16/6/2020

COMMENT FROM THE IFS TAX LAW REVIEW COMMITTEE TO THE PUBLIC BILL COMMITTEE

CLAUSE 100 FINANCE BILL- HMRC: EXERCISE OF OFFICER FUNCTIONS

The TLRC

The Institute of Fiscal Studies (IFS) created the Tax Law Review Committee (TLRC) in 1994. The TLRC's remit is to keep under review the state and operation of tax law in the UK. The TLRC asks in particular whether aspects of the tax system are working in a satisfactory and efficient manner and, if not, what might be done to improve matters. The TLRC's members include members of the judiciary, practitioners from law and accountancy and academics. Further information about the TLRC and a list of members and past publications can be found on the IFS website.

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EXECUTIVE SUMMARY

1. The TLRC took an interest in this measure following the publication on 31 October 2019 of the Ministerial Written Statement and accompanying Technical Note (TN). There were two aspects of the proposal in the TN that were of particular interest. The first and most important is the issue of how tax law, especially the "management" provisions, can function properly in a digital age, where not only computers are commonplace tools in tax but also where AI is also very much a live interest. The second issue is retrospectivity.

2. The Committee is generally satisfied with the objective and scope of the Technical Note issued in October 2019 but we have concerns about the scope for automating discretionary decisions. We would prefer the Bill to exclude the application to discretionary penalties from the scope of clause 100.

3. If this is not possible we ask for ministerial reassurance at Committee Stage that the powers will not be used, without proper consultation and discussion of safeguards, to replace those discretionary decisions especially about penalties currently made by human officers.

3. We would like an explanation of the reason for inclusion of section 30A TMA 1970 in the list.

4. We would like to know why neither the CT nor SDLT equivalent of section 30A TMA (and of s 9ZB TMA) were included. What is the relevant difference?

4. We would like an explanation for the omission from the list of provisions of many of those relating to partnerships (including LLPs).

5. We would prefer that at a minimum the type of function listed in subsection (2) of the clause included all the examples of missing cases we have pointed out.

6. We would prefer that the list was not illustrative but exhaustive, so that further candidates for addition that the Government have in mind for automation could be consulted on properly.

7. We are not certain that the clause covers NICs, Student & Postgraduate loan repayments etc and other matters not considered as "taxation". Will other Bills or regulations be dealing with these matters?

8. We have queried how the approach in clause 100 works where it is the power of an officer of Revenue and Customs to do something that is being supplemented by a reference to HMRC, both in relation to the provisions included in subsection (2) and others. We wish to know how HMRC see the relevant provisions being construed where it is HMRC performing the function.

9. We have queried how the validation of automated decisions can apply where currently an officer is required to have certain human attributes, such as the ability to come to an opinion, or is required to exercise judgment and discretion eg in mitigating penalties.

10 Perhaps the most important is that we have given three reasons why we do not understand how clause 100(1) achieves the object of validating automated decisions, and we should like to know what the thinking on this is.

11. We should like to know the intended effect of the words "by computer or otherwise" Are they seen as essential to achieving HMRC's purpose?

12. We should like to know if HMRC are contemplating delegating any of the functions to a third party.

12. On commencement we note the total retrospection with limited exceptions, and have some concerns about the approach. We do not think that HMRC would be faced with any or at most a minimal loss of tax if the exceptions were to be broadened and/or a backdating to a date of one or two years before October 2019 were included instead of the provisions always having had effect (something it cannot have had before 2005 in any case).

REPRESENTATIONS

General

1. There are two aspects of the proposal in the TN of 31 October 2019 that are of particular interest. The first and most important is the issue of how tax law, especially the "management" provisions, can function properly in a digital age, where not only computers are commonplace tools in tax but also where AI is also very much a live interest. The second issue is retrospectivity.

Scope of clause 100

The general thrust and scope of the TN

2. On reading the TN the TLRC was of the view that HMRC was seeking perfectly reasonably to ensure that currently automated, ie computer-made,

decisions are and have been validly made in law, for the reasons set out in paragraph 1.1 of the TN.

3. It was also satisfied generally with the apparent scope of the measure as it was set out in paragraph 2.3 of the TN, while noting that nothing in paragraphs 2.1 or 2.3 suggested that the proposed legislation would be limited to those decisions which are currently automated ones: indeed paragraph 2.2 says expressly "whether automatically or not".

