



Appeal number: FTC/81/2011

PAYE — employer's year-end return — penalties for late submission — jurisdiction of First-tier Tribunal — whether includes ability to discharge penalty on grounds of unfairness — no — whether finding that HMRC's failure to send prompt reminder unfair sustainable — no — whether penalties due — yes — appeal allowed

**IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

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

Appellants

- and -

HOK LIMITED

Respondent

**Tribunal: Mr Justice Warren, Chamber President
Judge Colin Bishopp, President of the Tax Chamber**

Sitting in public in London on 9 July 2012

Richard Vallat, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

The Respondent was not represented

DECISION

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Judge Geraint Jones QC and Mr Mark Buffery) (“the Tribunal”) released on 30 June 2011 (“the Decision”). They allowed, in part, an appeal by Hok Limited (“the Company”) against penalties imposed on it by the appellants (“HMRC”) for the Company’s failure to submit an employer’s end of year return, commonly referred to by its stationery number of P35, by the due date for its submission. Although it was conceded by the Company that the return was late and that there was no reasonable excuse for the lateness, the Tribunal concluded, on grounds of fairness, that the Company should be penalised for only the first of the five months which passed before the return was submitted. HMRC now appeal against that decision with the permission of Judge Bishopp.

2. The essence of HMRC’s case is that the First-tier Tribunal has no jurisdiction to discharge such penalties if they are properly due; its jurisdiction (in respect of this and other similar penalty provisions) is limited to determining whether or not the return was late as a matter of fact and, if so, whether there is a reasonable excuse for the lateness. Only if it decides one of those issues in favour of an employer may it discharge the penalty, and fairness is not a permissible consideration. Moreover, even if (contrary to that argument) the First-tier Tribunal does have any further jurisdiction, there was no basis on which it could properly have exercised that jurisdiction in this case in order to discharge the penalties.

3. The appeal raises an important point of principle, which has arisen on many occasions. We were provided with details of numerous other decisions of the First-tier Tribunal in appeals against late submission penalties, which show that differently-constituted panels have sometimes adopted a similar approach to that adopted in the Decision, while others have reached the same conclusion but by reliance on arguments of disproportionality rather than unfairness. Others still have accepted HMRC’s argument that there is no power in the tribunal to discharge the whole or any part of a penalty prescribed by statute, and have consequently upheld the penalties as imposed. We were taken to some of those cases but, with two exceptions to which we shall come, do not think it necessary to explore the reasons for their decisions which differently-constituted panels have given. We are also aware that there are many other cases pending before the First-tier Tribunal in which the same issue arises. This is the first occasion on which this Tribunal has had the opportunity of considering the matter.

4. Against that background it is unfortunate, though understandable in view of the modest amount at stake, that while HMRC were represented before us by Mr Richard Vallat of counsel, the Company was not represented, and in consequence we have not had the benefit of any oral submissions to counter those advanced by Mr Vallat. The Company did, however, make some written representations to which we shall refer below. We have in the circumstances undertaken additionally some analysis of our own of the relevant principles.

The statutory framework

5. The obligation to make a year-end return is imposed on an employer by reg 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) which provides that

5 “(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue [for which one must now read HMRC] a return containing the following information.”

6. The regulation goes on to list the information which must be supplied, and reg 211 provides that the employer must use two prescribed forms, the P35 to which we have referred and P14, in order to supply it. Form P35 contains, in essence, a summary, while one form P14 must be submitted for each employee, giving the prescribed information specific to that employee. They are still referred to as “forms” even though the requirement now is to file the information on line rather than on paper. Regulation 73(10) adds that

15 “Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).”

7. “TMA” means the Taxes Management Act 1970: see reg (2)(a). Section 98A of TMA, so far as material in this case, is as follows:

20 “(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable —

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues ...

25 (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100 ...”.

8. It was undisputed that a return should have been submitted by the Company on or before 19 May 2010, but that it was not in fact submitted until 15 October 2010. Thus four whole months and one part month had elapsed between the due date and the submission of the return and, the Company having fewer than fifty employees, five penalties of £100 each were imposed.

The Decision

35 9. The issue before the First-tier Tribunal is succinctly set out at para 2 of the Decision:

40 “In this appeal the appellant does not assert that it did file on time. Instead, the appellant says that it thought it did not need to file the appropriate returns because its only employee had ceased employment part way through the year. It acknowledges that it was wrong in that belief and the appellant also acknowledges that HMRC was entitled to levy a penalty. The appellant’s complaint is that had HMRC timeously notified it of its default, it would have been remedied at a far earlier time, thus avoiding ongoing penalties.”

10. We need to expand a little on that statement. Although the return was due by 19 May, it was not until September that HMRC served on the Company a notice to the effect that it had, by then, accumulated four monthly penalties of £100 each. That notice prompted the filing of the return; but when the notice was received it was already too late for the Company to avoid incurring one further month's penalty, hence it suffered a total of five penalties.

