[2020] UKUT 0061 (TCC)

Appeal ref: UT/2018/0075-76
UTJR/2018/002

INCOME TAX, JUDICIAL REVIEW – Whether adjustments made under s28B(4) of Taxes Management Act 1970 are "closure notices" – whether requirements necessary for issue of accelerated payment notices met – whether HMRC entitled to issue a new accelerated payment notice having withdrawn an earlier notice

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE QUEEN **on the application of** **(1) MARK REID** **(2) SIMON EMBLIN**	**Claimants**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Defendants**
(1) MARK REID **(2) SIMON EMBLIN**	**Appellants**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL **MR JUSTICE NUGEE**
JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 20 and 21 January 2020

Michael Sherry and Ximena Montes Manzano, instructed by Reynolds Porter Chamberlain LLP, for the Claimants and Appellants

Aparna Nathan QC and Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Defendants and Respondents

DECISION

1. Dr Emblin and Mr Reid are appealing against a decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 25 April 2018 (the "Decision") reported as *Mark Reid and Simon Emblin v HMRC* [2018] UKFTT 236 (TC). They are also seeking permission to challenge, by way of judicial review, closure notices and accelerated payment notices ("APNs") that HMRC have issued. We will refer to Dr Emblin and Mr Reid, in all of their capacities, as the "Appellants".

2. The Appellants' claims for judicial review were joined and transferred to the Upper Tribunal by order of Holgate J on 11 October 2018. Judge Berner refused permission to apply for judicial review on the papers in a decision released on 16 November 2018. When the Appellants applied for an oral reconsideration, this Tribunal directed that there should be a "rolled-up" hearing to determine (i) the appeal against the Decision, (ii) the renewed oral application for permission to apply for judicial review and (iii) (if permission is granted) the judicial review application itself.

3. The Appellants both submitted witness statements in connection with the judicial review claim. Peter Massey and Wendy Lee, both HMRC officers, submitted witness statements as well. No witness was cross-examined.

The relevant factual background

4. Since the arguments before us and the parties' respective positions have clearly evolved significantly since the hearing before the FTT, we will set out our own summary of the background (focused on the position relevant to the issues now in dispute). We intend no discourtesy to the FTT in not referring in detail to its decision.

5. In the 2004-05 tax year, the Appellants both entered into two tax avoidance schemes, both intended to generate relievable losses. The first scheme (the "Film Scheme") involved them being members of Future Screen Partners No 1 LLP (the "LLP"). The other scheme (the "Corbiere Scheme") involved them entering into transactions in gilt-edged securities. It is now common ground that neither the Film Scheme nor the Corbiere Scheme actually produced any relievable tax loss.

The various returns submitted and HMRC's enquiries into them

6. The partnership tax return for 2004-05 that the LLP filed under s12AA of the Taxes Management Act 1970 ("TMA") indicated that the LLP had made an aggregate loss for that tax year. That partnership tax return included a partnership statement (as required by s12AB of TMA) allocating that loss among members of the LLP.

7. On 24 January 2006, Dr Emblin filed his tax return for 2004-05. In that tax return, he gave details of his share of the aggregate loss of the LLP (which corresponded to the share allocated in the LLP's partnership tax return referred to above). He also claimed a deduction for manufactured interest arising from his participation in the Corbiere Scheme.

8. On 31 January 2006, Mr Reid filed his tax return for 2004-05. Like Dr Emblin, he claimed a tax deduction for manufactured interest paid in connection with the Corbiere Scheme. He also gave details of his aggregate share of the losses recorded in the LLP's partnership tax return for 2004-05.

9. On 7 September 2006, HMRC gave notice to the LLP under s12AC of TMA that they were enquiring into its partnership tax return for 2004-05. By virtue of s12AC(6) of TMA, HMRC's giving of a notice of enquiry to the LLP was deemed to include the giving of a notice of enquiry into the Appellants' respective individual tax returns. The parties are not agreed on the precise effect of this "deemed notice of enquiry".

10. On 25 September 2006, HMRC gave notice to Mr Reid that they were enquiring into his personal return for 2004-05. In their letter, HMRC indicated that they were not satisfied that he was entitled to the relief claimed in relation to the Corbiere Scheme. (HMRC say that this was a notice of enquiry under s9A of TMA, but Mr Reid disputes this).

11. On 10 January 2007, HMRC gave a similar notice to Dr Emblin, whose effect is also disputed, stating that they were enquiring into his personal return for 2004-05.

12. On 14 January 2013, HMRC issued a notice to the LLP setting out the conclusions of their enquiries into the LLP's partnership tax return for 2004-05. The parties were agreed that this document was a "closure notice" for the purposes of s28B(1) of TMA. The key conclusion set out in this document was that HMRC were reducing the aggregate losses that the LLP had included in its partnership return from £71,200,972 to nil.

13. On 3 April 2014, HMRC wrote to Mr Reid. Their letter explained that HMRC had now completed their enquiries into the LLP's partnership return for, among other years, 2004-05 and that, having amended the partnership return, HMRC "will be amending your own return/claim to reflect this". The amendment to Mr Reid's return for 2004-05 was expressed as follows:

> **2004/05**
>
> Your share of partnership losses before my enquiry was £1,451,690.00
>
> My amendment results in a £1,451,690.00 decrease in losses.
>
> Your amended share of partnership losses is £0.00

14. Although HMRC's letter to Mr Reid was expressed in the future tense, advising him that his return "will be" amended, HMRC sent Mr Reid no other letter seeking to reduce his share of the LLP's losses. Both parties, therefore, proceeded on the basis that the letter of 3 April 2014 notified Mr Reid, under s28B(4) of TMA, of <u>actual</u> adjustments to his return for 2004-05. Central to this dispute is Mr Reid's argument (and HMRC's denial) that the letter of 3 April 2014 was a "closure notice" for the purposes of s28A(1) of TMA that had the effect of closing the totality of HMRC's enquiries into Mr Reid's tax return for 2004-05.

15. On 8 April 2014, HMRC sent a similar letter to Dr Emblin. The parties are similarly agreed that this letter validly effected adjustments to Mr Reid's tax return for 2004-05 pursuant to s28B(4) of TMA. They do not agree, however, whether it was a "closure notice" for the purposes of s28A(1) of TMA. In the rest of this decision, we will refer to the letters of 3 April 2014 and 8 April 2014 to Mr Reid and Dr Emblin respectively as the "s28B(4) Letters".

16. On 24 April 2014, HMRC sent a letter to Mr Reid. In that letter, the writer said:

> I have now completed my check of your Self Assessment tax return for [2004-05]. This letter is a closure notice issued under Section 28A(1) & (2) Taxes Management Act 1970.

In this letter, HMRC informed Mr Reid that they were disallowing the losses which he said he had incurred as a consequence of his participation in the Corbiere Scheme so as to increase his liability to tax in 2004-05 by £1,447,400.95. HMRC maintain that this letter was an effective closure notice under s28A(1) which validly made adjustments to Mr Reid's tax return for 2004-05. Mr Reid denies this and asserts that the letter was of no effect.

17. On 30 April 2014, HMRC wrote to Mr Reid saying that the reasons given for the conclusions in their letter of 24 April 2014 were incorrectly worded. They enclosed a revised version of that letter (also dated 30 April 2014). Neither party suggested that the revised letter has any material bearing on this appeal.

