



TC01321

Appeal number: TC/2010/08072

Income tax – determination under section 28C TMA – whether right of appeal to the tribunal- held: no.

FIRST-TIER TRIBUNAL

TAX

MICHAEL BARTRAM

Appellant

- and -

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

Respondents

**TRIBUNAL: CHARLES HELLLIER (Judge)
NIGEL COLLARD**

Sitting in public at Brighton on 19 April 2011

Peter Clarke of Clarke & Co for the Appellant

P S Maffia for the Respondents

DECISION ON A PRELIMINARY ISSUE

5 Background

- 1 The Commissioners of Her Majesty's Revenue and Customs ("HMRC") made
determinations under section 28C Taxes Management Act 1970 for the years to 5
April 2006, 2007 and 2008.
- 10 2 On 4 October 2010 Mr Bartram submitted a notice of appeal against these
determinations. The grounds of appeal were that the determinations were
unlawful because they did not comply with section 28C.
- 15 3 The Respondents submit that the Tribunal has no jurisdiction to hear this appeal.
- 4 This hearing was listed to determine: (a) the question of jurisdiction, and, (b) if we
concluded that we had such jurisdiction, whether the appeal should be admitted
late. If we decide both those questions in the Appellant's favour the appeal would
20 then be listed for a substantive hearing of the grounds of appeal.

The legislation

- 5 Part IV Taxes Management Act 1970 ("TMA") is headed Assessment and Claims.
25 Sections 28A and 28B deal with the closure of an enquiry into a tax return and
consequent amendments to the return; section 28C permits HMRC to make a
'determination' where no return has been delivered; section 29 permits the making
of assessments where HMRC discover that tax has not been assessed; section 30A
and 30B deal with 'assessing procedure' and partnership discovery assessments
30 and section 31 to 31B with appeals. Later sections deal with claims, errors and
time limits.
- 6 Section 28C, so far as relevant to this appeal, provides that:
- 35 “(1) This section applies where –
- (a) a notice has been given to any person under section 8 or 8A of
 this Act (the relevant section),
 and
- 40 (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 –
- 45 (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;

5 and subsection (1AA) of section 8 ... applies for the purposes of subsection (1) of that section [section 9(1AA) provides for allowances and reliefs and claims to be deducted in determining the amount chargeable to tax and that the amount of tax payable is to be determined after deducting any tax paid at issue].

10 (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.

15 (3) Until such time (if any) as it is superseded by a self-assessment made under section 9 of this Act ... 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.

20 (4) Where –

- (a) proceedings have been commenced for the recovery of any tax charged by a determination under this section; and
25 (b) before those proceedings are concluded, the determination is superseded by such a self-assessment as is mentioned in subsection (3) above,

30 those proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

(5) No determination under this section, and no self-assessment superseding such a determination, shall be made otherwise than –

- 35 (a) before the end of the period of five years beginning with the filing date; or
40 (b) in the case of such a self-assessment, before the end of the period of twelve months beginning with the date of the determination.

(6) In this section “the filing date” means the day mentioned in section 8(1A) ... of this Act”

45 7 Section 31 TMA provides:-

- (1) An appeal may be brought against –

- 5
- (a) any amendment to a self-assessment under section 9C ...
 - (b) any conclusion stated or amendment made by a closure notice ...
 - (c) any amendment to a partnership return ...
 - (d) any assessment to tax which is not a self-assessment.

10 ...

- (3) A determination under section 12AE of this Act (choice between different cases of Schedule D) may not be questioned on an appeal under this section.
- (4) This section has effect subject to any express provision in the Taxes Acts, including in particular any provision making one kind of assessment conclusive in an appeal against another kind of assessment.

20 8 The Respondents' arguments

9 Mr Maffia says that this Tribunal has power to hear an appeal only if such power is given by Parliament. The only potentially relevant statutory provision is section 31. The only potentially relevant heading in section 31 is 31(1)(d): an appeal against an assessment which is not a self-assessment. He readily acknowledges that a determination is not a self-assessment, but says that a determination is not an assessment, and therefore that no appeal lies under section 31(1)(d).

10 It is plain from the use of "determination" in section 28C and "assessment" in section 31 and elsewhere that an assessment is different from, and does not include, a determination.

11 Mr Maffia says that section 28C provides a remedy against the making of a determination: the taxpayer has simply to make a return and a self-assessment under section 9. Once such a self-assessment is made the determination is superseded and has no further effect. The taxpayer has a remedy and needs no right of appeal. There is no reason to construe section 31 so that "assessment" is taken to include determination.

40 The Appellant's arguments

12 Mr Clarke says that section 28C sets out conditions for the making of a determination. If these conditions are not complied with a determination may not be made and cannot be valid. If a determination is purportedly made when the conditions are not satisfied a taxpayer must have a right of appeal to permit it to be shown that the determination is not valid.

13 Mr Clarke says that that right of appeal is, and must be, found in section 31(1)(d) – against an assessment which is not a self-assessment. The determination is plainly not a self-assessment, but it is also properly described as an ‘assessment’. It therefore falls within section 31(1)(d) and an appeal lies to this Tribunal.

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14 Mr Clarke draws our attention to the Shorter Oxford Dictionary’s definition of “Assessment” as “1. The determination of the amount of taxation, etc. to be paid.” A determination of the amount of tax to be paid under section 28C is thus plainly an assessment.

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15 Mr Clarke accepts that other sections in Part IV use the word assessment but he says that the Act has often been amended and different drafting styles, and the choice of slightly different words does not affect the fact that an assessment includes (or is) a determination.

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Discussion

16 This tribunal is a creature of statute and has only the powers given to it by statute. Unlike the High Court we have no inherent jurisdiction. We can entertain an appeal only if a statutory provision permits that appeal to be made to this tribunal.

