[2013] UKUT 071 (TCC)

Appeal number: FTC/67/2011

VAT – Whether First-tier Tribunal had jurisdiction to consider legitimate expectation to recover pre-registration input tax on supply of services – No – decision of First-tier Tribunal allowing taxpayer's appeal reversed

UPPER TRIBUNAL

(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S

REVENUE AND CUSTOMS **Appellants**

- and -

ABDUL NOOR

Respondent

TRIBUNAL: **The President, The Hon. Mr Justice Warren**
Judge Colin Bishopp

Sitting in public at the Royal Courts of Justice, Rolls Building, on 10 December 2012 and 11 December 2012

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

The Respondent in person for part of the hearing otherwise not present or represented

Introduction

1. The central issue raised on this appeal is whether the First-tier Tribunal ("**the F-tT**") has any jurisdiction, when dealing with a VAT appeal, to consider a taxpayer's claims based on the public law concept of "legitimate expectation". It is an important point: both HMRC and the judiciary of the F-tT need to know the extent of the F-tT's jurisdiction. It is, moreover, an issue on which different conclusions have been reached by differently constituted panels of the F-tT. However, while it is inevitable that much of what we say will be seen as relevant to other aspects of the jurisdiction of the F-tT, the issue of jurisdiction arises in this appeal in the context of a claim for input tax credit, and we emphasise that our actual decision relates only to that claim.

2. The appeal is from the decision released on 26 May 2011 ("**the Decision**") of the F-tT (Judge Brooks and Mr Corke) ("**the Tribunal**"). The Tribunal allowed Mr Noor's appeal from a refusal by HMRC to refund to him an amount of VAT which he claimed as an input in the circumstances which we will come to in a moment when setting out the facts of the case. But before we come to that, we wish to make the following observations.

3. HMRC was represented at the hearing of this appeal by Mr Peter Mantle, an experienced barrister. Mr Noor was not represented. He had not been represented before the F-tT. It was known to the staff and to the Chamber President of the Tax and Chancery Chamber of the Upper Tribunal that Mr Noor would not be represented at the hearing of HMRC's appeal. Given the importance of the point to HMRC and to the F-tT judiciary, HMRC were asked if they would provide funding for Mr Noor's appeal, but that was refused. We make no criticism of HMRC for that. The Tribunal therefore took steps to ensure that Mr Noor's appeal would be heard together with another appeal raising the same issue. That other appeal was not an appeal from the F-tT but was a statutory appeal to be heard at first instance by this Tribunal, having been transferred under the rules of the F-tT. In that statutory appeal, the taxpayer was represented by leading and junior counsel. We were therefore confident that all of the relevant arguments would be fully addressed; Mr Noor would not be disadvantaged by being unrepresented. Having addressed, as we thought, the problem of Mr Noor's lack of representation, we did not seek to obtain *pro bono* assistance for him or to seek the appointment of an advocate to the Tribunal.

4. Unfortunately for us (although not for the other taxpayer), the statutory appeal settled, but only a very few days before the date listed for the commencement of that appeal and Mr Noor's appeal on 10 December 2012. We would have welcomed an adjournment in order to attempt to obtain *pro bono* assistance for Mr Noor. However, Mr Noor wanted his appeal to proceed even in the absence of representation because, quite understandably, he wanted finality in relation to what, after all, is not a large amount of money: the tax at stake is less than £4,000. That sum, whilst not trivial or insignificant, was not an amount over which Mr Noor wanted to spend more time and effort, with uncertainty hanging over him.

5. Accordingly, we considered it right to proceed to hear the appeal. Mr Noor stayed for most of the first day of the hearing. He left in the middle of the afternoon to make his way back to his home in Wales, asking us to complete the hearing in his absence. We did so, finishing during the course of the following morning. He did not wish to make any

submissions. That is not surprising. The technical nature of the issue is not something about which he could be expected to be able to add to what Mr Mantle would say in fulfilment of his duty, as Counsel, to the Tribunal against HMRC's case.

6. We have gone into this detail because it is important to appreciate that our decision is reached without the benefit of full argument in opposition to HMRC's appeal. We have done our best, with the help of Mr Mantle's submissions, to identify the points which could be made in favour of Mr Noor and to deal with them in this decision. But that is no substitute for independent argument. Our decision may not, therefore, be as persuasive as it might otherwise be, although as a matter of precedent it will be binding on the F-tT.

The facts

7. The facts fall within a very narrow compass. We take the following from the Decision:

> "3. We heard from Mr Noor who told us that he encountered problems with a builder during the construction of a small commercial property. This resulted in legal action and a reference to adjudication before the building was completed. As a result he received three invoices from the solicitors, dated 24 August 2007, 16 October 2007 and 29 February 2008 and an invoice from the Adjudicator dated 3 December 2007 (the 'Invoices').
>
> 4. At the end of 2007, anticipating the final invoice from the builder, Mr Noor visited the Llanishen office of HMRC, armed with the Invoices then in his possession, to seek advice as to when he should register for VAT so as to be able to claim input tax in respect of the costs incurred on the construction of the property. He was directed to a telephone on a wall of the office on which he could contact HMRC's telephone National Advice Service ('NAS').
>
> 5. On telephoning the NAS Mr Noor explained about the construction of the property, he referred to the Invoices as these related to the property and that he was expecting the final invoice from the builder. He was told that he should keep all invoices relating to the new build as he could claim VAT under the option to tax within three years."

8. It is to be noted that the Invoices (as defined) related only to the invoices from the solicitors and the Adjudicator. The VAT on other invoices relating to the construction of the property (we imagine including invoices for the actual construction works) was allowed as input tax by HMRC. Those invoices did not feature in the appeal.

9. Later in the Decision, the Tribunal considered the decision of the Court of Appeal in *R v Inland Revenue Commissioners ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 at 1569 – 1570 ("***MFK***"), a decision which we will turn to later. In that context, the Tribunal made what seems to us to be a further finding of fact. The following appears in the middle of paragraph 12 where the Tribunal was looking at the requirement that a taxpayer had "to put all his cards on the table" (which they found Mr Noor had done):

> "12. … The purpose of the call to the NAS was to enquire (seek a ruling) as to when he should register for VAT in order to be able to claim input tax arising from the construction of the property. He had taken the Invoices which he then possessed with him and had referred to these during his conversation with the NAS about

reclaiming the input tax. In answer to a question from the Tribunal, Mr Noor confirmed that he did tell the NAS what the Invoices were for and that they all related to one property.…"

10. The reference to the Invoices in that paragraph is clearly a reference to the invoices rendered by the solicitors and the Adjudicator.

11. In September 2009, Mr Noor applied to register for VAT with effect from 1 July 2009. He was registered accordingly. He claimed to deduct the VAT shown on the Invoices on his first VAT return.

12. HMRC decided that Mr Noor was not entitled to deduct the VAT shown on the Invoices as input tax because of the effect of Regulation 111(2)(d) of the Value Added Tax Regulations 1995 ("**Regulation 111**" and "**the VAT Regulations**"). The reason was that the VAT on the Invoices was in respect of services which had been supplied to Mr Noor more than 6 months before his effective date of registration. He was allowed a deduction in respect of the buildings works themselves as a different time-limit applied under Regulation 111(2)(b).

13. The Tribunal concluded:
    a. that they had jurisdiction to consider, as they put it, "the issue of legitimate expectation" in Mr Noor's statutory appeal: see Decision [21]; and
    b. that Mr Noor had an enforceable legitimate expectation "that he could recover the input tax shown on [certain identified] invoices".