11. At paras 10 and 11 of the Decision the Tribunal said this:

“10. In its Statement of Case HMRC sets out that it runs a ‘structured programme to enable penalties to be issued regularly throughout the year, rather than waiting for the late return to be submitted and then issue a final penalty. These penalties, although aimed at encouraging compliance and having the effect of reminding are not designed to be reminders for the outstanding return.’

11. Thus, HMRC deliberately waits until four months have gone by and does not issue the first interim penalty notice until, as in this case, September of the year of default. By that time a penalty of £400, being four times £100 per month, is said to be due. In fact, if the penalty notice operates as a reminder and the taxpayer undertakes the necessary filing forthwith, a further one month penalty arises because the *de facto* reminder is received only after it is too late to avoid a further £100 penalty. Thus, the effect of HMRC desisting from sending out a penalty liability notice very soon after 19 May of the relevant year, and choosing deliberately to delay that penalty notice until four months has gone by, is to result in the taxpayer facing a minimum penalty of £500. We appreciate that HMRC takes the stance that it is the responsibility of the taxpayer to make the necessary filing and that it is its stance that it has no obligation to issue any reminder. However, we have no doubt that any right thinking member of society would consider that to be unfair and falling very far below the standard of fair dealing and conscionable conduct to be expected of an organ of the State.”

12. The Tribunal observed that the penalty system was not to be used as a “cash generating scheme” and that it was “inexplicable why HMRC deliberately delays sending out a penalty notice for four months”. Then, at paragraphs 15 and 16, they said:

“15. It has long been part of the common law of this country that organs of the State must act fairly and in good conscience with its citizens. In our judgement there is nothing fair or reasonable in setting a computer system so that it does not generate a penalty notice until four months have gone by from the date of default, thereby ensuring that a penalty of not less than £500 will be due. We are in no doubt that the computer system could easily be set to generate a single £100 penalty notice immediately after the 19 May in each year. That is the course that a fair organ of the State, acting in good conscience towards the citizens of the State, would adopt.

16. As, in our judgement, HMRC has neither acted fairly nor in good conscience, in the manner described above, we do not consider that any penalty is recoverable over and above the £100 penalty for the first month unless HMRC proves (the onus being upon it) that even if such a penalty notice, which would have acted as a reminder, had been issued, the default would nonetheless have continued. It has proved no such thing.”

13. The Tribunal thus discharged all but the first of the five penalties and determined the appeal accordingly.

HMRC's practice

5 14. Some support for the Tribunal's conclusion that HMRC's practice is unfair may, at least at first sight, be derived from a recent change in that practice which came to our notice only after the hearing had concluded. We accordingly asked for written submissions on it, and have taken them into account in what follows.

10 15. The earlier practice, current at the time relevant to this appeal, was to send, in mid-February each year, to those who were thought liable to make an end of year return a notice requiring them to do so or, if appropriate, to notify HMRC that they were not subject to the requirement, and warning that they would be exposed to a penalty if they failed to file a return or make a notification. The notice therefore arrived about three months before the return or notification had to be submitted. It was also, and critically for the Tribunal's conclusions, only in
15 September that a penalty notice was issued; there was no intermediate reminder or any other routine communication from HMRC about the return.

20 16. Now, starting in 2012, HMRC send the notice requiring the submission of a return and warning of the consequences of failure in mid-March, so that it is received closer to the deadline; they send a reminder, in early May, to those employers whose returns are still outstanding (thus giving them the opportunity if they act quickly of avoiding a penalty); and in early June they send what is referred to as a "P35 Interim Penalty Letter", advising employers that they may have incurred one month's penalty, reminding them of what is required, and pointing out that if the requirements do affect them they should take immediate
25 action to avoid incurring further penalties. Improvements to the on-line filing process have also been made. These changes, according to HMRC's public announcement of them, have been made following consultation with representative bodies, and it is clear from the same announcement that they were motivated at least in part by the very complaints which were identified in the
30 Decision. The date on which the first penalty notice is sent has, however, not changed and remains in September.

35 17. The change in practice was a matter considered in *Royal Institute of Navigation v Revenue and Customs Commissioners* [2012] UKFTT (472) (TC), in which Judge Jones QC again presided, though with a different member, Ms Anne Redston, who disagreed with him on the critical issue. The detail of the case differs a little from this. The decision is rather confusing about the date on which HMRC contended the return had been submitted, and about the calculation of the penalty, although it is clear that the aggregate of the penalties imposed was £400, thus four months' penalties of £100 each. The tribunal unanimously decided that
40 the return had been submitted on 4 August of the relevant year, 2009. That finding led to the elimination of one month's penalty; the question remained whether any further reduction was appropriate.

