[2017] UKUT 0289 (TCC)
Appeal number: UT/2016/0125

SELF ASSESSMENT — notice of enquiry into return given under s9A Taxes Management Act 1970 — reference in the letter opening enquiry to the tax year "ended 6 April 2009" — whether notice of enquiry invalid — application of s 114 Taxes Management Act 1970 — appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellants**
- and -	
MICHAEL MABBUTT	**Respondent**

TRIBUNAL: JUDGE COLIN BISHOPP
JUDGE GUY BRANNAN

Sitting in public at the Royal Courts of Justice, Strand, London on 11 May 2017

Akash Nawbatt QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Keith Gordon, Counsel, instructed by Moore Stephens LLP, Accountants, for the Respondent

DECISION

Introduction

1. On 17 January 2011, the Appellants ("HMRC") wrote to the Respondent, Michael Mabbutt, informing him that they intended to enquire into his tax return "for the year ended 6 April 2009". We refer to this as "the Mabbutt letter". The reference in it to 6 April 2009 was a mistake; there was no tax year which ended on that date. HMRC intended, instead, to refer to the year ended 5 April 2009. HMRC's enquiry nevertheless proceeded, and it led to a closure notice issued on 1 July 2014.

2. Mr Mabbutt appealed against the closure notice to the First-tier Tribunal ("the FTT"), challenging its conclusions but also arguing that there could be no effective closure notice in relation to the tax year ended 5 April 2009 because no valid notice of enquiry had been given. HMRC were by then out of time to serve a further (correct) notice of their intention to open an enquiry into Mr Mabbutt's tax return for that year. It was directed that the question whether an enquiry had been validly opened should be heard as a preliminary issue.

3. The FTT (Judge Bailey and Ms Shillaker) held that because of the mistake the Mabbutt letter did not constitute a valid notice of enquiry compliant with section 9A Taxes Management Act 1970 ("TMA") and that section 114 TMA could not save it. The FTT also held that a letter to Mr Mabbutt's accountants, Dickinsons ("the Dickinsons letter") referred to in, and a copy of which was enclosed with, the Mabbutt letter did not form part of the disputed notice of enquiry.

4. HMRC now appeal, with the permission of the judge, against the FTT's decision. Mr Mabbutt cross-appeals on one point in relation to section 114(1) TMA.

5. For the reasons given below, we allow HMRC's appeal and dismiss Mr Mabbutt's cross-appeal.

Factual background

6. The facts found by the FTT can be briefly stated and were not disputed. The following summary is taken mainly from [16 a) – j)] of the FTT's decision ("the Decision").

7. Mr Mabbutt submitted his tax return for the year ended 5 April 2009 online on 29 January 2010. During that tax year Mr Mabbutt had entered into a DOTAS registered tax scheme. "DOTAS" stands for "Disclosure of Tax Avoidance Schemes" and refers to legislation contained primarily in the Finance Act ("FA") 2004, Part 7 (sections 306 to 319 as amended). If a tax avoidance scheme is disclosed under these provisions it is allocated a reference number.

8. The Mabbutt letter, so far as material, was as follows:

> "Dear Mr Mabbutt,
>
> Thank you for your Tax Return for the year ended 6 April 2009. I am writing to tell you that I intend to enquire into this Return. I have written to your agent, Dickinsons to ask for the information I need and a copy of my letter is enclosed for your information.
>
> I will not be checking other areas of your Return unless the reply, or other information, gives me reason to do so. In such circumstances, the scope of the enquiry could be widened to cover the whole of the Tax Return."

9. The letter also enclosed a copy of HMRC's Code of Practice 8 which related, in particular, to tax avoidance schemes. The relevant part of the Dickinsons letter was:

> "Dear Sirs
>
> **Mr M Mabbutt**
>
> I have today given notice under Section 9 (a) [sic] Taxes Management Act 1970, to your above named client, of my intention to enquire into his Tax Return for the year ending 6 April 2009. I enclose a copy of this notice for your information.
>
> To enable me to check that the Tax Return is correct and complete, please let me have the following information:
>
> …."

10. Although the FTT did not quote its entire text, the Dickinsons letter referred expressly to the DOTAS registered scheme and to its reference number (which was also included on Mr Mabbutt's tax return for the year ended 5 April 2009).

11. In February 2011 there was correspondence between the promoter of the DOTAS registered scheme and HMRC concerning the material sought from Mr Mabbutt and how this could best be provided. The FTT concluded (Decision [16 e)]) that there was no confusion in the mind of the scheme promoters as to the arrangements into which HMRC wished to enquire.

12. Next, on 24 March 2011, Dickinsons wrote to HMRC as follows:

> "Will you please confirm that you agree with Mr Mabbutt's Tax Return for the year ended 5 April 2009, which was electronically submitted by this firm on his behalf on the 29 January 2010.
>
> We make this request as we have not received any notice of enquiry into the tax year to 5 April 2009 to date and we are now well past the deadline for HMRC doing so.
>
> Can you please confirm in writing that you agree with the Tax Return and Self Assessment on the basis as submitted.
>
> We would just for information confirm that we are in receipt of your 17 January 2011 letter but this does not refer to the tax year ended 5 April 2009."

13. HMRC replied on 26 April 2011, asserting that the Mabbutt letter "was a valid notice under section 9 (a)[sic] Taxes Management Act 1970 to your above named client, of my intention to enquire into his Tax Return for the year ending 5 April 2009." The letter went on to refer to, and impliedly rely on, section 114 of TMA.

14. By a letter dated 1 July 2014, HMRC closed the enquiry which they considered had been duly opened. That letter was headed: "Closure of the enquiry into your Self Assessment return for the year ended 5 April 2009." On 18 July 2014, Mr Mabbutt's new agents appealed on his behalf against the closure notice.

The statutory provisions

15. The central feature of the self-assessment system of taxation is that the taxpayer makes his or her own assessment of the tax due, and the payment of tax follows from that self-assessment. The corollary to self-assessment of tax by the taxpayer is that HMRC are given powers to verify the accuracy of the self-assessment return by enquiring into it.

16. Section 9A TMA (incorrectly identified in the letters set out above as section 9(a)) sets out the basic rule which is central to this appeal:

> "(1) An officer of the Board may enquire into a return under section 8 or 8A this Act [i.e. respectively a personal or trustee's tax return] if he gives notice of his intention to do so ('notice of enquiry') –
>
> (a) to the person whose return it is ('the taxpayer'),
>
> (b) within the time allowed.
>
> (2) The time allowed is –
>
> (a) if the return was delivered on or before the filing date [i.e. 31 January following the tax year to which it relates], at the end of the period of 12 months after the day on which the return was delivered."

