[2015] UKFTT 0512 (TC)

TC04670

Appeals numbers: TC/2014/917 & 6772

PROCEDURE – application for strike out of part of grounds of appeal – Rule 8(2) – whether lack of jurisdiction – Rule 8(3)(c) – whether no reasonable prospect of success – whether grounds asserted a public law matter outside Tribunal's jurisdiction – Noor considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

PERTEMPS LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 10 September 2015

Mr Timothy Brennan QC, instructed by Anthony Collins Solicitors LLP and Aspire Business Partnership LLP, for the Appellant

Mr James Puzey of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. By an application dated 20 March 2015 ("the Application") the Respondents ("HMRC") applied for stated paragraphs in the amended grounds of appeal dated 8 July 2014 ("the AGOA") of the Appellant ("Pertemps") to be struck out pursuant to Tribunal Procedure Rule 8, as detailed below.

Background

2. In February 2014 Pertemps filed a notice of appeal with the Tribunal, appealing against a VAT assessment issued by HMRC on 6 December 2013 in the amount of £529,574 ("the Disputed Assessment"). In December 2014 a further appeal was filed relating to an assessment in the amount of £186,344 covering different VAT periods but concerning the same dispute; that second appeal has, I understand, been stayed behind the first appeal.

3. The Disputed Assessment assessed VAT for the VAT periods 07/09 to 01/13 in respect of a salary sacrifice arrangement ("MAP") operated by Pertemps for some of its staff. The original grounds of appeal (stated in the notice of appeal) were that the operation of MAP did not involve a supply of services for consideration.

4. On 8 July 2014 Pertemps sought permission to amend its grounds of appeal, in the form of the AGOA. HMRC objected and the disputed application was the subject of a hearing on 28 January 2015, at which Pertemps were represented by Ms Kate Balmer of counsel and HMRC by Mr Puzey (who also appears at this hearing of the Application). The outcome was that on 3 February 2015 the Tribunal (Judge Poole) granted permission for amendment by substitution of the AGOA.

5. On 20 March 2015 HMRC filed the Application. On 1 July 2015 Judge Poole directed that the Application should be the subject of a hearing (and made appropriate case management directions) and commented as follows:

> "The application that came before me on 28 January 2015 was an application to amend the grounds of appeal. In the absence of some clear abuse of the Tribunal's process, a party ought generally to be allowed to argue its appeal on whatever grounds it wishes. I did not consider it appropriate to consider the merits of the new arguments which the Appellant wished to put forward, beyond a cursory consideration to ensure that they did not amount to such an abuse. I accordingly gave permission for the grounds of appeal to be amended to include them. I indicated that HMRC were at liberty to apply to the Tribunal to strike them out if they considered they were entitled to do so pursuant to the Tribunal's procedure rules (on the basis of there being "no reasonable prospect" of the new grounds succeeding). HMRC have chosen to make such an application, and the only question before me is therefore whether that application should be considered before the substantive hearing of the appeal or should effectively be subsumed as part of the full hearing.

> As the purpose of an application such as this is to reduce the length of the substantive hearing (and the costs of preparing for it) by eliminating arguments that are perceived to have no reasonable prospect of success (either because of total lack of evidential support or, more commonly, because of inherent fundamental legal flaw), I would generally wish to consider whether the extra time spent in separately considering the application is likely to outweigh the possible saving of time at the eventual hearing. I consider it is also appropriate that, as a general proposition, applications are considered when they are made and only deferred if there is good reason to do so. Also, unreasonable conduct of an appeal carries a risk in costs."

6. The Application now comes before me, with Mr Brennan QC now representing Pertemps and Mr Puzey continuing for HMRC.

Tribunal Procedure Rule 8

7. Tribunal Procedure Rule 8 (so far as relevant) provides:

> "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
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> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if— …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

Respondents' case

8. Mr Puzey for HMRC submitted as follows.

9. HMRC applied to have paragraphs 7-25 of the AGOA struck out on two alternative grounds:

(1) The Tribunal had no jurisdiction in relation to that part of the proceedings (Rule 8(2) refers).

(2) That part of the proceedings had no reasonable prospect of success (Rule 8(3)(c) refers).

10. These matters should be addressed now, rather than waiting until the substantive hearing of the appeal, because:

(1) The purpose of Rule 8 was to provide a strike out procedure at an interlocutory stage so that neither the parties not the Tribunal were required to address arguments that were outside the Tribunal's jurisdiction and/or were without foundation. Deferring such matters until the final hearing allows for the very outcome which Rule 8 is designed to avoid, resulting in a longer and more unfocussed final hearing.

(2) HMRC would be required to expend time and resources preparing matters (including legal and evidential issues and tasks) which should form no part of a final hearing.

(3) The words "part of the proceedings" in Rule 8 were adequate to cover the deletion of one or more grounds of appeal.

(4) Judge Poole's comments on the Application (quoted at [5] above) supported this approach.

(5) There was also support from the Tribunal in *Spring Capital* [2013] UKFTT 041 (TC) at [21]:

> "… the question was whether the Tribunal had jurisdiction. That is entirely a matter of law and it is one that a Tribunal faced with an appeal must determine. It must strike out an appeal where it has no jurisdiction: it cannot allow an appeal to continue to a substantive hearing on the merits where the Tribunal has no jurisdiction."

(6) This was a situation where the preliminary point had been taken in a case "where the facts are complicated and the legal issue short and easily decided" – per Lord Wilberforce in *Tilling v Whiteman* [1980] AC 1 at 17.