45 18. The appellant had received a fortuitous reminder in the course of a telephone conversation in July, though it then took about two weeks to submit the return. Judge Jones took the view that, because of that delay, it was "reasonable to

proceed on the basis that had the appellant received a *de facto* reminder some 28 days or thereabouts post default, it would nonetheless have incurred a second £100 penalty for the second month (or part thereof), in addition to the penalty for the first month, with the result that the penalty in this case should be reduced to
5 £200.” In other words, he was of the view that HMRC’s failure to issue a timely reminder, despite the lack (which he acknowledged) of any obligation to do so, amounted to grounds for discharging the penalty for one of the months.

19. At para 26 of the decision, in which Judge Jones was expressing his own view, he said that HMRC’s change of practice

10 “is as close as one will come to an admission from HMRC that its previous practice, as identified in *Hok* [that is, the Decision], was at least inappropriate and, quite probably, unfair or unconscionable.”

20. Ms Redston, in the part of the decision in which she set out her dissenting view, first referred to the guidelines identified by Lord Mustill in *R v Home Secretary ex p Doody* [1994] 1 AC 531 at 560,
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“that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be
20 applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects”

21. Her dissenting view was put, at para 40, in these terms:

25 “[The appellant’s representative] also sought to rely on HMRC’s subsequent change of practice, from the previous system of informing taxpayers for the first time in the September that they had failed to file their P35, to the current system of informing them within a month. In considering this point, I bear in mind the words of Lord Mustill, cited above, that it is not enough for
30 me to find that an alternative (such as a penalty notice issued within a month of the deadline) might have been fairer. In my judgment, the fact that under the new approach taxpayers are alerted to their defaults within a few days of the deadline does not mean that HMRC acted unfairly when it told the appellant of its default two months after the filing date.”

35 22. She therefore found no unfairness, and would have upheld penalties totalling £300 had the judge’s casting vote not precluded her from doing so. She did not, however, apparently dissent from the judge’s underlying position that, if HMRC’s practice was found to be unfair, one or more of the penalties could be discharged.

40 *HMRC’s arguments*

23. HMRC’s starting point is s 100 of TMA 1970, which provides that

“... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or
45 appropriate.”

24. An appeal to the First-tier Tribunal against a penalty imposed in accordance with that provision is governed by s 100B, in these terms:

“(1) An appeal may be brought against the determination of a penalty under section 100 above ...

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

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

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

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

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

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

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

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

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

25 (iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.”

25. Subsections 50(6) to (8) relate to assessments to tax and have no application to this case. Section 118(2) allows for a defence against the imposition of a penalty where the person concerned has a reasonable excuse for his failure to do a required act in time, but as we have said the Company did not seek to avail itself of that defence. Section 102 provides that

“The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty”;

35 but HMRC have not exercised that discretion in this case (or, we understand, in other similar cases).

26. The legislation makes it clear, said Mr Vallat, that an officer may determine what penalty is appropriate or correct (s 100), that in this case there is only one possible correct penalty, namely that prescribed by s 98A (£100 for each month or part of a month for which the return was late) and that the tribunal’s power on appeal against fixed penalties, as these are, is limited by s 100B(2)(a) to correcting mistakes: that is, it may decide that the officer was wrong in his belief that a penalty was due and discharge it; or it may decide that he imposed a penalty of the wrong amount, and replace it with the correct amount. The rather wider power applicable to other penalties, set out in sub-s (2)(b), cannot be invoked.

Thus if the officer has imposed a penalty in circumstances where one is due, and the penalty imposed is of the correct amount, there is nothing the Tribunal is permitted to do. It does not have a general power, in particular a power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise. No such power is granted by the statute and, since the Tribunal is a creature of statute, none can arise under the general or common law.

27. Although s 100 states that the officer “may” impose a penalty, thus affording him some discretion, there is no mechanism by which the Tribunal may review the exercise of that discretion. Similarly, the discretion to mitigate a penalty is conferred by s 102 on the Board, but not on the Tribunal, and again TMA does not provide any mechanism by which the refusal of the Board to exercise that discretion in accordance with s 102 may be challenged before the First-tier Tribunal. The Tribunal in this case did not explore the discretionary elements of ss 100 and 102 and it was, in our judgment, right not to do so as we are satisfied Mr Vallat’s argument on this point is correct.

28. Mr Vallat dealt also with the possible arguments (though apparently they were not expressly advanced in this case) that the prescribed penalties for late submission of year-end returns were incompatible with art 1 of the First Protocol to the Human Rights Convention, or disproportionate because the penalty for which an employer with one employee is liable is the same as that to which an employer with 50 is exposed.

