[2018] UKFTT 184 (TC)

TC06425

Appeal number: **TC/2016/03061**
TC/2017/04119

PROCEDURE – Scope of Tribunal's jurisdiction to consider public law issues – whether Hok, Birkett and other cases decided per incuriam – application to strike out

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE EXECUTORS OF ALAN DEVILLE DECEASED **Appellants**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 21 February 2018

Michael Firth, instructed by Gisby Harrison Solicitors for the Appellants

Christopher Stone, instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

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DECISION

1. This is my decision on:

(1) HMRC's application to strike out one of the appellants' grounds of appeal ("Ground of Appeal A") on the basis that the First-tier Tribunal ("FtT") has no jurisdiction to consider it or, alternatively, that it has no reasonable prospect of success.

(2) The appellants' application to bar HMRC from putting part of their case on the grounds that it has no reasonable prospect of success.

Evidence

2. Since this was an interlocutory application, I had limited witness evidence. HMRC relied on witness statements from Linda Littlewood and Nick Mosley, both officers in HMRC. The appellants relied on evidence from David Robert Mitson, a partner in Gisby Harrison Solicitors, who act for the appellants. None of the evidence was challenged in cross-examination. I have therefore accepted that evidence for the purposes of my interlocutory decision.

Background

3. The facts set out below were not in dispute and put both parties' applications in context.

4. Mr Deville was a solicitor and, until 2005, a partner in a firm of solicitors specialising in property.

5. In 1995, Mr Deville entered into a joint venture arrangement with a Mr Richard Daniels. That joint venture arrangement involved, in the main, investments being made into limited companies two of which were Samuel Beadie (Properties) Ltd and Samuel Beadie Investments Limited (the "Samuel Beadie Companies").

6. Mr Deville's business arrangement with Mr Daniels ended acrimoniously. Four court actions were brought with the main action being heard over 55 days in the High Court. Judgement in that action was delivered on 25 July 2008.

7. On 13 January 2012, Mr Deville filed his personal self-assessment return for the 2010-11 tax year online. In that return he recorded that he had received £52,000 of fees from a consultancy business (Alan Deville Associates) that he carried on as a sole trader. In computing the profits of that consultancy business, he claimed to be entitled to a deduction for "other expenses" of £30,859,057 (that was described in the accounts for his consultancy business as "previously undeclared trading losses under Subrogation Agreement") and a deduction for "legal and other professional fees" of £477,223. As a result, his tax return recorded that Alan Deville Associates had made a trading loss of £31,294,009.

8. It was common ground for the purposes of HMRC's strike out application that the "expense" of £30,859,057 that Mr Deville had claimed related to alleged losses that the Samuel Beadie Companies (and not Mr Deville himself) had incurred in connection

with the joint venture with Mr Daniels or its dissolution. It was also common ground that the "legal and other professional fees" had no connection with the Alan Deville Associates business and therefore were not deductible in computing the profits of that business. Therefore, the parties were agreed that statutory provisions governing the computation of Mr Deville's taxable income did not entitle him to relief for the averred loss of £31,294,009[1].

9. Mr Deville wanted to carry some of the loss back against taxable income that he had received in previous tax years so that he could obtain a refund of tax that he had paid in respect of those years. To that end, Mr Deville's tax adviser, Ms Brown, had discussions and correspondence with HMRC the effect of which was broadly as follows:

> (1) HMRC informed Ms Brown that, if Mr Deville wanted to claim a repayment, he would need to fill in Box 14 on his self-assessment return. On 9 February 2012, Ms Brown, on Mr Deville's, behalf submitted an amended return claiming a repayment of tax of £5,042,837.35(of which some £3.7m was described as "compound interest") as a consequence of carrying back part of the loss against previous years' taxable income.
>
> (2) Ms Brown was assiduous in chasing up the repayment, making a number of calls to HMRC to ask about progress. HMRC officers also made calls to Ms Brown as part of their own checks as to whether a repayment could be issued.
>
> (3) On 9 March 2012, HMRC and Ms Brown had a telephone discussion that evidently satisfied HMRC that Mr Deville was not claiming a loss pursuant to any "marketed avoidance" scheme.
>
> (4) By 12 March 2012, HMRC's progress was sufficiently far advanced that they called Ms Brown to say that the repayment process had been started. That evidently involved the payment being subjected to "security checks" which could take around 10 working days in total. By 16 March 2012, HMRC explained to Ms Brown that the payment had gone through the first set of security checks. By 23 March 2012, the repayment had been fully authorised and on or around that date, HMRC paid £5,042,837.35 into Mr Deville's account by way of BACS transfer.

