Neutral Citation Number: [2021] EWCA Civ 1565

Case No: A3/2020/2116

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Zacaroli and Judge Swami Raghavan
[2020] UKUT 0233 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2021

Before:

LADY JUSTICE KING
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants (Cross-Respondents)**
- and -	
DHALOMAL KISHORE	**Respondent (Cross-Appellant)**

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- -

Sarabjit Singh QC and Christopher Foulkes (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants/Cross-Respondents**
Brendan McGurk (instructed by **iTax UK**) for the **Respondent/Cross-Appellant**

Hearing dates: 6 & 7 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 28 October 2021 at 10:30am

Lord Justice Newey:

1. This appeal concerns penalties to which Mr Dhalomal Kishore has been assessed by HM Revenue and Customs ("HMRC") under the Value Added Tax Act 1994 ("the VATA"). Mr Kishore has appealed the penalties, but it is HMRC's position that it is an abuse of process for him to advance in those appeals issues which arose in previous appeals relating to the deduction of input tax which were struck out. For his part, Mr Kishore contends that the penalties should be set aside at once on the basis that HMRC have breached article 6 of the European Convention on Human Rights ("the Convention") and themselves acted abusively.

Basic facts

2. In the first half of 2006, Mr Kishore, who was registered for value added tax ("VAT"), entered into transactions by which he bought goods from UK suppliers and then exported them. He claimed input tax totalling £22,392,775.10 in his VAT returns for the periods 03/06 and 06/06 in respect of his purchases, but in decision letters dated respectively 13 July 2007 and 28 March 2008 HMRC denied that Mr Kishore was entitled to deduct input tax. HMRC maintained that Mr Kishore knew or ought to have known that the transactions were connected with VAT fraud and, hence, that the principles established in the decision of the European Court of Justice in Joined Cases C-439/04 and C-440/04 *Kittel v Belgium; Belgium v Recolta Recycling SPRL* [2008] STC 1537 ("*Kittel*") applied. It was held in *Kittel* that entitlement to the right to deduct input tax can be refused where:

> "it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT".

3. Mr Kishore appealed each of HMRC's decisions, by notices of appeal dated respectively 8 August 2007 and 24 April 2008. Protracted litigation ensued in the course of which, on 16 October 2014, the First-tier Tribunal ("the FTT") gave what have been termed "*Fairford* directions" after the guidance given in *Revenue and Customs Commissioners v Fairford Group plc* [2014] UKUT 329 (TCC), [2015] STC 156. These provided that, if an appeal which HMRC were then seeking to bring on a particular evidential matter were refused or withdrawn, Mr Kishore was by no later than three months after the refusal or withdrawal:

> "to specify by way of written pleading [his] position on the following issues:
>
> a. Does the Appellant accept that the transaction chains as set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases on which the Respondents have denied input tax recovery, accurately reflect the trading history of the goods bought and sold by the Appellant? If the Appellant does not accept the accuracy of the deal sheets, which chains does it consider to be incorrect, and why?

b. Does the Appellant accept (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud? If not, what reasons does it advance for its position?

c. Does the Appellant accept in relation to the transactions alleged to be directly connected with a fraudulent VAT default, that each alleged fraudulent defaulting trader occasioned a fraudulent default of VAT? If not, what reasons does the Appellant advance for its position? Further, in relation to the witness statements served by the Respondents, and admitted by the Tribunal, for each defaulting trader what, if any, are the matters in dispute?

d. In relation to the other witness statements served by the Respondents, and admitted by the Tribunal, what, if any, are the matters of fact in dispute?"

4. In a letter dated 19 March 2015, HMRC told Hill Dickinson LLP, who were acting for Mr Kishore, that, the Upper Tribunal ("the UT") having refused HMRC permission to appeal on the evidential matter, Mr Kishore had until 17 June to provide his list of issues in accordance with the directions given in the previous October. However, on 16 June Hill Dickinson LLP informed both HMRC and the FTT that they had been unable to obtain Mr Kishore's instructions and so concluded that they were no longer instructed. On 22 June, HMRC wrote to Mr Kishore himself pointing out that he was in breach of directions made by the FTT and warning that, in the absence of a response by 1 July, they would apply for an unless order. Nothing further having been heard from Mr Kishore, on 8 July HMRC made an application for an order providing for Mr Kishore's appeals to be struck out unless he complied with the FTT's directions. On 29 July, the FTT made an order requiring Mr Kishore within 21 days to say whether he intended to pursue the appeals and to comply with the October 2014 directions, failing which the appeals were to be struck out. Mr Kishore having failed to comply with that order, on 9 September the FTT told the parties that Mr Kishore's appeals had been struck out.

5. On 24 May 2016, Mr Kishore applied for the appeals to be reinstated. Following, however, an oral hearing on 28 October, that application was refused in a decision dated 2 November. Mr Kishore sought permission to appeal that decision, but that was refused, first, by the FTT on 26 September 2017 and, subsequently, by the UT on 1 November 2017.

6. A little earlier, by decision letters dated 3 August 2017, HMRC had told Mr Kishore that they were imposing penalties totalling £2,519,186 under section 63 of the VATA for inaccuracies in his 03/06 and 06/06 VAT returns. During the relevant period, section 63 of the VATA provided so far as material as follows:

"(1) In any case where, for a prescribed accounting period—

(a) a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit, or

> (b) an assessment is made which understates a person's liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners,
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> and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent. of the VAT which would have been lost if the inaccuracy had not been discovered.
>
> (2) The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent. of the relevant amount for that period.
>
> …
>
> (10) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if—
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> (a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or
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> (b) at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the Commissioners full information with respect to the inaccuracy concerned.
>
> (11) Where, by reason of conduct falling within subsection (1) above—
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> (a) a person is convicted of an offence (whether under this Act or otherwise), or
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> (b) a person is assessed to a penalty under section 60,
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> that conduct shall not also give rise to liability to a penalty under this section."

