TC03117

Appeal number: TC/2011/00492

VAT – zero rating of leaflets – Group 3 Sch 8 VATA - appeal against assessment- s83(1)(p)- whether tribunal has jurisdiction to consider fairness of decision to assess* Technip *considered.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOLLINGER PRINT LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
DAVID E WILLIAMS CTA (Fellow)

Sitting in public in Norwich on 22 November 2013

Mr Mark Hollinger, director of the Appellant, for the Appellant.

Miss H Jones for the Respondents

DECISION

1. There are two broad issues in this appeal. The first is whether five different items printed by the Appellant were "books, booklets, brochures pamphlets or leaflets" within Group 3 Schedule 8 VATA 1994. The second is whether the assessments made by HMRC on the Appellant for the periods 03/07 to 06/09 should be set aside or varied because, or to the extent that, they were improperly made by HMRC.

The background facts.

2. The Appellant is a family company with an annual turnover of some £500,000. It is now run by Mr Mark Hollinger ("Mr Hollinger").

3. The Appellant runs a printing business. Most of its customers are other businesses. HMRC accept that most of these businesses were fully taxable and could recover any input VAT which formed part of the Appellant's charges to them.

4. The Appellant printed a broad range of materials ranging from menus to booklets. Some of these were plainly outside the zero rating of Group 3, others were plainly zero rated. But there were some whose proper classification for VAT purposes was not immediately obvious to all concerned.

5. 2008 was a bad year for the Appellant. Not only did Mr Hollinger's father die, but the company's largest customer (Zenith) became insolvent and failed to pay a debt of some £68,000 (representing 3 months' sales to it), and the recession hit the company reducing its turnover by over a quarter.

6. HMRC conducted PAYE and VAT inspections in September and November 2008 respectively. The PAYE inspection gave rise to no problems, but on the VAT side HMRC were concerned about the VAT classification the Appellant had applied to a number of its supplies: they thought that some of them should have been standard rated while the Appellant had treated them as zero rated.

7. HMRC's officer, Mr Donnelly, conducted a sample test of the six months to 30 September 2008. He identified about 100 items which he thought should have been standard rated and which had been treated as zero rated by the Appellant. The additional output VAT payable attributable to these supplies over the period of the assessments would have been some £24,000 on the basis of this initial exercise.

8. They were then discussions and more detailed examination of some of the items. Mr Donnelly took advice from his policy colleagues. The list was revised and HMRC's claim for extra VAT reduced. Mr Donnelly calculated a percentage which was the fraction the extra VAT on his basis represented of the declared output VAT. He refined the percentage to allow for the bad debt of Zenith and for a change in the nature of the supplies which the company had been making to Zenith compared with its successor.

9. On the basis of that percentage Mr Donnelly raised VAT assessments under section 73(1) VATA 1994 for the VAT periods 03/07 to 06/09, having been told by Mr Hollinger that the company's business was fairly regular and that the six months' of the sample were a fairly representative period.

10. The majority of the items on Mr Donnelly's revised list were agreed to be subject to VAT by the Appellant or agreed by HMRC to be zero rated. But there remained five which were not agreed. Those five were the subject of the first issue in the appeal before us.

The 5 items.

11. Group 3 Schedule 8 VATA refers to:

> "1. Books, booklets, brochures, pamphlets and leaflets.
>
> 2. Newspapers, journals and periodicals.
>
> 3. Children's picture books and painting books.
>
> 4. Music (printed, and duplicated or manuscript).
>
> 5. Maps, charts and topographical plans.
>
> 6. Covers, cases and other articles supplied with items on 1 to 5 and not separately accounted for.
>
> Notes [not relevant in this case]."

12. None of the five items in dispute were said to be books or booklets. None of the items in dispute could in our view be called brochures or pamphlets. Neither did Mr Hollinger contend that they were.

13. We were referred to no binding authority on the meaning of "brochures" "pamphlets" or "leaflets" in Group 3, but in *Customs and Excise Commissioners v Colour Offset Ltd* [1995] STC 85, the meaning of "books or booklets" was considered by May J. Having referred to Lord Reid's speech in *Cuzens v Brutus* (to the effect that the meaning of an ordinary English word was not a question of law if it was not used in an unusual sense so that in relation to such a word the only question of law for the High Court was whether the tribunal's decision was one no tribunal acquainted with ordinary use of language could reasonably have reached), he went on to say that the ordinary meaning of "book" was limited to objects having the minimum characteristics of a book meant to be read or looked at.