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17 In this case the only statutory provision which could give us jurisdiction is section 31(1)(d). We may thus entertain the appeal only if it is an appeal against an assessment which is not a self-assessment.

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18 It is plain, we agree, that a determination is not a self-assessment. Not only is it not made by the taxpayer himself but it is not what is described in section 9 of the Act as an assessment included in a return. Thus if the determination is an assessment it is “an assessment to tax which is not a self-assessment” and therefore an appeal may lie under section 31(1)(d).

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19 We accept that in ordinary usage an “assessment to tax” is something which determines the amount of tax payable and therefore at first sight that a determination under section 28C could be called an assessment of, or to, tax. The question however is whether that meaning of assessment is that intended by section 31.

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Other provisions using “determination” and “assessment”

20 In this context it is proper to consider how “assessment” and “determination” are used in other parts of the legislation.

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21 First we note the difference between section 28C(2), which deals with giving notice of a determination and section 30A(3) which deals with the giving of notice of an assessment. Their words are the same, save that the latter section includes the extra italicised words:

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“Notice of any [such assessment/determination under this section] shall be served on the person [assessed/in respect of when it is made] and shall state the date on which it is issued *and the time within which any appeal against the assessment may be made.*”

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22 It seems to us that the replication in 28C(2) and 30A(3) of the provisions as to notice and date suggest that, for the purpose of Part IV, an assessment is different from a determination (although, recognising that an argument against redundancy is not a strong one in the construction of a tax statute, do not regard the replication as compelling such a conclusion). The omission in section 28C(2) of the italicised words relating to appeal suggest that, since notice of the period for appeal is not required for a determination, an assessment for the purposes of section 31 does not include a determination.

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15 23 Both section 28C and section 30A were inserted by FA 1994. That indicates that a distinction was intended between an assessment and a determination. The presence, in section 30A of the italicised words also suggest that the framers of section 28C did not consider that a right of appeal arose against an assessment under section 31, and may give some hint that it was not intended that such a right should arise.

20

24 Second, we note that in Part X TMA, section 100 provides that the Board “may make a determination imposing a penalty”, that section 100B(1) provides that an appeal may be brought against such a determination, and that subject to certain other sections “the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.”

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25 Those provisions suggest that a “determination” is used to mean something which is not an assessment.

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26 Third, we note the provisions of section 197 FA 1994. This section was repealed by FA 1998 Section 197 lay alongside the provision which inserted sections 28C and 30A into TMA. That section provided:-

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“(1) In the Tax Acts and the Gains Tax Acts, any reference (howsoever expressed) to a person being assessed,...shall be construed as including a references to his being so assessed...

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(a) by a self assessment...,or

(b) by a determination under section 28C of that Act (which until superseded by such a self assessment has effect as if it were one).”

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27 In this connection we note that TMA is not part of the Tax Acts although it is one
of the Taxes Acts (see s118(1) TMA and s.831(2) TA 1988). Thus section 197
required a determination to be treated as an assessment for the purposes of Acts
other than TMA. That suggests that a determination was not generally an
10 assessment, and shows that the equation of those was required for the purpose
of Acts other than the TMA.

The scheme of section 28C

15 28 It seems to us that the procedure envisaged by section 28C requires no right to
appeal against the amounts in any determination. That is because, as Mr Maffia
says, a taxpayer has a remedy for incorrect amounts which he may pursue by
submitting a return and self-assessment. Since the self-assessment supersedes and
cancels out the determination there is no need for a right of appeal against
20 amounts in the determination. Such a right would be superfluous.

29 But that does not deal with Mr Clarke's concern. He asks what remedy a taxpayer
has if a determination is purportedly issued when the conditions for its issue are
not fulfilled.

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30 It seems to us that a 'determination' so issued would be a nullity. It could not be
and is not a determination within section 28C. As a result the provision of Parts
VA (payment of tax), Part VI (collection and recovery of tax) Part IX (interest on
overdue tax) and Part XI could not apply to it: no tax would become payable by
30 virtue of such a determination, no distraint would be legal, no interest could be
due.

31 But what can a taxpayer do when the officers of HMRC seek to collect the tax
they say is due under an invalid determination. How does he resist their
35 predations?

32 The answer, it seems to us, is the same as would be the case for any other illegal
demand. He may contest the demand in the forum HMRC seek to enforce it. If
necessary he might institute judicial review proceedings in the High Court for a
40 declaration that the determination is a nullity. He has a remedy. That remedy
may be more formal than making an appeal to this tribunal but it is a certain
remedy.

33 Thus it seems to us that there is no general need (from a Human Rights
Convention approach or otherwise) to treat section 31 as providing a right of
45 appeal against an unlawful determination.

Summary

34 The words of sections 28C and 30A indicate that ‘assessment’ was not intended to include ‘determination’. The provisions of sections 100 and 100C and of the repealed section 197 FA 1994 support that conclusion. The scheme of section 28C suggests that no appeal is intended to be given against amounts in a determination and in turn that no right of appeal to this tribunal is intended to be given by section 31 against a determination.

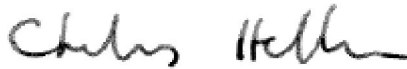
35 We conclude that ‘assessment’ in section 31(1)(d) does not include a determination under section 28C and that no appeal against such a determination lies to this Tribunal.

36 As a result the question of whether an appeal may be made out of time does not arise.

Disposal

37 This appeal is Struck Out pursuant to Rule 8(2)(a) of the Tribunals rules.

38 This document contains full findings of fact and reasons for the direction to join the appeals. Any party dissatisfied with this direction 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 document 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.



CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 14 July 2011