7. On 13 September 2017, Mr Kishore appealed the penalty assessments. One of the grounds of appeal was that his 03/06 and 06/06 VAT returns "were not inaccurate, nor was the input tax claimed therein over-stated" in that, among other things, "the denial of input tax, based as it was on the Appellant's alleged knowledge or means of knowledge of the alleged fraudulent activity of others in the supply chain, has not been established by any Tribunal nor is it accepted by the Appellant in the absence of any such finding" (ground 3(e)). Another ground of appeal was put in this way:

> "Further, in the alternative, if it is the view of the Tribunal that the returns were inaccurate, the Appellant claims reasonable excuse in his defence in that:
>
> a. At all times, when he had no reason to believe HMRC were enquiring into his affairs, he furnished them with full information with respect to the alleged inaccuracy concerned, in that HMRC at all times had full access to the Appellant's books and records and those of his immediate suppliers;
>
> b. Additionally, he reasonably believed that his business systems were sufficiently robust for him to avoid dealing with any fraudulent members of the supply chain;
>
> c. His specialist advisers, engaged during the relevant VAT accounting period, had advised him that his business systems and due diligence conducted during the course of his trading, was sufficiently robust to enable him to avoid dealing directly or indirectly with any counterparty involved in fraudulent activity."

Mr Kishore maintained, too, that the penalty decisions came too late, including, as Mr Kishore's case came to be developed, because the delay breached article 6 of the Convention.

8. On 7 December 2017, HMRC filed an application to strike out Mr Kishore's grounds of appeal to a great extent. They contended, in particular, that it would be an abuse of process for Mr Kishore to be permitted to litigate the *Kittel* issues in the penalty appeals. Among other things, it was asserted that ground 3(e) "amounts to an attempt to re-litigate the *Kittel* appeal" and that, "[i]n advancing a case that he had a reasonable excuse for the misdeclarations, the Appellant is maintaining that he did not have means of knowledge of the connection with fraud".

9. The case came before the FTT (Judge Barbara Mosedale) in the summer of 2018. Amongst the matters which the FTT had to consider was HMRC's strike out application. Save that it declined to strike out a ground of appeal to the effect that the penalties were disproportionate, the FTT acceded to that application. The FTT considered that Mr Kishore did not have a reasonable prospect (a) of showing either that it would not be an abuse of process for him to be allowed to re-open issues in the *Kittel* appeals or (b) of impugning the penalty assessments on the basis that there had been a breach of article 6 of the Convention. In the course of its decision, the FTT recorded that the parties seemed agreed that the proper test to apply in relation to abuse of process was that set out by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 (see paragraph 130 of the FTT decision). It also found that Mr Kishore's "case that he was actually prejudiced by 9-10 years of delay appears to be without prospect of success" (paragraph 195 of the decision) and that there could be no prospect of success with a "case that it is a breach of the Convention for a penalty to be determined after liability for it has been established, as long as it is assessed within a reasonable time of the determination" (paragraph 201 of the decision).

10. Mr Kishore appealed, and the UT (Zacaroli J and Judge Swami Raghavan) allowed the appeal in part. It concluded in paragraph 124 of its decision that the FTT had "erred in striking out those of Mr Kishore's penalty appeal grounds which it did on the basis that there was no arguable case that Mr Kishore's Article 6 rights were breached as a result of unreasonable delay and on the basis that it was an abuse of process for Mr Kishore to advance a defence of reasonable excuse". Like the FTT, the UT approached the abuse of process issue by reference to Lord Bingham's speech in *Johnson v Gore Wood & Co* which it was "common ground mandates a broad merits-based test" (paragraph 100 of the UT decision). However, the UT considered that the FTT had adopted too narrow an approach to the evaluation exercise and failed to take into account Mr Kishore's argument that "it would not be abusive to advance arguments in the penalty appeal relevant to reasonable excuse, even though they were also relevant to the issue of knowledge in the *Kittel* appeals, in circumstances where throughout the *Kittel* appeals there had been no intimation by HMRC of an intention to make a penalty assessment" (paragraph 100 of the decision). The UT further held that the FTT had been mistaken in thinking that Mr Kishore was barred from contending in the penalty appeals that the *Kittel* appeals had been struck out as a result of lack of funds caused by HMRC's conduct (see paragraphs 100 and 107 of the decision). With regard to article 6 of the Convention, the UT explained that it would "proceed for the purposes of this appeal on the assumption that the start point for Article 6(1) delay purposes coincides with HMRC's decisions of 13 July 2007 and 28 March 2008 to refuse repayment of input tax" (paragraph 84 of the decision) and concluded in paragraph 87 of the decision:

> "we disagree with the FTT's conclusion that Mr Kishore's case that his Article 6 rights were infringed due to unreasonable delay which has prejudiced him has no prospect of success. As noted above, we are not in a position to resolve the factual questions whether there was indeed unreasonable delay and whether that prejudiced Mr Kishore. Those matters will need to proceed to trial."

