[2017] UKUT 0089 (TCC)

Appeal number: UT/2015/0124

INCOME TAX – Schedule 36 Finance Act 2008 – whether daily penalties payable – jurisdiction of First-tier Tribunal to consider taxpayer's legitimate expectation – compliance with Human Rights Act

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

R & J BIRKETT T/A
THE ORCHARDS RESIDENTIAL HOME
DUNMORE RESIDENTIAL HOME
KINGLAND HOUSE RESIDENTIAL HOME
THE FIRS RESIDENTIAL HOME
MERRY HALL RESIDENTIAL HOME **Appellants**

- and -

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

TRIBUNAL: MR JUSTICE NUGEE
JUDGE ASHLEY GREENBANK

Sitting in public at the Rolls Building, London EC4A 1NL on 24 October 2016

Stephen Hackett, instructed by Johnsons Solicitors, for the Appellant

Christopher Stone, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Mr and Mrs Birkett from a decision (**"the Decision"**) of the First-tier Tribunal (Judge Christopher Hacking and Mr Alan Spier) (**"the FTT"**) dated 13 February 2015, the respondents being Her Majesty's Commissioners for Revenue and Customs (**"HMRC"**). Permission to appeal was granted by the FTT (Judge Hacking) dated 19 August 2015.

2. The appeal concerns daily penalties imposed by HMRC on Mr and Mrs Birkett for failing to comply with information notices. Mr and Mrs Birkett appealed to the FTT against the penalties. The FTT dismissed their appeals. They now appeal to the Upper Tribunal (**"UT"**) against that dismissal.

The statutory provisions

3. It is convenient at the outset to refer to the relevant statutory provisions. These are found in schedule 36 to the Finance Act 2008 (**"sch 36"**) which, so far as relevant, provides as follows:

> **"1 Power to obtain information and documents from taxpayer**
>
> (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")–
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, *"taxpayer notice"* means a notice under this paragraph.
>
> ….
>
> **6 Notices**
>
> (1) In this Schedule, *"information notice"* means a notice under paragraph 1, 2 or 5.
>
> …
>
> **7 Complying with notices**
>
> (1) Where a person is required by an information notice to provide information or produce a document, the person must do so–

(a) within such period, and

(b) at such time, by such means and in such form (if any), as is reasonably specified or described in the notice.

…

29 Right to appeal against taxpayer notice

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

…

39 Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who–

(a) fails to comply with an information notice, or

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

(2) The person is liable to a penalty of £300.

40 Daily default penalties for failure to comply or obstruction

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

…

44 Failure to comply with time limit

A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.

45 Reasonable excuse

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the

tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

…

46 Assessment of penalty

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A –

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

(a) the date on which the person became liable to the penalty,

(b) the end of the period in which notice of an appeal against the information notice could have been given, and

(c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

47 Right to appeal against penalty

A person may appeal against any of the following decisions of an officer of Revenue and Customs–

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

48 Procedure on appeal against penalty

(1) Notice of an appeal under paragraph 47 must be given–

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b) that is notified to the tribunal, the tribunal may–

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

4. The reference in para 48(5) of sch 36 to TMA 1970 is to the Taxes Management Act 1970 (**"TMA"**). Part V of TMA contains general provisions relating to appeals. We need not set them all out; for present purposes the relevant provisions are s. 47C under which the reference to "the tribunal" is (for most purposes) to the FTT, and ss. 49A and 49D under which an appellant who has given notice of appeal to HMRC may notify the appeal to the tribunal (see s. 49A(1) and (2)(c) and s. 49D(1) and (2)). In such a case s. 49D(3) provides:

> "If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."

It can be seen that the combined effect of these provisions and para 48 of sch 36 is that the FTT has jurisdiction to decide appeals brought under para 47 of sch 36 which are notified to the FTT.

Facts

5. Mr and Mrs Birkett are partners in a number of partnerships each of which operates a residential care home. Five such partnerships are concerned in the present appeal, namely The Orchards, Dunmore, Kingland House, The Firs and Merry Hall Residential Homes.

6. On 11 March 2009 a so-called 'Remuneration Trust' was established by one of

the partnerships (The Orchards) with a trust company based in Belize City, and with discretionary trusts declared in favour of 'providers', that is suppliers of services to the partnership. Thereafter the other four partnerships adhered to the trust, and each of the partnerships made contributions to the trust.

