# TC 04887

**Appeal number: TC/2015/02550**

***INCOME TAX– whether appellant served with valid notice to file return – no-whether valid enquiry opened into return and valid closure notice issued-no-appeal allowed-ss 8,9,28A,34and 115 TMA 1970***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ALEXANDER REVELL** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON**
**CAROL DEBELL**
**(TRIBUNAL MEMBER)**

**Sitting in public at Fox Court, 30 Brooke Street, London WC1 on 28 October 2015 and after consideration of further written submissions from the parties.**

**Mrs J Carter, Simia Farra & Company, for the Appellant**

**Mr J Kruyer, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

## Introduction

1. The Appellant, Alexander Revell, appeals against the decision taken on 10 December 2014 to close the enquiry into Mr Revell's self-assessment for the year 2008/2009 by making amendments to the return so as to increase the tax due for that year to £16,518.60.

2. The dispute which is the subject of this appeal can be summarised as follows. The Respondents ("HMRC") carried out a reconciliation of Mr Revell's PAYE records from his various employers over a number of years which showed an underpayment of a significant amount. Sometime later, HMRC sent a self-assessment return for the year ended 5 April 2009 to what it contended was Mr Revell's last known address.

3. Mr Revell did not complete that return because he never received it. In the absence of a completed return, HMRC purported to issue a determination of tax due for the year in question pursuant to s 28C of the Taxes Management Act 1970 ("TMA") which was received by his agent, Mrs J Carter of Simia Farra and Company. Mr Revell disputes whether such determination was valid because he contends that no request to file a self-assessment return was ever properly made. Nevertheless, he did subsequently complete a self-assessment for 2008/2009 which had the effect of displacing the determination referred to above.

4. The self-assessment which was filed applied a "notional credit" to the amount of tax paid for the year with the result that no tax was shown as being due for the year in question.

5. HMRC purported to an open an enquiry into this return pursuant to s 9A TMA and subsequently issued a closure notice amending the return so as to remove the notional credit with the result that the return now showed that Mr Revell was due to pay £16,518.60 in tax for the year in question.

6. Mr Revell disputes that it was open to HMRC to open an enquiry because no valid request to file a self-assessment return pursuant to s 8 TMA had been made and consequently the closure notice was also invalid.

7. HMRC's statement of case purely dealt with the issue as to whether the request to file a self-assessment return for the year 2008/2009 had been properly made, namely whether the request for the completion of the return had been sent to Mr Revell's last known address.

8. Following a review of the evidence in the course of the hearing of the appeal, the Tribunal indicated that it was minded to find that the request to complete a tax return for the year 2008/2009 had not been properly served. HMRC's representative, Mr Kruyer, gave no indication that he disputed that preliminary conclusion.

9. Accordingly, the hearing was adjourned and directions made that the parties should file written submissions on whether the enquiry undertaken into the return which was filed by Mr Revell to displace the determination made was a valid enquiry and consequently whether the closure notice was also valid.

10. In its written submissions on this point, HMRC contends that the return should be regarded as an unsolicited return and the taxpayer should be taken to have waived the requirement for a notice pursuant to s 8 TMA. Mr Revell contends that the return was not unsolicited, in the sense that it was not a voluntary act on his part but was in response to the determination and was the only basis on which that determination could be displaced. In his view he was therefore coerced into making the return.

**Findings of fact**

11. We heard no live evidence and consequently our findings are based solely on the bundles of documentation that we were provided with. Regrettably, the correspondence we saw demonstrates a clear lack of rigour on HMRC's part in getting to the bottom of what happened, a lack of rigour which continued right up to the hearing of the appeal. It is well summarised in a letter that HMRC wrote to Mr Revell's agents on 13 December 2013 in responding to well justified complaints that Mr Revell made about the manner in which his affairs had been handled. HMRC said the following:

> "Even though I have defended certain of our handling of this case, I admit that we have still not given Mr Revell the service he deserves. Plainly, our shortcomings have affected him particularly badly. Furthermore, I feel our treatment of his complaint-including my delay in sending this letter-only aggravated the situation."

