TC06892

Appeal number: TC/2017/6848

MISDECLARATION PENALTY – penalty of approx. £2.5m imposed after* Kittel *appeal struck out and shortly before HMRC agreed to pay repayment supplement for earlier periods – preliminary issue whether assessment formally valid - yes – preliminary issue whether Tribunal has jurisdiction to award hardship –no -* Guernsey Leasing *not followed – whether all grounds of appeal to be struck out – all struck out except case that penalty disproportionate

FIRST-TIER TRIBUNAL
TAX CHAMBER

DHALOMAL KISHORE **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 4 and 5 June and 31 July 2018

Mr B McGurk, counsel, for the Appellant

Mr C Foulkes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Kishore was VAT registered and made quarterly VAT returns. He claimed repayments of input tax in his VAT returns. HMRC delayed repayment of the input tax claimed in his VAT returns of 12/05, 03/06 and 06/06. The input tax (some £22,892,998.42) claimed in his 12/05 return was repaid in tranches in early 2006; the input tax claimed in the 03/06 and 06/06 returns (in total, £22,392,775.10) was never repaid. By decisions dated 13 July 2007 (in respect of 03/06) and 28 March 2008 (in respect of 06/06) HMRC refused repayment on the grounds that Mr Kishore knew or ought to have known that his transactions in those periods were connected with the fraudulent evasion of VAT.

2. The appellant appealed both of those decisions. The appeal proceedings were protracted. The appeals were ultimately struck out on 9 September 2015 for failure by the appellant to comply with an unless order dated 6 August 2015. The appellant later applied for the appeals to be reinstated; this was refused by the Tribunal by decision dated 2 November 2016. The Upper Tribunal refused leave to appeal that decision on 2 November 2017. Therefore, the appellant exhausted his appeal rights against the two decisions and cannot recover the input tax he claimed in respect of periods 03/06 and 06/06.

3. On 3 August 2017, HMRC issued the appellant with misdeclaration penalty assessments on the basis that his 03/06 and 06/06 returns contained inaccuracies. The penalties imposed were £1,707,846.00 in respect of period 03/06 and £811,340.00 in respect of period 06/06. The total in penalties was £2,519,186.

4. The appellant appealed these assessments on 13 September 2017. This hearing is concerned with those penalties: on 7 December 2017, HMRC applied to strike out the appeal against the penalties.

5. The appellant's position was that the delayed repayment of his 12/05 return is relevant to his appeal against the misdeclaration penalties. On 6 March 2006, on late receipt of the repayment, Mr Kishore had requested HMRC pay him a repayment supplement of £1,144,649.92. HMRC refused the claim on 18 April 2006 and on 13 July 2006 that refusal was appealed to this Tribunal.

6. Like the 'MTIC' appeal, the repayment supplement appeal was protracted. Ultimately, on 7 August 2017, HMRC conceded the appeal. The appellant has not, however, yet been paid his repayment supplement. HMRC informed him that the repayment supplement due to him would be set off against his liabilities to HMRC. HMRC had imposed the misdeclaration penalties four days earlier.

The matters in issue

7. The hearing was originally called to determine three matters:

(a) As Mr Kishore's appeal against the misdeclaration penalties was filed late, whether his application for the Tribunal's leave to allow him to lodge his appeal late should be allowed;

(b) The appellant's application for a preliminary hearing of his application for relief from payment of the penalties pending determination of his appeal on the ground of hardship; this was also phrased as an application for the Tribunal to determine whether HMRC was entitled to set-off the repayment supplement against the assessed penalties. While they were logically different applications, they were both aimed at the same end: to have immediate repayment of the repayment supplement to which HMRC have accepted the appellant is entitled.

(c) HMRC's application to strike out the appeal if admitted;

8. In reality, the appellant's case developed and changed before and during the course of the hearing. There were two significant changes. Firstly, although no prior mention was made of this, in his skeleton argument Mr McGurk asked for the appeal to be summarily allowed or for a preliminary issue on the basis there were no valid or timely assessments to the penalties. Secondly, he introduced during the hearing a new and significant ground of appeal, which was that the penalties were a breach of Mr Kishore's human rights as imposed so long after the (alleged) misdeclaration. This was in part responsible for the adjournment of the hearing for some weeks. He also asked for disclosure.

9. So while I deal with the issues and arguments in what I consider to be the logical order, which was not quite the order in which the arguments were made to me.

Late appeal

10. Mr Kishore's appeal was lodged with the Tribunal about ten days late. HMRC raised no objection to this and the appellant gave a good explanation (he was out of the country on extended leave at the time of receipt). I therefore admit the appeal out of time.

Application to allow the appeal

11. As I have said, the application for summary judgment in favour of the appellant was not foreshadowed before service of the appellant's skeleton argument. Nevertheless, HMRC did not suggest that the appellant was unable to argue the matter.

12. Having said that, the hearing proceeded on the footing that it was a preliminary hearing of these issues (indeed, the appellant had requested a preliminary hearing). That meant I was asked to make a ruling on the four points of law the appellant raised to justify the application and not merely to decide whether the points were so strong I should award the appellant summary judgment.

13. On the last day of the hearing, Mr McGurk suggested that I was only being asked to decide whether the points were fit to go to hearing but that was not how the matter was argued: indeed, I understood that Mr McGurk raised them because the appellant wanted immediate payment of the repayment supplement and did not want to wait until the end of the appeal proceedings. In any event, it would be wasteful for matters on which the Tribunal had had nearly two days of full argument to be heard again. I take account of what Lewison LJ said in *Mellor & Others v Partridge & Anor* [2013] EWCA civ 477:

> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better……

The points were fully argued and did not depend on factual findings, so it was appropriate to decide them.

14. Those four points of law were whether:

> (a) the assessment was invalid because (i) it referred (allegedly) to the wrong assessing provision and/or (ii) because the appellant had not been given a chance to state his defence before he was assessed;
>
> (b) The provision giving liability was repealed without saving;
>
> (c) The assessment was out of time.

I deal with each in turn.

(a) There was no valid assessment

15. A new case which was not in the appellant's grounds of appeal and which was first put in Mr McGurk's skeleton argument was that the assessments were invalid because (i) they were made under the wrong statutory provision and/or (ii) because they had been made without giving the appellant the chance to put a case that he had a reasonable excuse or any other defence.

<u>(i) assessment referred to wrong provision</u>

16. The notices of assessments stated that they were made under s 63 Value Added Tax Act 1994 ('VATA'). The parties were agreed, however, that s 63 is a provision which sets out circumstances in which a taxpayer incurs liability to a misdeclaration penalty but that such a penalty has to be assessed under s 76 VATA, which is the assessing provision.

17. I consider this argument misconceived. While s 76 is the provision which gives HMRC the power to assess, it does not require HMRC to refer to it when making an assessment. So the failure to refer to s 76 could not invalidate the assessment.

18. In any event, it is clear that a defect in an assessment does not invalidate it save in certain circumstances:

> 'Even if the process of assessment is found defective in some respect,,, 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.
>
> *Pegasus Birds* [2004] EWCA Civ 1015 per Carnwath LJ

19. The appellant's view was that the reference to s 63 rather than s 76 in the notices of assessment indicated that HMRC hadn't made the assessments under s 76 at all and so the defect was fundamental and incapable of rectification. I do not agree. S 76 was the only applicable assessing provision and the only power which HMRC could have been exercising and so clearly the assessments were made under s 76 whether or not this was expressly stated. The assessments were not defective.

20. HMRC referred me to cases such as *Queenspice* [2011] UKUT 111 (TCC) and *Foneshops* [2015] UKFTT 410 (TC) which had dealt with allegedly defective *notices* of assessment. The Upper Tribunal in *Queenspice* said:

> '[25].....(iii) in judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates.

21. In *Foneshops* the FTT upheld a notice of assessment which gave the wrong company registration number for the taxpayer and stated the wrong amount. HMRC's point in this appeal was that, if the reference to s 63 made the notice of assessment faulty, it was a minor fault and the notice of assessment as a whole met the test in *Queenspice* and was therefore valid. HMRC did not accept that the reference to s 63 made the assessment faulty in any event: s 63 was the provision under which the assessed liability arose and there was no need to refer to the assessing provision in a notice of assessment.

22. I agree with HMRC. The notices of assessment were not faulty in referring to s 63 rather than s 76. There was no need to refer to s 76 and it was helpful to refer to the provision under which the liability arose. It was the explanation for the assessment. Even if the notices were faulty in the sense that it might be read as saying s 63 was the assessing power, this did not alter the validity of the assessment which met the test in *Queenspice.* If it was a defect, it was very minor and not misleading.

23. I note that Mr McGurk pointed out another alleged error in the letter of assessment in that it stated that the appellant 'became liable' to the penalty on 3 August 2017. His point was that HMRC's interpretation of s 63 (see §43 below) was dependent

upon liability to the penalty accruing at the date of the filing of the incorrect VAT returns which was in 2006 and it was not right for HMRC to have it both ways. However, I agree with Mr Foulkes that this was not an error: while liability to the penalty accrued (if at all) in 2006, the appellant only became liable to pay it when assessed (on 3/8/17) because that is what s 76(9) provided. In any event, even if this was an error in the notice of assessment, it was minor and not misleading.

24. I dismiss this ground of appeal.

(ii) assessment can't be made unless the taxpayer is given prior chance to defend

25. This second argument on the alleged invalidity of the assessment had double relevance: it was the appellant's case that it meant that the assessments were invalid per se; it was also his case that because (he said) liability under s 63 could not accrue unless and until he had had a chance to explain what reasonable excuse or other defence he had, any liability he had under s 63 had not accrued until after s 63 was repealed and so he had no liability under s 63 at all. I deal with this second argument in the immediately following section of this decision notice (see §46 below). Here I deal with his case that the assessment was invalid because it was made before HMRC had given the appellant the chance to establish a reasonable excuse or other defence.

26. The appellant's case seemed to be that HMRC had no power of assessment unless and until they had established that the taxpayer had liability; another way of putting this was that HMRC had no power to assess unless and until they had given the taxpayer the chance to put forward any applicable defence he might have.

