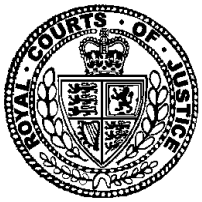

Neutral Citation Number: [2024] EWCA Civ 876

Case No: CA 2023 002059

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(TAX & CHANCERY CHAMBER)
MR JUSTICE FANCOURT
& UPPER TRIBUNAL JUDGE TILAKAPALA
UT/2020/000246

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE COULSON
and
LORD JUSTICE NUGEE

- -

Between:

PETER MARANO	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Keith Gordon and **Siobhan Duncan** (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Sadiya Choudhury KC (instructed by **HMRC Solicitor's Office & Legal Services**) for the **Respondents**

Hearing dates: 16 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the proper construction of section 103 Finance Act 2020 and whether that section renders it unnecessary for the Respondents, His Majesty's Revenue and Customs ("HMRC"), to prove the involvement of an "officer of the Board" in the giving of a notice requiring the submission of a tax return pursuant to section 8 Taxes Management Act 1970 ("TMA 1970") and whether penalty assessments made pursuant to paragraph 18 of Schedule 55 Finance Act 2009, ("Schedule 55") satisfy the relevant statutory requirements.

2. The underlying dispute between the Appellant, Mr Marano, and HMRC is about whether Mr Marano is liable under Schedule 55 to the penalty assessments made against him for the late submission of a self-assessment tax return for the tax year 2012/2013. On or after 6 April 2013, a notice to file a self-assessment tax return for the tax year 2012/2013 was sent to Mr Marano at his last known residential address. Mr Marano did not file a return before the filing date of 31 January 2014. As a result, on 18 February 2014, HMRC issued a late filing penalty of £100 under paragraph 3 of Schedule 55. This was followed by a daily penalty and a six month penalty under paragraphs 4 and 5, of Schedule 55, on 18 August 2014. Further, in November 2014, HMRC issued a determination based on the amounts shown in Mr Marano's returns for earlier years and a late filing penalty based on that determination. A second late filing penalty was issued on 3 March 2015. In 2017, Mr Marano sought to file a tax return which was too late to be assessed as such but which enabled HMRC to calculate and issue a discovery assessment on 8 March 2017 in the sum of £5,744,219. On 14 March 2017, HMRC also issued a late filing penalty for £574,422 made up of a six month 5% tax-geared late filing penalty of £287,211 and a twelve month late filing penalty of the same amount.

3. Mr Marano appealed the penalties as well as the discovery assessment to the First Tier Tribunal, (Tax Chamber) (the "FTT") and put HMRC to proof that the notice and assessments satisfied the requirements of the relevant statutes.

4. It has been common ground throughout that there can be no obligation to submit a return unless the taxpayer has previously been given notice requiring submission pursuant to section 8 TMA 1970. It is also common ground that a taxpayer who is not under a duty to submit a return pursuant to such a notice cannot be liable for a penalty for late filing.

5. In a decision dated 23 April 2020, (TC/2018/05611), the FTT dismissed Mr Marano's appeal. Where relevant for the purposes of this appeal, the FTT held that the notice to file a return was issued by an "officer of the Board" for the purposes of section 8 TMA 1970 [114] – [132] and that the penalties were issued by HMRC for the purposes of paragraph 18 of Schedule 55 [133] – [147]. In particular, in relation to the question of whether the notice had been issued by an officer of the Board for the purposes of section 8 TMA 1970, the FTT held:

> "126. . . . the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems.

> . . .
>
> 129. We have found as facts that a full return, including a Notice to File, was issued to Mr Marano, and that its issuance and posting was recorded by HMRC's systems. The only reasonable conclusions from that evidence are that the return was issued because HMRC's system was programmed to carry out that task, and that the program was authorised by HMRC officers, as defined.
>
> 130. As Mr Vallis said, the alternative would be that HMRC's computer system had been either (a) programmed by persons other than HMRC staff, or (b) programmed without any human intervention. There is no evidence that HMRC's computer system had been hacked, and it is not reasonable or credible to find that that in 2013 HMRC's computer system was being controlled by some sort of artificial intelligence, capable of deciding its own parameters without the need for a human being to program it."