14. In *Oldham's Leisure Group Ltd v C & E Commissioners* [1992] FTC 332, McCulloch J dealing again with the meaning of "book" said that his judicial instinct was to follow Lord Reid.

15. It seems to us that these cases require us to apply the ordinary English meaning of "brochure, pamphlet or leaflet" in assessing the VAT nature of the five disputed items.

16. Miss Jones referred us to a couple of tribunal decisions in which the meaning of "leaflet" in Group 3 had been considered. In *Multiform Printing Limited* VATD 13931 the tribunal reviewed some earlier decisions. It quoted the opinion of the tribunal in *Marylebone Cricket Club v Customs and Excise* LON 81/88 that the nature of a leaflet was a flimsy bit of paper containing propaganda, advertisement or similar information in writing which is distributed gratuitously for a nominal consideration to members of the public interested in reading it; and that of the tribunal in *Panini Publishing Ltd v Customs and Excise LON88/166Y)* which asked what an ordinary member of the public would pick out as "leaflets" from a shelf containing a mixture of published items, and considered that items which were too stiff or were laminated, or lacking in informative wording would not be selected as leaflets. The tribunal in *Multiform* commented that the emphasis on flimsiness which had arisen after the *MCC* case was unhelpful: the density of the paper used could only be a pointer.

17. In *GNP Booth Limited* VATD 17555 the tribunal considered that the purpose of an item, that is to say whether it was intended to convey information and to be widely distributed, and whether it had an ephemeral nature, were criteria relevant to whether a publication was a leaflet.

18. In the light of these cases it seems to us that the qualities which need to be possessed by publication in order for it to be a “leaflet" are these, and we have approached the disputed items in this case with these qualities in mind:

> (1) it is a single sheet, (or perhaps very few attached or folded sheets) of printed material containing words, with or without illustrations, which are designed to be read by the publisher’s intended readership;
>
> (2) its main purpose must be to impart information, advertising or propaganda to its readers;
>
> (3) it is likely to be ephemeral – so as normally to have a limited useful life:
>
> (4) but even if an item fulfilled the criteria above, it might fail to be a leaflet for the purposes of the zero-rating rules if it was so large that in reality it was best described as a poster and not as a leaflet, or so small that it was more likely to be described, not as a leaflet, but as a visiting or business card (which was the case with some of the items in *GNP Booth),* or made of stiff or laminated material (as in the *MCC* case) so that it was likely to have a more than limited life..

<u>Item 1.</u>

19. This was an A5 piece of paper printed on one side with a photograph of a conductor in a hall overprinted: "Calling Talented Young Musicians". It invited them to play under the baton of a great conductor at a workshop and in a performance. On the reverse were the times and dates of the rehearsals, the cost of participation, another picture and an application box.

20. This in our view was a leaflet. It was a single sheet of printed material designed to be read by the public and to impart information to them. It was not too stiff, too big

or too small. The application box on the back did not deprive it of having the principal purpose of advertising the opportunity described in it. It was not an application form with a picture, but an advert with details of how to apply.

Item 2 Chenery.

21. This was a small card about 2" x 3.5". It was printed on both sides with details of a ticket agency and coach travel firm. It was laminated and designed to be retained for later reference. It had a website address and telephone number but no personal contact details.

22. This was a single sheet of paper designed to be read by and to impart information to the public. But in our view it was too small to be a leaflet. In fact we believe that the ordinary person would describe it as a business card, and not as a leaflet.

Item 3 Orbit East Folder.

23. This was an A3 card folded and with a pocket on the inside clearly intended to retain documents. The front, back and the pocket were printed with the details of Orbit: its logo, slogan, contact details and pictures indicating what it did.

24. Mr Hollinger told us that it was supplied as a single item without inserts and that the Appellant had not supplied other materials to this customer.

25. Whilst this was a printed item containing words designed to be read by a section of the public it was not in our view a leaflet. It was so large, of such a design (particularly the pocket) and made of such durable material that the average person would conclude that its main purpose was to hold papers, while also giving some basic information about the customer on the outside.