29. These arguments were considered, and rejected, by a Special Commissioner in a comprehensive and careful decision in *Bysermaw Properties Ltd v Revenue and Customs Commissioners* [2008] STC (SCD) 322. He concluded that the imposition of a penalty as a means of encouraging the timely submission of a tax return was not merely not an infringement of the First Protocol, but expressly contemplated by it; that the scale of the penalty was within the range permitted by the state’s margin of appreciation; that the fact that an element of banding (that is, the setting of the monthly penalty by reference to the number of employees) had been used did not carry with it an obligation to refine the banding beyond the multiples of fifty which have been adopted; that correspondingly the fact that the penalty was the same for an employer with only a single employee as for one with 50 employees did not render the penalty disproportionate; and that even if those conclusions were wrong, HMRC could not have imposed a different penalty because the requirement was one imposed by, as s 6(2)(b) of the Human Rights Act 1998 puts it, “primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights [and] the authority was acting so as to give effect to or enforce those provisions.” The Special Commissioner concluded that s 98A fell within that description. Accordingly he upheld the penalties which had been imposed.

30. A fixed penalty scheme, Mr Vallat said, is clear and simple. Fixed penalties are often issued automatically, particularly where they affect, or potentially affect, a large number of employers, as is the case here. In such circumstances it is not possible to exercise any judgment before a penalty is issued. Those liable to such penalties, too, know in advance where they stand. The opportunity for an affected employer to demonstrate that he has a reasonable excuse, he added, is sufficient

protection for those who should be excused, but the Company was not one of them.

5 31. HMRC do not accept that they have acted unfairly. There is a statutory obligation on employers to file year-end returns. Despite there being no requirement that HMRC should do so, in practice they send a notice to complete a return to those they believe to be subject to the obligation in advance, and it was undisputed that the Company had received such a notice. There is no requirement that HMRC should send reminders, nor that they should warn employers that they are in default; and there is no time limit of relevance here for the sending to an offending employer of a penalty notice. The assumption made by the Tribunal that HMRC deliberately delayed in sending out notices is unfounded; penalties are triggered not only by an employer's failure to submit a return, but also if a return which is submitted is inaccurate or incomplete. The "structured programme" to which the Tribunal referred at para 10 of the Decision was designed to capture all of those various failings, and it necessarily took some time to complete. That was why penalty notices were not despatched immediately the submission deadline had passed.

20 32. Mr Vallat's argument in respect of HMRC's change of practice was that it has no significance in the context of appeals to the First-tier Tribunal. His reason was, as before, that it is not open to that Tribunal to stray beyond the boundaries of the jurisdiction conferred on it by Parliament. Moreover, the fact that HMRC have changed their practices to assist those subject to the requirement does not change the nature of that requirement, which is to fulfil the statutory obligation to submit a return by the due date, irrespective of whether HMRC have or have not sent a reminder. The legislation does not make the submission of the return dependent on the receipt of a notice to file it—although HMRC routinely send one, they are under no obligation to do so—nor is there any statutory provision for a reminder. That HMRC have chosen to assist employers by, now, sending a reminder and an early intimation that a first penalty may have been incurred cannot lessen the burden on them of complying, unprompted, with their obligations; nor can it be construed as a concession that there was anything unfair about the earlier practice.

35 33. In that, he said, Ms Redston's view as she set it out in *Royal Institute of Navigation* was to be preferred to that of Judge Jones, whose contrary opinion (which appeared to have been reached in the absence of any argument on the point from HMRC) should be rejected.

40 34. Even if HMRC's conduct was unfair, the correct amount of the penalty was clearly prescribed by statute. Thus there remained an insuperable obstacle to the Tribunal's deciding as it did: as the reasoning in *Bysermaw Properties* showed, it would not be open even to the High Court to adjust the penalty, because of the restrictions imposed by s 6(2)(b) of the Human Rights Act, though a refusal to exercise the s 102 discretion might be susceptible to judicial review.

The Company's arguments

45 35. The essence of the Company's argument before the First-tier Tribunal is set out in para 2 of the Decision, recited above (see para 9). It added, in its written

submission to us, the contention that HMRC's change of practice was a clear indication that the lack of any form of reminder until mid-September was unfair. In doing so it echoed, without adding to, what was said by the judge at para 26 of the decision in *Royal Institute of Navigation*, as it is set out above, and we cannot usefully say any more on that topic. We shall deal with other arguments in the discussion which follows.

Discussion

36. It is important to bear in mind how the First-tier Tribunal came into being. It was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007, "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is derived wholly from statute. As Mr Vallat correctly submitted, the statutory provision relevant here, namely TMA s 100B, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular, neither that provision nor any other gives the tribunal a discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair.

