[2015] UKUT 0579 (TCC)

Appeal number: FTC/148/2014

INCOME TAX – whether deeming provision in s 118(2) TMA could apply to deem out of time claim for repayment of income tax under Schedule 1AB TMA to have been in time where taxpayer had reasonable excuse – yes – whether tribunal had jurisdiction to hear the issue of whether claim out of time – yes – whether provisions on notices of enquiry and closure notices in Schedule 1A TMA enabled notice of enquiry and closure to be issued in immediate succession and in one document- yes - UT's decision in Portland Gas Storage Limited considered - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Dr VASILIKI RAFTOPOULOU

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE ROGER BERNER
JUDGE SWAMI RAGHAVAN

Sitting in public in London on 21 July 2015

Michael Thomas, counsel, instructed by the Bar Pro Bono Unit for the Appellant

Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the appeal of Dr Vasiliki Raftopoulou against the decision of the First-tier Tribunal ("FTT") (Judge John Brooks) dated 20 August 2014 (*Dr Vasiliki Raftopoulou v Revenue and Customs Commissioners* [2014] UKFTT 818 (TC)) striking out her appeal. Dr Raftopoulou had appealed in relation to her claim on 13 October 2011 for repayment of overpaid income tax for the tax year 2006-07. HMRC applied to have the appeal struck out on the ground that it was made out of time. The FTT noted that the claim was made outside the statutory four-year time limit and found that in the absence of a statutory provision to extend or appeal against the time limit the claim did not fall with the FTT's jurisdiction.

2. Permission to appeal was granted by this Tribunal on the single ground that the FTT erred in not having regard to the possible application of s 118(2) of the Taxes Management Act 1970 ("TMA"). Dr Raftopoulou argues, contrary to HMRC's position, that the FTT has jurisdiction in respect of her appeal if she is able to show, by application of s 118(2), that she had a reasonable excuse for not having made the claim within the four-year time limit, and that she made the claim without unreasonable delay after the reasonable excuse had ceased.

3. While HMRC were represented by counsel, Mr Stone, Dr Raftopoulou was representing herself until shortly before the hearing it became possible for her to secure *pro bono* representation by Mr Thomas who was instructed by the Bar Pro Bono Unit following assistance from the Revenue Bar Association. We are most grateful to Mr Thomas; the issues in this appeal concerned matters of legal interpretation and technical arguments on the FTT's jurisdiction and we derived a great deal of benefit from having the opportunity of hearing the considered legal submissions of both parties.

Background

4. The facts found by the FTT are recorded in [7]-[8] of the Decision and are not disputed. That said, however, and having regard to the submissions we have received, we need to refer in a little more detail to the factual background of the refusal by HMRC of Dr Raftopoulou's claim.

5. Dr Raftopoulou submitted her 2006-07 self-assessment return on 14 January 2008. On the figures stated in the return, a liability to tax of about £18,000 arose. Dr Raftopoulou believed the amount of tax due was the result of a mistake. However, Dr Raftopoulou did not amend her return, as she would have been entitled to do under s 9ZA TMA up to 31 January 2009, but instead on 13 October 2011 made a claim for repayment pursuant to Schedule 1AB TMA.

6. Although the FTT did not refer to it, we were shown a copy of a letter dated 22 November 2008 from Dr Raftopoulou addressed to the HMRC office at Stockton-on-Tees which reads:

> "I am writing to you regarding 2006-07 tax return. I signed a paper tax return different to the online tax return that was submitted to HMRC in April 2007. There is a mistake in the process. My income during the 2006-2007 (sic.) was not so high. Moreover, my expenses were more

> than what the online tax return claims. I can send you a copy of my income and the expenses paperwork for your information.
>
> Please advise as to how to proceed with the case."

7. The claim which was the subject of the appeal before the FTT was made by letter dated 13 October 2011, and is recorded as having been received by HMRC on 18 October 2011. The letter described itself as a claim for overpayment relief under Schedule 1AB TMA and stated that it related to an overpayment in respect of the tax year 2006-07. It said:

> "The overpayment was made due to a misunderstanding between myself and my accountant at that time. I bought equipment I used for my business benefit and I never claimed it at that time. I left the country a year after for studies in the States and I came back to the UK recently.
>
> I did not have the chance to make an appeal in connection with the payment in the past, due to my absence abroad."

8. HMRC replied to that letter on 9 November 2011. They said:

> "It is now too late to make an amendment to the return for 2006-07.
>
> From 1 April 2010 error or mistake relief under Section 33/33A TMA 1970 was replaced by overpayment relief as introduced by Schedule 1AB TMA 1970. The normal time limit for an overpayment relief claim is 4 years from the end of the relevant tax year. This means that the amendment is out of time and a repayment cannot be made."

9. There was further correspondence between Dr Raftopoulou and HMRC in 2013, following a further attempt by Dr Raftopoulou to obtain repayment of the claimed overpayment of tax. That resulted in HMRC reviewing the earlier correspondence and confirming, by letter of 31 July 2013 to Dr Raftopoulou, the decision that had been notified on 9 November 2011.

Issues on this appeal

10. The following issues arise on this appeal:

(1) Whether the FTT has jurisdiction to hear the issue of whether the claim was out of time. HMRC argue that such a claim falls outside the statutory regime of enquiries, closure notices and appeals, such that an appeal to the FTT is precluded. Dr Raftopoulou submits that the FTT does have jurisdiction in the form of an appeal against a closure notice. She argues that the correspondence between HMRC and herself may be construed as HMRC having opened an enquiry into the repayment claim and having issued a closure notice, which then gave rise to a right to appeal to the FTT.

(2) In relation to the failure of Dr Raftopoulou to make the claim within the period allowed by the statute:

> (a) whether s 118(2) TMA applies to claims under Schedule 1AB TMA which are voluntary acts of the taxpayer; and
>
> (b) if so, whether the effect of the application of s 118(2) is that such a claim that was made out of time is to be deemed as having been made in time for the purpose of Schedule 1AB.

Legislation

11. Under paragraph 1 of Schedule 1AB TMA a person "who has paid an amount by way of income tax" and who believes that the tax was not due may make a claim to HMRC for repayment. However, paragraph 3 of that Schedule provides:

> "(1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.
>
> (2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is –
>
> (a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a return or returns under section 8, 8A or 12AA of this Act, the tax year to which the return (or, if more than one, the first return) relates, and
>
> (b) otherwise, the tax year in respect of which the payment was made."

12. Schedule 1A TMA deals with claims not included in returns. It applies to claims made under Schedule 1AB TMA (see para 1(4), Sch 1AB).

13. Paragraph 1 of Schedule 1A defines terms used in the Schedule. The term "claim" is defined as meaning:

> "a claim or election as respects which this Schedule applies."

14. Paragraph 5 deals with enquiries:

> "(1) An officer of the Board may enquire into—
>
> (a) a claim made by any person, or
>
> (b) any amendment made by any person of a claim made by him,
>
> if, before the end of the period mentioned in sub-paragraph (2) below, he gives notice in writing of his intention to do so to that person or, in the case of a partnership claim, any successor of that person."

15. The provisions on closure notice are set out in paragraph 7:

> "(1) An enquiry under paragraph 5 above is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions.
>
> (2) In the case of a claim for discharge or repayment of tax, the closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the claim is required, or
>
> (b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.
>
> …
>
> (4) A closure notice takes effect when it is issued.
>
> (5) The claimant may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
>
> (6) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

> (7) The tribunal shall give the direction applied for unless … satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.
>
> …"

16. Paragraph 9 makes provision regarding appeals:

> "(1) An appeal may be brought against—
>
> (a) any conclusion stated or amendment made by a closure notice under paragraph 7(2) above, or
>
> (b) any decision contained in a closure notice under paragraph 7(3) above.
>
> (1A) Notice of the appeal must be given—
>
> (a) in writing,
>
> (b) within 30 days after the date on which the closure notice was issued,
>
> (c) to the officer of the Board by whom the closure notice was given."