17. Section 114 TMA, entitled "Want of form or errors not to invalidate assessments, etc" allows certain errors to be ignored. Subsection (1) provides:

> "An assessment or determination, warrant or other proceedings which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

18. It was common ground before the FTT that a notice of enquiry constitutes "other proceedings" for the purposes of that provision.

The FTT's decision

19. The FTT held that only the Mabbutt letter formed the disputed notice of enquiry (Decision [16] d)). Specifically, the FTT held that the Dickinsons letter, although a copy of it was enclosed with the Mabbutt letter and it was expressly referred to, did not form part of the notice of enquiry. The FTT accepted (and this appears to have been common ground) that it was possible for two or more documents together to form a notice of HMRC's intention to enquire into a return (Decision [16 (d)]). The FTT considered that the Dickinsons letter made it clear that it enclosed a notice of enquiry (i.e. the Mabbutt letter); likewise, the Mabbutt letter referred to the copy of the Dickinsons letter as being enclosed "for your information". The FTT concluded that it was HMRC's intention that it was the Mabbutt letter alone that would constitute the notice of enquiry.

20. The burden of proof was on HMRC to satisfy the FTT that a valid notice of enquiry was served. In addition, the burden of proof lay upon HMRC to satisfy the FTT that section 114(1) TMA applied (Decision [18]).

21. Section 9A TMA required notice of an intention to open an enquiry into a return to be given. The notice must be given within a certain period after the return in question had been filed. It was, therefore, implicit that the notice must specify the return into which the enquiry was being opened as there was no other way in which a recipient of a notice could know if the notice had been given within the required period of time. A notice to enquire into a return could not be given before a return was submitted. There was no requirement to refer to section 9A TMA in the notice. (Decision [25]).

22. As regards the Mabbutt letter, it was unclear which tax return was referred to because of the mistaken reference to the year ended 6 April 2009. It was clear, however, that the officer was intending to open an enquiry into a return – but the officer was intending to open an enquiry into a non-existent return for the year ended 6 April 2009. Accordingly, because of the HMRC's officer's professed intention to open an enquiry this was sufficient for the FTT to conclude that the Mabbutt letter did purport to be a notice of enquiry into a tax return. Therefore, that letter did purport to be made pursuant to a provision of the Taxes Acts for the purposes of section 114(1) TMA (Decision [27]).

23. The FTT also took into account other people's perception of the Mabbutt letter. The FTT concluded that Dickinsons' letter of 24 March 2011 was evidence of the fact that it must have been sufficiently clear to Dickinsons that the Mabbutt letter was intended as a notice of enquiry, because otherwise there would have been no reason for the agents to refer to it (Decision [28]).

24. Next, the FTT considered whether the Mabbutt letter was in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts for the purposes of section 114(1) TMA.

25. The FTT noted that a tax year begins on 6 April and ends on the following 5 April – a tax year does not end on 6 April and a return is not made for a period ending on 6 April (Decision [29]).

26. After referring to the decision of the Court of Appeal in *Baylis v Gregory* (reported with the judgments of the House of Lords in *Craven v White* [1989] AC 398), the FTT concluded that where a date was fundamental to a document then that date must be correct. It did not matter whether the error was to refer to another year altogether or to refer to a period which makes no sense in the context of a tax return (Decision [32]). The FTT found support for its view in the decision of the FTT in *Sokoya v HMRC* [2009] UKFTT 163 (TC) (Judge Berner) which held that a penalty notice which contained the wrong deadline for compliance could not be saved by section 114(1) TMA (Decision [33]).

27. Having concluded that the specific return into which the enquiry was made was an essential part of the notice and must be stated, the disputed notice of enquiry described a return which did not exist (Decision [34]).

28. At the time the Mabbutt letter was sent (17 January 2011) no other tax return [i.e. other than that for the tax year ended 5 April 2009] had been filed. In the absence of evidence, it was not possible to make any findings as to Mr Mabbutt's understanding in relation to the disputed notice of enquiry contained in the Mabbutt letter (Decision [35]).

29. The taxpayer's understanding was irrelevant if the assessment (or, in this case, the notice of enquiry) was not correctly worded: *Baylis v Gregory*, *supra*, at 437E *per* Slade LJ (Decision [35]).

30. The FTT's conclusion was that HMRC had to be "accurate in relation to the essential elements of a notice of enquiry, even if the taxpayer would be capable of discerning [HMRC's] true intention despite a minor error. For a notice of enquiry to meet the requirements of section 9A TMA, the return into which the enquiry was to be opened had to be stated accurately and with sufficient detail for it to be clear which return was intended. The detail as to the relevant return had to be correct" (Decision [36]). Because the return described in the Mabbutt letter was for a tax year which did not exist, the FTT concluded that the disputed notice of enquiry was "not in substance and effect in conformity with the intent and meaning of the Taxes Acts" (Decision [37]), and was not a valid notice of enquiry into Mr Mabbutt's tax return for the tax year ended 5 April 2009 under section 9A TMA. The return was not saved by section 114 TMA. Without a valid notice of enquiry, there was no enquiry and the purported closure notice had no standing. Consequently, the FTT allowed Mr Mabbutt's appeal (Decision [42]).

Grounds of appeal

31. HMRC's grounds of appeal were as follows:

(1) the FTT's conclusion that the relevant notice of enquiry was limited to the Mabbutt letter and did not include the enclosed Dickinsons letter and that HMRC did not give valid notice of its intention to enquire into Mr Mabbutt's tax return for the year ended 5 April 2009 was wrong in law.

(2) The FTT's conclusion that HMRC did not give valid notice of its intention to enquire into Mr Mabbutt's tax return for the year ended 5 April 2009 was wrong in law.

(3) In all the circumstances, the error in the Mabbutt letter was minor and it was in substance and effect in conformity with the intent and meaning of the Taxes Acts. The FTT's conclusion to the contrary (i.e. that section 114 TMA did not apply to cure the error) was based on a misdirection in law.

32. As will be seen from the discussion of the three grounds of appeal later in this decision, there is some overlap between the three grounds.

33. On 8 July 2016 Judge Bailey granted HMRC permission to appeal.

34. Finally, Mr Mabbutt cross-appeals on the basis that, because there was no reference in the Mabbutt letter to the statutory code pursuant to which the purported enquiry was to be made, that letter could not have been written pursuant to the Taxes Acts for the purposes of section 114(1) TMA.