37. Before moving on to consider whether there is any other route by which it might acquire additional jurisdiction we should add for completeness that, since the requirement imposed on employers to submit year-end returns is a product only of United Kingdom law, the concept of proportionality as it is understood in European Union law, with which we deal in our decision in *Revenue and Customs Commissioners v Total Technology Ltd*, to be released shortly after this decision, does not arise. The slightly different argument, that the penalty should be scaled to reflect the number of employees more precisely, has not been advanced, but in any event we consider the Special Commissioner was correct to reject it in *Bysermaw Properties Ltd*. We agree with his reasoning and with his conclusions, not only on this issue but on the others with which he dealt, and cannot usefully add anything to what he said.

38. The Decision assumes, even if it is not articulated in this way, a jurisdiction in the First-tier Tribunal to enforce what the Tribunal described, at para 9, as the "common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers". That HMRC should ordinarily act fairly cannot, we think, be doubted, and Mr Vallat did not suggest otherwise. We do not, therefore need to dwell on this point. What is in doubt is whether, and if so how, the First-tier Tribunal can give effect to that duty, by providing a remedy if it is breached.

39. Ordinarily challenges to administrative actions of government departments for which no clear avenue of appeal is provided must be made by way of judicial review: so much was made quite clear by the Court of Appeal in *Asplin v Estill* [1987] STC 723, in which the taxpayer argued that he should not be assessed to tax (which he accepted was due as a matter of law) because of advice he maintained he had been given by the Inland Revenue. At that time, judicial review was a comparatively rarely used remedy, and the jurisprudence was at an early

stage of development. On this point, however, it has remained constant. The reasoning was given by Nicholls LJ at p 727c:

5 “The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.”

10 40. The position here, as it seems to us, is materially the same. The Company accepted (as the Tribunal’s record of its case shows) that the penalty was lawfully imposed in principle, but that other facts—the absence of a timely reminder—should relieve it from some or all of the liability. It follows from what Nicholls LJ said (and, it should be added, other judges have said the same on many occasions) 15 that in the absence of a statutory route of appeal, as in this case, the only remedy available to an aggrieved person is to seek judicial review.

20 41. There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction. That was made abundantly clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22. That case related to the Value Added Tax Tribunals rather than the First-tier Tribunal, but they too were a creature of statute with no inherent jurisdiction, and the relevant principles are identical. Lord Lane (with whom the majority agreed) said, in what remains the classic statement on the point:

25 “Assume for the moment that the tribunal has the power to review the commissioners’ discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 30 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction.” 35

40 42. The Finance Act 1972 was at that time the statute conferring jurisdiction in VAT cases on the Value Added Tax Tribunals. A similar point was made by the High Court in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, in the latter case, after analysis of the authorities, by adopting and endorsing what had been said by Moses J in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205 at 247c:

45 “... in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct.”

43. That the First-tier Tribunal has no judicial review function is, in addition, the only conclusion which can be drawn from the structure of the legislation which brought both that Tribunal and this into being. The 2007 Act conferred a judicial review function on this Tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so; and it hedged the jurisdiction it did confer with some restrictions. It is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56), which points to a contrary conclusion.

44. The Tribunal did not set out the reasoning on which they relied in deciding that it was nevertheless open to them to discharge some of the penalties on grounds of unfairness, beyond stating that the Company was entitled to rely upon the common law duty of a public body to act fairly. However, we think we can safely extract the reasoning from the slightly later decision in *Foresight Financial Services Ltd v Revenue and Customs Commissioners* [2011] UKFTT 647 (TC), in which Judge Jones QC sat alone. He referred to *R (Q and others) v Secretary of State for the Home Department* [2004] QB 36 as authority for the proposition that there is a common law duty on public bodies to act fairly, and then said this:

“6. HMRC may well take the position that given the wording of section 98A(2)(a) Taxes Management Act 1970, there can be no answer to its demand for penalties regardless of the period of time that has elapsed prior to it sending out a First Penalty Notice. It may argue that this Tribunal must proceed on the basis that its jurisdiction is solely statutory and so it can do no more than strictly apply the relevant revenue statutes. It may argue that in this Tribunal there is no place for the application of any common law principles, however sound they might be.

7. Thus one of the first issues for consideration is whether sound common law principles must be left outside the door of the Tribunal room, never to cross its threshold.”

45. He then went on to consider the *J H Corbitt (Numismatists) Ltd* and *National Westminster Bank plc* judgments, before turning to what was said by Sales J in *Oxfam v Revenue and Customs Commissioners* [2010] STC 686. The principal issue in that appeal, which we need to mention only in order that what follows may be understood, was the extent to which Oxfam was able to recover input tax in accordance with an agreed method for apportioning business and non-business expenditure. The subsidiary issues, relevant to the instant appeal, were whether the First-tier Tribunal could enforce an agreement between the taxpayer and HMRC, and whether it could give effect to a taxpayer’s legitimate expectation. Those issues were, in the event, of academic interest only as it was decided that, as a matter of fact, there was neither a binding contract nor a legitimate expectation; but the judge went on nevertheless to consider the extent of the First-tier Tribunal’s jurisdiction (although this was an appeal from a decision of its immediate predecessor, the VAT and Duties Tribunal) had either issue been decided differently.