18. On 30 April 2014, HMRC wrote to Dr Emblin in terms similar to those set out at [16]. That letter was expressed to be a closure notice under s28A(1) of TMA and set out adjustments to Dr Emblin's return for 2004-05 (increasing the amount of tax due because of HMRC's conclusion that Dr Emblin was not entitled to relief for losses said to have arisen as a consequence of the Corbiere Scheme). Like Mr Reid, Dr Emblin denies that this letter was a closure notice and so denies that it effected any amendments to his return for 2004-05. We will refer to HMRC's letters of 24 April and 30 April 2014 together as the "Disputed Closure Notices".

19. The Appellants appealed against the Disputed Closure Notices (while maintaining these documents were not closure notices at all). In due course, those appeals were notified to the FTT and, in the Decision, the FTT dismissed both Appellants' appeals.

The follower notices and accelerated payment notices in respect of the Corbiere Scheme

20. The Corbiere Scheme was a tax avoidance scheme that constituted "DOTAS arrangements" for the purposes of s219(5) of Finance Act 2014 ("FA 2014"). HMRC have issued both Appellants with "follower notices" and "accelerated payment notices" relating to the Corbiere Scheme pursuant to the scheme set out in Part 4 of FA 2014. We will not set out the detail of all such notices but will confine attention to those notices that are relevant to the judicial review application.

21. On 9 December 2015, HMRC issued an accelerated payment notice ("APN") to Dr Emblin. That notice was given in respect of Dr Emblin's participation in the Corbiere Scheme. The APN required Dr Emblin to make an accelerated payment of £1,383,000.70 being the "disputed tax" that HMRC considered to arise as a consequence of his use of that scheme.

22. On 5 January 2016, Dr Emblin made representations to HMRC objecting to the issue of his APN. In those representations, Dr Emblin made the point that HMRC could only validly issue an APN if "Condition B" in s219 of FA 2014 was satisfied. That required that Dr Emblin was appealing against HMRC's closure notice "on the basis that a particular tax advantage… results from [the Corbiere Scheme]". Dr Emblin maintained that this condition was not met since his appeal against the closure notice was not made on the basis that the Corbiere Scheme produced any tax advantage, but rather was on the basis that HMRC had not validly amended his return for 2004-05 so as to deny him the benefit of the losses he had claimed.

23. HMRC initially accepted Dr Emblin's representations. On 18 February 2016, an HMRC review officer wrote to Dr Emblin to advise him that his APN was cancelled because "I am not satisfied that Condition B is met". However, in HMRC's Summary Grounds of Response to a joint claim for judicial review brought by both Appellants, served on 29 April 2016, HMRC's solicitors indicated that HMRC were "considering the circumstances" in which Dr Emblin's APN had been withdrawn and whether it should be reissued.

24. On 30 March 2017, a member of HMRC's Accelerated Payments team wrote to Dr Emblin to say that:

> HMRC has reviewed the position and considers that the [APN] originally issued [was] valid because all of the statutory requirements were met and therefore should not have been withdrawn.

HMRC therefore reissued an APN to Dr Emblin on 30 March 2017, requiring an accelerated payment of £1,383,000.70, the same amount as set out in the withdrawn APN.

25. The position with Mr Reid was more straightforward. On 8 December 2015, HMRC issued him with an APN relating to the Corbiere Scheme which was similar to that sent to Dr Emblin (although it required advance payment of a different amount in respect of "disputed tax"). Mr Reid made representations similar to those of Dr Emblin but his representations were not accepted, and so Mr Reid's APN was never withdrawn.

The issues arising in these proceedings

26. Much of the proceedings before the FTT, and a good proportion of the oral argument before us, were concerned with the mechanics of the Appellants' claims to carry losses arising from the Film Scheme back against profits of 2003-04 and an associated detailed analysis of the decisions of the Supreme Court in *HMRC v Cotter* [2013] UKSC 69 and *De Silva v HMRC* [2017] UKSC 74. However, during the hearing before us, the issues between the parties narrowed.

27. In their statutory appeals, the Appellants argue that the FTT was wrong to dismiss their appeals against the Disputed Closure Notices. The essence of their argument is that there was only ever a single enquiry into their individual tax returns for 2004-05 that was closed by issue of the s28B(4) Letters. By the time the Disputed Closure Notices were issued, the single enquiry into their returns had been closed and therefore the Disputed Closure Notices were of no effect. Since this argument has, at its heart, the proposition that the s28B(4) Letters were closure notices for the purposes of s28A(1) of TMA, we will refer to this as the "Section 28B(4) Issue".

28. The following issues arise for determination in relation to the Appellants' claims for judicial review:

> (1) The Appellants recognise that their arguments on the Section 28B(4) Issue rely on the proposition that the Disputed Closure Notices were not closure notices. However, the very statutory right of appeal that they were seeking to exercise before the FTT was, under s31(1) of TMA, against conclusions stated, or amendments made by closure notices. Therefore, in case they had no power to make their arguments that the relevant decisions were not closure notices in their statutory appeals, the Appellants repeat their arguments on the Section 28B Issue in their application for judicial review and ask us to determine that the Disputed Closure Notices were invalid and unlawful.
>
> (2) Both Appellants seek a direction quashing their APNs on the grounds that, since Condition B set out in s219(2) of FA 2014 was not satisfied, those APNs were not lawfully issued. We refer to this as the "Condition B Issue".
>
> (3) Both Appellants similarly seek a direction quashing their APNs on the ground that Condition A set out in s219(2) was not met (the "Condition A Issue").
>
> (4) Both Appellants seek a direction quashing their APNs on the ground that HMRC failed to meet the threshold set out in *R (oao Rowe and others) v HMRC* [2017] EWCA Civ 2105 of being "positively satisfied" that the Appellants' statutory appeals would fail. We refer to this as the "*Rowe* Issue".
>
> (5) Dr Emblin also makes a specific complaint about HMRC's decision to reissue his APN having initially decided, following his representations, that it should be cancelled. He argues first that this decision was *ultra vires* on the basis that HMRC lack power to re-issue an APN once they have withdrawn it in response to a taxpayer's representations (the "Ultra Vires Issue"). Alternatively, he argues that HMRC's conduct was so conspicuously unfair as to be unlawful (the "Unfairness Issue").

PART I – THE STATUTORY APPEAL

Relevant statutory provisions

29. In this section, we quote statutory provisions as in force at times material to this appeal unless we say otherwise.

30. It is common ground that the LLP fell to be treated for income tax purposes as if it were a partnership. Accordingly, it was "transparent" for income tax purposes and not itself subject to income tax or corporation tax. Rather, members of the LLP who are individuals are liable to income tax (or obtain relief from income tax) in respect of their proportionate share of the LLP's profits or losses.

31. Even though the LLP is not itself subject to income tax or corporation tax s12AA of TMA required the LLP to submit a "partnership tax return" whose function was to enable HMRC to determine the likely liability of individual members of the LLP. The relevant requirement is imposed by s12AA(2) of TMA as follows:

> **12AA Partnership return**
>
> (1) Where a trade, profession or business is carried on by two or more persons in partnership, for the purpose of facilitating the establishment of the following amounts, namely—
>
> (a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner…
>
> an officer of the Board may act under subsection (2) or (3) below (or both).
>
> …
>
> (2) An officer of the Board may by a notice given to the partners require such person as is identified in accordance with rules given with the notice or a successor of his—
>
> (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

32. By s12AB of TMA, together with its partnership return, the LLP was obliged to provide a "partnership statement" that set out a list of each member of the LLP in the relevant tax year, together with each such member's share of any profit or loss that the LLP made in that period.