11. At the heart of HMRC's appeal from the UT's decision is the proposition that the UT failed to apply the correct line of authority, and therefore to adopt the correct approach, when considering whether there was an abuse of process. HMRC maintain that the abuse of process issue should have been determined by reference to cases dealing with situations "where a party brings a second action in respect of matters which *were* raised in a first action but where that action had been struck out on procedural grounds and without any consideration of the merits" (to quote from paragraph 29 of the judgment of Morris J in *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB), [2018] 1 WLR 1734 ("*Davies*")). HMRC accept that neither the FTT nor the UT was referred to the cases in question but ask that this Court should nevertheless entertain this ground of appeal, which, they say, raises pure points of law. HMRC further contend, first, that the UT erred in failing to recognise that Mr Kishore's alleged lack of funds could not excuse his conduct in the *Kittel* appeals and, secondly, that the UT erred in finding that the absence of any notification of an intention to impose a misdeclaration penalty on Mr Kishore was relevant to the question of whether the penalty appeals were abusive.

12. For his part, Mr Kishore both took issue with HMRC's grounds of appeal and, by way of cross-appeal, argued that the UT should simply have set aside the penalty assessments. In that connection, Mr Kishore, first, invoked article 6 of the Convention and, secondly, alleged that imposition of the penalties involved abuse of process on the part of HMRC.

HMRC's appeal

The legal framework

13. There is no suggestion that the species of res judicata known as "issue estoppel" applies in the present case. Nor could there have been since the merits of the *Kittel* appeals were not the subject of a determination. Even so, it is relevant, I think, to refer to issue estoppel.

14. In ordinary civil litigation, of course, issue estoppel may serve to bar a party from re-litigating an issue which has been determined in earlier proceedings. Diplock LJ said this about issue estoppel in *Thoday v Thoday* [1964] P 181 at 198:

> "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

15. Issue estoppel has, however, been held to be of far more limited application in the context of tax assessments. In *Caffoor v Income Tax Commissioner* [1961] AC 584 ("*Caffoor*"), the Privy Council held that, in the words of the headnote, "A question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year … even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of res judicata did not apply". In *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch), [2014] STC 1761 ("*Littlewoods*") (reversed in part on other grounds: [2017] UKSC 70, [2018] AC 869), Henderson J concluded that there was "no doubt that the *Caffoor* principle remains good law in England and Wales, at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment" (paragraph 175) and that the principle also applied in the

context of VAT. Henderson J said in paragraph 190 that he could "see no good reason why the *Caffoor* principle, with suitable modifications, should not apply to it [i.e. VAT] in a similar way, at least where the dispute relates to the amount of VAT chargeable on supplies of goods or services in one or more (usually quarterly) periods, or to assessments (whether of VAT, interest, penalties or surcharges) made for particular periods, or to claims for the repayment of VAT originally paid in respect of particular periods". In *Shiner v Revenue and Customs Commissioners* [2018] EWCA Civ 31, [2018] 1 WLR 2812 ("*Shiner*"), at paragraph 23, Patten LJ was "prepared to accept (without deciding)" that Henderson J had been right that "the *Caffoor* principle remains good law in relation to annually assessed taxes such as income and capital gains tax where the basic question for determination on the tax appeal is the amount of the tax payable in that year of assessment".

16. The *Caffoor* principle was held to be in point in *King v Walden* [2001] STC 822. In *King v Walden*, the special commissioners had in 1991 upheld on appeal "out of time" assessments to income tax on the basis that the taxpayer had been guilty of wilful default or neglect. Penalty and interest determinations having then been made, the taxpayer appealed these, and it was argued on his behalf that he could re-argue both whether there had been wilful default or neglect and even, because they affected interest, the sums held due in 1991. Jacob J said in paragraph 15 that he "was at first startled by the proposition", noting:

> "It means that one could have a first finding that tax was due yet a subsequent finding that no interest or that any tax was due because the tax had not been due after all. Or, as is claimed here, a finding of wilful default or neglect justifying out-of-year assessments but then a finding of no interest on those assessments because wilful default or neglect was not re-proved. Moreover the Revenue, or indeed the taxpayer, would find itself having to prove the same thing over and over again in relation to exactly the same facts for exactly the same periods."

After reviewing the authorities, however, Jacob J accepted the contention, concluding in paragraph 27:

> "But the opinion in *Caffoor* has been taken as representing the law in many cases by now. I have enormous sympathy with the view that once a matter is decided after a full and fair fight that is that. I can see no real reason for a different rule for tax cases. But I think I must, as a judge of first instance, bow to the weight of authority which does not distinguish between settled and fought appeals."

17. In *Littlewoods*, the taxpayers were seeking to recover the compounded use value of sums of money which had been paid as VAT but which had since been refunded as overpaid. HMRC now sought to contend that VAT had in fact been due and, having regard to the *Caffoor* principle, Henderson J held that they were not prevented from doing so by issue estoppel. However, he further concluded in paragraph 252(5) that it would "be an abuse of process if HMRC were permitted to defend the present claims on the ground that the VAT was due". In that connection, Henderson J had explained

in paragraph 243 that it was common ground that the question whether HMRC should be prevented from re-litigating the underlying tax issue on the ground of abuse of process fell to be answered with primary reference to the principles stated by Lord Bingham in *Johnson v Gore Wood & Co*.

18. In *Johnson v Gore Wood & Co*, Lord Bingham (with whom Lords Goff, Cooke and Hutton agreed) said this about the "rule in *Henderson v Henderson*" at 31:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly

> applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

19. When explaining in *Littlewoods* why HMRC could not be permitted to contend that VAT had been due, Henderson J recalled in paragraph 248 that "in addition to accepting the decision in *Littlewoods (CA)* and subsequently freely entering into the 2004 and 2008 s 85 Agreements, after first putting the Littlewoods group to the time, trouble, expense and anxiety of protracted litigation on the underlying liability issues, the Revenue then expressly conceded in the First Trial before Vos J that all of the VAT upon which interest is now claimed by all of the active claimants had been overpaid". Henderson J continued:

> "Furthermore, this concession underlay, and was repeated in, the order for reference to the ECJ made by Vos J on 4 November 2010, as well as the United Kingdom's written observations submitted to the court on 6 April 2011."

