IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE TURNER
95/0301/D

Royal Courts of Justice
Strand
London WC2

Wednesday 12th July 1995

B e f o r e:

LORD JUSTICE NEILL

LORD JUSTICE ROCH

and

LORD JUSTICE HUTCHISON

- - - - - -

JOHN DEE LIMITED

v

COMMISSIONERS OF CUSTOMS AND EXCISE

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(Handed Down Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London WC2
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Official Shorthand Writers to the Court)

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MR S RICHARDS and MR P MANTLE (instructed by the solicitor for Customs and Excise, Salford) appeared on behalf of the Appellants.

MR R ENGLEHURT QC and MR A LEWIS (instructed by Dickinson Dees, Newcastle) appeared on behalf of the Respondents.

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JUDGMENT
(As Approved by the Court)

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LORD JUSTICE NEILL:

This case raises important questions as to the nature and scope of an appeal brought pursuant to section 40 of the Value Added Tax Act 1983 (as amended) (the 1983 Act) to a Value Added Tax Tribunal constituted in accordance with Schedule 8 to the 1983 Act. It is to be noted that the 1983 Act was repealed by the Value Added Tax Act 1994 and that the provisions as to appeals to a tribunal are now contained in sections 83 and 84 of the 1994 Act.

For many years prior to 1991 a number of companies carried on road haulage businesses as a group under the name of the John Dee Group. By the beginning of 1990, however, it became apparent that the group was experiencing financial and management problems. On 3

January 1991 joint administrative receivers were appointed. According to the directors' statement of affairs the estimated total deficiencies of the group at 3 January 1991 exceeded £24,000,000. The debts owing by the group included over £1,000,000 due to the Commissioners of Customs and Excise in respect of Value Added Tax.

On 23 January 1991 a company named Index Agent Limited was incorporated. On 19 March 1991 this company changed its name to John Dee Limited. John Dee Limited (whom I shall call "the company") took over 20% of the undertaking of the former John Dee Group. Two of the initial directors of the appellants had been directors of companies in the John Dee Group. Mr. Davison had been a director of five of the six companies in the group. Mr.

Newton had been a director of one of the six companies in the group.

The Commissioners of Customs and Excise (the Commissioners) became concerned about what they considered to be the apparent links between the company and the former John Dee Group of companies and decided to exercise their powers to require the company to give security for the payment of any VAT which either was or might become payable. At the material time this power, which had formerly been contained in section 32(2) of the Finance Act 1972, was contained in paragraph 5(2) of schedule 7 to the 1983 Act. The relevant provision was in these terms:

> "Where it appears to the Commissioners requisite to do so for the protection of the revenue they may require a taxable person, as a condition of his supplying goods or services under a taxable supply, to give security or further security of such amount and in such manner as they may determine, for the payment of any tax which is or may become due from him."

On 10 January 1992 a letter was written on behalf of the Commissioners to the company requiring the company to provide security in accordance with paragraph 5(2). So far as is material the letter was in these terms:

> "The Commissioners ... have noted the VAT record of the above business and other businesses in which your directors Mr. John Davison and Mr. Peter Newton were involved and for the protection of the revenue and in pursuance of their powers under Schedule 7, paragraph 5(2) of the [1983 Act] they require you, as a condition of your supplying goods or services under a taxable supply within the meaning assigned to it by Section 2(1) of the said Act, to give security to them by guarantee or by a cash deposit in the sum of £355,900.00 ... for the payment of any Value Added Tax which is or may become due from you.
>
> Alternatively the Commissioners will accept £237,200.00 ... if monthly returns are submitted.
> .....
>
> Although the security is required immediately, the Commissioners will allow you a period of 30 days from the date of this letter in order to give you the time to make the necessary arrangements. If you do not provide the required security by the end of this 30 day period, and you continue to trade, further action will be taken."

Enclosed with the letter was a leaflet setting out the procedure for making an appeal to a Value Added Tax

Tribunal.

