[2021] UKUT 182 (TCC)
Appeal number: UT/2019/0075

VAT – appeal under s83(1)(p) against assessment. Whether taxpayer had legitimate expectation that it was not liable to VAT, whether FTT had jurisdiction to consider issue of legitimate expectation on such an appeal.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

KSM HENRYK ZEMAN SP Z.o.o. **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE ADAM JOHNSON
JUDGE CHARLES HELLIER

Sitting in public by Microsoft Teams on 15 March 2021

Adrian Eissa QC instructed by Saunders Solicitors Ltd for the Appellant

Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. KSM Henryk Zeman Sp Z.o.o. ("KSM") appealed to the First-tier Tribunal (the "FTT") against an assessment to VAT on the grounds that it had a legitimate expectation that it would not be assessed to VAT on certain supplies. It said that its legitimate expectation arose from statements made by HMRC.

2. The FTT dismissed its appeal, finding that KSM could not rely on the principle of legitimate expectation because it had not acted reasonably in relying on HMRC's statements.

3. KSM sought permission to appeal to the Upper Tribunal. Such permission was given by the Upper Tribunal after a hearing, but only after raising the question as to whether the FTT had jurisdiction to consider the question of legitimate expectation in an appeal against an assessment to VAT.

4. No issue arose in the FTT, or before us, in relation to the amounts involved.

5. Two issues therefore arise in this appeal:

> (1) Whether, on the assumption that the FTT has jurisdiction to deal with legitimate expectation, it erred in concluding that KSM did not have a legitimate expectation on which it could rely, and
>
> (2) Whether the FTT has jurisdiction to consider the public law issue of legitimate expectation in an appeal against a VAT assessment.

Background facts

6. There was no issue as to the facts. The tribunal's findings are set out clearly in paras [2] to [22] of its decision. In summary:

> (1) KSM belonged in Poland for VAT purposes. It entered into a contract with Energoinstal SA, another company based in Poland to install a boiler in the UK. Energoinstal was not registered for VAT in the UK.
>
> (2) KSM considered that it should register for VAT in the UK. It applied to register for VAT. HMRC sent it a questionnaire. There were two questions which the FTT described as "central to this appeal":
>
> > "(4)Do you supply any of these services to business customers who belong in the UK?"

KSM replied "Yes" to this question. The FTT accepted that this was because it intended in the future to provide services to such persons even though the only person to whom they were actually supplying the relevant services at the time it completed the questionnaire did not belong in the UK.

"(5b) If [you are supplying services related to land] to business customers who belong in the UK, are all these business customers registered for VAT in the UK?"

KSM also replied "Yes" to this question. The FTT held that KSM thought that Energoinstal would be registered in the UK.

(3) Following receipt of these answers HMRC wrote to KSM on 18 June 2015. Its application to register was refused. The letter said:

> "You have confirmed that you are supplying construction services solely to business customers who belong in the UK and who are all registered for VAT in the UK.
>
> "When such land related supplies are being made in the UK to VAT registered business customers it is the customer who is deemed to be making the supply in the UK and who accounts for any VAT due under the "reverse charge" procedure.
>
> "As you are making no taxable supplies in the UK and also have no business or fixed establishment in the UK there is no requirement or entitlement to be registered for VAT in the UK. Therefore your application is refused."

(4) Following an abortive attempt to reclaim input VAT KSM applied again to be registered, this time declaring that Energoinstal did not belong in the UK. It was registered and after some correspondence HMRC assessed KSM to VAT in relation to the supplies it had made to Energoinstal.

(5) KSM appealed against the assessment to the FTT.

The Legislative setting of the assessment

7. There was no dispute about the application of the provisions relevant to the charge to VAT. VAT Act 1984 ("VATA") provides that VAT is charged on any taxable supply made in the UK by a taxable person in the course of a business. A taxable supply is any supply of goods or services in the UK other than an exempt supply. A taxable person is a person who is, or is liable to be, registered under the Act. A person is liable to be registered if his taxable supplies exceed a threshold.

8. KSM was supplying the construction of the boiler in the UK for an amount exceeding the VAT threshold. Such a supply is not exempt. Thus, without more KSM would be liable to VAT on that supply .

9. Section 8 VATA provides what is known as the Reverse Charge. Together with para 1(2)(e) Sch 4A it has the effect that that if:

> (1) services are supplied by a person who belongs in a country outside the UK;
>
> (2) the recipient is a relevant business person (which term includes a taxable person under the Directive) who belongs in the UK; and
>
> (3) if the supply relates to construction works on UK land, the recipient is registered,

then instead of the supplier being treated as making the supply and the recipient is treated as making it (to himself).

10. So if Energoinstal had belonged in the UK and been registered, KSM would not have been liable to VAT on the supply of the boiler because the supply would have been treated as made by Energoinstal to itself. But Energoinstal belonged outside the UK and was not registered, so VAT was payable by KSM and KSM should have been VAT registered in the UK.