17. Section 118(2) TMA provides:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

18. Under Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (" the Procedure Rules"), the Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

> "(a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them."

The Decision

19. At the hearing of HMRC's strike out application before the FTT Dr Raftopoulou represented herself and HMRC were represented by a presenting officer. In the section of its decision dealing with the relevant law on time limits and strike out, the FTT noted at [5] of its decision that there was no statutory provision by which the four-year time limit could be extended.

20. The FTT noted further at [9] that as Dr Raftopoulou had not amended her 2006-07 return within 12 months of its filing date the only way she could claim a repayment was under Schedule 1AB TMA and that "This required a claim to be made not 'more than 4 years after the end of the relevant tax year'". At [10] it was noted that the claim therefore had to have been made by 5 April 2011 and that Dr Raftopoulou's claim had been made on 13 October 2011. Judge Brooks' decision was that:

> "In the absence of any statutory provision to extend or appeal against this time limit it must follow that a claim such as Dr Raftopoulou's does not fall within the jurisdiction of the Tribunal and as such under Rule 8 of the Procedure Rules I have no alternative but to strike out her case."

21. Before the FTT neither party referred to s 118(2) TMA. It appears from [11] of the decision that Dr Raftopoulou's contention was that HMRC were aware of the "mistake" in her 2006-07 return before the expiry of the time limit, a matter Judge Brooks found to have no bearing on the issue of whether there had been a timely amendment to the return or claim for repayment. The FTT did not therefore consider whether s 118(2) could apply in principle, and did not therefore address whether the FTT had jurisdiction to consider whether Dr Raftopoulou might have had a reasonable excuse for her failure to make the claim within the statutory period.

22. Dr Raftopoulou applied for permission to appeal on grounds which again relied upon HMRC having been informed about the mistake in her return and which also argued that she qualified for a time extension under s 28C TMA. The FTT refused permission on 16 September 2014 explaining in its decision in that respect that HMRC's awareness of the mistake did not assist her case and that s 28C TMA 1970 which applied where HMRC had issued a determination of tax where no return had been delivered did not apply as the appellant had in fact filed her 2006-07 return. Permission to appeal was granted by this Tribunal on the single ground that the FTT had arguably erred in not having regard to the possible application of s 118(2) TMA.

This appeal

23. We have described the two principal issues in this appeal. The first concerns whether in the circumstances of a claim under Schedule 1AB TMA which has been made out of time an appeal right can arise at all, and if it can whether such a right has arisen in this case. The second is whether s 118(2) TMA can have effect in relation to such a claim so as to treat a claimant who has a reasonable excuse and who otherwise satisfied the conditions of s 118(2) to be treated as not having failed to make the claim on time, with the result that the claim is to be regarded as having been made within the statutory time limit. Those two issues are, as we shall describe, interlinked, and we shall address them together. First, however, we consider a preliminary point raised by Mr Thomas as to the threshold required to be met for this appeal to succeed.

Relevant threshold for appeals against strike out applications

24. Mr Thomas placed much emphasis on the fact that the matter we had before us was an appeal against a strike out application. He argued that there is accordingly a different threshold to consider, and he submitted that this Tribunal need only to be satisfied that Dr Raftopoulou has an arguable case and that it is not merely fanciful. We were referred in this regard to the decision of this Tribunal in *Revenue and Customs Commissioners v Fairford Group plc and another* [2014] UKUT 329 (TCC), on an appeal from a decision of the FTT on an application to strike out an appeal under Rule 8(3)(c) of the Procedure Rules (strike out on the basis that there is no reasonable prospect of success), where the tribunal at [41], in the context of referring to CPR r 3.4 in civil proceedings and a number of authorities in the higher courts stated that the FTT had to consider whether there was a "realistic, as opposed to fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing)". Although the Upper Tribunal was there concerned with the question of reasonable

prospect of success, and not of jurisdiction, Mr Thomas sought to argue that the same test fell to be applied to strike out applications based on jurisdiction.

25. We do not agree. There is in our judgment no basis, whether in statute or by reference to *Fairford*, or the authorities referred to in that case, for the proposition advanced by Mr Thomas in this respect. The test of whether there is a realistic as opposed to a fanciful prospect of succeeding referred to in *Fairford* is clearly directed at explaining how a tribunal should approach its discretion in cases where the ground of strike out is whether the proceedings stand a reasonable prospect of success. The strike out under consideration in this appeal was by contrast on the grounds of jurisdiction. It is clear that in relation to strike outs on the basis of lack of jurisdiction the test is a binary one; either the tribunal has jurisdiction or it does not. On appeal, the issue of law is whether the FTT made an error of law in its determination on jurisdiction. The task for this Tribunal is not simply to consider whether there is an arguable case that the FTT had jurisdiction. That is the threshold relevant to a grant of permission to appeal. On the appeal itself, it is for this Tribunal to determine those questions of law before us which are material to that case.

Jurisdiction of the FTT: questions of law

26. We turn therefore to consider the substantive questions of law in this appeal. The first question arises from the submission for HMRC that in this case, and irrespective of the possible application of s 118(2) TMA, there was no statutory right of appeal at all to the FTT. That question logically precedes any consideration of s 118(2), and also any consideration of whether there has in this case been a relevant enquiry or closure notice that could have given rise to an appeal right.

Statutory right of appeal

27. It is common ground between the parties that the FTT is a creature of statute and that if an appellant is to appeal to the FTT there needs to be a statutory basis for such an appeal. In this case the statutory gateway to FTT's jurisdiction which is provided by Schedule 1A TMA takes the form of appeals against closure notices.

28. Both parties accept that for the FTT to have jurisdiction on an appeal under Schedule 1A the following matters are required in the following sequence. First, a claim within the meaning of Schedule 1A. Secondly, an enquiry by HMRC into the claim. Thirdly, a closure notice in respect of the enquiry. Finally, an appeal in time against the closure notice. Each of these elements is in dispute in this appeal.

The need for a valid claim

29. We consider first the initial element, namely the need for a claim. Mr Stone submitted that it was necessary as a first step to establish what he described as a "valid" claim. He argued that a claim which is made outside the four-year time limit prescribed by paragraph 3 of Schedule 1AB is not a valid claim, and consequently is not a claim under Schedule 1AB or a claim within the meaning of that expression in Schedule 1A. Accordingly, none of the provisions of Schedule 1A apply to such a claim, including the provisions as to enquiry, closure notices and appeals.

30. In support of this argument Mr Stone referred us to certain observations of this Tribunal in *Portland Gas Storage Ltd v Revenue and Customs Commissioners* [2014]

STC 2589. Although that case concerned stamp duty land tax (SDLT), the relevant provisions of Schedule 10 to Finance Act 2003 relating to enquiries are couched in materially identical terms to the claim, enquiry, closure notice and appeal provisions in Schedule 1A TMA. *Portland Gas* also concerned the issue of whether there had been an appealable decision. Portland had amended its return to trigger a repayment of SDLT but there was a dispute as to whether this was in time. Portland argued that correspondence received from HMRC amounted to a closure notice. HMRC's position was that no closure notice had been issued.