46. At [62] he identified the legislative provision which conferred jurisdiction on the Tribunal, in that case s 83 of the Value Added Tax Act 1994 (“VATA”):

“(1) ... an appeal shall lie to the tribunal with respect to any of the following matters— ...

5 (c) the amount of any input tax which may be credited to a person”

47. Then, at [63], he said:

“On the ordinary meaning of the language of that provision, it appears that it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula, including both the contract issue and the legitimate expectation issue. The words, ‘with respect to’, in s 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer. The tribunal’s jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter.”

48. He recorded that the parties had agreed that the tribunal’s jurisdiction extended to the contract issue, and said that he concurred in that view. That conclusion is not relevant to this appeal. Then he added this in a passage which, despite its length, we need to set out in full:

“[66] However, the parties thought that the tribunal did not have jurisdiction to consider Oxfam’s alternative legitimate expectation argument. In my view, this is not correct. By the same construction of s 83(1)(c) and the same reasoning which led to the conclusion that Oxfam’s contract claim was within the jurisdiction of the tribunal, Oxfam’s legitimate expectation argument also fell within the jurisdiction of the tribunal. I can see no sensible basis in the language of that provision for differentiating between Oxfam’s contract claim and its legitimate expectation claim. In both cases, if Oxfam’s claim had been made out, an error of law on the part of HMRC in arriving at its decision on the amount of input tax to be credited to Oxfam would have been established (either a failure to respect Oxfam’s contractual rights or a failure to treat Oxfam fairly, in breach of Oxfam’s legitimate expectation) which would, on the face of it, be a proper basis for an appeal to the tribunal against HMRC’s decision within the terms of s 83(1)(c).

[67] Usually, of course, an appeal under one of the sub-paragraphs of s 83(1) will be on the merits of [a] decision taken by HMRC, and questions of private law or public law (such as whether HMRC took into account irrelevant considerations or failed to take account of relevant considerations) will simply not be relevant to the tribunal’s task on the appeal. But in my view it does not follow from this that the tribunal will never have jurisdiction to consider issues of general private law and general public law where that is necessary for it to determine the outcome of an appeal against a decision of HMRC whose subject matter falls within one of the sub-paragraphs of s 83(1).

[68] I do not think that it is a valid objection to this straightforward interpretation of s 83(1)(c) according to its natural meaning that it has the effect that sometimes the tribunal will have to apply public law concepts in

5 order to determine cases before it. It happens regularly elsewhere in the legal
system that courts or tribunals with jurisdiction defined in statute by general
words have jurisdiction to decide issues of public law which may be relevant
to determination of questions falling within their statutorily defined
10 jurisdiction. No special language is required to achieve that effect. Where
they are themselves independent and impartial courts or tribunals (as the
tribunal is) there is no presumption that public law issues are reserved to the
High Court in the exercise of its judicial review jurisdiction. So, for
example, a county court may have to consider whether possession
15 proceedings issued by a local authority have been issued in breach of its
public law obligations (*Wandsworth London BC v Winder* [1994] 3 All ER
976, [1985] AC 461); magistrates' courts and the Crown Court may have to
decide issues of public law in so far as they arise in relation to criminal
proceedings (eg to determine if a byelaw is a valid and proper foundation for
20 a criminal charge: *Boddington v British Transport Police* [1998] 2 All ER
203, [1999] 2 AC 143 or to determine the validity of a formal instrument
which is in some way a necessary foundation for the criminal charge: *DPP v
Head* [1958] 1 All ER 679, [1959] AC 83); and employment tribunals may
have to decide issues of public law in employment proceedings (eg to
determine whether a contract of employment with a public authority is
vitiating as having been made ultra vires).

[69] I cannot see any good reason for adopting a different approach to the
interpretation of the jurisdiction of the tribunal in s 83 of VATA. The
tribunal is used to dealing with complex issues of tax law. There is no reason
25 to think that it would not be competent to deal with issues of public law, in
so far as they might be relevant to determine the outcome of any appeal.
That view is reinforced by the fact that the tribunal may have to deal with
complex public law arguments in relation to Convention rights when
construing legislation under s 3 of the Human Rights Act 1998, and is
30 recognised by Parliament as being competent to do so.