20. As Morris J pointed out in *Davies* at 29, a distinct line of authority has addressed situations "where a party brings a second action in respect of matters which *were* raised in a first action but where that action had been struck out on procedural grounds and without any consideration of the merits". The earliest such case to which we were taken was *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 ("*Arbuthnot*"). There, Lord Woolf MR, giving the judgment of the Court of Appeal, said at 1436-1437 that "the change of culture which is already taking place will enable the courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process", that "wholesale failure, as such, to comply with the rules justifies an action being struck out, so long as it is just to do so", and that "[t]he question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action". Lord Woolf MR went on:

> "In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed."

21. *Arbuthnot* was one of the cases on which Chadwick LJ, with whom Rattee J agreed, relied in *Securum Finance Ltd v Ashton* [2001] Ch 291 ("*Securum*"). Chadwick LJ observed at paragraph 15 that "[w]hether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out (whether on grounds of delay or on other grounds) … is a different question from the question whether a party should be allowed to raise, in subsequent proceedings, issues which have already been determined or 'laid to rest' (whether by adjudication, or by concession, or as the result of a decision to withdraw) in earlier proceedings". With regard to the former question, Chadwick LJ said this in paragraph 34:

> "For my part, I think that the time has come for this court to hold that the 'change of culture' which has taken place in the last three years—and, in particular, the advent of the Civil Procedure Rules—has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have 'a second bite at the cherry' outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the *Arbuthnot Latham* case [1998] 1 WLR 1426, 1436-1437 …."

22. *Arbuthnot* and *Securum* were both cited in *C (A Child) v CPS Fuels Ltd* [2002] CP Rep 6 ("*C (A Child)*"), where the Court of Appeal upheld an order striking out a second claim. In his judgment, Judge LJ said:

> "47. The judge directed himself by asking two questions: (a) 'Is it an abuse of process for the claimant to seek to litigate in the present action the same issues which were raised, but not adjudicated upon, in the first action which was struck out?' (b) 'If the answer to (a) is 'yes', should I, in the exercise of my discretion, nevertheless allow the action to proceed?' Having answered the first of those two questions 'yes', he approached the exercise of his discretion in this way:
>
> > 'In order to exercise my discretion so as not to strike out the present action, some special reason needs to be identified which, having regard to the overriding objective, would mean that it was just to allow the present action to proceed.'
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> 48. The learned judge was entitled to adopt the approach that he did ….
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> 49. I should say a word or two about his reference to 'some special reason'. The use of these words is an attractive form of forensic shorthand which encapsulates the broad approach to the decision-making process to be adopted when an action has failed as a result of an abuse of process and the court is considering whether a second action relating to the same issues should be allowed to continue. The words come from authority binding on this court: *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426; but they are not words which derive from the statute, nor from the Civil Procedure Rules, and they should not be treated as if they had. Nor should they be employed as some form of ritual incantation. If the judge in this case had chosen to express the same principle by

> saying 'very good reason', or 'powerful' or 'sufficient reason', he would not, in my judgment, have misdirected himself."

23. *Arbuthnot* and *Securum* were distinguished in *Aktas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894, which, as Rix LJ explained in paragraph 1, raised "the issue whether a claim whose claim form has been issued towards the very end of a limitation period and has then been struck out owing to a failure to serve it in time … can be resurrected in a second action which invokes the discretionary provisions of section 33 of the Limitation Act 1980 relating to claims for personal injury". Answering the question in the affirmative, Rix LJ, with whom Longmore and Aikens LJJ agreed, said in paragraph 90:

> "A mere negligent failure to serve a claim form in time for the purposes of CPR rr 7.5/7.6 is not an abuse of process. It has never been held to be in any of the many cases cited to this court, nor in my judgment should it be described as such, nor as being tantamount to such. I say a 'mere' negligent failure to serve in time in order to distinguish the typical case of such failure to be found in these appeals and many other cases in the reports from any more serious disregard of the rules; but not in order to be in any way dismissive of the proper strictness with which a failure to serve in time, without good reason for doing so, is and has been rigorously dealt with by the courts, whether under the CPR or under the previous regime of the RSC. However, all the cases make clear that for a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules."

Rix LJ added in paragraph 92 that "there is nothing in the CPR themselves to indicate that a mere failure to serve in time is to be regarded as an abuse requiring or deserving anything further than the failure of the claim form itself - with the vital consequence in the absence of section 33 of losing a claim which has become time-barred".

24. In *Davies*, at paragraph 52, Morris J took cases such as *Arbuthnot*, *Securum* and *C (A Child)* as authority for the following:

> "(1) Where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason: the *Securum* case, para 34, citing the *Arbuthnot Latham* case, and *Aktas v Adepta* [2011] QB 894, paras 48 and 52.
>
> (2) In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: *Aktas v Adepta*, paras 72 and 90.

> (3) Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been 'inexcusable': *C (A Child)*, paras 24–25 and [*Cranway Ltd v Playtech Ltd*] [2008] EWHC 550 (Pat) at [20]."

