[2010] UKUT 176 (TCC)

Appeal Number: **FTC/36/2009**

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

- -

DECISION NOTICE

PROCEDURE - Transfer of functions of VAT Tribunal to First-tier Tribunal – transitional provisions – meaning of "current proceedings" in Schedule 3 to Transfer of Tribunal Functions Order 2009.
PROCEDURE – Discretion to apply 1986 Rules in place of 2009 Rules – whether to apply Rule 26(4) of 1986 Rules
PROCEDURE – application to set aside dismissal of VAT Appeals after failure of prior application not attended by applicant - 2009 Rule 38 – principles to be applied
APPEAL To Upper Tribunal – decision by First-tier Tribunal that it had no jurisdiction reversed – dismissal of VAT Appeals set aside.

ATEC ASSOCIATES LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

- -
- -

Tribunal: Mr Justice Briggs

Sitting in public at the Royal Courts of Justice, London on 18th May 2010

Mr David Scorey (instructed by DaySparkes, 9 Gray's Inn Square, London WC1R 5JQ) for the Appellant

Mr Jonathan Hall and Mr Howard Watkinson (instructed by HM Revenue and Customs, Solicitor's Office, Somerset House, Strand, London W2R 1LB) for the Respondent

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DECISION

Mr Justice Briggs :

1. This is an appeal from the Decision of Sir Stephen Oliver QC sitting as a judge of the First-tier Tribunal (Tax Chamber) dated 17th July 2009, which dismissed the application of the Appellant ATEC Associates Ltd ("ATEC") made on 23rd March 2009 to have re-instated its VAT appeal which had been dismissed for want of prosecution by the VAT Tribunal on 10th November 2008.

2. The Judge concluded that the First-tier Tribunal had no jurisdiction to entertain ATEC's application. He added that, even if there had been jurisdiction, he would not have granted the relief sought. Permission to appeal was refused by the Judge, but granted on a renewed oral application by Dr John Avery Jones sitting as a judge of the Upper Tribunal, on 4th December 2009.

3. The appeal raises an interesting point of general application concerning the nature of the First-tier Tribunal's jurisdiction in relation to matters arising in connection with proceedings which had been commenced before 1st April 2009 (when the First-tier Tribunal replaced the VAT Tribunal in connection with VAT appeals).

THE FACTS

4. ATEC is and was at the material time a trader in computer components and mobile phones. On 20th August 2007 HMRC notified to ATEC its refusal of ATEC's claims for repayment of input tax for periods 04/06 and 05/06. On 19th November 2007 HMRC notified its refusal of input tax claims for the periods 06/06 and 07/06. When aggregated with a further input tax refusal for 05/06 notified in February 2008, the input tax refused amounted to some £7.9 million.

5. ATEC appealed those refusals and the appeals were in due course consolidated pursuant to agreed directions given by the VAT Tribunal initially on 31st January 2008, which also provided for ATEC to serve a list of documents by 14th March and witness statements by 1st May 2008.

6. After two extensions of time, HMRC served its Statement of Case in the consolidated appeals. The gist of its case was that the transactions in respect of which ATEC claimed input tax repayment were connected with the fraudulent evasion of VAT, and that ATEC knew or should have known of that fact. The fraudulent evasion alleged was what is known as Missing Trader Intra Community ("MTIC") Fraud.

7. By that time the Appellant had by consent obtained an extension of time for the service of its list of documents until 2nd May. Neither that list, nor ATEC's witness statements had been served when, on 20th June, HMRC applied for an unless order. That application was heard on 6th August and refused on 12th August, but the VAT Tribunal directed that ATEC should serve its witness statements by 29th August. ATEC neither attended nor was represented at the hearing on 6th August.