6. In relation to whether Schedule 55 was satisfied, the FTT held as follows:

> "141. It is clear from *Rogers and Shaw* that the references to penalties being issued by HMRC do not mean that they have to be issued by an individual officer. The terms "HMRC" and "officers" are simply references to those at HMRC who are responsible for collecting tax. . . .
>
> 145. We add that . . . the penalties are fixed by statute, and follow from the taxpayer's failure to file. Parliament decided on the quantum and methodology of those penalties, and how they interact with particular periods of delay. There is no dispute that the penalties actually issued by HMRC's computer system accurately reflect those statutory provisions. The only reasonable conclusion is that HMRC staff designed the computer programs which implement the legislation. As Mr Vallis said, the alternative would require us to find that HMRC's computer had been hacked, or the computer was writing its own programs, but nevertheless still managed to ensure that the penalties actually issued reflect the statutory requirements.
>
> 146. We therefore find that the penalties issued by the computer in accordance with the program were authorised by the HMRC staff who had designed and implemented the computer programs."

7. Mr Marano appealed to the UT on four grounds. Only the ground relating to whether a valid notice to file a tax return had been issued pursuant to section 8 TMA 1970 and penalty assessments had been validly issued pursuant to Schedule 55 paragraph 18 is relevant on this appeal. The UT dealt, first, with the basis upon which the FTT had made its decision (the "*Rogers and Shaw basis*") and then turned to the proper

interpretation and application of section 103 FA 2020 which was enacted after the FTT's decision but with retrospective effect (subject to transitional provisions) ("*the section 103 basis*").

The Rogers and Shaw basis

8. In *HMRC v Rogers & Shaw* [2019] UKUT 406 (TCC), [2020] 4 WLR 23 ("*Rogers and Shaw*"), the Upper Tribunal Tax and Chancery Chamber (the "UT") had held at [32] that section 8 TMA 1970 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, "it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC" and that "the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer". The burden of proving that the requirement was met fell upon HMRC and the extent of the evidence necessary to discharge the burden depended upon the circumstances, including whether the taxpayer was disputing receipt [51] and [52]. As the UT put it in this appeal, at [6], "[P]revious decisions of the FTT and this Tribunal, culminating in *Rogers and Shaw v HMRC*. . . establish that there must be sufficient evidence of authorisation by an officer of HMRC. What is sufficient depends on whether the issue is disputed by the taxpayer."

9. In this case, the UT noted that the evidence before the FTT in relation to the section 8 notice was limited to a microfiche record of sending of a full return and a record of Mr Marano's tax affairs in HMRC's self-assessment system [10]. The UT went on, also at [10], as follows:

> ". . . The microfiche was described in the supplementary witness statement of Louise McGovern dated 7 January 2019 as a printed record of a computer output, and as being "maintained in all cases where a Notice to Complete a Tax return is issued automatically by the computer in line with default HMRC Retention of CY6+1". The microfiche shows a date of 6 April 2013, Mr Marano's name and residential address, and his unique taxpayer reference number. The computer record of Mr Marano's self-assessment return for 2012/13 records a full return as having been issued on 6 April 2013. It was agreed that the full return was received by Mr Marano. Despite HMRC having been put to proof of officer involvement, nothing was said in the evidence on behalf of HMRC to explain in what way or ways any officer was involved in or authorised sending out the full return on 6 April 2013."

10. The evidence in relation to the issue of the penalty assessments was said by the UT to be "essentially the same". It was described at [11] as:

> ". . . a microfiche record showing the addressee, the address and the amount of the assessment, and a screen shot of a computer record of Mr Marano's 2012-13 self-assessment showing the assessed penalties. The evidence in Ms McGovern's first witness statement was that the two 2017 "tax-geared" late filing penalties were "raised automatically in self-assessment" and "issued by the self-assessment system" based upon the discovery

> assessment issued by HMRC in March 2017. There was therefore no evidence of the involvement of any officer of HMRC in making the penalty assessments."