Morris J concluded in paragraph 55:

> "(1) Where a first action has been struck out for procedural failure, the court should apply the *Securum/C (A Child)* approach I set out in para 52 above. Even if [*Aldi Stores Limited v WSP Group plc* [2007] EWCA Civ 1260] and [*Stuart v Goldberg Linde* [2008] EWCA Civ 2] state general principles which are now applicable to all categories of abuse of process, I am not satisfied that there is any case authority which has specifically disapproved of the detailed analysis in the *Securum* case, *C (A Child)* and *Aktas v Adepta* of cases of procedural failure. Indeed the *Securum* case and *C (A Child)* were not considered in either *Johnson v Gore Wood & Co* or the *Aldi* case. In *Aktas v Adepta*, Rix LJ did not indicate disapproval of the *Securum* case.
>
> (2) However given the introduction, since those cases, of amendments to CPR r 1.1 and given developments in [*Mitchell v News Group Newspapers Ltd*] [2014] 1 WLR 795 and [*Denton v TH White Ltd*] [2014] 1 WLR 3926, the 'special reason' exception identified in the *Securum* case and *C (A Child)* falls to be more narrowly circumscribed. Where the conduct of the first action has been found to have been an abuse of process or otherwise inexcusable, then the second action will be struck out as an abuse of process, save in 'very unusual circumstances'. (Other terminology might equally be used to indicate this strict approach.) In addition, in a case where the first action was not itself an abuse of process, whether the conduct in that action was 'inexcusable' might fall to be assessed more rigorously and in the defendant's favour. However, even post-Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice: see *Aktas v Adepta*, para 92.
>
> (3) A single failure to comply with an unless order is not, of itself, sufficient to conclude that the second action is an abuse of process."

25. In *Davies*, a defendant had applied to have a claim struck out as an abuse of process on the basis that the claimant had previously brought a claim against it alleging the

same breach of contract which had been struck out. On the facts, Morris J decided that the claimant's conduct in the first claim had been neither an abuse of process nor inexcusable and, hence, that the second claim should not be struck out as an abuse of process.

26. For completeness, I should also mention the position where a claimant who has discontinued a civil claim wishes to bring another one. If the new claim is to be against the same defendant and arises out of facts which are the same or substantially the same as those relating to the discontinued claim, the claimant will need the permission of the Court to make the second claim if the defendant had filed a defence by the time the original claim was discontinued: see CPR 38.7. In that connection, Briggs LJ spoke in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609, [2015] CP Rep 14 at paragraph 61 of "the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon". Differing views have been expressed at first instance as to whether the rule in *Henderson v Henderson* can also have a role in such a situation: compare *Ward v Hutt* [2018] EWHC 77 (Ch), [2018] 1 WLR 1789 (Judge Paul Matthews), at paragraphs 51-53, and *King v Kings Solutions Group Ltd* [2020] EWHC 2861 (Ch) (Tom Leech QC), at paragraphs 108-113.

27. For present purposes, I derive the following from the authorities:

i) Where a civil claim has been the subject of an adjudication, issue estoppel will generally bar a party from re-opening in a second claim an issue determined against him in the first one if the issue was essential to that decision;

ii) Where a civil claim has been struck out as an abuse of process on account of intentional and contumelious conduct, want of prosecution or wholesale disregard of rules of Court or, perhaps, struck out by reason of other "inexcusable" procedural failure on the part of the claimant, a second claim covering the same subject matter will be struck out unless there is special reason not to do so;

iii) Where a civil claim has been discontinued, the claimant will need to obtain the Court's permission to bring a second one arising out of facts which are at least substantially the same if the defendant had filed a defence in the first claim;

iv) Where a point was not raised in a set of proceedings but could have been, it may be an abuse of process for the party to raise it in later proceedings. When deciding whether that is the case, the Court takes a "broad, merits-based" approach in accordance with *Johnson v Gore Wood & Co*;

v) While the point was left open in *Shiner*, the weight of authority suggests that issue estoppel has, at most, a much smaller part to play in the context of tax appeals. However, it may be abusive for a party to contest a point which has been decided against him in such an appeal in later proceedings and, in that context, the Court will again make a "broad, merits-based" evaluation.

The present case

28. As I have indicated, it is HMRC's case that the UT (blamelessly) applied the wrong test. The UT approached the case on the basis that the "broad, merits-based" approach espoused in *Johnson v Gore Wood & Co* was applicable when, having regard to the striking out of the *Kittel* appeals, the stricter line of authority stemming from *Arbuthnot* was in point and so Mr Kishore should be allowed to re-litigate issues raised in the *Kittel* appeals only if there were special reason to do so, which there was not. Mr Sarabjit Singh QC, who appeared for HMRC with Mr Christopher Foulkes, submitted that the sterner test adopted in *Arbuthnot*-type cases was the relevant one because there had been intentional and contumelious conduct, wholesale disregard of the rules or otherwise inexcusable conduct by Mr Kishore in the *Kittel* appeals. Mr Singh accepted that there would have been no requirement to identify a "special reason" for allowing Mr Kishore to dispute points at issue in the *Kittel* appeals had he simply withdrawn those appeals. Mr Singh argued, however, that the flouting of Tribunal requirements seen in the *Kittel* appeals makes the tougher test appropriate.

29. In my view, however, the UT was correct to proceed on the basis that *Johnson v Gore Wood & Co* principles applied. As I see it, the question whether Mr Kishore should be permitted to contest in the penalty appeals issues which arose in the *Kittel* appeals (notably, whether he should have known that he was participating in transactions connected with the fraudulent evasion of VAT) is to be determined on the basis of the "broad, merits-based judgment" of which Lord Bingham spoke, not the *Arbuthnot* line of authority.