27. The appellant relied on the provisions of s 63 for his case on this:

> **63 Penalty for misdeclaration or neglect resulting in VAT loss….**
>
> (1) In any case where, for a prescribed accounting period-
>
> (a) a return is made which…overstates his entitlement to a VAT credit….
>
> (b)….
>
> and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent of the VAT which would have been lost if the inaccuracy had not been discovered.
>
> (2) the circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent of the relevant amount for that period.
>
> (3) any reference in this section to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the….overstatement of entitlement referred to, in relation to that period, in subsection (1) above.

> (10) Conduct falling within subsection (1) above shall not give rise to a liability to a penalty under this section if –
>
> (a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or
>
> (b) at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the Commissioners full information with respect to the inaccuracy concerned.
>
> (11) Where, by reason of conduct falling within subsection (1) above –
>
> (a) a person is convicted of an offence…or
>
> (b) a person is assessed to a penalty under section 60,
>
> that conduct shall not also give rise to liability to a penalty under this section.
>
> (my emphasis)

28. However, as all parties were agreed, s 76 was the assessing provision. Under s 76(1) HMRC were given the power to assess 'any person [who] is liable….(b) to a penalty [under s 63]….'. Under s 76(9) notification of the assessment created liability pay the assessment. S 76 did not require HMRC to enter into any kind of dialogue with the taxpayer prior to assessment; it did not require HMRC to offer the taxpayer a chance to establish a defence before HMRC could assess. Therefore, where a taxpayer was liable to a penalty but was assessed to that liability without being offered the chance to give a defence, that assessment would be valid.

29. It is also true that, as s 76 only permitted HMRC to assess where there was liability, it also followed that if HMRC raised an assessment where the taxpayer did have a valid defence, the taxpayer had no liability and (on an appeal) the appeal would have to be allowed because the assessment would have been invalid.

30. The appellant's case was based on s 63(10) which provided as set out above. I understood that Mr McGurk in particular relied on the words 'if…(a) the person concerned satisfies the Commissioners….' for his case that there could be no liability unless the taxpayer had first been given an opportunity to put his case on reasonable excuse.

31. But it is obvious that s 63(10) cannot be read like that. If it was read as the appellant contends, it would create a chicken and egg situation. HMRC could only assess liability under s 76, but there could be no liability under s 63 until a *tribunal* had been convened, as s 63(10) not only referred to HMRC being satisfied but the Tribunal being satisfied too. So if the appellant was right, no one could have liability which could be assessed under s 63 until after the (as yet non-existent) assessment had been appealed: Parliament would not have intended a scenario under which it was impossible to assess.

32. Mr McGurk's case was that his interpretation did not create a chicken-and-egg situation because he thought it should be read as meaning it was only necessary for HMRC not to be satisfied that the taxpayer had a reasonable excuse in order for

liability to arise. But that makes a nonsense of his case that the phrase should be read literally.

33. And while I struggle to see what that phrase 'the person concerned satisfies the Commissioners or, on appeal, a tribunal…' adds to 'there is a reasonable excuse for the conduct', I do not think it is possible to read s 63 as providing that no liability accrues unless and until HMRC have given the appellant the opportunity to defend himself. That conclusion really means that s 63(10)(a) would mean exactly the same if the first part of it to and including 'that' was omitted. While I accept that it is a normal rule of statutory construction that words used were intended to have meaning and therefore should be given meaning, I think the phrase 'the person concerned satisfies the Commissioners or, on appeal, a tribunal…' was intended to convey nothing more than that either HMRC or the Tribunal could assess the question of whether the taxpayer had a reasonable excuse. But s 63(10) as a whole should be read as meaning, as Parliament must have intended, that where the taxpayer does have a reasonable excuse, there is no liability.

34. To interpret it as Mr McGurk suggests would mean that there is no liability for a taxpayer who does not have a reasonable excuse unless and until he has been given an opportunity to put forward a defence (which he does not have). That is nonsensical and could not have been intended.

35. Mr McGurk also referred me to s 63(11) and it seemed to be his position that this demonstrated that liability under s 63 did not arise until the 'conditions' in s 63(10) had been fulfilled. I surmise this was because under s 63(11) liability could be affected by events after the submission of the incorrect VAT return. While I accept that that is what s 63(11) provides, I do not accept it indicates his reading of s 63(10) is correct. So far from providing that liability does not arise until the conditions of s 63(11) are met, s 63(11) provides for liability to be *cancelled* if the conditions of it are met. S 63(11) is entirely consistent with the logical interpretation of s 63 as a whole that liability to the penalty arises at the moment the taxpayer submits an incorrect return without a reasonable excuse for so doing albeit that that liability may later cease to exist if the taxpayer admits to the error without prompting (s 63(10(b)) or is convicted of an offence in relation to it (s 63(11)(a)) or is assessed to a dishonesty penalty in relation to it (s 63(11)(b)).

36. Lastly, even if I am wrong in my interpretation that s 63(10) should be read as meaning that there was never any liability to a penalty where a taxpayer has a reasonable excuse, and instead s 63(10)(a) should be read completely literally, Mr Kishore's case on it would still fail. And that is because read literally, s 63(10)(a) does not impose liability: it removes liability. Read literally, it is like s 63(10)(b), and s 63(11)(a) and (b) in that the liability for the incorrect return exists until a later event (such as an unprompted admission or a conviction) negates the pre-existing liability. Read literally, s 63(11)(a) means that the taxpayer is liable to a penalty for submitting an incorrect VAT return up until the point that HMRC or (on appeal) the Tribunal is satisfied of a reasonable excuse. Read literally as Mr McGurk wishes me to do, it means that the liability to the penalty arose and could be assessed from the

moment the incorrect VAT returns were submitted irrespective of whether in fact the taxpayer had a reasonable excuse.

37. I reject the appellant's case on the interpretation of s 63. Whether s 63(10) should be read as set out in §§28-29 or as in §36, it certainly did not mean what the appellant contended. Without prejudice to any case Mr Kishore could put forward as to reasonable excuse, I find that the assessment was valid despite the fact that HMRC made the assessment without first giving Mr Kishore the chance to put forward any defence.

(b) Repeal of s 63

38. Another ground of appeal on which Mr Kishore sought summary judgment, and which I am for the reasons given above, deciding, was that the legislation under which the penalties were purportedly assessed had been repealed and was no longer in force. His case was that the assessments should therefore be discharged.

39. He had been assessed under s 76 VATA 1983 which enabled HMRC to assess a taxpayer who had liability under s 63 (penalty for misdeclaration…resulting in VAT loss…). S 63 VATA was repealed by no later than 1 April 2009 by ¶5 of Part 5 of Sch 27 to Finance Act 2007. At the same time, Sch 24 of the same Act introduced new penalty legislation for, amongst other things, filing an inaccurate VAT return. It applied to tax periods commencing on or after 1 April 2008 (see the Finance Act, Sch 24 (Commencement and Transitional Provisions) Order 2008 SI 2008/568.

40. There were no transitional or saving provisions for s 63 VATA in FA 2007. Article 4 of the Order, however, preserved s 60 and 61 VATA (penalties relating to evasion).

41. HMRC relied on s 16(1) of the Interpretation Act 1978 ('IA') which provided as follows:

> (1) Without prejudice to s 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,
>
> …
>
> (c) affect any ….liability acquired, accrued or incurred under that enactment;
>
> (d) affect any penalty….incurred in respect of any offence committed against that enactment.

42. The appellant's point appeared to be that, as the assessment was after the repeal, there was no liability pre- appeal to which s 16 applied. I do not accept that he was correct.

43. I find that liability arose under s 63 at the time that an inaccurate return was made: this is stated in s 63(1) (see [27] and [36] above). That liability did not crystallise in the sense of becoming an enforceable debt owed to HMRC until it was assessed; and in this case it was not assessed until after s 63 was repealed. However, s 16(1) IA

preserves liabilities acquired and penalties incurred before the date of the repeal. So while s 63 was repealed, the liability accrued under it by the appellant was preserved by IA s 16(1). And that liability could be later assessed by HMRC under s 76 VATA, which was not repealed, as long as the requirements as to time limits etc under s 76 were adhered to.

44. I accept that, as the appellant points out, there were specific saving provisions for s 60-61 (conduct involving dishonesty) but none for s 63. That is true but irrelevant. S 60-61 were saved because Parliament's intent was for those provisions to continue to be applicable to accounting periods after the date of repeal of s 63; s 63 had no saving provision because it was not intended to apply to conduct in accounting periods after the date of repeal. There was new legislation to deal with misdeclarations after that date (Sch 24 FA 2007- see §39 above). But s 16(1) IA preserved liability for conduct which had taken place before the repeal.

45. Mr McGurk pointed out that liability is only preserved by the IA if there is no contrary intent: he suggested the saving of s 60-61 but failure to save s 63 was contrary intent. I do not accept that. The preservation of ss 60-61 for future accounting periods made perfect sense as the new legislation did not deal with the conduct to which ss 60-61 applied; whereas the appellant's interpretation would lead to a nonsense: it would have left HMRC unable to assess misdeclaration penalties for earlier periods as soon as s 63 was repealed, a situation Parliament cannot have intended.

46. I find that s 63 remained in force in relation to conduct up to the date of its repeal and dismiss the appellant's case on this; in other words, I find that HMRC were entitled to assess under s 76 misdeclarations in periods up to and including the date of repeal of s 63. I also dismiss his case referred to in §25 above that liability under s 63 did not accrue until after s 63 was repealed because it was not until long after it was repealed he was given the chance to satisfy HMRC he had a reasonable excuse: I dismiss that for the reasons given at §§26-37 above.

47. I dismiss this ground of appeal.

(c) Assessment out of time

48. The appellant's next point was that even if he was wrong to say that it was not possible for HMRC to rely on s 63 to assess him in 2017, such an assessment was out of time in any event.

49. S 77 VATA provided time limits in which s 76 assessments could be made as follows:

> **77** ….
>
> (1) Subject to the following provisions of this section, an assessment under section …76 shall not be made -
>
> (a) more than 4 years after the end of the prescribed accounting period ….concerned, or

> (2) subject to subsection (5) below, an assessment under s 76 of an amount due by way of any penalty….referred to in subsection (3) …of that section be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined.

50. Clearly the assessment was made more than 4 years after the prescribed accounting period concerned; but the four year time limit of s 77(1) was subject to s 77(2). And that section gave a time limit of 2 years from final determination of the amount of VAT due for the prescribed accounting period. HMRC's case was that the amount of VAT due for the two prescribed accounting periods of 03/06 and 06/06 was finally determined on 2 November 2017 when the appeal against HMRC's refusal to repay the input tax came to an end; the assessment to the penalties was on 3 August 2017, which was (obviously) within the 2 years as it pre-dated the appeal coming to an end.