On 13 January the company replied. They indicated that they wished to appeal and stated the grounds of the appeal as follows:

"(a) Firstly the new company John Dee Limited has no connection with the old John Dee Group Limited apart from two of its directors were former directors of the John Dee Group Limited. Apart from this the new company was purchased from the Official Administrative Receiver which was a very small part of the old Group and the part purchased is profitable, this can be seen from the enclosed audited accounts.

(b) Secondly the two directors mentioned in your letter do not own the Company in fact there has been a

substantial third party investment ... .

(c) The payments made to the Customs & Excise for John Dee Ltd. since the commencement of business on 11 March 1991 have been made as per the terms and conditions laid down by H.M. Customs & Excise.

(d) As I am sure you are fully aware to ask for a security of such a large amount would only create further problems to a new company trying to survive during these difficult economic times."

By a Notice of Appeal dated 18 February 1992 the company exercised their right to appeal against the decision of the Commissioners to require security. On 4 June 1992 the Commissioners served a Statement of Case in accordance with rule 8 of the Value Added Tax Tribunal Rules 1986 (SI 1986/590) (as amended) (the 1986 Rules).

The appeal was heard before a tribunal sitting at Newcastle upon Tyne on 30 June 1993. The Decision of the tribunal was released on 11 October 1993. Before I turn to the decision, however, I should first refer further to the 1983 Act and to the provisions relating to appeals to a Value Added Tax Tribunal.

Appeals to a Value Added Tax Tribunal.

Value Added Tax, which was introduced by the Finance Act 1972, is a tax on the supply of goods and services in the United Kingdom and on the importation of goods into the United Kingdom. In broad terms the tax is charged where the supply is by a person in the course of a business carried on by him where the supplies made by that person over a specified period exceed a certain amount in value. Schedule 7 to the 1983 Act contains

provisions relating to the administration, collection and enforcement of the Act. By paragraph 1(1) of Schedule 7 it is provided that the tax is to be under "the care and management of the Commissioners".

A number of obligations are placed on persons who make taxable supplies in the course of business. These obligations include the duty to register and to make returns. For their part the Commissioners have wide powers relating to the administration, collection and enforcement of the Act. Thus, by way of example, the Commissioners are empowered to make assessments of tax due (paragraph 4 of schedule 7), and to require security and the production of evidence (paragraph 5 of schedule 7). In addition, again by way of example, the Commissioners may in certain circumstances impose

penalties or surcharges.

It will be apparent that in the course of their administration of the tax the Commissioners will frequently find it necessary to make decisions with regard to the affairs of individual tax payers. Against some of these decisions and in respect of specified matters the tax payer is given a right of appeal under section 40(1) of the 1983 Act (as amended). As I indicated earlier, one of the decisions against which a right of appeal lies is a decision to require security under paragraph 5(2) of schedule 7: see section 40(1)(n). Furthermore, in addition to the decisions specified in section 40(1) (as amended), a taxpayer can also appeal against a decision if it falls within the scope of section 40(6), which provides:

"Where an appeal under this section is against a

> decision of the Commissioners which depended upon a prior decision taken by them in relation to the appellant, the fact that the prior decision is not within subsection (1) above shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

It may be noted that section 40(6) of the 1983 Act re-enacted section 40(6) of the Finance Act 1972, subsection (6) having been added to section 40 by section 15 of the Finance Act 1981. This amendment followed the decision of the House of Lords in Customs and Excise Commissioners v. J.H. Corbitt (Numismatists) Ltd. [1981] AC 22 (the Corbitt case).

In the case of some of the decisions specified in section 40(1) of the 1983 Act (as amended) the Act itself (or later legislation) gives guidance as to the matters which are to be determined by the tribunal and as to the powers of the tribunal on an appeal. It is sufficient to

take three examples:

(1) One of the features of the VAT system is that a taxable person, when accounting for and paying tax in respect of supplies made by him, may in specified circumstances deduct the tax which he has had to pay in respect of supplies made to him. Put shortly, this means that "input tax" can be credited against "output tax". There are cases, however, where there are disputes between the Commissioners and the taxpayer as to whether certain input tax can be credited under section 15 of the 1983 Act. In these cases the Commissioners may make a determination which is adverse to the taxpayer and against which the taxpayer will wish to appeal. To some of these appeals section 40(3ZA) will apply. Section 40(3ZA) was inserted by section 46 of the Finance Act

1993. Section 40(3ZA) provides that in the case of appeals to which it relates:

> "... The tribunal shall not allow the appeal or, as the case may be, so much of it as relates to that determination unless it considers that the determination is one which it was unreasonable to make or which it would have been unreasonable to make if information brought to the attention of the tribunal that could not have been brought to the attention of the Commissioners had been available to be taken into account when the determination was made."