The FTT's Decision

11. The FTT was critical of the language of the questionnaire. It regarded it as insufficient to deal with the case where a person was making supplies to a customer who did not belong in the UK but who intended to make supplies to customers who would belong in the UK and were registered. It said:

> "32.The problem with both these questions therefore is that KSM did intend to supply some of its services to customers which belonged in the UK and which were registered for VAT. Their answers were entirely accurate in this respect. However, their answers were **incorrect** as regards their supplies to their main and, at that time and as it turned out, their only, customer, Energoinstal, which did not belong in the UK and which was not, in the end, registered for VAT.
>
> 33. If their replies had related solely to their only actual customer, Energoinstal, then they should have given different answers to both questions (4) and (5)(b). As regards the services to be supplied to Energoinstal therefore KSM's answers to the questionnaire were incorrect.
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> 34. In my view therefore the questionnaire was inadequate to make a final determination as to whether or not KSM should be permitted to register for VAT in the UK in its particular circumstances and given its intentions. It did not satisfactorily cover the situation in which KSM believed itself to be, ie one of making supplies both to customers which did not belong in the UK and were not

registered for VAT, ie Energoinstal, and to customers which did belong in the UK and which were registered for VAT.

35. Therefore, on the basis of the information provided to them, at their specific request, HMRC did not, and indeed were unable to, address fully the question of whether or not KSM were required, or should be permitted, to register for VAT in the UK in their particular circumstances. I can however understand how HMRC reached the conclusion they did given the answers to the questions which had been provided by KSM.

36. Nevertheless, when HMRC replied to KSM rejecting its application to register it explained clearly its reasons for rejecting the application and invited KSM to provide further information if it did not agree with their decision. This KSM declined to do."

12. The FTT then said that if KSM were to be entitled to rely on the principle of legitimate expectation "their actions must have been reasonable". It noted that KSM had sought professional advice. That, it said, was reasonable behaviour. But those advisers had advised that HMRC's refusal to register KSM was wrong and no challenge was mounted. The failure to contest HMRC's decision was not reasonable [47] and as a result KSM were not entitled to rely on the principle of legitimate expectation.

The First Question: did KSM have a legitimate expectation that it was not assessable?

The parties' arguments

13. Mr Eissa QC says that KSM acquired a legitimate expectation that it was not assessable by reason of HMRC's letter of 18 June 2015 when read in the context of its answers to the questionnaire in its application to register. That letter contained no request to confirm the facts on which HMRC's response was predicated, and KSM could rely on its conclusion. KSM acquired its expectation on receipt of that letter and the fact that it did not challenge HMRC's conclusion could not deprive it of the expectation it had acquired. KSM had done its best: the questionnaire was, as the FTT had found, deficient, and that was not KSM's fault. Its expectation could not be defeated by the fact that HMRC's decision was founded on a badly constructed questionnaire compiled by HMRC.

14. Miss Barnes relies on the principles summarised by Nugee J in *R(oao Veolia ES Landfill Ltd) v HMRC* [2016] EWCA 1880 Admin*:*

"(1) HMRC may create a legitimate expectation that a person's tax affairs will be treated in a particular way either by the promulgation of general guidance to a body of taxpayers or by a specific statement or ruling given to a taxpayer.
(2) A legitimate expectation will only arise if the guidance or the specific statement is clear, unambiguous and devoid of any relevant qualification.

(3) If a taxpayer approaches HMRC for a ruling, he has an obligation to place all his cards face up on the table, in the sense of giving full details of the transaction on which he seeks the revenue's decision.
(4) Provided there was a clear and unambiguous statement, and provided the taxpayer has placed all his cards face up on the table, he will generally be entitled to rely on an assurance given to him as binding on HMRC. A similar entitlement arises in relation to guidance issued by HMRC."

15. Miss Barnes accepts that there was some ambiguity in the questionnaire but says that even so these criteria were not satisfied. The letter of 18 June made the facts HMRC relied upon clear. The letter was not devoid of relevant qualification since it spelled out the assumptions on which the conclusions were based. And, because KSM had not set out "full details" of its transactions, it could not be said that it had placed all its cards face up on the table.

Discussion – legitimate expectation

16. We do not consider that KSM had a legitimate expectation that it would not be liable to VAT on its supplies to Energoinstal. It seems to us that the letter of 18 June gave KSM a legitimate expectation that if it was "supplying construction services solely to business customers who belong in the UK and who are all registered for VAT in the UK" it would not be making taxable supplies. If its supplies had been so limited it would have had a legitimate expectation that they were not taxable, but its supplies were not so limited and so it could have no legitimate expectation that its supplies would not be assessable.

17. We accept that the letter of 18 June must be read in context and that the questionnaire in the application to register is part of that context. But even if there was from KSM's perspective some ambiguity in the questionnaire there was none in the letter of 18 June, and any ambiguity in the questionnaire was plainly resolved by that letter. Even if KSM considered that the relevant questions in the questionnaire referred to future intentions, it could not have doubted the meaning of the letter of 18 June.

18. Miss Barnes' formulation is substantially the same: the letter contained a premise, a relevant qualification, which was not satisfied.

19. For these reasons, which differ from those of the FTT, we find that the FTT did not err in its decision that KSM did not have a legitimate expectation that it would not be taxable on its supplies to Energoinstal.

20. That is sufficient to dispose of this appeal, but we should say something about the more vexed question of whether the FTT had jurisdiction to consider the legitimate expectation argument.