10. On or around 29 January 2013, HMRC opened an enquiry into Mr Deville's tax return for 2010-11. On 11 November 2015, that enquiry was concluded and HMRC issued a closure notice concluding that the loss Mr Deville had claimed was not deductible for tax purposes. HMRC's overall conclusion was that Mr Deville had an aggregate income tax and national insurance liability for 2010-11 of £9,339.78. Since

[1] As will be seen, the appellants argue that the statutory provisions governing the issue of closure notices, properly construed, did not permit HMRC to issue a closure notice denying Mr Deville the benefit of the loss. However, they do not seek to argue that Mr Deville was, as a matter of statute law, entitled to the loss that he had claimed.

he had received a repayment of £5,042,837.35 for that year, their conclusion was that Mr Deville owed HMRC £5,052,177.13.

11. On 28 March 2017, HMRC issued a discovery assessment in relation to the 2010-11 tax year. That discovery assessment also related to Mr Deville's claim to carry back the loss to previous tax years. However, it approached the calculation of tax due differently from the calculation set out in the closure notice. Whereas the closure notice had focused on the difference between HMRC's calculation of his tax liability for 2010-11 (£9,339.78) and the repayment that Mr Deville had received, the discovery assessment focused on the difference between that tax liability and the total loss relief that Mr Deville had claimed when carrying his loss back. The discovery assessment calculated that Mr Deville owed an additional £1,347,322.28[2]. Importantly, the discovery assessment was expressed to be as an alternative to the amounts that HMRC regarded as due in accordance with the closure notice. Where it is not important to distinguish between the closure notice and the discovery assessment, I will refer to them together as the "Assessments".

12. Mr Deville passed away in April 2016. His executors are now pursuing his appeals against the Assessments which have been duly notified to the FtT. The "Ground of Appeal A" (which is the subject of HMRC's strike out application is that the Assessments are contrary to public law, are accordingly void and are thus not "closure notices" or assessments for the purposes of the applicable statutory provisions. The reason why the appellants argue that the Assessments are void are:

> (1) As demonstrated by the FtT's findings of fact in *Byrne v HMRC,* HMRC have a "secret policy" or practice, or at least a history, of allowing individuals to be taxed as if the activities of a company were their activities, even if there is no legal basis for doing so. HMRC failed to extend that policy or practice to Mr Deville and therefore the Assessments breached HMRC's public law duty of consistency.
>
> (2) HMRC's conduct when making the payment to Mr Deville (and in particular the number of checks they made before making it) was such as to engender a legitimate expectation that HMRC would not seek to reclaim it.

PART I – HMRC'S APPLICATION TO STRIKE OUT GROUND OF APPEAL A FOR WANT OF JURISDICTION

Overview of the parties' arguments and structure of this decision

13. Mr Stone for HMRC put HMRC's case on jurisdiction straightforwardly. In Ground of Appeal A, the appellants are not arguing that HMRC have calculated the assessments wrongly. Nor are the appellants arguing that HMRC have wrongly concluded that Mr Deville was not entitled to relief for the losses claimed. Rather, Mr Stone argued that Ground of Appeal A amounts to a public law challenge to HMRC's decision to issue

[2] The difference between this amount and the amount claimed pursuant to the closure notice appears to reflect the "compound interest" element of Mr Deville's original claim for repayment.

the assessments and binding authorities demonstrate that the FtT has no jurisdiction to consider such a challenge.

14. Mr Firth argued that it is a general principle of statutory construction that Parliament is presumed not to authorise abuses and unfairness and that safeguards against such abuse are to be implied into the relevant statutory provisions governing assessments and closure notices. It follows, in Mr Firth's submission, that the closure notices and assessments were void *ab initio* (i.e. from the moment they were issued) applying principles set out in *Boddington v British Transport Police* [1999] 2 AC 143. HMRC had never, therefore, issued closure notices or assessments and, importantly in his submission, this conclusion flowed not from the application of general principles of common law, but rather from the true construction of the statutory provisions governing HMRC's making of assessments.