35. Before going further we should dispose of two disagreements between the parties. The first is that, although it is not mentioned in HMRC's grounds set out above, in the expanded version attached to HMRC's notice of appeal to this Tribunal reliance is placed on the judgments of the House of Lords in the well-known case of *Edwards v Bairstow* [1956] AC 14. In essence, HMRC argue that the FTT's conclusions were ones which were not open to them on the facts as found. Mr Keith Gordon, appearing for Mr Mabbutt, contended that the argument was misplaced. Whether or not HMRC's reliance on *Edwards v Bairstow* was correct, the facts were not materially in dispute; the question before the FTT, and before us, is whether the Mabbutt letter, either alone or (if this is the better view) taken with the Dickinsons letter, amounts, *as a matter of law*, to a valid notice of enquiry. On any basis, this is a question of law on which an appeal can properly be taken to this Tribunal.

36. The second disagreement stems from Mr Gordon's contention, at paragraph 10 of his skeleton argument, that HMRC expressly conceded before the FTT that the Mabbutt letter was ineffective as a section 9A notice, subject to the availability of section 114. The point is significant not only for its own sake but also because of Mr Gordon's subsequent submissions in relation to the decision of the Upper Tribunal in *GDF Suez Teesside Power Limited v HMRC* [2017] UKUT 68 ("*GDF Suez*"), a decision to which we come shortly. Mr Gordon submitted that the Upper Tribunal had made certain observations about the FTT's decision in the appeal before us, unaware that this concession had been made by HMRC. Mr Akash Nawbatt QC, appearing for HMRC (but who did not appear below), denied on instructions that any such concession had been made before the FTT.

37. As we read the decision of the FTT, particularly at Decision [12]-[15], the discussion of the arguments put forward by HMRC before the FTT seemed to us inconsistent with the concession contended for by Mr Gordon. Moreover, the judge granted permission in respect of the grounds of appeal summarised above. There was no indication that the judge considered HMRC to be raising a new point or a point inconsistent with the alleged concession. Furthermore, no point was taken in respect of this alleged concession in the Respondent's Response to the Appellants' Notice of Appeal dated 10 August 2016.

38. For these reasons, we were not persuaded that HMRC had made the concession for which Mr Gordon contended and concluded that we should hear argument on the validity of the disputed notice of enquiry.

Submissions and Discussion

First Ground of Appeal – did the disputed notice of enquiry include the Dickinsons letter?

(a) Submissions

39. Mr Nawbatt submitted that the FTT had been correct to hold that it was possible for two or more documents together to form a notice of HMRC's intention to enquire into a return, but wrong to focus, at Decision [16d)], on the statement in the Dickinsons letter that a copy of the notice of enquiry was enclosed with that letter, on the absence of any suggestion within it that the Dickinsons letter was itself intended to form part of the notice, and on the absence of any suggestion in the Mabbutt letter that the Dickinsons letter formed part of the notice. The FTT drew attention to the fact that the Dickinsons letter was enclosed "for your [i.e. Mr Mabbutt's] information." The FTT had erred by focusing on what it considered HMRC intended would constitute the notice of enquiry. The issue in relation to section 9A TMA, correctly understood, was not a matter of HMRC's intention. In *Flaxmode v HMRC* (2008) SpC 00670, [2008] STC (SCD) 666 ("*Flaxmode*") the question was whether HMRC had given notice to enquire into a partnership return under section 12AC TMA, a provision which was, so far as material, identical to section 9A TMA. The Special Commissioner held at [30] that the understanding of the HMRC officer of what he was doing was immaterial.

40. Mr Mabbutt was plainly intended to read the Dickinsons letter together with the Mabbutt letter. Had he done so it would have been obvious, because of the nature of the information requested and the reference to the DOTAS scheme, that the officer who wrote the two letters wanted to enquire into Mr Mabbutt's return for the year to 5 April 2009, and that the reference to 6 April was a simple clerical error. The proposition that a notice of enquiry could be contained in more than one document was derived from *Wickersham v HMRC* [2016] EWHC 2956 (Ch) ("*Wickersham*"). There, the two documents said to constitute the notice were sent at different times in the enquiry period. In the present case the two documents were sent in the same envelope and at the same time. Furthermore, the Mabbutt letter specifically informed

Mr Mabbutt that HMRC were not intending to enquire into his whole tax return. That letter did not identify the specific aspect of his return which was the subject matter of the enquiry but explained that information was being requested in the Dickinsons letter and stated that HMRC would not be checking other areas of the return unless the reply (to the Dickinsons letter) or other information gave HMRC reason to do so. Thus, in Mr Nawbatt's submission, Mr Mabbutt could only understand the scope of the enquiry by reading the enclosed Dickinsons letter: whatever the wording used, the letters were plainly intended to be read together.

41. Mr Gordon accepted that a valid notice of an intention to open an enquiry for the purposes of section 9A TMA did not require any particular formality and need do no more than notify the taxpayer in writing of an intention to enquire into a particular tax return. It must, nevertheless, be clear what is meant. The Mabbutt letter enclosed two documents: a copy of the Dickinsons letter and a leaflet containing HMRC's Code of Practice 8. Mr Gordon observed that it had never been HMRC's case that the leaflet was part of the notice of enquiry and there was no reason why the Dickinsons letter should be treated differently. More importantly, Mr Gordon observed that the terms of the Dickinsons letter indicated that it did not form part of HMRC's notice to Mr Mabbutt. The first two sentences of the Dickinsons letter indicated that it was the letter to Mr Mabbutt which was intended to constitute the notice of the intention to open an enquiry. The second sentence specifically stated that it enclosed a notice letter, i.e. the Mabbutt letter, for Dickinsons' information.

42. Therefore, when construed objectively, the Dickinsons letter could not form part of the relevant notice because it expressly indicated that the notice itself was a separate document.

(b) Discussion

43. In our judgment, the Dickinsons letter did form part of the disputed notice of HMRC's intention to open an enquiry.

44. It was common ground between the parties that a section 9A TMA notice did not have to observe any particular formality and that all that was required was a document in writing informing the taxpayer of HMRC's intention to open an enquiry into a particular tax return: see *Flaxmode*. That decision was approved in *R (Sword Services Ltd) v Revenue and Customs Commissioners* [2016] EWHC 1473 (Admin) ("*Sword Services*") at [71] where Cranston J said of section 12AC TMA (giving notice of intention to open an enquiry into a partnership return):

> "To my mind, the Parliamentary intention behind that provision is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient. In this regard *Flaxmode Limited* [2008] STC (SCD) 666 is, in my view, correct."