[70] Moreover, there is a clear public benefit in construing s 83 by
reference to its ordinary and natural meaning which strongly supports that
construction. It is desirable for the tribunal to hear all matters relevant to
determination of a question under s 83 (here, the amount of input tax to be
35 credited to a taxpayer) because (a) it is a specialist tribunal which is
particularly well positioned to make judgments about the fair treatment of
taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice
and confusion associated with proliferation of proceedings and ensures that
all issues relevant to determine the one thing the HMRC and taxpayer are
40 interested in (in this case, the amount of input tax to be recovered) are
resolved on one occasion in one place. It seems plausible to suppose that
Parliament would have had these public benefits in mind when legislating in
the wide terms of s 83.

[71] Therefore, apart from any authority on this question, I would hold that
45 s 83(1)(c) bears its ordinary and natural meaning, so that resolution of the
issue of legitimate expectation which arose between Oxfam and HMRC fell
within the tribunal's jurisdiction."

49. The judge then went on to consider whether there was any authority which
compelled him to a different conclusion (mentioning, among others, the *J H
50 Corbitt (Numismatists) Ltd*, *National Westminster Bank plc* and *Marks and*

5 *Spencer plc* judgments with which we have already dealt), and decided that there was not. We interpose by way of caution that his conclusion was not necessary for resolution of the appeal, thus what he said is *obiter*, and that the extent of the First-tier Tribunal's legitimate expectation jurisdiction, if any, is the central issue in two cases to be heard by this Tribunal later in 2012.

50. We return at this point to the decision in *Foresight Financial Services Ltd*. After a short analysis of *Oxfam* the judge said:

10 “12. In my judgement the *Oxfam* decision cannot be properly understood whilst there is a misunderstanding of the differing principles involved. There has, so far, been a failure to advert to the fundamental difference between :

- 15 (1) the First Tier Tribunal exercising a supervisory jurisdiction by way of judicial review, and
- (2) the First Tier Tribunal applying sound principles of common law; which has nothing to do with exercising a supervisory jurisdiction by way of judicial review.

20 13. When I have regard to section 15 of the Tribunals Courts and Enforcement Act 2007 it is notable that the Upper Tribunal has been given a Judicial Review power because that section specifically provides that it may grant relief of the kind that ordinarily comes within Judicial Review powers. No such power is given to the First Tier Tribunal. Nor, in my judgement, has the First Tier Tribunal ever claimed to exercise or purported to exercise such powers; any more than Mr Justice Sales said that it has any such powers.

25 14. What, in my judgement, Mr Justice Sales decided in the *Oxfam* case was that sound principles of the common law are not to be left languishing outside the Tribunal room door when an appeal is heard in the First Tier Tribunal. He decided that they are a welcome participant at the appeal proceedings and, in appropriate circumstances, must be applied. There is plainly a stark distinction between the Tribunal, on the one hand, applying sound common law principles, which amounts to the application of

30 substantive common law to the appeal proceedings and, on the other hand, seeking to exercise a supervisory power by way of Judicial Review. Once that distinction is drawn and kept in mind, it seems to me that the authorities are readily understood and reconciled.”

35 51. He drew support for those conclusions from three further authorities. The first was *Wandsworth Borough Council v Winder*, also referred to by Sales J in *Oxfam*. In that case, the council unsuccessfully sought to strike out as an abuse a defence to an action to recover arrears of rent. The supposedly abusive argument was that the decision to increase his rent to which the tenant objected (he had paid the original rent) was *ultra vires*. In *Clark v University of Lincolnshire and*

40 *Humberside* [2000] 3 All ER 752 the issue was whether the court could adjudicate on a dispute between a student and a university about the marking of an examination paper, a very different matter from that before us. Moreover, the issue was not whether jurisdiction rested only in the High Court, but whether the court had any jurisdiction at all. We accordingly derive nothing of assistance to us in this appeal from that case. In *Rhondda Cynon Taff Borough Council v Watkins*

45 [2003] 1 WLR 1864 the defendant challenged an action for possession of land brought by a council which had made a compulsory purchase order in respect of

it, on the grounds that the deed poll executed by the council when the defendant refused to cooperate in the compulsory purchase procedure was void: the council had, the defendant claimed, changed its intentions since the compulsory purchase order was made. The Court of Appeal held that although a *claim* that the deed poll was ineffective could be made only in judicial review proceedings, there was no reason why the argument should not be deployed as a *defence* in a possession action.

52. In our judgment neither *Wandsworth v Winder* nor *Rhondda Cynon v Watkins* offers any support to the proposition that the First-tier Tribunal is able to apply (to use the judge’s terminology) “sound principles of the common law” in order to reduce or discharge penalties imposed pursuant to statute. What was in issue in both of those cases was not whether the councils’ actions were fair or reasonable, or indeed any general principle of the common law, but whether the actions they had taken had the effect for which they argued—that is, whether the rent had been validly increased, and whether the compulsory purchase order had been vitiated by a subsequent change of mind. Those questions may well have given rise to issues of public law, but they did not give rise to matters for which the only possible remedy is by way of judicial review; and they went, in each case, to the core of the individual’s defence of the claims made against him.