15. Mr Firth accepted that binding authorities apparently restrict taxpayers' abilities to raise arguments such as those contained in Ground of Appeal A. However, he submitted that the FtT is not actually bound by the decisions to which Mr Stone referred for the following reasons:

> (1) Insofar as they decide that the FtT has no jurisdiction to consider parallel "common law" challenges to HMRC's decision to issue the Assessments, that is not relevant since, as noted at [14], Ground of Appeal A is a challenge based on statutory interpretation.
>
> (2) Alternatively, the decisions on which Mr Stone relies were decided *per incuriam* (i.e. they were decided without reference to binding decisions of higher courts which would have required a different decision).

Therefore, Mr Firth argued that Ground of Appeal A is nothing more than a challenge to the question of whether closure notices or assessments had been issued at all and the FtT plainly has jurisdiction to consider such a challenge.

16. Given the way that the parties have made their respective cases, I will approach HMRC's application to strike out Ground of Appeal A for want of jurisdiction as follows:

> (1) First, I will consider what principles are emerge from binding authorities on the scope of the FtT's jurisdiction.
>
> (2) Second, I will consider the scope of the *per incuriam* doctrine and consider whether the authorities are *per incuriam*
>
> (3) Having done so, I will apply what I regard as the principles that are binding on me to determine whether the FtT has jurisdiction to consider Ground of Appeal A.

Applicable authorities as to the scope of the FtT's jurisdiction

17. Mr Stone referred me to a number of authorities on the scope of the FtT's jurisdiction including *Oxfam v HMRC* [2009] EWHC 3078, *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) *HMRC v Noor* [2013] UKUT 71, *Trustees of the BT Pension Scheme*

[2015] EWCA Civ 713 and *R& J Birkett (t/a The Orchards Residential Home) and others v HMRC* [2017] UKUT 0089. I will not deal with each authority in detail, but rather will refer to those that I regard as most illuminating.

The decision in Birkett

18. The Upper Tribunal's decision in *Birkett* itself contained a survey of the relevant authorities and expressed the applicable principle as follows:

> *Relevant principles*
>
> The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In Oxfam at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

The statements set out above are binding on me (subject to any question as to whether they were *per incuriam* or not which I consider in the next section).

19. Having set out the relevant principles, the Upper Tribunal applied them in the context of a right of appeal against penalties provided for by paragraph 47 of Schedule 36 Finance Act 2008:

> A person may appeal against any of the following decisions of an officer of Revenue and Customs—
>
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
>
> (b) a decision as to the amount of such a penalty.

20. Where a taxpayer appeals under paragraph 47, and the appeal is notified to the FtT, the Upper Tribunal concluded that, pursuant to s49D(3) of the Taxes Management Act 1970, the FtT's jurisdiction is to decide "the matter in question". They concluded that, for the purposes of an appeal under paragraph 47(a), the FtT's jurisdiction was limited to asking whether the statutory requirements to issue the penalty were met. More specifically, the Upper Tribunal said, at [39]:

> That means that the FTT cannot on an appeal under paragraph 47(a) review the decision of the HMRC officer on any other grounds. In the present case the appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. That does not seem to us to be an issue which goes to the matter in question under paragraph 47(a).

21. At [48] of their decision, the Upper Tribunal considered whether the appellants' complaints were within the FTT's jurisdiction by reason of paragraph 47(b) of Finance Act 2008 but concluded:

> In the present case, the complaint of the appellants is not that the amount of the penalty, assuming one to be imposed, was excessive: it is that no penalty should have been imposed at all. It seems to us that this raises the question whether this can be said to be an appeal against the decision of an HMRC officer "as to the amount of such a penalty". We do not think it can…

22. I do not consider that the Upper Tribunal's analysis referred to at [20] and [21] above is binding on me because that analysis determines the correct construction of statutory provisions different from those relevant to this appeal and, as the Upper Tribunal identified, the ultimate task is to construe the particular statutory provisions giving the right of appeal. Of course, the reasoning that the Upper Tribunal adopted when construing paragraph 47 of Finance Act 2008 will be instructive when I come to consider how the statutory provisions relevant to this appeal should be construed.