The appeal by HMRC

14. HMRC now appeal from the Decision with the permission of the Tribunal. They contend that the Tribunal had no jurisdiction to hear an appeal based on Mr Noor's alleged legitimate expectation; and, if that is wrong, they contend that the Tribunal was wrong, as a matter of law, to conclude that Mr Noor had a right to payment of the VAT based on the alleged legitimate expectation.

The Legislation

Input tax

15. For present purposes, it is necessary to refer, in relation to the crediting of input tax, to sections 24 to 26 of the Value Added Tax Act 1994 ("**VATA 1994**"). Section 24 provides materially as follows:

> **"**24(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) …
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

16. Thus in order to be "input tax", VAT must be on a supply to a "taxable person", *ie* to a person while he is, or is required to be, registered for VAT: see section 3(1) VATA 1994.

17. VAT incurred by a person before he was, or was required to be, registered is dealt with by section 24(6) and regulations made under it. Section 24(6), together with Regulation 111, is the key provision for present purposes and provides relevantly as follows:

> **"**Regulations may provide —
>
> …..
>
> (b) for a taxable person to count as his input tax, in such circumstances, to such extent and subject to such conditions as may be prescribed, VAT on the supply to him of goods or services … notwithstanding that he was not a taxable person at the time of the supply…;"

18. During the period relevant to the present appeal, Regulation 111 provided as follows:

> "(1) Subject to paragraphs (2) and (4) below, on a claim made in accordance with paragraph (3) below, the Commissioners may authorise a taxable person to treat as if it were input tax—
>
> > (a) VAT on the supply of goods or services to the taxable person before the date with effect from which he was, or was required to be, registered, … for the purpose of a business which either was carried on or was to be carried on by him at the time of such supply or payment, …
>
> (2) No VAT may be treated as if it were input tax under paragraph (1) above—
>
> > ……
> >
> > (d) in respect of services which had been supplied to the relevant person more than 6 months before the date with effect from which the taxable person was, or was required to be, registered."

Regulation 111(3) then provides in effect that the claim should normally be made on the first return the taxable person is required to make.

19. The basic key provisions on input tax credit in sections 25 and 26 are these:

    a. Section 25(2): "Subject to the provisions of this section, [a taxable person] is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

    b. Section 26(1): "The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period … as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

    c. Section 26(2): "The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business— (a) taxable supplies;…"

Appeals

20. A statutory right of appeal in VAT matters is provided by section 83 VATA 1994. Although the section has been amended from time to time, the material provisions for present purposes are as follows:

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

.....

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

The Tribunal's decision

21. The Tribunal recognised that applying the legislation to the facts, Mr Noor would not be entitled to repayment of the input tax, saying this at Decision [7]:

> "As the invoices concerned clearly relate to services provided to Mr Noor by the solicitors and adjudicator more than six months before his effective date of registration the VAT shown on them cannot be treated as input tax under Regulation 111 of the VAT Regulations."

We note that there is no other statutory provision which allows that VAT to be credited to Mr Noor as input tax.

22. Nevertheless, by reason of the judgment in *Oxfam v HMRC* [2010] STC 686 ("**the Judgment**" and "***Oxfam***"), the Tribunal considered that this analysis of the statutory provisions was not sufficient grounds to dispose of the appeal, because Mr Noor alleged a legitimate expectation to claim the VAT on the Invoices as input tax.

23. Mr Mantle identifies the question then facing the Tribunal in this way: Could Mr Noor, relying on the conduct of HMRC, namely what was said in conversation between Mr Noor and the NAS, seek to ask the Tribunal in effect to override the VAT legislation (in particular Regulation 111(2)(d)) to establish that HMRC were bound to pay the amount of VAT on the Invoices to Mr Noor, because of that conduct by HMRC?

24. To formulate the question is that way is, in a sense, to beg the issue since it assumes that to give effect to Mr Noor's legitimate expectation (assuming that the facts justify such expectation) would be to override the legislation. However, on one view of what Sales J said in *Oxfam*, the Tribunal would not be overriding the legislation but would be giving effect to it. On that view, it does not matter whether Mr Noor is entitled to recover the input tax because that is the result of the statutory provisions or whether it is because it is the result of giving effect to his legitimate expectation. In either case, Mr Noor's rights are to be vindicated by a repayment to him of the amount of input tax which he now claims. The dispute therefore falls, on this view, within section 83(1) by reference to paragraph (c) as "an appeal…..with respect to ……the amount of any input tax which may be credited to a person".

Judicial review in the F-tT

25. We explained in our decision in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) ("***Hok***"), starting at [36], the absence of any general supervisory jurisdiction by way of judicial review in the F-tT. It was important in *Hok* as we pointed out, and it is important in the present case, to bear in mind how the F-tT came into being. It was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ("**TCEA 2007**"), "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is derived wholly from statute. The same was true, of course, of the Value Added Tax and Duties Tribunal ("**the VAT Tribunal**"); decisions about the jurisdiction of the VAT Tribunal are therefore of great significance in relation to the F-tT.

26. At [39] of our decision we referred to the Court of Appeal decision in *Aspin v Estill* [1987] STC 723 citing from the judgment of Nicholls LJ at p 727c, a passage which bears repetition:

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

27. We then went on at [41] to [43] to say that there was no room for doubt that the F-tT does not have any judicial review jurisdiction. We considered that that was made abundantly clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22 ("***Corbitt***") and in particular by what Lord Lane had to say about the absence of a judicial review jurisdiction in the VAT Tribunal. It can be seen that, although *Hok* itself was a direct tax case, we based ourselves very much on decisions in the VAT field. Our decision is therefore of direct relevance to the present case.

28. As we noted a similar point was made by Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072 ("***National Westminster Bank***") after analysis of the authorities. The judge adopted and endorsed what had been said by Moses J in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205 at 247c:

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

29. Finally, so far as what we said in *Hok* is of direct relevance to the present appeal, we also considered (see [43] of our decision) the structure of TCEA 2007. We considered that the only conclusion which could be drawn from the structure of the legislation which brought both the F-tT and the Upper Tribunal into being was that the F-tT has no judicial review function. We noted that TCEA 2007 conferred a judicial review function on the Upper Tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so; and it hedged the jurisdiction which it did confer with some restrictions. We remain of the view that it is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the F-tT, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56), which points to a contrary conclusion.

30. It is clear that TCEA 2007 does not confer a general supervisory jurisdiction. It is also the case that section 83(1) VATA 1994 does not confer a general supervisory jurisdiction, as Sales J recognised (see Judgment [73]); and there is no other provision of VATA 1994 (or indeed any other legislation) which confers such a jurisdiction in relation to the legitimate expectation on which Mr Noor seeks to rely.

31. It does not follow from the analysis above that the F-tT can never take account of or give effect to matters of public law, and in particular legitimate expectation. There are many

examples in the authorities of a court or tribunal with no judicial review function giving effect to public law rights. Examples are given by Sales J in *Oxfam* and we will identify them when addressing his judgment. It would, however, be open to the F-tT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in deciding an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994, which comes down to a point of statutory construction.