33. The LLP's delivery of a partnership tax return did not excuse individual members of that LLP from their normal obligations to deliver tax returns under s8 of TMA of 1970 (which we refer to as "individual tax returns" to distinguish them from the partnership tax return). The Appellants were required, to set out, in their individual tax returns, their share of the LLP's losses as set out in the LLP's partnership statement.

34. Section 9A of TMA gives HMRC the power to enquire into individual tax returns as follows:

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act 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, up to the end of the period of twelve months after the filing date;

…

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

(4) An enquiry extends to—

(a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return,

…

but this is subject to the following limitation [which is not relevant in the context of this appeal and is not reproduced].

35. When HMRC have concluded an enquiry opened under s9A, s28A of TMA provides for them to issue a "closure notice". The relevant provisions applicable to such closure notices are as follows:

28A Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

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

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

(4) The taxpayer may apply to the Commissioners for a direction requiring an officer of the Board to issue a closure notice within a specified period.

36. Running in parallel with provisions dealing with the opening and closing of enquiries into individual returns are provisions dealing with enquiries into partnership

tax returns. Section 12AC permits HMRC to open an enquiry into a partnership tax return as follows:

> **12AC Notice of enquiry**
>
> (1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed.
>
> (2) The time allowed is—
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;
>
> …
>
> (4) An enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return, subject to the following limitation.
>
> …
>
> (6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry—
>
> (a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return, or
>
> …

37. Thus, importantly for the purposes of this appeal, where an enquiry is opened into a partnership tax return, s12AC(6) provides for what the parties described as a "deemed enquiry" (under s9A) into the individual tax returns of all partners in that partnership.

38. Section 28B of TMA sets out how enquiries into a partnership tax return are to be closed as follows:

> **28B Completion of enquiry into partnership return**
>
> (1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend—

(a) the partner's return under section 8 or 8A of this Act, or

…

so as to give effect to the amendments of the partnership return.

(5) The taxpayer may apply to the Commissioners for a direction requiring an officer of the Board to issue a closure notice within a specified period.

Jurisdiction

39. The Appellants' essential argument in their appeals against the Decision is that the s28B(4) Letters were closure notices for the purposes of s28A(1) of TMA. Therefore, they submit that the Disputed Closure Notices which were issued after the s28B(4) Letters, against which they notified appeals to the FTT, were not closure notices (having been issued after HMRC's enquiries were closed) and that the FTT erred in law in finding, at [56] of the Decision, that these documents were closure notices.

40. There is a possible anomaly in this approach. The Appellants' right of appeal set out in s31 of TMA arises in respect of "closure notices" and extends to amendments made, or conclusions expressed, in such closure notices. Yet, in exercising that statutory right of appeal, the Appellants seek to deny that the documents they received were closure notices at all. We therefore quite understand why the Appellants sought to cover all avenues by seeking to challenge the closure notices in judicial review proceedings as well as in their appeals to the FTT. The question for us is whether we should deal with the Appellants' arguments on the "invalidity" of the averred closure notices in considering the appeal against the Decision, or in the judicial review proceedings. For reasons that follow, we consider that the points should be dealt with by way of appeal against the Decision.

41. The FTT clearly concluded that it had jurisdiction to consider whether the notices against which the Appellants were purporting to appeal were valid closure notices or not. It referred, at [40] of the Decision, to the Appellants' argument that these notices were not closure notices. At [66(8)] of the Decision, the FTT rejected that argument, concluding that the notices were closure notices. All parties were content for the FTT to determine that issue. The Appellants consider that the decision of the Upper Tribunal in *Spring Salmon and Seafood Ltd v HMRC* [2016] UKUT 205 (TCC) demonstrates that the FTT had jurisdiction. HMRC preferred to rely on the decision of the High Court in *R (oao Archer) v HMRC* [2017] EWHC 296 (Admin).

42. Of course, the fact that the parties were agreed that the FTT had jurisdiction was not conclusive in proceedings before the FTT. The FTT's jurisdiction derives from statute and cannot be conferred by consent. However, our jurisdiction is to hear appeals against decisions of the FTT on a point of law. In circumstances where neither party seeks to appeal against the Decision on the basis that the FTT erred in law by assuming jurisdiction, we should approach this appeal, as both parties request, by considering the

correctness or otherwise of the FTT's conclusions on the s28B(4) Letters and the Disputed Closure Notices.

The Section 28B(4) Issue – Discussion

The parties' arguments

43. The Appellants present their core submission, that a notice under s28B(4) of TMA is a "closure notice", as following naturally from the scheme of the legislation as a whole. They submit that the overall scheme can be understood as follows:

> (1) If HMRC open an enquiry under s12AC(1) into a partnership tax return, the "deemed enquiry" opened by operation of s12AC(6) is into all aspects of the partners' individual tax returns. There is no justification for treating that deemed enquiry as extending only to matters arising from the partners' involvement in the partnership. The legislation in force at the time does not envisage any such partial enquiries (and at times relevant to the appeals, legislation permitting "partial closure notices" was not in force).
>
> (2) Section 9A(3) prevents there being more than one enquiry into an individual tax return and the restriction in s9A(3) applies to deemed enquiries resulting from an operation of s12AC(6) just as it applies to actual enquiries opened under s9A. Therefore, if HMRC have already opened and not yet closed an actual enquiry under s9A into a partner's return by the time they open an enquiry into the corresponding partnership return, s9A(3) does prevent a new deemed enquiry from arising under s12AC(6). However, no great injustice is caused by this: the extant actual s9A enquiry entitles HMRC to enquire into the totality of the individual return and HMRC do not therefore need a separate s12AC(6) deemed enquiry. Similarly, if HMRC open an enquiry into a partnership return, thereby opening deemed enquiries under s12AC(6) into the partners' individual tax returns, the deemed enquiry entitles HMRC to enquire into the totality of the individual returns. HMRC are not, therefore, disadvantaged by s9A(3) preventing them from opening actual enquiries into those returns. (Mr Sherry did accept, however, that the consequence of his approach is that if HMRC open an actual s9A enquiry into a taxpayer's return, to deal with a self-contained issue not related to participation in a partnership and close their enquiry in short order as it is easily resolved, they would not subsequently be able to rely on s12AC(6) as opening a deemed enquiry. However, he submitted that this would probably be rare in practice and, in any event, is simply an aspect of the overall scheme of the legislation that provides for finality once enquiries are closed).
>
> (3) The legislation envisages a harmonious and orderly sequence in which HMRC open enquiries, those enquiries are closed by means of a closure notice with the issue of the closure notice generating a right of appeal under s31 of TMA. The purpose of that orderly sequence is to produce both finality and certainty. The sequence would be disrupted if it permitted enquiries to be opened which are never closed, or if it permitted enquiries to be closed

without the issue of a closure notice as, without a closure notice, there is no right of appeal to the FTT under s31 of TMA.