8. ATEC had originally instructed the Khan Partnership (a firm of solicitors) to represent it before the VAT Tribunal. In May or June 2008 the solicitor dealing with ATEC's case, a Mr Smith, left the Khan Partnership and ATEC by its directors Bobby Kalia and his sister Renee Kalia decided to retain a Mr Paul Ross, ATEC's accountant, for the purposes of the consolidated appeals, on his representation (apparently orally) that

he was qualified and sufficiently experienced to handle the company's appeal. Mr Ross was also ATEC's company secretary, but it appears from surviving correspondence that he represented ATEC in his independent capacity as a practising accountant, from his own professional address in Harrow, rather than as ATEC's company secretary, from its address in Slough.

9. On 22nd August Mr Ross wrote to the VAT Tribunal objecting to the order made on 12th August, seeking an extension of time for ATEC's evidence and proposing a simultaneous exchange by 31st October 2008. It does not appear that the VAT Tribunal treated that letter as an application for a further hearing for directions.

10. In the meantime ATEC served neither its list nor its evidence as directed and, on 17th September, HMRC applied for an order that the appeals be dismissed for inordinate and inexcusable delay by ATEC, or, in the alternative, for an unless order. That application was duly notified by the VAT Tribunal to Mr Ross on 1st October.

11. On 3rd October ATEC by Mr Ross served its list of documents, but nothing was done about the preparation of witness statements. In a witness statement signed on 27th March 2009, in connection with the application from which this is an appeal, Mr Kalia said that he and his sister sought regular updates from Mr Ross during the remainder of 2008, were told that the appeal was "backed-up in the system and making very slow progress", were told about the need to file a list of documents, but not about the order for filing of witness statements, or about either of HMRC's applications for unless orders, or for dismissal, to which I have referred.

12. HMRC's application was heard, again in the absence of any representative of ATEC, by Sir Stephen Oliver sitting in the VAT Tribunal on 4th November. On 10th November he published his decision ("the November Decision") dismissing the consolidated appeals on the grounds of ATEC's non-compliance with the direction for service of witness statements, and for want of prosecution. His written directions referred to the VAT Tribunal's power to proceed in the absence of the Appellant pursuant to Rule 26(2) of the Value Added Tax Tribunals Rules 1986 ("the 1986 Rules"), and to the Tribunal's power to set aside a direction given in the absence of a party pursuant to Rule 26(3). The direction continued:

> "Rule 26(4) provides that any party making an application under paragraph (3) has no right to apply to have the direction set aside unless he attends the hearing of his application."

The covering letter from the Tribunal Service to Mr Ross which accompanied the November Decision contained this paragraph:

> "If this application was heard in your absence and if you are dissatisfied with the outcome, you may, within 14 days of the date of the written direction, apply to have the direction set aside and the application reconsidered. Your request must give reasons for your failure to attend. The Tribunal will consider your request and, if necessary, arrange for a hearing to decide the issue."

13. On 21st November Mr Ross wrote to the VAT Tribunal, acknowledging receipt of its letter enclosing the November Decision. He apologised for "the delay in this matter" and continued:

> "However, the company is now properly represented and wishes to continue with the various Appeals."

He repeated his earlier request for a simultaneous exchange of witness statements, in the interests of fairness, and concluded:

> "The company looks forward to hearing from the Tribunal with a timetable in which to provide the relevant documents to progress the case forward."

14. The Tribunal treated Mr Ross's letter as an application to set aside the November Decision. The Tribunal's files contain a copy of a letter to Mr Ross to that effect on 9th December, and HMRC's files contain a copy sent to them by way of notification. The original does not appear to have been filed by Mr Ross, but I am satisfied that he received it. The letter stated the Tribunal's intention to treat Mr Ross's letter as "an application under Rule 26(4)", and directed Mr Ross to the passage in the direction contained in the November Decision to which I have referred above.

15. In the meantime, Mr Ross appears to have been taking steps directly to retain tax counsel, and surviving emails between him and counsel in December and early January contain statements by him to the effect that "Customs may want to have these appeals struck out" due to lack of progress on ATEC's part. If those emails were honestly written, they suggest an extraordinary level of incompetence on Mr Ross's part, since he had by then been notified that the appeals had already been dismissed for want of prosecution. Mr Kalia states in his March 2009 witness statement that he and his co-director were not informed by Mr Ross of the dismissal of the appeals, but were asked by him to start work on the preparation of witness statements.