Powers and functions of F-tT

32. Before turning to *Oxfam*, we mention Mr Mantle's submissions in relation to the powers and functions of the F-tT. He makes two submissions which are relevant to a consideration of Sales J's decision:
    a. The first is that the F-tT's functions under section 83(1)(c) are appellate and not supervisory.
    b. The second is that the F-tT lacks the powers which the High Court and the Upper Tribunal have to deal with judicial review claims (including claims based on legitimate expectation and abuse of power) and the remedies which they may provide. We note, in this context, the limited extent to which a judicial review application may be commenced in the Upper Tribunal and in respect of which the Upper Tribunal has the function of deciding the application: see generally sections 15 and 18 TCEA 2007 and in particular section 18(6), in relation to which the class currently specified is very narrow and would not include an application by Mr Noor seeking to enforce his claimed legitimate expectation.

33. The second of those points is clearly correct and requires no real elaboration. The F-tT has no inherent jurisdiction equivalent to the jurisdiction of the High Court and no statutory jurisdiction equivalent to that of the Upper Tribunal. The first point does require some elaboration.

34. Mr Mantle has referred us to *John Dee Ltd v CCE* [1995] STC 941. In that case, the Court of Appeal emphasised that the jurisdiction of the VAT Tribunal under section 40(1) Value Added Tax Act 1983 (the forerunner of section 83(1) VATA 1994) was appellate and that references to public law authorities, and in particular to the well-known principles developed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, were capable of leading to confusion: see at p 952a. He submits that this is significant since control of a public body to ensure that it is not abusing its power, in the light of legitimate expectations created by its conduct, is normally part of a supervisory jurisdiction, typically exercised by way of judicial review, and not an appellate jurisdiction.

Oxfam

35. We wish to dispose at the outset with one issue concerning the status of Sales J's reasoning concerning legitimate expectation. At Decision [19], the Tribunal concluded that Sales' J's conclusion in relation to the jurisdiction of the VAT Tribunal (and, by implication the F-tT following the transfer of the VAT Tribunal's jurisdiction to it) was a necessary part of his reasoning and was accordingly of binding effect on the Tribunal. However, in *Hok*, at [49] of our decision, we stated that his conclusion was not necessary for resolution of the appeal and thus that what he said was *obiter*. In *Thorpe v HMRC*

[2010] STC 964 at [32] to [33] on p 972, Lloyd LJ (giving the only reasoned judgment, with which the other judges agreed) had already expressed the same view.

36. The basis on which Lloyd LJ expressed his view was that there had been a tax appeal and a separate judicial review proceeding, both of which came before Sales J. Lloyd LJ stated that the judge

> "decided both aspects of the case in favour of HMRC but *obiter* he made observations to the effect that the public law point, which was that raised in the judicial review proceedings, could have been raised by way of appeal, under the statutory provisions, to the [VAT Tribunal]".

In *Hok*, we did not explain in any detail why we considered Sales J's conclusion to be *obiter* nor was the point argued before us.

37. The Tribunal based its conclusion that *Oxfam* was binding on it on what Sales J said at Judgment [5]. We set out relevant parts of [5] preceded by parts of [4] as well:

> "[4] ….. However, as I explain below, I consider that Oxfam's claim based upon public law principles and the doctrine of legitimate expectation could properly have been raised in its appeal to the tribunal……. [His explanation begins at [61]]
>
> [5] Since Oxfam did not (for understandable reasons) raise its legitimate expectation argument in its appeal to the tribunal, I think that the correct approach for me is to treat that argument as a new argument raised on the appeal under VATA with the leave of the court and to rule upon it in the context of that appeal, applying principles of public law. Having given leave for the argument to be raised in the appeal, it is unnecessary for me to grant permission for the same argument to be brought by way of judicial review. (If I had reached a different conclusion about the jurisdiction of the Tribunal and of this court on a VAT appeal, I would have granted Oxfam permission to bring its judicial review claim and would have dealt with it on the substance of the legitimate expectation argument in the same way as I have done below in the context of this appeal)."

38. After dealing with the facts and describing the tribunal's decision (which did not deal with legitimate expectation since it had not been raised in the statutory appeal but was the subject matter of a separate application), Sales J then went on to deal with the appeal and with the issue of legitimate expectation in separate sections of his judgment, rejecting both aspects of Oxfam's case.

39. He commenced his consideration of the appeal against the decision of the VAT Tribunal at Judgment [35]. He rejected Oxfam's argument concluding at [42] that "the appeal is dismissed". He went on to agree with the VAT Tribunal's alternative reasons for dismissing Oxfam's statutory appeal. Then, at [44], he stated that "The dismissal of the appeal is not the end of the matter, since Oxfam maintains is alternative case" based on legitimate expectation.

40. He commenced his consideration of legitimate expectation at [45], observing that it had not been presented to the tribunal. He went on to reject Oxfam's claim, expressing his conclusion at [60]:

> "I conclude that there was no abuse of power on the part of HMRC in acting as they did. Therefore Oxfam's claim based on legitimate expectation also falls to be dismissed."

41. There then follows a section headed "Jurisdiction of the Tribunal" providing the explanation mentioned in [4]. It commences at [61] with the following:
> "That is sufficient to dispose of Oxfam's claims to be entitled to further recovery of input tax. However, the question of the proper procedure to be adopted to address the issues between Oxfam and HMRC arises, and I should deal with it."

42. Sales J was conscious that he was dealing with a procedural question of importance. He said as much in [80], acknowledging that he was departing from a widely held view about the jurisdiction of the VAT Tribunal. Recognising that his view might not be accepted at a higher level than the High Court, he suggested that a taxpayer, wishing to raise a public law challenge to a relevant decision falling within one of the headings in section 83, should raise the point as a ground of appeal but should also issue a protective application for judicial review.

43. It may be that a decision concerning the jurisdiction of the VAT Tribunal was not strictly necessary in order to deal with all of the matters in dispute. The VAT Tribunal clearly had jurisdiction to deal with the matters which it actually dealt with and those were properly the subject matter of an appeal. Sales J clearly had jurisdiction to deal with the issue of legitimate expectation. Either that issue fell within the jurisdiction of the VAT Tribunal or it did not. If it did, then it was within the jurisdiction of Sales J sitting as an appellate judge in the Chancery Division of the High Court to allow it to be raised by way of an additional ground of appeal even though the VAT Tribunal had not considered the point because it was not raised. If the issue did not fall within the jurisdiction of the VAT Tribunal, it could not have been raised in the appeal to the High Court. However, Sales J, as a judge of the Administrative Court (which he was), had the jurisdiction and power to hear the application for judicial review which had been brought by Oxfam. He might have declined to decide which jurisdiction he was exercising, deciding simply that Oxfam's claim based on legitimate expectation failed whichever jurisdiction he was exercising.

44. On one view, that is precisely what he did. Support for that view is found in Judgment [42] where he expressed his conclusion dismissing the appeal and in [44] where he refers to the dismissal of the appeal. Had he seen the issue of legitimate expectation as simply a further ground of appeal (which is what it would have to be in order to fall within the jurisdiction of the VAT Tribunal and within his jurisdiction as a judge of the Chancery Division on an appeal) he could not have dismissed the appeal at that stage but could have done so only after he had rejected that further ground of appeal. Support for that view can also be found in his rejection of the claim based on legitimate expectation in a separate section of the judgment and his conclusion that this claim "also falls to be dismissed" *ie* as well as the appeal.

45. The approach reflected in that view is not entirely satisfactory. Although an appeal would have been to the Court of Appeal whichever jurisdiction was being exercised, different considerations would have applied in considering any application for permission to appeal. An appeal from the Chancery Division in the tax appeal would have been a second appeal and could have been brought only with the permission of the Court of Appeal and only on a point of law. An appeal from the Administrative Court would have

been a first appeal in respect of which Sales J himself could have given permission. An appeal would not have been restricted to a point of law.