31. Mr Stone drew our attention to the acceptance by this Tribunal in *Portland Gas*, at [33], of the fact that there are some tax disputes that do not carry a right to an appeal to the FTT. The tribunal said:

> "We do, however, accept that ultimately the FTT only has such jurisdiction that Parliament has through the relevant statutory provisions conferred on it and there can be anomalies where certain decisions can possibly through oversight fall through the net. There can be other situations where it is clear from the legislation that Parliament did not intend there to be a right of appeal, and in those circumstances it is not for this tribunal to 'fill in the gaps' by giving a strained construction to clear language regardless as to whether the failure to give an appeal right appears to be an oversight or not."

32. Mr Stone was disposed to submit that the tribunal in *Portland Gas* might have gone a little too far in describing possible absences of appeal rights as anomalies. We do not consider it necessary for us to examine that point. It is clear that the tribunal had in mind both cases where the absence of an appeal right might properly be regarded as an oversight (and thus aptly described as an anomaly), and those cases, which we accept exist, where there can be discerned the intention of Parliament that no such right should be available. In neither case, however, was it suggested that any perceived gap could be filled judicially.

33. We accept that there are cases where no right of appeal will arise. But that does not resolve the question whether in any particular case there is or is not such a right. That will depend on the construction of the statute as well as the particular facts and circumstances.

34. The power to enquire into a claim, to issue a closure notice in respect of such an enquiry and the right on the part of the claimant to appeal against a conclusion or amendment to a closure notice are in each case confined to a "claim as respects which [Schedule 1A TMA] applies" (Sch 1A, para 1). In the case of claims for recovery of overpaid tax, Schedule 1A applies to claims "under [Schedule 1AB]" (Sch 1AB, para 1(4)). A claim under Schedule 1AB may not, however, be made more than four years after the end of the relevant tax year (Sch 1AB, para 3(1)). Thus, a claim that is made outside that period may be a claim in the ordinary sense of that word, but it cannot be a claim *under* Schedule 1AB, and thus cannot be a claim for the purpose of Schedule 1A. Absent anything which might deem a claim to have been made in time, and thus under Schedule 1AB, none of the provisions of Schedule 1A as to enquiries, closure notices and appeals can apply.

35. The provisions of paragraph 3(1) of Schedule 1AB (and similar provisions in para 3(4) precluding claims from being made in a tax return) can be contrasted with provisions which exclude the liability of HMRC to give effect to a claim. Those

provisions, found most particularly in paragraph 2 of Schedule 1AB, admit the existence of a claim under that Schedule, albeit one that cannot be given effect to, and such claims are within Schedule 1A. By contrast, paragraph 3 of Schedule 1AB does not provide that a claim is not to be given effect to if it is made late; it precludes the possibility of a claim at all if it is not made, and cannot be treated as having been made, in time.

36. In this case the letter of 13 October 2011 could not constitute a claim in time, and thus a claim under Schedule 1AB, unless s 118(2) TMA applies with the effect that the claim is treated as having been made in time. Before considering arguments as to whether the FTT had jurisdiction to consider the application of s 118(2), and issues as to the existence of an enquiry and a closure notice from which appeal rights would arise, we must first determine the logically prior question of whether in principle s 118(2) can apply in these circumstances and have that effect.

Application of s 118(2) TMA

37. It is common ground that, where it applies, s 118(2) TMA has a deeming effect. The difference between the parties is as to the scope of the application of that provision, in particular whether it can be applied so as to have any effect on a late claim for recovery of overpaid tax, and whether it could in any event deem a claim that has been made late as a matter of fact to have been made on time so as to be a claim under Schedule 1AB.

38. Those questions are questions of construction, both of s 118(2) and of Schedule 1AB. As regards s 118(2), HMRC put forward the following points which we did not understand Mr Thomas to disagree with:

> (1) Section 118(2) is made up of two limbs separated by a semi-colon; the first part not being relevant to Dr Raftopoulou's case. (It may however be relevant to construction of the provision as a whole.)
>
> (2) The purpose of the first limb is to deal with situations where HMRC, having agreed to extend time under its care and management powers (e.g. allowing payment by instalments), are then prevented from resiling from that agreement and asserting that the taxpayer had failed to pay on time and was therefore liable for penalties.
>
> (3) The second limb is of broader application and is not expressly limited to situations where time limits are in issue; it can apply to situations where there is a complete failure to do something.

Ordinary and natural reading

39. The starting point for interpreting the provision must be to give the words their ordinary meaning. Mr Thomas argued that, according to its ordinary meaning, paragraph 3 of Schedule 1AB requires a person to make a claim for recovery of overpaid tax within four years. That this was the ordinary meaning was well illustrated, in his submission, by the way in which the FTT had described the relevant provisions when, at [9] of the FTT's decision, it had said "this [Schedule 1AB] required a claim to be made not 'more than 4 years after the end of the relevant period'." Once it is established that something is required to be done, there is then no basis for reading in any further test such as to look at *why* something is required.

Purposive construction

40. To the extent s 118(2) fell to be construed purposively, Mr Thomas argued that time limits were imposed to provide certainty and to protect the exchequer from enormous claims being made a considerable time after the relevant events had taken place. But time limits could be arbitrary and give rise to unfairness. The purpose of s 118(2) was to eliminate that unfairness in cases where a reasonable excuse for a failure to comply with a time limit could be demonstrated. If s 118(2) did not exist, or did not apply, the application of time limits could give rise to real injustice.

41. HMRC's case is that the purpose of s 118(2) is plain; the function of the provision is provide a taxpayer with a defence to a claim that they have failed to do something that they are required to do which ordinarily would result in a penalty. Mr Stone gave an example of how the section was meant to work by reference to *Hok* [2012] UKUT 363 (TCC). That appeal before the Upper Tribunal concerned a penalty imposed in relation to failure to make an end of year PAYE return. The obligation to make the return which was provided for in Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 was expressed as "…an employer must deliver to [HMRC] a return…". Section 98A TMA imposed a penalty on "…any person who fails to make a return…". Mr Stone placed significance on the language "fails…" in s 118(2) and urged us to note how that particular language tied back to the language in various penalty provisions which, for example, refer to "fails to make a return". While s 118(2) was not in point in *Hok* as the appellant there did not seek to rely on it, the Upper Tribunal's decision stated at [25]:

> "Section 118(2) allows for a defence against the imposition of a penalty where the person concerned has a reasonable excuse for his failure to do a required act in time…"

42. Mr Stone also highlighted that s 118(1) as originally drafted included a definition of "neglect" (meaning "negligence or a failure to give any notice, make any return or to produce or furnish any document or other information required by or under the Taxes Acts"). This, he submitted, makes the link to failure to do mandatory acts clear.

Mandatory acts only

43. HMRC's case therefore is that s 118(2) only applies to compulsory acts within TMA, in other words, only those "required to be done" or those mandated under the statute (e.g. s 8(1D), which mandates that if a return is required to be made under s 8(1), it "must" be delivered in accordance with certain time limits). It has no application to acts which a taxpayer may or may not choose to do such as the making of a claim for repayment of overpaid tax under Schedule 1AB. In stating that "The person *may* make a claim to the Commissioners…", Schedule 1AB makes clear the voluntary nature of a claim.

44. Mr Stone argued that if s 118(2) applied to voluntary as well as mandatory acts, and in circumstances where the consequence of failure to comply was otherwise than a penalty, it would have radical consequences (which could not have been intended). It was submitted first that it would render otiose all sections of the TMA which specifically grant the FTT power to extend time beyond the period set in relevant statute. Secondly it was argued that HMRC (on the basis that HMRC is also a "person") could rely on reasonable excuse for failing themselves to comply with certain requirements imposed on them under the TMA, including the requirement to observe

time limits. An example of the latter is the requirement in s 9A TMA to give a taxpayer notice of an enquiry into a tax return within the specific time allowed by s 9A(2).