45. We agree but, with respect, wish to clarify one point. The question whether the disputed notice sufficiently makes a taxpayer aware of HMRC's intention to open an

enquiry into a particular tax return is an objective one. The test is whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return. It is not a matter of the parties' intentions or actual knowledge. We consider that this objective test applies as much to the question whether certain documents could be said to form part of the notice as it does to the question whether the notice itself sufficiently informed the taxpayer of the intended enquiry to be a valid section 9A TMA notice. We do not understand Cranston J, in the passage quoted above from *Sword Services*, to be contradicting this conclusion. The reference in this passage to "the taxpayer knows of HMRC's decision to conduct an enquiry" must be taken to refer to the knowledge that a reasonable taxpayer would have had on reading the relevant communication(s).

46. That the test is an objective one is clear from *Wickersham* in which the High Court held at [43]-[44] in relation to a purported notice opening an enquiry under paragraph 5 Schedule 1 A TMA 1970 of the test was what a reasonable person reading the relevant correspondence would have understood. In *Wickersham* the court relied on the judgment of Briggs LJ in *Bristol and West plc v Revenue and Customs Commissioners* [2016] EWCA Civ 397 ("*Bristol and West*"). This case dealt with a notice under paragraph 32 Schedule 18 to the Finance Act 1998 to close an enquiry. Briggs LJ held at [25]-[26] that the documents forming the purported notice had to be interpreted on the basis of what would be understood by a reasonable person in the position of the intended recipient. Although *Bristol and West* involved a different statutory provision and a different part of the enquiry process we see no reason, in principle, why the objective test set out by Briggs LJ should not be applied in relation to a notice of an intention to open an enquiry. Both cases involve HMRC giving a taxpayer notice, as required by statute, in relation to part of the enquiry process.

47. As regards Mr Gordon's submission that the Mabbutt letter and the Dickinsons letter evidenced an intention that only the Mabbutt letter should constitute the notice, we consider that this attaches too much emphasis to HMRC's intentions. As the Special Commissioner pointed out at [30] in *Flaxmode* the intentions of the issuing HMRC officer are irrelevant. The question is whether a reasonable taxpayer receiving the two letters of 17 January 2011 would have understood them as having to be read together and from that composite communication would have understood that they were intended to give the taxpayer notice of HMRC's intention to open an enquiry into a return. Mr Mabbutt, or to be more precise a reasonable taxpayer, could not reasonably have thought that the copy of the Dickinsons letter sent to him was a separate document, unrelated to the enquiry and provided for some other purpose. Any dispassionate and reasonable reader of the Mabbutt letter would recognise that it could be fully understood only if read together with the Dickinsons letter; the latter was incorporated by reference into the former. The proposition that an infelicity of wording should lead to the conclusion that the notice was confined to the Mabbutt letter is contrary to common sense and, with respect to Mr Gordon, mere pedantry. We do not accept the argument that, because the Mabbutt letter enclosed a leaflet which did not form part of the notice (assuming that to be the case—in our view the contrary proposition is sustainable) the copy Dickinsons letter too did not form part of

the notice. We see no reason why two enclosures to a letter should not have different purposes and statuses.

48. We have, therefore, come to the conclusion that the FTT erred in law when it decided at Decision [16 d)] that the Dickinsons letter did not form part of the relevant notice of enquiry.

Second Ground of Appeal – did the Mabbutt letter constitute a valid notice of enquiry?

49. Mr Nawbatt and Mr Gordon both dealt in their skeleton arguments and orally with the recent decision of this Tribunal (Newey J and Judge Bishopp) in *GDF Suez*, and since it contains a critique of the FTT's decision in the instant case we think it appropriate to set the scene for the parties' submissions by beginning with the reasoning in that case. There, HMRC opened, or purported to open, an enquiry by a letter to the company headed "Year Ended 31 December 2006". The purpose of the letter was to acknowledge the receipt of the company's recently submitted corporation tax return "for the above period" and to inform it that HMRC were intending to open an enquiry. The company had not made a return for that period but, instead, had made a return for a shorter accounting period ended 5 December 2006. The question whether this invalidated the purported notice of intention to open an enquiry was first raised in the Upper Tribunal. We shall quote at some length from the decision because it identifies and examines a number of the relevant authorities. After referring to the legislation, which for all material purposes was in the same terms as section 9A TMA, the Tribunal had this to say:

> "[110] The question whether the period to which a document relates has to be correctly identified was considered by the Court of Appeal in *Baylis v Gregory* (reported as *Craven v White, IRC v Bowater Property Developments Ltd, Baylis v Gregory* [1989] 1 AC 398). The appeals were later to proceed to the House of Lords, but not on this point. The relevant inspector instructed a subordinate to issue an assessment for the tax year 1975-76; by mistake the subordinate made and notified an assessment expressed to be for 1974-75. When the mistake was realised the assessment was vacated, although the taxpayer was not told that it had been vacated. The questions, identified by Slade LJ at 434, were whether, notwithstanding its vacation, the assessment had any legal effect at all, and whether, if so, it could be treated as a valid assessment for the year 1975-76 by virtue of section 114 of the Taxes Management Act 1970 ('TMA') or for some other reason. [Section 114 was then set out.]
>
> [111] At 436 Slade LJ recorded that the taxpayer's advisers realised immediately they received the notification of the assessment that the reference to 1974-75 was an error, and that 1975-76 had been intended, but said that, leaving section 114 to one side, it was nevertheless impossible to regard the assessment as one made for 1975-76. He accepted the argument of counsel for the taxpayer that the

identification of the correct year of assessment was critical, and said at 438 that section 114 was not apt to overcome so fundamental an error. Mr Peacock [for the taxpayer] accepted that there was no particular form by which an enquiry must be opened but argued that the correct identification of the relevant period was as critical to an enquiry as to an assessment. By way of analogy he referred us to the decision of Judge Berner, sitting in the FTT, in *Sokoya v Revenue and Customs Commissioners* [2009] UKFTT 163 (TC), where HMRC had incorrectly stated, in a letter to the taxpayer, that he must comply with an information notice within 30 days of receipt, rather than within 30 days of a determination by a Special Commissioner. The judge accepted that, in the circumstances of the case, the taxpayer had not been misled, but nevertheless took the view that the error in stating the date for compliance was fatal, and that the notice was invalid.

[112] The error in *Mabbutt* itself was similar: HMRC opened, or purported to open, an enquiry into the taxpayer's return for 'the year ending 6 April 2009'. Again, the taxpayer and his advisers knew perfectly well what was intended but the judge concluded that the error in the date was nevertheless fatal, because an enquiry had to be opened into a period which existed, and was accurately identified.