7. This was a scheme promoted by Baxendale-Walker LLP and was apparently designed to reduce the taxable profits of the partnerships. In the case of the Merry Hall Residential Home, for example, the profit and loss account for the year ended 30 June 2009 showed turnover of some £1.14m and gross profit of some £1.08m, against which were set expenses for such matters as administration, premises costs, employee costs and so on, which together came to some £820,000. The final expense item however was 'RT contributions' of £258,000, which had the effect (or ostensible effect) of reducing the profit to £261. We are not concerned in this appeal with the question whether the scheme was effective or not, but we do not find it at all surprising that in these circumstances HMRC wished to have full information about the establishment and operation of the Remuneration Trust, not least by asking Mr and Mrs Birkett themselves why they considered that the setting up of the Remuneration Trust, and the adherence of the other partnerships to it, was for the benefit of the partnerships' businesses.

8. By December 2010 HMRC had opened enquiries into each partnership's tax return. It is not necessary to detail the course of the correspondence between the relevant inspector of taxes, Mr Ruff, and the Birketts' accountants, Gallaghers, which continued through 2011. The upshot was that although Gallaghers claimed to have answered Mr Ruff's questions, Mr Ruff was not satisfied with the answers, and issued formal information notices to Mr and Mrs Birkett under para 1 of sch 36 on 28 November 2011, one for each partnership (**"the Information Notices"**). The Information Notices required the information requested by 28 December 2011. They contained a warning that:

> "If you do not do what this notice asks, you may have to pay a penalty of £300. If you still have not done what this notice asks by the time I have issued this penalty, you may have to pay a further daily penalty of up to £60 a day until you do."

This warning reflects the provisions of paras 39 and 40 of sch 36.

9. Gallaghers asked for the matter to be reviewed by another inspector. Mr Weissand carried out the review and by letter dated 15 February 2012 confirmed that in his view the information required in the Information Notices of 28 November 2011 was reasonably required. By letter dated 4 April 2012 headed 'Penalty Warning' Mrs Green, who had taken over from Mr Ruff as the relevant inspector, set a new deadline for the information requested of 1 May 2012, and warned that if the information was not received, she would charge a penalty of £300, and repeated the warning about a daily penalty of up to £60 a day.

10. Further correspondence from Mr and Mrs Birkett's new accountants Lucentum did not satisfy Mrs Green and on 17 May 2012 she issued formal penalty notices pursuant to paras 39 and 46 of sch 36 charging a £300 penalty in respect of each partnership. We will refer to these as **"the initial penalties"**. On 15 June 2012 Lucentum wrote asking that their letter be treated as a formal appeal against the initial penalties. On 4 July 2012 Mrs Green replied explaining why she considered that certain simple questions had still not been answered. That letter gave Lucentum another opportunity to indicate whether they wished to appeal against the initial penalties, and if so whether by review or by appeal to the FTT, and added:

> "Please note that if the appeals against the penalty notices are settled such that your client has not complied with the notices then daily penalties may be considered, however, until the outcome of your appeals has been settled I do not intend issuing any further penalty notices."

By letter dated 1 August 2012 Lucentum confirmed they wished to appeal by way of review. The review was carried out by Mrs Jessop. By letters dated 28 September 2012 she concluded that the initial penalty assessments should be upheld.

11. On 26 October 2012 Lucentum appealed to the FTT against the initial penalties. Unfortunately, the FTT appear to have misplaced the appeal papers and HMRC were not notified of this appeal. By letters dated 23 November 2012 Mrs Green issued five penalty notices pursuant to paras 40 and 46 of sch 36, one for each partnership, imposing daily penalties for the period from 18 May 2012 to 22 November 2012, a period of 189 days, at £20 per day. That resulted in a total penalty for each partnership of £3,780. We will refer to these as **"the daily penalties"**. In the covering letter to Lucentum Mrs Green said:

> "As Mr Birkett has not asked for the appeal to be heard by the Tribunal or supplied the outstanding information requested since the initial penalty notice I have issued the daily penalties notices attached."

That tends to confirm that if Mrs Green had been aware that an appeal against the initial penalties had been brought to the FTT she would not then have issued the daily penalties.

12. Mr and Mrs Birkett appealed against the daily penalties to the FTT. Those appeals were not in fact brought until 10 April 2014, but we need not go into the reasons as no point was taken on the appeals being brought late. It is those appeals that were dealt with by the FTT in the Decision under appeal to us. The appeals against the initial penalties were not proceeded with and Mr and Mrs Birkett paid them – "as a matter of commercial pragmatism" as it is put in the skeleton argument of their counsel, Mr Hackett.