(2) By paragraph 1(A) of schedule 1 to the 1983 Act the Commissioners are empowered to make a direction that the persons named in the direction shall be treated as a

single taxable person. This power is given to the Commissioners to counteract the carrying on of the severable parts of a single business under different ownership in order to avoid registration. It is provided, however, by paragraph 1A(2) that the Commissioners are not to make a direction unless they are satisfied of a number of specified matters. One of these matters is "that the activities in the course of which he makes or made those taxable supplies form only part of certain activities which should properly be regarded as those of the business described in the direction, the other activities being carried on concurrently or previously (or both) by one or more other persons."

An appeal against such a direction lies under section 40(1)(hh) of the 1983 Act. Section 40(3A),

however, makes a special provision in relation to such an appeal:

> "Where there is an appeal against a decision to make such direction as is mentioned in subsection (1) (hh) above, the tribunal shall not allow the appeal unless it considers that the Commissioners could not reasonably have been satisfied as to [certain matters set out in paragraphs (2) and (4) of paragraph 1A]."

(3) I mentioned earlier that the Commissioners have power to impose penalties. This power is contained in the sections relating to civil penalties in the Finance Act 1985. For example, where a return is made by a taxable person which understates (to an extent prescribed in the Act) that person's liability to tax he shall be subject to a penalty equal to a proportion of the tax which would have been lost if the inaccuracy had not been discovered: see section 14(1) of the Finance Act 1985. Section 14(6) however, provides as follows:

> "Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this

section if
(a) the person concerned satisfies the Commissioners, or on appeal, a Value Added Tax Tribunal that there is a reasonable excuse for the conduct ..."

An appeal against any liability to a penalty lies to a tribunal under section 40(1)(o) of the 1983 Act (as amended).

It is to be noted, however, that except in relation to certain specified appeals (of which I have given these three examples) no statutory guidance is given to a tribunal as to the scope of the appeal or as to the powers of the tribunal on the appeal.

I must now return to the decision of the Tribunal in the instant case.

The Decision dated 11 October 1993.

It was common ground before the Tribunal that the appeal was based on what are called Wednesbury grounds:

see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223. Accordingly, it was argued on behalf of the company that the Commissioners had failed to have regard to relevant matters and that they had reached an unreasonable decision.

It is apparent therefore that both the parties and the Tribunal adopted the approach that the jurisdiction of the Tribunal on the appeal was supervisory rather than appellate. Indeed in the course of the Decision the chairman referred to the judgment of Farquharson J. in Mr. Wishmore Ltd v. Customs and Excise Commissioners [1988] STC 723 where he said at 726:

> "The Tribunal ... should restrict itself, on the hearing of an appeal, to deciding whether the taxpayer company had established that the decision arrived at by the Commissioners was unreasonable, or (as the chairman of the Tribunal did in this case) whether the decision had been arrived at by taking into account matters which were not relevant, or by

ignoring matters which were relevant."

It may also be noted that a little earlier in the same judgment Farquharson J. said at 725:

> "The first matter in this appeal is to establish the nature of the appeal to the Value Added Tax Tribunal. Is it a re-hearing whereby the Tribunal can review the discretion of the Commissioners and alter it or come to a different conclusion if it so desires, or does the Tribunal on the other hand exercise only a supervisory jurisdiction, limiting its decision to one based on Wednesbury principles?
> ...
>
> There is very little difficulty about this aspect of the case because it is agreed on all sides that the latter alternative represents the correct approach."

