[2012] UKUT 105 (TCC)

Appeal number: FTC/66/2010

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ERF Limited **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE MANN
JUDGE CHARLES HELLIER

Sitting in public in London on 16th, 17th & 18th November 2011

Paul Harris QC and **Ewan West** (instructed by **Clifford Chance LLP**) for the **Appellant**

Nicola Shaw and **Michael Jones** (instructed by **General Counsel & Solicitor to HMRC**) for the **Respondent**

Introduction

1. This is an appeal from the First Tier Tribunal (Judge Roger Berner and Mr Tym Marsh) given on 25th May 2010. It relates to VAT assessments and penalties levied on the appellant ("ERF"), and in particular raises two issues:

    (a) Whether an assessment was within the time period allowed for assessments where there had been concealment and dishonesty on the part of the taxpayer.

    (b) Whether the penalties levied ought to have been mitigated more than they were. This is a point about whether a base sum of tax used to assess mitigation ought to be one which reflected netting off of overpayments or not.

2. There is also a complaint that the taxpayer did not have an adequate opportunity to make submissions about costs below.

3. There is a large amount of factual detail in this case. The full detail of the first instance decision can be found in online reports (neutral citation [2010] UKFTT 238), and there is only a limited complaint that the findings of primary fact were wrong, so those facts can be taken as read as they appear in that earlier decision unless the contrary appears below. The facts set out in this decision are just those sufficient to enable the relevant points to be made clear and decided. For the sake of convenience we refer to the relevant tax authority as HMRC, even though that entity technically came into existence only later.

The relevant statutory provisions relevant to the first point

4. The VAT legislation contains limitation periods restricting the time within which HMRC can raise assessments. Section 73 of the VAT Act 1994 permits HMRC to raise assessments where it considers that returns are wrong and provides time limits within which such an exercise has to happen. So far as material, it reads:

> "73(1) Where a person has failed to make any returns required under this Act … or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him …
>
> …
>
> (6) An assessment made under subsection (1) … of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following -
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> (a) 2 years after the end of the prescribed accounting period, or
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> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, come to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1) … another assessment may be made under that subsection, in addition to any earlier assessment …"

5. Section 76 provides for the assessment of penalties. Section 77 provides for some further time restrictions and a "supplementary" assessment:

> "(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76 shall not be made:
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> (a) more than 3 years after the end of the prescribed accounting period or importation or acquisition concerned, or
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> (b) In the case of an assessment under section 76 of an amount due by way of any penalty which is not among those referred to in subsection (3) of that section, 3 years after the event giving rise to the penalty.
>
> (2) Subject to subsection (5) below, an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3) of that section may be made at any time before the

> expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined.
>
> …
>
> (4) Subject to subsection (5) below, if VAT has been lost—
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> (*a*) as a result of conduct falling within section 60(1) or for which a person has been convicted of fraud, or
>
> (*b*) in circumstances giving rise to liability to a penalty under section 67,
>
> an assessment may be made as if, in subsection (1) above, each reference to 3 years were a reference to 20 years.
>
> …
>
> (6) If, otherwise than in circumstances falling within section 73(6)(*b*) or 75(2)(*b*), it appears to the Commissioners that the amount which ought to have been assessed in an assessment under that section or under section 76 exceeds the amount which was so assessed, then—
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> (*a*) under the like provision as that assessment was made, and
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> (*b*) on or before the last day on which that assessment could have been made,
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> the Commissioners may make a supplementary assessment of the amount of the excess and shall notify the person concerned accordingly.

6. In this case it is admitted (in the circumstances appearing below) that the fraud extension applies so that the 3 year long-stop date in subsection 77(1) is replaced by the 20 year date in subsection (4). The assessments in question were made more than 2 years after the end of the prescribed accounting period, but within the 20 year long-stop fraud period, and the question in this case becomes one as to whether HMRC raised the relevant assessments within one year after facts came to their knowledge sufficient to justify their being made for the purposes of section 73(6).

The essential facts and findings

7. The business of ERF was the manufacture of trucks until it ceased business (as a result of the matters underlying this appeal) in 2003. From 1998 its financial controller was Mr Stephen Ellis. One of his responsibilities was the accounting activities of the ERF group of companies. After a change of control of the group in 2000 some discrepancies came to light between the purchase ledger and the purchase ledger control account. In 2001 it was found to be impossible to reconcile those discrepancies, and an investigation was launched, in the context of which Mr Ellis was suspended. By the beginning of August 2001 it became apparent that there was a deficiency of approximately £100m in the balance sheet of ERF as at 30th June 2001. In due course it transpired that the manipulations of Mr Ellis had led to understatements of VAT due in some periods, or unjustified VAT repayment claims being made in other periods, so that the amount of VAT for which ERF ought to have accounted was very seriously understated. There were some months when it was overstated, but in number and amount they were fewer. The resulting VAT deficit over the period 1996-2001 was ultimately found to be some £13.8m. As a result of this debt ERF ultimately stopped trading, though its controllers procured that its VAT debt was fully paid despite its apparent insolvency.

8. The VAT position as it unfolded was disclosed from time to time by ERF. In August 2001 ERF told HMRC that it owed an additional £3.8m of VAT for the period from January to May 2001. Thereafter there were a number of meetings between ERF and HMRC (the latter represented by a Miss Stocker and by a Mr Blocksidge). In December 2001 BDO (accountants instructed by ERF) told HMRC that they were compiling a report into the failings and requested a meeting to make full disclosure of VAT errors. The meeting took place on 15th January 2002, and BDO's report was

presented to Miss Stocker and Mr Blocksidge. In the jargon of this case this report was called BDO/1. It disclosed overclaimed VAT of approximately £10m during the period 1st July 1997 to 30th June 2000, and said that Mr Ellis acknowledged responsibility for the errors but denied dishonesty.