26. Nor was it within Item 6 of Group 3 as it was not supplied with any other items within 1 to 5.

Item 4 St Edmunds Society.

27. This was an A3 sheet cut and folded to make a folder including a pocket. Once folded it had printing on the front and back which described St Edmunds Society and its work; on the front of the pocket were contact details.

28. This in our view was not a leaflet. Whilst it was a little smaller and less stiff than the Orbit folder, it was still too large and too stiff and its main purpose was clearly to hold papers rather than to advertise.

29. Mr Hollinger told us that whilst the supply of these folders had been invoiced separately, the Appellant also supplied the customer with printing for a 12 to 16 page stapled annual review and for newsletters. The Appellant did not insert them into folders, but it was likely that the Society had used the folders to contain and distribute those publications.

30. Two questions therefore arose. The first was whether the supply of the folder and of any other material was a single supply within the *Card Protection Plan* doctrine even if not invoiced as a single supply; and the second was whether note 6 of Group 3 applied to it.

31. If the provision of two things is made in such a way that they are economically indissociable, the supply is treated as a single supply for VAT purposes and classified according to its entirety. One example of two things being economically dissociable is where one is, for the typical customer, a better way of enjoying the other.

32. We were unable to conclude that the folders had been provided with other printed material in such a way as would make it possible to say that they were economically indissociable from it. Although the folders might have been ordered and used to contain or distribute an annual review or an annual newsletter, the review or the newsletter could have been ordered, read, used and distributed without the folder, and the folder ordered or used to contain other material. There was insufficient evidence on which we could conclude that the folder was economically part of a package with another supply.

33. In relation to Note 6 Miss Jones says that it does not apply because even if the folder was used to cover or contain other items supplied by the Appellant which fell within items 1 to 5 - such as the annual review these items had been separately invoiced and therefore were "separately accounted for" within Item 6.

34. It seems to us that “not separately accounted for" may have a slightly different meaning from "not separately invoiced", so that, for example, items agreed to be supplied together under a single contract paid for as one might properly be described as not separately accounted for whether or not invoiced as one. However, Mr Hollinger was unable to say that the supply of the folders had been linked in any way to the supply of other publications save that some annual reports were supplied at pretty much the same time as the folders. We did not find this enough to conclude that these folders had not been separately accounted for.

Item 5 Hellesdon Dental

35. This was a folder on A3 card which, when folded, had printing on all four sides. The inside had a picture and no words, and the outside had the logo, contact details and some details of services supplied by the dental centre. This in our view was not a leaflet:its size and durable material suggested that its purpose was both to advertise (inform) and to keep other documents.

36. Nor did Item 6 Group 3 apply: Mr Hollinger told us that it was supplied as a single one off job.

Conclusion - the 5 items

37. We conclude that item 1 should be zero rated but items 2 to 5 are standard rated.

The improper assessment issue.

38. Mr Hollinger's submissions on this limb of the appeal were directed at the whole of the items which HMRC reclassified as standard rated, and not just at the five items already mentioned. He submitted that:

(1) the Appellant, like many in the print industry, is struggling financially and that if it has to pay these assessments that could push it over the brink. Surely the government must be interested in preserving small business;

(2) the division between zero rating and standard rating is sometimes grey, and many competitors will apply, and have applied, zero rating to products which the appellant is having to accept as standard rated;

(3) the Appellant could attempt to invoice its customers for the additional VAT on the sales that had been made to them on a zero rated basis but which were now being assessed as standard rated. But this would be an extraordinarily time-consuming job - going back some seven years; its largest customer, Zenith, no longer existed, many still existing customers might not pay, and the customers might, because of the passage of time, not be able to reclaim the VAT even if they were fully taxable businesses;

(4) because it was therefore not practicable for the Appellant to reclaim the VAT from its customers, the effect of assessing the Appellant was to deliver a windfall to HMRC. Had the VAT due been invoiced at the time of supply, the Appellant's mainly fully taxable customers would have recovered it, and the net result would have been no net VAT receipt by HMRC. The effect of this assessment was that HMRC would receive the VAT and would not have to meet the corresponding input tax claims. The VAT was therefore burdening an intermediary and profiting HMRC: that was not intended by the scheme of the tax: HMRC was receiving more than it ought;