[113] Miss Wilson [for HMRC] emphasised, in response, the lack of any formality in the procedure for the opening of an enquiry: the only requirement is that the taxpayer should be informed of it. In *R (Spring Salmon and Seafood Ltd) v Inland Revenue Commissioners* [2004] STC 444 at [32] Lady Smith, sitting in the Outer House, pointed out that there was not even any requirement of writing, and that (as in that case) a notice given to one of a company's offices, but not its registered office, was valid. A similar conclusion was reached by Cranston J in *R (Sword Services Ltd) v Revenue and Customs Commissioners* [2016] 4 WLR 113; at [71] he observed that 'There is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient.'

[114] In *Portland Gas Storage Ltd v Revenue and Customs Commissioners* [2014] UKUT 0270 (TCC) this Tribunal was required to consider whether, as the taxpayer maintained, HMRC had opened an enquiry; HMRC's position was that they had not done so. The relevant statutory provision in that case (which concerned stamp duty land tax) was paragraph 12 of schedule 10 to the Finance Act 2003 which, like the applicable provision here, imposed no requirements of form. The taxpayer submitted a return relating to the grant of a lease, and paid the appropriate duty. Some time later the terms of the lease were amended in a manner which, had the amendments been effective from the outset, would have led to a substantially lower amount of tax. The taxpayer thereupon sought to amend its return, and the question was whether it was out of time to do so. In the course of correspondence an HMRC officer wrote that he was 'seeking advice from our policy team regarding the time limit …', and the Tribunal decided that was sufficient to open an enquiry. As it said at [48]:

'… 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 …'

[115] Here, said Miss Wilson, it was quite obvious what was intended: HMRC's letter of 22 August 2007 acknowledged [the taxpayer's] return and, despite the error in describing the period to which it related, there could have been no doubt that the letter referred to that return, and not some other, non-existent, return. Ernst & Young [the taxpayer's accountants] had quite clearly understood what was meant and, entirely sensibly and consistently with what happens in the real world, had not taken any point on the error. It was accepted in the statement of agreed facts that an enquiry had been opened, and it had not occurred to anyone until *Mabbutt* was decided that an error of this kind was of any significance at all. The error of the Tribunal in that case was to look first at section 114 of TMA, rather than to construe the letter in its context. In that case too it should have been obvious to the recipient of the letter that it contained an inconsequential clerical mistake. In the different but nevertheless comparable context of a notice to terminate a lease the House of Lords decided, in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, that an error in a notice served by the tenant to terminate a lease, which referred to 12 January when the applicable break day was 13 January, did not invalidate the notice. The error here, said Miss Wilson, was of a similar character.

[116] In our judgment Miss Wilson is right, and broadly for the reasons she gave. The essence of the reasoning of the majority in *Mannai v Eagle Star* was that, in the case of an error of form, what mattered was what the recipient would understand from the communication in question when it was objectively construed. As Lord Hoffmann put it at 774, the landlord 'will reject as too improbable the possibility that the tenant meant that unless he could terminate on 12 January, he did not want to terminate at all. He will therefore understand the notice to mean that the tenant wants to terminate on the date on which … he may do so, ie 13 January.'

[117] The position here, in our view, is much the same. The recipient of HMRC's letter cannot reasonably have understood it to mean that the writer had no wish to enquire into the return which had been made, but wanted to enquire instead into some other, hitherto unmade, return. On the contrary, despite the error there is no arguable ambiguity about what was meant: the writer intended to enquire into the return whose receipt he was acknowledging. Ernst & Young plainly understood that to be the message. The requirement that the taxpayer be informed of the opening of an enquiry was accordingly met and for that reason, in our view, this issue can be resolved without resort to section 114. If such resort is nevertheless necessary it seems to us clear that, despite the error, the letter was 'in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts', as section 114(1) puts it, and its defect is cured.

> [118] We do not consider that what was said in *Baylis v Gregory* or in *Sokoya* leads to a different conclusion. The former concerned the validity of a formal demand, for which there is a prescriptive statutory framework, by which a taxpayer is made liable, subject to appeal, to make a payment to the state. One can well understand why protection of the taxpayer demands formality and complete absence of ambiguity in such a case. The latter concerned a penal provision: the taxpayer was said to be liable to a penalty for his alleged failure to comply with an information notice by a date which had been incorrectly identified. In other words, he was said to be liable to a penalty for failing to do something which he could not lawfully have been required to do; moreover, it is well established that in a penal context any ambiguity must be construed in favour of the person penalised. We see no true parallel between those cases and this.
>
> [119] We therefore reject this ground of appeal, and conclude that HMRC had opened a valid enquiry. In so far as the FTT came to a different conclusion in *Mabbutt*, we respectfully disagree."

(a) Submissions

50. Mr Nawbatt submitted that there was nothing to distinguish this case from *GDF Suez*: the purpose of a section 9A TMA notice was to inform the taxpayer that an enquiry had been opened in order that he should know that questions may be asked about his tax return and that time limits may be affected. The notice activated the enquiry process. All that was necessary to satisfy the requirements of section 9A TMA was that the notice should indicate sufficiently clearly that the officer was giving notice of his or her intention to enquire into one or more returns. It was not necessary, Mr Nawbatt argued, for the return being enquired into to be specified in the notice as long as the taxpayer could identify it. The only other statutory requirement was that the notice should be issued within 12 months of the filing date of the return and that it should be addressed to the person whose return was being enquired into.

51. The Mabbutt letter, said Mr Nawbatt, met those statutory requirements. The officer stated that he was intending to enquire into "this Return". The letter was issued within the enquiry window and was addressed to Mr Mabbutt. Thus the FTT held at [27] that "it is clear that what the officer intends to do, or is claiming to do, is give notice that she will open an enquiry into a return…. We consider that professing an intention is sufficient for us to conclude that the letter of 17 January 2011 does purport to be a notice of enquiry into a tax return."

52. Mr Nawbatt argued that the statutory and factual context of the letter, viewed objectively, would clearly have communicated to Mr Mabbutt that it was his tax return for the year ended 5 April 2009 (notwithstanding the mistaken reference to the year ended 6 April 2009) that was the subject of the enquiry. In support of this submission, Mr Nawbatt referred to section 4(3) Income Tax Act 2007 which provides:

> "A tax year begins on 6 April and ends on the following 5 April."

53. A tax year did not end on 6 April and a tax return could not be made by an individual for the year ended 6 April. There was, Mr Nawbatt argued, only one tax year ending in 2009 for which a return could be made. In addition, there was only one tax return that could have been enquired into on 17 January 2011 because HMRC were out of time to enquire into the previous year's tax return and Mr Mabbutt had not yet filed his return for the year ended 5 April 2010. In addition, the Dickinsons letter made it clear that the subject matter of the enquiry was a DOTAS registered tax avoidance scheme which Mr Mabbutt had declared on his tax return for the year ended 5 April 2009.