9. At the end of the next month, on 26th February 2002, BDO sent through an amended version of BDO/1 ("Amended BDO/1"). This was the result of further checks and verification, and it contained a new schedule of questionable journal entries - questionable in the sense that it was questionable whether they were included in the relevant VAT returns. Appendix A contained the "Confirmed VAT errors" identified by BDO, and it formed the basis for an assessment made on 8th April 2002. On that date Miss Stocker raised an assessment in a sum of just over £2m. What Miss Stocker did was to start with Appendix A, which listed "errors" across various periods, and then took those periods which were within 3 years and raised assessments in respect of those three periods. She did that because she thought that the 3 year long-stop period identified above would apply, and had not been trained to go back more than that. Dishonesty was a matter for others.

10. HMRC's Law Enforcement section had been involved since August 2001 in order to consider whether criminal offences had been committed. At least one officer in that section thought there was some evidence of dishonesty. By August 2002 a Mr Harold had become involved on this front. He was more skilled in dealing with situations where fraud was, or may have been, involved. On 21st August 2002 there was a meeting involving inter alia BDO and him, in which it was made clear that something called the New Approach should be offered, and BDO made it clear that there was no dishonesty, or at least that in their view the question was still an open one.

11. The New Approach is an important matter in this case. It was established to provide a cost-efficient and time-efficient means of investigating potential VAT frauds. As recorded by the Tribunal, its purpose was to put in place a procedure under which the taxpayer is asked to assist in establishing the amount and extent of the arrears, and the reason for them, and it encourages the taxpayer's co-operation by holding out significant reductions in penalties for dishonest evasion and the removal of possible criminal proceedings. It is significant that in due course ERF, through BDO, sought to avail itself of this procedure.

12. On 3rd September 2002 solicitors acting for ERF requested an investigation under the New Approach. Mr Harold responded in correspondence by pointing out that there were irregularities and that an investigation would be conducted with a view to the imposition of a civil penalty

> "… for fraudulent conduct, should our suspicions be confirmed."

His letter enclosed an information sheet on the New Approach and possible reductions in penalties.

13. This was a forerunner to a meeting on 3rd October 2002 attended by Mr Harold, Miss Stocker (as note taker) and representatives of ERF and BDO. The Tribunal made some findings about this meeting which are challenged in this appeal, so we will set out part of the relevant paragraph here:

> " 80 … Mr Harold is recorded as having said at the meeting that the reason for the investigation was that the actions of Mr Ellis had tied ERF into a series of dishonest acts and omissions. He also advised the meeting that he considered the acts and omissions of Mr Ellis were dishonest rather than reckless and that Customs would have to issue a penalty for dishonest conduct. In cross-examination Mr Harold explained, and we accept, that he was here referring to the common ground between himself and ERF that Mr Ellis had acted dishonestly in how he had managed the accounting affairs of ERF. At that point it

> was still being maintained that there were no dishonest VAT omissions. At this point it is clear, and we find, that Mr Harold had no more than a strong suspicion as to the dishonesty in relation to VAT."

14. It is ERF's case on this appeal that Mr Harold had actually formed an opinion to the effect that Mr Ellis was dishonest in relation to VAT, and that these findings are erroneous. The significance of that is said to be that this started the clock running under section 73 (if it had not already started running), so that HMRC had one year to raise an assessment based on the dishonesty. The 2004 assessment was outside that year; therefore it was not properly raised. We shall come back to deal with that point, and in the course of doing so will set out some more details of the relevant facts.

15. At this meeting it was stated on ERF's side that ERF would be submitting a further report. They wished to investigate the actions of Mr Ellis more deeply, and Mr Harold agreed to send BDO a copy of some schedules which had been produced by HMRC. In a letter sent the next day ERF accepted that it was a possible interpretation of events that Mr Ellis had been reckless or dishonest as to the accuracy of some of the terms, but it was not accepted by ERF at this stage that he had been dishonest.

16. The result of ERF's (BDO's) further investigations was a further BDO report, (BDO/2) submitted to HMRC at the end of January 2003. This report acknowledged the dishonesty of Mr Ellis and revealed culpable arrears of £13.37m. A meeting took place after this report was submitted at which Mr Harold held and expressed the view that he would be content to take the disclosure of BDO/2 as to the amounts of VAT due without any further work, but ERF/BDO indicated that the figures were still not correct and would be reduced by yet more work. In those circumstances Mr Harold formed the view that it would be unreasonable not to allow further investigation to be done.

17. This meeting is also said to be significant in this case, because it is said that if HMRC did not have it before, by the time of this meeting HMRC (in the form of Mr Harold) knew of both the dishonesty of Mr Harold and of the amounts of VAT (and the periods) for which HMRC could now assess. Accordingly, if the clock under section 73 had not already started running, the one year period now started running with the effect that it had run down by the time of the March 2004 assessment, thus barring that assessment. Again, we will have to return to some of the detail relating to this meeting.

18. The further investigations of BDO resulted in a final report (BDO/3) which was sent to Mr Harold on 29th July 2003. It described itself as a Supplementary VAT Report, and its bottom line, in numerical terms, was set out in Appendix B. That Appendix showed that, far from the liabilities identified in BDO/2 being reduced, BDO had discovered further culpable errors in all but two of the periods in question (07/97 to 12/01), thereby increasing the apparent liabilities from the £13.37m in BDO/2 to £13.8m. This was a net figure after taking into account both over-claimed input tax arising in some periods, and overpayments made in others. It appeared that in some periods Mr Ellis had made deliberate overpayments - not, apparently, to make good previous wrongful re-claims, but to give himself some headroom for future claims. Mr Harold formally accepted the conclusions of BDO/3 at a meeting on 23rd July 2003.

19. The assessments that were ultimately made in March 2004, and which are the subject of this appeal, were made once HMRC had accepted BDO/3, and were based on it, albeit with some adjustments.