The decision in BT Pension Trustees

23. In the *BT Pension Trustees* case, the Court of Appeal considered whether the FTT had jurisdiction to consider an appeal based on the proposition that HMRC had wrongly, or unfairly, failed to give the taxpayer the benefit of an extra-statutory concession. The relevant right of appeal in that case was contained in paragraph 9(7) of Schedule 1A of TMA 1970 which provided as follows:

> (7) If on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good.

24. The Court of Appeal construed the scope of this right of appeal by taking into account s3 of the Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") which provides:

> There is to be a tribunal, known as the First-tier Tribunal, for the purposes of exercising the functions conferred on it under or by virtue of this Act or any other Act.

The Court of Appeal concluded:

> The statutory jurisdiction conferred upon the FtT by s3 of TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Sch 1A do not extend to what are essentially parallel common-law challenges to the fairness of the treatment afforded to the taxpayer… The appeals are concerned with whether the Trustees are entitled under s231 to claim the benefit of credits on FIDs … [n]ot with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s15, TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT.

25. The Court of Appeal's actual decision (as to the scope of the appeal right in paragraph 9(7) of Schedule 1A) is not binding on me in the context of this application since this application is concerned with a different statutory right of appeal. However, the approach that the Court of Appeal adopted, particularly that of using TCEA 2007 as an aid to the construction of the scope of a statutory appeal right, is highly instructive not least since the wording of the right of appeal relevant to this application is similar to that considered by the Court of Appeal.

The decision in Hok

26. The Upper Tribunal's decision in *Hok* was concerned with a right of appeal against penalties conferred by s100B of the Taxes Management Act 1970 in the following terms:

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but –

(a) In the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may-

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be correct, confirm the determination,

(iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount…

(b) in the case of any other penalty, the First-tier Tribunal may-

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate.

27. Central to the Upper Tribunal's analysis of this right of appeal was its conclusion that TCEA 2007 conferred no judicial review function on the FtT. Having emphasised that point, the Upper Tribunal's conclusion was as follows:

> [56] Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at [36] and [43], above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.
>
> [57] If that conclusion leaves 'sound principles of the common law … languishing outside the Tribunal room door', as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.
>
> [58] It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed. The appeal is allowed and we determine that all five of the penalties are due.

28. Again, the Upper Tribunal's overall conclusion relates to a different statutory appeal right from the one the appellants are seeking to invoke. However, their approach is nevertheless instructive and it is notable that, like the Court of Appeal in the *BT Pension Trustees* decision, the Upper Tribunal's approach to the construction of s100B of TMA 1970 was informed by the fact that Parliament has not, in TCEA 2007, given the FtT a judicial review function.

Other authorities

29. Mr Stone referred me to the decision of the Court of Appeal in *Aspin v Estill* [1987] STC 723. In that case, Nicholls LJ said:

> 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 the presence of some further facts, it would be oppressive to enforce that liability. In 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.

30. The decision does not purport to decide, as a matter of statutory construction, the scope of the Tribunal's jurisdiction in an appeal of the kind brought by the appellants in this appeal. Indeed, the Court of Appeal's judgment predated the formation of the FtT and the enactment of TCEA 2007. However, the decision is instructive since it indicates that complaints of the kind that Nicholls LJ identified will ordinarily need to be pursued by way of judicial review, although of course it would be open to Parliament to legislate to give the FtT jurisdiction to consider these matters in a particular context if it chose to do so.

31. To similar effect, Mr Stone referred to the judgment of the House of Lords in *Customs and Excise Commissioners v J H Corbitt Numismatists Ltd* [1981] AC 23. That case proceeded by construing the scope of a right of appeal to what was then the Value Added Tax Tribunal. The House of Lords concluded that Parliament could not have intended to give the Value Added Tax Tribunal a supervisory jurisdiction over the exercise of the customs and excise commissioners' jurisdiction, not least since Parliament would have used clear words if it had wished to do so.

Whether any of the decisions referred to above are *per incuriam*

32. Mr Firth submitted that the authorities referred to above failed to take into account that, as a matter of administrative law, if HMRC had issued the Assessments in breach of their duties to act fairly, it necessarily follows that the Assessments were void as a matter of statute law. In support of that proposition, he referred to the discussion of the ultra vires doctrine in *Wade and Forsyth on Administrative Law* (11th edition) and the decision of the House of Lords in Boddington.