Concerns about expansion into future automation of non-fixed or not automatically determinable penalties

4. This possibility of expanding the scope for automated decisions does cause us concern, as by no means all of the decisions made under all of the provisions listed at paragraph 2.3 TN are currently automated. We find it difficult to see how, and especially why, those that are not automated at present could, or without full consultation should, be automated in future.

5. For example, while penalties under section 98A(2)(a) of the Taxes Management Act 1970 (TMA) (employer and CIS related penalties) and paragraph 17 Schedule 18 FA 1998 (CT late filing penalties) are fixed amounts and are ones where the section 100 TMA determinations of them are currently made automatically, the same cannot be said of many penalty provisions where a decision has to be made about the appropriate level of a penalty.

6. These provisions include sections 98(1)(ii)[1] and (2) (information notices), 98A(2)(b) and 98C(a)(i) and (b) (DOTAS failures) of TMA where the penalty is not to exceed a given figure and those where the circumstances are such that a computer is very unlikely to be able to decide by itself that the relevant conduct gives rise to a penalty, even if the amount of that penalty is determinable by the computer (see eg paragraph 18 Schedule 18 FA 1998 and section 109C TMA – company ceasing to be resident in UK without fulfilling condition in section 109B).

7. The proposal in paragraph 2.2 has now been drafted in legislative terms as subsection (1) of clause 100, and our concern on reading it and subsection (2), which turns out to be illustrative and not exhaustive, is primarily that the subsection is intended to allow an automated decision to be made in those cases where currently a decision of an officer of Revenue and Customs is required to set the level of a penalty, the officer being required to have regard to the usual criteria for mitigation, or where the decision requires an officer to be of an opinion (eg section 100(1) TMA) or has to have reason to believe something (eg section 9ZB(1)(b) TMA)

8. We realise that the auxiliary verb "may" is used in subsections (1) and (2) and not "shall" or "must" and that would seemingly allow, for example, fixed penalties under paragraph 17 Schedule 18 FA 1998 (late filed CT returns) to be made automatically while leaving others to the discretion of the officer of

[1] The initial penalty in section 98(1)(i) for failing to comply with a notice under any of the provisions listed in the Table in section 98 is not a fixed penalty, but it cannot be imposed by a determination under section 100(1) TMA – see section 100(2)(c). It is imposed by the First-tier Tribunal under section 100C after proceedings are started

Revenue and Customs making the determination. However subsection (2) does not of itself seem to allow for some but not all penalties to be validly automated.

Assurances about future expansion

9. In other circumstances Ministers have given assurances that the use of computers to make decisions will not extend to those decisions which require discretion to be exercised, as many of the penalties do to which the provisions listed in the TN apply.

10. In the Parliamentary proceedings on the Social Security Bill in 1998, the minister in charge of the Bill in the House of Lords, Baroness Heigham, said in a debate on clause 2 (now section 2 Social Security Act 1998):

> "…
>
> It is important to consider the provision in this clause in context. Currently, automated decision-making in the private sector is not unlawful; indeed, it is commonplace in the financial sector where it was pioneered by credit reference agencies. *However, in relation to this department the law requires that social security and child support decisions are made by particular officers or by the Secretary of State or by officers acting on her behalf. This has the practical effect of excluding automated decision-making by computer unless the decisions are approved by officials.* Hence the need for this clause which removes the anomaly by stating explicitly that decisions may be made by computer.
>
> The question is: which decisions? Clearly, there are some kinds of decisions which are not suitable to be made by a computer process. *I can reassure the Committee that decisions which require the exercise of discretion or judgment will continue to be made by the department's trained staff.* …
>
> … However, modern computer systems are capable of using information already held and once programmed with the rules are capable of applying those rules automatically without the need for human intervention. They cannot make discretionary decisions: they will he made by staff."

11. Similar statements were made in the Committee Stage debates on this clause of the Bill in the House of Commons.

12. We would much prefer that the Bill specified that the discretionary penalties covered by the determinations in clause 100(2)(d) and (f) were excluded from the scope of clause 100 or that something along the lines of Baroness Heigham's statement was included in the Bill, but otherwise we would expect there to be a similar ministerial reassurance at Committee Stage that the powers will not be used, without proper consultation and discussion of safeguards, to replace those discretionary decisions especially about penalties currently made by human officers.