The issues before, and the findings of, the Tribunal

20. In relation to the first limb of this appeal, the contention of ERF below, as in this Tribunal, is that the March 2004 assessment was out of time because it was more than one year after HMRC knew facts which, in their opinion, were sufficient to justify the making of the assessment. The Tribunal identified this as the question in paragraph 100 of its decision. Having considered the principles arising from *Pegasus Birds Ltd v Customs & Excise Commissioners* [1999] STC 95 it set about deciding which of the various officers had the relevant opinion for the purposes of section 73, and when the relevant facts were first known to them and other officers. The conclusions to which it came (so far as germane to the issues on this appeal - we leave out findings in relations to matters which were not argued before us) can be summarised as follows:

> (i) So far as the April 2002 assessment was concerned, the relevant officer who decided to make the assessment was Mr Blocksidge.
>
> (ii) In relation to the 2004 assessment the relevant officers who decided to make the assessment were Mr Blocksidge and Miss Stocker - the former was the assessing officer, and the latter was a counter-signatory of the assessment. It was not Mr Harold.
>
> (iii) So far as the facts on which the 2004 assessment was based, the Tribunal concluded that the relevant facts on which it was based were derived from BDO/3, together with other facts, including the making of the earlier assessments, which caused certain adjustments to Appendix B of BDO/3 for the purposes of calculating the assessment.

21. It then turned to the question which it summarised in paragraph 112, which was whether there was an earlier time, more than one year before the assessment, when HMRC had sufficient evidence to justify the assessment, and whether it was reasonable or perverse to delay making it, and dealt with various suggestions propounded by ERF as to when that earlier time was. In that connection the Tribunal found:

(i) An assessment based on dishonesty would not have been justified in February 2002 (the date of an assessment not germane to this appeal).

(ii) No view of dishonesty had been taken by July 2002.

(iii) Mr Harold (whose job it was to consider dishonesty) had not reached a conclusion on dishonesty on 3rd October 2002, and had an open mind. ERF did not accept Mr Ellis had been dishonest and wanted to investigate more deeply, and Mr Harold confirmed he would await a further disclosure report.

(iv) Mr Harold learned about Mr Ellis's admissions of dishonesty when he received BDO/2, which was in early February 2003, and that this amounted to knowledge of dishonesty for the purposes of making a claim based on dishonesty.

(v) Even at this time HMRC did not have the full picture which would justify (or require) an assessment because there was uncertainty over the figures, because further work was to be done by BDO. The actual finding in this respect is important, so we set it out in full:

> "124. We accept that, on receipt of BDO/2, Customs had evidence of fact of the dishonesty of Mr Ellis, and through him the dishonesty of ERF. The question then is whether that could fairly be regarded as providing the last piece of the puzzle in relation to the unassessed periods in Appendix A of Amended BDO/1, which at the time of the delivery of Amended BDO/1 had been described as confirmed VAT returns errors resulting from journal entries. In our view this was not then the last piece of the puzzle. It would have been if Amended BDO/1 had been the last word on the figures. But it was not. The instigation of the New Approach process, and the further enquiries and investigations on the part of BDO that this entailed, meant that the figures in Amended BDO/1 could no longer reasonably be relied upon by Customs in the making of an assessment. Indeed, Amended BDO/1 had been expressly superseded by BDO/2 (albeit that BDO/2 was expressed as a draft report). The fact of confirmation of dishonesty was a piece of a puzzle, but it was a piece of a different puzzle than the one that had Amended BDO/1 as another piece. The receipt of the fact confirming dishonesty did not complete the puzzle so as at that stage to provide Customs with sufficient evidence to justify the making of an assessment, because part of the requisite factual evidence, namely the figures, had become uncertain, and remained outstanding, as a result of the further work being carried out by BDO. For these reasons we find that it was not wholly unreasonable or perverse for Customs not to have raised assessments for the remaining periods in Appendix A to Amended BDO/1 on receipt of the confirmation of dishonesty in BDO/2."

(vi) While it was true that Mr Harold would have been content to treat BDO/2 as being disclosure of amounts (and dishonesty) without the need for further work, he also thought it would be unreasonable not to have allowed a

further investigation. It was neither perverse nor unreasonable for HMRC to wait until the further assessment was complete.

22. In the light of these findings the Tribunal concluded that the March 2004 assessment was made within the statutory time limits because it was made within one year of HMRC's relevant knowledge being complete, and that its decision not to make earlier decisions was neither perverse nor unreasonable.

The appeal on the limitation point

23. Mr Paul Harris QC criticised the decision of the Tribunal by setting out some legal principles and reiterating ERF's case which was that there were two points in time at which HMRC had knowledge of facts which justified the making of the assessments, both of which fell outside the period of one year before the March 2004 assessment. He accepted that on the facts he needed to establish knowledge both of the amounts owed (the size of an assessment that might be made) and that the previous conduct of Mr Ellis which led to the underpayment of VAT (or wrongful claims for repayment of VAT) was dishonest, and said that those conditions could be seen to exist at one or both of two points of time. The first was the October 2002 meeting, and the second was on receipt of BDO/2 in February 2003 (or the February 2003 meeting itself). On both of those occasions (or alternatively on one or the other of them, which is good enough for Mr Harris) Mr Harold (who was the relevant mind for these purposes) knew enough under both heads to justify the raising of an assessment. Insofar as the Tribunal held that Mr Harold did not have knowledge of dishonesty in October 2002, it was wrong, because the evidence (including that of Mr Harold) clearly established that he did; and insofar as it held that HMRC did not know enough about quantum in

February 2003, it was again wrong because Mr Harold accepted BDO/2 (which provided quantum).

24. The legal principles involved can be seen from the following cases.

25. The principal authority is *Pegasus* (supra). In it Dyson J found 6 principles, which were relied on by the Tribunal below in this case and which were not challenged, or which were adopted as correct, by the parties before us.

> "**The legal principles to be applied**
>
> 1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995]

> V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act." (pp101-102)

Dyson J went on to consider whose opinions are significant for these purposes, and said (at p 102):

> "The person whose opinion is imputed to the commissioners is the person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment. The knowledge of all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners."

26. The case went to the Court of Appeal where the appeal was dismissed shortly and for the reasons given by the judge, albeit without expressly approving the parts of his judgment just cited.