(4) The conclusion that a notice under s28B(4) of TMA is not a closure notice would involve a disruption of the harmonious sequence outlined at [(3)]. Where a taxpayer is a member of a partnership, HMRC's only concerns about the taxpayer's return might be limited to the amount of profit made by the partnership and the taxpayer's share of that profit. In such a case, HMRC might enquire into the partnership return so triggering a deemed enquiry under s12AC(6). The closing of the enquiry under s28B(1) into the partnership return would trigger HMRC's obligations under s28B(4) to amend the taxpayer's individual return. If the adjustments under s28B(4) were simply "free-standing" and were not made by "closure notice" then the deemed s12AC(6) enquiry would potentially never be closed and the making of the adjustments would not crystallise any appeal rights under s31.

(5) It follows from the above that HMRC's single enquiry into the Appellants' individual returns was closed by issue of the 28B(4) Letters. The Disputed Closure Notices were issued later and could not have closed enquiries that had already been closed. The Disputed Closure Notices, therefore, were not closure notices and were of no effect.

44. HMRC's core argument on the Section 28B(4) Issue is that Parliament has taken care in the relevant provisions of TMA to spell out which notices are "closure notices" and which are not. Notices under s28B(4) are not closure notices because they are not identified as such. A notice under s28B(4) is not linked to either an actual enquiry into an individual's return under s9A or a deemed enquiry into an individual's return under s12AC(6). There is no reason, therefore, why a s28B(4) notice should be regarded as closing either an actual or a deemed enquiry into a partner's individual return. Rather, s28B(4) requires an HMRC officer to make free-standing adjustments on completion of the enquiry into the partnership tax return.

45. HMRC deny that their interpretation of s28B(4) produces any significant anomalies. They accept that, on their interpretation of s28B(4), there is no right of appeal to the FTT against adjustments made in s28B(4) notices. However, they argue that no such right of appeal is necessary since s28B(4) notices simply make adjustments consequent on amendments to the corresponding partnership return against which the partnership has a full right of appeal to the FTT. HMRC acknowledge that the implication of their approach is that deemed enquiries under s12AC might technically remain open after a 28B(4) notice is issued (for example if HMRC make adjustments under s28B(4) which deal with all the concerns they have about the individual return and therefore overlook the need to send a closure notice as well). However, it is always open to a taxpayer to request a closure notice.

46. As well as making that argument, HMRC also presented their own competing articulation of the interaction between actual and deemed enquiries as follows:

(1) Section 9A(3) does not prevent a "deemed enquiry" under s12AC(6) from being opened at a time when an "actual enquiry" under s9A is open.

> The restriction in s9A(3) applies only to prevent multiple actual enquiries under s9A.
>
> (2) A deemed enquiry under s12AC(6), however, has a limited scope which limits the practical significance of actual and deemed enquiries being permitted to carry on at the same time. The deemed enquiry under s12AC(6) is, HMRC submit, limited to what Ms Nathan QC referred to as "penumbral matters" relating to a taxpayer's participation in the partnership whose corresponding partnership return is the subject of an enquiry under s12AC(1).

Conclusion on the Section 28B(4) Issue

47. We understand why the Appellants sought to present an overall theory as to how the statutory provisions work which includes the scope of the "deemed enquiry" under s12AC(6). Since the legislation does not state expressly that a notice under s28B(4) is a closure notice, the Appellants seek to demonstrate that this is the implicit effect of the provisions read together and to make that argument they present an overall theory as to the scheme of the legislation. Since the Appellants put their argument in this way, it was understandable for HMRC to present their own theory as to the scope of the deemed enquiry under s12AC(6) and the implication of the restriction on multiple enquiries in s9A(3).

48. However, it seems to us, and we understood both parties to agree, that we do not actually need to decide whether a deemed enquiry under s12AC(6) is into the totality of the individual return as the Appellants argue, or only into penumbral matters, as HMRC argue. That is because the Appellants' appeal can succeed only if, as they argue, the 28B(4) Letters were closure notices. If those notices were not closure notices then whether HMRC are correct (and multiple enquiries were opened) or the Appellants are correct (and there was only ever a single "deemed enquiry" into all of their returns) does not matter since, on any view the Disputed Closure Notices would have closed an enquiry and made adjustments to the Appellants' returns for 2004-05. We will, therefore, limit our decision to the issue we need to decide, namely whether the s28B(4) Letters were closure notices. For reasons that follow, we broadly accept HMRC's arguments set out at [44] and [45] above and conclude that they were not.

49. First, we agree with HMRC that it is significant that Parliament has, in s28A(1) and s28B(1) of TMA explicitly labelled documents issued under those sections as "closure notices". The absence of any such label in s28B(4) gives rise to a clear inference that documents issued under that provision are not closure notices. Nor is the point one of pure labelling. "Closure notices" issued under s28A(1) and s28B(1) are required to leave the recipient in no doubt as to their status since they must inform the taxpayer or partnership that the enquiries have ended and state HMRC's conclusions. By contrast, a s28B(4) notice is required only to "make amendments" to an individual tax return. While it is conceptually possible that Parliament intended notices under s28B(4) to be closure notices by implication, given the close articulation of the statutory code, there would need to be strong support for such an implication.

50. The Appellants argue that there is such an implication: notices under s28B(4) must be closure notices as otherwise taxpayers would have no right of appeal against them. However, we see no compelling reason on the face of the statutory provisions why Parliament should have presumed taxpayers to have a separate right of appeal against s28B(4) notices. The function of those adjustments is simply to carry over, into individual returns, the consequences of adjustments that HMRC have made when closing their enquiries into the corresponding partnership tax return. The partnership itself has full rights of appeal against amendments made, or conclusions expressed, in the partnership return closure notice. If individual partners also had full rights of appeal against the consequences of those amendments there would be obvious anomalies. For example, a partnership could fail in its appeal against adjustments made to the partnership tax return, but individual partners could seek to relitigate the issue by raising, in individual appeals against s28B(4) amendments, the very issues on which the partnership was unsuccessful. The scheme of the legislation seeks to avoid such anomalies by ensuring that any dispute as to matters in the partnership tax return are dealt with at the partnership level (by means of an appeal in respect of the partnership closure notice). The outcome of that dispute is to be reflected in mandatory adjustments to the partners' individual tax returns under s28B(4) that are not subject to a separate right of appeal to the FTT.

51. Nevertheless, we accept Mr Sherry's submission that the absence of a right to appeal against a s28B(4) notice has the capacity to produce anomalies in some situations. For example, if HMRC make a simple transcription error in a s28B(4) adjustment and therefore, as a matter of arithmetic, fail to reflect properly the outcome of the partnership closure notice in an individual tax return it is, perhaps, surprising that a taxpayer should be put to the expense of instituting judicial review proceedings to deal with a comparatively straightforward dispute. Similarly, if a particular partnership agreement is unclear, so it is not straightforward to determine how profits and losses are allocated as between partners, there will be a similar lack of clarity as to how adjustments made to the partnership return in the partnership closure notice should be reflected in s28B(4) adjustments. It is perhaps surprising that disputes of this kind cannot be aired in an appeal to the FTT but would have to be dealt with by judicial review. However, we regard these anomalies as simply the result of the scheme that Parliament has chosen to implement. They do not displace the clear implication, apparent on the face of the statutory provisions, that s28B(4) notices are not closure notices.

52. We saw less force in Mr Sherry's submission that, if s28B(4) adjustments are not closure notices that bring to an end deemed s12AC enquiries, it is possible that such enquiries could remain open indefinitely. We accept that it is possible that, having made adjustments under s28B(4), HMRC might consider their task to be complete and either forget, or neglect, to issue a closure notice closing their enquiry into the individual tax return. However, the fact that HMRC might be forgetful in particular cases does not inform the construction of the statutory code that Parliament has enacted. As Ms Nathan QC submitted, taxpayers can always apply for closure notices if HMRC have been forgetful.