16. The hearing fixed for 7th January was at a late stage vacated due to the non-availability of the chairman of the VAT Tribunal and, by a letter to Mr Ross from the Tribunals Service dated 6th January, re-fixed for 29th January. That letter unfortunately described the nature of the forthcoming hearing as "a hearing for directions".

17. It appears belatedly to have dawned upon Mr Ross that the 29th January hearing was to deal with an application under Rule 26(4) shortly before that hearing, since on 27th January he emailed counsel to that effect, asking if, despite the short notice, he would be able to attend for the company. Counsel replied on the same day in the negative and suggested that Mr Ross seek a short adjournment, until 19th or 20th February. Mr Ross faxed a request for such an adjournment to the VAT Tribunal on the following day, stating that:

> "We were only advised yesterday by your office that the hearing is in respect of an application under Rule 26(4)."

An email from Mr Ross (apparently to himself) in March 2009 suggests that, even at that late stage, he may have been unaware of the consequences of non-attendance at an application under Rule 26(3), or have forgotten about them.

18. Rule 26 of the 1986 Rules provides as follows:

> "**Failure to appear at a hearing**
>
> (1) If, when an appeal or application is called on for hearing no party thereto appears in person or by his representative, a tribunal may dismiss or strike out the appeal or application, but a tribunal may, on the application of any such party or of any person interested served at the appropriate tribunal centre within 14 days after the date when the decision or direction of the tribunal was released in accordance with rule 30, reinstate such appeal or application on such terms as it may think just.
>
> (2) If, when an appeal or application is called on for hearing, a party does not appear in person or by his representative, the tribunal may proceed to consider the appeal or application in the absence of that party.
>
> (3) Subject to paragraph (4) below, the tribunal may set aside any decision or direction given in the absence of a party on such terms as it thinks just, on the application of that party or of any other person interested served at the appropriate tribunal centre within 14 days after the date when the decision or direction of the tribunal was released.
>
> (4) Where a party makes an application under paragraph (3) above and does not attend the hearing of that application, he shall not be entitled to apply to have a decision or direction of the tribunal on the hearing of that application set aside."

19. Mr Ross made no arrangements for anyone to attend on behalf of ATEC at the 29th January hearing, although the VAT Tribunal had before it his faxed letter seeking an adjournment.

20. On 4th February Sir Stephen Oliver published his decision, dismissing that application. His reasons included, in particular, his rejection of the assertion that Mr Ross had only learned on 27th January that the hearing would be of an application under Rule 26(4). For that purpose he relied upon copies of hearing notices of 23rd December and 7th January on the Tribunal's files, which appeared to state in terms that the application was under Rule 26(4). In fact, the hearing notice dated 6th January, in the form sent to the parties, referred (as I have described) to the 29th January hearing as a hearing for directions, and made no mention of Rule 26. It is by no means clear that Mr Ross received a 23rd December hearing notice or that, if he did, it contained any reference to Rule 26.

21. Mr Ross did not report the February Decision to ATEC, any more than he had reported the November Decision. Nonetheless, the patience of ATEC's directors having by then expired, they retained Control Tax Management Limited ("CTM") to take over the conduct of the appeal from Mr Ross. His papers were delivered to CTM on 23rd February and ATEC's directors were informed (according to Mr Kalia) on the following day for the first time that the company's appeal had already been dismissed. This led to ATEC's application to the VAT Tribunal on 23rd March 2009 to set aside the November Decision, supported by the witness statement of Mr Kalia to which I have referred. In the meantime, mindful of its lamentable record to date in the prosecution of its appeal, ATEC has, with the benefit of competent advice, been making preparations for the service of its evidence and reviewing the adequacy of its earlier disclosure such that, so I was informed by Mr Scorey who appeared for the company, service of its evidence, together with a supplementary list of documents, could be achieved within fourteen days.