46. Further, had Sales J been leaving open the question of which jurisdiction he was exercising, we think that he might usefully have said something more about the factual basis on which he was approaching the exercise of the judicial review jurisdiction of the Administrative Court. The VAT Tribunal had made findings of fact. It is not clear to us how Sales J would have seen its findings in the statutory appeal as ones on which he could rely or even by which he might have considered himself bound in the judicial review.

47. Another view is that expressed by the Tribunal, in effect that Judgment [5] was a necessary part of Sales J's reasoning so that his conclusion concerning the jurisdiction of the F-tT was not *obiter* at all. On this view, the reasons for his conclusion which appear in [61] are to be read into [4] ("as I explain below") so that his decision and reasoning in relation to jurisdiction inform everything which follows under the headings "The Appeal against the Tribunal's Decision" and "Legitimate Expectation". On this view, in using the words of dismissal which he did in [42] and [44], he was doing no more than state his conclusion in relation to that part of the appeal which related to matters raised before the VAT Tribunal so that Oxfam could not succeed on the basis that the statutory charging provisions did not apply. Further, he can be seen as dealing with the issue of legitimate expectation separately from the other issues in the appeal because what he had to say applied not only to the issue of legitimate expectation in the context of an appeal (which is where he considered it should be dealt with) but also in the context of an application for judicial review (thus providing the Court of Appeal with his answer to that application if he should have dealt with it under the judicial review jurisdiction of the Administrative Court).

48. We have spent some time on this aspect of the case because if Sales J's conclusion was a matter of decision, the Tribunal was bound by it. It might be suggested that, even assuming the conclusion was correct in relation to the jurisdiction of the VAT Tribunal, it is not correct in relation to the jurisdiction of the F-tT. We do not consider that that suggestion would be correct. Sales J recognised that there was no general supervisory jurisdiction vested in the VAT Tribunal and accepted that section 83 did not confer such jurisdiction. His point, as we will see, was that the words of section 83 were wide enough to allow the VAT Tribunal to determine any issue (including a public law issue) which went to the amount of the credit for input tax. If he was right in concluding that section 83 was wide enough to enable the VAT Tribunal to do so in the past, it must also be wide enough to allow the F-tT to do so from the time that it replaced the VAT Tribunal as the relevant tribunal for hearing appeals under section 83. Sales J's reasoning applies as much to the F-tT as it did to the VAT Tribunal.

49. Quite apart from that, if Sales J's conclusion formed part of his decision and was not merely *obiter*, we must consider carefully whether we can properly depart from it in accordance with established principles. The Upper Tribunal is not bound by the decision of a High Court judge in the way that the F-tT is bound: see *SoS for Justice v RB* [2010] UKUT 454 (AAC) at [40]. But, with the limited exception identified at Judgment [41] (which does not arise here), it should depart from such a decision only in circumstances where another High Court judge would properly be able to do so. Thus, we would be able to depart from Sales J's conclusion, assuming that it was a matter of decision, if we

thought it was plainly wrong or if we considered ourselves bound (and so that Sales J himself was bound) by earlier authority. Ordinarily, that is not only a sufficient condition for departing from a previous decision but is also a necessary condition. In the case of *Oxfam*, however, we remind ourselves that Sales J reached his conclusion without, as he put it, "the benefit of detailed argument to the contrary". Indeed, such argument as he did have was in favour of the conclusion which he eventually reached: see [78].

50. We incline now to the view that the Tribunal was right in considering that Sales J's conclusion was a matter of decision. In so doing, we depart from our own (clearly *obiter*) remark to the contrary in *Hok*. We do not consider ourselves bound by what Lloyd LJ said in *Thorpe v HMRC*. He was clearly, we think, under the impression that Sales J was dealing with two separate matters – an appeal and an application for judicial review. Lloyd LJ referred to Sales J as "making observations to the effect that the public law point could have been raised by way of appeal". Lloyd LJ could only have expressed himself in that way if he had thought that Sales J had dealt with the point within the judicial review and not as a ground of appeal. But raising the point by way of appeal was precisely what Sales J did: see Judgment [5].

51. From this discussion it will also be apparent that we very much doubt the observation of the tribunal at [45] of its decision in *Magdalene College Cambridge v HMRC* [2011] UKFTT 680 (TC). In that paragraph, the tribunal referred to what Sales J said in Judgment [80] and then stated that "on that basis, we think Sales J acknowledged that his observations were not binding". We do not read the Judgment, and particular [80] as providing any such acknowledgment. Indeed, the fact that Sales J envisaged the issue being resolved by a higher court suggests that he did see himself as making a decision, albeit one which a prudent taxpayer might not regard as the last word on the subject.

52. We acknowledge that the view that what Sales J said was simply *obiter* cannot be dismissed out of hand. But given what we see as the strength of the other view, we need to consider whether we are bound by Sales J's decision if that other view is correct. We do not consider that we are bound, for the reasons given below. On that footing, it is not necessary for us to reach a final conclusion about which view is correct since, on either view, we are able to make our own decision about the jurisdiction of the F-tT.

53. We now turn to Sales J's substantive reasons for reaching the conclusion which he did about the jurisdiction of the tribunal and his reasons for considering that he was not bound by the authorities to follow what even he accepted was a widely held view. We need to address the relevant part of his decision in some detail, as well as to refer to the decision of the VAT Tribunal from which the appeal to Sales J was made.

54. We start at paragraph [16], where Sales J stated that it was not altogether clear that HMRC, in the exercise of their tax management powers, could enter into a binding contract with a taxpayer regarding a method of apportionment of input tax. After noting that the Court of Appeal in *GUS Merchandise Corp Ltd v Customs and Excise Commissioners (No. 2)* [1995] STC 279 were of the view that HMRC's general tax management powers did include the power to enter into a binding contract in relation to such matters, (albeit that the point went by concession: see at 281h-282a) he expressed his own preliminary view to the same effect. However, since he considered that it was not necessary for him to resolve this question for the purposes of deciding the case, he did not rule on the point. The reason why it was not necessary is not expressly stated, but it can

only be because he went on to decide (see Judgment [35] to [41]) that the facts did not establish the meeting of minds which would have been necessary to result in a contract (even assuming, we would add, that there was power to make one).

55. At Judgment [63] to [71], Sales J discussed the jurisdiction of the tribunal. Having set out in [62] the relevant parts of section 83(1) VATA Act 1994, he said this at [63]:

> "[63] On the ordinary meaning of the language of that provision, it appears that it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula, including both the contract issue and the legitimate expectation issue. The words, 'with respect to', in section 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer. The tribunal's jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter."

56. Then, after drawing a parallel with the contract claim (we turn to his discussion about that in a moment), he noted (see Judgment [67]) that an appeal under one of the sub-paragraphs of section 83(1) would be on the merits of a decision taken by HMRC and questions of private law or public law would not be relevant to the VAT Tribunal's task on the appeal. It did not, in his view, follow from this that the VAT Tribunal would never have jurisdiction to consider issues of general private law or general public law where that is necessary for it to determine the outcome of an appeal against a decision of HMRC whose subject matter falls within one of those sub-paragraphs. He did not, therefore, see it as a valid objection to his "straightforward interpretation of section 83(1)(c) according to its natural meaning" that sometimes the VAT Tribunal would have to apply public law concepts in order to determine the case before it. After referring at [68] to cases where the county court (see *Wandsworth London BC v Winder* [1994] AC 461), the magistrates' court (see *Boddington v British Transport Police* [1999] 2 AC 143) or the Crown Court (see *DPP v Head* [1959] AC 83) had determined issues of public law, and after noting that employment tribunals may have to decide issues of public law in employment proceedings, he concluded at the beginning of [69] that he could not see any good reason for adopting a different approach to the interpretation of the jurisdiction of the VAT Tribunal in section 83 VATA 1994.