The Second Question: Jurisdiction

The Legislation

21. Section 73(1) VATA provides:

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

22. Section 83(1) VATA provides

> "(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—"

23. There follow 33 different matters, of which the variation in the jurisdiction conferred is illustrated by the following selection:

> "(*a*) the registration or cancellation of registration of any person under this Act;
>
> (*b*) the VAT chargeable on the supply of any goods or services or, subject to section 84(9), on the importation of goods;
>
> (*c*) the amount of any input tax which may be credited to a person;
>
> (*da*) a decision of the Commissioners under section 18A—
> (i) as to whether or not a person is to be approved as a fiscal warehouse keeper or the conditions
> from time to time subject to which he is so approved;
> (ii) for the withdrawal of any such approval; or
> (iii) for the withdrawal of fiscal warehouse status from any premises;
>
> (*e*) the proportion of input tax allowable under section 26;
> …
> (*l*) the requirement of any security under section 48(7) or paragraph 4(1A) or (2) of Schedule 11;
> …
> (*na*) any liability to a penalty under section 69C, any assessment of a penalty under that section or the amount of such an assessment;
> …
> **(*p*) an assessment—**
>
> **(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or**
> **(ii) under [subsections (7), (7A) or (7B)]1 of that section;**
>
> **or the amount of such an assessment;**
> …

(*r*) the making of an assessment on the basis set out in section 77(4);
…
(*rb*) an assessment under section 77C or the amount of such an assessment;

(*s*) any liability of the Commissioners to pay interest under section 78 or the amount of interest payable;

(*sa*) an assessment under section 78A(1) or the amount of such an assessment;

(*t*) a claim for the crediting or repayment of an amount under section 80, an assessment under subsection (4A) of that section or the amount of such an assessment;

(*ta*) an assessment under section 80B(1) or (1B) or the amount of such an assessment;

(*u*) any direction or supplementary direction made under paragraph 2 of Schedule 1;
…
(*y*) any refusal of authorisation or termination of authorisation in connection with the scheme made under paragraph 2(7) of Schedule 11;

(*z*) any conditions imposed by the Commissioners in a particular case by virtue of paragraph 2B(2)(*c*) or 3(1) of Schedule 11."

The parties' arguments

24. Miss Barnes says that since the FTT is a creature of statute, the answer to the question of whether or not it has jurisdiction to consider a challenge to an assessment on general public law grounds is a matter of the proper construction of section 83(1)(p). She says that the wording of section 83(1)(p) does not confer such jurisdiction.

25. Mr Eissa QC says that it does not follow that because a tribunal is a creature of statute that its functions are limited to those bestowed by statute. He says that tribunals are implicitly subject to, and bound to apply, the ordinary principles of public law; statutes are drafted on the basis that the ordinary principles of the common law would apply to express statutory provisions (*Ex Parte Pierson* 1998 AC 539). A decision to assess which was ultra vires at common law was a nullity and should be recognised as such by the tribunal: there was no difference between a decision which was void or voidable if it was ultra vires. He cites Lord Steyn (quoting Lord Browne-Wilkinson) in *Boddington* at 171H - 172:

> "If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires and therefore unlawfully."

26. He says that no special language was needed in the statutory words creating the tribunal to enable it so to find (*Oxfam v R&C Comms* [2010] STC 686 at [68]). The principle in *O'Reilly v Mackman* that it was in general an abuse of process to challenge the validity of public acts otherwise than by judicial review applied only to purely public acts; a VAT assessment could not be so described. The exceptions to that principle thus encompass an appeal against an assessment. Thus the ability to apply relevant public law concepts is implicit in the statutory authority given by section 83(1)(p).

A question of statutory interpretation

27. We have no doubt that the nature of the FTT's jurisdiction depends on the proper construction, in the context of the statutory provisions to which it relates, of the statutory provision by which it is given, in this case, section 83(1)(p). That is quite clear from: *John Dee Ltd v CCE* [1995] STC 94; *Oxfam v HMRC* [2009] EWHC 3078 Ch; *R & J Birkett & Ors v HMRC* [2017] UKUT 89 (TCC); *PML Accounting Ltd R(oao) v HMRC* [2018] EWCA Civ 2231; *HMRC v David Goldsmith* [2019] UKUT 325 (TCC); *Beadle v R & C Comms* [2020 EWCA Civ 562.

28. That is the beginning, rather than the end, of the inquiry however.

29. It is well established that the exclusivity principle derived from *O'Reilly v Mackman* [1983] 2 AC 237 is subject to exceptions. These include certain cases where a public law defence is raised in a private law action: see *Wandsworth London BC v Winder [1994] AC 461* and *Pawlinski v Dunnington* [1999] EWCA Civ 3020.

30. The question in this case is how the exclusivity principle operates in the context of a statutory scheme which contemplates private enforcement action being taken against a defendant.

31. An important part of that analysis is to determine the proper approach to be taken to construction of the relevant statutory language.

