efficiently) and paras 3.5 and 3.7, which demonstrate that the intention of proposals was to allow discrete matters to be dealt with individually. He added that, in his experience, substantive points concerning domicile were often considered by tribunals prior to quantification of the tax potentially due.

It was also argued that *Archer* was irrelevant, as this case referred to what are now called final closure notices (rather than partial closure notices) under the previous regime. In particular, *Archer* was distinguished on the basis that a final closure notice marked the end of HMRC's enquiry, which therefore made it necessary for the amount due to be stated, whereas the whole point of a partial closure notice was that the enquiry continued, and further amendments could be made.

For HMRC, Mr Purnell argued that following *Archer*, a final or partial closure notice could not be issued without stating the revised amount of tax due. He argued that there had been no significant change to the requirement in s 28A(2)(b) requiring HMRC to make amendments to the taxpayer's return (required to give effect to conclusions set out in the relevant closure notice), whether partial or final. To issue a closure notice in the circumstances would not satisfy the statutory requirements.

Mr Purnell further argued that the enquiry was into Mr Embiricos's claim to benefit from the remittance basis as a whole, not an enquiry into domicile status alone. The remittance basis and tax payable were argued to be inextricably linked.

He claimed that it cannot have been Parliament's intention to do this without very clear wording, as the same principles would apply to any 'all or nothing' question (and consequently have wide ranging consequences). *Hallamshire Industrial Finance Trust Limited v Inland Revenue Commissioners* [1979] 1 WLR 620 was referred to in support of this.

Should a partial closure notice be issued?

The tribunal stated: 'It is clear in our view that the purpose of the partial closure notice regime is to make the enquiry process more efficient and flexible both for HMRC and for the taxpayer by enabling a matter on which a conclusion has been reached to be dealt with by way of appeal … whilst other matters continue to be investigated.'

The examples given in the consultation document before the partial closure notice regime was introduced all referred to different aspects of a return. The issue here was whether a partial notice could be issued on one part

of the same matter. The tribunal decided that HMRC could issue a partial closure notice concluding that Mr Embiricos was domiciled in the UK during the relevant period and that, as a result, his return should be amended to remove the claim to the remittance basis of taxation. It noted that: 'This would not be invalidated by the fact that the partial closure notice does not go on to quantify the overseas income and gains on which Mr Embiricos would be taxed.' The judges acknowledged that their conclusion gave a wide interpretation to the partial closure notice regime, but they considered this accorded with Parliament's intention to enable enquiries to be dealt with more flexibly and potentially more efficiently.

Having reached those overall conclusions on how partial closure notices should be applied, the tribunal then considered whether a partial closure notice should be issued here. This turned on whether HMRC had reasonable grounds for not doing so (with the burden of proof on HMRC). It was argued for HMRC that they were entitled to have the full facts before issuing a partial closure notice. It was further argued that HRMC were entitled to consider what secures the best return for the Exchequer: if a small amount was due, it may be considered that it was not an effective use of resources to litigate the domicile question. Moreover, if the cost of providing the information was substantial, it could be insignificant in contrast to the amount of tax due.

In contrast, the taxpayer claimed it would be a waste of time and money to require details of overseas income prior to a determination on domicile. Mr Embiricos had already incurred £150,000 of professional fees with the provision of information costing between £30,000 and £40,000. Enquiries of this nature would be intrusive, especially since non-domiciliaries are not normally required to provide details of overseas income and gains. A brief mention was also made of Article 8 of the European Convention on Human Rights (as part of the overall picture of confidentiality which Mr Embiricos was entitled to expect regarding his overseas affairs).

Finally, Mr Kessler QC pointed out that HMRC should be able to work out that the tax at stake is not insignificant from the facts already provided, given that £150,000 in legal fees had already been spent, and Mr Embiricos had instructed leading counsel.

The tribunal concluded that there were no reasonable grounds for refusing the application and directed HMRC to issue a partial closure notice within 30 days of the date of the decision (subject to appeal).

Information notice appeal

On the information notice issue, the FTT agreed with HMRC that the taxpayer could not use an appeal to the tribunal against an information notice to effectively force HMRC to agree to a joint referral under TMA 1970 s 28ZA. Nonetheless, the taxpayer's appeal against the information notice was allowed as the information requested was not reasonably required pending determination of Mr Embiricos's domicile. The tribunal did state that the opposite conclusion would have been reached if the conclusion regarding the issuing of a partial closure notice turned out to be wrong.

Conclusion

The FTT has, in my view, given a very sensible and logical decision in favour of the taxpayer. It is clearly correct that the partial closure notice regime represents a fundamental change in order to assist in cases such as this, where the alternative would be a protracted (and often extremely expensive and invasive) process. Although previous case law on closure notices is irrelevant for interpreting the new regime, cases such as *HMRC v Vodafone 2* [2006] STC 483 at [43] highlight that the purpose of closure notices and partial closure notices is to protect taxpayers in situations such as this.

The consequences of this decision are wide ranging, in that (in theory) wherever there is a preliminary issue in a case, such as residence or domicile or whether a business is trading, taxpayers can now seek a partial closure notice to speed the process of deciding that 'all or nothing' question along. This is particularly important in a context where taxpayers with genuinely meritorious cases might otherwise be forced to consider conceding, due to the cost consequences of complying with long running and demanding enquiries.

The substantive arguments for HMRC are, with respect, weak. *Archer* is irrelevant in the context of partial closure notices because the very point of them is that they are not final but partial, and so a quantification of tax due in the overall, final issue is unnecessary. It is therefore surprising in my view that HMRC have been granted permission to appeal.

A conflicting decision

There has been an interesting development post *Embiricos*, as a new case, *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 0418 (TC) ('Levy') has recently been decided on the same point. However, Judge Andrew Scott came to the opposite conclusion than that of *Embiricos*.

In his view, there is 'no power under TMA 1970 s 28A for HMRC to issue a partial closure notice in respect of a "matter" that is said to consist of a determination of … a claim for the remittance basis at a time when the tax effect of the determination is unknown'.

He came to his conclusion 'principally by reference to a consideration of TMA 1970 s 28A in the light of other relevant provisions of TMA 1970 and the manner in which Parliament gave effect to the concept of a partial closure notice in Finance (No. 2) Act 2017, noting that it did so at a time when, applying normal principles of statutory interpretation, it can be taken to be aware of the decision by the High Court in *Archer* … on the meaning of TMA 1970 s 28A(2). In my judgment, "matter" in TMA 1970 s 28A must be understood in the wider context of the provision made by that Act, including the provisions relating to appeals in TMA 1970 s 50 and joint references by the taxpayer and HMRC under TMA 1970 s 28ZA for a determination of questions arising in connection with the subject-matter of an enquiry.'

Judge Scott went on to state that: 'In addition, I have had regard to the relevant contextual background, notably the consultation document and connected material relating to the introduction of partial closure notices, which, in my judgment, support the view that I have reached of the meaning intended by Parliament in referring to a "matter" in TMA 1970 s 28A.'

However, as argued above, *Archer* is irrelevant in the context of a partial closure notice. Moreover, HMRC's consultation paper was actually cited in support of the taxpayer's arguments in Embiricos, as paras 1.1 and 1.3 emphasise the need for more flexibility to settle enquiries more efficiently, and paras 3.5 and 3.7 demonstrate that the intention of proposals was to allow discrete matters to be dealt with individually. I therefore consider that, with respect, Levy has been decided incorrectly.

As *Embiricos* and *Levy* were both decided in the FTT, neither binds the other: it does however mean that the position is once again uncertain until the point is decided in the Upper Tribunal.