To close or not to close?

Management of taxes | Personal tax



01 April 2021

Karmjit Mader and Dominic Arnold consider the Embiricos case and ask what we can take away about domicile enquiries and the use of partial closure notices

Key Points

What is the issue?

Mr Embiricos considered himself to be domiciled outside the UK when HMRC opened enquiries into his self-assessment tax returns. It concluded that he was UK domiciled and sought to calculate the additional tax by issuing an information notice to ascertain his worldwide income. Mr Embiricos asked the FTT to make a direction to HMRC to issue a partial closure notice on the matter of domicile.

What does it mean for me?

A partial closure notice closes a particular ‘matter’ or an aspect of an enquiry whilst the rest of the enquiry continues. HMRC concluded that it was unable to issue a partial closure notice until the additional disputed tax had been calculated.

What can I take away?

The case of Embiricos has clarified (for the moment at least) that a partial closure notice must include the tax assessment resulting from HMRC’s decision on a matter.

Those tax practitioners who frequently deal with long running domicile enquiries with HMRC were no doubt awaiting with anticipation the decision of the Upper Tribunal (UT) in the case of Mr Epaminondas Embiricos. The wait is now over with the decision being published (see HMRC v Embiricos [2020] UKUT 370).

The Upper Tribunal disagreed with the earlier decision of the First-tier Tribunal (FTT) (see [2019] UKFTT 236(TC)) and allowed HMRC’s appeal. The decision not only has implications for those with domicile enquiries; it also clarifies the use of partial closure notices as a tool to accelerate ongoing HMRC enquiries.

The journey to the Upper Tribunal

Mr Embiricos considered himself to be domiciled outside the UK and claimed the benefit of the remittance basis of taxation when filing his UK tax returns for the years ending 5 April 2015 and 2016. HMRC opened enquiries into his returns and concluded that the taxpayer was UK domiciled during this relevant period. HMRC sought to calculate the additional tax by issuing an information notice to ascertain his worldwide income. Mr Embiricos disagreed with HMRC’s analysis but was unable

to appeal this until HMRC issued a formal ‘decision’ in the form of a closure notice under the Taxes Management Act 1970 s 28A.

The ‘traditional’ closure notice was replaced from 16 November 2017 by a partial closure notice and a full closure notice regime. A partial closure notice closes a particular ‘matter’ or an aspect of an enquiry whilst the rest of the enquiry continues. A full closure notice is issued once all aspects of an enquiry are dealt with and concluded. A taxpayer may apply to the FTT to direct HMRC to issue a partial or full closure notice unless the tribunal is satisfied that there are reasonable grounds for not issuing it.

This is a powerful tool for the taxpayer to force HMRC to conclude its decision so that a formal appeal on the matter can be lodged.

Mr Embiricos applied to the FTT to request that HMRC be directed to issue a partial closure notice on his domicile. However, HMRC concluded that it was unable to issue a partial closure notice until the additional disputed tax had been calculated as this had to be included.

The FTT held that a partial closure notice did not require a quantification of tax – stating that the domicile position was a separate ‘matter’ to the quantification of the resulting tax. For the purposes of a partial closure notice, it was sufficient for HMRC to simply remove the remittance basis claim, which could then be the basis of an appeal by the taxpayer.

Following the release of the FTT’s decision on Mr Embiricos, the opposite decision was arrived at by the FTT in the case of Executors of Mrs Levy v HMRC [2019] UKFTT 418(TC). In that case, the FTT held that the partial closure notice had to state the amendments to the tax position and ruled that domicile was not a separate matter to the tax.

The Upper Tribunal’s decision

The UT allowed HMRC’s appeal. It confirmed that a partial closure notice must include HMRC’s calculation of the tax at stake. Thus, Mr Embiricos was required to comply with the information request.

The UT summarised the reasons for reversing the decision of the FTT citing the following factors.