11. Paragraphs 7-25 of the AGOA maintain that HMRC have foregone the collection of the disputed VAT in the exercise of their collection and management powers under sch 11 VAT Act 1994. The first allegation is that Revenue & Customs Brief 28/11 (*VAT: Changes to the treatment of certain supplies made by employers under salary sacrifice arrangements following the CJEU Judgment in Case C-40/09*) made representations to the public (including Pertemps) that VAT would not be required to be accounted for under salary sacrifice schemes until 1 December 2012; there is also reference to a May 2010 statement by HMRC to Pertemps that this VAT issue was then under review by technical advisers. The second allegation is that two HMRC officers (Mr Caven and Mr Pratt) specifically considered the tax consequences of MAP; that Mr Pratt on 9 November 2011 notified Pertemps in writing that his review was complete; that Mr Pratt gave a statutory dispensation to Pertemps in respect of MAP pursuant to s 65 ITEPA 2003; and that the effect of all of the above is that Mr Pratt was indicating that VAT was not payable or would not be collected.

12. Paragraph 25 of the AGOA states that if VAT would otherwise be due then it would be an abuse of power to collect it.

13. If part of the proceedings is not within the Tribunal's jurisdiction then the Tribunal had no discretion; Rule 8(2) was mandatory that that part of the proceedings *must* be struck out – as was confirmed by the Tribunal in *Spring Capital* (quoted above).

14. The Tribunal's jurisdiction in an appeal against a VAT assessment is conferred by s 83 VAT Act 1994. The Tribunal has no jurisdiction to entertain grounds of appeal based on a claim that HMRC have "foregone" the collection of VAT under their collection and management powers. HMRC did not accept that any such decision had been made but, hypothetically for the purposes of the hearing of the Application, even if it had that would not be a matter on which the Tribunal could adjudicate. The Tribunal has no jurisdiction under s 83 over disputes concerning HMRC's collection and management decisions under sch 11. Paragraph 1 sch 11 VAT Act 1994 provides, "[HMRC] shall be responsible for the collection and management of VAT." There is nothing in s 83 that refers to any decision under para 1 sch 11. Pertemps contends that the jurisdiction comes by virtue of s 83(1)(p) because its appeal is against a VAT assessment. However, s 83(1)(p) could not be interpreted as encompassing all and any arguments advanced against a VAT assessment; that approach had been rejected by the Upper Tribunal in *HMRC v Noor* [2013] STC 998 in relation to an appeal against a refusal of input tax credit (at [87]):

> "In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle [HMRC counsel] is correct in his submission that the right of appeal given by s 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric 'VAT legislation' it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising 'under the VAT legislation' as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83. As Mr Mantle puts it, the jurisdiction of the FTT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The FTT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under s 83(1)(c) the FTT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v Customs and Excise Comrs* [2011] UKUT 497 (TCC) at [48]–[53], [2012] STC 885 at [48]–[53]—a discretion under reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."

15. It was not in dispute that HMRC can choose not to collect tax due. *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 per Lord Diplock at (269):

> "All that I need say here is that the Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the Board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection."

And Lord Scarman (at 279):

> "… in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected."

16. However, there was nothing in legislation or caselaw to suggest that if HMRC decides not to collect then the tax ceases to be chargeable. HMRC's powers of collection and management did not extend to a power to change the law – see *R (on the application of Wilkinson) v IRC* [2006] STC 270 per Lord Hoffmann:

> "[21] This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose [taxpayer's counsel] drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers under s 1 of the 1970 Act. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women."

HMRC could refrain from collecting certain VAT but that did not mean the VAT was no longer chargeable. A change of decision on collection might be susceptible to a "legitimate expectation" challenge (although not before the Tribunal) but Pertemps denied that was the basis put forward in the AGOA.

17. There was no contention in the AGOA that there had been any contract concluded between Pertemps and HMRC. Rather, it was contended that HMRC had made a unilateral decision not to collect the VAT. Pertemps' contention in the AGOA appeared to be that if HMRC decide not to collect VAT due on a supply then (a) the VAT is no longer chargeable, and/or (b) HMRC cannot later decide to collect the VAT.

18. Further, even if (again hypothetically) a decision to "forego" tax had been taken, the only argument given by Pertemps as to why HMRC could not change that decision and require the tax to be paid was that this would be an "abuse of power" (para 25 AGOA). Such a submission is clearly one founded in public law and outside the jurisdiction of the Tribunal.

19. The matters set out in paragraphs 7-25 AGOA were effectively a claim that Pertemps had a legitimate expectation that if the VAT would otherwise be due then it should not be collected because of representations made to it by HMRC. That was clearly a dispute outside the jurisdiction of this Tribunal, as confirmed by the Upper Tribunal in *Noor* at [95]. Further, the VAT Tribunal in *Jersey Telecoms* (1996) V13940 stated:

> "… this tribunal does not have any jurisdiction to review the exercise by Customs and Excise of any discretion it may have in its management of the collection and refund of VAT unless such a jurisdiction can be read explicitly in, or by implication into, the statutory wording granting the jurisdiction. Since we have no general jurisdiction to review that exercise by Customs and Excise of its discretion we neither have power to impose our own decision nor to remit to Customs and Excise to take into account factors we consider to have been overlooked."