53. Finally, we will address briefly a slightly different way in which Mr Sherry sought to put the Appellants' case on the Section 28B(4) Issue. Mr Sherry submitted that s28B(4) could be read as an instruction to HMRC officers to make adjustments to individual returns by issuing a closure notice in respect of the deemed enquiry. On that formulation of the argument, a notice under s28B(4) would not necessarily be treated as a closure notice. Rather, if an officer purported to make adjustments to an individual return following closure of the partnership enquiry, the purported adjustments would be of no effect unless set out in a document answering to the description of a closure notice.

54. We do not accept that submission. For reasons that we have given above, the scheme of the legislation envisages that adjustments under s28B(4) are free-standing adjustments that are consequent on completion of the enquiry into the partnership tax return. They are not themselves closure notices and are not required to be completed by the issue of closure notices.

55. In addition, s59B of TMA provides a clear indication that notices under s28B(4) do not need to take the form of closure notices. Section 59B specifies due dates for the payment of tax in the following terms:

> (5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—
>
> > (a) section … 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or
> >
> > (b) section ... 28B(4)(a)…(amendment of partner's return to give effect to amendment or correction of partnership return),
>
> is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act.

56. Section 59B demonstrates that the very issue of a s28B(4) amendment results in tax becoming due and payable and that, accordingly, s28B(4) is not simply an instruction to HMRC officers to issue future closure notices. In addition, s59B envisages that a notice under s28B(4) is something different from a closure notice as otherwise there would be no need to refer to s28B(4)(a) adjustments in s59B(5)(b) as those adjustments would already be dealt with in the reference to s28A closure notices in s59B(5)(a).

57. Our overall conclusion is that the s28B(4) Letters were not closure notices. We note that the FTT (Judge Mosedale) reached a similar conclusion in *Gibbs v HMRC* [2013] UKFTT 236 (TC) and we endorse both the reasoning and conclusion of that decision. It follows from our decision that the Disputed Closure Notices were closure notices and the Appellants' appeal against the Decision is dismissed.

PART II – THE APPLICATION FOR JUDICIAL REVIEW

Relevant statutory provisions

58. HMRC's power to issue APNs is derived from s219 of FA 2014 which provides, so far as material, as follows:

219 Circumstances in which an accelerated payment notice may be given

(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.

(2) Condition A is that—

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or

(b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—

(i) determined by the tribunal or court to which it is addressed, or

(ii) abandoned or otherwise disposed of

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").

(4) Condition C is that one or more of the following requirements are met—

…

(b) the chosen arrangements are DOTAS arrangements;

59. As can be seen from s219(2), HMRC can issue an APN either while a tax enquiry is "in progress" (s219(2)(a)) or after the taxpayer has made a tax appeal (s219(2)(b)). In these proceedings, both parties agreed that the lawfulness or otherwise of the APNs falls to be determined solely by reference to s219(2)(b) (i.e. on the basis that they were issued after the Appellants made a "tax appeal").

60. By s218 of FA 2014, when read together with s201(2) a "tax advantage" (a defined term used in the formulation of Condition B) includes a "relief or increased relief from tax" and it was common ground that the losses that the Appellants claimed in connection with the Corbiere Scheme were "reliefs" (even though the Appellants now accept that the Corbiere Scheme was not effective).

61. Section 221 of FA 2014 specifies the content of an APN such as that issued to the Appellants. Materially for the purposes of these proceedings, the APN must specify the amount of the "disputed tax". That amount is defined in s221(3) of FA 2014 as:

so much of the amount of the charge to tax arising in consequence of –

(a) the amendment or assessment to tax appealed against, or

(b) where the appeal is against a conclusion stated by a closure notice, that conclusion

as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage…

62. The "denied advantage" which drives the calculation of the "disputed tax" is, applying s221(4) and s220(5)(b) of FA 2014:

> …so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise

63. We will discuss the various definitions in more detail when we consider the Condition B Issue and the *Rowe* Issue. At this stage, we will simply observe that the concept of an "asserted advantage" which is used in the determination of the "denied advantage" is defined in Condition B in s219(3).

The Appellants' claim for judicial review - Discussion

The validity of the Disputed Closure Notices

64. We have already determined, in the appeal against the Decision, that the Disputed Closure Notices were valid closure notices under s28A of TMA. We formally refuse the Appellants permission to bring judicial review proceedings that seek to argue the contrary.

The Condition B Issue

65. The Appellants' argument on the Condition B Issue is that made successfully in Dr Emblin's initial representations referred to at [22]. In essence, the Appellants argue that, since their statutory appeals revolved around their arguments on the Section 28B(4) Issue and that they now accept that the Corbiere Scheme failed to produce any tax advantage, those appeals were not made "on the basis that … a particular tax advantage … results from particular arrangements".

66. Mr Sherry accepted that the Appellants had made appeals on the basis that they were seeking "tax advantages" within the meaning of s201(2) of FA 2014. He was right to make that concession. In their tax returns for 2004-05, the Appellants were asserting that they were entitled to reliefs from tax, namely the losses claimed in connection with the Corbiere Scheme, that fell within the definition of "tax advantages". When HMRC sought to deny those reliefs, the Appellants appealed on the basis that they were entitled to retain the benefit of them. On any view, therefore, the Appellants made their appeals "on the basis" that they were entitled to "particular tax advantages".

67. Therefore, the essential question is whether tax advantages whose benefit the Appellants were seeking to retain by making their appeals "resulted from" the Corbiere Scheme. The Appellants' argument is simple. They submit that their appeals are not made on the basis that the Corbiere Scheme was successful. Rather, their argument was that the Disputed Closure Notices were not closure notices and so were ineffective to deny them the benefit of the losses that they had claimed in connection with the Corbiere Scheme. That, they submit, is not the same as appealing on the basis that the losses "resulted from" the Corbiere Scheme.

68. The Appellants argue that their interpretation is supported by the decision of Lewis J in *R (on the application of Broomfield and others) v Revenue and Customs*

Commissioners [2018] EWHC 1966 (Admin). They relied on Lewis J's conclusion, at [61] of that decision, that, in the context of the analogous "Condition B" in s204(3) of FA 2014 relating to follower notices:

> [61] …on a natural reading of s 204(3) of the 2014 Act, an 'appeal is made on the basis' that a particular tax advantage results from particular tax arrangements where it is asserted in the appeal that that advantage arises from those arrangements. …

69. The Appellants also rely on Lewis J's conclusion (at [62]), also in the context of Condition B as applicable to follower notices, that the "particular tax advantage" being referred to in Condition B is not to be interpreted simply as the "end result sought by the taxpayer … that no additional tax is payable".

70. The Appellants also derive support from [76] of *Broomfield*. In that paragraph, when considering the situation of a taxpayer who has received both a follower notice and an APN and takes the requisite corrective action in respect of the follower notice, Lewis J said:

> [76] Similarly, if the taxpayer has taken corrective action and relinquished the denied advantage, the purpose underlying the giving of the follower notice would have been achieved. The taxpayer would no longer be liable to any penalty under the follower notice provisions. He would no longer be maintaining the appeal on the basis that he was entitled to claim the particular advantage. In those circumstances, if the taxpayer had other reasons for maintaining the appeal, he should not normally be required to pay the disputed tax immediately. It would be inconsistent with the specific and limited purpose of an APN given in a follower notice case for the APN to apply and prevent postponement of payment of the income tax until the appeal on the other ground was determined. In those circumstances, the defendants would need to withdraw the APN and any refusal to do so might itself be subject to judicial review.