33. *Wade and Forsyth* includes the following paragraph:

> It is presumed that Parliament did not intend to authorise abuses and that certain safeguards against abuse must be implied in the Act. These are

> matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that is passed. They may be taken for granted as part of the implied conditions to which every Act is subject and which the courts extract by reading between the lines. Any violation of them, therefore, renders the offending action ultra vires.

34. Mr Stone did not really dissent from Mr Firth's submission that the ultra vires doctrine developed in administrative law was rooted in concepts of statutory construction. Nor did he really dissent from Mr Firth's submission that, if a public authority makes an ultra vires decision, that decision is necessarily void from the moment it is taken (see *Boddington* and *Anisminic Ltd v Foreign Compensation Commission* 1969 2 AC 147). Mr Stone was less prepared to accept that implied conditions as to "fairness" are necessarily incorporated into taxing statutes. However, without deciding the point, I will proceed on the basis that HMRC's powers to issue the Assessments were subject to implied statutory limitations to the effect that HMRC had to act fairly when making the Assessments and that, if HMRC failed to act fairly, the Assessments were, by virtue of these implied limitations, void from the moment they were made. I also agree with Mr Firth that none of the authorities spell out in detail the rule of law that I have just outlined. The question, therefore, is whether the failure to do so means that those authorities were decided *per incuriam*.

35. In *Morelle Ltd v Wakeling* [1955] QB 379 the Court of Appeal said:

> As a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong.

36. I do not consider that this high threshold is met in relation to any of the authorities referred to above. The cases of *Hok*, *BT Pension Trustees* and *Birkett* are concerned with the interpretation of specific statutory rights of appeal. They all reach the conclusion that the statutory rights of appeal, properly construed, do not give the FtT jurisdiction to consider what might be loosely termed "public law issues". I can certainly accept that if the Upper Tribunal or Court of Appeal had the benefit of Mr Firth's clear exposition of the nature of the *ultra vires* doctrine, they might have construed the relevant statutory provisions differently. However, that is by no means certain not least since the Upper Tribunal in *Hok* and the Court of Appeal in *BT Pension Trustees* all clearly considered that it was highly relevant that TCEA 2007 did not confer a judicial review function on the FtT and that aspect of their reasoning would not obviously be altered by even the fullest understanding or analysis of the *ultra vires* doctrine in administrative law.

37. Mr Firth submitted that the statement from Nicholls LJ from *Aspin v Estill* that I have quoted at [29] was wrong and *per incuriam*. He reasoned that a taxpayer who argues that HMRC have made an unfair assessment was indeed, and contrary to what Nicholls LJ thought, arguing that the conditions necessary to impose the assessment were not meant. It is clearly not for me to determine whether Nicholls LJ's statement

was wrong, but I do not consider that it was *per incuriam*. As I read Nicholls LJ's statement, he was merely saying that, where the complaint is that an assessment breaches something other than express provisions of tax statute law, the appropriate remedy is judicial review. I do not regard it as obvious that, if Nicholls LJ had spelled out that tax assessments need to meet implied statutory conditions, his statement would have been any different. Rather, I regard it as entirely likely that Nicholls LJ would have concluded that any complaint that the implied statutory conditions were not met would equally be the province of judicial review, rather than an appeal to the General Commissioners.

38. Mr Firth referred me to *Rickards v Rickards* [1989] EWCA Civ 8 which suggests that in "rare or exceptional cases", a decision can be treated as *per incuriam* if it involved "a manifest slip or error". There is some suggestion in this decision that a court might be more ready to apply this principle to erroneous decisions as to a court's jurisdiction (reasoning that such errors are particularly objectionable since they involve an abuse of power (if a court has assumed jurisdiction where it has none) or a breach of a court's duty (if it wrongly concludes that it has no jurisdiction)). However, even taking this into account, I respectfully do not consider that there is any "manifest slip or error" in any of the decisions referred to above.

39. Finally, in my analysis of the relevant authorities, I have set out my view as to the extent to which the decisions are binding on me. As I have noted, the actual conclusions set out in *Hok*, *BT Pensions Trustee* and *Birkett* are all concerned with the construction of statutory rights of appeal different from that on which the appellants seek to rely. In that narrow sense, therefore, these decisions are not binding on me. However, I do not accept Mr Firth's submission that these authorities are concerned only with the jurisdiction of the FtT to consider parallel common law challenges to HMRC decisions (as distinct from the statute-based challenge that the appellants are seeking to bring in their Ground of Appeal A). *Birkett*, in particular, is expressly concerned with a challenge based on the concept of "legitimate expectation" which is precisely the kind of challenge that the appellants are making in Ground of Appeal A. I therefore consider that, even if the actual conclusion in *Hok*, *BT Pensions Trustee* and *Birkett* is not binding, I must give careful attention to the line of reasoning that led to the conclusion in these cases.