The main argument on behalf of the company before the Tribunal was that before issuing any notice requiring security the Commissioners should have asked the company for information about their financial position. In particular it was said that the Commissioners should have asked for and have taken into account the information about the financial position of the company which had

been made available to the North Eastern Traffic Area Licensing Authority at the time when they made a successful application under the provisions of the Transport Act 1968 for a licence to carry on business as a road haulage company. In dealing with this argument the chairman said:

> "It seems to me that it is not tenable to argue that the Commissioners must always have regard to the financial position of the taxpayer when considering whether or not to require security. ... However, [the evidence on behalf of the Commissioners] indicated that it was the practice of [the department responsible for security] never to ask taxpayers to provide financial or other information. I cannot see that this can be a fair approach or one which a reasonable body of Commissioners would take in a number of cases. In the present case the appellant is far from being a straight forward "phoenix" company, although it may have some of the features of such. The directors of the defunct companies are only two amongst a number in the present company which has only taken over a comparatively small part of the undertaking of the former company albeit continuing the company name. I think that in such a case the Commissioners should consider whether or not to ask the taxpayer for financial information in order to assist them with their decision. I therefore find that in this case the Commissioners did fail to have regard to the possibility of seeking financial information from the appellants which could have assisted them in discharging their duty of acting fairly towards the taxpayer where the position relating to the requirement for security was not otherwise clear.

It follows from the conclusion of the Tribunal that the Commissioners had failed to have regard to the possibility of seeking relevant financial information from the company that the Tribunal found that the Commissioners had misdirected themselves in law. This finding by the Tribunal has not been subsequently challenged by the Commissioners. The Tribunal went on to consider, however, what the position would have been had a reasonable body of Commissioners asked for and been given and had taken into account the material financial information which was available as at 10 January 1992. In this context the Tribunal referred to the following passage in the judgment of Sir John Donaldson MR in Commissioners of Customs and Excise v. Secretary of State for Social Services, ex parte Wellcome Foundation Ltd.

[1987] 1 WLR 1166 at 1175:

> "The jurisdiction of the courts to entertain applications for judicial review is a supervisory jurisdiction of an essentially practical nature designed to protect the citizen from breaches by decision makers of their public law duties. That there will be such a breach if the decision maker takes account of irrelevant matters or fails to take account of relevant matters, in the sense that his decision is affected thereby, is not in doubt. But, if his decision is not affected thereby, there is no reason why the jurisdiction should be exercised and every reason why it should not."

In the Tribunal's Decision the chairman understood this passage to indicate that where a decision maker fails to take into account a relevant matter the court or tribunal must look to see whether or not the decision maker's decision would have been affected if he had taken such matter into account.

In the light of the guidance given by Sir John Donaldson MR the chairman stated his conclusion on the matter as follows:

> "I find that it is most likely that, if the Commissioners had had regard to [the doubt expressed

> in the report to the Licensing Authority] their concern for the protection of the revenue would probably have been fortified. ...
>
> In summary in the present case I think that the Commissioners should have considered whether or not to seek financial information from the appellant but that if they had so considered and had decided to seek such information their decision would not have differed from that which they actually took."

Accordingly the Tribunal dismissed the company's appeal.

The Appeal to the High Court.

The company then appealed to the High Court in accordance with the provisions of the Tribunals and Inquiries Act 1992. The appeal was heard by Turner J. on 12 and 13 January 1995. He gave judgment on 3 February 1995.

Before Turner J. counsel for the company submitted that the Tribunal had misconceived the nature of its jurisdiction and had been in error in applying to an appeal to a Value Added Tax Tribunal the principle that

is applicable to judicial review in public law. It was further argued that the Tribunal had failed to have regard to evidence of facts which had occurred subsequent to the date of the Decision contained in the letter of 10 January 1992.

For their part the Commissioners sought to uphold the Decision of the Tribunal and, certainly at the outset of the hearing before Turner J., supported the contention that the jurisdiction of the Tribunal was supervisory.

In his judgment Turner J. identified the issues of law for his determination as follows (8):

"Issue 1.

What is the true nature of the jurisdiction of the VAT Tribunal on an appeal from a discretionary decision of the Commissioners?

Issue 2.