57. It can be seen from the above that Sales J reached his conclusion based on what he saw as a straightforward reading of the section giving its words their natural meaning. It is to be noted from Judgment [63] that he considered section 83(1)(c) to cover <u>all</u> issues regarding the amount of input credit.

58. He found support for this reading in the treatment of the issue of contract law which arose in the appeal. Indeed, he appears to have attached considerable importance, at Judgment [66], to the parallel he detected between the legitimate expectation argument and the contract issue. We set it out for completeness:

> "However, the parties thought that the tribunal did not have jurisdiction to consider Oxfam's alternative legitimate expectation argument. In my view, this is not correct. By the same construction of s 83(1)(c) and the same reasoning which led to the conclusion that Oxfam's contract claim was within the jurisdiction of the tribunal, Oxfam's legitimate expectation argument also fell within the jurisdiction of the

tribunal. I can see no sensible basis in the language of that provision [s 83(1)(c)] for differentiating between Oxfam's contract claim and its legitimate expectation claim. In both cases, if Oxfam's claim had been made out, an error of law on the part of HMRC in arriving at its decision on the amount of input tax to be credited to Oxfam would have been established (either a failure to respect Oxfam's contractual rights or a failure to treat Oxfam fairly, in breach of Oxfam's legitimate expectation) which would, on the face of it, be a proper basis for an appeal to the tribunal against HMRC's decision within the terms of section 83(1)(c)."

59. We will come to Sales J's reading of the section in a moment. But we want first to consider the parallel which is drawn in Judgment [66]. What is said, as we understand it, is that the arguments which led to the conclusion that the VAT Tribunal had jurisdiction to deal with the contract issues should lead also to the conclusion that it had jurisdiction to deal also with the issue of legitimate expectation. Sales J recorded that the VAT Tribunal and the parties in *Oxfam* had agreed that the VAT Tribunal had jurisdiction in relation to the contract issue, a proposition with which he agreed. Accordingly, it would have had jurisdiction to deal with the issue of legitimate expectation.

60. It is important for us to draw, at this stage, a distinction between contracts which are within the powers of HMRC to make and those which are not. It may well be that a contract which is within the powers of HMRC to make is one which could have been recognised and given effect to by the VAT Tribunal (and can now be recognised and given effect to by the F-tT) when it comes to establishing the correct amount of input tax under section 83(1)(c). That is not a matter which we need to decide in this appeal. The argument in favour of that view is simple: the amount of input tax credit which is <u>properly</u> to be credited to a taxpayer reflects not only the relevant provisions for the calculation of such credit but also anything which the legislation permits to be done.

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

62. The argument that such a case nonetheless falls within section 83(1)(c) therefore has to go well beyond the simple argument which we have briefly adumbrated in paragraph 60 above. It cannot therefore, in our view, be maintained that there would be a helpful parallel between the case of <u>contracts within</u> HMRC's powers and the case of <u>contracts outside</u> those powers when it comes to deciding the ambit of the jurisdiction under section 83(1)(c). The fact that there is (if there is) jurisdiction in the former case does not indicate that there is jurisdiction in the latter case.

63. So far as concerns legitimate expectation, we can well accept that a useful parallel can be drawn with contracts which it is not within the powers of HMRC to make. Indeed, we have just given legitimate expectation as one of the examples of a non-contractual juridical basis for giving effect to an *ultra vires* contract. But just as we can see no parallel between a claim based on a contract which it was outside the powers of HMRC to

make and a claim based on a contract which it was within the powers of HMRC to make, so too we can detect no useful parallel between a claim based on legitimate expectation and a claim based on a contract which it was within the powers of HMRC to make.

64. What Sales J said in Judgment [66] was that he could see no sensible basis in the language of section 83(1)(c) for differentiating between Oxfam's contract claim and its legitimate expectation claim. In both cases, if Oxfam's claim had been made out, an error of law on the part of HMRC in arriving at its decision on the amount of input tax to be credited to Oxfam would have been established. We would not disagree that there is no basis for differentiation if the contract claim being referred to related to an *ultra vires* contract. But if the reference was to a claim in respect of a contract which it was within the powers of HMRC to make, there is a very sound basis for differentiating between that claim and a claim to give effect to a legitimate expectation. A claim under a valid contract would be a claim to establish the amount of input tax ascertained in accordance with the combined effect of the legislation and an agreement properly made by HMRC in accordance with its statutory powers and thus in accordance with what Parliament has provided. In contrast, if effect is to be given to an *ultra vires* agreement, that will be to enforce something which has not been authorised by Parliament.

65. What is not, unfortunately, entirely clear is whether Sales J had *ultra vires* contracts in mind in saying what he did at Judgment [66]. It seems to us that, in the context of [63] to [66] he was focusing on a contract which would be valid as a contract, in other words, one which it was within HMRC's powers to make. And this is so notwithstanding the question which he left open in [16]. The "contract issue" was in reality whether a contract had been made (leaving aside the question whether there was power to make it): if that question were determined against Oxfam, that would be an end of its appeal to the Tribunal, subject of course to the issue of legitimate expectation.

66. We find support for that in the references in Judgment [64] and [65] to "the issues of contract law" and "the contract law argument":

> "64 In this case, issues of contract law (under rules of general private law), legitimate expectation (under rules of general public law) and application of general rules of VAT law all arose. The first two issues were the primary issues governing the question whether Oxfam should be credited with more input tax, since Oxfam did not maintain any serious argument against its assessment apart from by reference to those issues.
>
> 65. The parties and the Tribunal agreed that the Tribunal had jurisdiction to deal with the contract law argument. I think this is correct – the question of contract was an issue potentially determinative of Oxfam's rights to be credited with input tax, so the Tribunal had jurisdiction to deal with it."

67. An examination of the decision of the VAT Tribunal discloses no agreement of any sort about the jurisdiction of the VAT Tribunal in relation to an *ultra vires* contract and, indeed, [84] of that decision suggests very strongly that the VAT Tribunal did not consider that it would be able to give effect to such an agreement:

> "84. Our conclusion on the facts is consistent with the legal context for apportionment methods. The legislation does not recognize such methods and

> places responsibility upon the taxpayer to get it right. The internal guidance stresses that the Respondents have no legal challenge to the method used by the taxpayer. The guidance does not mention the use of care and management powers to secure free-standing agreements on apportionment. Thus on our analysis any purported exercise by the Respondents of care and management powers to enter into contractually binding agreements on an apportionment method would be contrary to their statutory functions and section 24(5) of the VAT Act 1994."

68. Further, HMRC clearly did not agree that the VAT Tribunal should be able to give effect to such an agreement. In any case, the whole idea of giving effect to an *ultra vires* contract as a matter of contract law rather than on some other basis (*eg* to give effect to a legitimate expectation) appears to us to be something of an oxymoron.

69. If Sales J was referring to the same contract claim in Judgment [66] as we have identified in relation to [64] and [65] (which it is reasonable to assume he was), then there is, with due respect to him, every reason for drawing the distinction for which he saw no sensible basis.