45. Although Mr Thomas was disposed to criticise this submission as a "floodgates" argument, we do not consider that it can properly be so described. It was an argument as to the construction of s 118(2) in the context of the various provisions of the TMA to which HMRC sought to argue that it could apply were the construction put forward by Mr Thomas to be adopted.

46. Section 118(2) has been on the statute book for a considerable time. Mr Stone submitted that it is striking, given the longevity of the provision, that there is no authority which shows s 118(2) being applied in the way suggested by Dr Raftopoulou's case. He took us by way of example to *Durkin v Revenue and Customs Commissioners* [2012] UKFTT 706 , *Janet Lawford v Revenue and Customs Commissioners* [2014] UKFTT 582, and *Bbosa v Revenue and Customs Commissioners* [2014] UKFTT 694. In essence these were all FTT cases where, if the arguments deployed in this appeal were to have been accepted, s 118(2) could have been applied but it had not been. In two of those cases the appellant was professionally represented.

47. The construction of s 118(2) received more detailed scrutiny in the FTT case of *Robert Ames v Revenue and Customs Commissioners* [2015] UKFTT 0337 (TC). That appeal concerned the availability of a CGT exemption to the appellant which turned on whether a claim for Enterprise Investment Scheme income tax relief had been claimed. The appellant had made a late claim and the FTT considered whether s 118(2) enabled the tribunal (and for that matter HMRC) to consider whether the late claim should be allowed on the basis of the appellant's reasonable excuse. Submitting the provision to close textual analysis the FTT came to the view that s 118(2) did not allow either HMRC or the tribunal to permit a late claim. The FTT reasoned as follows:

> "105…For the purposes of this Act, a person shall be deemed not to have *failed to do anything required to be done within a limited time* if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."
>
> 106. There are two possible readings of the italicised phrase. The first is that "a person shall be deemed not to have failed to do anything / required to be done within a limited time." On that reading, it may extend to late claims, because a claim is something "required to be done within a limited time" which the taxpayer has failed to do.
>
> 107. The second possible reading is: "a person shall be deemed not to have failed to do anything required to be done / within a limited time." On that reading, it applies where a person has failed to do something which he was required to do, complying only after the due date. The subsection would then apply, for example, to a failure to file a return, or pay taxes, by the statutory deadline. It would not extend to late claims, because a claim is not something "required to be done" but is at the taxpayer's option.
>
> 108. The wording in the later part of TMA s 118(2) makes it clear that the second reading is correct. It says that "where a person had a

> reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it." Were the first reading to be correct, this reference back would say something like "where a person had a reasonable excuse for not doing anything within the required time limit" or "where a person had a reasonable excuse for not doing anything which he was required to do within a limited time."
>
> 109. As a result, we find that neither HMRC nor the Tribunal can allow a late claim by relying on TMA s 118(2)."

48. The conclusion that the second reading was the correct one and the view that s 118(2) did not apply to claims as they were something done at the taxpayer's option and not something which was "required to be done" mirrors the approach which HMRC invite us to take in this case. Mr Stone submitted that the reasoning of the FTT in *Ames* has proper regard to the purpose of s 118(2) of providing a defence against penalties and invited us to draw the same conclusion as the FTT in that case. The consequence of not putting a claim in within four years is that the person does not have a valid claim. But in that situation there are no penalties which could be imposed in relation to which that person would require a reasonable excuse defence.

49. Mr Thomas put forward four reasons why we should not follow the reasoning in *Ames*. First, as an FTT decision it is not binding on this Tribunal. Secondly the FTT in *Ames* did not have benefit of counsel representing the parties. Thirdly it was a small part of a lengthy judgment. Finally, the FTT started in the wrong place by looking at the first limb of the section, and not having regard to the fact that the second limb is not confined to time limits but can be construed more broadly.

50. Mr Stone also referred to the case of *Orakpo v Lane* [1996] STC (SCD) 43, before a single special commissioner (Mr Cornwell-Kelly), as an illustration of another tribunal coming to the conclusion that s 118(2) could not be relied upon as a means of extending the time limit by which claims of this nature could be brought. The special commissioner found, at [44] of his decision, that the provision could not overtake or supplement the provision on claims relevant to that case (s 43 TMA) which made specific provision for time limits for claims because it would be contrary to the maxim that general things do not derogate from special things.

Limited deeming effect

51. Mr Stone argued that even in those situations where s 118(2) applies it is significant that the provision does not go as far as deeming the taxpayer to have done an act which he did not do; it does not deem the claim to have been made. Rather the effect is the taxpayer "shall be deemed not to have failed to do" the act that he was required to do. It therefore has the effect only that the taxpayer may escape the consequences that would normally follow from his having failed to do an act; this confines the effect of the provision to penalties. The purpose of the section is to provide a taxpayer with a potential defence against such penalties. The provision could easily have said "deemed to have done it [that which the taxpayer has failed to do but for which he has a reasonable excuse]" but it does not say that.

52. Mr Stone put forward by way of admittedly tentative support for the fact the provision does not have the effect suggested for Dr Raftopoulou the view expressed in *Carl Linde v Revenue and Customs Commissioners* (unpublished, FTT decision released

on 25 March 2014), that s 118(2) is an interpretative provision not a free-standing one. It would be surprising, argued Mr Stone, if such a powerful tool was tucked away at the back of the TMA.

53. In Mr Stone's submission the construction put forward by HMRC avoids what he characterised as the absurdity that all time limits within TMA could be overridden. In this regard we were referred to the following passage from the judgment of Peter Gibson J (giving the only reasoned judgement of the Court of Appeal) in *Marshall v Kerr* 67 TC 56 on the proper approach to the construction of deeming provisions. He said, at p 79:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

54. Mr Thomas argued that little may be drawn from the three FTT cases: s 118(2) TMA was not even referred to. In relation to *Orakpo,* it was not Dr Raftopoulou's submission, as it had been in that case, that s 118(2) allows HMRC or the tribunal to extend the time for doing anything. In *Linde* the argument was made in a throwaway manner without the benefit of the detailed argument in this Tribunal. In relation to the guidance to be extracted from *Marshall v Kerr,* Mr Thomas emphasised that the natural meaning of the provision was that the taxpayer would be deemed not to have failed to comply with the time limit and he submitted that in any case the inevitable consequence of a taxpayer being deemed not to have failed to have made a claim within the four year time limit would be that the time limit had been complied with.

Discussion

55. At the heart of this issue is the question of the proper scope of the words "required to be done" in the second limb of s 118(2). The starting point as always is to give those words their ordinary and natural meaning. For the reasons we explain below we have reached the view that the ordinary and natural meaning of those words provides a complete answer to the proper construction of s 118(2). There is in our judgment no manifest absurdity or inconsistency of the nature referred to by Peter Gibson J in *Marshall v Kerr* (at p 78) which would require any modification to the grammatical and ordinary sense of the words in s 118(2). There is nothing inherently unjust or absurd about a failure to comply with a statutory time limit being relieved to the extent to which there is demonstrated a reasonable excuse for that failure. That has led us to the conclusion that the second limb of s 118(2) is to be construed as applying in the case of something which, although of itself a voluntary act, is nonetheless required to be done within a time limit if it is to have the consequence which it is intended to have.