The statutory right of appeal in this case

40. Section 31 of the Taxes Management Act 1970 ("TMA 1970") provides, relevantly as follows:

> (1) An appeal may be brought against -
>
> …
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A of 28B of this Act …
>
> (d) any assessment to tax which is not a self-assessment.

41. Section 29(8) of TMA 1970 deals specifically with "discovery assessments". Section 29 sets out relevant conditions that have to be met before HMRC are entitled to make a discovery assessment and s29(8) provides:

> (8) An objection to the making of an assessment under this section on the ground that neither of the conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

42. Section 49D(3) of TMA 1970 provides that when an appeal is notified to the FtT:

> the Tribunal is to decide the matter in question.

43. Section 50(6) of TMA 1970 provides:

> (6) If, on an appeal notified to the tribunal, the tribunal decides –
>
> (a) that the appellant is overcharged by a self-assessment
>
> …
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> The assessment or amounts shall be reduced accordingly but otherwise the assessment or statement shall stand good.

Discussion of HMRC's application to strike out Ground of Appeal A on the basis that the FtT has no jurisdiction

44. Mr Firth's argument proceeded on the basis that, once it is established that assessment issued by HMRC in breach of its public law duties is necessarily a nullity, as a matter of statutory construction, it necessarily follows that the FtT has jurisdiction to consider whether HMRC made the assessment in breach of its public law duties. I do not accept that broad submission. All the authorities indicate that ascertaining the scope of the FtT's jurisdiction can only be done by reference to the specific statutory provisions conferring a right of appeal. Mr Firth placed weight on HMRC's concession that they accepted that the FtT had jurisdiction to consider whether an assessment had been made. I took HMRC to accept that the FtT could consider whether, for example, a document issued answered to the statutory definition of a "closure notice", whether an enquiry had been validly opened and any necessary statutory preconditions to the issue of a "discovery assessment" were met. However, that concession cannot determine the scope of the FtT's jurisdiction which is fixed by the relevant statutory provisions.

45. As I have said, I will, for the purposes of this application, accept Mr Firth's analysis of the *ultra vires* doctrine. However, the Assessments can only be void, or a nullity, if a court or tribunal of competent jurisdiction declares them to be so. Therefore, the question is whether, in an appeal against the Assessments, the FtT is competent to determine that that the Assessments were void or a nullity or whether, if the appellants want such a determination, they need to take judicial review proceedings in the High Court. That question is not conclusively answered by the fact that the FtT has no judicial review function since the appellants are not, in terms, asking for judicial review of HMRC's decision to make the Assessments: they are simply arguing that no

assessments have been issued. However, as will be seen, the fact that the FtT has no judicial review function is relevant when construing the statutory provisions that confer jurisdiction on the FtT to consider an appeal against the Assessments.

46. Section 50(6) of TMA 1970 sets out the FtT's powers on an appeal notified to it[3]. The powers in s50(6) are clearly focused on determining whether the taxpayer is overcharged by an assessment. Mr Firth submitted that s50(6) should be construed as setting out only those powers that the FtT has if it concludes that there was a valid assessment in the first place. If the FtT concluded that HMRC had failed to issue a valid assessment (for whatever reason, including if the Assessments breached the implied statutory provisions), it had a separate power to set the assessment aside. However, that is not what s50(6) says: the provision focuses attention squarely on whether the taxpayer is "overcharged" or not and, if the taxpayer is not overcharged, the assessment must "stand good".