32. This point arose recently in the tax context in *Beadle v R&C Comms* [2020] EWCA Civ. 562. *Beadle* concerned an appeal against a penalty for a failure to comply with a Partner Payment Notice (a "PPN"), issued in the context of a film finance scheme. Simler LJ at [44] endorsed the view that:

> " … the exclusivity principle derived in *O'Reilly v Mackman* [1983] 2 AC 237 is subject to an important limitation which itself has limits as follows. Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or

> criminal) proceedings that are dependent on the validity of an underlying administrative act."

33. Simler LJ went on to say that the exclusion need not arise expressly but might arise by clear and necessary implication when the relevant statutory scheme is construed as a whole and in light of its context and purpose.

34. It seems to us that a similar logic must apply here. Although technically the taxpayer is a claimant in the proceedings rather than a defendant, in substance he is defending part of an enforcement action by HMRC. The promotion of the rule of law and fairness means that the taxpayer should be entitled to defend himself by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, unless that entitlement is excluded by the relevant statutory regime. That is a question of construing the relevant statutory language.

35. On the facts of *Beadle*, given the regime for PPNs contained in the Finance Act 2014, it *was* a clear and necessary implication of the statutory language that the ability to raise a public law challenge was excluded.

36. What is the position in this case? The authorities on the proper construction of s83(1) present a somewhat fragmented picture. The subsections within section 83(1) cover a variety of situations and are of course expressed differently.

37. Perhaps the high watermark in terms of cases construing section 83(1) expansively, i.e. in manner which includes consideration of public law issues, is *Oxfam [2009] EWHC 3078* Ch, a decision of Sales J (as he then was). That was a case under section 83(1)(c), which provides that " *... an appeal shall lie to the tribunal with respect to ... (c) the amount of any input tax which may be credited to a person*."

38. Oxfam appealed against HMRC's refusal of a VAT input tax refund claim. In the FTT Oxfam rested its case on an agreement with HMRC but it also brought judicial review proceedings arguing that it had a legitimate expectation of a repayment. The FTT dismissed its appeal and Oxfam's appeal therefrom came before Sales J together with the judicial review application. Sales J treated the legitimate expectation argument as a new argument in the appeal from the FTT under VATA and ruled on it as part of his decision in that appeal. He did not give permission for the judicial review action [5]. His reasoning as to the scope of section 83(1)(c) was therefore a necessary part of his decision.

39. Although he recognised that he was departing form a widely held view, Sales J considered that section 83(1)(c) conferred jurisdiction on the FTT to consider issues of public law relevant to the matter in that subheading. He did so because:

> (i) he regarded the ordinary meaning of the phrase "*with respect to*" in the opening words of section 83(1) as clearly wide enough to cover any question relating to the determination of the input tax,

(ii) the jurisdiction of the tribunal was determined by reference to the subject matter of the heading, not by reference to a legal regime or type of law,

(iii) at [68], it happened regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words had jurisdiction to decide issues of public law relevant to determination of questions falling within their statutorily defined jurisdiction. No special language was required to achieve that effect. There was no presumption that public law issues were reserved to the High Court in the exercise of its judicial review jurisdiction. He cited *Wandsworth LBC v Winder* [1985] AC 461; *Doherty v Birmingham City Council* [2008] UKHL 57); *Boddington v British Transport Police* [1999] 2 AC; and *DPP v Head* [1959] AC 83),

(iv) there was no good reason for treating the tribunal's jurisdiction as more limited, and

(v) there was a public benefit if the tribunal had such a jurisdiction:

> "[70] Moreover, there is a clear public benefit in construing section 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 section 83 (here, the amount of input tax to be 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 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 section 83."

40. Sales J also drew a parallel between the adjudication of an agreement between HMRC and a taxpayer and a legitimate expectation.

41. At [76], Sales J said that whilst section 83 does not confer a *general* supervisory jurisdiction for which clear words would be required - a point made by Lord Lane CJ in an earlier case under the predecessor legislation, *C&E Comms v JH Corbitt [1980] STC 231* - it is a *non sequitur* to say that the tribunal has no power to apply public law principles relevant to an appeal within one of the sub-paragraphs of section 83(1):

> "It is clear that section 83 – like section 40 of the 1972 Act - does not confer any general supervisory jurisdiction on the Tribunal, but it seems to me to be a non sequitur to say that the Tribunal has no power to apply public law principles if they are relevant to an appeal against (i.e. a decision either to uphold or overturn) a decision of HMRC which falls

within the terms of one of the headings of jurisdiction set out in section 83 … ."

42. In other words, depending on the nature of the issues falling within the scope of a particular sub-heading or subsection, it may well be that public law principles do fall within the scope of the appeal jurisdiction that subsection confers. As we see it, that is not a proposition at odds with Lord Lane's observations in *Corbitt*, because it is not saying anything about what is needed to confer a general supervisory jurisdiction. It is saying no more and no less than that one must look at each of the subsections on its own terms and determine whether public law issues are likely to be relevant to the appeal jurisdiction each creates.

43. In a later case, *HMRC v Abdul Noor [2013]* UKUT 071 (TC), the Upper Tribunal took exactly the opposite view of the same issue under section 83(1)(c), i.e. whether there was jurisdiction on an appeal with respect to "the amount of any input tax which may be credited to a person", to consider a taxpayer's claims based on the public law concept of legitimate expectation.