56. In our view, in identifying what TMA provisions fall within scope of s 118(2) it is not sufficient to simply and mechanistically look for a reference to the term "require" in

the TMA provision. HMRC gave the example of the wording in s 8(1D) TMA, which states that a return required to be made by s 8(1) "must be delivered" within a certain time limit, as being apt to permit the application of s 118(2) and we have noted above at [41] the wording of the provision HMRC referred us to which obliges employers to deliver year end PAYE returns using the words "must deliver". It is necessary to establish whether in substance something is "required to be done".

57. We consider that it is clear from the wording of Schedule 1AB that what in substance is being said is "If you want to make a claim you have to do it within a certain time limit". It is no stretch of language to say that a claim, if a taxpayer chooses to make one, "is required to be done" within a certain time limit. There is nothing on the face of s 118(2) which indicates that the words "required to be done" should be limited to mandatory acts and must exclude those cases where the act itself is a voluntary act, but there is a requirement, in order for that act to have validity, for it to be done by a certain time, or in a particular way. There is no less of a requirement for the claim to be filed within a certain time limit merely because the act of filing a claim is voluntary.

58. There are nevertheless limits to what may count as something that is "required to be done". The essence of something being required to be done is that there is a consequence (which may be a financial penalty, but is not limited to that) for failure to do that thing. That applies whether the requirement is to do something at all, such as a requirement to make a return under s 9A TMA, or a requirement imposed on the manner in which something that may be done voluntarily. There is no limitation in s 118(2) as to the nature of the requirement that is imposed. Still less is there any limitation, whether express or as a matter of construction, on the nature of the consequence of failing to comply with the relevant requirement. Accordingly, we conclude that the requirement imposed by paragraph 3(1) of Schedule 1AB that in order to have the intended consequence that it will constitute a claim under that Schedule the claim must be made within four years after the end of the relevant tax year is something within the meaning of "required to be done" in s 118(2), and that provision can therefore apply in that context.

59. We are, in this respect, disagreeing with the reasoning of the FTT in *Ames*. In our respectful view, the FTT in that case fell into the error of considering the question before it by reference to the first limb of s 118(2), and by construing that limb by reference to the differently-expressed language of the second limb of that provision. In *Ames* the taxpayer was not claiming that he had made his claim within any extended time period that had been permitted and which could then have been the subject of the first limb of s 118(2). He was arguing that he had a reasonable excuse for having made his claim late. He was seeking to place reliance on the second limb of s 118(2), and not the first.

60. The FTT in *Ames* construed the words "failed to do anything required to be done within a limited time" in the first limb of s 118(2) as referable only to a mandatory act for which there was also a limited time. It did so by pointing to the contrasting absence in the second limb of any reference to a requirement for something to be done within a time limit. But, with respect, we can find no reason why the reference to something "required to be done" cannot include as well something that is required to be done within a limited time. The inclusion of a specific reference to a limited time period in the first limb of s 118(2) is explained by the fact that that limb is concerned solely with cases of extended time periods. The second limb requires no such limitation. The absence in the second limb of express wording concerning required time limits does not

therefore, contrary to what the FTT decided, suggest any restriction on the meaning of the phrase "required to be done", either in the first limb of s 118(2) or in the second.

61. Nor are we dissuaded from our conclusion by the further arguments raised by HMRC. In saying that, we do not disagree with HMRC that s 118(2) cannot deem something to be done which has not been done at all. We accept that s 118(2) could not treat a claim as having been made, if no claim has been made, any more than it could treat a return as having been filed when it has not been. It is necessary, in the application of s 118(2), to identify the relevant failure to which s 118(2) can have effect: in this case it is not the failure to make the claim, it is the failure to make the claim on time. In this case it is not to the point that s 118(2) could not deem the claim to have been made; a claim was made, and thus it is not necessary that s 118(2) should be capable of deeming a claim to have been made.

62. While it is clear that s 118(2) has an important role to play in providing a means by which taxpayers may, if they have a reasonable excuse, escape the imposition of penalties by virtue of being deemed not to have failed to do the relevant act, in our judgment, agreeing with Mr Thomas, there is nothing on the face of s 118(2) which necessarily limits its application to financial penalties. Nor, whether s 118(2) is construed according to its plain terms or purposively, is there any proper basis for it to be so restricted in its application. To the extent the passage in *Hok* we have set out at [41] above represents the Upper Tribunal's view that s 118(2) is a defence to penalties (it appears to us merely to be a recitation of HMRC's argument to that effect) then such a view is to be understood as the Upper Tribunal referring to an illustrative example of the role that s 118(2) may play. The cited passage cannot be taken to indicate judicial approval of the proposition that the role of s 118(2) is confined to being a defence against penalties.

63. We do not accept the submission for HMRC that time extension provisions elsewhere in TMA would be otiose if s 118(2) is construed according to the conclusion we have reached. By way of example, s 49(2)(a) TMA enables the FTT to permit a notice of appeal to be given after the relevant time limit. The tribunal's discretion is a discretion at large and while it requires the FTT to consider all the circumstances, including the reason for any delay in making an appeal, it is not limited to considering whether the taxpayer had a reasonable excuse. The application of s 118(2) must be considered by reference to the particular context of the provision in respect of which its deeming effect is sought to be applied. Section 49(2) contains express provision of a statutory means by which the consequences of the making of a late appeal may be obviated. As with any interpretative provision, the application of s 118(2) is conditioned by the context. In the context of an independent mechanism providing for relief, there can be discerned the clear intention of Parliament that the question of a late appeal being permitted is not something which can be resolved solely by reference to reasonable excuse. Accordingly, s 118(2) can have no application in such a case. The same reasoning, in our view, would apply in other cases where the consequences of a failure to do something by a certain date (including, but not limited to, the incurring of a penalty) may be avoided by express relieving provisions.

64. We accept that, by concluding that the effect of s 118(2) is not confined to obviating the consequences of a financial penalty for failing to comply with an obligation, the ambit of s 118(2) might arguably extend to requirements imposed on HMRC themselves under the TMA. An obvious example is the requirement, to which we have referred, in s 9A(1) TMA, for a notice of enquiry to be given to the relevant

taxpayer within the time allowed by s 9A(2). Arguments of that nature, which are necessarily speculative, do not however dissuade us from what we consider to be the proper construction of s 118(2), so far as it relates to a claim that is the subject of this appeal. Even if it could sensibly be argued on such a construction that in a particular statutory context HMRC could rely on a reasonable excuse for failing to do something required to be done by them within a particular period, that could not, in our view mandate a construction of s 118(2) to limit it to cases where the consequence of failure would be a financial penalty.

65. Any argument as to the positioning of s 118(2) in the interpretation part of the TMA, and thus at the end of the Act, is marginal at best. Its position can have no relevance to its importance. It is concerned with deeming effects on a number of other provisions of the TMA. It is thus both interpretive and general in its application. Its positioning in the TMA is logical and provides no basis for any argument that its effect should be limited.

66. Nor can HMRC's reliance on the special commissioner's decision *Orakpo* take their case further. We accept, as we have described, that where a provision provides its own relief for failure to comply, which is independent of the operation of s 118(2), that may provide a context in which it could be held that s 118(2) could have no application. That, in our view, would simply be a matter of purposive construction, and would not require the application of any maxim such as that relied upon by the special commissioner in *Orakpo*. But we would in any event respectfully disagree with the special commissioner that the mere inclusion of a time limit, in that case in s 43 TMA, would be sufficient to exclude the application of s 118(2), whether by reference to a maxim or otherwise.

67. The absence of discussion on s 118(2) TMA in the various FTT cases to which HMRC referred us cannot assist. There is no indication in those cases that arguments on s 118(2) were raised by the parties and therefore considered by the tribunal. Novelty is no bar to the section having wider application than may have been assumed in practice to date.