70. If, in contrast, he had in mind *ultra vires* contracts in saying what he did in Judgment [66] then the parallel he sought to draw would have been a good one. But since there was no basis for making, in relation to an *ultra vires* contract, the statement which he actually made in [65] about the agreement of the VAT Tribunal and the parties there is nothing to underpin the reasoning in [66].

71. The single question for us, therefore, is whether we agree with the wide interpretation given to section 83(1)(c) by Sales J in Judgment [63] and if we do not whether our disagreement is such that we consider it appropriate to depart from his conclusion.

72. At this stage of our decision, we wish to consider Sales J's conclusions (i) that it was no valid objection to his interpretation that sometimes the VAT Tribunal would have to apply public law concepts and (ii) that he was not bound by prior authority to conclude that the VAT Tribunal did not have the jurisdiction which he held it did have.

73. As to the first of those conclusions, we have mentioned already the cases to which he referred and on which he relied at paragraph 56 above. We do not disagree with his actual conclusion although the cases do not provide a close analogy. Each of them was concerned with the extent to which public law issues could be determined by a court in the context of either (i) an issue which clearly fell within its jurisdiction and to which it was necessary to know the answer before that jurisdiction could be properly exercised or (ii) whether it had jurisdiction in the first place. In *Oxfam*, Sales J was concerned with something rather different, namely the interpretation of a statutory provision which was the source of the jurisdiction. If, on its true interpretation, section 83(1)(c) is concerned, as HMRC submit, only with appeals in relation to the amount of credit for input tax which is permitted by the legislation, the VAT Tribunal would not have had jurisdiction to deal with legitimate expectation in order to determine the issues which did fall within its jurisdiction. Nonetheless, the factors referred to by Sales J in Judgment [69] and [70] do provide support for the view that there is no reason of policy why the jurisdiction of the VAT Tribunal should be restricted by a narrow reading of section 83(1) when to do so

would depart from its ordinary and natural meaning (assuming that Sales J was correct about that meaning).

74. We are, however, troubled by Sales J's reliance on the public benefit which he identified in Judgment [70]. He considered that it was desirable for the VAT Tribunal to hear all matters relevant to determination of a question under section 83 (here the amount of input tax to be credited to a taxpayer) because (a) it was a specialist tribunal and (b) it would avoid the cost, delay and potential injustice and confusion associated with proliferation of proceedings and would ensure that all issues were resolved on one occasion: "It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of section 83". By that we understand him to imply that not only did Parliament have those benefits in mind but that it should be taken as implementing a statutory regime which gave effect to those benefits rather than reject them: otherwise, there would have been no purpose in making the point.

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

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

77. In any case, we disagree with the suggestion concerning the plausibility of what Parliament can be supposed to have had in mind. There are several reasons for this, including these:

    a. If Parliament had intended to confer this jurisdiction on the VAT Tribunal, we would have expected it to say so clearly. Even as late as the passing of VATA 1994, *a fortiori* when the VAT Tribunal was first set up and given a statutory appellate jurisdiction, it would have been exceptional for an inferior tribunal to have a judicial review jurisdiction or an appellate jurisdiction allowing it to adjudicate on public law issues other than in the course of its statutory jurisdiction. VATA 1994 does not use words which clearly confer such a jurisdiction, reliance instead having to be placed on the words "with respect to".

    b. In cases where an inferior tribunal is intended to have a judicial review function, express provision has been made. See, for instance, the powers given to the newly-created (and now abolished) Charity Tribunal under section 8 Charities Act 2006.

    c. We have referred to the structure of the tribunal system put in place by TCEA 2007 at paragraph 29 above. Parliament decided that the F-tT should not have a

judicial review function; and although the Upper Tribunal does have a judicial review function, its jurisdiction usually comes into play on the transfer of a case commenced in the Administrative Court. It is only in a very limited class of case that a judicial review application can properly be commenced in and heard by the Upper Tribunal. It is well known that there was significant opposition even to these powers being conferred on the Upper Tribunal. It is simply inconceivable that Parliament would have contemplated conferring a similar power on the F-tT notwithstanding the two factors which Sales J identified and of which legislators were well aware.

d. Just as it was inconceivable that the F-tT should be given a judicial review jurisdiction, so to it was not plausible, in our view, that Parliament, when enacting section 83 VATA 1994, intended to confer a judicial review function on the VAT Tribunal.

e. We are bound to say that, if it was plausible in the way which Sales J suggests, it is very surprising that the point was not raised in litigation or otherwise many years before *Oxfam* came before the court. In fact, it was not raised as a plausible result before the VAT Tribunal even in *Oxfam* itself. As Sales J acknowledged, he was departing from a widely held view, a view which, on his approach, was entirely at odds with what Parliament is to be supposed to have wished to achieve. Although Sales J describes the view as widely held (and we do not know on what he based that description) we ourselves know of no contrary view being promoted as a correct view prior to the decision of Sales J himself.

f. Further, if Parliament's intention had been as Sales J suggests, we would have expected the same Parliament to have introduced secondary legislation in the form of suitable tribunal rules to govern the procedure (and in particular rules concerning permission to bring judicial review and time-limits) applicable to public law claims.

78. Accordingly, we cannot accept Sales J's reasons for his conclusions insofar as they rely on what it was plausible to suppose Parliament would have had in mind and thus, as we have explained in the preceding paragraph**,** what Parliament can be taken to have intended. Indeed, we think that the features which we have mentioned in that paragraph point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the F-tT in relation to appeals under section 83 VATA 1994.

79. That deals with the first conclusion mentioned at paragraph 72 above. As to the second conclusion, (that he was not bound by prior authority to conclude that the VAT Tribunal did not have the jurisdiction which he held it did have), Sales J (correctly) observed that none of the decisions which he mentioned in Judgment [72] was binding on him if he was clearly of the view that their reasoning on the point should not be followed. But what he was bound by was the decision of the House of Lords in *Corbitt*. He therefore spent some time considering the dictum of Lord Lane in that case (which was considered by Jacob J in *National Westminster Bank* as supporting the view that the VAT Tribunal had only a limited jurisdiction), concluding that it did not prevent him from deciding as he did.

80. One significant aspect of Sales J's conclusion is found in Judgment [77]:

> "Further, if Lord Lane's dictum were taken to exclude jurisdiction for the Tribunal under section 83(1)(c) in this case, it would be very difficult to reconcile with the approach in the other decisions of the House of Lords and the general approach to interpretation of statutory jurisdiction provisions referred to in para [66] above."

81. We think that the reference to [66] is probably meant to be a reference to [68] where Sales J considered some of the cases where inferior courts have made decisions in relation to public law. For our part, we do not see any problem with the reconciliation which Sales J saw as very difficult. As we have explained, the cases referred to are examples of a court needing to decide a point of public law in order to be able to exercise the jurisdiction which it did have or to decide whether it in fact had jurisdiction in the first place. In contrast, the issue, as we see it, in *Oxfam* and in the present case is (simply) one of statutory construction, namely the extent of the jurisdiction of the VAT Tribunal and the F-tT under section 83(1)(c). We do not understand why Sales J saw the difficulty identified in [77]. If the construction for which HMRC contend is correct, the VAT Tribunal had, and the F-tT has, no relevant jurisdiction; in which case, it would not be necessary to decide the public law issue in the exercise of the jurisdiction which it did or does have, namely to decide, in an appeal, what credit for input tax a taxpayer is entitled to under the terms of the legislation.