51. The appellant had two reasons for saying that the assessment was not in time under s 77(2). The first was that the two year time limit was expired and the second was that s 77(2) was inapplicable to claims for repayment of input tax.

Assessment more than two years after final determination?

52. HMRC's point was that the relevant date from which the 2 years run was correctly stated in *Teletape (a firm)* [2016] UKFTT 797 at [48] as being when the appeal was withdrawn. They agreed, as I do, that to the extent I had suggested in *Foneshops* [2015] UKFTT 410 (TC) that time started running from the slightly later date when an in-time application for appeal/reinstatement could no longer be made, I was wrong. It made no difference in that case or this case: the penalty was assessed within 2 years from the final decision in the appeal. In this case, that final decision was when the Upper Tribunal on 2 November 2018 refused the appellant permission to appeal the FTT's decision refusing to reinstate his appeal. That was *after* the date of assessment. Even if the date of final determination was when the appeals were struck out, as they were struck out on 9 September 2015, the assessments were still (just) within 2 years of that date.

53. The appellant does not accept that. His case is that his liability had finally accrued no later than the date of repeal of s 63. Mr McGurk's point was that even HMRC accepted that if liability had not accrued under s 63 by the date of repeal, no further liability could be accrued.

54. But that is irrelevant. The two years does not run from when liability to the penalty accrued (which, it seems to me, would have been when the incorrect VAT returns were filed back in 2006) but from when 'the amount of VAT due for the prescribed accounting period concerned has been finally determined'. That could not have been before the appeals were struck out on 9 September 2015.

55. It seems to me that what the appellant is really suggesting is that, until he lost his appeals against HMRC's refusal to repay the input tax claimed in 2006, he had no liability for misdeclaration in his 2006 returns because it was not determined before

the strike out that there had indeed been a misdeclaration. If he had won his appeal, it would have been established that there had been no misdeclaration. So if his liability only accrued in 2015, it accrued after s 63 was repealed.

56. If that is his case, I reject it. The liability existed from the moment incorrect VAT returns were filed even though the correctness of the returns was an unresolved issue between the parties for the next nine years. It is true that the fact of the incorrectness of the VAT returns could only be known with the benefit of hindsight granted in 2015 when the appeal was struck out, but the fact is that the returns were – and as a matter of law always were – wrong.

57. In conclusion, I dismiss the appellant's case on this.

S 77(2) does not apply to over-claimed input tax?

58. The second element of the appellant's case on s 77(2) was that it did not apply to misdeclarations of too much input tax because s 77(2) referred only to determination of 'VAT *due for* the prescribed accounting period concerned'; this appeal was about VAT claimed to be *owed* by HMRC for the prescribed accounting period.

59. The appellant referred to s 25 VATA which dealt with claims for repayment of input tax as follows:

> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under s 26, and then to deduct that amount from any output tax that is due from him.
>
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a 'VAT credit'.

The appellant's point was that his input tax claim the subject of his appeals was a (claimed) VAT credit owing to him; it was not VAT due from him.

60. Mr Foulkes pointed out that while this section does describe input tax as a 'VAT credit' it also describes it as 'an amount which is due' (see penultimate line) so it is clear that a VAT credit (in other words, input tax) is an amount due under the VAT Act and is as aptly described as 'VAT due for the prescribed accounting period' as output tax. It is significant that s 77(2) does not restrict the words 'VAT due' to VAT due to HMRC or VAT due from the taxpayer. While input tax is due from, rather than to, HMRC, s 77(2) does not require the VAT to be due to or from any particular person: it just requires VAT to be due:

> 'when the amount of VAT due for the prescribed accounting period concerned has been finally determined'.

61. Therefore, I agree with HMRC. There is nothing in s 77 which restricts 'the amount of VAT due' to VAT due to HMRC. And it is far more logical and in line with Parliament's presumed intent to give the words their literal meaning because Parliament clearly intended all culpable misdeclarations, whether relating to output tax or input tax, to be penalised and there is no reason why the extended time-limit of s 77(2) should be limited to output tax misdeclarations rather than all VAT misdeclarations.

62. I dismiss the appellant's case on this.

63. In conclusion, my preliminary ruling is to dismiss the grounds of appeal on which I was asked to give a preliminary ruling. So I now move on to the next matter which was the appellant's application for a ruling on the set-off and/or on hardship.

Application for Tribunal to rule that HMRC is not entitled to set-off

64. The set-off provisions are contained in s 81 VATA 1983 which provided as follows:

> **81 Interest given by way of credit and set-off of credits**
>
> (3) ….in any case where –
>
> (a) an amount is due from the Commissioners to any person under any provision of this Act, and
>
> (b) that person is liable to pay a sum by way of …penalty….
>
> The amount referred to in paragraph (b) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners, and the person concerned shall be discharged.

65. The appellant put forward five reasons why HMRC were not entitled to the set-off and they were:

> (a) There was no valid penalty assessment on the appellant as HMRC purportedly made the assessment under s 63 VATA rather than s 76 VATA and because HMRC did not enquire whether the appellant had a reasonable excuse before assessing him;
>
> (b) There was no valid penalty assessment on the appellant as it was time-barred so s 81 could not apply;
>
> (c) Under EU law, HMRC were prohibited from exercising set-off;
>
> (d) Applying set off was equivalent to a wrongful refusal of an application for hardship;
>
> (e) Applying set off violated the appellant's rights under the European Convention on Human Rights ('the Convention) Article 6(2).

66. The first thing that the appellant had to do, though, was satisfy me that this was a dispute I had jurisdiction to determine.

Jurisdiction

67. It was not obvious to me that the Tribunal had any jurisdiction over HMRC's exercise of set-off: there is no provision in any Act conferring such jurisdiction and the FTT is a creature of stature which only has jurisdiction to the extent Parliament has conferred it. I asked Mr McGurk to explain why he thought the FTT had jurisdiction. Mr McGurk's original response was to point out that the Tribunal did have jurisdiction to determine the appellant's liability to the appealed penalties; if I gave summary judgment in favour of the appellant, it would mean that the repayment supplement would be immediately due from HMRC.

68. While that might be true, I have not given summary judgment in favour of the appellant yet Mr McGurk still maintained that I could nevertheless make an order to the effect that HMRC could not exercise set-off pending final resolution of the appeal against the penalties. His explanation for why the FTT would have jurisdiction to do this was because the FTT had been given jurisdiction to determine applications for hardship, and the interaction of that jurisdiction with the effect of decision of the CJEU in *Garage Molenheide* was sufficient (he said) to confer jurisdiction.

69. *Garage Molenheide* concerned a set-off: the member State concerned had retained tax due to be repaid to a taxpayer against suspected liability of the taxpayer for tax irregularities. The taxpayer challenged the set-off in the Court of Justice of the European Union ('CJEU') which is the final arbiter on VAT matters. The CJEU said that, in principle, set-off was lawful [44] but, as such set-off was an interference with the taxpayer's right to repayment of input tax, which was a fundamental principle of VAT [47], proportionality required that the set-off provisions be the least detrimental to that principle as possible consistent with the legitimate objective of protecting state revenue. That meant that the taxpayer had to have the right to challenge whether the set-off was necessary [51] and to have the right to offer alternative security [58]. And, if the national provisions concerned did not confer those rights on the taxpayer, the set-off would be unlawful.

70. The appellant's argument that that case gave me jurisdiction to rule on the validity of the set-off was based on [57] of the judgment where the CJEU said:

> [57] …provisions of laws or regulations which would make it impossible <u>for the court adjudicating on the substance of the case</u> to lift in whole or in part the retention of the refundable VAT balance before the decision of the substance of the case becomes definitive would be disproportionate.
>
> (my emphasis)

The appellant's case focussed on the phrase 'for the court adjudicating on the substance of the case': its position was that the court dealing with the substantive dispute must have the power to determine the rights and wrongs of the set off as this is what the CJEU required in [57]. As the FTT had sole jurisdiction to determine the

appellant's liability to the penalties, it followed (said Mr McGurk) that as a matter of EU law, the FTT had to have jurisdiction to decide the rights and wrongs on HMRC's purported exercise of set-off.

71. However, reliance on that phrase in that passage is misplaced. It was not an issue in *Garage Molenheide* whether it was necessary for the court hearing the substantive case to be the court which could deal with the question of lifting the set-off: the issue in that case was the fact that *no court* had the right to lift the set-off. The set-off was automatic and unchallengeable. So, as the CJEU were not asked to rule on the identity of the court, they should not be taken to have ruled on the point. So while the CJEU did refer to 'the court adjudicating on the substance of the case' clearly they simply meant that there would need to be judicial power in some judicial body: they were assuming (but certainly not deciding) that the jurisdiction would be held by the same court as the one dealing with the substantive issue.

72. Indeed, in *R (oao Rouse) v HMRC* [2013] UKUT 383 (TCC) the Upper Tribunal said at [75] of that phrase in *Garage Molenheide* that

> '….the CEU was not seeking to lay down the principle that the court (here, the FTT) which is to determine the merits of the claim must also be able to suspend the effect of [set-off]….'

The Upper Tribunal went on to say that the requirements set out in *Garage Molenheide* by the CJEU were met by the right for taxpayers to challenge by way of judicial review HMRC's decision to exercise its right to set off. Indeed, the Upper Tribunal felt so strongly on this they said the contrary was 'unarguable': see [77].

73. In conclusion, there is nothing in *Garage Molenheide* which requires the FTT to have jurisdiction over the question of set-off. Nor would it make any difference to my jurisdiction if it did as the CJEU cannot confer jurisdiction on the FTT.

74. Mr McGurk's next point was that, under the European Communities Act 1972, legislation should be interpreted to be consistent with CJEU judgments and the jurisdiction which Parliament clearly had conferred on the Tribunal to determine applications for hardship should be read, in order to be compliant with *Garage Molenheide,* as including a power to determine set-offs. Mr McGurk relied on what Judge Wallace said in *Guernsey Leasing* (2007) VTD 19974 about this.

75. *Guernsey Leasing* was a similar case to this one in that the taxpayer in that case was both owed money by HMRC and said to be owing money to HMRC, and for that reason HMRC had exercised its right of set-off. Moreover, as with this case, the taxpayer was disputing in the VAT tribunal whether it had any liability to HMRC.