47. The most natural reading is that s50(6), with its emphasis on whether the taxpayer is "overcharged" is concerned with the application of what the Upper Tribunal described in paragraph [32] of their decision in *Birkett* as "tax law" namely whether the Assessments have been correctly made in accordance with the express provisions set out in the statute. I accept that there is room for doubt on this issue as a matter of statutory construction. A taxpayer who receives an assessment that was void from the moment it was made because HMRC failed in their public law duties might, as a matter of ordinary English, wish to argue that he or she was "overcharged" by the assessment. The taxpayer might reason that since no assessment should have been issued at all, the entirety of the amount demanded is necessarily an "overcharge". Therefore, I can accept that, if I were approaching the matter for the first time, there might be room for a conclusion that Parliament intended the FtT to consider all matters relevant to the issue of whether HMRC had made a valid assessment in the first place, including whether the assessment was void because it was issued in breach of public law duties. However, I am not approaching the matter for the first time. The authorities I have mentioned above make it clear that the scope of the FtT's jurisdiction must be determined in the light of the fact that Parliament has not given the FtT any judicial review function in TCEA 2007. That, when read together with Parliament's use of the word "overcharge" firmly points to the conclusion that Parliament intended the FtT's jurisdiction to be limited to a consideration of the application of express provisions of tax law.

48. I acknowledge also that the approach I have adopted itself gives rise to questions. For example, Mr Stone accepted that s50(6) gives the FtT power, on an appeal against a closure notice, to consider whether the closure notice was validly issued (for example, by determining whether HMRC opened a valid enquiry into the taxpayer's return). It might be asked why s50(6) necessarily precludes the FtT from considering implied statutory conditions that must be met for a closure notice to be issued validly. However, I consider that the authorities I have considered supply an answer to that question: because Parliament chose not to give the FtT a judicial review function, its power under

[3] The provisions of s29(8) of TMA 1970 are not relevant in the context of Ground of Appeal A since the appellants are not arguing, in Ground of Appeal A, that the conditions in s29 of TMA were not met in relation to the discovery assessment

s50(6) of TMA 1970 to conclude that there are defects in an assessment or closure notice is necessarily limited to defects arising as a consequence of express provisions of tax law and does not extend to defects that are properly the subject of a claim for judicial review.

49. I am reinforced in this conclusion by the fact that the FtT's powers in s50(6) of TMA 1970 are in many respects narrower than the provisions considered in *Birkett* and *Hok*. In *Birkett*, there was an ostensibly wide right of appeal to the FtT against a decision that "a penalty is payable". In *Hok,* the relevant appeal right entitled the FtT to set aside a penalty if "it appears that no penalty has been payable". Those appeal rights are ostensibly wide and could certainly be read, as a matter of ordinary English, as giving the FtT power to consider the "implied statutory conditions" to which Mr Firth refers. However, in both cases, the Upper Tribunal concluded that, despite the apparent width of the statutory appeal right, the FtT had no jurisdiction to consider arguments similar to those underpinning Ground of Appeal A. In those circumstances, I consider that Parliament cannot have intended the apparently more narrow right of appeal at issue in this appeal, with its focus on whether the appellant is "overcharged" to give the FtT jurisdiction to consider Ground of Appeal A.

50. It follows that I have no jurisdiction to consider Ground of Appeal A and that ground of appeal is accordingly struck out pursuant to Rule 8(2)(a) of the FtT Rules.

HMRC's application to strike out Ground of Appeal A for the reason that it has no reasonable prospect of success

Relevant provisions of the FtT Rules

51. The parties were broadly agreed on the approach that I should follow when considering the application to strike out the appeal and therefore I will summarise the applicable principles briefly.

52. The FtT has a power to strike out the appeal. That follows from Rule 8(3) of the FtT Rules that provides, relevantly, as follows:

> (3) The Tribunal may strike out the whole or a part of the proceedings if-
>
> …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

That is a discretionary power. If satisfied that there is no reasonable prospect of an appellant's case succeeding, I am not obliged to strike the appeal out.

53. The Upper Tribunal have, in *HMRC v Fairford Group* [2015] STC 156 given guidance as to how the FtT should assess whether a case has no reasonable prospect of success which requires the FtT to apply certain principles that have been developed in the courts. At [41] of their decision, the Upper Tribunal said:

> [41] In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under

> CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all.

Both parties took me briefly to the underlying authorities that apply in the courts but I will not quote from those authorities since the Upper Tribunal's decision quoted above captures the essence of them.

Discussion and conclusion

54. I do not need to consider this point since I have already concluded that the FtT has no jurisdiction to consider Ground of Appeal A. However, for completeness, I will record very brief reasons for concluding that, if the FtT did have jurisdiction to consider Ground of Appeal A:

> (1) I would strike out that part of Ground of Appeal A as is set out at [12(1)] above on the basis that it has no reasonable prospect of success.
>
> (2) I would not strike out that part of Ground of Appeal A as is set out at [12(2)].