27. Mr Harris also relied on *Re: Lazard Brothers Co Ltd* Tribunal Decision No: 13476, which he said demonstrated that waiting to make a better assessment is not a reason for not making an assessment if HMRC could do so. The facts of that case were such that at the relevant time HMRC had all the relevant facts required for making an assessment, and a schedule of the amounts to be assessed, some time before the assessment. It was conceded that the Commissioners could have made an assessment before they did, but they chose to try to form a better judgment by asking the taxpayer to carry out calculations with a view to reaching a negotiated or agreed assessment. A close study of the facts demonstrates that all that happened at the later stage was the calculation by the taxpayer's representative of sums due based on material that the Commissioners already had. The Tribunal in that case held that the ability to make

the earlier assessment started the clock running, so a later assessment, based on the additional material, was out of time. Mr Harris says that that demonstrates that waiting to make a better assessment is not a good reason for not assessing earlier. In our view it does not say that, and is not directly applicable to the case before us. In that case all the evidence the Commissioners had at the earlier stage was material which could have been used to make precisely the same assessment as was ultimately made, and the reasons for not making the assessment earlier were not because of any uncertainty as to any factual matter. In our view it does not assist the debate in the present case. For the reasons appearing elsewhere in this decision, that was not the position in relation to the affairs of ERF.

28. Mr Harris's arguments did not turn on a suggestion that the assessment ultimately made could have been made earlier in all its particulars. On the facts he could not make out such a case. The figures appearing in the assessment were different in respect of practically all periods from the figures that had appeared before. Rather, Mr Harris's case was that there were two prior points of time at which HMRC could have raised an assessment, and should have raised an assessment. There was provision in the legislation for making adjustments, if appropriate, later. The failure of HMRC to make such assessments was *Wednesbury* unreasonable within Dyson J's principle 5. He maintained that on the Tribunal's own findings, when coupled with what the evidence plainly contained, he could make out his case at either of those two dates referred to above (October 2002 and February 2003). If that was right, then the final assessment was out of time.

29. Before considering this point further it is necessary to note one important point about the way in which Mr Harris puts this case and how it does, or does not, fit in with Dyson J's 6 principles.

30. At one level it might be thought that Dyson J's principles applied in relation to the actual assessment made in the case in hand. On this footing the assessment referred to in principle 5 would be the actual assessment ultimately made, not an earlier, and different, assessment. If this were the approach then there would be a short answer to the present case. Any actual assessment has to be based on properly constituted figures for the periods in question. The actual assessment in the present case was based on figures that only became apparent as a result of BDO/3, and contained the figures from that document (save for one period). For almost all of the periods the figures were different from those which had appeared in previous reports, and no-one suggested that the actual figures that were assessed could have been reached any earlier than BDO/3. That being the case, it is plain that HMRC could not have raised these assessments earlier than the date of receipt of that document, so it would not be possible to mount a challenge under principle 5 on the footing that a decision not to raise <u>that</u> assessment was unreasonable before receipt of the report.

31. However, Mr Harris's challenge is not based on that premise. His challenge is based on the premise that a different assessment could and should have been made earlier, on one or other of the two occasions mentioned above. On those occasions HMRC had different quantifying information available to it in the form of the earlier reports, and the earlier assessments should have been the basis of an assessment which would, could and should have reflected those figures. On each of those occasions the jigsaw referred to in *Pegasus* principle 4 was complete.

32. The tribunal below said at paragraph 100 that the only "relevant question was whether the assessments had been made within one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, came to their knowledge". Miss Shaw said this was the right question. The Tribunal below addressed Mr Harris's analysis. This is apparent from the Tribunal's paragraph 112.

> "112. We now turn to consider whether, as Mr Harris argued, there was an earlier time at which Customs had sufficient evidence on which an assessment could be justified, and whether it was wholly unreasonable or perverse for Customs at any of those times to have delayed the making of the assessment, so that if the earlier assessment was made more than one year after that time it would be out of time. Mr Harris submitted that there were a number of occasions on which Customs had sufficient evidence to justify the making of an assessment. We consider each of those submissions in turn."

HMRC through Miss Shaw accepted that this again was the correct question. If HMRC succeed on Mr Harris's approach they plainly succeed on this part of the appeal. We therefore deal with this point, and do not consider whether Dyson J's point 5 requires a different approach.

33. So returning to the debate, Mr Harris accepted that in order to succeed he needed to establish that at the date he was contending for he needed to demonstrate that the Revenue had two essential pieces of the jigsaw puzzle such that it became *Wednesbury* unreasonable not to assess as at that date. The two essential pieces were the dishonesty of Mr Ellis (necessary to go back more than 3 years) and the figures to be assessed for those older periods. His first candidate date was 3rd October 2002.

34. The Tribunal found that as at that date Mr Harold (whose job it was to deal with dishonesty, and whose views on the point ought to be attributed to HMRC) had not reached an opinion on dishonesty at this stage. In paragraph 121 of the decision the Tribunal held he had not reached a conclusion on this point and retained an open mind

and would await a further disclosure report. They also held in paragraph 124 that the figures were not clear because BDO/1 had been overtaken by the offer and acceptance of the New Approach:

> "The instigation of the New Approach process, and the further enquiries and investigations on the part of BDO that this entailed, meant that the figures in Amended BDO/1 could no longer reasonably be relied on by Customs in the making of the assessment."

35. Mr Harris sought to challenge the finding of Mr Harold's views on dishonesty by saying that it was contrary to the plain evidence as it appeared in the transcript. It was, he said, apparent from what Mr Harold said that he had indeed made up his mind that Mr Ellis was dishonest.

36. A note of the meeting on 3rd October, made by HMRC, contains a suggestion of dishonesty on the part of HMRC, while recording Mr Ellis's denial of dishonesty. It also contains a recorded statement by Mr Harold, as part of the debate with those representing the company, to the effect that if Mr Ellis were called to give evidence at a VAT Tribunal then he would be presented as a dishonest man in relation to his handling of company affairs, yet not dishonest in his handling of VAT, which contradiction Mr Harold did not think would be accepted by the Tribunal. It was put to him in cross-examination that he was expressing an opinion as to Mr Ellis's dishonesty as at 3rd October and he accepted that. Mr Harris relies on that as being the last word, and a clear word, on the topic.

37. However, the matter is not as simple as that. That answer has to be read in context. His previous answers in cross-examination were not so categorical as to that sort of opinion. His previous evidence indicated, more than once, that he held a strong suspicion as to dishonesty, but he did not at that point go so far as to indicate that he

had concluded there was dishonesty. He had previously expressed the view that he had an open mind.