76. One potentially significant difference between the two cases was that the dispute in that case was about assessments to VAT; the dispute in this case is two assessments to penalties. The difference might be thought significant because assessments to VAT cannot be appealed unless the tax is either paid or deposited with HMRC in advance *or* the taxpayer is granted relief on the basis of hardship. That is not true of penalties

which can be disputed without any pre-payment of them. For reasons explained below, I do not consider the distinction relevant.

77. In *Guernsey Leasing*, the Tribunal said at [30] that it was irrelevant that the taxpayer had the right to apply for judicial review of HMRC's decision to exercise set-off: that was on the basis of its reading of [57] of *Garage Molenheide* which, it thought, required the VAT Tribunal, as the court seized with the substantive dispute, to have the power to review the set-off. I have already said that I do not agree with that interpretation of [57] and indeed *Rouse* shows it was wrong.

78. The Tribunal went on to say at [32] that the Tribunal's power to grant hardship must be seen as a power to review the exercise of set-off as otherwise the UK's provisions on set-off would be inconsistent with EU law as explained in *Garage Molenheide* which required a court to have the power to review the appropriateness of set off in any individual case. It went on to decide that as the appellant had demonstrated hardship, the set-off should not have taken place [37] but did not go quite as far as ordering HMRC to repay the input tax [39].

79. Respectfully, I do not agree with this analysis. I consider it was wrong for at least four reasons:

(1) It was wrong on the face of the decision as even the Tribunal recognised that it had no jurisdiction to order HMRC to repay the sums set-off; it should have recognised it had no jurisdiction to determine the set-off at all.

(2) It was also wrong because no question of hardship arose in that case: the tax had been paid, albeit the payment was forced on the taxpayer by HMRC's exercise of set-off. But, because the tax had been paid, the Tribunal was seized with jurisdiction in the appeal and did not then have any jurisdiction to rule on hardship. It should not have purported to do so. For this reason, that case is no different to this case where similarly no question of hardship arises (see §76 above).

(3) Even putting those two points aside, HMRC's right to be paid tax pending a dispute (save where hardship is proved) is a quite separate right from HMRC's right to exercise a set-off when it both owes, and is owed, tax. The Tribunal was wrong to conflate them. Even if hardship was proved that only meant HMRC did not have the right to be paid the tax pending the dispute: it did not by itself prevent HMRC exercising its quite separate right to set off one liability against another (subject to public law requirements). The Tribunal only has jurisdiction to determine disputes on hardship, so by purporting to rule on set-off, the Tribunal was taking to itself a jurisdiction that had not been conferred on it.

(4) Lastly, as already explained, the tribunal's original premise that judicial review did not meet the *Garage Molenheide* requirements was fallacious. But even if it had been right that on this, that would not have conferred jurisdiction on the Tribunal. The CJEU cannot confer jurisdiction. It is not possible to read the legislation as conferring

jurisdiction on the FTT and in any event it is not necessary to do so as it is clear (see *Rouse*) that the Administrative Court does have the necessary jurisdiction to satisfy *Garage Molenheide.*

In conclusion, with respect, I do not consider that the analysis in *Guernsey Leasing* was correct in law and I will not follow it.

80. This tribunal is seized of jurisdiction in the penalty appeal. There is no requirement to pay the penalty in advance; there is therefore no jurisdiction for me to determine whether the appellant should be relieved of the liability to pay the penalty in advance on the grounds of hardship.

81. While I appreciate that the appellant has in effect paid a part of the penalty in advance because HMRC's has exercised its right of set-off, the FTT has no jurisdiction to determine the rights and wrongs of that set-off. This Tribunal has no power to order HMRC to pay the repayment supplement.

82. If the appellant wishes to challenge the exercise of set-off he must lodge judicial review proceedings against HMRC.

83. In conclusion, I have no jurisdiction to deal with the set-off. I do not have to consider the five reasons put forward by the appellant as justifying the lifting of the set-off. As a reminder, those five reasons were:

(a) There was no valid penalty assessment on the appellant as HMRC purportedly made the assessment under s 63 VATA rather than s 76 VATA and because HMRC did not enquire whether the appellant had a reasonable excuse before assessing him;

(b) There was no valid penalty assessment on the appellant as it was time-barred so s 81 could not apply;

(c) Under EU law, HMRC were prohibited from exercising set-off;

(d) Applying set off was equivalent to a wrongful refusal of an application for hardship;

(e) Applying set off violated the appellant's rights under the Convention Article 6(2).

I will, nevertheless, make a few brief comments on them despite not having jurisdiction, as follows.

Legislation no longer in force

84. I have dealt with and dismissed this case at §§38-47 above.

Assessment out of time

85. I have dealt with and dismissed this case at §§52-62 above.

Set-off in breach of EU law?

86. As I have said, the appellant relied on the case of *Garage Molenheide.* HMRC pointed out that the High Court had more recently upheld a set off on the basis that a debt was due and payable when assessed, even if still subject to appeal: see *Infinity Distribution Ltd* [2010] EWHC 1393 applying *Anglo-German Breweries* [2002] EWHC 2458 (Ch).

87. However, as the appellant pointed out, *Garage Molenheide* was not cited in *Infinity Distribution Ltd* and it relied on a case (*Anglo-German)* which preceded *Garage Molenheide.* But, as pointed out above, while these UK cases may not have referred to *Garage Molenheide,* it appears they were consistent with it as the Upper Tribunal in *Rouse* (applying the Court of Appeal decision in *Teleos* [2005] EWCA Civ 200) held that the right to judicial review was a sufficient remedy to satisfy EU law.

88. In any event, I consider that reliance on *Garage Molenheide* in this case was misplaced for yet another reason. In *Garage Molenheide,* the appellant was reclaiming repayment of input tax to which it was accepted he had entitlement. Here, the appellant is claiming payment of repayment supplement to which it is accepted he has entitlement. However, repayment supplement is something to which he is entitled under UK law: he has no right to it under EU law. It is <u>not</u> input tax; unlike the input tax at stake in *Garage Molenheide,* his right to repayment supplement is not a fundamental principle of EU law such that any derogation from it must constitute the least possible interference consistent with the objective of proper administration of tax collection. On the contrary, an absolute right of set-off against repayment supplement would appear lawful under *Garage Molenheide*.

Unlawful refusal of hardship?

89. While the appellant did not clearly articulate this, his case appears to have been that, under the principles explained in *Coleman and others* (1999 VTD), it was unlawful to exercise a set off which had the effect of making him pay the penalty while his liability to it was still in dispute. This was nothing to do with *Garage Molenheide* which merely required a member state to give a taxpayer a forum in which he could challenge the set-off: rather it was a claim that it was unlawful to hinder a taxpayer from disputing his liability for a civil offence by effectively insisting the penalty was paid in advance.

90. The appellant may have an arguable case on this: but the forum in which to argue it is clearly the Administrative division of the High Court in an action for judicial review of HMRC's decision to exercise its right of set-off. I have no jurisdiction over HMRC's exercise of set-off.

Set-off in breach of the Convention?

91. The appellant's last point on the legality of the set-off was that the penalties were criminal in nature for purposes of the Convention. This raised two issues: (i) whether

the penalties gave him rights under the Convention and (ii) whether those rights were breached.

Do the penalties give the appellant rights under the Convention?

92. The right the appellant relied on was the right to a fair hearing in Article 6. But it is well-established that Article 6 does not normally apply to tax matters (*Ferrazzini v Italy)* as the European Court of Human Rights ('ECHR') does not regard tax matters as 'civil proceedings'. However, civil tax *penalties* can be seen as criminal matters under the Convention and when they are, that gives rise to Art 6 protection. *Jussila v Finland* (2007) 45 EHRR 39 was a case about a small civil tax penalty and the ECHR held that:

> …the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. The court considers that this establishes the criminal nature of the offence. The minor nature of the penalty…does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.'

93. The appellant also relied on what the FTT said in *Teletape (a firm)* [2016] UKFTT 797:

> [128]….to summarise…case law, a penalty will be criminal if it is both 'deterrent' and 'punitive'; those factors weight more heavily in the balance than a penalty's domestic classification as civil.
>
> [129] the penalties here total £664,668; they are clearly both deterrent and punitive and Article 6 is therefore engaged….

94. The penalties in this case were, I agree with the appellant, imposed under a provision the purpose of which was deterrent and punitive rather than compensatory. This is because it was charged at a set % of tax in issue irrespective of any loss to the Revenue actually occasioned by the behaviour of the taxpayer; moreover, the statutory defence of reasonable excuse aims to excuse non-culpable behaviour and the statutory defence of s 63(10)(b) aims to encourage self-disclosure. The provision is therefore about encouraging tax compliant behaviour and (by implication) punishing and deterring non-compliant behaviour: it is not about compensating loss.

95. I also agree that the penalties were not minor. A total of £2.5m in penalties cannot be described as minor on any scale.

96. In conclusion, and in line with the view in *Teletape,* I agree that the penalties were criminal in nature and Art 6 of the Convention was engaged. In any event, HMRC conceded the point.

Was there a breach of art 6 of the Convention?

97. Article 6 provides in so far as relevant as follows:

> 1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….
>
> 2.Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and the facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) ….

98. The appellant is particularly concerned with his right to:

(a) Be presumed innocent until proved guilty;

(b) A right to representation in the hearing and

(c) Right to equality of arms

99. I understand that the appellant's case was that the refusal to repay his repayment supplement meant he has been presumed guilty (because the state has effectively got the benefit of the penalty to the extent of the set-off); he was also, he says, left without funds to pay a representative to enable him to effectively pursue his appeal; and, as a litigant in person he will (he says) be significantly disadvantaged as HMRC will employ lawyers.

(a) Presumption of innocence

100.It was Mr McGurk's case that the retention of the repayment supplement presumed Mr Kishore to be guilty because it effectively treated the penalty as due to HMRC when it would only be due if he was 'guilty' of the offence of misdeclaration.

101.I do not accept that the set-off made a presumption of guilt. The presumption of innocence is a rule about the burden of proof in a criminal trial: it means that the accuser must prove the guilt of the accused. The accused is not required to establish his innocence. (In any event, see *Euro Wines* [2018] EWCA Civ 46, it is not always even a requirement of Art 6 that the burden of proof is on HMRC in civil penalty cases.)