The Decision of the FTT

13. In their appeals to the FTT against the daily penalties Mr and Mrs Birkett essentially complained of the fact that HMRC imposed the daily penalties on 23 November 2012 in the belief that no appeal had been brought against the initial penalties, but that when it was made clear to HMRC that such an appeal had in fact been brought on 26 October 2012, HMRC refused to withdraw the daily penalties, thereby in effect penalising Mr and Mrs Birkett for a breakdown in communication between the FTT and HMRC.

14. A number of arguments were advanced in support of this case. One was that the Information Notices had in fact been complied with. The FTT however took the view that this point was not open to Mr and Mrs Birkett. Their Notices of Appeal did not raise this substantive point but only the difficulties flowing from the failure of communication between the FTT and HMRC, which were essentially procedural points (Decision at [16]). HMRC's representative, Mr Massey, had not come prepared to argue the substantive point, and Mr and Mrs Birkett's then counsel, Mr Paulin, did not press the point, nor did he seek to amend the Notices of Appeal or adjourn (at [16]-[17]). The FTT agreed to proceed only on the basis of the procedural points: it would not serve the interests of justice to further adjourn the appeal, and Mr and Mrs Birkett, far from preserving their right to maintain that the Information Notices were not competent or that they had complied with them, had apparently accepted that they were in default by paying the initial penalties. To seek to resurrect such issues would, in the view of the FTT, be an abuse of process (at [18]-[19]).

15. The FTT in fact went on (at [21]) to record and accept a submission made by Mr Massey that Mr and Mrs Birkett had not satisfied the requests in the Information Notices, that only by providing the information sought would time cease to run for the daily penalties, and that the replies which had been given were unsatisfactory as they wholly failed to provide a transparent view of the working arrangements of the Remuneration Trust.

16. No attempt was made before us to challenge either the decision of the FTT not to allow the substantive question to be re-opened, or the FTT's apparent acceptance that the replies to the Information Notices were unsatisfactory. It follows that as far as the appeal to us is concerned it must be regarded as settled that Mr and Mrs Birkett did not comply with the Information Notices.

17. Three points were however advanced before the FTT on the procedural grounds. The first was that Mr and Mrs Birkett had a reasonable excuse for the failure to comply and hence that liability to the penalty did not arise, pursuant to para 45 of sch 36. The second was that there had been no failure to comply because of the provisions of para 44 of sch 36. The third was that the imposition of daily penalties was contrary to the Human Rights Act 1998.

18. As the FTT recorded (at [20]):

> "Mr Massey did not dispute on behalf of the Respondents that the impression had been given to the Appellants that the daily penalty regime would be held in suspense pending the outcome of the appeal against the fixed penalties. Clearly there had been mis-communication between the Tribunal Service and HMRC. That was unfortunate."

19. But the FTT held that this was not something that they could take into account, as follows (at [24]):

> "The Tribunal finds that the Appellants may well have had a legitimate expectation of deferring any further penalties in respect of their failure to comply with the Information Notices in question by reason of the circumstances related above concerning the appeal against the first fixed penalties. The Tribunal however has no jurisdiction to address this issue as this would amount to the exercise of a judicial review function."

20. On the para 44 issue, the FTT held that it was not in point. The reference in para 44 to allowing further time was to allowing further time for compliance with the Information Notices; it did not relate to the circumstances outlined by Mr and Mrs Birkett in their Notices of Appeal (at [25]).

21. On the Human Rights point, the FTT rejected the contention that the action of HMRC in applying daily penalties was not Human Rights compliant: there was no evidence that the penalty regime as a whole was other than compliant (Decision at [26]); the penalties were not in themselves disproportionate at £60 per day; the tax at stake was of the order of £400,000 so it was not unreasonable to consider a daily penalty of £60 as proportionate; and the possibility of an appeal to a tribunal provided relief against arbitrary exercise of the penalty regime (Decision at [27]).

22. The FTT then said at [28] that

> "For the above reasons we are unable to find that there is a reasonable excuse for the continuing failure by the Appellants to comply with the Information Notice. We dismiss this appeal and confirm the penalties imposed."