30. As was pointed out by Mr Brendan McGurk, who appeared for Mr Kishore, the focus of the *Arbuthnot*-type authorities has been on whether a claimant can bring a second civil claim. In the present case, Mr Kishore has of course been the appellant in the penalty appeals as he was in the *Kittel* appeals, but in substance he is defending himself, challenging penalties which HMRC have sought to impose on him. We were not referred to any case in which it has been held that, absent a special reason, it is an abuse of process for a defendant to a civil claim to raise by way of defence a point that he ran in previous proceedings in which his claim or defence (as the case may be) was struck out on account of procedural failings. Even assuming that to be the law, however, the stricter *Arbuthnot*-type approach must, as it seems to me, be of no more than limited significance in the context of appeals against tax penalties. I can see that it might be in point if, say, a person brought a second appeal against a penalty, a previous appeal against the same penalty having been struck out. In contrast, I do not consider that an *Arbuthnot* test should be applied in a case such as the present one. Had the *Kittel* appeals reached a final hearing and the FTT decided against Mr Kishore on, say, means of knowledge, it appears that there would have been no issue estoppel and so he would not automatically have been debarred from denying means of knowledge in the penalty appeals: whether he should be allowed to do so would, rather, have fallen to be decided on *Johnson v Gore Wood & Co* principles. It would strike me as odd if *Johnson v Gore Wood & Co*'s "broad, merits-based" approach applied in circumstances where a Tribunal had already decided a point but a stricter approach were taken when the previous proceedings had never been the subject of a decision but had instead been struck out. It is also, I think, important that the penalty appeals concern punitive measures. That, to my mind, militates in favour of a "broad, merits-based" approach rather than an *Arbuthnot* test.

31. In any event, it has not been demonstrated that Mr Kishore was guilty of intentional and contumelious conduct, wholesale disregard of the rules or otherwise inexcusable conduct in the *Kittel* appeals. Mr Kishore failed to comply with the FTT's October 2014 directions and, subsequently, the unless order made on 29 July 2015 in respect of that. I do not think those defaults can be said to represent "wholesale disregard of the rules", nor that Mr Kishore's unsuccessful attempts to have his appeal reinstated help Mr Singh. Nor again is it evident from the available materials that Mr Kishore was guilty of "intentional and contumelious" or otherwise "inexcusable" conduct. He maintains that he ran out of money and we are in no position to gainsay that explanation. Mr Singh submitted that deciding whether Mr Kishore acted inexcusably involved an evaluative judgment rather than a finding of fact, but the distinction does not matter. However the exercise is characterised, we cannot undertake it.

32. It follows that I do not accept HMRC's principal ground of appeal. There remain to be considered HMRC's contentions that the UT erred in failing to recognise that Mr Kishore's alleged lack of funds could not excuse his conduct in the *Kittel* appeals and in finding that the absence of any notification of an intention to impose a misdeclaration penalty was relevant to whether the penalty appeals were abusive.

33. With regard to the first of these points, Mr Singh did not dispute that a litigant's lack of funds could potentially be relevant to a *Johnson v Gore Wood & Co* assessment. In fact, Lord Bingham said in terms in *Johnson v Gore Wood & Co* that he "would not regard [lack of funds] as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim", and in the present case Mr Kishore says that he ran out of money at least in part because of the way HMRC had conducted the *Kittel* appeals and their refusal to pay a repayment supplement which they eventually conceded was due to him in relation to the 12/05 period. Mr Singh's argument was essentially to the effect that lack of funds would be irrelevant to the application of an *Arbuthnot*-type test, but, as I have said, I do not consider such a test appropriate. In short, this ground of appeal is parasitic on the ground of appeal which I have already rejected and fails with it.

34. The position is similar with HMRC's final ground of appeal, that the UT erred in considering that the absence of any notification of an intention to impose a misdeclaration penalty was relevant to whether the penalty appeals were abusive. Once again, Mr Singh accepted that the absence of notification could potentially be of relevance to a *Johnson v Gore Wood & Co* assessment such as is, in my view, apposite. He was right to do so. In *Johnson v Gore Wood & Co*, Lord Bingham explained that the "broad, merits-based judgment" should take account of "all the facts of the case". In the circumstances, this ground of appeal must also fail.

35. In short, I would permit HMRC to advance all their grounds of appeal, but dismiss the appeal.

The cross-appeal

Article 6

36. Article 6 of the Convention provides so far as relevant as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ….
>
> …
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> …."

37. Mr Kishore's case is that HMRC breached both article 6(1) and article 6(3)(a). He contends, first, that the question whether he is liable for penalties has not been determined within a reasonable time. Secondly, it is his contention that article 6(3)(a) required HMRC to raise penalty assessments as soon as there was a basis for doing so and that that point must have been reached by the time HMRC rejected Mr Kishore's input tax claims.

38. Mr McGurk stressed that, as is common ground, the imposition of a tax penalty is regarded as a criminal matter for the purposes of the Convention. He also took us to passages in HMRC's "Compliance Manual", which, while addressed to their officers, is made public and stated to be intended to help "external customers" as well as HMRC officers to "understand and apply the penalties and compliance powers introduced by FA 2007 to FA 2013". At a number of points, the Manual speaks of the need to give a person early notification of the possibility of a penalty being imposed. For example, CH300400 states:

> "In order to protect the person's rights under Article 6 of the ECHR you must tell them that they may be liable to a penalty as soon as you find something wrong that could result in a penalty and before you discuss the behaviour. This will be when you have an evidence-based reason to believe that a penalty may be due, see CH300700. At this point you must make the person aware of their rights under Article 6, see CH300100 and CH300500."