12. Mr Revell is a professional footballer. Over the years for which he has been in correspondence with HMRC regarding alleged arrears of tax, namely tax years 2007/2008 to 2011/2012, he played for a number of different clubs. As he was playing in the lower divisions during these years his earnings were relatively modest compared with the rewards given to those who play in the Premier League and all his tax was accounted for through the PAYE system. Until 2012 he had never been asked to complete a self-assessment return. Accordingly, the address held by HMRC for Mr Revell to which any notices or other necessary correspondence should be sent would, in accordance with usual practice, be that disclosed by his latest employer on the P 60 End of Year Certificate issued at the end of each tax year.

13. On 28 March 2011 HMRC identified an underpayment of tax on Mr Revell's PAYE record. This underpayment calculation was sent to an historic address of Mr Revell's in Newhaven and he never received it. At the relevant time, Mr Revell was living at 28 Brunel House, St James Road, Brentwood. HMRC's records show that Mr Revell's records were updated to show this as his current address on 15 September 2011, but it is clear that HMRC were aware of that being Mr Revell's address some time earlier than that; a P45 issued by Wycombe Wanderers to Mr Revell on 28 July 2010 shows this address.

14. No response having been received to the underpayment notification, on 10 September 2012 HMRC issued a self-assessment return for the tax year 2008/2009 and sent it to the Brunel House, Brentwood address. However, by that time Mr Revell was no longer living there and the property was let to tenants. A P60 issued by Rotherham United for the tax year to 5 April 2012 showed Mr Revell's address is being at a different address in Brentwood and accordingly, HMRC's records should have been updated to show this as Mr Revell's last known address by the time the self-assessment return was issued. Mr Kruyer could offer no explanation at the hearing as to why this had not been done.

15. Some time after the self-assessment return was sent in September 2012, other correspondence from HMRC which had been sent by it to the Brunel House address was passed on to Mr Revell by the letting agent for the property. This correspondence related to certain penalties charged in relation to the year 2010/2011 but did not include the 2008/2009 self-assessment return. Mr Revell's agent contacted HMRC regarding this correspondence on 1 October 2012 and notified HMRC of Mr Revell's updated address in Doncaster, which was duly recorded on HMRC's records on the same date.

16. HMRC's Notes on its contact with Mr Revell record that on 3 October 2012 they had returned back to him a 2009 return as it had not been signed. HMRC had therefore clearly proceeded on the basis that Mr Revell had received the return sent to Brunel House and then returned it, albeit unsigned. We believe Mr Revell when he says he never received this return and accept the explanation given by Mrs Carter that the tenants at the Brunel House had returned the letter containing the return to HMRC on the basis that Mr Revell did not live at the property. What HMRC received back therefore was not only an unsigned return but a completely blank one and had clearly jumped to the wrong conclusion without proper investigation. This explanation was given to HMRC by Mrs Carter in correspondence, but her representations were ignored and HMRC consistently maintained their original position without any further serious investigation, particularly as to the issue as to whether Mr Revell's last known address was in fact Brunel House, bearing in mind the P 60 referred to at [14] above which HMRC had received.

17. What the return of the blank form prompted HMRC to do, however, was to change Mr Revell's address on their records back again from the Doncaster address to the Brunel House address on 4 October 2012.

18. On 2 October 2012 HMRC sent Mr Revell a duplicate return which had no date of issue on it or a name and address. This was pointed out to HMRC on 21 November 2012. This prompted continuing correspondence between Mrs Carter and HMRC including a number of complaints about how matters were being handled culminating in HMRC's letter of 13 December 2013 referred to at [11] above. Mrs Carter observed, and we agree with her, that it appeared that at this point HMRC realised that the time limit in s 34 TMA had expired and that consequently a renewed request to file a return for the year 2008/2009 would be out of time. HMRC therefore continued to rely on the fact that in its view a request to complete a return for the year in question had been validly served. The letter referred to the fact that Mr Revell

could still submit a return but in any event that HMRC would issue a determination to protect their position.

19. On 13 February 2014 HMRC issued a notice of determination under s 28 C TMA in relation to the underpayment of tax it contended was due for the tax year ended 5 April 2009.

20. In response, on 4 March 2014, Mrs Carter submitted a return on behalf on Mr Revell for the year 2008/2009. She said that this course was adopted because it was the only way to supersede the determination, but made it clear that it was done under protest and that Mr Revell felt coerced into doing so because at this point he was being pursued for the outstanding tax claimed by HMRC.

