



[2022] UKFTT 00011 (TC)

**TC 08364**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/09190  
TC/2020/00612**

*PROCEDURE – strike out application – whether Unison should be applied to imply appeal rights in respect of s28B(4) notice – no – application granted*

**BETWEEN**

**JOHN MATHIESON**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The hearing took place on 9 September 2021. The hearing took place on the Tribunal video hearing platform. A face to face hearing was not held because of restrictions arising from the COVID-19 pandemic. The documents to which I was referred are a hearing bundle of 104 pages, an authorities bundle of 419 pages and a supplementary authorities bundle of 152 pages.**

**Mr Birkbeck, counsel, instructed by Edwards & Keeping, for the Appellant**

**Mr Chandler, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. The Appellant ('Mr Mathieson') appeals against a notice issued by the Respondents ('HMRC') on 22 July 2019. The hearing considered two applications in relation to that appeal made firstly by HMRC, to strike out the appeal, and, if that application failed, secondly by Mr Mathieson for postponement of payment of the amount due.

### Background

2. Mr Mathieson was a partner in Scotts Atlantic Distributors LLP (the 'LLP') which invested in a number of film projects. The LLP reported a loss on its 2003 tax return, and Mr Mathieson claimed loss relief in respect of his share of those losses in his 2002/03 tax return.

3. HMRC enquired into the LLP's 2003 tax return and, on 13 September 2016, issued a closure notice disallowing the partnership losses and amending the LLP tax return accordingly.

4. The LLP appealed the closure notice to this Tribunal on 16 March 2017. HMRC produced a Statement of Case asserting that the LLP arrangements did not amount to a trading activity with a view to a profit, and that the claimed expenditure was not allowable. The LLP was put into liquidation and the appeal was subsequently withdrawn by the liquidators on 4 January 2019.

5. On 22 July 2019, HMRC issued Mr Mathieson with a notice under s28B(4) Taxes Management Act 1970 (TMA 1970), advising him that the LLP appeal had been withdrawn and that, as the matter was now final, his 2002/03 self-assessment tax return was amended to remove the loss relief claimed therein. The effect of this was that Mr Mathieson was liable to repay an amount of tax that had been paid to him in 2003, together with interest.

6. Mr Mathieson stated that he did not understand HMRC's decision to issue him with the notice, and HMRC had not provided any explanation other than to state that he could not dispute the demand. He had invested in the LLP in 2002 but had had nothing to do with it thereafter; he was aware that there was a dispute with HMRC but, as this was a large scheme, he had little or no control over matters. The liquidators had chosen to withdraw from the appeal, rather than that being an act by the partners.

7. Mr Mathieson appealed to this Tribunal on 5 December 2019. His grounds of appeal included the preliminary point that the s28B(4) notice issued to him should be considered to be a closure notice, appealable under s31 TMA 1970.

### Strikeout application

8. HMRC applied under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) 2009 (the 'FTT Rules') to strike out Mr Mathieson's appeal on that basis that the Tribunal has no jurisdiction to consider the appeal.

9. Mr Mathieson contended that the notice dated 13 September 2019 should be regarded as a closure notice, appealable under s31 TMA 1970. This is because the notice was issued under s28B TMA 1970 and, it was submitted, satisfies the conditions of s28B(2) as it closed the deemed enquiry into Mr Mathieson's tax return, by notifying Mr Mathieson that the enquiries had been completed, stating that an amendment to his return is required, and making the amendment to his return.

10. The question of whether a notice under s28B(4) TMA 1970 should be regarded as a closure notice was considered by the Upper Tribunal in *Reid and another v Revenue and Customs Commissioners* [2020] UKUT 61 (TCC) ('*Reid*'). The Upper Tribunal held that the s28B(4) notice is not a closure notice (at [49]-[50]):

“... it is significant that Parliament has, in s 28A(1) and s 28B(1) of TMA explicitly labelled documents issued under those sections as ‘closure notices’. The absence of any such label in s 28B(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 s 28A(1) and s 28B(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 s 28B(4) notice is required only to ‘make amendments’ to an individual tax return. While it is conceptually possible that Parliament intended notices under s 28B(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”

“... 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 s 28B(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 s 28B(4) amendments, the very issues on which the partnership was unsuccessful.”

11. HMRC contended that the decision in *Reid* and other similar cases such as that of the Court of Appeal in *Regina (Amrolia) v Revenue and Customs* [2020] EWCA Civ 488 made it clear that a s28B(4) notice cannot also be a s28(1) notice, and drew a distinction between the two types of notice. To treat them as equivalent was not a logical construction of the partnership enquiry scheme and, as noted in *Reid*, would lead to practical problems such as potential re-litigation of matters if each member of an LLP had the ability to appeal their s28B(4) notice. As these were each decisions of a higher court, they were binding on this Tribunal. As the s28B(4) notice was not a closure notice under s28(1) TMA 1970, there were no appeal rights in respect of that notice and so this Tribunal could have no jurisdiction in respect of the appeal.

12. For Mr Mathieson, it was contended that the decision in *Reid* had failed to consider the Supreme Court decision in *Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51 (*‘Unison’*) and that this Tribunal was bound to follow the Supreme Court decision, rather than the Upper Tribunal decision. Submissions were also initially made on the basis that the decision in *Reid* was *per incuriam*, but these were not pursued further in the hearing.