> "HMRC will look at everything that ERF Ltd produced to us with an open mind. What we wanted was the true amount of tax and the true picture of culpability."

38. It is also important to bear in mind that this meeting confirmed that ERF had accepted HMRC's offer of the New Approach. For present purposes this did two things. First it tended to indicate that HMRC did not take the final view that it had enough information to make an assessment. Second, it gave ERF/BDO the opportunity to present what they thought was the true picture on liability, which included presenting a picture on culpability. They had been asked 4 questions, the last of which was whether they were aware that any of the VAT returns were incorrect or incomplete at the time they were submitted. The answer was apparently equivocal, but ERF's representative (Mr John O'Donnell) acknowledged that they had answered "No". Mr O'Donnell indicated that they wanted to investigate more deeply and that:

> "they may come to the same conclusion as HMRC but could not comment further until they had conducted detailed inquiries."

That might be thought to reinforce Mr Harris's point as to the views of Mr Harold, but the next note indicates that Mr Harold said he was happy for them to conduct those inquiries and would await the disclosure report. After a little more discussion he is recorded as saying:

> "HMRC will look at everything that ERF Ltd produced to us with an open mind. What we wanted was the true amount of tax and the true picture of culpability."

39. We think that an overall view of the material does not yield a conclusion that the Tribunal reached the wrong view about Mr Harold's state of mind at the date of the meeting. Mr Harold formed his views in the run-up to a meeting at which the New

Approach was to be tendered. It is inherent in that approach that the taxpayer has an opportunity to present a factual case to HMRC, and HMRC holds off whatever it might do until the taxpayer has availed himself (or, we suppose, failed to avail himself) of it. In that context, it is a fair reading of the evidence that Mr Harold had been moving to an opinion which, if he were left entirely to his own devices, might well have crystallised to an opinion of dishonesty sufficient to amount to a piece of the jigsaw. But to have got to a state of finality about that in these circumstances would have gainsaid the purpose of the New Approach which was proffered bona fide to ERF. The relevant opinion of Mr Harold was that which he expressed towards the end of the meeting, which was that the matter would be approached with an open mind. It would have been disingenuous of him to have said that and in fact have had a firm, and irremovable, opinion of dishonesty, and no-one has suggested he was disingenuous. He was, in effect, invited not to have that opinion and he implicitly agreed. If one wants to pursue the metaphor, he might have been toying with the piece of the jigsaw in his hand, but he was invited not to put it down lest it be the wrong piece, and he agreed with that. There is nothing *Wednesbury* unreasonable with that. This is essentially what the Tribunal found in paragraph 122 of its decision. This was not only a view which it was entitled to reach; it was in our opinion the correct view.

40. That means that one of the two pieces that Mr Harris relied upon to argue that the clock started running in October 2002 was not available to him. It is therefore unnecessary to consider whether the other one (quantum) was available or not, but we will deal shortly with his arguments, not least because the facts form part of the run-up to the next crucial event in February 2003.

41. The Tribunal found (in paragraph 124) that at the time of Amended BDO/1 the figures had been regarded as confirmed errors, but by October 2002 the picture changed and those figures were not the last word on quantum. The New Approach was offered and accepted. This

> "meant that the figures in Amended BDO/1 could no longer reasonably be relied upon by Customs in the making of an assessment."

So while the figures might once have been a piece of the jigsaw, they lost that capacity because certainty was removed at the invitation of the taxpayer. We can see no reason why, in those circumstances, they should nonetheless be treated as being figures which HMRC should be forced to act on lest they lose the chance of making an assessment at all. This is not agreeing a form of extension of a limitation period. It is taking a proper view of the facts and considering when HMRC knew so much, taken all together, that the limitation clock had to start running.

42. It is therefore necessary to move on to February 2003. Mr Harris submitted that if the jigsaw was not complete before this time, it was now complete. The Tribunal found that Mr Ellis had admitted his dishonesty in meetings in November 2002, and HMRC, in the form of Mr Harold, knew about that upon his receipt of BDO/2 in early February 2003 (paragraph 123). That much is uncontroversial.

43. The other piece of the jigsaw was, Mr Harris submitted, provided by the figures in the same report (actually described as a draft report). He relied on the Tribunal's finding in paragraph 132 to the effect that Mr Harold would have been content to accept those figures as being sufficient, without the need for any further work, and said that that was the second piece of the jigsaw, and the Tribunal was wrong to find otherwise. He said his submissions were borne out by what happened when BDO/3 was presented - Mr Harold accepted those figures and they were used as the basis of the assessment.

44. We do not agree. The Tribunal found that the context in which BDO/2 was produced was the New Approach, under which it was accepted that more work would be done. It found (paragraph 134):

> "Whilst that work was continuing, whatever the thoughts of HMRC officers as to its likely outcome might have been at any stage, in the exercise of their best judgement, it was neither perverse nor wholly unreasonable for them not to make an assessment until the investigation was complete. Until BDO had produced their final report nothing that had previously been provided in BDO/2 could be regarded as complete or conclusive, and in our view it was reasonable for HMRC not to regard the information in BDO/2 as evidence of facts sufficient in their opinion to justify the making of the assessment. Mr Harold's expression of willingness to accept BDO/2 was overtaken by his actual acceptance of the further investigation to be carried out by BDO. It is not enough that there merely be evidence of facts. That evidence must be sufficient, taking into account the obligation to exercise best judgement, to justify the making of the assessment. That does not simply refer to the quantum of the evidence, but it refers also to its quality. Mr Harold, by accepting the further investigation, was accepting that BDO/2 did not have the necessary quality of factual evidence on which an assessment could be based."

45. That assessment was open to the Tribunal, and, save only that we would have said "should" rather than "could" in the last sentence, we agree with it. HMRC, and Mr Harold, were being invited to hold off forming a final view until the taxpayer had done some more work, and acceded to that invitation. A final view was not formed. That was not an unreasonable view for HMRC to take. True it is that Mr Harold was sceptical as to whether that work would produce a more favourable result for the taxpayer (and he turned out to be right) but that does not mean that it was unreasonable for him not to make an assessment.