Mr McGurk acknowledged that the Manual did not exist in 2007 or 2008 and that it is expressed to apply to the imposition of penalties under the Finance Act 2007 and Finance Act 2013 rather than the VATA, but he submitted that it reflected pre-existing duties.

39. As regards article 6(1), Mr McGurk argued that Mr Kishore should be taken to have been "charged" by the time HMRC denied his entitlement to deduct input tax in 2007 and 2008, yet the penalty assessments were not raised until 2017 and the appeals relating to them remain to be determined even now. Mr McGurk submitted that, in the circumstances, the right to have a hearing within a reasonable time which article 6(1)

confers has clearly been violated, that a fair hearing is no longer possible and that it would anyway be unfair on Mr Kishore to proceed to a trial.

40. Mr McGurk cited in support of his submissions the decision of Jacob J in *King v Walden* and subsequent proceedings before the European Court of Human Rights in *King v United Kingdom*. There, Mr King had been warned of the possibility of a criminal prosecution or a penalty determination by a "Hansard" letter in late 1987, but penalties were not in fact imposed until 1994 and appeals against them were not concluded until 2000. Jacob J accepted that the start date when considering whether article 6(1) had been breached was that of the "Hansard" letter, explaining in paragraph 90:

> "Look at the substance. The Revenue knew what their case for a penalty determination was by the time they wrote the Hansard warning letter. Indeed the fact that they have contended that the 1991 decision was conclusive of liability to penalties shows that the penalty hearing could have taken place at the same time. The period from then on was avoidable."

Jacob J nevertheless decided, "marginally", that there had not been too much delay (see paragraphs 91-96).

41. The European Court of Human Rights likewise considered that the period to be considered for article 6(1) purposes ran from late 1987. It said this on the subject in *King v United Kingdom (No 2)* [2004] STC 911 at 921-922:

> "The court recalls that the parties dispute the moment from which the applicant should be regarded as subject to a criminal charge. The government considered that time runs from 17 October 1994 when the applicant was served with notification of the penalties to be imposed, the applicant that it runs from the moment it was clear that penalties were envisaged, either a meeting on 21 November 1986 with the Inland Revenue or 27 November 1987, when the Revenue read out to him the 'Hansard warning' (inter alia, putting him on notice of the possibility of prosecution).
>
> The court observes that the High Court took the latter date as the appropriate moment at which the applicant became subject to a criminal charge. In *Janosevic*, the time ran from the issuing of the audit report containing a supplementary tax assessment, which included tax surcharges; in the *Västberga Taxi* case, from the date the applicants were informed by the tax authority of its intention to impose additional taxes and tax surcharges on them. In *Georgiou (t/a Marios Chippery) v United Kingdom* [2001] STC 80, (2000) 3 ITLR 145, however, concerning non-payment of VAT, the date taken was not that of the assessments of unpaid VAT but the subsequent issue of the formal summons informing the applicants of imposition of a penalty for dishonest evasion.

> According to the court's case law, criminal proceedings are said to commence with 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test of whether 'the situation of the [suspect] has been substantially affected' (*Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, para 73). In a case such as the present, where an applicant's financial affairs are under investigation by the Revenue in order to assess whether or not any tax is owed, it must always be considered a possibility that, in the event of any dishonesty or neglect being disclosed, measures may be taken by way of imposing criminal penalties. While it does indeed appear from the minutes of the meeting of 21 November 1986 that the settlement that the Inland Revenue wished to reach already included an element representing penalties for late returns, this was in the context of attempting to reach an agreed solution with the applicant, which did not in fact occur. The court is not persuaded that asking the applicant to agree to pay unpaid taxes with a surcharge element included, even with the possible threat of penalty or prosecution procedures in the background, is sufficient to be considered as substantially affecting his position. It would rather take the view that the issuing of the Hansard warning, which the government admit is only generally done in serious fraud cases, was a clear and unequivocal indication to the applicant that he was suspected of criminal misconduct. Even though he was not in fact formally charged with specific tax offences as such but subject to a penalty procedure, the applicant may claim to have been put on formal notice that he was at risk of serious consequences. It also appears that the domestic courts have held that the provisions of the Police and Criminal Evidence Act 1984 should apply to Hansard interviews, in particular that a caution should have [been] given as to all persons suspected of having committed a criminal offence (*R v Gill* [2003] EWCA 2256, [2003] STC 1229, [2003] 4 All ER 681). It is irrelevant that the Revenue's main motivation, according to the government, was in fact to induce the applicant to stop prevaricating and produce a statement of assets."

42. Unlike Jacob J, the European Court of Human Rights held article 6(1) to have been violated. It stated in *King v United Kingdom (No 3)* [2005] STC 438, at paragraph 42, that "Notwithstanding … what the domestic courts found was deliberate time-wasting by the applicant, the court cannot but conclude that the authorities themselves contributed, without reasonable justification to the length of the proceedings, which on any analysis took an excessive length of time". The Court declined, however, to award Mr King any damages.

43. We were also referred to the decision of the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, in which Lord Bingham said in paragraph 24:

> " If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. "

Pending proceedings do not therefore automatically fall to be dismissed where breach of article 6(1) is established. It is also necessary to consider whether there can no longer be a fair hearing and whether it would otherwise be unfair to proceed to trial.

44. In the present case, as I have indicated, the UT was willing to assume that time ran for article 6(1) purposes from 2007-2008 and, differing from the FTT, thought it impossible to say that Mr Kishore had no prospect of success with his article 6(1) case. It observed that it was "not in a position to resolve the factual questions whether there was indeed unreasonable delay and whether that prejudiced Mr Kishore".