102.The presumption of innocence is not a more general rule that, pending the criminal trial, the state is prohibited from taking any steps that might be consistent with guilt of the accused. On the contrary, it is lawful to remand accused persons in prison in certain circumstances *despite* the presumption of innocence of the accused.

Even more so, therefore, it is not necessarily unlawful under Art 6 for the state to withhold, pending the 'criminal' hearing, payment of a disputed sum that will not be due to be repaid to the accused if he is found 'guilty' in that hearing.

103. The set off does not breach the presumption of innocence.

(b) the right to representation

104. The appellant's position is that if he is not offered legal assistance, he cannot be found liable to the penalty as he will not have been given a fair trial. If the Tribunal finds he cannot have a fair hearing, it must discharge the penalty. His view is that he cannot have a fair trial unless at least a significant part of the repayment supplement is released to him in order for him to fund his defence at the penalty hearing.

105. HMRC did not accept that and I agree. Proceedings, such as these penalty appeals, which are criminal proceedings for purposes of art 6 ECHR are also criminal proceedings for purpose of s 14(h) Legal Aid, Sentencing and Punishment of Offenders Act 2012 by virtue of Reg 9(v) of the Criminal Legal Aid (General) regulations 2013/9 and therefore the appellant was able to, and did, apply for legal aid. By the time of the adjourned hearing, he had been awarded criminal legal aid at the rate of £80 per hour up to a maximum of £10,000.

106. He was dismissive of the award. It was his case the rates offered were insufficient to pay for tax counsel. That may or may not be correct but in my view is irrelevant. He had been offered legal representation paid for by the state. He could reject the offer if he chose but there is no arguable breach of Article 6(3)(c).

(c) to equality of arms

107. There is no express right to equality of arms but there is a right to a fair hearing. This refers to the right to have equal opportunity at the hearing to present argument and be forewarned of the case of other party: is not a right to have equivalent legal representation.

108. In conclusion, I am not satisfied that these proceedings involve a breach of the appellant's human rights as set out at §97 above. Whether the Administrative Court would grant relief against HMRC's discretionary decision to apply their right to set off to the repayment supplement is another matter and one which will only be determined if the appellant makes an application to that court.

109. I refuse to give the relief requested by the appellant: I have no jurisdiction to consider whether or not the set-off was lawful and I have no jurisdiction to decide 'hardship'. But I do not consider the hearing in the FTT will be a breach of his human rights or to his right to a fair trial under common law.

110. It is logical to take next Mr Kishore's application to amend his grounds of appeal, albeit this application was not made until the last day of the hearing.

Application to amend grounds of appeal

111. The notices of appeal gave seven grounds of appeal. HMRC applied to strike out all 7 grounds of appeal: in effect they applied to strike out the appeal. The application was made on the basis that the seven grounds (allegedly) had no reasonable prospect of success; in addition, HMRC applied for the seventh ground of appeal to be struck out on the basis that the Tribunal had no jurisdiction to determine it.

112. The appellant's case in opposition to the strike out application was that he has a good defence to the penalties.

113. As I have said, as the hearing progressed, the appellant's case changed. The hearing was adjourned to allow the appellant to apply to amend his grounds of appeal and he did so on 14 June 2018.

The original grounds of appeal

114. The original grounds of appeal were (in summary form) as follows:

(1) The assessments were out of time under s 77(2) VATA 1994;

(2) The assessments were out of time under s 77(1)(b) VATA 1994;

(3) The returns were not inaccurate. There was no misdeclaration. There were 6 reasons given for this which were (i) the returns accurately recorded the appellant's trading (ii) the appellant holds all the VAT invoices for input tax deductions claimed (iii) HMRC merely disallowed the claim for input tax (iv) *Kittel* did not mean the returns were inaccurate but merely that the input tax claim could be disallowed; (v) the Tribunal has never found, nor does the appellant accept, that he knew or should have known of the connection to fraud and (vi) *Kittel* required a finding of dishonesty but no dishonesty was alleged with respect to the penalty.

(4) The assessments were not to best judgment as HMRC had never said that the returns were inaccurate;

(5) Even if the returns were inaccurate, the appellant had a reasonable excuse. Three reasonable excuses were given which were (in summary) that (a) the appellant had always cooperated with HMRC; (b) the appellant had good business systems and (c) the appellant had robust due diligence.

(6) The imposition of penalties 11 years after the alleged filing of inaccurate returns was (i) oppressive and (ii) prevented the appellant from properly defending himself. This was followed by allegations of five circumstances which resulted in evidence which would have been available to the appellant some years earlier no longer being available.

(7) HMRC's motive in imposing the penalty was to deny him the repayment supplement to which he was entitled.

115. The applicant wanted to amend these grounds as follows:

(1) The appellant deleted the sixth reason for alleging there was no misdeclaration. I agree he was right to do so: it was hopeless. HMRC had no objection to the deletion. I say no more about this ground of appeal as it is withdrawn.

(5) that all the factors pleaded in Ground 5 and the factors taken into account by HMRC entitled the appellant to 100% mitigation

(6) Ground 6(i) was amended to say 'oppressive in the sense of disproportionate' because of both its size and the delay in imposing it; Ground 6(ii) was amended to include a further allegation that the penalty was in breach of Art 6(3) of the Convention.

(7) This was amended to include an allegation that the penalty was imposed in breach of the Convention and in breach of EU law and that all the factors pleaded in Ground 5 and the factors taken into account by HMRC entitled the appellant to 100% mitigation.

116. I will consider each proposed amendment in turn. HMRC objected to all the amendments (bar the deletion of ground 3(iv)) on the basis that they had no reasonable prospect of success. HMRC did not object to any of the proposed amendments on any other grounds and in particular did not suggest it was too late for the appellant to make amendments.

117. For this reason, it is right to admit all the proposed amendments save to the extent that I consider they have no reasonable prospect of success. And as HMRC's case for strike out was based entirely upon (save in respect of Ground 7) the allegation that the grounds had no reasonable prospect of success, it makes sense to deal with the prospects of success of the proposed amendments as I deal with each ground of appeal.

The strike out application

118. There seemed to be no dispute over the test I would apply to decide if the grounds of appeal had a reasonable prospect of success. Mr McGurk referred me to *Mellor & Others v Partridge & Anor* [2013] EWCA civ 477 where Lewison LJ said that the Tribunal's role was simply to decide which parts of a case are fit to go to trial. In particular,

> [3]….i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real

> substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

I consider the grounds with these principles in mind.

Grounds 1 & 2: Assessment out of time

119. These grounds of appeal have failed: see §§52-62. These grounds of appeal would be struck out if they had not already been dismissed.

Ground 3: VAT returns accurate

120. The appellant's third ground of appeal was that his VAT returns were not inaccurate because, even if HMRC correctly denied him the claimed input tax on the basis of *Kittel,* that 'ground of denial in no way relates to, or requires there to be, an

inaccuracy in the taxpayer's VAT returns'. This was ground 3(i) and (ii) set out at §114 above.

121. As set out at §27, the circumstances in which s 63 VAT imposed a penalty were:

> **63 Penalty for misdeclaration or neglect resulting in VAT loss….**
>
> (1) In any case where, for a prescribed accounting period-
>
> (a) a return is made which…overstates his entitlement to a VAT credit….

122. HMRC consider it unarguable that, if HMRC were correct to deny the input tax claim on the basis of *Kittel,* the appellant's VAT returns for the two periods in question did overstate his entitlement to a VAT credit. The returns were therefore inaccurate. HMRC cite *Mobilx* where the Court of Appeal analysed *Kittel* in the following terms:

> [43]…A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally fails to meet the objective criteria which determine the scope of the right to deduct.

123. I agree that it is not arguable that the appellant's returns were accurate if they claimed input tax to which he had no entitlement because he knew or ought to have known the input tax was incurred in transactions connected to fraud. His recovery was denied on that basis; his appeal against that decision failed and therefore in effect in law the denial decision was upheld. So at the least it must be taken that Mr Kishore ought to have known his transactions were connected to fraud. Reclaiming input tax in those circumstances is wrong and means the returns were inaccurate.

124. Ground of appeal 3(i)-(ii) are not arguable and are struck out.

125. Grounds 3(iii)-(iv) are very similar to (i) and (ii). It is really a claim that in some way the return was valid but *Kittel* operated after the event to reverse the effect of the returns rather than to make them invalid. I do not consider this arguable. It is clear that the effect of *Kittel* was that the taxpayer, who entered into a transaction which he knew or ought to have known was connected with fraud, never met the objective criteria which would give him the right to deduct the input tax on that transaction. It is not the case that the appellant had the right to deduct the input tax up until the moment that HMRC denied it: the appellant never had the right to deduct the input tax so his returns were erroneous. These grounds of appeal are also struck out.

Ground 3: Knowledge or means of knowledge not proved

126. Ground (v) was a claim that the appellant did not know nor ought to have known that his transactions were connected to fraud. HMRC accept that there was no judicial finding that the appellant had either or both knowledge or means of knowledge that his transactions were connected with fraud. Nevertheless, HMRC's case is that that was conclusively determined against him when the Upper Tribunal

refused him permission to appeal the FTT decision refusing to reinstate the appeal; it would be abusive for the appellant to be allowed a second bite at the same cherry.

127. It is an established principle that there should be finality in judicial decisions but it is not an absolute principle. In some instances, a person is allowed to re-litigate a matter against the same party that has already been judicially determined between them. The question is whether it is an abuse of the Tribunal process when a litigant seeks to do this as the normal rule is finality.

128. While the *Kittel* appeal never went to hearing, it was judicially determined against the appellant because his appeal was struck out. The effect of that was to uphold HMRC's decision that the input tax in question was irrecoverable because it was incurred in transactions which the appellant knew or should have known were connected to fraud. So the question for me is whether HMRC have satisfied me that the appellant does not have a reasonable prospect of establishing that Ground 3(v) is not an abuse of the Tribunal's process by seeking to re-litigate a matter that has already been judicially determined (albeit not following a hearing). If he does not have a reasonable prospect of establishing that, this ground of appeal may be struck out.

129. So the question is what is the test for abuse of process and how good is the appellant's case that his Ground 3(v) is not abusive under that test?