Background materials to the legislation

The UT reviewed consultation documents from 2014 (when the partial closure notice legislation was being introduced). Those pre-consultation materials confirmed that the use of partial closure notices was to provide greater finality by the early resolution of discrete matters at the enquiry stage, thereby to accelerate the tax payable – as recognised in the Levy decision.

The UT further considered the introduction of partial closure notice rules by comparing the old and new Section 28A. The method chosen by Parliament to introduce the partial closure notice regime was to amend the existing closure notice rules. This led to the conclusion that partial closure notices were intended to operate and be subject to the same restrictions as closure notices. Section 28A(8) makes it plain that a partial closure notice was a closure notice for the purposes of the Taxes Acts – and therefore must state the amount of tax.

Review of the appeal rights

The UT reviewed the appeals process set out in TMA 1970 ss 31(1)(b) and 50 (specifically s 50(6) and (7)), which refer to the tribunal's powers to increase or decrease an assessment subject to a closure notice appeal. The FTT recognised that these appeal rights did not apply to the partial closure notice in Embiricos as there was no quantification of tax.

The FTT had relied on s 50(7A), which confers power on the tribunal to allow or disallow the [remittance basis] claim on an appeal against the closure notice. The UT determined that it did not need to decide this question in view of its other conclusion.

Reliance on Archer

The UT confirmed that the issue was both the scope of the term 'matter' in s 28A(1A) and the provision in s 28A(2) which states that a partial closure notice must 'make the amendments of the return required to give effect to [the officer's] conclusions'. The meaning of this requirement was considered in the Court of Appeal in R (Archer) v HMRC [2017] EWCA Civ 1962.

Unlike the FTT, the UT found that the Archer case was wholly relevant to partial closure notices. The conclusion of the UT was therefore that the quantification of the

resulting tax was fundamentally based on Archer.

Use of Taxes Management Act 1970 s 28ZA

If a joint application by the taxpayer and HMRC was made to the tribunal under this provision, the matter of domicile was capable of being decided without the need for a partial closure notice.

A determination under s 28ZA is treated in the same way as a determination of a preliminary issue in an appeal.

The UT recognised that the FTT's construction of s 28A would have the effect of acting as a unilateral version of s 28ZA. It concluded that it was not the intention of Parliament to have two parallel mechanisms for dealing with the same problem, with only one requiring the consent of both parties.

Practical consequences of the FTT's decision

The UT concluded that if a 'matter' is to be given such a wide construction as the FTT's decision implied, this would open the floodgates to multiple requests for partial closure notices at every opportunity. This went against the policy objective of the use of partial closure notices to help expedite disputes.

The UT decision has clarified (for the moment at least) that a partial closure notice must indeed include the tax assessment resulting from HMRC's decision on a matter.

Be very careful what you wish for…

The recent case of Henkes v HMRC [2020] UKFTT 7645 (TC) highlights that a request for a partial closure notice should be used with caution, as it may not achieve the desired aim of simply forcing HMRC to confirm its view on domicile so it can be appealed.

This case had similar circumstances to Embiricos and Levy. Unlike the findings in Levy, in Henkes the FTT decided that it had the jurisdiction to determine the domicile question as a preliminary matter to the closure notice application or appeal. Having decided on the matter (albeit not in favour of the taxpayer), the FTT held that this determination was binding and could not be subject to appeal.

Practitioners are reminded that there are other avenues to be explored when dealing with domicile enquiries without the need to request formal decisions or head towards litigation. Obvious as it may sound, it is worth asking HMRC for a meeting or applying for alternative dispute resolution if practitioners feel that their messages are simply being ‘lost in translation’ through protracted enquiry correspondence.

It’s not quite over (yet)

Mr Embiricos has been granted leave to appeal the UT decision to the Court of Appeal, so the story may continue.

It has been a long-established tenet that non-domiciled taxpayers are not required to disclose to HMCR details of their non-UK income, unless such income has been remitted to the UK or they are deemed domiciled for income tax and capital gains tax purposes. Is it fair for such taxpayers to incur the burden of calculating foreign income and gains before first deciding if these were indeed taxable by confirming the domicile position?