82. As to the decisions of the High Court referred to in Judgment [72] (in addition to *National Westminster Bank* he mentioned *Marks & Spencer plc v Customs and Excise Comrs* [1998] V&DR 93, *Greenwich Property Ltd v Customs and Excise Comrs* (2000) VAT Decision 16746, *R (on the application of Greenwich Property Ltd) v Customs and Excise Comrs* [2001] STC 618, *Customs and Excise Comrs v Arnold* [1996] STC 1271, *Marks & Spencer plc v Customs and Excise Comrs* [1999] STC 205 ("***M&S***"), and *Customs and Excise Comrs v United Biscuits (UK) Ltd* [1992] STC 325), Sales J did not follow them. However, although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a High Court judge ought to be followed by another judge unless that judge thinks that the earlier decision was clearly wrong; presumably Sales J would see his formulation ("…if I am clearly of the view that their reasoning on this point should not be followed") as bringing about the same result. It must, therefore, be that he not only regarded his own interpretation as the preferred interpretation, but also that he was clearly of the view that the reasoning in those decisions should not be followed. His only reason expressly articulated is the difficulty identified in Judgment [77] which we have just discussed and which does not, in our view, provide the foundation for rejecting the earlier decisions. But if one were to reject that expressed reason as adequate (as we do) we are left not knowing whether Sales J would not only have regarded his own interpretation as correct but also have regarded the earlier decisions as plainly wrong or, at least, decisions whose reasoning was clearly wrong. It is difficult to see that he would have regarded himself as clearly correct since he himself described the issue as "not straightforward" (see Judgment [78]).

83. It needs to be noted also that although Sales J recognised that the narrower view of the VAT Tribunal's jurisdiction had been taken in *Arnold*, *M&S* and *National Westminster Bank*, he did not embark upon a detailed analysis of why that view had been taken. The various judges did not rely only on the absence of a general supervisory jurisdiction in forming the view which they did. They also relied on the focus of section 83(1) being on entitlements or obligations under the VAT legislation. As Moses J put it in *M&S* at [1999]

STC 247d, the complaint of the taxpayer had to be "focused upon the consequences of the statute".

84. Sales J did not refer to the decision of the Court of Appeal in *Aspin v Estill* from which we have quoted at paragraph 26 above. The reasoning of the court turned on tax being due as a matter of law; there is a parallel with the present case and the absence of entitlement to credit in respect of the VAT on the invoices under the VAT legislation. Mr Mantle says that there is a strong parallel, because Mr Noor seeks to rely on additional facts to show that HMRC have conducted themselves unfairly, essentially that it would be an abuse of power for HMRC not to pay him the VAT shown on the Invoices. In such cases, following the reasoning of Nicholls LJ in the passage we have quoted, if the additional facts are as alleged by the taxpayer, the remedy provided is by way of judicial review. There is something in the point: but that was a direct tax case where there was no equivalent to section 83 VAT Act 1994. It does not really provide an answer to the point of statutory construction with which the present case is concerned.

85. Even if Sales J was correct in saying that he was not bound to follow the earlier decisions on jurisdiction, our view is that we, in turn, are not bound to follow his decision on jurisdiction, even assuming that we are correct in thinking that what he said about jurisdiction was a matter of decision and not merely *obiter*. We reach that conclusion for the following reasons:

    a. He recognised that the matter had not been the subject of detailed argument.

    b. As discussed at paragraph 65 above, he relied on the position in relation to the contract issue without drawing the distinction for the purposes of the argument between a contract which HMRC had power to enter into and one which they had no power to enter into. What he said in Judgment [66] about the absence of any serious basis for drawing a distinction between the contract claim and the legitimate expectation claim was correct if, but only if, the VAT Tribunal would have been able to give effect to a contract which it was not within the power of HMRC to make. Although the arguments in favour of that view of Oxfam's contract claim were the same, or at least very similar, to the view that the VAT Tribunal could give effect to legitimate expectation, that view of the contract claim does not afford any <u>additional</u> support to the corresponding view of the legitimate expectation claim. Rather, they both stand or fall together, leaving the contract claim as a potentially valid claim only where HMRC in fact had power to enter into the alleged contract.

    c. He perceived very great difficulty in reconciling the exclusion of jurisdiction from the VAT Tribunal with Lord Lane's dictum in *Corbitt*. We consider that he was wrong to perceive such difficulty. Absent reliance on that difficulty, it is not possible to say that he would have reached the conclusion that he should not follow the earlier cases (even if he was correct in saying that he was not bound to do so).

86. For completeness we should mention the decision of the Court of Appeal in *Nipa Begum v Tower Hamlet London BC* [2000] 1 WLR 306 to which Mr Mantle referred us. That case concerned a statutory right of appeal "on any point of law" in section 204 Housing Act 1996 following a decision on a review by a housing authority in relation to a number

of matters. It is entirely unsurprising in the context of the legislation in issue and in the light of the terms of the right of appeal conferred by section 204 that the Court of Appeal considered that an appeal lay even in relation to issues akin to those which gave rise to judicial review. We find it of no assistance in the determination of the present appeal.

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

88. In our view, the subject matter of section 83(1)(c) ("the amount of input tax which may be credited to a person") is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under VATA 1994, reflecting the provisions of, now, the principal VAT Directive (2006/112/EC). Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the F-tT is formulated, in the case of section 83(1)(c), by reference to those concepts. The F-tT is not, expressly at least, given jurisdiction under this provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions.

89. Suppose then that a taxpayer had received express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation. Suppose that the Administrative Court were prepared to grant a remedy in order to give effect to that legitimate expectation. We are not clear precisely what such a remedy would be, but one thing it could not do would be simply to order that HMRC give credit for the input tax. Take the

present case as an example. Obviously the Administrative Court could not declare the VAT on the Invoices to be allowable input tax – it clearly was not. Indeed, it would not have been input tax even if Mr Noor had claimed it within the 6 month time limit since it would only have been counted (section 24(6)(b)) or treated (regulation 111(1)(a)) as input tax. Nor, we consider, could the Administrative Court order HMRC to authorise Mr Noor to treat the VAT on the Invoices as if it were input tax for the purposes of Regulation 111(1): that would fly in the face of Regulation 111(2). What we think the Administrative Court could do is to order HMRC to treat Mr Noor as entitled to a credit of an amount equal to the VAT on the Invoices. But that amount it not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a "credit" within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC.

90. We can put this point in a slightly different way. The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, *prima facie*, to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is "input tax" (or what can be counted or treated under the legislation as input tax *eg* under section 24 or Regulation 111) or what can be "credited" for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of "input tax which may be credited" to a person. The F-tT has no jurisdiction to effect that financial adjustment since its jurisdiction under section 83(1)(c) relates only to "input tax which may be credited" to a person.

91. Our conclusion, in the light of this discussion, is that the F-tT has no jurisdiction over Mr Noor's claim to a credit in respect of VAT on the Invoices. In so concluding, we disagree with and depart from the decision of Sales J. We have dealt already with the concerns which we have about his reliance on the position in relation to the contract issue and with the difficulty expressed in Judgment [77]. We wish to say something more, however, about his principal reason for deciding as he did, namely his perception of the "ordinary meaning of the language" of section 83(1)(c) and the importance which he attached to the words "with respect to". We do not consider that the "ordinary meaning of the language" is that which Sales J attributes to section 83(1); and we consider that the words "with respect to" do not bear the weight with which he burdens them.