20. If tax was chargeable and assessed then any argument as to "unfairness" could be pursued only through judicial review proceedings, not before the Tribunal. Per Lord Templeman in *Preston v IRC* [1985] STC 282 at 292:

> "…a taxpayer cannot complain of unfairness, merely because the commissioners decide to perform their statutory duties including their duties … to make an assessment and to enforce a liability to tax. The commissioners may decide to abstain from exercising their powers and performing their duties on grounds of unfairness, but the commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes. And if the commissioners decide to proceed, the court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. The commissioners possess unique knowledge of fiscal practices and policy. The commissioners are inhibited from presenting full reasons to the court for their decisions because of the duty of confidentiality owed by the commissioners to each and every taxpayer.
>
> The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the taxpayer complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

21. Pertemp's case seemed to be close to claiming that HMRC were estopped from collecting the VAT, which was clearly not arguable. The VAT Tribunal in *GUS Merchandise Corporation Ltd* [1978] VATTR 28 stated:

> "… value added tax is to a large extent a self assessing tax. It is often of great importance that a taxpayer should be able to seek guidance on his position vis-a-vis the Commissioners, so as to be able to comply with the many provisions of the statutes and regulations relating thereto. In our judgment, however, having regard to the authorities to which we have referred, and to the mandatory nature of sections 1 and 2, an estoppel cannot lie against their provisions. Moreover, having regard to the passage from the judgment of Lord Parker CJ quoted above, we have reached the conclusion that an estoppel cannot lie so as to hinder the exercise of a statutory discretion. In our judgment, therefore, no estoppel can lie under the fourth ground of appeal.
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> The third ground of appeal is based on a promissory estoppel. In our judgment, however, the reasoning in the above paragraph applies equally to this ground of appeal, so that no estoppel can lie against the Commissioners. …
>
> In our judgment the mandatory provisions of sections 1 and 2 and the discretion vested in the Commissioners by section 31(1) of the Finance Act 1972 override any question of estoppel in the present case."

22. That same approach had been adopted by the VAT Tribunal in *Normal Motor Factors* [1978] VATTR 20 and numerous other authorities. Pertemps was attempting to circumvent a line of authority stretching back decades.

23. Whatever went before in meetings and correspondence, by November 2013 when the Disputed Assessment was issued, HMRC had decided that the VAT was chargeable. Even on Pertemps' interpretation of events (which HMRC did not accept), HMRC's alleged representation that no VAT would be collected was a decision that was no different from other discretionary actions of HMRC which, when challenged before the Tribunal, had resulted in taxpayers being told that the Tribunal had no jurisdiction and they must pursue their dispute elsewhere.

24. Pertemps sought to cast doubt on *Noor* by reference to two cases that were not cited by the Upper Tribunal and, according to Pertemps, would have resulted in the Upper Tribunal reaching a different conclusion had it been aware of the cases: *Wandsworth London BC v Winder* [1984] 3 All ER 976 and *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550. However, neither case impugned the reasoning in *Noor*. Both cases concerned allegations that a litigant's reliance on a public law remedy amounted to an abuse of process. That was not the case here; Pertemps was at liberty to pursue any public law remedies available to it, but only in the correct forum and not before the Tribunal.

25. Pertemps complained of possible delays and costs of having to pursue their arguments in court (or the Upper Tribunal) as well as before this Tribunal – but those matters could not be put ahead of the question of whether the Tribunal had the jurisdiction to hear the arguments in the first place – see *Spring Capital*. The Upper Tribunal in *Noor* stated:

> "[74] We are, however, troubled by Sales J's [in *Oxfam v RCC* [2010] STC 686] reliance on the public benefit which he identified at [70]. He considered that it was desirable for the VAT Tribunal to hear all matters relevant to determination of a question under s 83 (here the

amount of input tax to be credited to a taxpayer) because (a) it was a specialist tribunal and (b) it would avoid the cost, delay and potential injustice and confusion associated with proliferation of proceedings and would ensure that all issues were resolved on one occasion: 'It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s 83.' By that we understand him to imply that not only did Parliament have those benefits in mind but that it should be taken as implementing a statutory regime which gave effect to those benefits rather than reject them: otherwise, there would have been no purpose in making the point.

[75] We are in full agreement with Sales J that two factors which he identified indicate that it would have been desirable for the VAT Tribunal to have the wide jurisdiction which he held to exist. But we do not agree with his speculation about what Parliament intended. Sales J did not restrict his interpretation to para (c) of s 83(1). His approach to the 'ordinary and natural' meaning of s 83 applies to all its paragraphs; there is no hint in his reasoning that it turned somehow on the particular wording of para (c).

[76] That approach, in effect if not name, would have been to give to the VAT Tribunal a power of judicial review in relation to the matters covered by s 83(1). Although not exhaustive of all areas in which HMRC is amenable to judicial review in relation to VAT, it would have conferred a very extensive judicial review jurisdiction. It would have done so, moreover, without any of the procedural safeguards, in particular the filter of permission to bring judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject."

26. In the (post *Noor*) Upper Tribunal case of *RCC v Dhanak* [2014] STC 1525 David Richards J stated:

> "[37] Miss McCarthy [taxpayer's counsel] relied on what Judge Bishopp said in [*Prince v RCC* [2012] SFTD 786] at [23]:
>
> > 'The position here is very different. The tribunal is not being asked, as in [*Oxfam v Revenue and Customs Comrs* [2010] STC 686], to determine how much tax is due—that has already been agreed—but whether HMRC should be required to exercise their discretion not to collect the tax. That is not a tax dispute at all, but a matter governed by public or administrative law, and precisely the kind of issue which must be determined by judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, be waived could properly be regarded as the province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and *Oxfam*.'
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> [38] The point made by Judge Bishopp in that passage is that a challenge to a decision to collect tax lawfully due is a matter for

> judicial review and cannot be brought by way of a statutory appeal to the Tribunal. By saying that the proper province of the Tribunal is to determine 'tax disputes', that is to say the amount of tax due, he is not saying that the Tribunal has jurisdiction in all such disputes, irrespective of whether provision for a statutory appeal is made."