54. Mr Mabbutt could not reasonably have understood the Mabbutt letter to mean that the officer did not wish to enquire into the return that Mr Mabbutt had made but, instead, wanted to enquire into a return which did not exist for a tax year which also did not exist. As in *GDF Suez*, notwithstanding the error relating to the date, there was no ambiguity about what was meant: the writer intended (and the recipient could not reasonably have been in any doubt that the writer intended) to enquire into the return for the year ended 5 April 2009, the receipt of which he was acknowledging.

55. Mr Gordon argued that HMRC were wrong to suggest that a valid notice of enquiry did not have to specify the return into which the enquiry was being made. The purpose of section 9A(1) was to give a taxpayer notice that a particular (specified) return was under enquiry. Indeed, the taxpayer had to be aware of the consequences of an enquiry being underway, namely:

(1) that the return may not be considered to be final;

(2) that HMRC had extensive rights to issue information notices in relation to the tax year, the return in respect of which was under enquiry (paragraph 21 Schedule 36 FA 2008);

(3) that the taxpayer had the right to seek a closure notice (section 28A TMA);

(4) that HMRC were entitled to amend the taxpayer's return and, subject to compliance with public law requirements, were under no time restriction to do so; and

(5) that HMRC may withhold any repayment due to the taxpayer (section 59B(4A) TMA).

56. It could not be assumed, Mr Gordon submitted, that an objective recipient of the Mabbutt letter would have known that, notwithstanding the mistaken reference to "the year ending on 6 April 2009", HMRC's intention was to refer:

(1) to a *tax* year; and

(2) not to the tax year *commencing* on 6 April 2009, but

(3) to the tax year ending on a different date.

57. HMRC's second ground of appeal presupposed that one particular correction was so obviously the correct one whereas, in Mr Gordon's submission, any number of

corrections could have been made to the Mabbutt letter. This demonstrated why precision was required.

58. Mr Gordon drew attention to the judgment of Slade LJ in *Baylis v Gregory* 436E-H and 437 A-B and H, in which he held that a statutory notice could not be read by reference to what the recipient might have appreciated rather than what it actually says. Furthermore, Mr Gordon argued, there was no statutory obligation for a notice of assessment to state the year of assessment to which it related, but common sense required that the year of assessment be identified, and the same applied to notices under section 9A.

59. If, contrary to Mr Gordon's submissions, the Dickinsons letter did form part of the notice, Mr Gordon contended that the Dickinsons letter simply repeated the mistake of the Mabbutt letter by referring to the "year ending 6 April 2009". Also, the two specific questions raised in the Dickinsons letter made no reference to the actual tax returns submitted by Mr Mabbutt.

60. Mr Gordon also submitted, referring to the decision of the First-tier Tribunal in *Coolatinney v HMRC* [2011] UKFTT 252 (TC) (Judge Berner and Mr Collard) ("*Coolatinney*") at [21] and [25], that where Parliament had itself provided a mechanism for determining whether a notice was ineffective by reason of mistake contained in it (i.e. section 114(1) TMA) recourse could only be had to the statutory provision to resolve the issue. Accordingly, the Upper Tribunal had been wrong in *GDF Suez* to rely on the decision of the House of Lords in *Mannai Investment Co Ltd v Eagle State Life Insurance Co Ltd*.

61. Mr Gordon argued that the present case should be distinguished from *GDF Suez* on five grounds:

(1) In *GDF Suez* the notice (which referred to the "Year Ended 31 December 2006") was always understood to refer to the accounting period which started on 1 January 2006 but which ended early (on 5 December 2006). The error was raised only during the course of proceedings before the Upper Tribunal (apparently as a result of the FTT's decision in the instant appeal).

(2) The provisions in paragraph 5 Schedule 18 FA 1998 made it clear that a company's accounting period could be for a shorter period than that covered by the initial notice requiring a return to be made.

(3) The actual accounting period in *GDF Suez* was, therefore, fully covered by the period specified in the original notice to file and also in the wording on the enquiry notice.

(4) Contrary to the assumption made in *GDF Suez* at [112], there was no reason to believe that Mr Mabbutt personally understood the nature of the error in the letter to him.

(5) Finally, there was ambiguity in the present case about the intended meaning of the Mabbutt letter.

(b) Discussion

62. It is clear to us that the Mabbutt letter was a valid notice for the purposes of section 9A TMA. We would reach the same conclusion even if the Dickinsons letter did not, contrary to our view expressed above, form part of that notice.

63. When viewed objectively, there can be no doubt, in our judgment, that a reasonable taxpayer reading the Mabbutt letter would have concluded that HMRC were intending to open an enquiry and that the reference to the year ended 6 April 2009 was simply a minor clerical slip.

64. The Mabbutt letter made it clear that it was sent to Mr Mabbutt in response to a tax return which he had submitted. On the unchallenged findings of the FTT (Decision [35]) the only tax return that Mr Mabbutt had submitted was his return for the year ended 5 April 2009. It was also clear that HMRC intended to open an enquiry into a tax return for a year which ended in April 2009. Only one tax year could end in April 2009 and that was the tax year to 5 April 2009. The reference to 6 April was clearly a mistake.

65. There was no tax year which ended or could end on 6 April 2009 and we reject Mr Gordon's submission that a possible understanding of the letter was that it was referring to the year commencing on 6 April 2009 – that is simply not an interpretation which we consider tenable on the wording of the letter. On this point, we agree with the conclusion of the FTT at Decision [32] that it would be unusual in the context of a personal tax return to refer to a tax year by reference to its start date. Furthermore, the reference to the "year ended" must surely be taken, in the context of a letter from HMRC written to a taxpayer in response to the filing of tax return and purporting to open an enquiry into that return, to be a reference to a *tax* year and we reject Mr Gordon's submission to the contrary.

66. We are fortified in our conclusion by the letter from Dickinsons to HMRC dated 24 March 2014. It is perfectly clear from this, plainly disingenuous, letter that Mr Mabbutt's agents understood what had happened. We also note that (at Decision [16 e)]) the FTT found (a finding which has not been challenged) that there was no confusion in the mind of the scheme promoters as to the arrangements into which HMRC wished to enquire. Thus, the understanding of Dickinsons and the promoters was consistent with our view of the objective interpretation of the Mabbutt letter.