44. The Upper Tribunal concluded not. It considered that the right given by 83(1)(c) is in respect of a person's right to credit for input tax "under the VAT legislation". The subject matter of s 83(1)(c) was the "amount of input tax"; input tax was a creature of the statute and the FTT's jurisdiction was formulated by reference to that statutory concept. The claim based on legitimate expectation was not a claim under the VAT legislation.

45. The Tribunal did not agree with Sales J's view that as a matter of ordinary language in context the words "with respect to" were wide enough to cover any legal question relevant to the issue of the amount of input tax attributable to the taxpayer. Any result of giving effect to the legitimate expectation would not affect the "amount of input tax". It went too far in the context of a section focussed on decisions relating to rights and obligations under the VAT legislation to include a right arising from a legitimate expectation in the words "input VAT" as Sales J's reasoning implicitly required.

46. This approach – which draws a distinction between determining of the amount of tax due (which falls within the appeal jurisdiction), and other matters (which do not) – echoes that in other decisions. An example involving section 83 is *C&E Comms v National Westminster Bank* [2003] EWCA 1822 (Ch), a case involving section 83(1)(t). The Commissioners had invoked the defence of unjust enrichment against the appellant's claim for repayment of VAT, but had not invoked that defence in relation to the claims by other parties. Jacob J considered whether the appellant's complaint of unfair treatment was within the jurisdiction of the tribunal under section 83(1)(t). He concluded not, because the essence of the unfair treatment case was not that the VAT was not due, but that *even though it was due*, it should be repaid because the appellant's trade rivals had been repaid. That was outwith section 83(1)(t).

47. Another, earlier example from a different context is *Aspin v Estil* [1987] STC 723. This case concerned a taxpayer who claimed that he had relied on information given to him by the Revenue over the telephone that certain income would not be subject to

tax in the United Kingdom. He argued that as a result it was unfair and oppressive for the Revenue to assess him to tax on the income. The context was a claim for income tax where section 31 TMA 1970 provided for an appeal against an assessment, but section 50 provided that if it did not appear to the tribunal that the appellant was overcharged or the assessment excessive the assessment should "*stand good*." The Court of Appeal held that the General Commissioners' jurisdiction was only "*to see whether the assessment has been properly prepared in accordance with [the] statute*". Nicholls LJ drew the following distinction:

> "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."

48. We think it is inappropriate to generalise, however. Cases are likely to differ depending on the statutory language in question. In *Aspin*, given the limitation in section 50 on the actions the General Commissioners could take, it is not surprising that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation. Likewise in *NatWest*, Jacob J's reading of section 83(1)(t) was that it conferred an appeal jurisdiction only where the challenge was that an amount of VAT was *not* in fact due. It did not confer jurisdiction in a case where the relevant VAT amount *was* due but was said to be repayable for an extraneous reason.

49. What then of the specific provision in this case? So far as relevant in the context of the current proceedings, an appeal under Section 83(1)(p) is permitted "with respect to … an assessment … under section 73(1) … or the amount of such an assessment."

50. The language of section 73(1) is set out above at [21]. It can be seen that in cases where certain requirements are fulfilled - i.e., where a person has failed to make any returns or to keep relevant documents or where it appears that returns are incomplete and incorrect - then the Commissioners "may assess the amount of VAT due from him to the best of their judgment and notify it to him" (emphasis added).

51. What, then, does the appeal jurisdiction under section 83(1)(c) encompass?

52. We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in *Oxfam* and *Noor*), because an appeal lies not only with respect to the *amount* of an assessment but instead with respect to "an assessment … under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – the Commissioners *may* assess the amount of VAT due to the best of their judgment and notify it.

53. The operation of section 73(1), taken together with section 83(1)(p), has been the subject of consideration in two important decisions of the Court of Appeal, namely *Rahman (No 2) v C&E Comms* [2003] STC 150 and *C&E Comms v Pegasus Birds [2004]* STC 1509. These are relied on by HMRC in this case as authority for the proposition that the scope of the appeal jurisdiction under section 83(1)(p) is limited and does not permit the tribunal to consider defences based on general public law principles.

54. In *Rahman (No. 2)*, Chadwick LJ explained that the requirement in section 73(1) for the Commissioners to "assess the amount of VAT due … to the best of their judgment" had led to what he described as a "two stage approach to appeals under section 83(p) of the Act." Thus, at [5] and [6] he said:

> "[5] Section 83(p) of the 1994 Act provides both for an appeal 'with respect to … an assessment under section 73(1)' and for and appeal 'with respect to … the amount of such an assessment.' That distinction reflects the two distinct questions which may arise where an assessment purports to have been made under section 73(1) of the Act. First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount of VAT for which the taxpayer is accountable.
>
> [6] The first of these questions itself contains two elements: (i) whether the pre-condition to the exercise of the power is satisfied – that is to say, has there been a failure to make returns, keep records or afford facilities for inspection, or has it appeared to the commissioners that returns which have been made are incomplete or incorrect – and (ii) whether the assessment made by the commissioners was made 'to the best of their judgment'. The first of these elements is, I suspect, rarely in dispute; but the second element – the need for 'best judgment' – has led tribunals to adopt what has been described as a 'two-stage approach' to appeals under section 83(p) of the Act. It has become the practice for tribunals to consider, first, whether - on the material available to the commissioners at the time when the assessment was made - the assessment satisfies the 'best judgment' test. It is only if that test is satisfied that the tribunal goes on to consider, as a second stage in the appeal, whether the assessment should be varied - or, as the taxpayer is likely to contend, reduced - by reference to additional material not available to the commissioners or in the light of explanation or argument advanced on the appeal."