(5) in *Technip Coflexip Offshore Limited* VATD 19298, the tribunal held that section 73(1) gave a discretion to HMRC whether or not to assess. The tribunal rested its argument on the word "may" in that subsection. The tribunal held that a failure by HMRC to consider whether or not to assess in the unusual circumstances of that case (where, absent the effect of time limits, no amount would have been due to HMRC at all) permitted the tribunal to set aside the assessment. Mr Hollinger argued that in the circumstances of the Appellant, HMRC should have considered whether the assessment was an unfair exercise of discretion - they had not; had they done so they could only have concluded that it was.

39. Miss Jones replied thus.

40. First she said that she had not been prepared by the correspondence and pleadings to meet this issue, but would do her best. Second she wished to reserve HMRC's position on the correctness or otherwise of the decision in *Technip*.

41. Third she said that even if *Technip* was correctly decided (and she contended that the tribunal did not have power to review the behaviour of HMRC in making the assessment), HMRC had exercised its discretion in a reasonable manner having regard to all the relevant circumstances. One of the circumstances was the way in which the

legislature structures the tax by imposing an obligation to pay at each stage in the chain with a relief for input tax given to the recipient. The obligation and the relief were separate, and a taxpayer could not avoid his obligation to pay merely because his customer obtained or should obtain a relief; and that in effect, she said, is the appellant's argument. On that basis HMRC would almost never assess.

42. Fourth, she said that section 73(1) permitted the assessment: the tax returns had been incorrect and the assessment had been made without caprice or malice and to the best judgement of Mr Donnelly: he had taken into account the representations of the Appellant, the effect of the Zenith bad debt, and changes in the product lines. The tax was legally due and it was a wholly reasonable to require it to be accounted for through an assessment.

Mr Donnelly's evidence.

43. Mr Donnelly told us that his official instructions required that unless the amount which would be assessed under section 73 was small (less than say £50) or if there were one or two inconsequential inaccuracies, he was obliged to issue an assessment. Once an error of a substantial size, such as that in this case, had been identified, he was not able to let it go. He said that it in deciding to issue such an assessment no consideration was given to the wider circumstances of the taxpayer or its customers, for example whether or not some of them might be partially or wholly exempt businesses, or below the VAT registration threshold. In particular he said that even if all the taxpayer's customers had been able to reclaim the VAT he would still have made the assessment.

Discussion - unfairness.

44. Section 73 (1) provides:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision appeals by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of the VAT due from him to the best of their judgement and notify it to him."

45. In *Technip* the tribunal was considering an assessment made to withdraw bad debt relief in respect of the supply which had earlier been accounted for at a standard rate when in fact no tax had been due on the supply. The tribunal said:

> "Although the matter does not seem to have been the subject of express decision hitherto the Tribunal considers it to be the case that the Commissioners do have a discretion in the matter of making an assessment. The enabling provisions use the word "may". The Commissioners accordingly may make an assessment or they may not. There is nothing imperative in the statute. Even if there was an ascertained and justified sum due to the Commissions still are not obliged to issue a demand for it.

"It is apparent from the correspondence in the present dispute that the Commissioners took the view that they had no discretion at all and never considered the particular circumstances of the particular case in which they recognised that these were "unfortunate circumstances". In our opinion that is an erroneous approach. They are not entitled so to fetter their actions. The circumstances of the present case are that the effect of what the Commissioners have done is to attempt to secure to themselves a sum of money which never was due in reality and always fell outwith the scope of the tax. There was never a taxable transaction. There could be no tax point. It is in such circumstances that the commissioners, in the Tribunal's view, require to consider whether they are justified in seeking, obtaining or retaining this windfall which in our view would be a matter of unjust enrichment, before making an assessment like the present. As a public body they have to consider the appropriateness of the whole circumstances, and not seek a manifestly unfair advantage…

"Since the Commissioners did not exercise any discretion and paid no attention to the circumstances of the case, for aught yet seen, the assessment in the tribunal's view cannot stand. It will therefore be discharged. ..."