THE FIRST-TIER TRIBUNAL

22. Before ATEC's application could be heard by the VAT Tribunal, its functions were transferred, on 1st April 2009, to the Tax Chamber of the First-tier Tribunal. The First-tier Tribunal was itself the creation of section 3(1) of the Tribunals, Courts and Enforcement Act 2007. Section 22 of the same Act made provision for procedure rules, pursuant to which the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules") came into force on the same day. By Rule 1(2) they are expressed to apply to proceedings before the Tribunal which had been allocated to the Tax Chamber by the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 ("the 2008 Order"), which had itself by then been amended by the First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2009. By paragraph 5A of the 2008 Order there were assigned to the Tax Chamber (subject to an irrelevant exception) all functions relating to (*inter alia*) "an appeal, application, reference or other proceedings" in respect of a function of HMRC or an officer of Revenue and Customs.

23. By the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the TTFO") the VAT Tribunal was abolished with effect from 1st April 2009 and its functions transferred to the Tax Chamber of the First Tier Tribunal. This was achieved, in relation to new appeals, mainly by amendment of provisions for appeals in existing primary legislation by substituting the First-tier Tribunal for the VAT Tribunal. The 1986 Rules were revoked by Schedule 2, and Schedule 3 made transitional provisions in relation to current proceedings. Paragraph 6 provided that:

> "Any current proceedings are to continue on and after the commencement date as proceedings before the tribunal."

"Current proceedings" are defined in paragraph 1(2) as follows:

> "For the purposes of this Schedule there are "current proceedings" if, before the commencement date—
>
> (a) any party has served notice on an existing tribunal for the purpose of beginning proceedings before the existing tribunal, and

(b) the existing tribunal has not concluded proceedings arising by virtue of that notice."

24. Paragraph 7(3) provided, in relation to current proceedings, that:

> "The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may—
>
> (a) apply any provision in procedural rules which applied to the proceedings before the commencement date; or
>
> (b) disapply any provision of Tribunal Procedure Rules."

Plainly sub-paragraph (a) refers, in a VAT context, to the 1986 Rules, and sub-paragraph (b) refers to the 2009 Rules. Paragraph 7(5) provided for directions and orders of the VAT Tribunal made prior to the commencement date to remain in force as if made by the First-tier Tribunal. Paragraph 7(6) provided for the continued running of unexpired time periods.

25. The 2009 Rules differed in material respects from the 1986 Rules. They were as much a fresh start as had been the CPR, when they replaced the RSC. Rule 2 created a bespoke overriding objective, in the following terms:

> **"Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> 2.—(1) The overriding objective of these rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

26. Rule 26 of the 1986 Rules was replaced by Rule 38, as follows:

"Setting aside a decision which disposes of proceedings

38.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party of a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party's representative, was not present at a hearing related to the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

(4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable."

Rule 5(3)(a) gives the Tribunal power to extend or abridge time limits.

27. Conspicuous by its absence from the 2009 Rules is any equivalent of Rule 26(4) of the 1986 Rules. It is a reasonable inference that, however salutary it may have been

in the eradication of a perceived abuse in 1986, it was regarded as an undesirable fetter on the ability of the First-tier Tribunal to achieve the overriding objective in and after 2009.

JURISDICTION – ANALYSIS

28. HMRC's case, which was broadly accepted by the Judge, may be summarised as follows:

    i) The combined effect of Rule 26(4) of the 1986 Rules, ATEC's failure to attend the hearing of its Rule 26(3) application on 29th January 2009, coupled with the February Decision's rejection of that application, meant that the VAT Tribunal had concluded the proceedings constituted by ATEC's consolidated appeals, within the meaning of paragraph 1(2)(b) of Schedule 3 to the TTFO, by February 2009.

    ii) There were therefore no "current proceedings" within the meaning of paragraph 1(2) of Schedule 3 on the commencement date.

    iii) There was therefore nothing about which, as a mere creature of statute, the First-tier Tribunal could adjudicate, at any time on or after the commencement date.

    iv) The Judge added that the question whether the November Decision should be set aside had been adjudicated upon by the February Decision, so that the matter was in any event *res judicata*, applying the following dictum of Lord Denning MR in Fidelitas Shipping Co Ltd v. Exportchleb [1966] 1 QB 630 at 643:

    > "The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances."