New provision in the clause not in the TN

13. In relation to the point about discretionary decisions, we were disturbed to note that subsection (2)(c) includes section 30A TMA in the list of relevant provisions which was not mentioned in the TN. Discovery and other assessments which are not self-assessments (except possibly simple assessments under sections 28H and 28I TMA) are clearly matters which require a decision of a human officer, who in the case of a discovery assessment has to

consider whether a discovery had been made, what the amount of tax loss is and whether the tax loss is of the type listed in section 29(1) TMA. **We would like an explanation of the reason for inclusion of section 30A in the list, and also why it was decided that neither the Corporation Tax (CT) equivalent of section 30A TMA[2] nor the Stamp Duty Land Tax (SDLT) one[3] were included. What is the relevant difference? And why was section 30B TMA (discovery amendments on partnerships) not included?**

Non-inclusion of analogous provisions

14. We also wonder why the CT and SDLT equivalents of section 9ZB TMA[4] were not included, or why section 12ABB TMA (partnerships) was not included. Again **what is the relevant difference between the TMA provisions and those for these other taxes, particularly in the light of the inclusion of the CT and SDLT notice to file provisions.**

15. And why we wonder was section 12ABB TMA (partnerships) not included when section 9ZB was. **Again what is the relevant difference between the individual case and the partnership case?**

16. We understand that the list in subsection (2) is illustrative, but the absence of identical provisions for other taxes or for other sorts of taxpayer creates confusion. **We would prefer that at a minimum the type of function listed in subsection (2) included all the examples, and we would prefer that the list was not illustrative but exhaustive, so that further candidates for addition that the Government have in mind for automation could be consulted on properly.** But

Are NICs and some other types of impost included?

17. Finally on scope, while we note that the relevant enactments have to relate to "taxation", a term which is very wide and goes beyond the taxes for which the Board of Inland Revenue had the care and management (though subsection (2) only covers three of those taxes), **we question whether HMRC are satisfied that it covers National Insurance contributions (NICs) and other matters for which HMRC are now responsible, such as collection of student and postgraduate loan repayments?**

18. In the past, successive governments have been very clear that NICs (even Class 4) are not taxes. For administration purposes though, section 16 Social Security (Contributions and Benefits) Act 1992 (SSCBA) applies most of the provisions of TMA to Class 4 NICs. This has the result that Class 4 NICs are a matter which is very closely tied up with the self-assessment system for income tax, so that, for example, the information parts of a tax return[5] and the self-assessment/tax calculation parts[6] include Class 4.

[2] Paragraph 41 Schedule 18 FA 1998
[3] Paragraph 28 Schedule 10 FA 2003
[4] Paragraph 16 Schedule 18 FA 1998 & paragraph 7 Schedule 10 FA 2003.
[5] Boxes 101 and 102 of SA102F (2020).
[6] Boxes 1, 2 and 4 of SA100 (2020)

19. It is difficult to see what then will enable HMRC, rather than an Officer of Revenue and Customs (OoRC[7]), to exercise the power in section 8 TMA so far as the information required (and included in the return forms) relates to Class 4 NICs. And indeed Class 2 NICs and student loan repayments, both of which are also matters to which the provisions of TMA are applied[8] and which feature in the boxes and calculations in the tax return. We assume that this issue will be addressed in other Bills or regulations.

The approach of clause 100

Our assumptions and expectations

20. The comments we have made and the points we have raised above depend naturally on the assumption that the legislation will have the effect HMRC said in the TN that it would have of validating automated decisions.

21. By "automated decisions" the Committee naturally assumed that HMRC were using this term to be consistent with, for example, section 14 Data Protection Act 2018 and therefore Article 22 of the GDPR, that is decisions made without human intervention even if humans (whether or not OoRCs) supplied data and wrote algorithms that enabled the computer to come to a decision.

22. On that basis the Committee was rather expecting that a provision similar to that in section 2 Social Security Act 1998 (SSA) (see quotation from the Committee debate on the Bill above) would be applied to those provisions referred to in the TN.

23. That section provides, irrelevant material being removed,:

> **"2 Use of computers**
>
> (1) Any decision, determination or assessment falling to be made … by the Secretary of State under or by virtue of a relevant enactment … may be made … not only by an officer of his acting under his authority but also—
>
> (a) by a computer for whose operation such an officer is responsible[9]"

The approach in clause 100

24. The Committee was then rather surprised to find that clause 100 did not adopt that approach in any recognisable way. It was not even headed "Automated decisions" or "Use of computers" or "Use of automation" but was simply headed "Officer's functions".