46. In *John Scofield v HMRC* [2011] UK FTT 199 (TC) the tribunal (Guy Brannan and Anne Redstone) considered the effect and meaning of the word "may" in the provisions of section 66 FA 2004 which provided that the Board "may ... make a determination cancelling" a gross payment registration under the CIS scheme in specified circumstances. After a comprehensive review of the authorities the tribunal concluded that the statute conferred a discretion on HMRC to cancel or not to cancel gross payment registration. The tribunal said that where Parliament confers a discretion on a public body that the body must exercise the discretion in accordance with the normal rules of public law and could not fetter a discretion bestowed by statute ([132]): it could adopt policies but those policies must not become a rule preventing consideration of individual circumstances. In that case no consideration had been given to whether or not to exercise the discretion in the taxpayer's circumstances, and the tribunal, having been given express jurisdiction under the statute "to review any relevant decisions taken by the Board ... in the exercise of its functions under section [66]", allowed the appeal.

47. In the same vein the tribunal in *Algarve Granite limited v HMRC* [2012] UK FTT 463 considered that if HMRC did not give consideration to the exercise of its specific statutory discretion to reduce a penalty because of special circumstances, its decision could be treated as flawed and, as a result of the special power conferred on the tribunal by Schedule 56 FA 2009, the tribunal was entitled to impose its own view of any reduction in the penalty which should be made for such circumstances.

48. We reconsider that section 73(1) does confer a discretion on HMRC whether or not to make an assessment. That is for reasons similar to those which the tribunal in *Schofield* gave in relation to section 66:

(1) the normal and natural meaning of "may" is permissive, not mandatory, and

(2) in the statutory context of section 73 - the repeated use of "may" in the power of assessment conferred on HMRC, the contrast in subsection 6 of the use of "must" limiting the time in which an assessment may be made, and the use of "shall" in adjacent provisions, all indicated that "may" is permissive not mandatory.

49. Certainly it seems from Mr Donnelly's evidence that HMRC regard themselves as possessed of a discretion since they do not deign to assess small amounts. Further the existence of a discretion to overlook certain errors seems to us to be consistent with the obligations and duties of HMRC under paragraph 1 Schedule 11 VATA to collect and manage the tax and within the purpose of the assessment provision.

50. If we are right, and HMRC do have a discretion in relation to section 73 whether or not to assess, then, as the tribunal said in *Scofield* they must exercise it properly.

51. The next question is what power is given to this tribunal in relation to an assessment which has been made improperly. In *Scofield* and *Algarve* an express power of review was given to the tribunal. In the case of an assessment the powers and duties of the tribunal are determined by section 83(1)(p) VATA which provides that an appeal shall lie to this tribunal in respect of:

"(p) an assessment ... under section 73(1) ... or the amount of such an assessment".

52. In *Rahman (No 2) c C&E Commissioners* [2003] STC 150 at [5], Chadwick LJ said of this provision that it provided

"both for an appeal "with respect to ... an assessment under section 73 (1)" and for an appeal "with respect to the amount of such an assessment"".

He said that that distinction reflected two distinct questions:

"first, whether the assessment had been made under the power conferred under that section; and second, whether the amount of the assessment is the correct amount of the VAT for which the taxpayer is accountable."

Having thus stated the first question in wide terms. He went on at [7]:

"[7]. The first of these questions itself contains two elements: (i) whether the precondition for the exercise of the power is satisfied - that is to say has there been a failure to make returns, keep records or afford facilities for inspection, or has it appeared to the Commissioners that the returns which have been made are incomplete or incorrect - and (ii) whether the assessment made by the Commissioners was made "to the best of their judgement".

53. He explained that the first of these was rarely in dispute but that the second had led to a two-stage process in the hearing of the appeals against VAT assessments: the first stage being in relation to whether best judgement had been exercised and the second in relation to the amount of the assessment.

54. We note that, whilst his initial formulation of the first question was in very wide terms and appears to countenance an inspection of the question of whether or not there should have been assessment at all, his second formulation is restricted to the more specific issue of whether the amount of the tax was assessed to the best judgement of HMRC.