67. We would simply add, in relation to *Baylis*, that the intended and mistaken tax years referred to were both valid tax years, unlike the present case. There was, therefore, greater scope for the taxpayer to be misled by the error (even though in that case Slade LJ found that the taxpayer could not reasonably have believed that the mistaken year of assessment was the one which HMRC intended to assess). Moreover, at 436 F-H and 437 A-B of *Baylis*, Slade LJ drew attention to various aspects of capital gains tax legislation which emphasised the critical nature of the correct year of assessment. We agree with Mr Nawbatt's submission that those features were not present in this appeal.

68. In relation to Mr Gordon's attempts to distinguish *GDF Suez* from the present appeal, we were unpersuaded by those submissions.

69. First, whilst it is true that in *GDF Suez* the error was raised only during the course of the proceedings before the Upper Tribunal (and that previously there had been no misunderstanding about what had been intended), we do not consider that to be a relevant distinction. The question is whether, on an objective reading of the Mabbutt letter and the Dickinsons letter, the recipient would have understood that HMRC were intending to open an enquiry into Mr Mabbutt's tax return for the year ended 5 April 2009. The actual understanding of the parties in *GDF Suez* is irrelevant (save to the extent that it supports the view of the Tribunal that the objective interpretation of the purported notice in that case was that there was no ambiguity about what was meant – the writer of the letter intended to enquire into the return whose receipt she was acknowledging).

70. Second, the fact that a company's accounting period could be shorter than that covered by the initial notice requiring a return (and this would be fully covered by the notice) likewise seems to us to be an immaterial distinction.

71. Third, as we have indicated, what Mr Mabbutt actually understood is not relevant, save to the extent that it is indicative of the understanding of the reasonable taxpayer.

72. Finally, we do not accept that there was sufficient, or indeed any real, ambiguity about the intended meaning of the Mabbutt letter. As we have stated, an objective reading of that letter would have made it plain that HMRC were intending to enquire into the return that Mr Mabbutt had submitted for the year ended 5 April 2009 and that the reference to "the year ended 6 April 2009" was a simple and minor clerical error.

73. We have considered afresh the decision of this Tribunal in *GDF Suez* and the authorities referred to therein but we see no reason to depart from its reasoning or conclusions. We consider that the reliance placed by Mr Gordon on the judgment of Slade LJ in *Baylis* is misplaced. As was noted in *GDF Suez* at [118], that case involved the formal assessment procedure, circumscribed by a detailed statutory framework, under which a taxpayer becomes liable to make a payment of tax. That statutory context required a more prescriptive and formal approach than is required in the context of a notice of an intention to open an enquiry under section 9A TMA. We do not think, as Mr Gordon seemed to come close to arguing, that any error as to a date in an HMRC notice *ipso facto* invalidates a notice. Whether that is so will depend on the type of notice, the statutory context, and the nature of the circumstances surrounding the mistaken date.

74. As regards Mr Gordon's submissions concerning *Coolatinney*, that case involved the question whether a purported notice of enquiry for the purposes of stamp duty land tax ("SDLT") was valid for the purposes of paragraph 12, Schedule 10 Finance Act 2003 ("FA 2003"). The SDLT legislation contained a provision (section 83(2) FA 2003) which was similar to section 114(1) TMA. Section 83(2) contained two conditions which had to be satisfied if it was to have the effect that a mistake did not

render a notice ineffective. The first condition was that the notice must be substantially in conformity with Part 4 FA 2003. The second condition was that the intended effect of the notice must be reasonably ascertainable by the person to whom it is directed.

75. It will be observed that section 114(1) TMA does not contain the second condition. It was in this statutory context that the Tribunal in *Coolatinney* made its comments at [21] and [25] about section 83(2) providing the exclusive test for determining the validity of a notice to open an SDLT enquiry. In relation to sections 9A and 114 (1) TMA, we consider that the correct approach is to determine first whether a purported notice of enquiry is a valid notice under section 9A (i.e. in this case whether a reasonable taxpayer reading the Mabbutt letter would have concluded that HMRC were intending to open an enquiry into a particular tax year) and only if the answer to that question is in the negative move on to consider whether any mistake could, if necessary, be cured by section 114(1) TMA. That was the approach adopted by the tribunal in *GDF Suez*.

76. We do not, however, accept Mr Nawbatt's submission that it is not necessary for an enquiry notice to specify the tax year of the return into which HMRC wish to enquire. We consider that the reference in section 9A TMA to "a" return refers to a specific return into which HMRC intend to enquire. Moreover, the time limit in which HMRC are entitled to open an enquiry into a tax return depends on the date on which the tax return was filed. It follows, therefore, that HMRC must either specify the return in question or that it must be clear from the information contained in or enclosed with the notice into which return HMRC are intending to enquire.

77. Accordingly, we conclude that the FTT erred in law by deciding that the Mabbutt letter did not constitute a valid notice of enquiry under section 9A TMA into Mr Mabbutt's tax return for the tax year ended 5 April 2009.

78. We have reached this conclusion largely without taking into account the Dickinsons letter. If we are correct in our decision that the relevant section 9A notice included the Dickinsons letter, then the inescapable conclusion in our view is that on any reasonable interpretation of the Mabbutt letter and the Dickinsons letter taken together HMRC were intending to open an enquiry into the tax return for the year ended 5 April 2009. The reference to the DOTAS scheme and its reference number in the Dickinsons letter creates a link to Mr Mabbutt's 5 April 2009 tax return and makes this perfectly clear.

Third Ground of Appeal and cross-appeal – does section 114 TMA remedy the position?

79. In the light of our conclusion that the Mabbutt letter (either alone or taken together with the Dickinsons letter) constituted a valid section 9A notice it is, strictly, unnecessary for us to consider whether any alleged defect in the notice can be cured by section 114 TMA. Nonetheless, because the point was fully argued before us, we shall briefly give our views on this third ground of appeal. We necessarily assume in

what follows that we are wrong in our conclusion on the second ground. It is convenient to deal with the cross-appeal at the same time.

(a) Submissions

80. Mr Nawbatt submitted that the FTT had erred in law by deciding that the specific return into which the enquiry is made must be correctly stated in the notice and that a mistake in this regard cannot be remedied by the application of section 114 TMA even if it is otherwise clear what return was being enquired into [36].

81. The FTT had erred, Mr Nawbatt said, when it relied on principles derived from authorities concerning assessment and penalty notices (see the discussion by the Upper Tribunal in *GDF Suez* at [118] quoted above). These principles were not applicable in relation to a section 9A enquiry notice where the requirements are less formal and strict than those applied by Slade LJ in *Baylis v Gregory* to assessments. The error in the present case, according to Mr Nawbatt, related to a single day and, importantly, there was only one tax year ending in 2009. In those circumstances, the error in the notice was minor in nature and not comparable to the error in *Baylis v Gregory*.