68. In conclusion on the question of the application of s 118(2) to a claim for recovery of overpaid tax that has been made outside the time limit provided for by paragraph 3(1) of Schedule 1AB, in our judgment the second limb of s 118(2) does apply to such a late claim. If the taxpayer has a reasonable excuse for not filing such a claim within the time limit, and has made the claim without unreasonable delay after the excuse ceased, then s 118(2) deems the taxpayer to not have failed to comply with the time limit and therefore deems the claim that has been filed to have been filed within the relevant time limit. Such a claim will as a consequence be a claim under Schedule 1AB, and accordingly will be a claim within the scope of Schedule 1A, and subject to the provisions of that Schedule in relation to enquiries, closure notices and appeals.

Determination of questions of reasonable excuse: jurisdiction of the FTT

69. The consequence of our conclusion on the possible application in principle of s 118(2) TMA to claims of this nature is that a late claim which, but for the application of that provision, would not be capable of being regarded as a claim under Schedule 1AB, and which would thus not fall within Schedule 1A, would be regarded as such a claim, and the enquiry, closure notice and appeal provisions of Schedule 1A would apply.

70. That, however, gives rise to a jurisdictional conundrum. Until the question of reasonable excuse, and the application of s 118(2), has been resolved, it is not clear whether the claim is under Schedule 1AB, and thus subject to Schedule 1A. A right of appeal arises only in relation to a closure notice. Such a notice will only be capable of being issued if the claim is under Schedule 1AB, which will depend on the claim being treated as having been made on time by s 118(2) TMA.

71. Although we have described this as a conundrum, it is in fact one that is straightforward to resolve. The FTT is empowered to determine questions of jurisdiction in any case coming before it. That much is clear from the power given to the FTT by its Procedure Rules to strike out an appeal for want of jurisdiction. That jurisdiction to determine such questions is not excluded because, for example, it may be argued that the appeal is not validly made at all because there has been no appealable decision. That is the very question that the FTT will be required to determine.

72. The same reasoning applies to any question of the validity of a claim under Schedule 1AB, and the related question whether there has been a closure notice from which an appeal under Schedule 1A may lie, where those questions turn on the application of s 118(2). The FTT would have power to determine all questions relevant to its jurisdiction, including the application of s 118(2) and whether there had been a closure notice under paragraph 7(2) of Schedule 1A from which an appeal could be made. If the FTT found on the facts that there was no reasonable excuse or that s 118(2) otherwise did not apply, it would necessarily follow that no claim would have been made under Schedule 1AB, that no closure notice could have been given under Schedule 1A and that the FTT would have no jurisdiction. On the other hand, if s 118(2) did operate on the particular facts, a claim would be regarded as having been made on time, and the FTT would have jurisdiction to determine whether there had been a closure notice and consequently an appeal within the jurisdiction of the tribunal.

Whether HMRC opened an enquiry and issued a closure notice in this case

73. Although the questions whether HMRC had opened an enquiry in this case and had completed that enquiry by the issue of a closure notice against which an appeal would lie within the jurisdiction of the FTT, are questions that would fall to be considered only if it were to be determined by the FTT on the facts that Dr Raftopoulou had a reasonable excuse for the failure to make the claim, we heard argument on those questions, and it is right that we should determine them on this appeal.

74. We referred earlier to the decision of this Tribunal in *Portland Gas* in which, in the analogous case of the SDLT provisions, the tribunal considered whether an enquiry had been opened and whether a closure notice had been issued.

75. In that case the amendment to the SDLT return and claim for repayment was contained in a letter dated 18 July 2012. HMRC rejected the claim in a letter dated 15 August 2012 giving two reasons, one of which was that the claim was out of time. The tribunal considered additional correspondence following HMRC's letter of 15 August 2012. On 23 August 2012 Portland's solicitors wrote to HMRC to express disagreement on the question of the time limit. HMRC wrote back on 6 September 2012 to say they were seeking advice from their policy team regarding the time limit issue and then wrote again on 5 November 2012. Further dialogue on the issue ensued, and HMRC confirmed its conclusion in a letter dated 23 November 2012. Portland filed its notice of appeal. The FTT rejected Portland's argument that HMRC's letter of 18 July 2012

amounted to an enquiry and the letter of 15 August 2012 was a closure notice. The issues considered by the Upper Tribunal were whether HMRC's response of 12 August 2012 or its later letters amounted to the opening of an enquiry and if so whether those letters amounted to a closure notice.

76. At [40] the tribunal noted that the enquiry provision had two elements, first that HMRC "must enquire", the effect of which, in the tribunal's view, was to create an "enquiry" and secondly that it had to give notice of HMRC's intention to do so within the "enquiry period".

77. The tribunal found that the further steps HMRC had taken following the letter from Portland's solicitors of 23 August 2012 in seeking legal advice on the arguments raised by Portland amounted to an enquiry within the ordinary meaning of the term.

78. Having considered the FTT case of *Coolatinney Developments Ltd v Revenue and Customs Commissioners* [2011] UKFTT 252 (TC), the Upper Tribunal approved the principle discerned from that case that a notice of enquiry need not be in any particular form and later extended this to closure notices (at [51]). The tribunal said, at [48]:

> "In our view consistent with the policy in s 83(2) of the FA 2003, a communication should be regarded as giving notice of an intention to inquire provided the intended effect is reasonably ascertainable by the person to whom it is directed."

79. The tribunal found that HMRC's letter of 6 September 2012 satisfied this test. It went on to conclude that either the letter of 5 or 23 November 2012 could be regarded as constituting a closure notice.

80. In response to HMRC's submission that there had to be a clear intention on HMRC's part for an enquiry to be opened at [55] the tribunal said:

> "The question is purely one of substance: do the steps taken by HMRC amount to the opening of an inquiry? It must also be clear to the taxpayer from what HMRC say that an inquiry is being undertaken."

81. At [56] the tribunal noted it would find it impossible to find that there was a right to a closure notice in the absence of an enquiry being opened.

82. It was common ground between the parties to this case that there is no prescribed form for the enquiry notice or the closure notice.

83. Mr Thomas accepted that an enquiry is needed before there can be a closure notice and an appeal, but he argued that an enquiry and a closure notice may be in the same document. He submitted that it is unnecessary for there to be any investigation by HMRC, in the sense of seeking further information from the taxpayer. In a case where HMRC have been provided with all relevant information, and can reach a conclusion based on that information alone (an "open and shut" case as Mr Thomas described it), HMRC must nonetheless have addressed their minds to the issue at hand before reaching a conclusion and must accordingly have enquired into the claim and issued a closure notice.

84. Mr Thomas urged us to adopt a purposive construction of the relevant provisions, echoing the acceptance by the Upper Tribunal in *Portland Gas* (at [32]) that the corresponding SDLT provisions in that case should be construed against the underlying

philosophy that the FTT is the body in which parliament has vested the jurisdiction to deal with disputes between the taxpayer and HMRC as to the correct amount of tax to be paid.

85. Mr Thomas submitted that the letter of 9 November 2011 meets the threshold for any notice of an enquiry, and that any indication that HMRC did disagree with Dr Raftopoulou must be taken to encapsulate the conclusion. That conclusion, rejecting the claim as out of time, falls on Mr Thomas' argument to be treated as a closure notice amending the claim to zero.

86. In the alternative, were it to be concluded that the letter of 9 November 2011, or subsequent correspondence, sufficed to amount to a notice of enquiry but that the letter could not also amount to a closure notice, Mr Thomas submitted that there was an open enquiry, and the FTT would have jurisdiction under paragraph 7(5) - (7) of Schedule 1A TMA to direct a closure notice to be issued in that respect.