55. Both the two-stage process referred to by Chadwick LJ and the nature of the "best judgement" question were issues which loomed large in a number of cases. In *Van Boeckel* [1981] STC Woolf J had said of the "best judgement" question that it required an honest bona fide value judgement by the Commissioners on the material before them of the amount of tax due. What the words "best of their judgement" envisioned, he said, was that the

> "Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due."

56. In *Rahman v Customs and Excise Commissioners* [1998] STC 826 Carnwath J said that to overturn an assessment on this basis required a strong finding "for example that the assessment had been reached dishonestly or vindictively or capriciously" or is a "spurious estimate or guess from which all the elements of judgement are missing" or is wholly unreasonable". In substance, he said, these tests were indistinguishable from the familiar *Wednesbury* principles (see page 825a –c).

57. This approach was revived and visited again by the Court of Appeal in *Customs and Excise Commissioners v Pegasus Birds* [2004] STC 1515, where Chadwick LJ described the best judgement test as one of whether the officer had made an honest and genuine attempts to assess the correct amount of tax; and Carnwath LJ gave guidance to the tribunal: indicating that its primary task was to find the correct amount of tax.

58. What, in view of our discussion of the meaning of "may" in section 73, is striking about these cases is the concentration on the use of "best judgement" to assess the tax. There is no express consideration of the question whether, if it is found that to the best of HMRC's judgement tax is due, it should in fact be assessed, even though the *Wednesbury* principles, which are clearly in the linked to the requirement properly to consider the exercise of any discretion by a public body, were in the minds of the judges. But that approach must be viewed in the light of the arguments in the appeals before the courts. The attack in each case had not been on the decision to assess, but on the judgement used in making the assessment. It seems to us that the test is described is equally applicable to both questions and that the two questions are not to be addressed separately; there is one question only and that is whether it was wholly unreasonable to make the particular assessment.

59. Miss Jones relied on the decision of the Upper Tribunal in *Abdul Noor v HMRC[2013] UKUT 071 (TCC)* in which that tribunal held that this tribunal did not have power under section 83(1)(c) to adjudicate on an argument that a taxpayer's legitimate expectation could afford him a right to a repayment of VAT contrary to the

Commissioners' decision. The tribunal referred to its previous decision in *Hok* and said:

> 26. At [39] of our decision we referred to the Court of Appeal decision in *Aspin v Estill*[1987] STC 723 citing from the judgment of Nicholls LJ at p 727c, a passage which bears repetition:
>
> > "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."
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> 27. We then went on at [41] to [43] to say that there was no room for doubt that the F-tT does not have any judicial review jurisdiction. We considered that that was made abundantly clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22 ("***Corbitt***") and in particular by what Lord Lane had to say about the absence of a judicial review jurisdiction in the VAT Tribunal. It can be seen that, although *Hok* itself was a direct tax case, we based ourselves very much on decisions in the VAT field. Our decision is therefore of direct relevance to the present case.
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> 28. As we noted a similar point was made by Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072 ("***National Westminster Bank***") after analysis of the authorities. The judge adopted and endorsed what had been said by Moses J in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205 at247c:
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> > "… in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct."

60. The Court of Appeal in *Aspin* was dealing with direct tax where section 31 of the TMA 1970 provided for an appeal against an assessment, but section 50 provided that if it did not appear to the tribunal that the appellant was overcharged or the assessment excessive the assessment should "stand good". The High Court in *National Westminster* was concerned with section 83(1)(t) VATA which provided for an appeal against a decision on a claim for repayment; and the House of Lords in *Corbitt* were concerned with the VAT tribunal's purported review of the Commissioners refusal to exercise a discretion in relation to a provision of the margin scheme. And as we have said *Noor* was concerned with section 83(1)(c) which related to the "amount of tax which may be credited to a person".

61. None of these cases deal therefore with the express jurisdiction of section 83(1)(p) in relation to the ability to appeal both against an assessment *and* against its amount. And it is clear from the cases dealing with "best judgment" that the process which must be carried out by the tribunal in relation to that task is akin to that of judicial review. The question is whether the wider wording of section 83(1)(c) specifically confers on this tribunal the power and duty to consider an appeal on such principles against both the making of the assessment and the best judgement exercise in making that assessment?