55. As is apparent from this quotation, one issue with the two-stage approach is its potential inflexibility: only if stage 1 is overcome does stage 2 arise. That gave rise to an argument, deployed in *Rahman No. 2*, that if the amount of tax assessed by the Commissioners was materially in excess of that later assessed as properly due by the tribunal, then the original assessment cannot have been made to best judgment, did not pass stage 1, and consequently the tribunal had no power to re-assess the tax in a lower amount.

56. In *Rahman No. 2*, however, Chadwick LJ explained that the "best judgment" threshold had a particular meaning, and it did not follow from the fact that there was a reduction in the assessment made by the Commissioners that the assessment had not been conducted to "best judgment" and had to be set aside without more. It would depend on the reason why (see at [32]):

> "The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions – say, as to food/drink ratio, wastage or pilferage – from those made by the commissioners. As Woolf J pointed out in *Van Boeckel* ([1981] STC 290 at 297), that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake – that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in the computing the amount of VAT payable from their own figures. In such cases - of which the present is one - the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary." (Emphasis added in quotation).

57. It might be thought that this formulation of "the relevant question" bears a close relationship to the public law test of *Wednesbury* unreasonableness, and indeed in an earlier case in the same ongoing litigation, *Rahman (1)*, Carnwath LJ had said that the "best judgment" test was "indistinguishable from the familiar Wednesbury principles." In the *Pegasus Birds* decision, however, decided after both *Rahman (1)* and *Rahman (2)*, Carnwath LJ said that in light of Chadwick LJ's authoritative statement of the law in *Rahman (2)*, he considered the reference to the *Wednesbury* principles was unhelpful and a possible source of confusion, and he cautioned against attempts to refine or add to Chadwick's LJ's formulation.

58. *Pegasus Birds* dealt with the question whether, even if an assessment were to fail the best of judgment test, the automatic consequence was that there was no assessment at all, such that the tribunal had no power to go on and vary the amount of the assessment.

59. On this point, Carnwath LJ said as follows (our emphasis added in para. [27]):

> "[26]…There is no general rule that a decision arrived at in breach of administrative law principles is of no effect; the consequences of the breach must be looked at in the context of the particular statutory scheme (see e.g. in another context, *R v Wicks* [1998] AC 92) …

[27] As has been seen, the 1994 Act lays down certain preconditions for the making of an assessment; requires the assessment to be made to the best of their judgment; and provides a right of appeal to the tribunal against either the assessment or the amount. Although the tribunal's powers are not spelt out, it is implicit that it has power either to set aside the assessment or to reduce it to the correct figure. There is no doubt that an appeal to the tribunal, rather than judicial review, is the appropriate remedy if there are grounds for treating it as of no effect (*Harley Development Inc v IRC* [1996] STC 440, [1996] 1 WLR 72)7). Thus in *Argosy* (see above) the assessment was set aside, because, under the relevant statute, it was a precondition to making an assessment that the commissioner should be 'of the opinion' that the taxpayer was liable to pay tax. The commissioner made no attempt to explain how he had formed that opinion, in the face of clear evidence that any assumed profits would have been 'swamped' by previous trading losses (see [1971] 1 WLR 514 at 516).

[28] Where, however, the complaint in substance is not against the assessment as such, but is that the amount has not been arrived at by 'best of their judgment', I see nothing in the statute or in principle which requires the whole assessment to be set aside. Clearly much will depend on the nature of the breach. We were told by Miss Foster that the Commissioners would not seek to defend an assessment which was arrived at dishonestly in any respect. That is understandable as a matter of public policy. However, the issue facing the tribunal is unlikely to be so clear-cut. Fortunately in this country, sustainable allegations of actual fraud or corruption on the part of public officials are likely to be very rare indeed. What is much more likely is an allegation that, in 'the heat of the chase' of an apparent wrongdoer, the officers concerned have, consciously or unconsciously, cut corners or closed their minds to relevant material. Defining the boundaries of 'dishonesty' in such cases is notoriously difficult (cf *Twinsectra Ltd v. Yardley* [2002] UKHL 12 at [20]-[22], [2002] 2 AC 164 at [20]-[22]).

[29] In my view, the tribunal, faced with a 'best of their judgment' challenge, should not automatically treat is as an appeal against the assessment as such, rather than against the amount. Even if the process of the assessment is found defective in some respect applying the *Rahman (2)* test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it. In the latter case, the tribunal is not required to treat the assessment as a nullity, but should amend it accordingly."

60. *Rahman (No. 2)* and *Pegasus Birds* thus give guidance on the decision-making framework under section 73(1) and section 83(1)(p). One way of framing the question on this appeal is to ask whether that framework is compatible with the FTT's jurisdiction under section 83(1)(p) being broad enough to encompass a legitimate expectation argument by the taxpayer.