11. Having set out the FTT's conclusions at [126] and [129] and [130] to which I referred at [5] above, the UT noted at [13], that the FTT had inferred from the evidence before it "that computers had issued the full return and had recorded doing so, that HMRC's computers were used and that HMRC officers programmed them so that the return was sent to Mr Marano." In relation to the penalty assessments, having noted the FTT's approach at [145] (set out above at [6]) the UT observed that in relation to both the notice to submit a return and the penalty notices, the FTT had assumed that it was HMRC's computer systems which had sent out the notices which, in the light of the evidence of outsourcing in the *Rogers and Shaw* case, was not a safe assumption to make [15].

12. Having considered the effect of the decision in *Rogers and Shaw*, the UT went on to hold that the evidence was "insufficient where the fact of sending was challenged by the taxpayer" [20]. It concluded at [21] that the FTT's inference at [126], that "the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems" could not properly be drawn from the evidence and was mere "speculation about how the automated system was set up and operated, or alternatively an assumption that HMRC officers had control over its own system and so had authorised what was done." It concluded at [22], that there was no evidence before the FTT capable of justifying the inference that officers of HMRC decided the criteria on the basis of which computers were programmed to give effect to them, resulting in the service of a return on Mr Marano.

13. In relation to the penalty assessments the UT noted that the statutory provision was different and that for the purposes of paragraph 18 of Schedule 55 the assessment of a penalty and the notification of the assessment had to be proved to have been done under the authority of an officer (or Commissioner) of HMRC [25]. The UT described the question on appeal as whether it was proper for the FTT to infer from the primary facts that the penalties were assessed and notified under the authority of such an officer. It stated that the FTT did so "on the basis that it could be inferred that HMRC staff designed the computer programs, and that it was not reasonable to infer that the computer had been hacked or had written its own programme." The UT also noted at [27] that "there was no evidence about whose computers produced the outputs that were recorded in HMRC's data." The UT concluded at [28] that "design of the relevant computer programs by an officer of HMRC was not the only reasonable inference to be drawn from the evidence. . . " and concluded at [29] that the "very slight evidential material" was insufficient to enable the FTT to draw the inference it did.

The section 103 basis

14. The UT would have allowed the appeal, therefore, if it had turned on whether HMRC had satisfied the "*Rogers and Shaw basis*". It went on, however, to address the effect of section 103 FA 2020. The UT described the nature of the dispute in relation to the effect of that section, as follows:

> "32. It can be inferred from the reference to the use of computers and the retroactive effect that the section has, that it was intended to validate existing or previous automated functions carried on by HMRC, and to remove the focus on whether an officer, or a specified kind of officer, carried out the function in question. How much further than that it goes is in dispute on this appeal. Mr Marano submits that it does not dispense with the need for HMRC to prove by evidence that the automated functions were carried out under the authority of an officer of HMRC. HMRC submit that there is no longer a requirement to prove the authority of an officer or Commissioner: all that is required is to prove that HMRC issued or sent the notice."

15. The UT noted as part of the background to section 103 that there were a series of cases determined by the FTT in which taxpayers had challenged penalty notices on the basis that HMRC had failed to prove that an officer authorised the notice to file and that there were similar cases in which penalty notices issued by computer had been alleged to be invalid [33]. It went on to record the content of a written ministerial statement dated 31 October 2019, announcing the legislation later enacted in the form of section 103 [34], a technical note issued on the same day by HMRC [35] and the Explanatory Notes to the Finance Bill 2020 [36], before identifying the mischief which section 103 was intended to remedy at [38]. It concluded that it was directed at "the doubt about the validity of fully automated functions, as used by HMRC in 2019 and previously, on the basis that they were not functions performed by an officer of HMRC."