27. In *HMRC v Fairford Group plc and another* [2015] STC 156 the Upper Tribunal had provided guidance on the exercise of the power under Rule 8(3)(c):

> **"[41]** In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

28. It was clear from the documents cited by Pertemps (particularly correspondence from HMRC and notes of meeting between HMRC and Pertemps) that, in fact, the only assurance given by HMRC to Pertemps related to the income tax implications of MAP, in the form of a s 65 ITEPA 2003 dispensation; nothing at all was said about the VAT implications of MAP.

Appellant's case

29. Mr Brennan for Pertemps submitted as follows.

30. 30. HMRC were, in effect, now running the same arguments that they advanced as their opposition to the July 2014 application to amend the grounds of appeal, which had already failed before Judge Poole after a hearing at which both parties were represented by counsel, and HMRC had chosen not to appeal Judge Poole's decision.

31. There were grounds of appeal apart from those in paragraphs 7-25 of the AGOA and thus there would in any event be a substantive hearing of the appeal. If HMRC wished to pursue their strike out of paragraphs 7-25 of the AGOA then the substantive hearing was the appropriate time and place. Requiring Pertemps to split the dispute into two parts and pursue them in separate fora was expensive and time-consuming. Already over a year had been lost because HMRC were reluctant to have the dispute heard on its full facts. In *Tilling v Whiteman* [1980] AC 1 Lord Wilberforce commented (at 17):

> "Miss Whiteman did not yield up possession as she had agreed, so the owners brought proceedings in the Canterbury County Court for possession and other relief. Pleadings were exchanged, and the case

> came on for trial in May 1977 with both sides legally represented. The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."

Also, Lord Scarman commented (at 25): "Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense."

32. There was only one issue in the proceedings: whether Pertemps had been overcharged by the Disputed Assessment. That dispute was clearly within the jurisdiction of the Tribunal and HMRC were wrong to claim that "part" of the proceedings could be identified and struck out. Rule 8(2)(a) was aimed at situations where more than one matter was advanced in the same appeal, and at least one matter was outside the jurisdiction.

33. In outline, Pertemps would at the substantive hearing of the appeal contend:

(1) For the period to which it relates (ie up to 1 January 2012) Brief 28/11 had the effect *generally*, under HMRC's powers of collection and management, of relieving those who fell within its terms of any VAT which might otherwise have been due. The legal position had been unclear (following the CJEU decision in *Astra Zeneca* Case C-40/09) and it was appropriate that there should be a transitional period, and HMRC announced the arrangements; that was in conformity with the position expressed by Lord Hoffmann in *Wilkinson* (at [21], quoted at [16] above). Presumably HMRC would accept that if Pertemps falls within the terms of Brief 28/11 then HMRC is not entitled to the VAT. Then the question becomes whether MAP fell within the terms of Brief 28/11 – that is not a public law question because if MAP fell within the terms of Brief 28/11 then the VAT ceased to be chargeable.

(2) The prolonged discussions and correspondence between the parties had the effect *specifically*, under HMRC's powers of collection and management, of relieving Pertemps of any VAT which might otherwise have been due. The factual position (if disputed) would require determination by the Tribunal by deliberation on documentary and witness evidence – that was not appropriate to the determination of a preliminary application. Pertemps contended that what HMRC actually did had the effect of discharging the VAT (if otherwise due) under their statutory powers of collection and management of VAT: s 58 and para 1 sch 11 VATA 1994. Assuming that HMRC disputed that contention – HMRC had not yet served their statement of case against the appeal - the matter would require study, by reference to facts and documents, of what HMRC

actually said and did; that was appropriate to the substantive hearing of the appeal when documents and witnesses would be available for examination and challenge. To raise the matter now was premature and would involve the Tribunal in a "mini-trial", which process the higher courts had expressly disapproved - see the passage from *Three Rivers* quoted at [39] below. In the current appeal even a mini-trial was impossible because HMRC had not yet stated their case.

(3) HMRC's assurances in Brief 28/11 and also orally and in writing, had the effect of releasing, or discharging, the liability for VAT (if any), collection and management of which was in HMRC's care, by statute. HMRC had misconceived Pertemps' argument as being a public law point; Pertemps was not saying that the Tribunal should look at what HMRC did and review HMRC's actions; rather, Pertemps was saying that the Tribunal should look at what HMRC did and determine the legal effect of HMRC's actions; that was an appellate jurisdiction and one held by the Tribunal, as confirmed by the Upper Tribunal in *Noor* at [31]. HMRC had unilaterally agreed that the VAT was discharged; that was entirely within the powers conferred on them by sch 11 VATA 1994 and thus any dispute was within the jurisdiction of the Tribunal – see *Noor* at [60-61 & 92].

34. In *Noor* the Upper Tribunal was careful to emphasise that the taxpayer had been unrepresented and that its decision was reached without the benefit of full argument:

> "[6] … it is important to appreciate that our decision is reached without the benefit of full argument in opposition to HMRC's appeal. We have done our best, with the help of Mr Mantle's [HMRC's counsel's] submissions, to identify the points which could be made in favour of Mr Noor and to deal with them in this decision. But that is no substitute for independent argument. Our decision may not, therefore, be as persuasive as it might otherwise be, although as a matter of precedent it will be binding on the FTT.
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> …
>
> [96] … It has been difficult for us to deal with the legal issue of jurisdiction in the absence of legal representation for Mr Noor. It is even more difficult for us to deal with the appeal on the facts. We have had full written and oral submissions from Mr Mantle on this aspect of the case. We have not, in the absence of argument, found anything with which we positively disagree. …"

35. The attention of the Upper Tribunal appears not to have been drawn to two cases which might have been found to be of assistance: *Wandsworth* and *Pawlowski*. In *Wandsworth* the House of Lords unanimously held that a tenant who had failed to apply for judicial review (which was an available remedy) could nonetheless argue in enforcement proceedings in the County Court that the decision to increase his council house rent was ultra vires. The County Court does not have a general supervisory jurisdiction (its jurisdiction is statutory, as is that of the First-tier Tribunal), nonetheless the public law point could be argued in the County Court and the tenant was not sent away to litigate the same point in another court. Per Lord Fraser (at 981):

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover, he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour."