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

93. So far as concerns the words "with respect to", we do not agree that those words are wide enough "to cover any legal question capable of being determinative of the issue of the amount of input tax which should be attributed to a taxpayer" at least not in relation to the "amount of input tax" which should be attributed to a taxpayer. As we have said, we do not see any financial credit to which Mr Noor may be entitled by way of recognition of his legitimate expectation as "input tax". But clearly Sales J is including such financial adjustment within the phrase "amount of input tax". On that basis, Sales J's reading goes too far, in our view. It departs from the natural meaning of section 83(1)(c) which, reading the subsection as a whole, is focused on the large number of decisions on rights and obligations under the VAT legislation which HMRC have to make and in respect of which a specialist tribunal is provided. Quite apart from that, Sales J's reasoning applies to all of the paragraphs of section 83(1) and would be to give the F-tT, as we have said, an extensive if not comprehensive judicial review jurisdiction. For reasons already given and with respect to Sales J, we do not consider that it is plausible to suppose that that is what Parliament intended

Conclusion on jurisdiction

94. We do not consider that we are bound by the decision of Sales J in *Oxfam*; nor do we consider that, although not bound, we ought to follow him. We have given our reasons for that conclusion.

95. Our conclusion, free from the fetter of Sales J's views, is that the F-tT does not have jurisdiction to adjudicate on Mr Noor's claim based on legitimate expectation. Whether Sales J was bound or whether we ourselves are bound by *Arnold*, *M&S* and *National Westminster Bank* to hold that the F-tT does not have such jurisdiction, we do not need to decide. We should not be taken as deciding that the tribunal in *Magdalene College Cambridge* (see paragraph 51 above) was wrong in saying that they should follow *National Westminster Bank* rather than *Oxfam* if, contrary to its view (as we have held to be the case), Sales J's observations on jurisdiction were not *obiter*.

Legitimate expectation on the facts

96. The issue of legitimate expectation on the facts does not need to be decided in order to deal with this appeal. It has been difficult for us to deal with the legal issue of jurisdiction in the absence of legal representation for Mr Noor. It is even more difficult for us to deal with the appeal on the facts. We have had full written and oral submissions from Mr Mantle on this aspect of the case. We have not, in the absence of argument, found anything with which we positively disagree. We set out below a summary of his argument taken from his written skeleton argument and content ourselves with expressing the preliminary view that, if we are wrong on the issue of jurisdiction, then HMRC should succeed on its appeal in relation to legitimate expectation on the facts. We make clear that our view is not expressed as a matter of alternative decision and is entirely *obiter*.

97. We summarise Mr Mantle's submissions in the following sub-paragraphs.

    a. The F-tT erred in law in its approach to the doctrine of legitimate expectation and as to when HMRC, by applying the VAT legislation rather than acting in accordance with advice given to a taxpayer by HMRC, will abuse their powers.

    b. Most obviously, the F-tT did not reach any conclusion that HMRC's refusal to meet Mr Noor's claim in respect of the VAT on the Invoices would be so unfair as

to amount to an abuse of power, or even any express conclusion that it would be unfair. This is critical because as Lord Templeman put it in *Preston v IRC* [1985] STC at 293b-c:

> "The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the taxpayer complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

c. The F-tT did conclude that two conditions identified by the Divisional Court in *MFK* had been met, namely: (1) the taxpayer has to "put all his cards face upwards on the table" (see Decision [12]); and (2) the statement of HMRC relied upon should be "clear, unambiguous and devoid of any relevant qualification" (see Decision [13]).

d. The F-tT erred because satisfying those two conditions was relevant to the existence of a legitimate expectation, and to fairness, but was not sufficient to conclude that Mr Noor had a substantive entitlement based on a legitimate expectation. It erred in upholding Mr Noor's appeal without reaching a conclusion on unfairness amounting to an abuse of power. Its conclusions at Decision [14] were not a substitute for reaching the necessary conclusion on fairness and abuse of power and were flawed.

e. The F-tT's attention was not drawn to *F & I Services Ltd v Customs and Excise Commissioners* [2001] STC 939, CA, involving a claim based on a legitimate expectation arising out of a clearance in advance, in which Sedley LJ stated at [70] – [71]:

> "…But at least two of the steps by which Mr Cordara [counsel for the taxpayer] has approached the point deserve explanation. One is the suggestion that a public authority can create a legitimate expectation which defeats the law. In his written submission Mr Cordara contended: 'The mere fact that advice turns out to be wrong in law does not by itself entitle the commissioners to go back on it.' I entirely disagree. There is nothing 'mere' about official advice which is wrong in law, at least if the taxpayer relies on it. It is of course serious for the taxpayer; but it is serious for the public and for the rule of law. It is the Bill of Rights 1688 – the nearest thing we have to a constitutional text – which abrogates the dispensing power of the Crown. The decision of the Divisional Court in [*MFK*], which Mr Cordara regards as giving him support, makes it absolutely clear that the law recognises no legitimate expectation that a public authority will act unlawfully. It is only where the expectation is of a particular exercise of managerial discretion that the court will begin to examine its legitimacy…"

f. This is a robust indication that caution is necessary in concluding that advice given by HMRC which is wrong in law will create a legitimate expectation, such that applying the law correctly amounts to an abuse of power.

g. The F-tT's attention was drawn to *R (oao Corkteck Ltd) v HMRC* [2009] STC 1681 ("*Corkteck*"). In *Corkteck* Sales J gave compelling reasons why it was only in very exceptional circumstances that it will be an abuse of power for HMRC to

depart from advice given by the NAS (see at [27], [30] at 1691(g)—(j) and [31]), reasons which are relevant to the question of fairness, as well as more specifically to the adequacy of disclosure.

h. The Tribunal held that the purpose of Mr Noor's call to the NAS was to "enquire (seek a ruling)": see Decision [12]. However, the function of the NAS is to provide advice about general enquiries, not to provide rulings, and that was how it was held out in VAT Notice 700 ('the VAT Guide') as published in late 2007. It was also the case that the VAT Guide made it clear that for VAT on services supplied before registration to be claimed the services had to be received no more than six months before registration.

i. The F-tT reached its conclusion on legitimate expectation on the express basis that this was a case within the "very exceptional circumstances" contemplated by Sales J in *Corkteck*. That conclusion was based on the "nature of the information sought", essentially that it was information about registration and recovery of VAT on supplies made before registration.

j. That the enquiry related to such subject matter does not make the circumstances of this appeal exceptional, nor does anything else. Nor does it transform the advice given into advice (or a ruling) which it would be unfair for HMRC to depart from. In terms of fairness the obvious scope for misunderstanding remains of central importance in a situation such as that under consideration, even in a cases in which, having heard evidence from the taxpayer, a tribunal feels able to conclude, applying the balance of probabilities as it must, that it was on balance more likely than not that there was no misunderstanding between the person calling the NAS and the person answering his enquiries.

k. Alternatively, on the facts found by the F-tT about the relevant telephone conversation and the circumstances surrounding it, no reasonable tribunal properly directing itself in law could have concluded that Mr Noor had a legitimate expectation such that it would be so unfair as to amount to an abuse of power for HMRC to refuse his claim in respect of the VAT on the Invoices.

Disposition

98. HMRC's appeal is allowed.

Mr Justice Warren
Chamber President

Judge Bishopp
Upper Tribunal Judge

Release Date: 14 February 2013