16. The UT went on to consider the proper interpretation of section 103 in more detail:

> "41. We start by considering the natural meaning of the language of the section, bearing in mind the identified mischief. The following points arise.
>
> i) First, the intended effect of s.103 is very broad and general: HMRC may do "anything capable of being done by an officer of Revenue and Customs". The examples given in subsection (2) are non-exclusive.
>
> ii) Second, there is to be no distinction between the effect of things done by HMRC and things done by an officer, or by an officer of a particular kind: subsection (3).
>
> iii) Third, subsections (1) and (3) draw a clear conceptual distinction between an officer (or officers) of Revenue and Customs and "HMRC" itself, and between an officer performing a function and HMRC doing it. If "HMRC" here means little more than the aggregate of the officers of HMRC it would be virtually meaningless.
>
> 42. We are unimpressed by Mr Gordon's argument that the purpose of referring to HMRC was to import the definition in s.4 CRCA and thereby extend the range of those on whom statutory functions are conferred so as to include the Commissioners. It

> seems to us that the Commissioners would impliedly have the necessary authority to act in any event, but there is nothing in the background to this enactment to suggest that problems were being caused by challenges to the ability of Commissioners to discharge functions of officers. If indeed that was the intended purpose of the section, it is obvious that very much clearer and simpler language would have been used to achieve it. In our view, HMRC is being referred to here as the body or department itself, albeit a body comprised of the Commissioners and officers of Revenue and Customs. That is because it is recognised that notices, determinations and assessments are sent out on a fully automated basis in the name of HMRC, not in the name or with the specific authority of an officer. The words in parenthesis, "whether by means involving the use of a computer or otherwise" indicate the intended effect of the legislative change. They are obviously not there merely to permit an officer of HMRC to use a computer to assist them with their work.
>
> 43. A fourth point is that the section goes further than stating that an act capable of being done by an officer may be done by HMRC and that it has the same effect: it also provides that something only capable of being done by an officer of a particular kind may be done by HMRC and has the same effect. Even on Mr Gordon's argument, that would mean that officers and Commissioners of Revenue and Customs generally and not only specified officers are capable of authorising that action. The section on any view therefore makes a more far-reaching change than merely precluding an argument that fully-automated functions are unauthorised by statute. That conclusion suggests that a restrictive interpretation of the section – which would leave HMRC having to prove in every appeal that an officer of Revenue and Customs provided the criteria for and authorised the establishment and use of the automated function – is unlikely to be the right interpretation. The more likely interpretation is that Parliament intended to validate the exercise of functions by HMRC in its own name, including its fully automated functions."

17. At [46], the UT stated that it refused to depart from its decision in *Assem Allam v HMRC* [2021] UKUT 291 (TC) which was concerned with the validity of enquiry notices which had been challenged on the basis that they had been required by automated notices to file. The UT concluded, also at [46], that "the effect of that decision and our own preferred construction of s.103 is that a notice issued by HMRC, whether by automated computer function or otherwise, is as valid as if issued by an officer of HMRC." The UT concluded, therefore, that it was "no longer necessary for HMRC to adduce evidence that an officer of HMRC authorised the criteria for and the establishment and use of an automated computer to send notices to file or penalty assessments." Instead, it was necessary for HMRC to prove that the notice was its notice.

Grounds of Appeal and Respondent's Notice

18. Permission to appeal was granted on the ground that the UT erred in deciding that in a situation in which a statutory function must be carried out by an officer of HMRC, the enactment of section 103 FA 2020 removed the need for HMRC to prove the involvement of an officer in the process. The narrow question on this appeal, therefore, is whether section 103 removes the need for that proof as long as the notice in question is a notice sent by HMRC. We are not concerned with whether section 103 would allow for a fully automated process in which there is no human involvement.

19. If we are minded to allow the appeal in relation to the proper interpretation of section 103, HMRC contends by way of a Respondent's Notice, that the appeal should be dismissed, in any event, on an additional ground. It is said that the UT erred in interfering with the FTT's conclusion that the section 8 notice was validly issued and in deciding that the FTT was not entitled to reach the conclusions it did, as a matter of inference from the evidence before it.

Relevant Legislation

20. Section 8(1) TMA 1970 provides, where relevant, that a person "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; . . ." The important phrases for these purposes are that the notice is "given . . . by an officer of the Board" and the person to whom the notice is sent must "make and deliver" a return "to the officer".