36. In *Pawlowski* the Court of Appeal held that where a taxpayer had failed to exercise the available remedy of judicial review (in that case, in response to a PAYE direction) he could nonetheless argue, in collection proceedings, the public law issue which he claimed to arise. Simon Brown LJ stated (at 552):

> "This is yet another appeal concerning the relationship between public law and private law proceedings. The difficult and important point it raises is whether a taxpayer can invoke a public law defence to a claim by the collector of taxes under Part VI of the Taxes Management Act 1970 - the Part concerned with the collection and recovery of tax. ..[Is] the defendant to collection proceedings of this kind entitled to raise a public law defence which puts in issue the legality of directions underlying the assessment"

In reliance on *Wandsworth* the Court of Appeal in *Pawlowski* held that, in the absence of an available appeal against the PAYE direction (as was then the case), the public law issue could be raised in collection proceedings, even in the magistrates court, which was "hardly the ideal forum for a public law dispute" (at 557).

37. In the present case, the position is *a fortiori*. There *is* an available statutory appeal, so it would be particularly inapt for Pertemps to be told that it cannot use the statutory appeal for one-half (only) of its case, but must argue the rest of it in another court.

38. For the above reasons, the decision in *Noor* must be considered with caution and (as the Upper Tribunal itself recognised) may not be "as persuasive as it might otherwise be". At most, *Noor* is authority for the proposition that the First-tier Tribunal does not have a general public law supervisory jurisdiction. However, the Upper Tribunal was careful (at [60] and [92]) to make the important distinction that this proposition does not preclude the First-tier Tribunal from considering the effect of "anything which the legislation permits to be done", "including, on one view, HMRC's care and management powers". Thus the FTT has power to decide (but after proper investigation of the facts, not on a strike-out application where HMRC has not disclosed its position) what is the legal effect of the exercise by HMRC's officers of the power of collection and management conferred by para 1 sch 1 VATA 1994.

> "[60] It is important for us to draw, at this stage, a distinction between contracts which are within the powers of HMRC to make and those which are not. It may well be that a contract which is within the powers of HMRC to make is one which could have been recognised and given effect to by the VAT Tribunal (and can now be recognised and given

effect to by the FTT) when it comes to establishing the correct amount of input tax under s 83(1)(c). That is not a matter which we need to decide in this appeal. The argument in favour of that view is simple: the amount of input tax credit which is properly to be credited to a taxpayer reflects not only the relevant provisions for the calculation of such credit but also anything which the legislation permits to be done.

[61] It is a very different question, however, whether the VAT Tribunal would have had (and now whether the FTT has) jurisdiction to give effect to a purported contract which HMRC had (or now has) no power to enter into. A purported agreement which it is outside the powers of HMRC to make is prima facie void. If a taxpayer is to have the benefit of it, he must assert some non-contractual juridical basis (eg in private law, based on representation or mistake or, in public law, based on breach of legitimate expectation) on which he relies to obtain a tax credit different from that for which the legislation provides.

…

[92] For our part, we consider that the ordinary meaning of the language used in the context of the VATA 1994 as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers). We have already given our main reason for reaching that conclusion in our analysis of what is meant by 'input tax' and 'credit' in s 83(1)(c). Further support for our conclusion is found when it is remembered that s 83(1) concerns appeals, that is to say appeals against decisions of HMRC. That makes perfectly good sense in the context of a decision concerning the matters listed in the paragraphs of s 83(1), and in particular concerning a decision in respect of a person's entitlement to an input tax credit under the VAT legislation. In the absence of an appealable decision, there is nothing to appeal and s 83 does not come into play."

39. The Tribunal's discretionary power under Rule 8(3)(c) to strike out for no reasonable prospects of success must be exercised in the light of the overriding objective of dealing with cases fairly and justly (Rule 2(1)). HMRC faced a high hurdle; only an unarguable or fanciful case was liable to be struck out. Guidance was given (under a different procedural regime) by Lord Hope in *Three Rivers District Council & others v Governor & Company of the Bank of England* [2001] 2 All ER 513:

"94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For

> example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

Consideration and Conclusions

Timing of the Application

40. I do not agree with Mr Brennan that HMRC are to be criticised for making the Application at this stage of the proceedings. The Application was effectively invited – at some stage of the proceedings – by Judge Poole (see [5] above). The question is whether it should be made now as an interlocutory application or instead left to be raised at the substantive hearing of the appeal.

41. I agree with Judge Poole's view ([5] above again) that applications of this nature should be dealt with when they arise, rather than be deferred to the substantive hearing of the appeal. That is because the nature of HMRC's objection goes to the heart of whether the disputed grounds (ie paras 7-25 of the AGOA) constitute a matter which is within the jurisdiction of the Tribunal. It can be distinguished from the case of *Tilling v Whiteman* cited by Mr Brennan where the preliminary point of law concerned whether a statutory landlord and tenant provision "applies to a case where there are joint owners one only of which requires the house as a residence". In *Tilling* the House of Lords was critical of the lower courts for not making findings of facts sufficient to inform the determination of the preliminary point of law. That is, in my view, qualitatively different from the situation before me; this is not a preliminary point of law arising in the substantive appeal but instead a strike-out application which alleges that the Tribunal should not be considering the challenged aspects of the dispute, for want of jurisdiction.