53. At first glance, what Sales J said in *Oxfam* leads to a different conclusion, but on closer analysis we do not think it does. The judge described the basis of the claim at [46]:

“Although the agreement of HMRC to the use of the approved method formula by Oxfam did not constitute a binding contract, it clearly did amount to an express assurance by HMRC that Oxfam’s recoverable input tax would be calculated by reference to that formula.”

54. From that sentence it becomes clear that the issue in that case and the issue here are quite different. There, the tribunal was required to decide the amount of input tax which Oxfam could recover, a question which, as Sales J said at [63], comes four-square within the ambit of s 83(1)(c) of VATA. Here, the question is not the amount of a penalty, or even whether one is due as a matter of law—there is no dispute that s 98A was engaged, and that it imposed a liability for five monthly penalties of £100 each—but whether HMRC should be precluded from imposing the penalties prescribed by that section, or from collecting them if imposed. That, in our judgment, is a quite separate question of administration, one which, in accordance with the authorities to which we have already referred, is capable of determination only by way of judicial review and therefore not by the First-tier Tribunal.

55. Paragraph 12 of his decision in *Foresight Financial Services Ltd* represents an attempt by the judge to circumvent that difficulty by drawing a distinction between judicial review and the application of common law principles. We do not accept that there is any warrant for drawing such a distinction; indeed, we think it is a false distinction. But even if it is not, we do not accept the judge’s view that the First-tier Tribunal is able to give effect to common law principles in order to override the clear words of a statute; indeed, it must be doubtful whether the High Court could ever legitimately do so. The reality, moreover, is that the judge was

not determining that the penalties were not due by reason of some common-law impediment, but that HMRC should not have imposed them. That is classically a matter for judicial review.

5 56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, 10 but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.

15 57. If that conclusion leaves “sound principles of the common law ... languishing outside the Tribunal room door”, as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to 20 leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.

25 58. It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed. The appeal is allowed and we determine that all five of the penalties are due.

Fairness

30 59. Section 12(2) of the 2007 Act enables us to re-make the decision of the First-tier Tribunal, but sub-s (4) allows us, when doing so in the context of an appeal such as this, only to make a decision which that Tribunal could have made. Thus if, as we have determined, the First-tier Tribunal could not discharge the penalties, nor can we. Accordingly it is unnecessary for this decision for us to consider whether HMRC's conduct was in fact unfair; but as we heard some argument on the point it is appropriate we make some brief comments.

35 60. As we have said, Mr Vallat told us that HMRC did not send penalty notices to employers who have failed to submit returns until September each year because their systems are designed to check not only whether a return was due at all, but whether those returns which have been submitted are correct. That remains the practice following the procedural changes to which we have referred; the material 40 change is the sending of two reminders where before there were none. It remains the case that a penalty notice is not despatched until September. While we have no reason to doubt it, we recognise that what Mr Vallat told us was no more than a recitation of his instructions and was not evidence; still less was it evidence tested in cross-examination. For those reasons we do not think it necessary or desirable

to explore the matter further, and we cannot make a positive finding that the earlier practice was fair.

5 61. By the same token we do not make any finding that the earlier practice was unfair. We agree with the view expressed by Ms Redston in *Royal Institute of Navigation* that an improvement in practice does not carry with it any necessary implication that before the improvement the practice was unfair; but there is insufficient before us from which we could properly say any more.

10 62. We end with some comments about the judge's reasoning. In their Decision the Tribunal asserted, as the extracts set out above show, that HMRC's practice was deliberate, and that it was designed to ensure that a defaulting employer paid a minimum of £500 in penalties. There was no evidence before the Tribunal from which they could draw such a conclusion; it was based entirely upon the judge's perception (which emerges from the Decision and from what he said in *Royal Institute of Navigation*) that because, as he assumed (and it was no more than assumption), a penalty notice could have been sent out within a month, the fact that it was sent later meant that HMRC deliberately delayed. He appears to have made no enquiry of HMRC about the justification or reasons for the practice and simply dismissed the explanation (which we acknowledge was somewhat opaque) given in the statement of case; and in neither case did the judge give HMRC an opportunity to make representations before condemning their conduct as unfair, even unconscionable. Against that background, in our judgment, the Tribunal's comments to that effect were not appropriate.

Disposition

25 63. The appeal is allowed and the penalties purportedly discharged by the Tribunal are restored. HMRC have made it clear from the outset that, this being in the nature of a test case, they will not seek a direction in respect of their costs and we shall not make one.

30 **Mr Justice Warren**
Chamber President

35 **Judge Colin Bishopp**
Upper Tribunal Judge
President, Tax Chamber of the First-tier Tribunal

Released: 23 October 2012