21. As detailed at [8] and [9] above, HMRC purported to open an enquiry into this return and following completion of that enquiry, issued the closure notice which is the subject of this appeal.

**Relevant legislation**

22. Section 7 TMA so far as relevant provides:

"(1) Every person who –

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B),

shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) a person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

…

(3) A person shall not be required to give notice under subsection (1) above in respect of the year of assessment if that year –

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

…

(4) A source of income falls within this subsection in relation to a year of assessment if –

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations."

23. Section 8 TMA so far as relevant provides:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

24. Section 9A TMA so far as relevant provides:

"(1) An officer of the Board may enquire into a return under section 8… of this Act if he gives notice of his intention to do so ("notice of enquiry") –

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed."

25. Section 28A TMA so far as relevant provides:

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

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

(2) A closure notice must either –

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

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

26. Section 28C TMA so far as relevant provides:

"(1) This section applies where –

(a) a notice has been given to any person under section 8 … of this Act... and

(b) the required return is not delivered on or before the filing date.

(1A) An officer of the Board may make a determination of the following amounts, to the best of his information and belief, namely –

(a) the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) the amount which is payable by him by way of income tax for that year;

….

(2) Notice of any determination under this section shall be served on the person in respect of whom it is made and shall state the date on which it is issued.

(3) Until such time (if any) as it is superseded by a self-assessment made under section 9 of this Act (whether by the taxpayer or an officer of the Board) on the basis of information contained in a return under the relevant section, a determination under this section shall have effect for the purposes of Parts VA, VI, IX and XI of this Act as if it were such a self -assessment."

27. Section 34 (1) TMA provides that "…an assessment to income tax... may be made at any time not more than 4 years after the end of the year of assessment to which it relates."

28. Section 115 TMA provides:

"(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person –

(a) at his usual or last known place of residence, or his place of business or employment, or

(b) …

(3)…"

29. Section 7 Interpretation Act 1978 provides:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

**Discussion**

30. The first issue we have to deal with is the question as to whether, pursuant to s 8 TMA Mr Revell was "required by a notice given to him..." to make and deliver a return for the year 2008/2009.

31. It was common ground that the answer to this question depended on whether a notice had been validly served in accordance with the provisions of s 115 TMA. In interpreting this question reference must also be made to the provisions of s 7 of the Interpretation Act 1978, as set out at [28] above.

32. Our findings of fact as recorded at [14] above lead to the inevitable conclusion that the request to make and deliver a self-assessment return on 10 September 2012 was not served in compliance with the provisions of s 115 TMA because at the time the request was made the address to which it was sent was no longer Mr Revell's "usual or last known place of residence", HMRC having received a more up-to-date address by virtue of its receipt of a form P60 issued for the tax year to 5 April 2012. Neither was there any suggestion that the address to which the return was sent was his place of business or employment. Accordingly, the presumption of service in s 7 of the Interpretation Act 1978 cannot apply.

33. As a consequence of that finding, we now have to consider the status of the purported determination notice, enquiry and closure notice.

34. HMRC's written submissions on this issue are very brief and continue to display the lack of rigour which has characterised their conduct of this matter. Their submissions contain no analysis of the legislative provisions concerned and refer to no direct authority on the point.

35. HMRC observe that they receive approximately 350,000 unsolicited returns each year, largely from PAYE taxpayers who do not need to complete a self-assessment but who are seeking a repayment. They quote what they say is long-standing advice from their solicitors as follows:

> "In my view that which is intended to be a return, whether paper or electronic and is in an appropriate form may properly be regarded as a statutory return. I appreciate that the statutory scheme puts an obligation on the taxpayer to make a return arise [sic] only once he receives a notice which requires him to do so. But in any case in which an unsolicited return has been received, the better view, as it seems to me, is that the taxpayer has waived the formal notice step."

36. On the basis of that advice, it appears that HMRC's policy is that it treats an unsolicited return for all purposes as if it were in response to a notice to make a return by the date HMRC received it. In support of this view, they refer to *Giles Davis v HMRC* (2011), a decision of this Tribunal. That case concerned a penalty assessment made in respect of an error on an unsolicited return which HMRC contended was careless. HMRC had opened an enquiry into the return under s 9A TMA and pursuant to a closure notice amended the return to include an additional liability for tax.