42. Rule 8(2) is mandatory that proceedings (in whole or part) outside the jurisdiction of the Tribunal *must* be struck out. I agree with the statement of Judge Mosedale in *Spring Capital* (at [19]):

> "An appeal where this Tribunal has no jurisdiction *must* be struck out. It is not open to the Tribunal, having concluded that there is an arguable case on jurisdiction, to refuse to strike out the appeal: it must

> resolve the issue. It must decide whether there is jurisdiction or not and, in the latter case, the appeal must be struck out."

43. The issue of jurisdiction must be resolved by the Tribunal and it would not be just and fair to require both parties to prepare their cases for the substantive appeal on a basis that, in effect, ignores the fact that much (perhaps most) of that work relates to a matter that may not even be within the jurisdiction of the Tribunal. Accordingly, it is appropriate to determine the matter as an interlocutory application.

Rule 8

44. I do not agree with Mr Brennan that the words "a part of the proceedings" in Rule 8 do not permit the Tribunal to strike out specified grounds of appeal (or, indeed, to bar specified contentions in HMRC's statement of case, pursuant to Rule 8(7)). In my view, that is one type of situation that Rule 8 is designed to accommodate, so that only the grounds of appeal that can be determined by the Tribunal should be litigated before it.

The decision in Noor

45. Mr Brennan points out that the Upper Tribunal in *Noor* (a) stated (at [6]) that it had not had the benefit of expert argument for the taxpayer; and (b) did not cite the cases of *Pawlowski* or *Wandsworth*. Mr Puzey correctly, in my view, observes that that is only a matter of concern for this Tribunal if the apparent failure to consider those two cases meant that the decision in *Noor* might have been different had they been considered. Although the cases of *Pawlowski* and *Wandsworth* were not cited in *Noor*, those two cases have been examined in the context of the jurisdiction of this Tribunal (and its predecessors) by the courts and superior tribunal on several occasions.

46. In *Guthrie (Inspector of Taxes) v Twickenham Film Studios Ltd* [2002] STC 1374 HMRC appealed to the High Court against a decision of the General Commissioners. Lloyd J stated:

> "[37] The question of raising public law points by way of defence to collection proceedings was touched on in the judgments of the Court of Appeal in *IRC v Aken* [1990] STC 497. In the judgments of Fox and Parker LJJ a challenge on public law grounds otherwise than in the context of an appeal was recognised as a theoretical possibility, but nothing in those judgments suggested that the General Commissioners could take account of matters of public law, as to the impropriety of the exercise of a discretion by the Revenue.
>
> [38] Mr McDonnell's [taxpayer's counsel's] principal reliance was on *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550. Those were collection proceedings. A company had failed to deduct PAYE tax when paying the respondent his salary. The company had been assessed for the tax which it should have deducted, but it did not pay. The Revenue then directed that the tax should be recovered from the respondent, acting under a power exercisable where the Board was of the opinion that the employee had received his emoluments knowing that the employer had wilfully failed to deduct the amount of tax which

it was liable to deduct. There was no right of appeal for the employee against such a direction. The employee, the respondent, denied that he had received the payments with the necessary knowledge. The issue in the Court of Appeal was whether the respondent could rely on such a point by way of defence to collection proceedings. The Court of Appeal, following *Wandsworth London Borough Council v Winder* [1985] AC 461, held that the direction could have been challenged by the respondent by judicial review, but that the respondent was also entitled to raise the same point by way of defence in the collection proceedings. The issue would be whether the Board had material on which it was entitled to be satisfied that he had received the payments with the necessary knowledge.

[39] None of these cases seem to me to provide any basis for the suggestion that the line of cases from *Aspin v Estill (Inspector of Taxes)* [1987] STC 723 to *Steibelt (Inspector of Taxes) v Paling* [1999] STC 594 is no longer binding on me in holding that it is not open to General Commissioners to entertain a challenge to an assessment on grounds of public law, that the Revenue were acting unreasonably (in a *Wednesbury* sense) in raising the assessment at all. In my judgment those cases are unaffected by *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550 and *Wandsworth London Borough Council v Winder* [1985] AC 461. Accordingly the commissioners were wrong to consider that they could either substitute their own view of the right way to exercise the discretion whether or not to raise an assessment under s 30(1), or to review the Revenue's decision on the grounds that it was unreasonable in the *Wednesbury* sense. The former is not open to anyone. The latter is only open to the Administrative Court."

47. In the Court of Appeal case of *CEC v Pegasus Birds Ltd* [2004] STC 1509 Carnwath LJ stated (making specific reference to s 83(1)(p) VATA 1994):

"[26] Mr Woolf [taxpayer's counsel], following on this issue, submitted that, where it is shown that any aspect of the assessment is vitiated under the *Rahman* (*2*) tests, the [VAT Tribunal] has no discretion; it must set it aside. However, this approach takes no account of the development of modern principles of administrative law, under which the traditional distinctions between 'void' and 'voidable' have largely been eroded (see eg De Smith, Woolf and Jowell: Judicial Review (5th edn) para 5-048). 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 eg in another context, *R v Wicks* [1998] AC 92). Mr Woolf's submission is not helped by his reference to *Pawlowski* (*Collector of Taxes*) *v Dunnington* [1999] STC 550. In that case, it was held that the validity of a direction making an employee liable to PAYE tax could be challenged in the defence to tax collection proceedings. However, there was no right of appeal against the direction, and the only issue was whether the challenge had to be by judicial review (see [1999] STC 550 at 557). The case does not assist in construing the scope of the tribunal's powers under the statutory appeal created by s 83(p)."