25. But the heading is not a proper guide to the meaning of statutory provision so our attention has to be on the wording of the provision, and in particular subsection (1). First we note that the words 'whether by means involving the use of computer or otherwise' in parentheses at the end are

[7] We have used this abbreviation rather than oRC or ORC to avoid any unfortunate Tolkienian overtones.

[8] Section 11A SSCBA and regulation 34 of the Education (Student Loans) (Repayment) Regulations 2009 (SI 2009/470). We recognise that regulation 30 may affect the point we are making, but it is not clear to us that it does.

[9] It is, we believe, recognised within the DWP that the words after "computer" in paragraph (a) are too limiting, and we would not have expected HMRC to have copied them.

rhetorical – they say essentially that both X and not-X are the case which is always true and does not make any difference to the meaning of the subsection.

26. The subsection is not drafted as a series of textual amendments, nor does it even say, for example, that in every place in the Tax Acts (or elsewhere) where an OoRC may exercise a function under an enactment, the words "or HMRC" are to be inserted after the words "officer of Revenue and Customs": but that it seems to us is the effect of clause 100(1), especially when read with subsection (2).

27. The case where the notional insertion or deeming is to be done is that where the officer is performing or exercising a function, meaning here a power or duty given by an enactment. (The meaning of "function" as used here as "power or duty" is given by section 51(2)(a) CRCA.)

Problems with the clause 100(1) approach

28. This notional insertion or deeming works perfectly well where the legal proposition to which it applies consists of a sentence providing simply that an OoRC may do something to a taxpayer (TP), or something may be done to TP by an OoRC. But if the purpose of referring additionally to HMRC as the person exercising the function is to permit or require the function to be performed by a computer, a problem seems to arise where there is more to the legal proposition than the simple act described in this paragraph. These more complex types of case arise where an OoRC is both the subject of one action and the object of another (whether in the same section or subsection or not) and in particular where the OoRC as the object is required to be a specific officer. They also arise where the OoRC is required to have attributes which only a human being may have, such as the ability to form an opinion or to have a belief.

29. We note that each of the six provisions listed in subsection (2), which we know from the TN are the ones most important for HMRC, is of the complex type.

<u>Sections 8, 8A and 12AA TMA</u>

30. Each of these requires the taxpayer who is given a notice by an OoRC or HMRC to make and deliver the return "to *the* officer", ie the officer who gave the notice. Is "to the officer" to be read as "to HMRC" in those cases where HMRC gives the notice?

31. We are of course aware of the decision of the Upper Tribunal (Zacaroli J and Judge Richards) in *HMRC v Rogers & another* [2019] UKUT 406 (TCC) (*Rogers*) that in relation to section 8 TMA at least, HMRC and OoRCs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax. However the decision is limited in scope and does not detract from the need for clarity within the legislation.

32. It might be said that the administrative act of giving a notice to everyone included on the HMRC Self-assessment computer system does not require any "decision", automated or not, and that the inclusion of these sections is unnecessary, perhaps even more so in the light of *Rogers*.

33. Section 8A(1) in its fullout words specifies that the notice is to be given to one trustee or to such of them "as the officer thinks fit". If HMRC gives the notice is that to be read as "HMRC think fit"?

Section 9ZB TMA

34. If HMRC have amended the return, are the words "the officer has reason to believe is incorrect in the light of the information available to the officer" to be read as references to HMRC's belief and the information available to them?

35. In section 9ZB(5)(a) is notice of rejection to be given to HMRC in cases where HMRC made the contested amendments?

Section 30A TMA

36. At first glance section 30A(1) is of the simple kind, allowing an assessment which is not a self-assessment to be made by either an OoRC or HMRC. But doesn't section 30A(5) allow this to happen already? Maybe not, as "the Board" is to be read as a reference to "the Commissioners for Her Majesty's Revenue and Customs", not "HMRC" (section 50(1) CRCA). Either way section 30A(5) surely needs attention.

37. But section 30A(1) and (5) does not stand alone. It has to be read by reference to the powers given to make an assessment which is not a self-assessment, the most obviously important of which is section 29 TMA (discovery assessments). Section 29(1) also contains two references to "the Commissioners for Her Majesty's Revenue and Customs" as well as an officer. Presumably "HMRC" is to be read in after the reference to an "OoRC" so that there are effectively three persons able to assess, an OoRC, the Commissioners and HMRC. Is this intended? And is the opinion of the amount to be charged to be that of HMRC in cases where HMRC is the decision maker for the assessment?