Ground 1 of the Appeal

23. Three grounds of appeal were initially advanced in support of the appeal to the UT. The first ground was that the FTT was wrong in law to conclude that Mr and Mrs Birkett did not have a reasonable excuse for the non-payment of the relevant penalties. This ground was not however pursued at the hearing and we say no more about it.

Ground 2 of the Appeal

24. Ground 2 of the appeal was that the FTT had erred in law in determining that it lacked jurisdiction to consider Mr and Mrs Birkett's legitimate expectation and/or in failing to take account of HMRC's common law duty of fairness.

25. This ground raises an issue of law on which there is by now a fair body of authority. The principal decisions to which we were referred were *Oxfam v HMRC* [2009] EWHC 3078 (Ch) (***"Oxfam"***), *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) (***"Hok"***), *HMRC v Noor* [2013] UKUT 71 (TCC) (***"Noor"***) and *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 (***"BT Trustees"***).

The authorities

26. *Oxfam* concerned the apportionment of Oxfam's input tax for VAT purposes between taxable and exempt supplies. Oxfam claimed to have reached agreement on a method of apportionment with HMRC; when HMRC later decided that this method should not be applied as it did not produce a fair and reasonable amount, Oxfam appealed to the tribunal (then the VAT and Duties Tribunal) claiming that it had the benefit of a binding contract with HMRC. The appeal was brought under s. 83(1)(c) of the Value Added Tax Act 1984 (**"VATA"**) which provided that an appeal should lie to the tribunal:

> "with respect to … (c) the amount of any input tax which may be credited to a person"

Having lost on that point, Oxfam appealed to the High Court, and there sought to rely in the alternative on the agreement having given rise to a legitimate expectation enforceable as a matter of public law, both as a new ground of appeal and separately in judicial review proceedings. Sales J allowed the legitimate expectation point to be taken as a new ground of appeal, but rejected it on the facts, finding that there was no abuse of power by HMRC (at [45]-[60]). He then dealt with the question whether the Tribunal had had jurisdiction to consider the legitimate expectation point and concluded that it had (at [61]-[80]), acknowledging that he was departing from a widely held view that the Tribunal's jurisdiction was more limited (at [80]). The basis for this decision was that the wording of s. 83 VATA was wide enough to include any legal question capable of being determinative of the issue of the amount of input tax that should be credited to a taxpayer, including the question whether HMRC had made an error of law by failing to treat Oxfam fairly in breach of Oxfam's legitimate expectation (at [63], [66]) and that although it was clear that s. 83 VATA did not confer any general supervisory jurisdiction, it was a non-sequitur to say that the Tribunal had no power to apply public law principles if they were relevant to an appeal against a decision of HMRC which fell within one of the headings of jurisdiction set out in s. 83 (at [76]).

27. *Hok* concerned penalties imposed on Hok for failing to file its employer's end

of year annual returns under PAYE regulations on time. Hok was nearly 5 months late, and HMRC imposed penalties totalling £500 on Hok pursuant to s. 98A TMA which provides that any person who fails to make a return becomes liable to a penalty of "the relevant monthly amount" for each month or part of a month for which the default continues, the relevant monthly amount for a business such as Hok being £100. Hok did not dispute its default, but appealed to the FTT on the basis that it was unfair for HMRC to impose the penalties as HMRC had not told it that it was in default and if they had done, Hok would have remedied it. The appeal was brought under s. 100B TMA which provided that an appeal might be brought against the determination of a penalty, and that in the case of a penalty which was required to be of a particular amount, the FTT might:

> "(i) if it appears that no penalty has been incurred, set the determination aside
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount…"

The FTT reduced the penalties to £100 on the grounds that HMRC had acted unfairly in delaying sending out a default notice. On HMRC's appeal to the UT, the UT (Warren J and Judge Bishopp) held that the FTT had no jurisdiction to do this. There was no issue that the penalties were due as a matter of law; the issue was whether HMRC should be precluded from imposing or collecting them. That was not an issue of what was due but a quite separate issue of administration which was capable of determination only by way of judicial review and hence not by the FTT (at [54]).