46. Accordingly, on this limb of the appeal we find that the decision of the Tribunal was correct, and the appeal must be dismissed.

Penalties - the decision below generally

47. The second limb of this appeal concerns the penalties which HMRC imposed by virtue of the non-payment of VAT. By a letter dated 17th February 2004 HMRC notified ERF of an assessment to a penalty under section 76 of the VAT Act 1994. It stated that a VAT sum of £13,831,068 had been evaded through dishonesty in the period from 1st March 1996 to 31st December 2001, and that a penalty of the evaded tax could be imposed. However:

> "taking into account the full disclosure and co-operation you gave from 3rd October 2002 when invited to do so"

it was decided "exceptionally" to reduce the penalty to £2,707,424:

> "being one fifth of the amount believed to be evaded".

48. The letter then breaks down the assessment in columns into various periods, identifying the maximum penalty for each period and stating an 80% reduction for co-operation, with the last column showing a rounded penalty figure. In fact the maximum tax per period column aggregates to the lesser sum of some £13.5m, and the penalty figure is a rounded 80% of that, not of the £13.8m figure. Mr Harris criticised this letter as being misleading, but does not claim that his client was misled.

49. ERF appealed that assessment. On the appeal the Tribunal allowed a small reduction of the total amounts of unpaid tax on which the penalty was assessable, and then considered the question of mitigation of the penalty. It acknowledged that on an appeal the Tribunal had its own discretion which it could exercise afresh, and is not confined to reviewing the reasonableness or correctness of the original decision (paragraph 173). Since HMRC was not arguing for a further reduction (not surprisingly) the Tribunal confined itself:

> "to considering the extent to which, if at all, we ought to further reduce the penalty including, as Mr Harris invited us to do, down to nil."

50. Having correctly directed itself as to the need to exercise the discretion by applying the principles of equality, fairness and, in particular proportionality (paragraph 174), it then set about considering the case in favour of that reduction under various heads - the nature of dishonesty, the suspension and dismissal of Mr Ellis, disclosure and co-operation, payment of tax in full and "netting". It found that an 80% abatement was appropriate to reflect the level of co-operation and disclosure that had been forthcoming from ERF, but beyond that none of the factors relied on required any further abatement.

Penalties - the issues on this appeal

51. The only issues raised on this appeal were those centred around what I have described above as "netting" and consequential issues as to the level of mitigation to be applied. Netting arose in two ways below. In the period covered by the penalty there were periods in which VAT was underdeclared, or reclaims over-declared, and periods in which there was an overpayment of VAT. In those latter periods that overpayment was apparently dishonest on the part of Mr Ellis - he did it to give himself some headroom for future illicit activities. They were not done in a bona fide attempt to pay sums which were, in truth due. When the penalty was assessed the base figure was arrived at by taking the liabilities periods, without giving any credit for the overpayment periods; there was no netting off of the one against the other so as to reduce the base sum on which the penalty was calculated.

52. ERF's first submission on netting was that, as matter of principle, there ought to have been netting off to find an accurate level of tax which, at the end of the day, had been underpaid which took account of the overpayments. In other words, netting ought to

have taken place as a matter of statutory construction. The Tribunal rejected this argument and held that the statute required that the sums underpaid, taken in aggregate period by period, had to constitute the base sum for the penalty, with no netting off of other periods. There is no appeal from that decision.

53. ERF's second submission was that netting ought to be looked to as part of the mitigation exercise, and if it had been properly dealt with both HMRC and the Tribunal would have arrived at different figures. Fairness required the penalty to be assessed on a net sum. The Tribunal dealt with this shortly. It criticised the approach of the Revenue (which we deal with more fully below) and regarded the misleading nature of the notification letter as unsatisfactory. Having done that, the Tribunal acknowledged that the decision was its own and it did not have regard to what it regarded as the unsatisfactory process by which the original evaluation was made, or the views of Customs officers. It then concluded that in the circumstances it would not be appropriate to allow further mitigation of the penalty by reducing the starting point for assessment to a net, as opposed to a gross amount, because the overpayments made by Mr Ellis were part of the fraud and not restorative. It therefore allowed no further mitigation (beyond the limited adjustments referred to above).

54. The Tribunal's reasoning in relation to netting was thus simple. It considered that netting ought not to apply as a matter of discretion and fairness because the reason for the overpayments was bound up with the fraud. Being an original discretion it can only be impeached on the basis of ignoring the relevant, taking account of the irrelevant or being perverse.

55. Mr Harris criticises the decision reached on three bases. First, he says that it fails to take into account properly (or at all) the views of HMRC and the method under which HMRC calculated the penalty itself, which method logically supported a greater reduction. Second, the Tribunal acted inconsistently in criticising HMRC's approach (which seemed to favour a net calculation) and yet imposing a gross calculation. Third, it adopted the wrong starting point in starting with the 80% mitigation which was given, and failing to start from an appropriately netted off figure, because that is where HMRC would have started from. Mr Harris's end point is to say that the appropriate thing to do is to apply a percentage of 14.24% to the evaded tax figures in the assessment (in place of the 20% arrived at by mitigating at 80%) and thus allow a further reduction of the amounts payable in the sum of £779,728.

56. In order to understand Mr Harris's points it is necessary to summarise the evidence on how the penalty came to be arrived at. The job of calculating the penalty fell to Mr Harold. When he calculated it he took the view that the periods which fell within the penalty calculation were only those falling within the period of two years before the penalty assessment. Those were the periods which ultimately appeared in the relevant notice. However, the periods of underpaid tax went earlier than that, and he was wrong in relation to his cut-off date. If one went back as far as one could, the relevant underpaid (and wrongly reclaimed) tax was a sum just over £19.4m on a gross basis. If one looked for a net figure for the same extended period it was £13.8m. That is the higher figure referred to in the assessment notice. When one knows that, it is plainly a mistake - it ought not to have been there.