62. It seems to us that the width of the words in section 73(1)(p) "against the assessment" indicate that this tribunal's role is not confined solely to the question of whether it was made to the best of HMRC's judgment. The section does not limit the appeal to one "against the question of whether the amount of assessment was made to the best of HMRC's judgement". But in our view the scheme of section 73 does not require a separate formal decision to exercise the power to assess, and a second separate formal decision as to what amount should be assessed. The two decisions are one, and, on appeal against the assessment, there is one question which is to be asked in relation to that single decision: was it made wholly unreasonably? If the answer is yes, then the appeal against the assessment must succeed. In any event if it was made wholly unreasonably it cannot have been made to the best of the judgement of the Commissioners.

63. In this appeal the essence of Mr Donnelly's evidence was that, if on a fair determination he considered that tax was due he would assess it unless it was small or inconsequential; in the Appellant's case the amount was not small and he decided to assess. It seems to us that that can properly be described as the decision in the light of the circumstances to exercise discretion under section 73 to make an assessment.

64. However in our view, in making that decision, Mr Donnelly did not fail to take account of any relevant factors, take into account irrelevant factors or make a decision which was wholly unreasonable or incorrect in law. In our view, and taking Mr Hollinger's arguments one by one, he did not do so for the following reasons:

(1) Unfortunately the effect of making an assessment on the survival of the taxpayer or its business does not seem to us to be a relevant question. An assessment is concerned with determining the amount of tax which is due; the second stage is the collection of the tax. It is the collection which may affect the business of the taxpayer, not the assessment. Mr Donnelly was not wrong to fail to take this issue into account.

(2) The approach to zero rating taken by other taxpayers does not seem to us to be relevant to the question of the proper treatment of this taxpayer unless it was evident to the Appellant that such treatment was with the approval or connivance of HMRC. There was no evidence that it was. We accept that the principle of VAT neutrality requires that similar supplies be treated in the same way; but that means treatment in the same way under the law. The treatment

adopted by other suppliers may not have been lawful. Mr Donnelly was correct to ignore the approach taken by other taxpayers to their tax affairs in determining whether, and in what amount, to assess the Appellant.

(3) The fact that some products might lie at the margin of zero rating does not make an assessment in respect of those products which were considered standard rated unreasonable if Mr Donnelly made his assessment without malice or caprice. Whether or not they were in fact taxable supplies would be decided by agreement between the parties or by this tribunal. If the mere fact that a case was near the margin was a valid reason for HMRC exercising a discretion not to assess, the effect would be to remove the margin altogether to some remoter point, which in our view cannot be correct. There was no evidence that Mr Donnelly had been motivated by malice or caprice. He was correct not to have regard to this issue.

(4) In making his assessment we consider that Mr Donnelly acted fairly and honestly on the information available to him. He took a decent length of sample period, he asked for the Appellant's comments on his conclusions and on the representative nature of the period before making his assessments. He adjusted the assessments for the Zenith bad debt. He considered the taxpayer's representation on individual items. In his evidence before us, he said that he had addressed the issue of whether the disputed supplies were "one-offs" and thus whether it was fair to extrapolate calculations about their effect into earlier periods: he said that he had invited Mr Hollinger's comments on the point but concluded that, if anything, the incidence of similar supplies to those in dispute was probably greater in earlier periods, such that a detailed review of those periods might produce more additional tax than a mere extrapolation.

(5) We do consider that Mr Donnelly was required to consider any "windfall" which might accrue to HMRC as a result of any assessment upon the Appellant and the administrative near impossibility of the Appellant invoicing its customers and their reclaiming the invoiced input tax. The process of assessment is directed to determining the tax due from the taxpayer under the law. The scheme of the legislation pays no attention in this process to the later reclaim of the tax by a trader's suppliers and customers. Mr Donnelly was correct to ignore this fact.

We should elaborate a little on the scheme of the legislation. Article 2 of the First Directive provided that the principle of VAT involved a tax on consumption such that on each transaction VAT was chargeable after the deduction of input tax – with no mention of the tax deductible by the next person in the chain of supply. Article 2 of the Sixth Directive provided that the supply of goods or services was subject to tax, and Article 10 that the tax became chargeable when the supply was made. The right to deduct was given separately by Article 17 and no allowance was given to a supplier for the tax deductible by his customer. This scheme is mirrored in the domestic legislation.