48. In the Court of Appeal case of *Thorpe v RCC* [2010] STC 964 Lloyd LJ stated:

> "[28] Mr Macdonald's [taxpayer's counsel's] other point is that the withdrawal of approval by the letter of 30 July 2004 was invalid as a matter of public law and that this is a point which can be taken on appeal to the special commissioners. There is no express provision for such an appeal. In the 30 July 1994 letter it was said that there was no right of appeal, but that the withdrawal of approval could be challenged by judicial review if that was done promptly. In my judgment that was a correct statement of the position. Mr Macdonald relied on the principle stated generally in *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] 1 AC 461 and applied in the context of claims for income tax in *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550. In *Pawlowski* the claim for recovery of tax against Mr Dunnington was on the basis that his employer had made payments of emoluments to him without making the statutorily required deductions of pay as you earn tax, and the claim against him was on the basis that the Board of Inland Revenue had concluded that he had received the payments knowing that the employer had wilfully failed to make these deductions. In the county court the judge considered that the issue was whether the Revenue had shown that the employee had indeed known of the employer's wilful failure to make the deductions and he dismissed the claim on that basis.
>
> [29] The Court of Appeal, on an appeal by the Collector of Taxes, held that this was the wrong test but that it was open to the defendant to challenge by way of defence the legality of the Board of Inland Revenue's conclusion on public law grounds. That is, as it seems to me, very different from saying that the point sought to be taken in this case can be raised on a statutory appeal where no provision to that effect exists among those which allow taxpayers to appeal to the special commissioners.
>
> [30] There are statutory provisions allowing appeals to the special commissioners, now the Tax Chamber of the First-tier Tribunal, in respect of decisions by the Board of Revenue as distinct from assessments to tax made by an Inspector of Taxes. Miss Simler [HMRC's counsel] cited to us ss 741 and 754 of ICTA 1988 as well as para 16(2) in Pt III of Sch 27 to ICTA 1988. She accepted that there may be cases in which such jurisdiction arises by necessary implication. In the present case there is no express provision and, she contended, no basis for implication.
>
> [31] I will not decide either way, even if I could on this appeal, whether in principle the analogy of *Pawlowski v Dunnington* could be applied in defence to a claim for payment of tax under an assessment under s 591C. However I agree with the special commissioner and, so far as he said anything about it with the judge, that the point is not open to be taken on this statutory appeal."

49. In the recent Upper Tribunal case of *Lobler v RCC* [2015] STC 1893 Proudman J stated:

> "[132] Mr Firth [taxpayer's counsel] argued that for the FTT to assess principles of public law would not amount to an abuse of process. He

> said that there was plainly no disadvantage for HMRC, Mr Lobler, the public or the tribunal in asking the UT to determine a question of public law in this forum. He relied on the decisions in *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461 and *Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550 where the Court of Appeal adopted the following formulation from Trustees of the *Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747 at 755, [1998] 1 WLR 840 at 849: 'If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting abuse.'
>
> [133] However, *Dennis Rye* was a completely different case, not one in which the UT was asked on an appeal from the FTT, a body without judicial review jurisdiction, to exercise public law jurisdiction. I have no doubt that the Administrative Court is the appropriate forum in the first instance. There has been no order for the UT to hear judicial review proceedings concurrently with the appeal."

50. From the above authorities I conclude that there is unanimous agreement, which is of course binding on this Tribunal, that the cases of *Pawlowski* and *Wandsworth* do not assist in determining the jurisdiction of this Tribunal on a dispute coming before it under the statutory appeal mechanism provided by s 83(1)(p) VATA 1994. Consequently, I have no reason to believe that even if those two cases had been cited to the Upper Tribunal in *Noor* then the learned judges would have reached any different conclusions from those stated in their decision. Accordingly, I take *Noor* as being binding on this Tribunal without qualification.

The nature of the claims in paras 7-25 of the AGOA

51. Pertemps disputes HMRC's assertion that its grounds in paras 7-25 of the AGOA constitute public law points – which Pertemps accepts would (subject to its above reservations on the decision in *Noor*) be outside this Tribunal's jurisdiction. Instead, Pertemps contends that what HMRC actually did (both by publication of Brief 28/11, and in meetings and correspondence concerning MAP) was to exercise their powers of collection and management (conferred by para 1 sch 11) in such a way as to relieve Pertemps of any liability to VAT that might otherwise have been due. Mr Brennan in his submissions fairly elaborated this point as being that if, as contended, HMRC had unilaterally decided (pursuant to its powers of collection and management under sch 11) to forgo collection of VAT then there was no longer a VAT liability - rather than there still existing a VAT liability that could no longer be collected. The result, says Pertemps, is that the Disputed Assessment is appealable under s 83(1)(p): "… an appeal shall lie to the tribunal with respect to … an assessment ... or the amount of … an assessment". Mr Brennan submits that this is a point that has not previously been adjudicated.

52. The leading authority in this area is now the Upper Tribunal decision in *Noor*. In *Noor* the taxpayer had claimed a credit for input tax incurred before registration; that claim was in fact time-barred but the taxpayer alleged (to the satisfaction of the First-tier Tribunal) that he had been misled as to the time limit by advice from HMRC. The First-tier Tribunal, relying on the Upper Tribunal decision in *Oxfam*, considered that "Mr Noor did have a legitimate expectation that he could recover the

input tax shown on the Invoices" ([2011] UKFTT 349 (TC) at [22]) and that "the Tribunal does have the jurisdiction to consider the issue of legitimate expectation in the present case" (at [21]), and allowed the appeal. That was reversed by the Upper Tribunal, which held (at [87]): "the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax". In so doing, the Upper Tribunal (Warren J and Judge Bishopp) differed from the views it had earlier expressed in *Oxfam* (Sales J), and much of the *Noor* decision comprises a careful explanation of that difference.