37. It appears that although the Tribunal refer to sections 7, 8, 9, 9A and 28 A TMA it provided no analysis of those sections and in particular did not consider whether the return in question was a return falling within s 8 and consequently did not consider either whether the enquiry was a valid enquiry and the closure notice was a valid closure notice. The point was never argued and the Tribunal appears simply to have assumed the validity of the process that had been followed. Consequently, aside from

the fact that such a decision is not binding on this Tribunal in any event, as the points were never argued the decision cannot be regarded as authority for HMRC's position.

38. We reject HMRC's analysis of the position. In our view the wording of the relevant sections is absolutely clear and provide no basis for the submission that by making an unsolicited return the taxpayer has waived the requirement for a notice under s 8. The legislation makes no provision for such a waiver to be effective. If Parliament had meant the submission of a voluntary return to amount to a waiver of the requirement to give notice then it could have said so.

39. As far as the determination notice is concerned, in our view it is clear that there was no legal basis for it. Section 28C TMA only applies where "a notice has been given to any person under s 8 …" As our finding is that no notice was given to Mr Revell in respect of the 2008/2009 return pursuant to s 8 there can be no valid determination under s 28C.

40. It is not necessary for us to decide this point on this appeal, but our conclusion at [39] above gives rise to the question as to how a taxpayer can resist a purported determination which he maintains was not validly made because he was not given notice under s 8 to complete a return. There is no express right of appeal in TMA against a determination notice because it is assumed that the taxpayer's remedy is to displace the notice by filing a self-assessment return. That is what Mr Revell did in this case. If the taxpayer chose not to take that course, but resisted enforcement of the determination notice, it would appear that this Tribunal would not have jurisdiction in respect of those enforcement proceedings which presumably would be instituted in the county court and where the taxpayer would be able to defend the proceedings on the basis that the notice was invalid. We do not regard that as being particularly satisfactory.

41. As mentioned above, HMRC treated the determination as having been superseded when Mrs Carter on behalf of Mr Revell filed a self-assessment on 4 March 2014. However, it follows from our finding on the status of the determination that it was not in fact superseded for two reasons. First, it was not validly made therefore there was no determination to supersede. Secondly, the statute provides that it is superseded by a "self-assessment made under s 9..." Such a self-assessment can only be made in a return delivered pursuant to s 8 TMA and, as we have found, the return concerned in this case was not delivered following a request validly made pursuant to s 8.

42. In our view the correct analysis of the position is that the return that Mr Revell made is in fact to be characterised as a notice of liability to income tax pursuant to s 7 TMA rather than a self-assessment return at all. Had the time limit in s 34 TMA not then expired it would have been open to HMRC to issue a request for a self-assessment return pursuant to s 8 TMA in response to the information submitted by Mr Revell but in the absence of that opportunity it is hard to see how what he filed could be characterised as a return made pursuant to a request under s 8. The examples HMRC gave in their submissions would it appear be dealt with in this manner, that is in response to a request for repayment HMRC would ask the taxpayer to complete a

return and that request would bring into play sections 8, 9 A and 28A. Insofar as that course of action was not possible, because for example the expiry of limitation periods, then it may be possible for a discovery assessment to be made pursuant to s 29 TMA so HMRC are not entirely without tools to deal with the situation.

43. Therefore it seems to us that in this case HMRC must accept the consequences of having failed to give notice as required by s 8 TMA and then being unable to issue a valid request for a self-assessment return because of expiry of the time limit in S 34 TMA. The consequence is that there is no opportunity to open an enquiry and the only route available to them would have been the making of a discovery assessment, had the statutory conditions for such an assessment been satisfied.

44. We therefore conclude that both the notice of enquiry and the closure notice issued to Mr Revell which are the subject of this appeal were invalid. Accordingly, the assessment to income tax made in respect of the 2008/2009 tax year must be discharged.

## Disposition

45. The appeal is allowed.

46. 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.

**TIMOTHY HERRINGTON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 FEBRUARY 2016**