57. Prior to that assessment Mr Harold had made a recommendation to his superiors. He had recommended that there be a penalty cap "of some £2.76 million". This figure

was reached by taking the net figure across the extended period and applying an abatement of 80% to that net figure. In other words, it presupposed that the correct approach was a netting approach, but to a longer period than HMRC eventually took. This recommendation was accepted by his superiors. His line manager indicated that applying a 20% penalty to gross under-declarations/repayments would be unfair. He proposed that since a negative penalty could not be applied to periods of overpayments, then a penalty of 14.24% should be applied to the gross underdeclaration/repayment periods. As a matter of calculation, applying 14.24% to gross has the same result as applying 20% to net.

58. Mr Harris's case was that Mr Harold then went on a frolic of his own. In the face of his own initial inclination to adopt a netting basis before applying a penalty, and in the face of his superiors' preference for a netting basis, he in fact applied a gross calculation to a shorter period than he had wanted to charge for in order to come up with a similar result to the figure that would have resulted from applying a net calculation to the extended period. While the Tribunal acknowledged that his conduct was unsatisfactory, it did not take that properly into account in coming to its decision. The result of its decision was that a greater degree of penalty was imposed than HMRC would itself have imposed, because if the logic of the superiors were imposed on the shorter period ultimately propounded by Mr Harold, a figure of 14.24% would and should have been applied to his gross figures. The result, according to Mr Harris, was a disproportionate penalty. This was even more striking because (in accordance with his second point) the Tribunal had itself commented on the oddity of the situation within HMRC in paragraph 184:

> "If within Customs it was considered right to calculate the penalty on a net basis, we cannot see how it could be reasonable to assess on a gross

> basis, having excluded periods for which no penalty could be levied, and to seek to justify that on the basis that the resultant gross-based penalty was lower than the net-based penalty would have been taking into account the excluded periods."

59. We do not think that Mr Harris's first and second points found a basis for impeaching the Tribunal's decision on penalties. It correctly observed that the decision on the point was its own. It is apparent that Tribunal was well aware of, and understood, the process by which HMRC arrived at its own penalty figure, and in particular of the inconsistencies of approach relied on by Mr Harris. It even criticised them. However, it did so in a context which makes it quite clear that it was reflecting on what HMRC did, rather than building on it, and in which it went on to make its own mind up, so there is no inconsistency in its arriving at a decision not to start from a net figure whilst acknowledging the deficiencies in HMRC's manner of going about things.

60. It should also be noted that the Tribunal had had cited to it HMRC's own internal guidance, which reserved netting for exceptional cases. That document provided:

> " … there is no legal obligation to off-set specific periods where there may have been over declarations in one period and under declarations in another for the purposes of applying a civil evasion penalty …
>
> Occasionally, it may be considered, for equity reasons, that exceptional off-setting should be carried out so that the culpable arrears is equal to the net tax arrears over the entire period. Such cases are likely to be rare, with careful consideration on how they should be handled. For instance, if tax has been repaid in the later periods, indicating no permanent deprivation, consideration should be given whether the case should be adopted for civil evasion in the first place rather than off-setting the amounts.
>
> …
>
> Conclusion
>
> There is no legal requirement to off-set over-declarations in one period against under-declarations in another for penalty purposes.

> Any case of off-setting should be rare and only where it is demonstrably in the interests of fairness."

61. The Tribunal actually referred to it in the context of Mr Harris's submissions on what the statute required (as opposed to the discretion to mitigate) and it did not return to the document in considering netting as a matter of discretion, but it must have had it in mind.

62. There is one criticism that might be made of the Tribunal's approach. In paragraph 185 it said:

> "We shall take into account the arguments in favour of a net basis in that exercise, but we do not regard the unsatisfactory process whereby the original calculation was made, or the views of Customs officers, as material to our own separate evaluation."

63. Miss Shaw for HMRC accepted that the reference to the views of Customs officers was misplaced in that it put it too high to say that those views were irrelevant in the sense that they should never be taken into account. But we doubt if that is what the Tribunal meant. The Tribunal was in a situation in which it was exercising its own discretion, and had received evidence of Mr Harold's views which were sometimes hard to rationalise, the expressed views of his superiors which said one thing, and the general guidance document which seemed to say another. In those circumstances it is not surprising that they would indicate that the views of officers, as such, were not helpful. They did not contain a clear pointer and were not consistent the one with the other. We think that that is likely to be what the Tribunal meant.

64. So the Tribunal manifestly had, and demonstrated an awareness that it had, all the points that might be made in favour of netting, and came to a conclusion against it. That is a permissible decision, and not one with which we should or can interfere. It held that the reason for the overpayments was to further the fraud. It is plainly

reasonable not to allow netting in respect of that. If it matters, it would be quite in accordance with HMRC's own guidance not to allow it (it would not be an exceptional case), and the fact that others in HMRC who expressed a view (without the benefit of the full picture that the Tribunal had) does not mean that the Tribunal reached the wrong decision. But in fact none of that does matter. It is apparent that the Tribunal reached a decision in the light of all the evidence, and the grounds for interfering with that decision do not exist.

65. We would add that even if it had fallen to us to take the decision again, we would not have arrived at a different one even paying regard to the internal views of HMRC.

66. Mr Harris's third point fares no better. It is really a re-casting of some of his other arguments. The Tribunal considered a series of proposed mitigation factors sequentially. It considered netting last, but that is of no logical significance. It had been invited to consider achieving a figure which reflected netting, but declined to do so. It would not matter whether it considered that factor first or last. It decided that an approach involving starting from a net figure was not appropriate in the circumstances, and it was not rendered the correct starting point by the fact that some HMRC officials considered it was.

67. In the circumstances we find that the Tribunal did not err in failing to allow for netting. It exercised its discretion in a manner which was open to it and did not err in its approach.

The Appeal on Costs

68. The Tribunal determined costs in paragraph 192 of its decision by saying simply:

> "192. As HMRC have substantially succeeded in these proceedings, we award costs to HMRC, to be assessed if not agreed."

69. ERF seek to appeal that on procedural and substantive grounds:

(i) It complains that it did not have a proper opportunity to make submissions about costs.

(ii) It complains that the costs order fails to take into account the following factors:

(a) It achieved a reduction of the base from which penalties were calculated because some £181,000 of the sums assessed were not attributable to dishonestly, leading to a reduction in the penalty of some £36,000.

(b) The "reprehensible" (Mr Harris's word, not the Tribunal's) conduct of Mr Harold.