82. Similarly, he said, the FTT had erred at Decision [33] in relying on the principle "that the date must be correct where it is fundamental to the disputed document". It derived this principle from *Sokoya* where it was held that an error in the penalty notice in respect of the date for compliance not only rendered it invalid but also had the consequence that it could not in substance and effect conform with or be according to the intent and meaning of the Taxes Acts and therefore could not be saved by section 114 TMA. The FTT's error in the present case, said Mr Nawbatt, was that it applied principles derived from cases concerning much more formal notices to the much less formal notice contained in section 9A. Again, as the Upper Tribunal explained in *GDF Suez*, *Sokoya* was to be distinguished.

83. Mr Nawbatt noted that Henderson J (as he then was) in *Pipe v HMRC* [2008] STC 1911 ("*Pipe*") observed that an error could not be saved by section 114 if it was "a gross error and one that, viewed objectively might be misleading." Mr Nawbatt contended that the mistaken reference to the "year ended 6 April 2009" did not fall into this category. A section 9A notice was not required to be in any particular form and was not an appealable decision but simply a communication to the taxpayer that an enquiry was about to begin. It was clear from the Mabbutt letter that the officer was giving notice of his intention to enquire into Mr Mabbutt's tax return. As held by the FTT at Decision [27]-[28], it is clear that the Mabbutt letter purports, and is intended, to be a notice of enquiry under section 9A TMA and was understood to be a section 9A notice of enquiry by Mr Mabbutt's accountants. In so far as there was a defect in the section 9A notice of enquiry, that defect was plainly within the scope of section 114(1).

84. Mr Gordon submitted that the error in this case was of precisely the kind which Henderson J had in mind in *Pipe v HMRC*. A mistake in the identification of the tax year in a section 9A notice was not a mere error of form; as Henderson J put it, the

letter "might have been misleading" and it therefore fell within the category of a "gross error" and in consequence could not be cured by section 114.

85. Mr Gordon also observed that the Mabbutt letter informed Mr Mabbutt that HMRC were not enquiring into his whole return. There was no statutory justification for the concept of a limited enquiry into a self-assessment tax return and this was a further reason for concluding that the purported notice was not in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts.

86. Mr Gordon also argued that his submissions were consistent with other authorities on errors made by officials carrying out their statutory functions. He referred, in particular, to *R (Barnet LBC) v Traffic Adjudicator* [2007] RTR 14 ("*Barnet LBC*") where Jackson J noted at [38] in relation to parking penalty charge notices that the statutory requirements were clear and simple and that compliance was not difficult. In that case Jackson J observed, at [39]:

> "There must always be certainty about the date when the notice was issued and the dates when the various periods for payment will expire."

87. At [40] he concluded that the penalty charge notices' deficiencies meant that they did not substantially comply with the statute. We interpose that Mr Nawbatt's response was that in that case the time limits were critical because they affected the amount of the penalty which would be charged. The case was similar to *Sokoya*, and was to be distinguished for the same reason.

88. Finally, Mr Gordon submitted, by way of cross-appeal, that in order for the section 114(1) to be engaged there was a requirement that the impugned document must "purport to be made in pursuance of any provision of the Taxes Acts." The absence of such a statement prevented any defect in the notice being remedied under section 114(1). The letters of 17 January 2011 made no reference to the Taxes Acts and therefore the letters did not "purport" to be pursuant to the Taxes Acts. Consequently, Mr Gordon submitted that the FTT's decision at Decision [27], that the officer was professing to open an enquiry into the return for the (non-existent) return for the year ended 6 April 2009 and that the notice therefore purported to be made pursuant to a provision of the Taxes Acts, was an error of law.

(b) Discussion

89. In our view, if the mistaken reference to the "year ended 6 April 2009" in the Mabbutt letter vitiated the letter for the purposes of section 9A, the defect could be cured under section 114(1) TMA.

90. First, the disputed notice informed, or purported to inform, Mr Mabbutt that HMRC intended to enquire into his tax return. Leaving aside the mistaken date, the words used in the Mabbutt letter are clearly intended to refer to the authority conferred on an HMRC officer under section 9A(1). That subsection requires the officer to give notice of his intention to open an enquiry; it does not require him to give reasons or to refer expressly to the statutory provision on which he relies. In any event, the Dickinsons letter expressly referred to section 9A TMA and, having

concluded that the Dickinsons letter formed part of the notice of enquiry, we consider that there is nothing in this point. We therefore reject the cross-appeal put forward on behalf Mr Mabbutt and consider that the FTT reached the correct conclusion (at Decision [27]) on this point.

91. Second, the error was, in our view, manifestly a minor clerical error which, as we have explained, could have left a reasonable recipient taxpayer in no doubt as to what was intended. The error was not, therefore, "gross" or "misleading" to use Henderson J's terminology in *Pipe*. Thus, in the circumstances of this case, the mistake was not of a magnitude that took the Mabbutt letter outside the scope of section 114(1) TMA. For the same reason, the Mabbutt letter was, in our judgment, "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts."

92. In reaching this conclusion, we note that Megarry J in *Fleming v London Produce Co Ltd* [1968] 2 All ER 975 at 987 and Brightman J in *Hoare Trustees v Gardner (Inspector of Taxes); Hart (Inspector of Taxes) v Briscoe and others* [1978] STC 89 at 99 attached importance, in applying section 114(1) TMA to mistakes, to the fact that those mistakes would not have caused the taxpayer to have been deceived or misled. As we have said, in our judgment, no reasonable taxpayer could have been deceived or misled by the mistaken reference to the "year ended 6 April 2009" rather than the year ended 5 April 2009.

93. Accordingly, we consider that the FTT erred in law in concluding at [37] that the Mabbutt letter was not in substance and effect in conformity with the intent and meaning of the Taxes Acts.

Conclusion

94. For the reasons given above, we have concluded:

(1) that the Dickinsons letter formed part of the notice of enquiry;

(2) the mistaken reference to the "year ended 6 April 2009" did not, in the circumstances, render the notice of enquiry invalid; but if we are mistaken in that conclusion,

(3) the Mabbutt letter was "in substance and effect in conformity with the intent and meaning of the Taxes Acts"; and

(4) the error was such that section 114(1) TMA would have applied to cure the defect.

95. Accordingly, HMRC's appeal is allowed and Mr Mabbutt's cross-appeal is dismissed.

96. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

COLIN BISHOPP

GUY BRANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 02 AUGUST 2017