28. *Noor* concerned Mr Noor's ability to deduct as input tax VAT which he had paid on services supplied before he was registered for VAT. Under the VAT regulations Mr Noor could not treat such VAT as input tax if the services had been supplied more than 6 months before he was registered. Mr Noor was not registered within 6 months and HMRC therefore decided that he was not entitled to deduct the VAT as input tax; but he appealed to the FTT on the basis that he had been told by HMRC's telephone advice line that he could claim VAT if he registered within 3 years. The FTT accepted this, and held that they had jurisdiction to consider the issue of legitimate expectation and that Mr Noor had an enforceable legitimate expectation that he could recover the input tax. On appeal to the UT, the UT (again Warren J and Judge Bishopp) held that the FTT did not have any jurisdiction to give effect to any legitimate expectation which Mr Noor might have. The right of appeal to the FTT was (as in *Oxfam*) given by s. 83(1)(c) VATA, and the subject matter of s. 83(1)(c) was the input tax which was ascertained applying the VAT legislation (at [88]). The UT therefore disagreed with and departed from the decision of Sales J in *Oxfam*.

29. *BT Trustees* concerned a claim by the trustees of a pension scheme that they were entitled to payment of tax credits on certain dividends which were not claimable under domestic law but in respect of which the trustees claimed that their EU rights had been infringed. HMRC disallowed the claims and the trustees appealed to the FTT. There were further appeals to the UT and the Court of Appeal, and the Court of Appeal had already determined that most of the claims were subject to a six-year time-bar under domestic legislation (s. 43 TMA). In the UT the trustees had claimed that HMRC had acted unlawfully in refusing to grant a waiver of this time limit under the terms of an extra statutory concession which provided that repayments of tax would be made outside the statutory time limit in certain circumstances. The UT held that it had no jurisdiction to consider the question, and the Court of Appeal agreed. The appeals to the FTT were appeals against closure notices disallowing the claims for tax credits. Those appeals were brought under sch 1A TMA, para 9(7) of which provided that:

> "If … the tribunal decides that a claim which was the subject of a decision contained in a closure notice … should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good."

The UT had the same powers as the FTT. The statutory jurisdiction was to be read as exclusive and not as extending to what were essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer (at [142]). The appeals were concerned with whether the trustees were entitled to claim the benefit of the tax credits, not with the trustees' entitlement under the extra statutory concession (at [143]). The Court of Appeal referred to *Oxfam*; they had heard no argument about s. 83(1) VATA and so expressed no view about the correctness of Sales J's interpretation of that section; but they agreed with the UT that *Oxfam* should not be treated as authority for any wider proposition and rejected the suggestion that the reasoning could be applied to the jurisdiction of the FTT and UT to determine the appeals in the case before them (at [141]).

Relevant principles

30. The principles that we understand to be derived from these authorities are as follows:

(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 (**"TCEA"**) "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].

(2) The FTT has no judicial review jurisdiction. It has no inherent

jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

31. Some cases are relatively straightforward. *Hok* is a good example. The appeal to the FTT was against fixed penalties of £100 per month. The FTT's jurisdiction was given by s. 100B TMA (set out above at paragraph [27]). That only entitled it to determine if the penalties had been incurred and if the amounts were correct. The issue which was sought to be raised (was it unfair of HMRC to levy the penalties because of delay?) did not go to either issue. Hence the FTT had no jurisdiction to consider it.

32. In other cases the Court may have to construe the statutory provision conferring jurisdiction on the FTT to decide the scope of it. An example is *BT Trustees*. Here the appeals were against closure notices. The FTT's

jurisdiction was given by para 9(7) of sch 1A TMA (set out above at paragraph [29]). That entitled the FTT to determine if the claims for tax credits "should have been allowed". The Court of Appeal held that that was limited to the question whether the claims should have been allowed as a matter of tax law, and as not extending to the question whether the taxpayers should have been allowed the benefit of the extra statutory concession. That must on analysis have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 0135 (TC).

33. However we do not read the Court of Appeal in *BT Trustees* as having laid down any general rule as to the FTT's jurisdiction applicable in all cases. It is noticeable that in relation to Sales J's judgment in *Oxfam* they said (at [141]):

> "We have heard no argument about s. 83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section."

That confirms that they viewed the question whether Sales J was correct on s. 83(1) VATA as a question of interpretation of that section. His view that s. 83(1) was wide enough to include the question of public law argued before him (had HMRC acted in breach of a legitimate expectation?) is to be contrasted with the view of the UT in *Noor* that the jurisdiction of the FTT under s. 83(1) was limited to the amount of input tax as a matter of the VAT legislation. Like the Court of Appeal in *BT Trustees* we do not propose to express a view on the jurisdiction of the FTT under s. 83(1), which does not arise in the present appeal; but it can be seen that what is in issue is the correct interpretation of that provision.