130. Both parties seemed agreed that the proper test was the one set out by the Court of Appeal in *Johnson v Gore Wood & Co* [2002] 2 AC 1 where Lord Bingham said

> …..[there] should…be a broad, merits-based judgment which takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before….While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse, and then, if it is, to ask whether the abuse is excused or justified by special circumstances.'

Neither party suggested that what I said in *Foneshops* to the effect that previously litigated issues could not be re-tried between the same parties unless there were special circumstances was correct. I agree that the test is as stated in *Johnson v Gore Wood & Co* although I do not consider that it would have made any difference to the outcome in *Foneshops.*

131. In the case of *Hackett* [2016] UKFTT 781 (TC), the Tribunal had allowed a director of the company to dispute the company's liability in circumstances where the director was assessed to personal liability based on misdeclarations by the company. However, I agree with HMRC that that is properly distinguishable because the taxpayer in that case had not previously litigated the matter. Here, Mr Kishore himself had previously unsuccessfully litigated the question of whether he knew or should have known his transactions were connected to fraud.

132. Mr Kishore's case that Ground 3(v) is not abusive rests on the evidence Mr McGurk says Mr Kishore will give that he only effectively conceded the appeal (by failing to comply with the Tribunal's directions) because he ran out of funds to instruct a representative; moreover, he blames HMRC for the fact he ran out of funds because he says it was HMRC's fault as they protracted the *Kittel* litigation by serving numerous rounds of evidence and making (and then appealing) unsuccessful applications to admit even more evidence.

133. HMRC accept that Mr Kishore ran out of funds, but they do not accept that they conducted the *Kittel* appeal improperly nor that the lack of funds was the reason Mr Kishore ceased to pursue the appeal: their position is that the multiple rounds of evidence in the *Kittel* appeal was an inevitable result of their ongoing investigation into the very complex fraud with which (they say) Mr Kishore and his family were involved. (They filed a witness statement by an officer in this hearing in order to refute the allegation but I did not need to consider it as I was not deciding the question of who was to blame for the proceedings taking so long). So in respect of Mr Kishore's case that re-litigation is not abusive, it is clear that the *facts* are contested: but what about the legal position?

134. In *Johnson v Gore-Wood & Co* Lord Bingham said:

> '…while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim.'

135. I accept, therefore, that as a matter of law, in some instances lack of funds, particularly where the other party is to blame, might mean it is not abusive to re-litigate a matter that has already been decided. HMRC suggested that the appellant would have difficulties making out the factual case but that, it seems to me, is something that would ordinarily have to go to trial.

136. However, the appellant faces a further difficulty and that is that it may be abusive for him even to put his factual case that the reason his *Kittel* appeal was struck out was because he ran out of funds due to the manner in which HMRC conducted the litigation. And that is because Mr Kishore applied to reinstate the *Kittel* appeal (see §2): one of the issues in a reinstatement application is the reason why the appeal was struck out in the first place.

137. So there is a second issue of abuse of law and that is whether it is abusive for Mr Kishore to seek to litigate a second time the issue of why his *Kittel* appeal was struck out.

138. To consider that, I have to consider the case Mr Kishore put in the reinstatement hearing and the findings of the Tribunal. Mr Kishore's application for reinstatement was late and so the Tribunal looked at the question of whether to permit the application to be made late. So the question before that Tribunal was why the application was made late rather than why the unless order was not complied with

thus triggering the strike out, but it is difficult to see them as entirely separate issues. That is for two reasons. Firstly, the application for reinstatement had to be made within 28 days of the strike out so in effect the question before the Tribunal in 2016 was why Mr Kishore did nothing to progress the litigation from around mid-2015 to the application for reinstatement in May 2016, which is the same question that this Tribunal would have to address if it is to consider the question of whether its abusive to allow Mr Kishore to re-litigate the issues in the *Kittel* appeal. Secondly, the explanation now to be given for the strike out was that it was long-term shortage of funds to progress the litigation due to HMRC's long-term behaviour in (allegedly) stretching out the *Kittel* litigation over the previous 9 years. That explanation only makes sense if it continued over time and indeed Mr McGurk's position was that it continued to the present day.

139. So it seems to me that in order to support Mr Kishore's case that it would not be abusive to allow him to re-litigate in the penalty appeal issues that were live in the *Kittel* appeal, he would have to satisfy the tribunal that it was not abusive to put his case over the reasons why he did nothing to progress the *Kittel* litigation from around mid-2015 onwards in the face of the fact that that was an issue he has already litigated with HMRC and on which a Tribunal has reached a conclusion in the reinstatement proceedings.

140. It seems to me that it is fanciful to say it would not be abusive. This is for at least 2 reasons. Firstly, Mr Kishore applied for permission to appeal the Tribunal's reinstatement decision and was finally refused: see §2. Allowing him to put virtually the same case again would be a second challenge to the same FTT decision. Secondly, the reason and the evidence Mr Kishore gave to the tribunal dealing with the reinstatement application for the failure to progress the litigation from mid-2015 was not the same as he now intends to give. The written decision of the Tribunal records:

> '…the appellant's application for reinstatement was therefore over 7 months late. He was not able to give any good reason for this, he has said, somewhat vaguely, that he assumed his professional advisers Hill Dickenson were dealing with correspondence relating to his appeal. However, in cross examination by Mr Foulkes he accepted he had known since June 2015 that Hill Dickinson were no longer acting for him in these appeals. I do not therefore accept his evidence that from June 2015 he had a genuine belief that Hill Dickenson were progressing his appeal……

141. Moreover, his lack of professional representation was specifically a live issue in that hearing. The decision records:

> '…He also said that he has not been able to secure professional representation to enable him to pursue the appeals….'

However, it appears Mr Kishore gave no reason for this and in particular did not put the case that it was due to lack of funds, nor that the lack of funds was (alleged) to be the fault of HMRC. In the written reasons for the Upper Tribunal's refusal of permission to appeal, there is even a comment that Mr Kishore failed to give to the

FTT or Upper Tribunal a good reason for his delay in making the application for reinstatement. It seems, therefore, he had two opportunities to put the case that it was lack of funds caused by HMRC's actions but he did not do so. I also note that in his original grounds of appeal for this appeal he put the case that the death of the solicitor representing him in the *Kittel* appeals '…led to a change of approach within Hill Dickenson, where the new partner in charge no longer wished to proceed with representing the appellant….'. Again, that is not the case he now wants to put.

142. I think Mr McGurk suggested that Mr Kishore should be excused his failure to put to the Tribunal hearing his reinstatement application the (now said to be) true reason the appeal was struck out, because he was unrepresented before both the FTT and Upper Tribunal. But being unrepresented cannot be relevant: a person's account of events should not change depending on whether or not they are represented.

143. The FTT in the reinstatement hearing made a finding on why the litigation had not been progressed:

> '…the Appellant has not shown any serious intention of pursuing the claim for some time.'

144. What the appellant is now asking is for the tribunal to allow that conclusion to be undermined: he wants the Tribunal to reach a finding that the real reason the litigation was not progressed was because Mr Kishore could not afford representation due to the fault of HMRC. He is also asking the FTT to undermine the decision of the Upper Tribunal which refused permission to appeal against the FTT decision on the grounds there was no arguable error of law in it.

145. The relevant test in *Johnson v Gore-Wood* is as set out above. The tribunal must weigh the pros and cons in determining whether there is an abuse. The difficulty here is that Mr Kishore hasn't really put forward anything to justify why he thinks it right for him to undermine the FTT and Upper Tribunal decisions on the reinstatement, other than the fact he was unrepresented. What I understood Mr McGurk to say was that the shortage of funds was the real reason for Mr Kishore's inertia over the litigation: but that is simply saying that Mr Kishore wants a second bite of the cherry. His original case did not succeed: now he wants to put a significantly different slant on his evidence.

146. In these circumstances, as the appellant's case stands at present, I am satisfied that his case, that it is not an abuse of the Tribunal process (and in particular the litigation over the reinstatement application) to be allowed to give evidence that shortage of funds was the real reason for his inertia, has no reasonable prospect of success. As it is currently put, the Tribunal is virtually bound to find that it would be abusive to allow that issue to be re-opened. No acceptable explanation has been given for why he wants to put a different case to the one he put on virtually the same issue before. And if he cannot re-open that issue, that means he would be unable to put forward his case that that the reason for the discontinuance of the *Kittel* appeal was ultimately HMRC's fault, and unless he could successfully do that, his desire to re-litigate issues from the failed *Kittel* appeal is also bound to be seen as abusive.

147. In conclusion, this ground of appeal lacks a reasonable prospect of success and in my discretion I consider it should be struck out.

Ground 4 – assessments not to best judgment

148. I find it difficult to understand this ground of appeal. It seems similar to the deleted Ground 3(vi). The appellant's case seems to be that HMRC should have told him they considered his returns inaccurate before they assessed the penalty: however, there is no legal requirement to do so and in any event the letters sent in 2007 denying his right to input tax recovery implicitly if not expressly stated that his returns were inaccurate, so I do not consider that there is anything in this ground in either law or fact.

149. I strike out this ground of appeal.

150. In oral argument, Mr McGurk appears to suggest that there was a lack of best judgement in the assessment because the officer failed to give a clear explanation of why she had chosen to award 25% mitigation of the penalty. He suggested that the decision on mitigation couldn't have been to best judgement as it wasn't explained.

151. Irrespective of the fact that that is not the right test for whether an assessment is to best judgement, neither the s 63 assessment nor the ability to mitigate it under s 70 VATA is required to be exercised to best judgement. The Tribunal has full appellate jurisdiction over mitigation and so the question is not whether HMRC's reasons were correct but what is the proper amount of mitigation. Therefore, his ground of appeal has no prospect of success and is also struck out. I deal with mitigation more generally below under Ground 7.

Ground 5 – reasonable excuse

152. It seems to me that the position with this ground of appeal is the same as with Ground 3(v). This matter has already been litigated unsuccessfully by the appellant. His reasonable excuse is that he neither knew nor should have known of the connection to fraud because (he claims) he cooperated with HMRC, had sound systems and effective due diligence. Technically, it is not a reasonable excuse at all because there would have been no misdeclaration if it was the case that the appellant did not know and should not have known of any connection to fraud. I agree with what I said in *Foneshops* on this and neither party suggested it was wrong:

> [52] In my view, if the question is whether, objectively, the appellant behaved as a reasonable person would have behaved in reclaiming the tax, that is indistinguishable from the question of whether it *ought to have known of the connection to fraud.* The question of 'ought to have known' is objective. Would a reasonable person have inferred that there was fraud? If a reasonable taxpayer ought to have known of the connection to fraud, it would have known, and it would not have entered into the transaction in the first place, and would therefore not have reclaimed the input tax to which it was not entitled. A person who ought to have known of the connection to fraud but carried out the

> transaction anyway would therefore not be behaving as a reasonable person would behave and would not have a reasonable excuse for the misdeclaration.