29. Simple and attractive though that analysis may be, I consider that it must be wrong. My reasons follow. The starting point is to have regard to the general architecture of the statutory scheme by which the jurisdiction and functions of the VAT Tribunal were replaced by those of the First-tier Tribunal. It was, plainly, designed as a lock stock and barrel once and for all transfer with effect from 1st April 2009. The VAT Tribunal was abolished altogether on that day, and left with no residual functions for the purposes of the orderly run-off of its activities. It simply ceased to exist for any purpose. The evident purpose was that all business, including unfinished business of any kind would, from and after 1st April 2009, be discharged by the First-tier Tribunal. Any application relating to VAT proceedings which had been initiated before the VAT Tribunal was to be dealt with by the First-tier Tribunal, on and after the commencement date. Even an application part-heard by the VAT Tribunal on the commencement date would be concluded before the First-tier Tribunal, the same individual tribunal members sitting throughout: see paragraph 7(2) of Schedule 3 to the TTFO.

30. For most purposes, the definition of "current proceedings" in paragraph 1(2) of Schedule 3 to the TTFO unambiguously achieves that effect in relation to proceedings pending before the VAT Tribunal on the effective date. By "pending" I mean appeals started and not determined, either by a decision on the merits or by a dismissal on procedural grounds, such as occurred in the present case.

31. Nonetheless a literal interpretation of that definition gives rise to difficulty, where previously pending proceedings have been determined (either on the merits or for procedural default) but with a propensity to come back to life at a later date. Circumstances in which that could occur would include the following:

    i) A decision on the merits, followed by an appeal in which the decision was set aside and the original case directed to be re-heard.

    ii) The dismissal of proceedings for want of prosecution or other procedural default by a decision of the VAT Tribunal, followed by a setting aside of that decision on appeal.

    iii) The dismissal of proceedings in the absence of a party, followed by a successful application at first instance to set aside that decision on the ground of the party's non-attendance.

    If, in each of those examples, the event which re-constituted the proceedings at first instance occurred after the commencement date, then a strictly literal interpretation of paragraph 1(2) of Schedule 3, as at the commencement date, would lead to the result that there were no "current proceedings" as at the commencement date.

32. In my judgment the definition of "current proceedings" must be interpreted so as to accommodate within the jurisdiction of the First Tier Tribunal all applications and other functions which relate to or arise out of proceedings which were before the VAT Tribunal, and which, but for the transfer, would have fallen to be dealt with by it. In particular it must accommodate applications and other functions in relation to proceedings which, although apparently concluded as at the commencement date, had a propensity for revival, however remote.

33. It is tempting to think that proceedings may be regarded as not concluded after a dismissal, only for as long as there remains some time limit running, either for appeal or for an application to restore them at first instance, but this apparently tidy solution founders upon the undoubted power of the first instance or appeal tribunal (or court) to give permission to apply out of time, which is, very occasionally, exercised long out of time in very special circumstances.