(c) It had been unable to understand the interest calculation imposed by HMRC and so pleaded. This was not accepted by HMRC in its pleading, but shortly before the hearing HMRC acknowledged an error and gave a credit of £72,000.

(d) ERF struggled to reconcile some of the figures on which calculations were, as (it was said) had the Tribunal and even HMRC officers. This confusion increased the costs.

In the circumstances it was wrong to treat HMRC as the victor without more and not to allow some abatement of the costs, even to the extent of making no order as to costs.

Costs - the procedural point

70. The proceedings below straddled the creation of the First-tier Tribunal. The rules applicable to the VAT Tribunal, where the proceedings started, gave that Tribunal a broad discretion as to costs, without providing for the manner and timing of any submissions as to costs (see Rule 29 of the VAT Tribunal Rules 1986). Rule 10(5)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that orders for costs should not be made without giving the potential payer the

opportunity of making submissions. However, as the Tribunal records at paragraph 191 of its Decision, it gave a direction under Schedule 3 para. 7(3) of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (as it was entitled to do) that Rule 10 should not apply. Accordingly the old costs provisions applied and there was no rule-based obligation on the Tribunal to give a separate opportunity to make submissions on costs.

71. We start, therefore, from that position. Mr Harris in his skeleton argument submitted that somehow Rule 10(5) applied by implication, but we do not see how that can be the case in the light of the Tribunal's recorded ruling. Alternatively, he said that in this case it would be a clear breach of the requirements of natural justice not to have been given an opportunity to make submissions in this case.

72. Mr Jones, who dealt with the costs point on behalf of HMRC, accepted that there would be circumstances in which it was proper to invite submissions on costs, by which we took him to mean that the only fair course would be to do so. However, he submitted that this was not such a case because the position was clear enough.

73. We are told that each side claimed costs in their submissions below, but we were not told what those submissions were. They cannot have been the same as those made now because it was not foreseeable that those points would arise in that way. However, we infer that each side left the matter to the Tribunal and did not expressly seek to have another opportunity to make submissions. In those circumstances, while it would have been open to the Tribunal to seek further submissions anyway, the only basis on which it can be said that it was contrary to the principles of justice to fail to give that opportunity was if it would have been apparent to any reasonable tribunal that its decision required it. We do not think that that case has been made out -

indeed, Mr Harris did not seek to make good his case in that way. The points relied on by Mr Harris as requiring a more favourable costs order were all apparent as points in the proceedings by the end of the submissions, and the Tribunal was justified in taking the view that it did not require further submissions in the light of the view to which it had come which was, as will appear below, a justifiable view. The circumstances were not such as to require the Tribunal to come to the conclusion that the parties might wish to make further submissions on costs.

Costs - the substantive points

74. So far as the substantive points are concerned, they only come into play if they are matters which the Tribunal failed to take into account in dealing with the costs. The Tribunal's only reasoning is that HMRC was substantially the winner. That seems to us to be a conclusion that the Tribunal was entitled to reach on the facts of this case. ERF was seeking to appeal a large assessment, and a penalty. It failed on all points of principle. It succeeded in a small point of detail in relation to a small amount of the assessment and the penalty flowing from it (Mr Harris's point (a)), but it is such a small proportion as not to affect the conclusion as to who won. It is true that interest was reduced (Mr Harris's point (c)), but Mr Jones tells us that that did not flow from the appeal; it flowed from a separate general auditing exercise that was going on, and in any event it was only £72,000 out of total interest of £1.7m. Whether or not that is true, it cannot have taken any significant part of the time or effort on the appeal, and the Tribunal would have been right in giving it no real weight in the costs exercise. So far as Mr Harris's point (b) is concerned, the Tribunal did not go so far as to describe Mr Harold's conduct as "reprehensible", and while it did express an adverse comment it did not, again, mean that HMRC was any the less a winner, and the

Tribunal was entitled to treat HMRC as still being the substantial winner. Nor was it conduct which, of itself, obviously justified some sort of deduction from HMRC's costs as a winner. Nor is it plain that confusion as to the figures (and it is plain that some of the figures could not be entirely rationalised) caused such an increase in the costs as to require a reduction of the amount of costs to which HMRC, as the main winner, would be prima facie entitled as winner.

75. We also note that there were other issues before the Tribunal on which HMRC succeeded and on which there has been no appeal. This applies principally to an application to appeal other assessments out of time, which was rejected at the beginning of the decision below. That enhances the extent to which it is right to treat HMRC as substantially the winner.

76. The main points before the Tribunal were the limitation point and the penalty point. We think that the Tribunal was quite right to treat HMRC as substantially the winner on those. Although it did not set out its reasoning on points which made the win less than total, it obviously had in mind the fact that there were some - hence the word "substantially". The points relied on by Mr Harris (apart, perhaps, from the details of the interest point) were actually apparent from the decision itself. The Tribunal must therefore have had them in mind, while not articulating them. It was not perverse to treat them, as the Tribunal obviously did, as not cumulatively sufficient to require any move away from the view of HMRC as the winner. Nor (returning to the procedural point) were any of them such as to alert the Tribunal to the need to invite further submissions on costs.

Conclusions on the costs appeal

77. On the costs appeal we therefore conclude:

(a) There was no procedural irregularity in failing to provide an opportunity for separate submissions on costs.

(b) The situation was not such that it was perverse not to provide such an opportunity. The available points did not obviously require it.

(c) The particular criticisms of the failure to take into account factors in ERF's favour on costs all fail. They are not, either separately or cumulatively, sufficient to conclude that the Tribunal erred in failing to give effect to them, and it is not apparent that they failed to consider them.

78. Accordingly this part of the appeal fails, and it is not necessary either to remit the matter for further submissions, or to decide the point ourselves. We would add, however, that if we had decided to allow the appeal on this point, we would not have remitted but would have decided the point ourselves, and we have considered if we would have come to any different decision. We have decided that we would not.

Overall conclusions

79. It therefore follows that this appeal should be dismissed.

DECISION

MR JUSTICE MANN

JUDGE CHARLES HELLIER

RELEASE DATE: 21 MARCH 2012