21. As I have already mentioned, liability for penalties is provided for in Schedule 55. Schedule 55, paragraph 18(1) provides that where a person is liable for a penalty, "HMRC must" assess the penalty, notify the person and state in the notice, the period in respect of which the penalty is assessed. The term "HMRC" is expressly defined for the purposes of Schedule 55, in paragraph 27(3) as "[His] Majesty's Revenue and Customs". Mr Gordon also referred us to the definition of that term in Schedule 1 to the Interpretation Act 1978, which states that it has the meaning given by section 4 of the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005"). Section 4(1) of that Act provides that "[T]he Commissioners and the officers of Revenue and Customs may together be referred to as [His] Majesty's Revenue and Customs." Accordingly, Mr Gordon submits that the term "HMRC" where it appears in section 103 FA 2020 should be interpreted as a reference to the Commissioners and officers of HMRC.

22. Section 103 FA 2020 which was enacted on 22 July 2020, provides as follows:

> "(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).
>
> (2) Accordingly, it follows that HMRC may (among other things) –

> (a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return);
>
> (b) amend a return under section 9ZB of that Act (correction of personal or trustee return);"
>
> (c) make an assessment to tax in accordance with section 30A of that Act (assessing procedure);
>
> (d) make a determination under section 100 of that Act (determination of penalties);
>
> (e) give a notice under paragraph 3 of Schedule 18 to FA 1998 (notice to file company tax return);
>
> (f) make a determination under paragraph 2 or 3 of Schedule 14 to FA 2003 (SDLT: determination of penalties).
>
> (3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or, where the function is conferred on an officer of a particular kind, an officer of that kind).
>
> (4) In this section—
>
> "HMRC" means Her Majesty's Revenue and Customs;
>
> references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment.
>
> (5) This section is treated as always having been in force.
>
> (6) However, this section does not apply in relation to anything mentioned in subsection (1) done by HMRC if—
>
> (a) before 11 March 2020, a court or tribunal determined that the relevant act was of no effect because it was not done by an officer of Revenue and Customs (or an officer of a particular kind), and
>
> (b) at the beginning of 11 March 2020, the order of the court or tribunal giving effect to that determination had not been set aside or overturned on appeal."

Contemporaneous materials

23. The contemporaneous materials which are said to be an aid to construction were referred to at [34] – [37] of the UT decision. First, on 31 October 2019, the Financial Secretary to the Treasury made a written ministerial statement in the following form:

> "The Government is committed to doing what is necessary to protect the Exchequer, maintain fairness in the tax system and

> give certainty to taxpayers. Therefore, the Government is announcing today that legislation will be brought forward in the next Finance Bill to put the meaning of the law in relation to automation of tax notices beyond doubt. Specifically, that legislation will put beyond doubt that HMRC's use of large-scale automated processes to give certain statutory notices, and to carry out certain functions is, and always has been, fully authorised by tax administration law. This measure will have effect both prospectively and retrospectively."

A Technical Note, headed "Automated Decisions" was issued by HMRC on the same day. We were referred to the following paragraphs:

> "Overview and aim
>
> 1.1 HMRC uses large-scale automated processes to carry out routine tasks such as to give statutory notice, where making individual decisions on individual cases would be impractical, resource intensive, or simply unnecessary in light of published guidance or underlying legislation. HMRC has used automated processes to fulfil its functions for many years in order to manage the assessment and collection of taxes in the most efficient and cost effective way.
>
> 1.2. This long-established use of automation has been challenged in the courts on the basis that it is not supported by legislation. HMRC believes that its current practices are supported by legislation, but to provide certainty the government therefore plans to introduce legislation in the next Finance Bill to affirm that HMRC's practice of using automated processes to help fulfil certain functions has a firm legal footing.
>
> 1.3 This technical clarification will provide fairness across all taxpayer groups and provide certainty regarding the statutory basis for the existing policy and practice which have been in place for many years. The legislation will not introduce any new or additional obligations or liabilities for customers.
>
> **Automated Decisions**
>
> 2.1 The policy intention is to make clear that HMRC's use of large-scale automated processes to serve certain statutory notices and to carry out certain functions is and always has been fully supported by legislation.
>
> . . .
>
> 2.4 The government intends that the legislation will apply both retrospectively and prospectively in order to safeguard revenue charged since automated processes were introduced by HMRC.
> .