Application of the principles to the present case

34. We can now try and apply the principles we have identified to the present case.

35. As set out above (paragraph [4]), the jurisdiction which the FTT was exercising was jurisdiction under s. 49D(3) TMA, as applied by para 48(5) of sch 36, to decide appeals brought under para 47 of sch 36.

36. Para 47 confers two rights of appeal. Para 47(a) confers a right of appeal against a decision of an officer of HMRC that a penalty is payable under para 40. Para 47(b) confers a right of appeal against a decision of an officer of HMRC as to the amount of such penalty.

37. The Notices of Appeal do not state in terms whether the appellant partnerships were bringing appeals under para 47(a) or 47(b). The Notices of Appeal in

each case said that the penalty notices were not competent; that the daily penalties had been imposed on the ground that no appeal had been made against the initial penalty; that despite that it having been made clear to HMRC that the initial penalties had in fact been appealed, the daily penalties had not been withdrawn; and that this constituted a lack of fairness. They asked for the penalties to be withdrawn.

38. On the face of it that looks like an attempt to invoke the right of appeal under para 47(a). The decision that can be appealed under para 47(a) is the decision of an HMRC officer:

> "that a penalty is payable by that person under paragraph … 40."

Para 40 applies in the circumstances set out in para 40(1), that is that the relevant failure (in this case to comply with an information notice) continues after the date on which the initial penalty is imposed under para 39. Where it applies, para 40(2) provides that:

> "the person is liable to a further penalty."

Under s. 49D(3) TMA, the FTT's jurisdiction is to decide "the matter in question", and under para 48(3) of sch 36, the FTT is limited to confirming or cancelling the decision. The matter in question on an appeal under para 47(a) is whether "a penalty is payable by that person [that is, the appellant] under paragraph 40". That seems to us to be the same question as whether "the person is liable to a further penalty" under para 40(2), which in turn depends on whether the requirements of para 40(1) are met. In other words, the FTT's jurisdiction on an appeal under para 47(a) is in our view confined to asking whether the statutory requirements under para 40(1) are met.

39. That means that the FTT cannot on an appeal under para 47(a) review the decision of the HMRC officer on any other grounds. In the present case the appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. That does not seem to us to be an issue which goes to the matter in question on an appeal under para 47(a).

40. We have reached this conclusion simply as a matter of construction of the relevant statutory provisions. Mr Hackett referred to what he called the "tension" between the decisions in *Oxfam* and *Noor*, and invited us to resolve that tension in favour of preferring the reasoning in *Oxfam*. He also submitted that it would be unfortunate if a taxpayer who wished to argue that HMRC had acted unfairly and in breach of a legitimate expectation had to take proceedings in the Administrative Court rather than availing himself of the comparatively simple and low-cost jurisdiction available in the FTT. We have not found it necessary to consider these points: the resolution of this appeal turns in our view on what the statutory provisions say, not on some broader principle.

41. Mr Hackett indeed said that he was not arguing for the FTT having a broad supervisory jurisdiction, but was arguing that the legislation in this case was wide enough to confer power on the FTT to review whether a penalty should have been imposed: para 46(1)(a) of sch 36, which provides that "HMRC may assess the penalty", conferred a discretion on HMRC to assess a penalty, and the power of the FTT to confirm or cancel the decision under para 48(3) should be construed as wide enough to enable the FTT to reconsider the exercise of discretion and hence to take into account such matters as fairness and the appellants' legitimate expectations.

42. We do not accept this argument. We accept that para 46(1)(a) confers on HMRC a discretion whether to assess a penalty. If the legislation had conferred a right of appeal against that discretionary decision, then it would no doubt have been arguable that the FTT on appeal would have had the power to reconsider the appropriateness of the penalty being assessed, and that in doing so it could take into account all relevant factors, including fairness and legitimate expectation. But as we read the legislation, para 47(a) does not confer a right of appeal against the discretionary decision of an HMRC officer under para 46(1)(a) to assess the penalty. Instead para 47(a) only confers a right of appeal against the decision that a penalty is payable under paras 39, 40 or 40A. Under para 46(1) HMRC can only assess the penalty when a person becomes liable for a penalty under paras 39, 40 or 40A, so the question whether the person has become so liable is a pre-condition to the exercise of the para 46(1) powers. Para 47(a) confers a right of appeal against the officer's decision that that pre-condition has been met, but that is simply a question of whether the requirements in para 40 have been satisfied.