13. It was contended that the “strong support” which *Reid* had indicated would be needed for the implication that a notice under s28B(4) should be regarded as an appealable closure notice was given by the principle in *Unison* that (at [77], quoting Lord Diplock in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 309):

“The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; ...”

And (at [76]) that:

“although a statute might deprive a subject of the right to appeal to the courts, the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension”.

14. It was submitted that, as Mr Mathieson would have no appeal rights if a s28B(4) notice is not a closure notice, the decision in *Unison* means that, in considering alternative interpretations, any interpretation of the term “closure notice” which hinders access to justice for a taxpayer in receipt of a s28B(4) notice without clear and express words in the legislation should be rejected.

15. HMRC submitted that there was no interference with access to justice if the s28B(4) notice is not a closure notice as Mr Mathieson could have applied for judicial review of the decision to issue the s28B(4) notice. The Court of Appeal in *Knibbs and others v Revenue and Customs Commissioners* [2019] EWCA Civ 1719 (*Knibbs*) had agreed that (at [25]) “the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review.”

16. For Mr Mathieson, it was contended that the decision in *Knibbs* had started from the premise that a s28B(4) notice was not a closure notice and did not examine the question further, so that its conclusion on the use of judicial review was not determinative of the point. Further, it was submitted that judicial review could not be used to challenge whether the correct amount of tax had been assessed: it could only be used if the decision to issue the notice had been ultra vires or irrational. It was also submitted that the costs of judicial review and the lack of access to the tax expertise of this Tribunal was also an impediment to rights of access of the courts.

17. Finally, HMRC submitted that if Mr Mathieson wished to challenge the partnership assessment, it was open to him to appeal against it: the decision in *Annie Gibbs* [2013] UKFTT 236 (TC) had noted (at [56]) that “a proper interpretation of s31 and one that is consistent with logic is that only the partnership returns can be appealed. But ... any partner can bring the appeal.”

18. Mr Mathieson contended in reply that this had not been an option open to him, as he had not known about the partnership closure notice until some considerable time after it had been issued.

## **Discussion**

19. Mr Mathieson’s argument is, in summary, that the decision in *Unison* should be applied by this Tribunal so as to interpret the term “closure notice” as providing him with appeal rights over his s28B(4) notice.

20. In *Unison* the Supreme Court was considering an action by the executive (the imposition of fees for access to tribunals) which, they concluded, would interfere with the constitutional right of access to justice because it would interfere with the ability of individuals to exercise their appeal rights before the Employment Tribunal. The Supreme Court concluded that such interference would need to be clearly authorised by primary legislation.

21. In this case, the parties are within a statutory appeal regime that sets out the parameters within which a person may appeal. That regime does not seek to remove or restrict the ability to exercise appeal rights (such as the statutory appeal rights against the partnership closure notice, whether by the partnership or by a partner, or judicial review). Mr Mathieson is, in effect, arguing that because the legislation does not give him specific appeal rights in relation to a s28B(4) notice, the decision in *Unison* means that those rights should be implied by the Tribunal into the legislation.

22. The logical effect of his argument would be that any specific appeal rights written into tax legislation (or indeed, any other such statutory appeal regime) would be rendered pointless as any contemplated appeal which is not specifically permitted in the legislation would then need to be permitted because to do otherwise would be treated as restricting access to justice.

23. The *Unison* decision does not state, and I do not consider that there is any scope to interpret it to mean, that the legislation for a statutory appeal regime should be interpreted so as to imply an appeal right that is not expressly provided for in the wording of that legislation.

24. Accordingly, I do not consider that the decision in *Unison* can support Mr Mathieson's contention for a wide interpretation of the term "closure notice" that provides appeal rights in respect of a s28B(4) notice.

25. This case arises because Mr Mathieson chose to become a member of a large LLP in which he had limited individual rights, and apparently received little or no information as to the decisions made by or on behalf of the LLP. For example, correspondence in the hearing bundles makes it clear that he (at least prior to appealing) had little information as to HMRC's enquiry into the LLP return and other partnership matters. This lack of information was stated to be the reason that he had not been able to appeal the partnership closure notice, and it was argued that it was unreasonable for him to be subject to demands for repayment of tax without any information from HMRC as to how those demands arose. I consider that, if there has been any limitation on Mr Mathieson's ability to exercise appeal rights, this has arisen because the LLP has apparently not communicated information to him. This is not a circumstance which provides him with implied appeal rights against HMRC.

26. In summary, I do not consider that the decision in *Unison* provides any basis for me to depart from the conclusion of the Upper Tribunal in *Reid* and other decisions noted above that a s28B(4) notice is not a closure notice and cannot be appealed under s31 TMA 1970. Accordingly, this Tribunal has no jurisdiction in respect of the appeal and the application to strike out is granted.

27. Given this conclusion, the appellant's application to postpone payment of tax has not been considered further.

### **Decision**

28. The application is granted and the appeal is struck out. The associated application for postponement of payment of tax is also dismissed.

### **Right to apply for permission to appeal**

29. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**Release date: 15 DECEMBER 2021**