> 2.5 This is not a new policy and nothing will change for taxpayers. It is intended that any taxpayers who have received a settled judgment from a court or tribunal regarding the use of automation by HMRC before the date of this announcement (31 October 2019) will not be subject to the retrospective application of this legislation in respect of the issues covered by that judgment."

24. The legislation was introduced as clause 100 of the Finance Bill 2020. In this regard, Ms Choudhury, who appeared on behalf of HMRC, referred us to a short extract from Hansard in which the Financial Secretary to the Treasury explained the clause in much the same terms as the Explanatory Notes to the clause to which I refer below. The extract also records that the long-standing practice of issuing notices to file tax returns and penalty notices through an automated process, had been "challenged in the courts on the basis that the legislation states that some tasks are to be carried out by "an officer of the Board"". Mr Gordon questioned the admissibility of the extract but submitted that, in any event, it was of no assistance to HMRC.

25. Amongst other things, the Explanatory Notes to clause 100 state:

> "**Summary**
>
> 1. This clause puts beyond doubt that functions given to an officer may be carried out by HM Revenue & Customs (HMRC) using automated processes or other means. It affirms long standing and widely accepted operational practice.
>
> . . .
>
> **Background note**
>
> 8. HMRC has historically used automated processes to carry out repetitive, labour intensive administrative tasks, including issuing certain statutory notices. This reduces costs and creates efficiencies.
>
> 9. To avoid any doubt, this clause confirms that the rules already in place work as they are widely understood to work and as they have been applied historically over many years.
>
> 10. It makes clear that any function capable of being done by an individual officer may be done by HMRC, using a computer or other means, with the same legal effect.
>
> 11. Action resulting from, and as a consequence of, automated notices can therefore take place without ambiguity.
>
> 12. The clause will help to ensure that the tax system applies fairly to all and that tax payers will have certainty over their tax affairs."

Proper interpretation of section 103

Submissions in outline

26. Mr Gordon, who appeared with Ms Duncan on behalf of Mr Marano, submits that the purpose of section 103 is much more limited than the UT held it to be. It was intended, he says, to have a similar effect in other circumstances, to section 113(1B) TMA 1970. That sub-section provides that once the Board or an inspector or other officer of the Board has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer of the Board responsibility for completing the assessment procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax.

27. In other words, Mr Gordon says that section 103 should be interpreted to authorise the use of computers for administrative tasks in circumstances other than those spelt out in section 113(1B). At best, it was intended to fill in the gaps and in fact, it was not strictly necessary. He says, therefore, that the section does not abrogate the need for functions to be carried out by an officer of the relevant kind and for HMRC to prove input from such an officer. He says that the UT's interpretation fails to take account of the wide range of circumstances in which the section applies.

28. In addition, he submits that the UT gave the term "HMRC" a meaning wider than the definition in section 103(4) and was wrong to do so. He says that "HMRC" refers to the Commissioners and officers of Revenue and Customs in accordance with section 4 CRCA 2005.

29. He submits that this narrow construction is consistent with the contemporaneous materials relied upon by the UT and stated that there is nothing to suggest that what became section 103 was intended to reverse any aspect of the requirements in *Rogers and Shaw* and that neither the contemporaneous materials nor section 103 itself addresses the question of evidence and burden of proof.

30. To the extent that the UT approached the penalty assessment pursuant to paragraph 18 Schedule 55 in the same way, Mr Gordon's complaint is the same. He submits, however, that if the UT reached its conclusion on the basis of the wording of paragraph 18 itself: the assessment and notification process must both be carried out by "HMRC"; as a result of paragraph 27 Schedule 55, the Interpretation Act 1978 and the CRCA 2005, that term is ultimately defined as the collective body of "Commissioners and officers of Revenue and Customs"; and, as the UT held, there was insufficient evidence of human agency in the process.