61. The approach of the FTT in *Hollinger Print Ltd v HMRC* [2013] UKFTT 739 (Ch.) suggests that it is.

62. *Hollinger* was an appeal under section 83(1)(p). The FTT accepted the proposition that although the Court in *Rahman (No. 2)* and *Pegasus Birds* had been concerned with the process of assessment of tax, section 73(1) gave rise to a closely related question, namely whether to assess at all. That is because of the language of section 73(1), which provides that if the relevant conditions are fulfilled, then the Commissioners *may* assess the amount of VAT due from the taxpayer to the best of their judgment and notify it to him.

63. In discussing the approach derived from *Rahman (No. 2)* and *Pegasus Birds*, the FTT said at [58]:

> "What, in view of our discussion of the meaning of 'may' in section 73, is striking about these cases is the concentration on the use of 'best judgement' to assess the tax. There is no express consideration of the question whether, if it is found that to the best of HMRC's judgement tax is due, it should in fact be assessed ... But that approach must be viewed in light of the arguments in the appeals before the courts. The attack in each case had not been on the decision to assess, but on the judgement used in making the assessment. It seems to us that the test [] described is equally applicable to both questions and that the two questions are not to be addressed separately; there is one question only and that is whether it was wholly unreasonable to make the particular assessment".

64. In *Gore v HMRC* [2014] UKFTT 908, however, FTT decided expressly that it did *not* have jurisdiction to adjudicate on a legitimate expectation argument under section 83(1)(p).

65. The FTT considered *Pegasus Birds* at [27]. It said that there and in previous cases the Court of Appeal had closely scrutinised the wording of section 73(1), and it seemed to the tribunal inconceivable that it would have analysed best judgement in the way it did if the tribunal had an overriding power to consider whether HMRC were justified in exercising their discretion to make an assessment. If that was right the concept of best judgement would be almost redundant. At [30], the FTT summarised the position as follows:

> "For the reasons given above the scheme of section 73(1) and section 83(1)(p) envisages two questions for the tribunal. Firstly whether the assessment was made to best judgement pursuant to the power in section 73(1). Secondly whether the amount of the assessment was correct. I agree with Mr Bates [counsel for HMRC] that the decision as to whether an assessment should be made is essentially a matter of enforcing the liability provided for by the statute."

66. In this case, Miss Barnes effectively adopted this conclusion, and submitted that the two questions identified at para. [30] of Gore represent the entire scope of the FTT's appellate jurisdiction under section 83(1)(p).

67. At [44], having referred to *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC), a case concerning s83(1)(t) and 83(1)(sa) in which the FTT had expressed doubts about the approach taken in *Hollinger*, the FTT in *Gore* then said as follows:

> "I do not consider that the words 'with respect to … an assessment' in section 83(1)(p) are capable of incorporating within the jurisdiction of the tribunal HMRC's discretion whether or not to make an assessment. They are limited to whether the assessment is correct as a matter of law, including whether the assessment is made to best judgement."

68. Miss Barnes again adopted that position. She argued that there is a distinction between a decision to assess and how the decision is then made. The latter falls within the FTT's appellate jurisdiction but not the former.

The Jurisdiction Question: Conclusion & Summary

69. It is clear from the detailed list of appeal subjects in section 83 that the FTT does not have a *general* supervisory jurisdiction (*Corbitt*). We agree with that proposition and nothing we say is intended to derogate from it.

70. That is not, however, the same thing as saying that a taxpayer may not in at least certain of the cases described in section 83(1) defend himself by challenging the validity of a decision on public law grounds. The starting point is that he should be able to (see *Beadle* at [44]). The question which arises is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence (again, see *Beadle* at [44]).

71. In the present case, the relevant statutory language provides that if certain conditions are fulfilled, the Commissioners "may assess the amount of VAT due … to the best of their judgment" (s.73(1)), and if they do then an appeal shall lie to the tribunal "with respect to" the assessment or its amount (s.83(1)(p)).

72. The word "may" is permissive, not mandatory. It must follow that an assessment is made not by operation of the statute but by a discretion exercised by HMRC. We prefer a construction of section 73(1), and therefore of section 83(1)(p), which recognises and gives effect to that word. We therefore respectfully disagree with the approach adopted in *Gore* at [30] and [44] (see [65] and [67] above), which treats the word "may" as descriptive of a separate enforcement function and attributes no weight or meaning to it in the context of section 73(1) looked at on its own terms.

73. A taxpayer has a right of appeal to the tribunal "with respect to … an assessment … under section 73(1)." Although made in a different context, and indeed in the context of statutory language which is narrower than that in section 83(1)(p) (see [39] above), we agree with the comments on Sales J in *Oxfam* at [63] as to the ordinary and natural meaning of the phrase "with respect to". As a matter of language, it defines the scope of the tribunal's appellate jurisdiction not by reference to any particular legal regime or type of law, but instead by reference to the subject-matter of the subsection.

74. Here the subject matter of subsection 83(1)(p) is, straightforwardly, "an assessment … under section 73(1) … or the amount of such an assessment." And for there to be "an assessment … under section 73(1)" the Commissioners need to have made a decision that there should be one (see [72] above).