53. There are two paragraphs in *Noor* where the Upper Tribunal specifically refers to HMRC's powers under para 1 sch 11. The Upper Tribunal used the earlier (pre April 2005) terminology of "care and management" powers rather than "collection and management" powers; I have taken that as being an inadvertent slip rather than being intended to imply any distinction. First, at [87] the Upper Tribunal stated:

> "In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle [HMRC's counsel] is correct in his submission that the right of appeal given by s 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric 'VAT legislation' it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising 'under the VAT legislation' as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83. As Mr Mantle puts it, the jurisdiction of the FTT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The FTT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under s 83(1)(c) the FTT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v Customs and Excise Comrs* [2011] UKUT 497 (TCC) at [48]–[53], [2012] STC 885 at [48]–[53]—a discretion under reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."

54. Applying that passage to the current matter I take it that the Upper Tribunal is drawing a distinction between:

(1) Cases where HMRC have power (whether as part of their para 1 sch 11 powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in a VAT liability of a different amount than would have resulted in the absence of the agreement. In such cases the amount ascertained in accordance with the agreement may be one arising under the VAT legislation, and thus within the scope of an appeal to this Tribunal pursuant to s 83.

(2) Cases where a taxpayer claims a right based on legitimate expectation which goes behind his liability ascertained in accordance with the VAT legislation. In such cases the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; this Tribunal has no jurisdiction to determine the disputed issue in the context of an appeal under s 83.

55. The other paragraph in *Noor* where the Upper Tribunal specifically refers to HMRC's powers under para 1 sch 11 is at [92], which is in the following passage:

> "[90] We can put this point in a slightly different way. The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, prima facie, to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is 'input tax' (or what can be counted or treated under the legislation as input tax eg under s 24 or reg 111) or what can be 'credited' for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of 'input tax which may be credited' to a person. The FTT has no jurisdiction to effect that financial adjustment since its jurisdiction under s 83(1)(c) relates only to 'input tax which may be credited' to a person.
>
> [91] Our conclusion, in the light of this discussion, is that the FTT has no jurisdiction over Mr Noor's claim to a credit in respect of VAT on the invoices. In so concluding, we disagree with and depart from the decision of Sales J. We have dealt already with the concerns which we have about his reliance on the position in relation to the contract issue and with the difficulty expressed in [2010] STC 686 at [77]. We wish to say something more, however, about his principal reason for deciding as he did, namely his perception of the 'ordinary meaning of the language' of s 83(1)(c) …
>
> [92] For our part, we consider that the ordinary meaning of the language used in the context of the VATA 1994 as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers). We have already given our main reason for reaching that conclusion in our analysis of what is meant by 'input tax' and 'credit' in s 83(1)(c). Further support for our conclusion is found when it is remembered that s 83(1) concerns appeals, that is to say appeals against decisions of HMRC. That makes perfectly good sense in the

> context of a decision concerning the matters listed in the paragraphs of s 83(1), and in particular concerning a decision in respect of a person's entitlement to an input tax credit under the VAT legislation. In the absence of an appealable decision, there is nothing to appeal and s 83 does not come into play."

56. Applying that passage to the current matter I take it that the Upper Tribunal is saying that this Tribunal does have jurisdiction under s 83(1)(p) to determine the amount of an assessment where the VAT assessed arises under the terms of the VAT legislation "(including, on one view, HMRC's care and management powers)".

57. Taking together both [87] and [92], I think the outcome is that if HMRC have as part of their statutory powers "(including, on one view, HMRC's [para 1 sch 11] powers)" entered into an agreement with a taxpayer, the terms of which agreement result in a VAT liability of a different amount than would have resulted in the absence of the agreement, then the amount ascertained in accordance with the agreement "may be" within the scope of an appeal to this Tribunal pursuant to s 83.

58. I take particular note of the caution exercised by the Upper Tribunal in its choice of words ("on one view" and "may be"). However, I conclude that the Upper Tribunal did have it in mind that an agreement reached by HMRC in their exercise of their para 1 sch 11 powers would be capable of being the subject matter of an appeal under s 83 to this Tribunal. I readily accept that the matter is not without doubt but, given the apparent equivocation of the Upper Tribunal on this point in *Noor*, I do not accept that it is sufficiently clear that the Tribunal does not have jurisdiction in relation to the grounds stated in paras 7-25 of the AGOA, sufficient to justify striking out those grounds. For the same reason, I do not accept that it is sufficiently clear that the grounds stated in paras 7-25 of the AGOA have no reasonable prospect of success. I emphasise that I make no findings on whether the actions of HMRC alleged in paras 7-25 of the AGOA did constitute an "agreement" as contemplated by the Upper Tribunal in *Noor*. Mr Puzey was clear that if the matter came to trial then HMRC may wish to challenge the factual assertions in paras 7-25 of the AGOA. That is a matter for the Tribunal hearing the substantive appeal, by reference to the full documentary and witness evidence.

59. Accordingly, I shall refuse the Application. The next procedural step is for HMRC to produce their statement of case, pursuant to Rule 25, and I make a direction for that below. If HMRC are minded to apply for permission to appeal against this refusal of the Application then they should ensure that they also apply for a stay of the direction for production of statement of case, pending the determination of that application for onward appeal.

Decision

60. The Application is REFUSED.

61. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Direction for Statement of Case

62. The Tribunal DIRECTS:

(1) No later than 60 days after the date of issue of this decision notice to the parties, the Respondents shall send or deliver to the Tribunal and the Appellant their statement of case in relation to these proceedings.

(2) Leave to apply.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 7 OCTOBER 2015