31. Ms Choudhury, on behalf of HMRC, submits that Mr Gordon's interpretation of section 103 is much too narrow and renders the section meaningless and purposeless. She says that "HMRC" in section 103 means the body or department itself, albeit comprised of the Commissioners and officers of Revenue and Customs. Furthermore, she says that reliance upon section 113(1B) TMA 1970 is misplaced. She points out that those provisions are fifty years old and says that effectively, they have been superseded by section 103 which is more wide-ranging.

Principles of statutory construction to be applied

32. The task of statutory construction was considered most recently by the Supreme Court in *PACCAR v Competition Appeal Tribunal and Others* [2023] UKSC 28, [2023] 1 WLR 2594. Lord Sales, with whom Lords Reed, Leggatt and Stephens agreed, stated at [40] that:

> "The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.""

33. Lord Sales went on at [41] to refer to examples of the "authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose" and noted that "[T]he purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it." He emphasised at [42], that:

> ". . . it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."

34. He also made clear at [43] that "the courts will not construe a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753" and that the "courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief"."

Meaning of the words read in context

35. With that guidance in mind, I turn to consider the words used in the context in which they appear. First, I note, as did the UT, that section 103 is drafted in broad and general terms. Reference is made at section 103(1) to "[A]nything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation . . .". There is nothing to suggest from the words used, that it is intended to have a restricted meaning or to apply in limited circumstances. Sub-section (2) is consistent with that broad approach. It states that it follows that "HMRC" may carry out the six functions which are listed but makes clear that the list is not exhaustive.

36. Furthermore, sub-section (3) makes clear that anything done by HMRC in accordance with subsection (1) has the same effect as if it had been done by an officer of Revenue and Customs or, where the function is conferred on an officer of a particular kind, an officer of that kind. A distinction is made, therefore, between HMRC and an officer of the Revenue and Customs as it is in sub-section (1). It seems to me that this leaves no room for Mr Gordon's argument that where certain functions must be carried out by an officer of a particular kind, it is still necessary to prove the involvement of such an officer. Such an interpretation is contrary to the plain words of sub-section (3) when read alone and in the context of section 103 as a whole. Sub-section (3) refers back to anything done by HMRC in accordance with sub-section (1) which itself states that anything capable of being done by an officer may be done by HMRC whether by means of a computer or otherwise. Sub-section (4) defines "HMRC" as [His] Majesty's Revenue and Customs and states explicitly that "references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment." The words speak for themselves and should be taken at face value.

37. Who or what is HMRC for these purposes? I agree with the UT and Ms Choudhury in this regard. At [42], the UT stated that ". . . HMRC is being referred to here as the body or department itself, albeit a body comprised of the Commissioners and officers of Revenue and Customs." Obviously, the body, which is an emanation of the State can only act through individuals whether they use computers or not. It is common ground that HMRC do not have computers which make decisions themselves. Section 103 is not intended to authorise the use of artificial intelligence. What is clear from the words used, interpreted in context, is that the section enables anything which can be done by an officer to be carried out by HMRC, the body, albeit comprised of officers and Commissioners. If Mr Gordon's interpretation of the meaning of "HMRC" were correct, sub-sections 103(1) and (3) would be practically meaningless. Section 103(1) would be read as if anything capable of being done by an officer of Revenue and Customs could be done by such an officer or the Commissioners. That is not the natural meaning of the words used and it would be surprising if the legislation were intended to have such a circular effect. Had it been intended to make clear that Commissioners could carry out certain functions, different language would have been used. Lord Sales makes clear in the *PACCAR* case that the court should avoid an interpretation which is futile or pointless. It seems to me that Mr Gordon's narrow construction verges on the pointless. It also blurs the distinction between "an officer of Revenue and Customs" and "HMRC" made in both sub-sections (1) and (3).