Discussion

87. In *Portland Gas*, in the SDLT context before it, the Upper Tribunal considered the essential nature of an enquiry. It said, at [42]:

> "It is helpful to consider the ordinary meaning of 'enquire' and 'enquiring'. We were referred to various dictionary definitions. The words are synonymous with 'inquire' and 'inquiring' and it is clear to us that in the context in which we are considering the term, that is in relation to legislation that gives HMRC power to verify information contained in a return so as to ascertain whether the correct amount of tax has been paid, it must mean 'examine', 'investigate' or 'make an investigation into'. Another synonym would be 'scrutinise'."

88. The tribunal considered a submission on behalf of HMRC that to enquire means "an act of asking for information". At [44], the tribunal said:

> "We can see the force of Ms Choudhury's submission in relation to the letter of 15 August 2012 taken in isolation because it would appear that the only 'examination' that took place was to ascertain that the original return in respect of which an amendment was sought was more than 12 months before the claim was made. In other words, HMRC did not have to go beyond the face of the letter that they were sent to respond to it and in our view that is insufficient to amount to an inquiry in the context of para 12 of Sch 10 to the FA 2003."

89. Thus the tribunal in *Portland Gas* took the view that if all the relevant information was contained in the claim itself, the conclusion drawn by HMRC from that information would not be the result of any enquiry on their part. We are not bound by this observation of the tribunal; the remarks in this respect were *obiter* as the tribunal found that later correspondence did amount to an enquiry. With respect to that experienced tribunal, we cannot agree with them on this point. The conclusion reached by that tribunal seems to us to pay insufficient regard to the synonym for the act of enquiry which the tribunal itself had noted, namely that of "scrutinise". It would also in our judgment have the unfortunate, and counter-intuitive, result of giving rise to different conclusions as to whether there had been an enquiry depending on the level of information provided by the taxpayer.

90. An example, which we put to counsel at the hearing, will illustrate the point. Take two taxpayers. The first taxpayer was diligent, and sent in everything that HMRC would want to see at the outset. The taxpayer's position was crystal clear. On the basis HMRC had everything it needed it wrote back to the taxpayer giving its decision which was to refuse the claim. By contrast the second taxpayer provided little information. HMRC stated they were opening an enquiry and once the further information was obtained the closure notice was issued. According to the analysis in *Portland Gas*, the second taxpayer has a right of appeal, the first does not.

91. It cannot be right that the more information a taxpayer discloses to HMRC (thereby giving HMRC less need to enquire about it) the less likely that it is that the taxpayer will be able to appeal to the FTT, but will instead be reliant on other remedies such as judicial review. Construing the legislation in this way would give rise to a perverse incentive: taxpayers would be better advised to hold back information so that HMRC would have to open an enquiry to obtain it and from which would follow a closure notice giving the taxpayer a right of appeal to the FTT. Whilst judicial review may be an adequate remedy, it is not, in contrast to an appeal to the FTT, one that is specifically contemplated or provided for by the legislation. In our judgment, a construction that recognises the existence of a specific right of appeal to the FTT in respect of conclusions reached by HMRC on a claim is to be preferred to one that denies such an appeal right, even if other remedies not provided by the statute might be available.

92. Mr Stone's response to this is that this outcome is simply the logical conclusion of Schedule 1A. There are circumstances where what HMRC does does not open an enquiry. The tribunal should avoid filling in gaps or straining the clear language of the statute. The factual position in this case cannot be compared with that in *Portland Gas*. In contrast to *Portland Gas*, where HMRC examined the case in further detail, in this case HMRC's response does not amount to evidence of any further enquiry. HMRC said straightaway it was not a valid claim. The letter does not show HMRC might have accepted the claim or that it had an inquiring mind. It quite clearly did not accept the claim. The later correspondence that Dr Raftopoulou referred to was, in contrast to that in *Portland Gas* (where the further corresondence was a month or so later), almost two years after the initial refusal of the claim. It was also written by a complaints officer writing on behalf of HMRC's complaints handling service. As such it could neither be, nor evidence, any enquiry.

93. From *Portland Gas* we can conclude in summary that:

(1) The opening of enquiries and their closure do not require any particular formality.

(2) The term "enquire" as described by the Upper Tribunal in *Portland Gas* bears its natural and ordinary meaning and which, as noted above, includes to "scrutinise".

(3) For there to be an enquiry, it must be made clear to the taxpayer that what HMRC have sent to the taxpayer notifies him in substance that an enquiry has been opened.

94. In relation to the third of these points, this proposition seems entirely consistent with the fact that the underlying significance of the enquiry is that it subjects HMRC to time limits which protect the position taken by the taxpayer, and that it opens the door

to certain statutory information gathering powers which impact on the taxpayer. That being the case it is readily apparent why it needs to made clear to taxpayers when an enquiry has been opened. There is no reason why the same proposition should not equally extend to HMRC's act of issuing a closure notice (and it is implicit in the decision of the Upper Tribunal in *Portland Gas,* at [51], that the closure notice had a function of informing the taxpayer of certain matters). In other words it must be clear to the taxpayer from what is sent that in substance HMRC are closing the enquiry.

95. The situation which *Portland Gas* does not address, because it was not relevant on the facts of that case, is the position where there is one document which arguably opens an enquiry and also closes that enquiry. That is, however, the question that arises in this case in relation to the 9 November 2011 letter.

96. From the scheme of the legislation it can be observed that there are time limits by which an enquiry may be opened (Sch 1A, para 5). There are certain things that HMRC are empowered to do (but not necessarily required to do) during the course of the enquiry (such as to call for documents under the information powers in Schedule 36 of the Finance Act 2008 and prior to that as provided in paragraph 6 of Schedule 1A). There are protections for the taxpayer in the way of application rights to the tribunal in ensuring that enquiries do not proceed indefinitely (Sch 1A, para7(7)).

97. While on the face of it the legislation accommodates the typical case where there is a period of time in between the opening and closing of an enquiry, there is no provision for a minimum length of time for the enquiry. Indeed, HMRC is, subject to applications to the tribunal by the taxpayer, in control of the enquiry and the use of their enquiry powers. If the taxpayer considers that HMRC has closed an enquiry prematurely and disagrees with the result he may appeal the conclusion stated, amendment or decision in the closure notice as appropriate. If the taxpayer regards HMRC's enquiry as having taken too long, he may apply to the FTT for a direction for a closure notice to be issued. If it were correct that there needed to be some minimum period of time in between the opening and closure of a notice then it might be expected that the legislation would either set this out or provide a mechanism for specifying a minimum period. To the contrary, by providing for an enquiry to be brought to an end by a closure notice, including one issued following an application to the FTT, the legislation is expressly contemplating an otherwise indeterminate period for the enquiry.

98. We conclude therefore that the legislation does not preclude from its scheme the situation where the opening and closure of an enquiry follow in immediate succession. Nor is there any bar on the notice of enquiry and the concomitant closure notice being in the same document. Neither party is prejudiced: the taxpayer may appeal if they do not accept the result, HMRC are not obliged, except by direction of the FTT, to issue a closure notice within any particular period. The provisions on enquiry refer to the officer notifying his intention. We do not consider that this requires that the notification of intention must precede the actual scrutiny.