153. In so far as Ground 5(i) is a claim that he cooperated with HMRC *after* the event it is irrelevant and must be struck out: it cannot go to the question of whether at the time of the transactions he knew or should have known they were connected to fraud.

154. However, this defence otherwise is a defence that he should or would have put in the *Kittel* appeal and, for the reasons given at §§126-147 above, I am satisfied that he does not have a reasonable prospect of showing that it would not be an abuse of the Tribunal process to be allowed to re-open the issue. The whole of Ground 5 falls to be struck out.

155. As I have said, the appellant sought to amend this ground of appeal to include a case that his Ground 5 factors entitled him to greater mitigation than already allowed by HMRC. However, as I have said in the immediately preceding paragraph, I am satisfied that he does not have a reasonable prospect of showing that it would not be an abuse of the Tribunal process to be allowed to re-open live issues in the *Kittel* appeal. For this reason, those issues cannot be used in a case on mitigation any more than they could be used in a case on reasonable excuse. This ground of appeal is not admitted. In my discretion, I consider that the whole of Ground 5 should be struck out as lacking a reasonable prospect of success.

Ground 6 – penalties served 11 years after VAT returns to which they relate

156. Before amendment, this ground of appeal was that the penalties were oppressive because of the 11 year delay between the submission of the incorrect returns and the imposition of the penalty for doing so. During the original hearing and in the subsequent hearing, this morphed into a case that the delay was a breach of Mr Kishore's Article 6 rights under the Convention. It makes sense to consider this amended ground of appeal under the heading of Ground 7.

157. Another amendment was to include an allegation that the penalty was disproportionate because of its size.

158. HMRC's position was that it was not arguable that the s 63 regime was disproportionate of itself: the penalty contained defences of reasonable excuse (s 63(10)(a) and where there was an unprompted admission (s 63(10(b)). Moreover, the tribunal had (virtually) unfettered discretion to mitigate the penalty (s 70).

159. It was also HMRC's position was that it was not arguable that the size of the penalty in this particular case made this particular penalty disproportionate. HMRC relied on what was said in *Trinity Mirror* [2015] UKUT 421 (TCC) at [48-50] which implied it would be rare that a fixed rate penalty was disproportionate because (by being measured as a % of the default) it was necessarily in proportion to the gravity of the default.

160. My understanding of the appellant's case was that the circumstances were wholly exceptional in that, while the penalty imposed was somewhat less (after mitigation) than 15% of the misdeclaration, it was nevertheless of itself a very large sum (over £2million) which was imposed on the appellant some 11 years after the misdeclarations.

161. However, I do not consider the 11 year interval between the offence and the penalty can be relevant to the question of proportionality which is a doctrine which looks at the gravity of the offence compared to the gravity of the default (eg see [58] of *Trinity Mirror).* Proportionality is not a doctrine which looks at the fairness or otherwise of the *manner* in which the penalty was imposed but at the *amount* in which it was imposed: to complain about the manner in which the penalty was imposed the appellant must identify another doctrine. And that is what he has done in his case on Article 6 of the Convention and I address that below at [184-202].

162. So his complaint about proportionality remains a complaint merely about the size of the penalty. I considered a similar complaint in *Foneshops* and refused to strike out that appeal as I considered that the size of the penalty meant there was at least an arguable case that the penalty was disproportionate. HMRC considered that I was wrong to do so.

163. I have a lot of sympathy with HMRC's view that a fixed percentage penalty is proportionate to the default whatever its size: a default of, say, £100 million should be penalised at about the same percentage as a default of say £100 where the circumstances of the default are equally blameworthy. No maximum overhead limit for a default surcharge penalty is needed to make the system proportionate. Why should a person, who made a misdeclaration of millions of pounds in circumstances where he ought to have known his transactions were connected to fraud, have his penalty capped at a maximum, where another defaulter, whose knowledge was the same but whose default was for a much lower figure, must pay the full 15% penalty? In my view, such a suggestion is verging on the irrational as the much larger default obviously has much more serious implications for the public purse.

164. Nevertheless, my view appears to be wrong and this Tribunal is bound by authority. In *Total Technology Engineering Ltd* [2012] UKUT 418 (TCC), the Upper Tribunal said of the default penalty regime at [93]*:*

> "*There is no maximum penalty.* This, we think, is a real flaw at both the level of the regime viewed as a whole and potentially at the individual level of a taxpayer with a very large payment obligation. In *Enersys,* Judge Bishopp considered it unimaginable that a tribunal imposing a penalty would do so in an amount as much as £130,000 for the sort of error in that case….any approach to the analysis must pay due regard to the principle that the absolute amount of the penalty must be proportionate in the context of the aim pursued and in the context of the objectives of the Directive. We agree therefore that there must be some upper limit, although it is not sensible for us in the present case to suggest where that might be…"

165. And then in its conclusion on the default surcharge regime it said at [100]:

> "Our conclusion, therefore, is that with the possible omission of an upper limit on the penalty which may be imposed, the regime viewed as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

166. Moreover, the Upper Tribunal in *Trinity Mirror* [2015] UKUT 0421 (TCC) agreed with these comments. They said it was not appropriate for a Tribunal to attempt to state what an upper ceiling for a penalty should be (see [62]) but at [66] stated that 'the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate…'.

167. These statements were made in respect of the late payment penalty regime but I see no obvious basis on which to distinguish the misdeclaration penalty regime. Therefore, I agree with what I said in *Foneshops,* which was that the point is an arguable one. It is arguable that the sheer size of the penalty is disproportionate. If there ought to be a cap on penalties, it is clearly arguable in the light of *Total Technology* and *Trinity Mirror* that a penalty of over £2million may exceed such a cap.

168. I will, therefore, admit and not strike out the ground of appeal that that the penalty was disproportionate because of its absolute size.

Ground 7 – penalties an attempt by HMRC to avoid payment of repayment supplement?

169. Ground 7 as originally pleaded was a case that HMRC had acted unlawfully in a public law sense by imposing the penalties, not (said the appellant) in order to punish a misdeclaration but in order to avoid paying repayment supplement which HMRC accepted they owed to the appellant.

170. HMRC's position was this ground of appeal must be struck out because it had no reasonable prospect of success: the Tribunal has no jurisdiction to consider whether HMRC acted lawfully when imposing a penalty (see *Hok* [2012] UKUT 363 (TCC)). Mr McGurk's position was that this was not intended as a pleading of a public law point: his case was that the Tribunal had jurisdiction to mitigate the penalty and, in doing so, could consider HMRC's behaviour.

171. In so far as it could be read as a pleading that it was unlawful for HMRC to impose the penalty because HMRC acted unlawfully in a public law sense, I agree with HMRC and it must be struck out as the Tribunal lacks jurisdiction to consider it.

172. On the issue of mitigation, HMRC referred me to *Alan John Jones* [2016] UKFTT 451 (TC) where, in a case where the tribunal had jurisdiction to mitigate the penalty, the Tribunal said at [13]:

> '….complaints about HMRC's conduct are not a matter over which this tribunal has any jurisdiction – I have no power to do any more than record the complaints and, importantly for this appeal, I have no power to adjust a penalty because of a perception that HMRC have acted

> unfairly. I agree ….that the position might be different if HMRC's conduct had somehow led the person concerned to commit the dishonest act….but that HMRC's conduct after the act has been committed, including in the imposition of the penalty, is not a factor which the tribunal may take into account….'

173. *Jones* followed an earlier VAT Tribunal case (*Gent* (1995) VTD 13227) which said that HMRC's conduct after the default was irrelevant to the question of mitigation. However, HMRC also drew my attention to the case of *Whereat* in 2000 where a different FTT judge had mitigated penalties because of post-default conduct by HMRC, although the Tribunal in that case did so without consideration of whether it had any power to do so. HMRC considered the decision to be obviously wrong (although I note that they did not choose to appeal it at the time).

174. Mr McGurk's position is that these are all first instance decisions and none are binding; as they are conflicting, there is clearly reasonable doubt in the correct legal position and therefore this ground of appeal should not be struck out.

175. I am reminded of my own decision in *Welland* [2017] UKTT 870 (TC) on 'special circumstances' where I allowed an appeal in part in a situation (3 successive penalties incurred before the taxpayer was aware of any of them) very similar to that in *Hok*. My view was that, while the Tribunal has no public law jurisdiction and cannot discharge a penalty in circumstances where HMRC has exercised its discretion unlawfully, nevertheless the Tribunal's jurisdiction to determine defences and mitigation may in some cases lead to a similar outcome. For instance, a taxpayer might have incurred a penalty because he had relied on incorrect advice by HMRC. While the Tribunal would have no jurisdiction to discharge the penalty on the grounds it was an unlawful exercise of their discretion for HMRC to impose a penalty in such circumstances, the Tribunal does have jurisdiction to discharge the penalty on the grounds that the taxpayer had a reasonable excuse. In *Welland* and *Hok,* the tribunal had no jurisdiction to discharge the penalty on the grounds it may have been an unlawful exercise of HMRC's discretion to impose successive penalties in circumstances when the taxpayer had had no opportunity to rectify his behaviour after incurring the first penalty, but in *Welland* I had the jurisdiction to mitigate all but the first penalty on the grounds of 'special circumstances' for this very reason.

176. Therefore, I do not entirely agree with what was said in *Jones.* I consider issues of fairness can be relevant to statutory defences such as those of reasonable excuse, special circumstances and mitigation. On the other hand, I think, as recognised in *Jones,* there must be some nexus between the offence penalised and the circumstance giving rise to the mitigation. So conduct, however objectionable, by HMRC but which in no way contributed to the commission of the offence, would not be grounds for mitigation and I cannot agree with the decision in *Whereat.*

177. In my view, even if the appellant could prove that there was some nexus between HMRC's decision to impose the penalty and its decision no longer to resist liability to pay the repayment supplement, that would only be a matter for judicial review. In particular, I consider the appellant does not have a reasonable prospect of making out a case that as a matter of law a decision to impose the penalty in order to offset the

repayment supplement would justify mitigation of the penalty. The entirety of Ground 6 is struck out.