38. HMRC are also, we assume, to replace the "officer" in subsections (5) and (6).

39. Sections 29 and 30A cannot be considered in isolation. Section 31(1)(d) permits an appeal against an assessment which is not a self-assessment. Section 31A(4) requires that appeal to be made "to the officer by whom the notice of assessment was given." (That is not necessarily the officer deciding to make the assessment or, if different the officer who made it.) Where HMRC makes the assessment under section 30A(1) and an appeal is to be made, who is to be made to? HMRC?

Section 100 TMA

40. Firstly we note that in this section the officer making the determination must be authorised by the Commissioners.

41. This case seems to be dealt with by subsection (3) of Clause 100, if the effect of clause 100(1) is to deem the words "or HMRC" to have been added after "an officer of Revenue and Customs authorised by the Commissioners for Her Majesty's Revenue and Customs for the purposes of this section", so that there is no requirement for any authorisation where HMRC makes the decision. This is a technically far-reaching change which we would have thought required some explanation, but since we understand that the Commissioners have actually authorised any officer to make this particular decision[10], thus neutralising the

[10] See paragraphs 2 & 3 of the Appendix to the decision of the FTT (Judge Berner) in *Nigel Barrett v HMRC* [2015] UKFTT 329.

safeguard without telling the world at large, the removal of the safeguard is simply a recognition of reality.

42. But in relation to the power of the authorised OoRC to set the determination in the amount "as, in his opinion, is correct or appropriate". Does this need "or their" to be added after "his"? Compare section 29(1) TMA.

43. Much the same points arise in relation to section 100(5) and (6).

Paragraph 3 Schedule 18 FA 1998

44. Paragraph 3(4) raises the same points in relation to the officer to whom a return is to be given as are discussed above in relation to sections 8, 8A and 12AA TMA.

Paragraphs 2 and 3 Schedule 14 FA 2003

45. These raise the same points as in relation to section 100 TMA.

Other provisions referring to an exercise of a power by an OoRC

46. We have noted that subsection (1) is not exhaustive. It could therefore apply to provisions as important as section 9A TMA and the equivalents in CT and SDLT for enquiries and to section 113 TMA about the form of assessments etc.

47. What is to be done to the references to the Commissioners for Her Majesty's Revenue and Customs in section 113(1B) and (1D) where HMRC make the assessment or determinations?

48. And how is section 11(3) Corporation Tax Act 2009 to be applied where HMRC exercise the power to direct? It provides that if an OoRC "thinks, on reasonable grounds, that the date chosen by the company is inappropriate, the officer may give notice to the company directing one of the other accounting dates to be used".

Are relevant provisions capable of being read as including HMRC?

49. We have set out above questions about how references to an OoRC are to be read in certain cases where it is HMRC who exercise the power concerned. An example is section 9ZB TMA. We have queried whether the reference to an OoRC is subsection (5) is to be taken to be to HMRC in cases where HMRC make the amendment. But clause 100(1) only applies where a function is being exercised by HMRC, and that means a exercising a power or carrying out a duty.

50. Where HMRC is the passive recipient of something as in a notice of objection (or a return or an appeal) does clause 100(1) apply? It seems to us not. There is nothing about making appropriate consequential readings of the affected provision or those related to them (eg section 31A TMA where HMRC make a section 29 assessment under section 30A) nor obviously are there any consequential amendments in the Bill, even to the subsection (2) provisions.

51. Section 31A it should be noted contains an anomalous provision. Section 28H and 28I TMA provide that HMRC may make a "simple assessment". Thus clause 100(1) does not apply. But section 31A(4A) requires an appeal against a simple assessment to be made to "the officer by whom the notice of assessment

was given". We note in passing that s 113(1B) does not apply to simple assessments.

52. We wonder therefore how HMRC see the provisions working given that few if any cases exist in TMA where only the simple proposition is present.

Does clause 100(1) actually validate automated decisions?

53. But what we still find strange after all this deeming has been done is that there appears to be no change, nothing to indicate that automated decisions are now possible, save for the substitution of "HMRC" for an OoRC. Thus the thinking here seems to be that that is enough to validate any automated decisions. Is it because there are automated decisions currently made in cases where the legislation already refers to HMRC? Obvious examples of that are the assessment provisions in the penalty regimes introduced in Finance Acts 2007, 2009 and 2009 and the power in sections 28H and 28I TMA to issue a simple assessment.