Given that the Commissioners had wrongly exercised their initial discretion, should the VAT Tribunal then:

(a) Allow the appeal against the Commissioners' initial Decision and leave it to them to make a fresh Decision on the basis of such facts as they ought properly to have considered or consider at the time of the fresh Decision; or

(b) Itself come to a decision in the light of the current evidence; or

(c) Put itself in the position of the Commissioners, in the light of the evidence as it existed at the time of the Decision which they had taken and

substitute its Decision for that of the Commissioners."

In the course of his judgment Turner J. referred not only to the judgment of Farquharson J. in the Wishmore case (supra) but also to the decision of Dyson J. in Customs and Excise Commissioners v. Peachtree Enterprises Ltd. [1994] STC 747, and pointed out that in both those cases the Commissioners had conceded that the Tribunal's jurisdiction was supervisory and that the powers of the Tribunal had to be exercised in accordance with the Wednesbury principles. In view, however, of the detailed arguments which were addressed to this court I do not think it is necessary to do more than attempt to summarise what I understand to have been the conclusions reached by Turner J. in the course of his careful

judgment. His conclusions, as I understand them, were as follows (the references are to the internal numbering of the judgment):

(a) That the jurisdiction of the Tribunal was not "limited to the detection and quashing of any decision made by the Commissioners which is Wednesbury unreasonable." (18F and cf 26A and 28C). The provisions contained in the 1986 Rules were inconsistent with a purely supervisory function. Accordingly the jurisdiction was appellate and not supervisory.

(b) That an appellate jurisdiction can be of two kinds - an appeal by way of re-hearing or an appeal simpliciter (22A). An appeal by way of re-hearing is of the kind which is conferred on the Court of Appeal by section 15(3) of the Supreme Court Act 1981 which provides: "For all purposes of and incidental to - (a) the hearing

> and determination of any appeal to the Civil Division of the Court of Appeal ... the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought."

(c) That on an appeal to a VAT Tribunal the tribunal does not have powers equivalent to those contained in section 15(3) of the 1981 Act. One of the reasons for this is that the tribunal "cannot be expected to be invested with the same knowledge and experience as the Commissioners for the purpose of substituting its own exercise of discretion in place of the discretion which ought to have been exercised by the Commissioners." (32C). It follows therefore that an appeal to a Tribunal is an appeal simpliciter or at any rate something less than a full appeal by way of re-hearing.

(d) That once the Tribunal had decided that the Commissioners had misdirected themselves the appeal

should have been allowed and the Tribunal should have left it to the Commissioners to take a fresh Decision if they thought fit on the facts as they had become by the date of the fresh Decision (32F). The Tribunal had erred in substituting its own view of what the Commissioners would have determined had they properly taken into account the facts as they were at the date of that Determination (31A).

Accordingly Turner J. allowed the company's appeal.

The Commissioners have now appealed to this court.

The Appeal to the Court of Appeal.

In this court counsel for the Commissioners accepted that a Tribunal's jurisdiction was appellate and not supervisory. The concessions which had been made in previous cases and at earlier stages in this case had

been mistaken. Indeed, he suggested, references to the decision in Wednesbury were apt to be misleading.

Counsel further submitted that in considering the function and powers of a VAT tribunal on appeal under section 40 of the 1983 Act it was necessary to examine the nature of the decision against which the appeal was brought and also any statutory provisions which threw light on the matter. It was not possible to treat all appeals under section 40 in the same way. In some cases the tribunal had a fact finding role and could reverse findings of fact made by the Commissioners. In other cases there were special statutory provisions which applied to particular classes of appeals under section 40: in this context counsel referred us to a number of these provisions including section 40(3ZA) and (3A) and

to provisions in the Finance Act 1985 including section 14(6), section 14A(5) and section 15(4). In the present case, however, the function and powers of the tribunal were determined by the nature of the decision against which the appeal was brought. The opening words of paragraph 5(2) of schedule 7 were important - "Where it appears to the Commissioners requisite to do so for the protection of the revenue ..." These words set out the statutory condition which has to be satisfied before the Commissioners can, in the exercise of their discretion, require a taxable person to give security. On an appeal under section 40(1)(n) the Tribunal can therefore examine whether the statutory condition has been satisfied. The task of the Tribunal, though appellate rather than supervisory, is therefore very similar, if not identical,