Ground 7 – mitigation

178. As I have said, the appellant applied to add to ground 7 a ground of appeal that penalty should be mitigated by 100% because of the factors in Ground 5. I have already said at §155 that this ground of appeal cannot be admitted as it has no prospect of success for the reasons given at §§126-147.

179. It was also the appellant's case that he should be allowed a larger percentage mitigation than already allowed him by HMRC and for the same reasons; however, he did not know the reasons HMRC had allowed him mitigation (see §150) so he also wished to be informed what they were so that he could put the case that those factors justified greater mitigation than already allowed to him.

180. HMRC's position at the hearing was that the only reason the officer allowed mitigation of the penalty was to reflect what HMRC saw as Mr Kishore's cooperation in identifying the error. In so far as Mr Kishore wanted a greater degree of mitigation allowed for this cooperation, HMRC considered that the Tribunal would not be able to hear the arguments as it would be in effect a re-litigation of his 'no means of knowledge' defence in the *Kittel* case.

181. My view is that this Tribunal has in general an unfettered jurisdiction on mitigation but, in this case, Mr Kishore cannot re-argue matters that were a part of the *Kittel* hearing, as to do so would be abusive. Therefore, he cannot put forward as mitigation allegations of fact that were in effect decided against him when his *Kittel* appeal was struck out. Therefore, he cannot put forward a case that he did not have constructive knowledge of the fraud, nor any case that is only consistent with him not having constructive knowledge of the fraud.

182. But HMRC have accepted (see §180) that, despite this constructive knowledge, Mr Kishore cooperated in identifying the error. Therefore, it must be open to Mr Kishore to put forward a case that that, *in fact*, his cooperation, despite his constructive knowledge, was greater than accepted by HMRC and/or justified a greater % mitigation than HMRC have already given him. I do not think that to do so is abusive, as it does not involve re-litigation a matter of law or fact deemed to be decided against him by his withdrawal from the *Kittel* appeal. However, no argument on the law or on the facts about his cooperation was advanced so it is difficult to see that it has any prospect of success.

183. As the only other reason given for his mitigation ground of appeal was the matter referred to above at (§178) which I have said does not have a reasonable prospect of success, his case on mitigation must be struck out. Nevertheless, as the appeal remains live, he is able to apply for a further amendment if different, arguable, grounds for mitigation appear to him.

Ground 7 – delay a breach of the Convention?

184.I have already referred to Article 6 of the Convention at §97. The new ground of appeal which the appellant sought to add was that the penalty was in particular levied in breach of Article 6(1) and/or (3)(a):

> 1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….
>
> ….
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> …..

185.I understood his case that there was delay of some 9-10 years from when HMRC refused to repay the input tax (in 2007/2008) to the assessment to the penalty (2017) and/or to the determination of the penalty which much necessarily be later. His position was that was a breach of Article 6 which gave him a right to a hearing 'within a reasonable time' and a right to 'be informed promptly' of the allegation.

186.I was referred in detail to a number of authorities on this. In particular, *King v Walden* [2001] STC 822 which concerned a case where the taxpayer was assessed to tax in 1989 (having been warned of potential liability to assessments and penalties in 1987). His appeal to the tribunal was dismissed in 1991, and appeals against that decision were dismissed first by the High Court and then by the Court of Appeal in 1995. In 1994, HMRC imposed penalties on the taxpayer for negligently making incorrect returns. The appeal against the penalties was not determined until 2000, and an appeal against that decision was dismissed by the High Court. The Court of Appeal did not give leave to appeal. Mr King then complained to the ECHR that the determination of the penalties appeals involved a breach of his human rights because of the delay from 1987 to 2000.

187.There are some parallels with those facts to the facts in Mr Kishore's case: one significant difference is that Mr King was warned of the possibility of penalties being imposed at about the time of the assessments.

188.While the High Court had taken the tax assessment as the start date for the Convention, it had held that the delay in imposing the penalties of about five years was not a breach of the Convention; the ECHR ([2004] ECHR 631) considered that there was a breach for which the UK government was in part to blame but awarded no compensation for the breach as it was not satisfied that the taxpayer had suffered any damage from the breach.

189. The ECHR did not appear to consider whether it was a breach of the Convention to assess a penalty only after an assessment had been determined although its decision is only consistent with the view that it was not; the issue was briefly referred to in the High Court at [96] which recommended that HMRC assess penalties at the same time as tax but did not suggest it was unlawful to do otherwise.

190. In the *AG's Reference (no 2 of 2001)* [2003] UKHL 68 the House of Lords (Lord Bingham) said unambiguously and after detailed consideration, that delay by itself, although a breach of the Convention, does not mean that a criminal charge cannot be tried:

> '[24]….it will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant…..

191. In summary, the authorities establish that delay should be measured from the assessment; but the mere fact of delay does not mean that there has been a breach of the taxpayer's human rights: he must also show that it was a prejudicial delay.

192. It was the appellant's case that the delay was not only very long (at least 9 years) but was also prejudicial. His evidence would be that the manner in which the *Kittel* litigation was conducted meant he ran out of funds and could no longer afford representation; moreover, he had lost contact with some witnesses who had originally been prepared to give evidence on his behalf and the solicitor who originally acted for him had died. His case was that he could no longer have a fair trial.

193. I do not accept that he has a good case on this. Firstly, the prejudicial matters of which he complains in the above paragraph would have occurred even if, say, HMRC had charged the penalty at the moment they issued the input tax refusal letters back in 2007 and 2008. This is because the penalty appeal must have proceeded with the *Kittel* appeal as liability to the penalties depended on the outcome of the *Kittel* appeal. The *Kittel* appeal was still on foot until 2015 and most if not all of the prejudice of which Mr Kishore complains had already occurred by that date: so the cause of the alleged prejudice was not the lateness with which the penalties were imposed but the time the *Kittel* proceedings took to resolve.

194. Moreover, he cannot allege (for reasons already given) that his current lack of funds was as a result of the manner in which HMRC conducted the *Kittel* litigation nor that HMRC was at fault in the manner in which they conducted that litigation: he could and should have put that case to the tribunal hearing the reinstatement application but he did not and, as I have said, has no prospect of showing it is not abusive to put it now. Moreover, the lack of witnesses is not relevant as they were to support his case of lack of knowledge/means of knowledge and he cannot now allege that there was no misdeclaration and/or he had a reasonable excuse because (as I have said) it would be abusive to do so.

195. So I find his case that he was actually prejudiced by 9-10 years delay in assessing the penalties appears to be without prospect of success.

196. It seems to me that what at root he was saying is that the outcome of the *Kittel* litigation might have been different if he had known penalties were also at stake; he is saying that the real prejudice to him was being assessed to misdeclaration penalties *after* it was in effect judicially determined that he had made a misdeclaration. The effect of that was that he is now unable to defend the penalties on the basis there was no misdeclaration as to do so would be abusive. Had he known penalties were at stake, he might not have conceded the *Kittel* appeal. Had he not conceded the *Kittel* appeal, he would be able to defend the penalty assessments on the basis he had a reasonable excuse and/or there was no misdeclaration.

197. This argument is not an argument about the passage of time but a claim that it conflicts with Article 6 for any penalty to be imposed after determination of liability. I find that to be a surprising proposition.

198. The legislation clearly permits a penalty to be imposed after liability is determined: that is clearly the rationale of the time limit in s 77(2) VATA and the time limit which is applicable here. It is not open to the Tribunal to find that legislation is incompatible with the Convention. While it is the case that legislation should be interpreted in so far as possible to be consistent with the Convention (s 3(1) Human Rights Act 1998), it is not possible to read s 77(2) as anything other than permitting penalties to be assessed after liability is determined.

199. Moreover, it is difficult to see the rationale of why it would be a breach of the Convention for penalties to be assessed after liability was determined. If people admit to liability or are found to have liability to tax in circumstances which give rise to a penalty, it is difficult to see why they are prejudiced procedurally if the penalty is then assessed. All Mr Kishore can say is that he might have conducted the *Kittel* case differently if he knew he might be penalised if he lost it; he might, perhaps, have taken more active steps to pursue it than he did.

200. But he must be taken to know the law. From 2007/8, he knew that HMRC asserted that he knew or ought to have known his 2006 transactions were connected to fraud. He must be taken to realise when he conceded the *Kittel* appeal that he was in effect accepting that (at the least) HMRC could prove he ought to have known, when he made his input tax claims, that those transactions were connected to fraud. He was therefore admitting to conduct for which he could be penalised and he should not be surprised when he was penalised.

201. I cannot see how there can be any prospect of success in a case that it is a breach of the Convention for a penalty to be determined after liability for it has been established, as long as it is assessed within a reasonable time of the determination. It is relevant (if not conclusive) that in *King v Walden* neither the High Court nor ECHR considered that penalties assessed after an assessment was determined amounted to a breach: it was not really considered as a possibility (although I accept Mr King had been warned of penalties at the time of the assessment).

202. While the appellant's case that the 11 year delay was a breach of the Convention struck me originally as one which must be arguable, on analysis, for reasons I have given above, I have concluded that it is not and it should be struck out.

Disclosure

203. In his skeleton argument, Mr McGurk asked for disclosure by HMRC of communications between HMRC officers involved in either the decision to accept the repayment supplement was due to be paid or involved in decision to impose penalties.

204. I understood that Mr McGurk considered that it might contain material relevant to mitigation. However, I find this material could only be relevant to mitigation if the question of whether HMRC decided to impose the penalties was influenced by the decision no longer to defend their liability to repayment supplement, was relevant to mitigation.

205. At §177, I have said such a case is not one which could be argued in a case on mitigation; on the contrary, allegations of improper conduct after the event penalised, which by its nature could not have contributed to the misdeclaration, are only matters for the complaint to the Administrative Court and not matters this Tribunal can take into account. The application for disclosure is therefore refused.

Overall conclusion

206. The appeal is entirely struck out save in one respect and that it the argument that the size of the penalty made the misdeclaration regime or this particular penalty disproportionate. I have to consider this arguable because of comments made to that effect by the Upper Tribunal in *Total Technology* and *Trinity Mirror*, even though, without such comments, I would not have considered it arguable.

207. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 20 December 2018