54. None of those provisions mention computers, even as a means of making the assessments let alone as the decision maker.

55. But whether it is correct that the switch to "HMRC" does not do anything to validate automated decisions depends to a great extent on what is meant by "HMRC" in clause 100. It can either mean simply any or all of the officers of Revenue and Customs, or it can mean those officers together with the assets used by HMRC, including obviously their computers and their software.

56. In our view references to HMRC are references only to the officers of Revenue and Customs, and not to any computer or other asset. This is for the following reasons.

57. First, clause 100(4) says that:

> "In this section—
>
> "HMRC" means Her Majesty's Revenue and Customs;"

58. No definition is given in the Bill of "Her Majesty's Revenue and Customs", nor is there any general definition of the term in TMA or in FA 1998 and FA 2003. Therefore resort is required to the definition in Schedule 1 to the Interpretation Act 1978 (inserted by section 4(3) CRCA):

> ""Her Majesty's Revenue and Customs" has the meaning given by section 4 of the Commissioners for Revenue and Customs Act 2005."

59. Section 4(1) CRCA says:

> "The Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs."

60. Under section 5 CRCA the Commissioners for Her Majesty's Revenue and Customs have the functions that were vested in the predecessor Commissioners, including the collection and management of income tax, corporation tax and SDLT. Under section 13(1) CRCA an OoRC may exercise any function of the Commissioners, save for certain irrelevant non-delegable functions.

61. Nothing here suggests that the functions vested in an OoRC may instead be performed by a computer.

62. Second, the use of the words in parentheses in clause 100(1) "whether by means involving the use of a computer or otherwise" does not establish the validity of automated decisions. The words are identical to those used in section 113(1B) and (1D) TMA, where the latter says:

> "Where an officer of the Board has decided to impose a penalty under section 100 of this Act and has taken all other decisions needed for arriving at the amount of the penalty, he may entrust to any other officer of the Board responsibility for completing the determination procedure, **whether by means involving the use of a computer or otherwise**, including responsibility for serving notice of the determination on the person liable to the penalty."

63. Section 113(1B) does the same job in relation to discovery assessments under section 29 TMA and paragraph 41 Schedule 18 FA 1998[11]. Thus it is difficult to see why the words in parentheses in clause 100(1) are even needed in relation to section 29 TMA assessments (subsection (2)(c) of clause 100 effectively covers this) or section 100 TMA determinations (where subsection (2)(d) is directly in point). And it is also difficult to see what the words in parentheses add to the provisions in the other subsections beyond what section 113(1B) and (1D) already do for assessments and determinations.

64. All these examples of the "computer or otherwise" wording (and there is also an example in paragraph 37(4) Schedule 10 FA 2003 – SDLT assessments, which is *not* covered by subsection (2)) relate to how the *decision of an officer* is to be given effect, and were introduced into TMA in 1970 as a result of the case of *Burford v Durkin (HM Inspector of Taxes)*[12], but at a stage before the inspector had succeeded in establishing that it was not necessary for the decision-making officer to also be the officer executing the procedures necessary to get the assessments physically made and issued[13]. Nothing in this case or subsequently has suggested that a decision to assess in which a computer is used for part of the process amounts to a decision by a computer or an automated decision.

65. Third, the term "HMRC" is already used in situations comparable to those listed in clause 100(2), but without any words such as those in parentheses or in section 113(1B) and (1D) being used, yet the decisions include automated ones. The most important of these are in the various provisions introduced from 2007 onwards as a result of HMRC's review and consultation on its powers. In relation to Schedule 24 FA 2007 (incorrect returns and other documents) and Schedule 41 FA 2008 (failure to notify liability or to register etc) there is always an officer who takes a decision and in particular decides the level of any mitigation, whether there is a reasonable excuse for a failure, whether the failure or error amounts to carelessness or worse and whether the confession of wrongdoing

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[11] Paragraph 2(5) Schedule 14 FA 2003 does the same for an SDLT penalty determination.
[12] 63 TC 645
[13] In *Corbally-Stouton v HMRC* the Special Commissioner (Charles Hellier) set out ([91]) what he was told by HMRC as to how this section also applies in the age where assessments are not physically made by signing a book, but by entering data into a computer.

was prompted by HMRC action or not. But that legislation is drafted throughout using the term HMRC as the person exercising the various functions involved.