71. Read in isolation, these passages can be read as providing some tangential support for the Appellants' arguments. However, when the judgment is read as a whole, in the light of the issues that the court was deciding, it is clear that they do not actually support the Appellants' position.

72. In *Broomfield*, the taxpayers had entered into arrangements whereby they provided services through a partnership based in the Isle of Man to companies in the UK. The partnership paid part of its profits to trusts established by the taxpayers. The trusts in turn made payments to the taxpayers in their capacity as beneficiaries in those trusts. The Tribunal had considered similar tax avoidance arrangements in the case of *Huitson v HMRC* [2015] UKFTT 448 (TC) and had concluded that the income received by taxpayers in similar circumstances was taxable and not exempt under the provisions of the UK/Isle of Man tax treaty. The taxpayers in *Broomfield* received a follower notice (referencing the *Huitson* decision) and an accelerated payment notice (referencing the follower notice). In their appeals, the taxpayers sought to argue both (i) that *Huitson* was incorrectly decided and that the payments in question were exempt and (ii) a new

argument, not raised in *Huitson*, that they were employees, who should be treated as having received the payments under deduction of income tax.

73. Therefore, in the passages of *Broomfield* we have quoted, Lewis J was addressing the taxpayers' submissions that (i) because they were raising some arguments in their appeal that had not been raised in *Huitson*, Conditions B and C for the issue of a follower notice set out in s204(3) of FA 2014 were not met, (ii) the follower notice should be set aside and (iii) the APN that depended for its validity on the follower notice should similarly be set aside.

74. In paragraphs [61] and [62] of *Broomfield*, Lewis J was dealing with the taxpayer's submission (i) referred to at [73]. In the course of that submission, the taxpayers in *Broomfield* argued (see [55] of the judgment) that "particular tax advantage" referred to in s204(3) was the "end result" they sought, namely that the payments they received were exempt from tax on one of two bases. From this premise the taxpayers argued that *Huitson* could not determine the validity or otherwise of that "end result", as it did not address their employment income arguments and that, accordingly, HMRC could not lawfully have formed the view that *Huitson* was a "relevant judicial ruling".

75. It follows that, in paragraph [61] of *Broomfield*, Lewis J was not considering Condition B as applicable to APNs in s219(3) of FA 2014. He was considering analogous provisions applicable to follower notices. More fundamentally, even in the context of follower notices, in paragraph [61] he was not considering the situation of a taxpayer who accepts in his or her tax appeal that the underlying scheme fails, but that the relief remains due for technical or procedural reasons. On the contrary, Lewis J was dealing with taxpayers who were arguing not only that their tax avoidance arrangements succeeded, but that there was an additional reason (not considered in *Huitson*) why they succeeded. Since paragraphs [61] and [62] of *Broomfield* are dealing with such different arguments, raised in the context of the follower notice regime rather than the APN regime, it is not possible to read them as supporting the Appellants' case in this appeal.

76. Paragraph [76] of *Broomfield* also needs to be read in context. Lewis J reached the preliminary conclusion (at [62]) that HMRC could lawfully issue a follower notice even though *Huitson* did not address all of the arguments that the taxpayers wished to raise in their appeals. At [64] to [68] of *Broomfield*, Lewis J determined that his preliminary conclusion was consistent with the scheme of the follower notice legislation and that the taxpayers could avoid a penalty under the follower notice regime by taking "corrective action" by disclaiming the argument that *Huitson* was wrongly decided even if they persisted in their employment income arguments. Paragraph [76] of *Broomfield* appears in a section of the decision in which Lewis J considers the implications of his preliminary conclusion on the APN issued on the basis of the follower notice.

77. Paragraph [76], therefore, is a step in Lewis J's conclusion (at [77]) that where an APN is issued in consequence of the issue of a follower notice, his preliminary conclusion at [62] results in the APN and follower notice regimes working "in harmony". In paragraph [76], Lewis J builds on the chain of reasoning set out at [64] to [68] by concluding that, if the taxpayers took "corrective action" under the follower notice regime by disclaiming their arguments that *Huitson* was wrongly decided, the

follower notice would have achieved its end and that, accordingly, any APN issued by reference to that follower notice should be withdrawn. That conclusion, therefore, was dealing specifically with the situation where an APN is issued by reference to a follower notice and the purpose of the follower notice is achieved by the taxpayer abandoning some of the arguments raised, but continuing to assert that the tax advantage is achieved by reference to arguments not considered in the "relevant judicial ruling". We are not concerned in this appeal with an APN that depends for its validity on a follower notice and therefore paragraph [76] of *Broomfield* offers little if any guidance as to how we should determine the Condition B Issue that arises in that appeal.

78. Since *Broomfield* is of no assistance, we have nothing but the words of the statute to guide us. For the reasons that follow, we have reached the conclusion that the Appellants have made their appeal on the basis that a particular tax advantage "resulted from" the Corbiere Scheme.

79. The first and most obvious point is that the Appellants have made their appeal precisely because HMRC are seeking to deny them the benefit of a "tax advantage" that the Appellants claimed on the face of their tax returns for 2004-05. Those tax advantages could not have arisen if the Appellants had not participated in the Corbiere Scheme. The tax advantages therefore arose from the Corbiere Scheme in the sense that they could not have arisen but for that scheme.

80. In our judgment, this "but for" connection is sufficient to satisfy the requirements of Condition B. We see no suggestion that Parliament intended Condition B to be satisfied only where, in his or her grounds of appeal, the taxpayer positively asserts that the underlying tax avoidance scheme was effective. The evident purpose of the FA 2014 regime applicable to APNs is not to regulate the arguments that taxpayers choose to make in connection with their tax avoidance schemes but rather, as Arden LJ (as she then was) said in paragraph [1] of *Rowe*:

> to change the financial benefit of tax avoidance arrangements by ending the economic benefit to taxpayers of retaining an amount equal to the disputed tax until the issue is finally determined against them (if the arrangements are ultimately held to be ineffective)

Given that purpose, we see no reason why a taxpayer who asserts that his or her scheme "works" as a technical matter should be in a different position from a taxpayer who makes the procedural argument that, irrespective of whether the scheme works or not, HMRC have failed to challenge it effectively.

81. Our conclusion at [80] can be tested by considering what might happen if Condition B invited a detailed examination of a taxpayer's grounds of appeal to ascertain whether that taxpayer is arguing that a scheme works or not. In such a case, taxpayers might have an incentive to provide vague and uninformative grounds of appeal, declaring their true case at the last minute in order to defer the point at which an APN could be issued. Even less attractive would be the prospect of taxpayers who realise that their avoidance scheme is ineffective raising spurious procedural arguments hoping that, even though such arguments are likely ultimately to fail, their presence could disqualify HMRC from

issuing an APN so that the taxpayers could retain use of the tax in dispute and so obtain precisely the timing benefit that the APN regime was intended to restrict.