65. Therefore we conclude that in this case a decision was taken to assess and that the decision was not unreasonable. That makes this case quite different, in our view,

from cases such as *Scofield* and *Algarve*, where it was held that HMRC failed to address relevant issues at all. If we were wrong in our conclusion that a decision had been taken we would have concluded that if separate consideration had been given, the answer would inevitably have been the same. That is because we could see no reason for HMRC not to have assessed, and because its policy was to assess.

66. Finally we should explain why we consider that the reasoning in *Technip* does not apply to this appeal. In *Technip* the tribunal found that HMRC considered "they had no discretion at all". In this appeal by contrast Mr Donnelly's evidence was that a discretion not to assess was exercised in small cases, although he described himself as having no real choice in cases such as this where he was persuaded that large amounts of tax were at stake. In *Technip* the tribunal found that HMRC "never considered the particular circumstances of this case". In this appeal the Appellant's letters to HMRC's review team make the argument in relation to windfall clearly but they are rebutted by the reviewer, as they were by Mr Donnelly before us, on the basis that any windfall was a result of the legislation or the failure or inability of other taxpayers to claim input tax.

67. In *Technip* the focus of the tribunal was on the amount of tax which the company should pay in relation to its supplies; in this appeal the unfairness of which the appellant complains arises from a consideration of the position of the taxpayer taken together with its customers. The unfairness in *Technip* arose because the application of the intention of the legislation to the taxpayer should have resulted in the taxpayer paying no VAT; in this case the application of the intention of the legislation to the taxpayer is that it should pay VAT. It does not seem to us that in the Appellant's circumstances it can be said that a windfall unintended by the legislation arose to HMRC at a cost to the appellant which was unintended by the legislation.

68. *Technip* was a case with a confused factual background in which it appeared that a failure by the Appellant to make its claim in the correct procedural form had resulted in an assessment which related to supplies which were outside the scope of the tax. Even if it was rightly decided, *Technip* cannot dictate the result of this appeal, in which any advantage to HMRC arises from the possible failure of the Appellant to invoice and the possible failure or inability of its customers to reclaim input VAT.

69. Finally we should mention Article 1 of the First Protocol to the Convention on human rights. This provides that:

> "Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.
>
> "The preceding shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

accordance with the general interest or to secure the payment of taxes or other contributions or levies."

70. In Peg*asus Birds,* in the High Court, Patten J at 37 to 39 summarised the cases on the application of this Article in relation to the collection of VAT. He said that there had to be a reasonable relationship of proportionality between the means employed and the end sought to be realised. The collection of tax was a legitimate aim which needed to be pursued by means which were not completely arbitrary or out of all proportion to their purpose, but there was a margin of appreciation allowed to the legislature in relation to the means prescribed by it.

71. The legislation which affects the appellant in this appeal comprises those provisions which permit HMRC to assess tax which has not been collected without making allowance for the input tax which the assessed businesses customers might claim. The legislature could have provided for collection in a different manner but it did not. It seems to us that in the context of the structure laid down by the European directive, this approach, even though it might in this case disadvantage the Appellant, is not devoid of reason or disproportionate to the aim of collecting the tax. It does not seem to us that Article 1 can avail the Appellant.

Conclusion: unfairness

72. We conclude that the assessments should not be set aside.

Disposition

73. We have concluded that the assessment should not be set aside. Although it will be of little comfort to Mr Hollinger we should pay tribute to his honesty and his clear exposition of his case. His analysis and comparison of the *Technip* case was particularly clear.

74. We should also record that Mr Donnelly told us that if the Appellant did now invoice its customers for the VAT, and if its customers claimed the input tax, HMRC's approach would be to permit the claim even though the related supply would have been made up to 6 years ago.

75. Since the assessment was computed on the basis that the disputed items 1 to 5 were all standard rated, it should be revised to take into account our conclusion that item 1 was zero rated. That means adjusting the percentage calculated by Mr Donnelly for the sample period and applying that revised percentage to the other periods of assessment.

76. Formally we adjourn the appeal for the parties to agree the amounts. They may apply for the hearing to be reconvened if they are unable to do so.

Right of Appeal

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHARLERS HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 9 December 2013