to the task of a court on judicial review of an administrative decision. But it is more satisfactory to avoid references to Wednesbury itself and instead to follow the guidance given by Lord Lane in the Corbitt case where he said at 60G that the Tribunal could only properly review the Commissioners' discretion "if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or if they had taken into account some irrelevant matter or disregarded something to which they should have given weight". In the Corbitt case Lord Salmon dissented but the other Law Lords agreed with Lord Lane's speech.

Mr. Richards accepted that the Commissioners' Decision dated 10 January 1992 was erroneous. He submitted, however, that the Tribunal had been entitled

to consider whether the Commissioners would have reached the same decision even if the further relevent material had been taken into account and that on the facts the Tribunal's decision to dismiss the company's appeal was correct. Turner J. was in error in suggesting that the Tribunal had substituted its own judgment for that of the Commissioners.

Mr. Engelhart QC on behalf of the company put the matter quite differently. He submitted that one could identify four categories of case:

(1) An appellate jurisiction in respect of matters of fact; an example of this category of appeal would include the jurisdiction to determine whether certain records had been kept: cf. Lord Simon of Glaisdale in the Corbitt case at 52B.

(2) An appellate jurisdiction where Parliament has given a tribunal an original jurisdiction; an example of this jurisdiction is to be found in section 14(6) of the Finance Act 1985 which empowers a tribunal to determine whether there is a reasonable excuse for conduct which otherwise would give rise to liability to a penalty.

(3) An appellate jurisdiction which is circumscribed by statute; an example of this jurisdiction is to be found in section 40(1)(3ZA) of the 1983 Act where the function of the tribunal is limited to considering whether the determination by the Commissioners was unreasonable.

(4) An appellate jurisdiction where there is a general right of appeal. Where a general right of appeal is given and the relevant decision was a discretionary decision the appellate function is that set out in the

speech of Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1983] 1 AC 191 where he said at 220C:

> "The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist ... There may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision ... is so aberrant that it must be set aside upon the grounds that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

Counsel for the company submitted that the appeal to the Tribunal fell into this fourth category and was to be determined on Hadmor principles. Accordingly, where the Commissioners had misdirected themselves, the Tribunal could exercise its own discretion. He referred us to the 1986 Rules and emphasised that the facts had been investigated for the first time before the Tribunal. The

Commissioners decided the matter without any evidence or representations from the company.

In the case of an appeal under section 40(1)(n) there was no statutory limitation on the appeal. As a matter of construction of the 1983 Act and of the 1986 Rules the appeal was therefore plainly an appeal by way of re-hearing. Counsel referred us to the decision of the Court of Appeal in Saglata Ltd. v. Norwich Corporation [1971] 2 QB 614 and in particular to passages in the judgments of Edmund Davies L.J. and Philimore L.J. In that case the court was concerned with an appeal to Quarter Sessions from an administrative decision by the committee of a local authority. At 639G Philimore L.J. said:

> "What sort of appeal is it? Is the Recorder to look at the reasons of the committee and to give effect to them unless they are so lacking in grammar or so obviously wrong on the face of them that certiorari

would lie?

> The position seems to me to be so well established that it is not susceptible of legal subtlety. The hearing of an appeal at quarter sessions is a rehearing. It cannot be less so if the decision from which the appeal is brought is an administrative decision by the committee of a local authority which heard no evidence, before which no one took an oath, or was cross-examined."

In addition counsel referred us to Lothbury Investment Ltd. v. IRC [1981] Ch. 47 where Goulding J. considered the jurisdiction of the Special Commissioners to review a determination by the Board Of Inland Revenue under section 296 of the Income and Corporation Taxes Act 1970. In holding that the Special Commissioners had the right and indeed a duty to form their own view of the whole matter and substitute their view, if necessary, for that of the Board Goulding J. was clearly impressed by the facts that the determination by the Board could be made in the absence of any representations by the

taxpayer and that there was a provision for the Commissioners to hear any relevant evidence on the appeal.