38. In my judgment, the plain words of the section as a whole, also leave no room for Mr Gordon's interpretation based upon section 113 TMA 1970. As he would have it, section 103 is merely a "catch all"/ "for the avoidance of doubt" provision which, if necessary, extends section 113 to all circumstances. In other words, Mr Gordon submits that section 103 puts beyond doubt that having made the relevant decisions, the appropriate officer can hand the matter over to another officer responsible for completing the procedure and that officer may use a computer to complete the administrative task. He says that it does not abrogate the need for proof of officer involvement.

39. Had this been the intention, it seems to me that the legislature would have amended section 113 itself rather than enact another quite different provision. I say quite different

because it seems to me that it is not possible to import the two stage process in section 113 into the words used in section 103. There is no suggestion that section 103 is intended merely to put beyond doubt that HMRC is permitted to complete administrative tasks by the use of computers. Nor can section 103 be interpreted to mean that it is necessary to prove that an individual officer or an officer of a particular type or status carried out the initial decision making process. The words used in section 103 are to the reverse effect. Anything capable of being done by an officer of Revenue and Customs may be done by HMRC and has the same effect as it would have if done by such an officer or an officer of a particular kind. The wording of sub-sections (1) – (4) is entirely contrary to Mr Gordon's interpretation.

40. The point is made even more clearly by the transitional provisions in sub-section 103(6). It provides that the section does not apply to anything which would fall within sub-section (1) done by HMRC, if before 11 March 2020, a court or tribunal determined that the relevant act was of no effect because it was not done by an officer or an officer of a particular kind and at that date the order of the court or tribunal had not been set aside or overturned on appeal. In other words, if before 11 March 2020, a taxpayer has been successful in proving that a particular act was invalid because HMRC had not proved that it was done by an officer or an officer of the necessary kind, that judgment will not be undermined or reversed by section 103. The inclusion of this saving provision is consistent with the wider interpretation of the section as a whole. It would be unnecessary if proof of the involvement of an officer were still required. To put the matter another way, the need for the saving provision is consistent with the section having rendered proof of involvement of an officer no longer necessary because anything capable of being done by an officer may be done by HMRC both prospectively and retrospectively.

41. I come to that conclusion despite the fact that there is no mention of evidence or the burden of proof in section 103. It seems to me that the express terms of sub-section 103(1) and (3) make the proof of the involvement of an officer unnecessary. Those sub-sections move the focus from the officer to HMRC as a body.

42. Although I place little or no weight upon them, I also note that the wider construction is consistent with the contemporaneous documents relied upon before the UT and the background to the enactment of section 103. It is common ground that there had been numerous challenges to the validity of notices sent out on behalf of HMRC by the use of automated procedures. It seems to me that given that background and the terms of section 103 itself, the UT was right to describe the mischief that the section was intended to address as being to put beyond doubt that acts carried out by HMRC by the use of automated functions are valid without the need, on each occasion, to prove the direct involvement of an officer.

43. Furthermore, the background materials are consistent with this interpretation. I come to this conclusion without the need to consider the extract from Hansard. The Explanatory Note to clause 100 repeats at paragraph 10 that any function capable of being done by an individual officer may be done by HMRC using a computer or otherwise. Like section 103 itself, if it had been the intention to replicate section 113 or to continue to require proof that an individual officer had authorised the function, it seems to me that both section 103 and the Explanatory Note would have been worded differently.

44. It follows that this applies just as much to the penalty notices issued pursuant to paragraph 18 of Schedule 55.

45. As the UT pointed out at [48], Mr Marano did not dispute that the notices emanated from HMRC. Accordingly, it seems to me that the UT was correct to conclude as it did that the appeal on this ground must be dismissed.

46. It also follows that although we were addressed very briefly about an alternative way of reaching the same result by reliance upon the principle of a statute "always speaking", it is unnecessary to consider that argument further. It is also unnecessary to consider the issues raised by the Respondent's Notice.

47. For all the reasons set out above, I would dismiss the appeal.

Nugee LJ:

48. I agree.

Coulson LJ:

49. I also agree.