45. Mr McGurk now argues that Mr Kishore's article 6(1) case does not merely have a prospect of success but can be seen even at this stage to be well-founded. It follows, he maintains, that the penalty assessments should simply be set aside.

46. I disagree. In the first place, there is, in my view, real scope for argument as to when time started to run for article 6(1) purposes. It is open to debate whether the letters denying Mr Kishore's entitlement to deduct input tax which were sent in 2007 and 2008 represented "official notification given to the individual by the competent authority of an allegation that he has committed a criminal offence" such that Mr Kishore's situation was "substantially affected". *King v Walden* is of little, if any, assistance to Mr Kishore in this context since in this case, unlike *King v Walden*, there was no "Hansard" warning.

47. Secondly, it seems to me, as it also seemed to the UT, that there are issues as to the reasons for the delay and its consequences which cannot be decided now but must go to trial. The UT recorded in paragraph 72 of its decision that it was "common ground that we are not in a position to determine whether, in the context of the *Kittel* appeals, there was unreasonable delay". More than that, the matters on which Mr Kishore relies to show that a fair trial is no longer possible raise factual issues on which we cannot reach conclusions. Take, for example, the assertions that Mr Kishore has become estranged from his brother and nephew, who are "key witnesses"; that other witnesses have retired, moved to other sectors or died; and that Mr Kishore cannot hope to earn enough to pay the alleged liability. Not having seen evidence about any of these claims, we are in no position to assess the potential importance of evidence

from Mr Kishore's brother and nephew or any other witnesses, to form a view on how far any loss of witnesses is attributable to delay or to understand Mr Kishore's financial position.

48. Turning to article 6(3)(a), this is, on its face, concerned with what should happen when a person is *in fact* charged. I understood Mr McGurk to contend that article 6(3)(a) also regulates when a person *should* be charged, but we were not referred to any decision of either the European Court of Human Rights or a domestic Court where article 6(3)(a) has been so construed. Such an interpretation could, moreover, have far-reaching and surprising implications. Were Mr McGurk's submissions correct, it would presumably be open to someone charged with a criminal offence to challenge the charge on the basis that the police were in a position to charge him earlier than they did. Further, while it may make very good sense for HMRC to tell their officers to warn of the possibility of a penalty when there is "an evidence-based reason to believe that a penalty may be due", the Compliance Manual represents no more than instructions to staff and has no legal force.

Abuse of process

49. Mr McGurk submitted that the imposition of penalties on Mr Kishore amounted to an abuse of process by HMRC. He argued that the penalties depended on the same facts as the refusal of Mr Kishore's input tax claims and that HMRC ought to have raised the penalty assessments at the same time as they denied the right to deduct input tax. Invoking the rule in *Henderson v Henderson*, Mr McGurk maintained that HMRC should have sought to impose the penalties earlier if they wished to impose them at all.

50. I have not been persuaded. *Johnson v Gore Wood & Co* confirms that the "bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". In the present case, however, Mr Kishore is complaining of HMRC's failure to do something other than make a claim or advance a defence in proceedings, viz. issue penalty assessments. Any proceedings were always going to be initiated by Mr Kishore; HMRC could never have invoked the penalties by way of defence to the *Kittel* appeals; and the penalties could not have been put in issue before the FTT, whether in conjunction with the *Kittel* appeals or otherwise, until after they had been raised. In any event, it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive", as Lord Bingham explained in *Johnson v Gore Wood & Co*. For a party to be held to be acting abusively, it must be the case that he should have raised a claim or defence in previous proceedings, not just that he could have done so. In this context, paragraph 91 of the UT's decision is in point. The UT there said this:

> "s77 [of the VATA] clearly permits HMRC a two-year period after the conclusion of the underlying tax appeal within which to issue a penalty assessment. The section is unambiguous and there is no basis for reading it down in reliance on Article 6. We consider, in agreement with HMRC, that there is in any event a sound basis for this extended limitation period, given

> that HMRC has a choice of penalties (a s63 VATA misdeclaration penalty or a s60 dishonest evasion penalty) depending on the degree of culpability of the taxpayer. At least in some cases (the present case being one) that degree of culpability is not established until after the underlying tax appeal has been concluded. Mr McGurk's contention that s60 (dishonest evasion) cannot have been in issue in this case because the penalty notices specifically disavowed dishonesty is beside the point, because this says nothing about whether a dishonest penalty might have been a possibility prior to the conclusion of the *Kittel* appeals. We note that HMRC's decisions dated 13 July 2007 and 28 March 2008 contended in the alternative that Mr Kishore knew or that he ought to have known of the fraudulent nature of the fraudulent scheme to defraud the revenue. At that stage, therefore, both options in terms of penalty remained open."

51. I agree with these comments and, in all the circumstances, do not consider that the rule in *Henderson v Henderson* assists Mr Kishore. For completeness, I should record that section 77(2) of the VATA provides that a penalty assessment "may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined".

Other matters

52. Mr McGurk also put forward arguments to the effect that it was an abuse of process for HMRC to invoke the *Arbuthnot* line of authority and that a ruling that Mr Kishore could not raise in the penalty appeals points that were at issue in the *Kittel* appeals would breach article 6 of the Convention. If, however, the other members of the Court agree that HMRC's appeal should be dismissed, we do not need to address these further contentions.

Conclusion

53. I would dismiss both the appeal and the cross-appeal.

Lord Justice Nugee:

54. I agree.

Lady Justice King:

55. I also agree.