Mr. Engelhart also referred us to the last paragraph in the speech of Lord Simon of Glaisdale in the Corbitt case at 52G. He submitted that this paragraph supported the proposition that, if the Tribunal found that the Commissioner's Decision was flawed, it could exercise its own discretion.

Finally counsel submitted that, though he accepted that in a case where if all the facts had been before the decision maker he would inevitably have reached the same conclusion the Tribunal could decline to interfere, that was not the position in this case. The Tribunal did not decide that the Commissioners would inevitably have

reached the same conclusion.

Conclusions.

Counsel for the company was clearly right to emphasise that the function of the Tribunal is an appellate function. Section 40(1) of the 1983 Act makes provision for an appeal. Furthermore, I agree that references in this context to Wednesbury principles are capable of being a source of confusion.

The decision in the Wednesbury case itself, as is apparent from the passages which were helpfully cited by Turner J. in his judgment, was concerned with the power of a local authority to license premises for cinematographic performances. It was in the context of a challenge to the decision of the local authority to impose certain conditions on the grant of a Sunday

entertainment licence that the Wednesbury principles were enunciated. Accordingly the principles, as formulated by Lord Greene MR, apply primarily to cases where the court is exercising its supervisory jurisdiction. This is a jurisdiction, which, as Lawton L.J. observed in R. v. Sussex Quarter Sessions, ex parte Johnson Trust [1974] QB 24 at 40, dates from medieval times. An appellate jurisdiction, on the other hand, is almost invariably statutory in origin.

It is clear from section 40 itself that the decisions from which an appeal may lie cover a wide field. It is also clear that, though the construction of the 1983 Act cannot be determined by the subordinate legislation, the 1986 Rules show that the Tribunal can, inter alia, hear evidence and make orders relating to

discovery.

It is true that there is no express provision in schedule 8 to the 1983 Act or elsewhere in the 1983 Act governing the powers of a VAT Tribunal on an appeal under section 40. I am, however, unable to accept Mr. Engelhart's general proposition that, in the absence of any express limitation, the powers of a Tribunal are akin to those of the Court of Appeal. In my judgment it is necessary in each case to examine the nature of the decision against which the appeal is brought. It is also necessary to take account of the fact that, by virtue of paragraph 1(1) of schedule 7 to the 1983 Act, Value Added Tax is under the care and management of the Commissioners.

In furtherance of his argument that, once the

tribunal had decided that the decision of the Commissioners was flawed, it could substitute its own discretion, counsel for the company was constrained to submit that it was for the Tribunal to decide whether it appeared to it "requisite for the protection of the revenue" to require a taxable person to give security. I am quite unable to accept this submission. It seems to me that the "statutory condition" (as Mr. Richards termed it) which the Tribunal has to examine in an appeal under s.40(1)(n) is whether it appeared to the Commissioners requisite to require security. In examining whether that statutory condition is satisfied the Tribunal will, to adopt the language of Lord Lane, consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they

had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The Tribunal may also have to consider whether the Commissioners have erred on a point of law. I am quite satisfied, however, that the Tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in Hadmor. The protection of the revenue is not a responsibility of the Tribunal or of a court.

I do not consider that it is necessary or would be appropriate in this case to give guidance as to other categories of appeal under section 40(1), other than to say that in my view the function and powers of a Tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions. It may be noted, however,

that in an appeal under section 40(1)(h) against a refusal of an application under section 29 of the 1983 Act similar questions to those raised in the present case may arise. Thus an application under section 29 is not to be refused by the Commissioners "unless it appears to them necessary ... for the protection of the revenue": see section 29(4) and (5).

I turn therefore to the second matter raised in the appeal. I can deal with this very shortly.

It was conceded by Mr. Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic,

the crucial words in the Decision were:

> "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr. Ross' report, their concern for the protection of the revenue would probably have been fortified."

I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal.

LORD JUSTICE ROCH:

I agree.

LORD JUSTICE HUTCHISON:

I also agree and have nothing to add.

ORDER: Appeal dismissed with costs.