34. Mr Scorey for ATEC submitted that the solution lay in treating as included within "proceedings" within the meaning of paragraph 1(2) of the Third Schedule of the TTPO not merely proceedings started by originating process, but any *lis* between the parties constituted, for example, by the making of an application, such as the application made by ATEC on 23rd March 2009. In my judgment that analysis would lead to unintended results. For example, whereas an application made on 29th March 2009 to reinstate proceedings dismissed in a party's absence would constitute current proceedings and thereby trigger the transitional provisions, an application for exactly the same relief made on 2nd April 2009 would not. If the dismissal had occurred

during the last week of March, this would impose a bizarre disability on a party which had not acted with lightening speed in seeking to protect its position. Furthermore, to treat the application of the transitional provisions as dependent upon whether a relevant application was made before or after the commencement date would also lead to the unintended consequence that, whereas on an application made on 29th March and heard after the commencement date, the First-tier Tribunal would have discretion to apply the 1986 Rules, it would have no such discretion in relation to an identical application made two days later. The reason for the conferral of that discretion has nothing to do with the date of the application, but everything to do with the fact that the application relates to proceedings which, even if apparently determined before the commencement date, were proceedings which had been started and carried on by the parties under the regime constituted by the 1986 Rules.

35. In my judgment the First-tier Tribunal had jurisdiction to entertain ATEC's application, regardless whether it was made before or after the commencement date. In fact, faced with forensic difficulties arising out of the fact that the 23rd March Application was made at a time when, pursuant to Rule 26(4) of the 1986 Rules, ATEC had, at least *prima facie*, no entitlement to make it, Mr Scorey made a belt and braces fresh application for the same relief at the hearing on 9th July 2009, although the Judge made no reference to it in his Decision. The reason why the First-tier Tribunal had jurisdiction to entertain the application was that it related to proceedings originated before the commencement date which the application, were it to succeed, would have revived. It was, therefore, an application in relation to current proceedings within the meaning of Schedule 3.

36. I recognise that this requires an other than strictly literalist interpretation of paragraph 1(2) of Schedule 3, but it is the only one which seems to me to give effect to the obvious intent of the transitional provisions, viewed as a whole, in the context of the general architecture of the scheme. There is nothing unique about the notion that something recognised by the law may seem to have disappeared, subject to a prospect of being revived, so that it continues in the meantime to have what in argument was described as a ghostly existence. A lease which has been determined by forfeiture is a well known example, for as long as there remains a prospect that relief from forfeiture may be granted at a future date. Relief once granted does not create a new lease, but revives the old one as if it had never been determined.

37. The obligation of the First-tier Tribunal was therefore to apply the 2009 Rules in relation to that application, subject to a discretion under paragraph 7(3) of Schedule 3 to disapply those rules, or apply one or more provisions of the 1986 Rules. There was therefore no automatic disentitlement preventing ATEC from applying. Rule 26(4) had been revoked, although the First-tier Tribunal had a discretion to apply it nonetheless. That discretion was to be exercised so as "to ensure that proceedings are dealt with fairly and justly", a matter to which I shall shortly return.

38. As to the second ground upon which the Judge concluded that he had no jurisdiction, I have not been persuaded that the question whether the November Decision should be set aside had become *res judicata*. That well known principle has in recent times been re-evaluated, and identified as a principle (rather than strict rule) designed to prevent abuse of process: see Johnson v. Gore Wood & Co [2002] 2 AC 1, at page 31, where Lord Bingham said this:

> "It is, however wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Even the earlier citation from Lord Denning relied upon by the Judge expressly acknowledged that the *res judicata* principle may be subject to exceptions in special circumstances.

39. In the present case, ATEC's consolidated appeals have been dismissed for want of prosecution on an application about which the company's governing mind and will (i.e. that of its directors) had been given no notice and as to the outcome of which they were not informed until late February 2009. Furthermore, they were equally unaware of Mr Ross's letter to the VAT Tribunal of 21st November 2008, of the Tribunal's decision to treat it as an application under Rule 26(3), of its hearing date, or of the need to attend at the hearing on 29th January. All those matters were dealt with (or rather mis-conducted) by a professional representative who was, at the very least, incompetent and negligent in the highest degree. Once ATEC's directors were appraised by the newly appointed professional representative of what had occurred, they lost no time in doing the only thing that could be done to attempt to rescue the important and potentially valuable appeals from oblivion.