43. For these reasons we have concluded that the FTT has no jurisdiction on an appeal under para 47(a) of sch 36 to consider the question sought to be raised in the appellants' Notices of Appeal.

44. That leaves the question of an appeal under para 47(b). An appeal lies under para 47(b) against a decision "as to the amount of such a penalty", and the FTT has power under para 48(4) to confirm the decision or substitute for the decision another decision which the officer of HMRC had power to make.

45. We have already said that the Notices of Appeal do not clearly invoke the right of appeal under para 47(b). Before us however Mr Hackett relied on para 47(b), and we will assume that it was open to the appellants to do so. Mr Hackett said that para 47(b) conferred power on the FTT to decide the amount of the penalty and that this included the power to take the decision again, taking account of the appellants' legitimate expectation. Mr Stone, for HMRC, said that an appeal under para 47(b) was confined to the question whether the penalty imposed was excessive, that is outside the limits specified in para 40(2).

46. We agree with Mr Hackett that if para 47(b) had been intended to be confined to the question whether the penalty imposed exceeded the statutory limit in

para 40(2), one would have expected it to be worded differently. The right of appeal is a right of appeal against the decision of an officer of HMRC as to the amount of penalty. On its face that does not seem to be limited to the question whether the amount of penalty exceeded the maximum payable (£60 per day in the case of daily penalties), but enables an appeal to be brought against the decision of the HMRC officer as to how much the amount of the penalty should be. That is clearly a discretionary decision, and we do not see why the right of appeal against that discretionary decision should not enable the FTT to consider not only whether the penalty was within the permissible range, but also where in that range the penalty should be levied. No doubt as in other appeals against discretionary decisions, the FTT should only disturb the decision under appeal if the decision was one that fell outside the generous ambit within which the decision could be made, but we decline to interpret para 47(b) in the very limited way that Mr Stone invited us to, that is, in the present context, as to whether the daily penalties exceeded £60 per day. Since the FTT has power under para 48(4) to substitute for the decision another decision that the officer had power to make, Mr Stone's submission would mean that if an HMRC officer assessed a daily penalty at £61 per day, the FTT could set it aside and assess the penalty at £20 per day; whereas if the officer had assessed the penalty at £59 per day, the FTT could not intervene. That does not seem to us to be a sensible or natural interpretation of the provisions.

47. In our view therefore the FTT does have power under para 47(b) to consider an appeal against a decision as to the amount of a penalty assessed by HMRC, and is not limited to deciding whether the amount exceeds the statutory maximum or not.

48. But this is not the end of the question. In the present case, the complaint of the appellants is not that the amount of the penalty, assuming one to be imposed, was excessive; it is that no penalty should have been imposed at all. It seems to us that raises the question whether this can be said to be an appeal against the decision of an HMRC officer "as to the amount of such a penalty". We do not think it can. An appeal under para 47(b) assumes that the penalty has been incurred and challenges the amount, or to use terminology familiar in litigation generally, it is concerned with quantum rather than liability. If the basis of the appeal is that no penalty should have been imposed at all, that is a challenge to liability not quantum, and cannot we think be characterised as an appeal against a decision as to the *amount* of such a penalty.

49. Nor do we think that it is an answer to this point to say that a penalty could be imposed of nil. It is true that para 40(2) lays down no minimum amount for a penalty, so that a penalty of £1 per day would be permissible. But that does not we think mean that a penalty could be imposed of £0 per day. A purported decision to impose a penalty of £0 per day would in truth be a decision not to impose a penalty at all. The assessment of a penalty imposes an obligation to pay the amount assessed. But a purported assessment of a penalty of £0 would impose no obligation to pay, would not penalise the taxpayer and would in fact have no effect. That does not seem to us to be a penalty.

50. We conclude therefore that although para 47(b) does enable an appeal to be brought against a decision as to the amount of a penalty that has been incurred, it is not possible for an appellant under the guise of an appeal under para 47(b) to appeal against a decision to assess a penalty at all. If no penalty has been incurred under para 40, then this can be the subject of an appeal under para 47(a); but if a penalty has been incurred, para 47(b) only permits an appeal against the amount of such a penalty, not against the decision to assess the penalty.

51. In the present case there is we think no doubt that the challenge was to the principle of assessing the daily penalties at all. There was no separate challenge to the quantum or amount of such penalties, assuming them to have been properly assessed.