66. By contrast Schedule 55 FA 2009 (failure to deliver a return in time) and Schedule 56 FA 2009 (failure to pay tax by penalty date) do, as was established in *Donaldson v HMRC*[14], involve *only* automated decisions in relation to both fixed and tax geared penalties[15]. But nothing in *Donaldson* or any subsequent case established or even considered whether by saying "HMRC must … assess the penalty"[16] this legislation permitted an automated decision[17]. It is noteworthy that the exact same formula is used in Schedule 24 FA 2007 and Schedule 41 FA 2008 and in many other places in post-2005 legislation, where it is always an officer who makes the decision to assess.

67. **On the basis of these three reasons we have yet to understand how clause 100(1) achieves the object of validating automated decisions, and we should like to know what HMRC's thinking is here. The real question as we see it is what weight are the words : can the "computer or otherwise" intended to carry and does this work to achieve the objective of the legislation?**

Does HMRC intend to subcontract decision making to 3rd parties?

68. By virtue of section 14(1)(c) CRCA the Commissioners can (subject to a few particular exceptions) delegate one of their functions "to any person". All the Commissioners have to do in the case of such a delegation is to monitor the exercise of the function and give any necessary directions for its exercise. Section 2(1)(b) SSA 1998 already allows that. **Do the Commissioners intend to delegate the function of determining penalties to a person who is not an officer of Revenue and Customs?**

Retrospectivity

69. As for the retrospectivity issue, we noted that the proposal in the TN that the Finance Bill provision would involve complete retrospection (always in force), subject to a limited exception where a person had received a "settled" judgment from a Court or Tribunal decision before 31 October 2019. Our first concern was that might require the judgment to be final in the same sense as used in the legislation about follower notices in Chapter 1 Part 4 FA 2014 (see section 205(4) in Part 4 of that Act).

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[14] [2016] EWCA Civ 761

[15] In *Donaldson* only paragraph 4 Schedule 55 was in issue and it contained a unique safeguard which required HMRC to decide to impose a penalty before it was issued. The issue in *Donaldson* whether this decision had to be made by an officer in relation to each case or could be a one-off decision made by a panel of HMRC officers before the legislation had even come into force which governed and validated the imposition of all penalties under paragraph 4. In an *obiter dictum* Lord Dyson suggested that a computer could not make a decision, but section 2 SSA 1998, the GDPR and the Data Protection Act 2018 seem to contradict that view.

[16] Paragraph 18(1) Schedule 55 FA 2009. See also paragraph 11(1) Schedule 56.

[17] In each of the four schedules mentioned there is a definition of "HMRC", and it is that used in clause 100(4). So it means the Commissioners and the officers of Revenue ands Customs.

70. Clause 100 in the Finance Bill makes it clear however that a "settled" judgment was one which had not been set aside or overturned before 11 March 2020 even if it was under appeal, and that is welcome clarification.

71. However it did seem to us that HMRC would be under little, if any, risk of serious tax loss if the drafter had adopted the same formula as in section 87(4) FA 2019 about voluntary returns and had also excepted cases where a person had made an appeal under the Taxes Acts before 31 October 2019 and the ground (or one of the grounds) for the making of the appeal was that the relevant act was of no effect.

72. The number of cases where there is an appeal on those grounds which has not been already been decided by the First-tier Tribunal is likely to be very small, and the appeal will most likely have been made in 2019 or possibly 2018.

73. In any event the clause cannot, it seems to us, have effect in relation to anything done by an officer of Revenue and Customs before the enactment of the CRCA as neither such officers nor HMRC existed before then. So it does seem to be overkill to apply the new provision as always having had effect, and a more reasonable cut off date would draw sting from any major complaints.

74. On a point of detail, in subsection (6) of clause 100 paragraph (b) refers to an "order" of a Court or Tribunal. The First-tier Tribunal (Tax Chamber) and the Upper Tribunal do not make "orders" but give "decisions" (see Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and Rule 40 of the Tribunal Procedure (Upper Tribunal) Rules 2008). Thus in relation to *Rogers v HMRC*[18] and *Shaw v HMRC*[19] it could be argued that they are not affected by the decision of the Upper Tribunal because there was no "order" of the FTT in those cases that has been overturned by the Upper Tribunal in *Rogers*.

[18] [2018] UKFTT 312 (TC)
[19] [2018] UKFTT 381 (TC)