82. We regard the Condition B Issue as arguable and therefore grant permission to bring judicial review proceedings on this ground. However, having done so we find for HMRC on the Condition B Issue and so dismiss this aspect of the Appellants' claim for judicial review.

The Condition A Issue

83. The Appellants' argument on the Condition A Issue was that, since the Disputed Closure Notices were not closure notices, the Appellants could not validly have exercised a right of appeal under s31 TMA against those decisions. Therefore, the taxpayers had made no appeal for the purposes of s31 with the result, they submit, that Condition A which was dependent, in these circumstances, on the making of a (valid) "tax appeal" was not satisfied.

84. This issue can be decided briefly. As we have concluded when determining the Appellants' appeals against the Decision, the Disputed Closure Notices were closure notices for the purposes of s28A of TMA. In the light of that conclusion, the Appellants' case on the Condition A Issue is not arguable and we refuse permission to bring a judicial review claim on this ground.

The Rowe Issue

85. This issue concerns the requirement for a designated HMRC officer to determine the "disputed tax" to the best of his or her information and belief. In *Rowe*, the Court of Appeal concluded that the HMRC officer concerned needed to reach certain conclusions before he or she could properly issue an APN requiring advance payment of an amount in respect of "disputed tax". Arden LJ expressed the requirement as follows:

> 61.The starting point must in my judgment be to identify the principle at stake on this appeal. The recipient of an APN/PPN, whether served during appeal proceedings or during an enquiry, is not a person against whom liability to tax has been finally determined. On the other hand, it is as I see it open to Parliament to impose a new obligation on certain groups of taxpayers to make a payment on account of tax potentially due. However, it is implicit in the new regime that it is not a power to impose that extra obligation simply because the tax collecting arm of the state subjectively considers that the citizen ought to pay tax. The courts are entitled to approach these unusual powers on the basis that (unless the legislation clearly provides the contrary) Parliament would not confer power to serve an APN/PPN unless there were reasonable grounds for concluding that the tax would ultimately be found to be payable. That would result in APNs/PPNs only being capable of being used in a proportionate manner when the interests of the state and of the taxpayers involved are fairly balanced. The contrary proposition would involve allowing the state arbitrarily to deprive individuals of their

> property, even only in anticipation of an obligation that has not yet become complete in law.
>
> 62. In my judgment, the test propounded by Charles J is more generous to HMRC than the statutory language permits. As I see it, the statutory language requires the designated officer to be positively satisfied on the information that he then has that the scheme is not effective. This is because FA 2014 s 221(3) requires the designated officer positively to determine, to the best of his information and belief, "the denied advantage". Otherwise he cannot compute the amount of the adjustments needed to counteract that advantage. The definition of "tax advantage" in FA 2014 s 220(5) applies (s 221(4)). This defines "the denied advantage" as "so much of the asserted advantage as is not a tax advantage which results from the chosen advantages or otherwise" (my underlining). None of this language suggests that it is enough that the officer is simply not satisfied that the scheme is effective and that the taxpayer has to prove the contrary.

86. McCombe LJ reached a similar conclusion at [220] saying:

> 220 I turn now to the "designated officer" ground of appeal, as it affects the Vital-Nut appellants. In her judgment, Arden LJ has covered much of this ground in paragraphs 56 to 69 and I agree respectfully with her analysis of the "designated officer's" function. In particular, I agree with what she says in paragraph 62 as to the requirement for the designated officer to be positively satisfied that the scheme under consideration is not effective in the manner claimed by the taxpayer. I also agree that the test formulated in paragraph 35 of the judgment of Charles J reverses the relevant onus. I would add that I cannot see that the statutory requirement of a "designated officer" should mean that that officer should be a mere cipher. He/she must be there to exercise a function and to shoulder responsibility, i.e. a responsibility to be satisfied that on all the information with which he is furnished from the various sources available to him that the scheme in issue does not provide the tax advantage claimed by the taxpayer and that the sum to be determined for the purpose of a notice is, therefore, a particular amount. Otherwise, the statutory requirement of a designated officer would serve no purpose.

87. The Appellants argue that the APNs should be quashed because the designated officer issuing the APNs failed to turn her mind at all to the question whether the Appellants' procedural arguments (as to the invalidity of the Disputed Closure Notices) were correct. HMRC did not suggest that Officer Lee, the designated officer issuing the APNs, considered the Appellants' procedural arguments. Her witness statement certainly made no mention of those arguments. However, HMRC argue that Officer Lee satisfied the requirements set out in *Rowe* by turning her mind to the efficacy of the Corbiere Scheme and concluding (as is now accepted) that the Corbiere Scheme was ineffective and produced no tax advantage.

88. In our judgment, for reasons that follow, in the circumstances of this appeal, Officer Lee could only properly issue an APN to the Appellants if she was satisfied that the Appellants' "procedural" argument (that the Disputed Closure Notices were not valid) was wrong in law.

89. Officer Lee was, as Arden LJ explained in *Rowe*, under an obligation to calculate the "disputed tax" to the best of her information and belief. In order to do so, she first needed to determine the "asserted advantage". By virtue of s219(2)(b), an "asserted advantage" arises where a taxpayer makes an appeal "on the basis that [the asserted advantage] results from particular arrangements". As we have explained in our discussion of the Condition B Issue, even though the Appellants accept that the Corbiere Scheme was ineffective, they were nevertheless, in challenging HMRC's closure notice on procedural grounds, making an appeal "on the basis that" tax advantages "resulted from" the Corbiere Scheme.

90. Having identified the "asserted advantage", Officer Lee had to calculate the "denied advantage". In order to do so, pursuant to s220(5) of FA 2014, she had to determine how much of the "asserted advantage" HMRC did not accept actually to be available. That process would necessarily involve engaging with the "basis" on which the Appellants were asserting, in their appeal, that the advantage was available. If Officer Lee did not do so, the risk is that, in issuing the APN she was simply making a bald statement that the tax advantage claimed was not available and leaving it to the Appellants to prove the contrary, precisely the conduct that Arden LJ considered not to be permissible. Moreover, unless she considered the reasons why the Appellants were arguing, in their appeal, that the tax advantage was available, she could not, in the words of McCombe LJ be "positively satisfied that the scheme under consideration is not effective in the manner claimed by the taxpayer" (emphasis added).

91. We acknowledge that, both Arden LJ and McCombe LJ focused in the passages we have quoted on HMRC's beliefs as to the efficacy of the underlying scheme. However, in phrasing their judgments in this way, we do not consider that they were indicating that HMRC should be absolved from reaching a settled view on the merits of a taxpayer's arguments in the (probably unusual) situation where the taxpayer acknowledges that the scheme fails but asserts that HMRC have, for procedural reasons, failed effectively to challenge the relief sought. That was not the case with which the Court of Appeal was dealing and we do not, therefore, read the judgments as providing guidance on how such a case should be approached.

92. Therefore, we have concluded that Officer Lee's failure to engage with the Appellants' reasons for concluding that the reliefs claimed in connection with the Corbiere Scheme could conceptually cause the APNs to be invalid. However, that is not the end of the matter. Section 31(2A) limits the circumstances in which a court or tribunal can grant the remedy of judicial review as follows:

> (2A)The High Court[1]—
>
> (a) must refuse to grant relief on an application for judicial review, and

[1] Since the Upper Tribunal must apply principles similar to those applicable in the High Court when determining applications for judicial review (see s15(4) of the Tribunals, Courts and Enforcement Act 2007), s31(2A) applies equally to judicial review proceedings in the Upper Tribunal.

> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B)The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C)If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied

93. In this case, the "conduct complained of" is Officer Lee's decision to issue the APN without first forming the view that the Appellants' procedural arguments were incorrect. However, even if Officer Lee had turned her mind fully to the procedural arguments, it appears to us highly likely that she would have concluded that those arguments would not succeed. The consistent position of HMRC in correspondence with the Appellants (and in a meeting with them in May 2015) was that where an enquiry had been deemed to be opened by s12AC(6), that did not stop an actual enquiry being opened under s9A; and that the completion of the enquiry into a partnership return under s28B did not bring to an end an actual enquiry under s9A. In June 2014 an Inspector of Taxes (Mr Regan) said that it was "our view" that separate notices could be issued, and confirmed this in a letter which referred to extracts from the Self Assessment Legal Framework. In September 2014 he said that these views had been confirmed by a technical specialist. In December 2014 HMRC's ADR panel, in declining ADR, agreed that HMRC could not depart from its "established view". At a meeting in May 2015 with the Appellants, reference was made to "HMRC's interpretation." It seems to us that Officer Lee would have concluded, had she considered the point, that the closure of the s12AC enquiry into the partnership return under s28B, and the consequent giving of the s28B(4) Letters, did not have the effect of closing enquiries into the partners' own tax returns.

94. That is the very conclusion that we have reached when considering the appeal against the Decision, albeit on the narrower basis that whether a separate enquiry could be opened or not, the s28B(4) Letters were not closure notices. In those circumstances, we are satisfied that it is highly likely that the outcome for the Appellants would not have been any different if the conduct complained of had not occurred. Since we see no "exceptional public interest" requiring a different course, we consider we are obliged, by s31(2A) to refuse the Appellants the remedy of judicial review.

95. The *Rowe* Issue is arguable and we grant permission to apply for judicial review on that ground. However, having granted permission, we refuse the remedy of judicial review.

The Ultra Vires Issue

96. Dr Emblin argues that, in circumstances where he has availed himself of the only statutory mechanism to object to his APN (by making representations under s222 of FA

2014) and HMRC have accepted those representations by withdrawing the APN it is "outwith the intention of Part 4 of Chapter 3 of FA 2014" for HMRC to be permitted, unreasonably, to change their mind and reissue a virtually identical APN. Put in this way, the issue is one of statutory construction namely whether the statutory provisions permit a fresh APN to be issued in the circumstances Dr Emblin identifies.

97. There is no express statutory provision prohibiting the reissue of an APN once it has been withdrawn and therefore Dr Emblin is arguing that such a prohibition must exist by implication. The difficulty with that argument is that there are indications in Chapter 3 of Part 4 of FA 2014 that Parliament did not intend any such restriction.

98. First, s204 of FA 2014 provides that, in order for HMRC to be permitted to issue a follower notice, "Condition D" must be met which requires:

> …no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

99. Section 204 does not apply to APNs. However, it appears within the same Part of FA 2014 and indicates that, when Parliament wished to deal with the implications of prior notices, it did so expressly. Moreover, having turned its mind to the issue in connection with follower notices, Parliament provided expressly that Condition D could be met where HMRC have previously issued a follower notice and withdrawn it. We regard s204 as a strong indication that Parliament could not have intended, in the absence of any specific provision and so by mere implication, that a different result should apply in the analogous context of APNs.

100.Moreover, s227(12) of FA 2014 provides that, whenever an APN is withdrawn, it is to be treated as never having had effect. It follows that, when HMRC withdrew Dr Emblin's first APN, both he and HMRC were in the same position as if no APN had ever been issued.

101.In his oral submissions, Mr Sherry sought to meet these points by arguing that statutory provisions did not impose a total restriction on the reissue of an APN in any circumstances, but only make the re-issue of an APN *ultra vires* when HMRC are acting unreasonably. However, the difficulty with that submission is that there is no statutory provision that prevents the re-issue of an APN at all and still less is there any provision that distinguishes between "reasonable" and "unreasonable" decisions to reissue.

102.We do, however, accept a more limited version of Mr Sherry's submission. If the APN team within HMRC had a free rein to disregard the decision of an independent reviewer within HMRC by simply reissuing an APN, there would be scope for unfair or oppressive behaviour. However, the correct mechanism for dealing with that risk is a claim for judicial review if and when HMRC do behave oppressively. The mere risk of such behaviour does not justify the implication of provisions in FA 2014 restricting reissue of an APN that has been withdrawn in circumstances where there is no express restriction and indeed the statutory provisions indicate that no such restriction was intended.

103.We do not consider that the Ultra Vires Issue raises an arguable ground for granting the remedy of judicial review and we therefore refuse permission to bring judicial review proceedings on that ground.

The Unfairness Issue

104.Dr Emblin's alternative complaint is that the decision to reissue his APN was "so unfair as to amount to an abuse of power". Mr Sherry clarified, in response to our questions, that Dr Emblin is not seeking to argue that he had any "legitimate expectation", once his first APN was withdrawn, that it would never be re-issued. Rather, he puts his argument on the basis of what he submits to be the unfairness of HMRC's decision.

105.In *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2018] UKSC 25, the Supreme Court conducted a detailed survey of prior authorities in the course of deciding whether a complaint of "conspicuous unfairness" (not involving unfairness of a procedural nature) could amount to a free-standing ground of challenge under public law to decisions made by a public body. The Supreme Court concluded that such a complaint was not a free-standing ground of challenge, but rather was already covered by well-established principles dealing with irrationality and legitimate expectation. In the words of Lord Carnwath:

> 41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged.

106. Lord Sumption agreed saying:

> 50. I agree with Lord Carnwath's analysis of the relevant legal principles. In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories. …[To] say that the result of the decision must be substantively fair, or at least not "conspicuously" unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from the decision-maker's statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense.

107. In a letter of 30 March 2017 to Dr Emblin, HMRC explained their reasons for re-issuing the APN as follows:

> HMRC has now reviewed the position and considers that the notices originally issued were valid because all of the statutory requirements were met, and therefore should not have been withdrawn.

108. As we have concluded in our consideration of the Condition B Issue, HMRC were correct to conclude that the original APN did not need to be withdrawn. It is, therefore, not arguable that that conclusion was irrational. Mr Sherry's argument was really to the effect that it must be irrational for HMRC first to accept a taxpayer's representations and later to come to a different conclusion. We do not see that it is. If (as we have concluded is the case when considering the Ultra Vires issue) it is open to HMRC to issue another APN after a first one has been withdrawn, then it seems to us that it must be open to HMRC to consider afresh whether the conditions are satisfied or not. We refuse permission to bring judicial review proceedings in respect of the Unfairness Issue.

Disposition

109. The Appellants' appeals against the Decision are dismissed.

110. We refuse both Appellants permission to bring judicial review proceedings in respect of the alleged invalidity of the Disputed Closure Notices and the Condition A Issue.

111. We refuse Dr Emblin permission to bring judicial review proceedings in respect of the Ultra Vires Issue and the Unfairness Issue.

112. We grant both Appellants permission to bring judicial review proceedings in respect of the Condition B Issue and the *Rowe* Issue. However, having done so, we dismiss the applications for judicial review.

MR JUSTICE NUGEE

JUDGE JONATHAN RICHARDS

RELEASE DATE: 3 March 2020