40. While I bear fully in mind that the need for finality in litigation, and the need to avoid a party being twice vexed with the same matter, is as important in VAT appeals as in litigation generally, I do not regard ATEC's March 2009 application to set aside the November Decision, or the belt and braces application made at the hearing in July 2009 as abusive, in all the circumstances.

DISCRETION

41. I must first deal with the Judge's view that, even if he had jurisdiction, he would not have granted the relief sought. His analysis, set out at paragraphs 34 to 39 of the Decision, was that, on any view, the 2009 Rules did not apply, although he noted in passing that, if they had applied, he might have had authority to set aside the November Decision pursuant to Rule 38. He then addressed the question whether he had some residual authority to put things right so as to avoid a breach of natural justice (see paragraph 36) and concluded, in accordance with Al Mehdawi v. Secretary of State for the Home Department [1990] 1 AC 876 that a party who had lost the opportunity to have his case heard through the default of his own advisers cannot complain of a breach of natural justice. If that had been the only basis available for granting the relief sought by ATEC, the Judge's decision not to do so would have been unassailable.

42. Nonetheless, I consider that the Judge was wrong, for the reasons which I have already given, to conclude that the 2009 Rules had no application to the matter before

him. They were, at least *prima facie* the applicable rules, subject only to a discretion under paragraph 7(3) of the Third Schedule to disapply them, or to apply parts of the 1986 Rules. It is therefore necessary for me to conduct that exercise for the first time.

43. The first question, as I see it, is whether it is in the interests of fairness and justice to disapply all or part of the 2009 Rules, in favour of all or part of the 1986 Rules, and Rule 26(4) in particular. In favour of doing so is the undoubted fact that the parties had during the relevant period been obliged to conduct themselves in connection with the consolidated appeals in accordance with the 1986 Rules. If HMRC had, after the February Decision, done anything to make their task significantly harder on an assumption that Rule 26(4) put an end to the matter (for example by destroying or parting with possession of relevant documents), then this consideration would have been of very powerful force. There is however no evidence, or suggestion, that HMRC did any such thing, and it was only slightly more than one month after the publication of the February Decision that ATEC renewed its application.

44. I consider that there are powerful countervailing considerations, which I infer were also those which inclined the framers of the 2009 Rules not to include anything similar to Rule 26(4). In short, it operates automatically, regardless of the particular circumstances of any special case. It would, for example, prohibit a renewed application where the applicant had been struck down by a bus on his way to the hearing under Rule 26(3), and therefore regardless of the question whether his absence from the hearing was, or was not, his own fault. I assume for that purpose (but without deciding) that Rule 19(v) of the 1986 Rules (which enabled the VAT Tribunal to waive any breach on non-observance of the rules on such terms as it thought just) would be of no assistance, because Rule 26(4) imposes no express obligation on a party to attend. It merely imposes a draconian consequence if he does not. Neither of the parties before me suggested that Rule 19(v) would have been of any assistance to ATEC.

45. In my judgment it would be a retrograde step, contrary both to the overriding objective and to general considerations of fairness and justice, to apply a rule like Rule 26(4) as a matter of discretion, unless effectively compelled to do so, for example where a party not in default had relied upon it to his detriment. Accordingly, I shall apply the 2009 Rules to the exercise of discretion, paying due regard to the fact that, as a matter of history, Rule 26(4) was triggered, but not bound by its consequences.

46. Rule 38 of the 2009 Rules enables the First Tier Tribunal to set aside a decision which disposes of proceedings, and re-make that decision if it considers that it is in the interests of justice to do so and (*inter alia*) a party, or a party's representative, was not present at a hearing related to the proceedings. Rule 38(3) imposes a 28 day time limit, but Rule 5 enables the First-tier Tribunal to extend time in an appropriate case. In the present case, ATEC applied almost exactly 28 days after learning of its predicament from its new advisers, albeit more than 28 days after the February Decision had been notified to Mr Ross.