99. One particular point in this regard does, however, call for some explanation. Under paragraph 5 of Schedule 1A, the power to enquire into a claim is exercised by an officer of HMRC by giving notice of that officer's intention to do so. Of itself, that might suggest that such a notice must be prospective. We do not consider that such a literal construction is appropriate. Paragraph 5 is concerned with the giving of notice. That will necessarily follow after the intention to enquire into the claim has been formed. It may also follow some, and possibly some considerable, consideration or

scrutiny of the available materials. The notice of intention is simply that. It may be prospective, but it equally may be – indeed it is more likely to be – retrospective in the sense that the officer may already have engaged in elements of enquiry before the notice is given. There is no requirement that HMRC must give notice before scrutinising or otherwise turning their minds to the claim; the only requirement is that the notice itself must be given within a certain period.

100. We also derive from *Portland Gas* the proposition that what is important is the substance of what is communicated by HMRC to the taxpayer and not the formality. There is no requirement that notice of an enquiry should formally state that an enquiry is being opened. Nor, likewise, is there any requirement that a closure notice should formally state that an enquiry is closed; the requirement that the officer inform the claimant that he has completed his enquiries need not be stated in those terms so long as the claimant is in substance so informed. Furthermore, a single letter may constitute in substance both notice of enquiry and closure notice. It is the substance, and what the correspondence can properly be regarded as having informed the claimant, that is material.

101. In a potential case of an enquiry being opened and closed in a single document, the question to ask therefore is whether the document would be understood by the taxpayer as having that effect. On the facts of this case, if we ask if HMRC scrutinised what the taxpayer sent in, the answer must be yes. Would the taxpayer understand that HMRC had amended the claim to make good or eliminate the deficiency or excess (in this case by rejecting the claim)? The answer again would in our view clearly be yes.

102. Does this amount to saying that every conclusion expressed by HMRC will be taken to have an embedded enquiry in it, such that any conclusion in a letter will give rise to an appealable decision? At [55] in *Portland Gas* the Upper Tribunal dealt with the argument that all responses to taxpayers' questions would then amount to an enquiry. Rejecting that submission, the tribunal referred to the fact that in practice the closure notice would be carefully circumscribed by reference to the circumstances being dealt with.

103. We agree. It will always be a question of fact as to whether HMRC have enquired into a claim. But the situations where a conclusion has been stated, and an amendment in substance made to the claim, but there has been no scrutiny or enquiry by HMRC into the claim are likely to be exceptional.

104. The outcome that HMRC's conclusions will, except in an exceptional case, be appealable to the FTT ought not to be a startling one. It should not be cause for alarm to HMRC who will be well able in practice to determine those points in disputes at which they want to state a conclusion and when they wish to maintain an ongoing enquiry. We see no reason to doubt that in an ordinary case, the usual practice of HMRC expressly stating that a letter constitutes a notice of enquiry or, as the case may be, a closure notice should not, in the vast majority of those cases, provide certainty as to the position. It is only cases at the margins, which are likely to be exceptional, where disputes may arise and where the question of the substance of a particular communication or series of communications will fall to be ascertained.

105. The letter from HMRC to Dr Raftopoulou dated 9 November 2011 states the conclusion arrived at by the HMRC officer who had considered Dr Raftopoulou's claim, namely that the claim (described as an amendment, but clearly understood to

refer to the claim for relief from overpaid tax) was out of time and that a repayment could not therefore be made. The substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero.

106. That conclusion can have been arrived at only by the officer scrutinising the claim. That amounted to an enquiry into the claim, and by notifying Dr Raftopoulou of the result of that enquiry, the officer was at the same time giving notice of the intention formed by the officer prior to that scrutiny of enquiring into the claim.

107. If therefore the FTT were to find that the effect of s 118(2) TMA is to treat Dr Raftopoulou's claim as in time, and accordingly as a claim under Schedule 1AB, so that under Schedule 1A an enquiry may be opened and completed by the issue of a closure notice, we find that the letter of 9 November 2011 was both notice by HMRC under paragraph 5 of Schedule 1A of the intention to enquire into the claim and a closure notice under paragraph 7 of that Schedule.

Other issues

108. Mr Thomas accepted that the issue of whether Dr Raftopoulou had paid the right amount of tax was not within the scope of the appeal to this Tribunal.

109. At the hearing, Mr Thomas raised for the first time an argument that Dr Raftopoulou's letter of 22 November 2008 could constitute a claim. If correct this would mean that the claim would have been made in time and there would be no need to rely on s 118(2). Mr Stone objected to this Tribunal considering this matter. The FTT had determined in its decision when the claim had been made and there was no appeal against this finding of fact on *Edwards v Bairstow* grounds. The only ground upon which permission had been granted was that as articulated by this Tribunal in its permission decision. There were also factual issues around whether the claim had been received by HMRC (HMRC maintain that it had not been received) and therefore it would be something which HMRC would want to cross-examine on. To the extent the new point raised issues of law, such as the nature of a claim, HMRC would also be prejudiced by not having been given the opportunity to refer to relevant authorities in this respect.

110. We agree with Mr Stone that the scope of this appeal does not encompass consideration by this Tribunal of any argument on the question whether the letter of 22 November 2008 constituted a claim under Schedule 1AB TMA. It is not clear to us that this was an issue before the FTT. The FTT did not address it as such, although it did refer to the argument of Dr Raftopoulou that HMRC had been aware of the mistake in the 2006-07 return before the expiry of the four-year time limit. In any event, it is not a matter that can properly be raised at this stage in an appeal on a question of law. Whether it is a matter that can be raised before the FTT, to which this case must now be remitted, will be a matter for that tribunal.

Decision

111. For the reasons set out above we have concluded that the FTT erred in law in failing to consider the issue of whether Dr Raftopoulou had a reasonable excuse for the late submission of her claim, and on that basis whether the FTT had jurisdiction. We allow this appeal and set aside the decision of the FTT and remit the case to the same panel for its reconsideration in the light of this decision. In view of the matters that

have been raised on this appeal, which have as we have explained ranged somewhat wider than the issue of the application of s 118(2) for which permission to appeal was given, we consider it appropriate to set aside the entire decision of the FTT and to direct it to determine afresh the application of HMRC for a strike out on the ground that the FTT has no jurisdiction. It will be a matter for the FTT, according to its own Procedure Rules, what issues it permits to be raised on that fresh hearing.

Costs

112. We shall hear further argument on the question of costs.

113. Although Mr Thomas made a prospective application for pro bono costs, and Dr Raftopoulou's appeal has been successful, there is a doubt whether this Tribunal is in a position to make such an Order. The power to order pro bono costs is derived from s 194 of the Legal Services Act 2007, which applies to proceedings in a civil court. That power is, however, limited by the definition of a civil court in s 194(10) which encompasses only the Court of Appeal, the High Court and the county court. Tribunals are not included. Although in their report, Costs in Tribunals, to the Senior President of Tribunals (December 2011), the Costs Review Group recommended, at para 175, that the power to award pro bono costs should be extended to tribunals, this recommendation has not to date been implemented.

114. On the other hand, under s 25 of the Tribunals, Courts and Enforcement Act 2007, this Tribunal has, in England and Wales, and in relation to certain matters, "the same powers, rights, privileges and authority as the High Court". The specified matters relate to witnesses and documents, and "all other matters incidental to the Upper Tribunal's functions" (s 25(2)(c)). It may be argued, therefore, this Tribunal does have the power conferred on the High Court by the 2007 Act to order pro bono costs.

115. Because this is an area of some doubt, and we are not aware of such an Order having been made by this Tribunal, we invite the parties to make representations on the question of costs. Those representations should be in writing and be delivered to the tribunal and to the other party within 14 days of the release of this decision.

Roger Berner
Judge of the Upper Tribunal

Swami Raghavan
Judge of the Upper Tribunal

Release date: 16 October 2015