55. The parties have not yet exchanged full lists of documents or witness statements. I can quite accept that the appellants will have something of an uphill struggle in making out the argument that HMRC's conduct in processing Mr Deville's repayment gave rise to a legitimate expectation that the payment would not be recovered. However, it would be premature, before having seen the appellants' evidence to conclude that this argument has no reasonable prospect of success.

56. The argument that HMRC failed in their duty of consistency in failing to apply the "secret policy" that the appellants allude to is different. I am certainly sceptical as to whether the appellants will be able to demonstrate the existence of the "secret policy" which appears, at first sight, to run entirely contrary to the fundamental principle of law that companies have separate legal personality. I regard it as most likely that the finding of fact in *Byrne* on which the appellants rely was either mistaken (noting from the reported decision that the finding was made because the presenting officer conducting the litigation for HMRC chose not to challenge the appellant's evidence) or is explicable by some other extraneous factor (for example if Mr Byrne's company was trading in a fiduciary capacity in which case it would not be liable to tax on profits earned in that capacity by virtue of s6 of the Corporation Tax Act 2009). However, sceptical though I am, I consider that it would be premature to conclude that the appellants will not be able to establish the existence of the "secret policy" without seeing their evidence.

57. The reason I would strike out this part of the appellants' appeal is that, even if the appellants could establish that the "secret policy" exists, I still believe that this aspect of Ground of Appeal A would have no reasonable prospect of success. The appellants accept that the loss Mr Deville sought to claim was not deductible as a matter of law. There is no suggestion from the appellants' case as currently pleaded that Mr Deville had any expectation, whether legitimate or otherwise, that HMRC would not apply the law so as to deny the deduction. Indeed, the whole essence of the appellants' case is that Mr Deville was unaware of the "secret policy" that HMRC were applying to other taxpayers. Given the Court of Appeal's decision in *R (on the application of Hely-Hutchinson) v HMRC* [2017] STC 2048, the appellants would have to establish that HMRC's actions, in failing to apply a "secret policy" to Mr Deville, were conspicuously unfair. I see no reasonable prospect of the appellants overcoming that threshold given that they accept that the loss Mr Deville was claiming was not deductible as a matter of law.

PART II – THE APPELLANT'S APPLICATION TO BAR HMRC FROM MAKING THEIR CASE IN RELATION TO THE DISCOVERY ASSESSMENTS

58. Mr Firth put the appellants' arguments simply. The discovery assessment was expressed as an alternative to the closure notice. Therefore, HMRC could not have any belief that the discovery assessment charged the correct amount of tax because the amount of tax that they considered due was the higher amount, calculated on a different basis, set out in the closure notice. Accordingly, he argued that HMRC had no reasonable prospect of establishing that the amount claimed pursuant to the discovery assessment falls due.

59. I will dismiss the appellants' application for much the same reason that I have dismissed HMRC's argument that the appellants' case on "legitimate expectation" has no reasonable prospect of success. In order for the discovery assessment to be valid, an officer of HMRC must have "discovered" that Mr Deville had paid insufficient tax. If the assessing officer did not believe that the assessments issued charged Mr Deville the correct amount of tax, that may be evidence that no requisite "discovery" was made. However, HMRC are entitled to expect that the question of "discovery" will be determined by reference to the totality of the evidence as to what was in the assessing officer's mind at the time. It would be premature, without having seen any witness evidence from the assessing officer on this issue, to decide that HMRC's case in this regard has no reasonable prospect of success.

Overall conclusion

60. My overall conclusion is as follows:

(1) The FtT has no jurisdiction to consider the appellants' Ground of Appeal A. That ground of appeal is, accordingly, struck out.

(2) If the FtT had jurisdiction to consider Ground of Appeal A, I consider that the appellants would have no reasonable prospect of establishing that HMRC's failure to apply a "secret policy" to Mr Deville caused the Assessments to be void. Therefore, I would strike out that aspect of the

appellants' case Ground of Appeal A if, contrary to my view, the FtT had power to consider it.

(3) The appellants' application to bar HMRC from putting their case in relation to the validity of the discovery assessment is refused.

61. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 5 APRIL 2018