47. An important question in the exercise of discretion is the extent to which it matters that the grave procedural defaults which led both to the November and February Decisions were the fault of Mr Ross rather than ATEC's directors, and that those directors were, until late February 2009, entirely unaware of what had previously been

done or omitted in the company's name. The law provides no clear answer to that question.

48. In the context of the obtaining of relief from sanctions under the Civil Procedure Rules, it is relevant (in mitigation of the applicant's default) that the relevant failure to comply was caused by the party's legal representative, rather than by the party himself: see CPR 3.9(1)(f). By contrast, in Mullock v. Price [2009] EWCA Civ 1222, the Court of Appeal declined to apply the same consideration in the context of an application to set aside a default judgment under CPR 13.3(2), relying upon a dictum of Peter Gibson LJ in Training in Compliance Ltd v. Dewse [2001] CP Rep 46, at 66 that:

> "Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to the fact, though it does not follow that this would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

In Mullock v. Price however, the defendant had known for some two years that a default judgment had been obtained against him, and plainly failed, by himself or by his legal adviser, to apply to set aside the judgment promptly, as required by Rule 13(2).

49. The present case is about dismissal for breach of directions and want of prosecution, rather than the setting aside of a default judgment, and is not in any event governed by the CPR. To the extent that an analogy with the CPR is appropriate, I regard the present case as concerned more with relief from sanctions than with default judgments. The dismissal of the consolidated appeals was in the November Decision clearly applied as a sanction for failure to serve witness statements on time, and for want of prosecution generally.

50. Against setting aside the November Decision are the following considerations:

i) There was undoubtedly a history of non-compliance with the directions for preparation of the consolidated appeals.

ii) There was a repeated failure to attend hearings before, in and after November 2008, and it is now May 2010.

iii) ATEC's directors may fairly be criticised for accepting without inquiry Mr Ross's oral assertion of competence in relation to tax appeals and, at the same time, for failing to do more than obtain occasional oral assurances from him thereafter that all was in hand. This was, as the Judge observed, an important appeal about a very large sum of money in which allegations of dishonesty had been made against the company and, by implication, its directors.

iv) Mr Ross was the company secretary, albeit that he did not misconduct the appeals in that capacity, and the company was in any event affected (or perhaps afflicted) by his conduct as its agent.

v) HMRC took the proper and available steps to try and enforce compliance with the directions, to be met with non-attendance by the company at all relevant hearings.

51. In favour of setting aside the November Decision there are in my judgment the following considerations:

i) The appeals concern what is, for this company, a very large sum of money, and allegations affecting both its and its directors' reputations. If permanently disabled from pursuing the appeals, it will have no realistic remedy for a very large financial loss, or be able to clear its or its directors' names, from an allegation of, and administrative action based on, alleged tax fraud. It is not suggested that Mr Ross's professional indemnity insurance would come near to answering for ATEC's loss.

ii) By contrast, HMRC will suffer no comparable prejudice if the November Decision is set aside, other than wasted costs, which ATEC is prepared to pay on an indemnity basis, and the need to prove a case in fraud or gross negligence, from the cost and effort of which the November Decision might fairly be regarded as something of a windfall deliverance.

iii) The preponderance of blame for the circumstances which led to the dismissal of the appeals, and to the February Decision, lies fairly and squarely with Mr Ross, who (whether dishonestly or not does not matter) concealed the company's extreme predicament from its directors.

iv) The company lost no time in seeking to obtain the appropriate relief, once appraised of its predicament by its new advisers, and has, in the meantime, continued to prepare for a hearing, against the possibility that the November Decision might be set aside. It has therefore not merely promised, but taken some steps to demonstrate, repentance.

52. Taking into account and weighing all those considerations, I have concluded on a narrow balance that this is a case in which fairness and justice, and the achievement of the overriding objective, is best served by granting ATEC's application, and setting aside both the November and February Decisions. I therefore allow this appeal.

Mr Justice Briggs

Release date: 27 May 2010