52. In those circumstances we agree with the FTT that the FTT had no jurisdiction to decide the question of legitimate expectation that was raised – neither under para 47(a) as its jurisdiction there was confined to the question whether the penalties had been incurred, nor under para 47(b) as the legitimate expectation point did not go the question of the amount of penalties but as to the principle of there being any penalty. We therefore dismiss this ground of appeal.

Ground 3 of the Appeal

53. The third ground of appeal was that the application of the daily penalties was not compliant with the appellants' human rights. In oral argument Mr Hackett confined himself to one point which is that the penalty regime is perfectly acceptable in principle, but that this did not mean that the application of it in any particular case might not infringe the right to peaceful enjoyment of one's possessions which is found in Article 1 of Protocol 1 to the European Convention on Human Rights (**"A1P1"**). Otherwise he relied on his written submissions.

54. We can take this quite shortly. A1P1 reads as follows:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Mr Stone accepted that the assessment of penalties constitutes a deprivation of possessions for these purposes such that A1P1 is engaged.

55. Mr Hackett accepted that a penalty regime is a necessary component of the information gathering regime in sch 36, and as already mentioned, did not dispute that the penalty regime is perfectly acceptable in itself. He submitted however that it is not enough that the regime is human rights compliant as a whole; it must be applied in such a way that is proportionate. That requires applying the familiar three-stage test in *R v Secretary of State for the Home Department v Daly* [2001] 2 AC 532 namely (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measures designed to meet the legislative objective are rationally connected to it; and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

56. Mr Hackett accepted that the imposition of penalties met a legitimate legislative objective, namely to deter the appellants from ignoring the initial (fixed) penalties and the Information Notices. He submitted however that once it became clear that the appellants had not ignored the initial penalties and Information Notices but had engaged with them through appealing the initial penalties, the continued imposition of daily penalties met no legitimate objective and was therefore disproportionate.

57. Mr Stone referred us to the recent decision of the UT (Barling J) in *Allan v HMRC* [2015] UKUT 16 (TCC) for a convenient exposition of the principles. These are that a tax measure must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights; that there must be a reasonable relationship of proportionality between the means employed and the aims pursued (at [38], citing *National & Provincial Building Society v UK* [1997] STC 1466); that a contracting State enjoys a wide margin of appreciation, and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (at [39], citing *ibid*); that the hurdle for those alleging infringement of A1P1 in the context of taxation provisions has been described as "very high" (at [40], citing *R (on the application of St Matthews (West) Ltd v HM Treasury* [2014] EWHC 1848 (Admin)); that tax measures are seen as entitled to particular deference (at [40]); and that for a national tax measure to be rendered disproportionate, the measure must represent an interference with an individual taxpayer's enjoyment of the fundamental right in question which is so burdensome, arbitrary, unfair or excessive, relative to any community or public interest, as to preclude its being regarded as reasonably founded (at [52]).

58. On the basis of these principles, which we did not understand to be in dispute, we do not consider that there was any infringement of A1P1. Mr Hackett is right that the purpose of the daily penalties in sch 36 is to encourage compliance with the duty to provide information. There is no provision in the legislation suspending the daily penalty regime so long as the initial penalty is being challenged by way of appeal, and we do not consider that the failure to include such a provision falls outside the wide margin of appreciation afforded to contracting States, or is devoid of reasonable foundation, or is so

burdensome, arbitrary, unfair or excessive as to preclude it being regarded as reasonably founded. That means that the legislation itself cannot in our view be regarded as disproportionate. But once that stage is reached, the challenge to the application of the legislation in the present case must in our view also fail, as HMRC have done no more than apply the legislation.

59. Mr Stone also pointed out that the FTT did consider the proportionality of the amount of the daily penalties in the present case, comparing the penalty of £60 per day with the amount of tax at stake which was said to be of the order of £400,000. In fact the daily penalty for each partnership was £20 per day. Even taking all five partnerships together, it is difficult to say that daily penalties of £100 in all in the context of the amounts at stake was overly burdensome or excessive.

60. Mr Hackett also relied on Article 6 of the Convention, which confers the right to a fair trial. No separate argument was however advanced under this head, and we do not think it needs to be considered separately.

61. We reject this ground of appeal as well, and we will dismiss the appeal.

MR JUSTICE NUGEE

JUDGE ASHLEY GREENBANK

RELEASE DATE: 2 March 2017