75. On its face, therefore, we find it difficult to see that this statutory language excludes the availability of a general public law defence based on legitimate expectation. Such a defence would seem to fall squarely within the subject-matter described.

76. We do not construe either *Rahman (No. 2)* or *Pegasus Birds* as compelling any different conclusion. If anything, we consider they support the view we have taken.

77. For one thing, neither decision was concerned with defining definitively the full scope of the appellate jurisdiction under section 83(1)(p). They were concerned with defining the scope of the "best of judgment" test and with the consequences of breach of that test. We do not read them as saying that the *only* legal questions which can ever legitimately arise on an appeal under subsection 83(1)(p) are those referred to at [5] and [6] of Chadwick LJ's judgment in *Rahman (No. 2)*, and referenced in *Gore* at [30] (see [65] above).

78. On the contrary, Carnwath LJ at [26]-[29] of *Pegasus Birds* appears to assume that a range of legal challenges might properly be made which fall within the subject-matter of section 83(1)(p), some of which might be of such a nature that they have the effect of vitiating any assessment completely. Having referred generally to "administrative law principles" at [26], Carnwath LJ then said expressly at [27]: "There is no doubt that an appeal to the tribunal, rather than judicial review, is the appropriate remedy if there are grounds for treating it as of no effect." It is true that he then referred to a case (*Argosy*) where the assessment was set aside because the requisite statutory conditions had not been fulfilled, but as we read it, that was only an example, and we do not read it as limiting the types of vitiating factor properly falling within the scope of the appellate jurisdiction created by subsection.

79. Moreover, HMRC's approach involves making a clear distinction between (i) the decision to assess (which, despite the word "*may*" does not fall within the tribunal's appellate jurisdiction), and (ii) the process of assessment exemplified by the best of judgment test (which does). This distinction does not emerge from a straightforward reading of the subject-matter of the subsection, as we have already stated. We also have serious concerns about its workability.

80. Under the formulation of the "best of judgment test" endorsed in *Rahman (No. 2)*, the relevant question is "whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it." It seems to us that issues are likely to arise in the operation of that test which might well be characterised as relating not only to the process of assessment but also to the decision to assess.

81. Assume for example a case in which the taxpayer's defence is that an assessment was made dishonestly or maliciously in knowing disregard of an undertaking not to assess. HMRC's argument would be that that defence has no place on an appeal under section 83(1)(p), because it relates to the decision to assess. It is true that it does, but that is not the same as saying that it relates only to that question. On the contrary, it seems to us it might equally well be said to be relevant to the *process* assessment, because it is difficult to see how an assessment made in knowing disregard of such an undertaking – whether binding in contract or under general principles of public law – could be said to be an assessment made to best judgment. We see nothing in *Rahman (No. 2)* which limits the "best of judgment" test in a manner which would exclude such a matter from its scope, and as we have already noted, Carnwath LJ in *Pegasus Birds* plainly contemplated that matters might be relevant to the "best of judgment" test which were of such fundamental importance – including outright dishonesty at end of the spectrum but other matters also – that they would result in the assessment as a whole having to be set aside. But that in substance is the same thing as setting aside the decision to assess. There is no meaningful distinction between the two.

82. In such circumstances, it seems to us there are good policy reasons for not adopting a construction of section 83(1)(p) which strictly limits the appellate jurisdiction of the FTT in the manner identified in the *Gore* decision at [30] (see [65] above), and which therefore excludes consideration of a legitimate expectation argument. We refer again to the comments of Sales J in *Oxfam* quoted at [39] above. Were one to adopt such a restrictive approach, there would be an obvious risk of duplication, delay and potential injustice given the potential for disputes to arise as to which forum any particular challenge should be brought it.

83. Finally, and again as to issues of policy, it seems to us that the interest of HMRC in achieving speedy certainty after the making of an assessment is well protected by the (shorter) time limits for appealing against assessments. Whilst there is a public interest in the tax which is raised by assessments, private law rights are also involved and injustice may be caused if the individual has to resort to judicial review because of the difficulty and expense of that course of action. Appeals against assessments do not lie in the category of cases where a decision relating to one taxpayer has wider public significance, for a decision of the FTT in one appeal will not bind the FTT in another.[1]

84. Coming back then to where we started our analysis, the critical question in this case (see *Beadle* at [44]) is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law defence of legitimate expectation (again, see *Beadle* at [44]). For all the reasons given above, we do not consider that

[1]They lie in the third category of cases identified by Lord Woolf in *North and East Devon health Authority Ex Parte Coughlin* [2001] QB 213 which are "likely in the nature of things to be cases where the expectation is confined to one person or a few people giving the promise or representation the character of a contract." [59]

section 83(1)(p) does exclude that ability. On the contrary, on the facts of this case and given the broad subject-matter of section 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case.

Disposition

85. Notwithstanding the conclusion we have expressed on the jurisdiction issue, in light of our conclusion on the legitimate expectation issue, we dismiss the appeal.

Signed on Original

MR JUSTICE ADAM JOHNSON
JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

Release Date 04 August 2021