[2017] UKUT 0305 (TCC)

Appeal number: UT/2016/0150

INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS (NICs) – withdrawal by appellant in FTT appeal – Rule 17, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – notice by HMRC of objection to withdrawal – s 54(4), Taxes Management Act 1970 – case made by HMRC for increase in determinations and decisions under appeal – TMA, s 50(7) – whether FTT had power to increase

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

C M UTILITIES LIMITED **Respondent**

TRIBUNAL: MR JUSTICE ARNOLD
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 13 July 2017

Richard Vallat and Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

The Respondent did not appear and was not represented

DECISION

1. This appeal raises a question of the jurisdiction and powers of the First-tier Tribunal (Tax Chamber) ("FTT") in circumstances where an appellant has given the tribunal notice of withdrawal, but HMRC have notified their unwillingness to accept that the appeal is to be treated as withdrawn on the basis that HMRC's case includes an argument that the appellant was undercharged by the assessments under appeal, and that the assessments should accordingly be increased.

2. The FTT (Judge John Brooks) decided, in its decision released on 23 May 2016, [2016] UKFTT 358 (TC), that the FTT was bound to accept the withdrawal by the appellant, C M Utilities Limited ("CMU"), in the appeal before it, and that it had no power to enable it to accede to the request of HMRC to increase the determinations and decisions under appeal. It is from that decision that HMRC now appeal to this Tribunal, with permission of the judge.

3. As was the case in the hearing before the FTT, CMU did not appear in this appeal, and was not represented. In accordance with Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we were satisfied that CMU was notified of the hearing, and in the circumstances of the case we considered that it was in the interests of justice to proceed.

4. Richard Vallat of counsel appeared for HMRC before us, as he had before the FTT. He produced, with Marika Lemos of counsel, a helpful skeleton argument and made further oral submissions. We are grateful for his assistance, including quite properly drawing our attention to authorities on which, had CMU attended or been represented, it might have sought to rely.

The facts

5. We can take the material facts quite shortly. It is not necessary to describe in detail the basis upon which HMRC made their various decisions and determinations, save to say by way of background that they concerned substantial contributions that CMU had made between 2007 and 2010 to certain trusts for the benefit of its directors and employees and their families. One of those trusts was described as an employee benefit trust ("EBT") and the others as business benefit trusts ("BBTs").

6. As a consequence of those transactions, HMRC considered that the relevant sums were earnings of the directors' and employees' employments on which PAYE income tax and national insurance contributions ("NICs") were due. Accordingly, between February 2012 and October 2013, HMRC issued what are described as Regulation 80 Determinations and Section 8 Decisions on CMU (and which we shall, for convenience, describe as "the Assessments") in a total amount of £537,102.05. CMU appealed against the Assessments.

7. By letter dated 8 May 2014, which constituted the offer by HMRC of a statutory review and accordingly set out HMRC's then view of the matter, HMRC informed

CMU that the amounts considered due were in fact greater than those initially assessed. In an appendix to the letter, Appendix 4, HMRC set out the revised figures totalling £763,187.52, broken down by relevant tax year and by relevant individual director and employee.

8. CMU also appealed against a corporation tax assessment for the period ended 31 March 2007 and amendments made in closure notices for later periods. Those assessments and amendments were made on the basis that the EBT/BBT contributions were not deductible for corporation tax purposes.

9. Following notification of the appeals to the FTT, and by directions issued on 21 November 2014, the various appeals of CMU were consolidated.

10. On 21 January 2015, HMRC filed their statement of case which stated that if and so far as the relevant sums were earnings for PAYE income tax and NICs purposes, CMU would be entitled to a corresponding corporation tax deduction in so far as those earnings were paid within nine months of the end of the relevant accounting period. In relation to the amounts of the Assessments, the statement of case said this (at para 48):

> "Owing to an insufficiency of information at the time, the Regulation 80 determinations and s 8 decisions for 2007/08 and 2009/10 are not in amounts that reflect [HMRC's] case as presently pleaded. HMRC informed [CMU] of the amount of PAYE income tax and NICs they consider due for those years in a letter dated 8 May 2014, being PAYE income tax of £344,207.74 and NICs of £124.733.43 for 2007/08 and PAYE income tax of £217,384.40 and NICs of £76,861.95 for 2009/10. [HMRC] will ask the Tribunal to determine the appeals in those amounts."

11. By letter dated 14 January 2016, which was four days before the listed date for the substantive hearing of the appeals by the FTT, CMU's representatives informed HMRC and the FTT that CMU could no longer continue with its appeals, and invited them to "accept this letter as the formal withdrawal of the appeals".

12. On 18 January 2016, HMRC sent an email to CMU's representatives and the FTT, drawing attention to paragraph 48 of their statement of case, and making clear that HMRC did not accept the withdrawal of CMU's case unless either:

> (a) it was agreed by CMU that the amounts set out in the statement of case were owed (and for that purpose an agreement would be drawn up under s 54 of the Taxes Management Act 1970 ("TMA")); or
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> (b) the FTT made a decision disposing of the proceedings by upholding the amounts of tax and NICs due and payable as set out in the statement of case.

13. On 20 January 2016, HMRC received from the FTT a letter dated 15 January 2016 notifying HMRC of the withdrawal, stating "the effect is that the appeal has failed".

14. On 31 January 2016, CMU emailed HMRC to say that it made no admission of liability but confirmed that it was withdrawing the appeals because it "is in no financial position to defend itself".

15. By letter dated 23 February 2016, HMRC asked the FTT to confirm the Assessments in the increased amounts set out in the now unopposed statement of case. It was following that letter that the hearing before FTT to consider the effect of CMU's withdrawal was listed, and the decision of the FTT now under appeal was made.

The law

16. Part 5 TMA contains extensive provisions with regard to appeals and other proceedings in direct tax cases, including those concerning the PAYE Assessments. It is necessary for us to refer only to two such provisions. The first, s 50 TMA, governs the procedure on an appeal which is notified to the FTT. That section materially provides:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
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> (a) that, the appellant is overcharged by a self-assessment;
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> (b) that, any amounts contained in a partnership statement are excessive; or
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> (c) that the appellant is overcharged by an assessment other than a self-assessment,
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> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
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> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
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> the assessment or amounts shall be increased accordingly."

17. Section 54 TMA provides for cases where appeals are settled by agreement. It sets out the relevant procedure, including safeguards for both the taxpayer and HMRC. For the purpose of this appeal it relevantly provides:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or

decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

…

(4) Where—

(a) a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desires not to proceed with the appeal; and

(b) thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,

the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation.

(5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal."

18. Both s 50 and s 54 TMA apply to Regulation 80 Determinations by virtue of reg 80(5) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682). Analogous provisions apply to the NICs Decisions: reg 10 of the Social Security (Decisions and Appeals) Regulations 1999 (SI 1999/1027) provides that if it appears to the FTT that the decision should be varied in a particular manner, the decision shall be varied, and reg 11 of those Regulations mirrors s 54 TMA.

19. The procedural rules governing the FTT, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"), include provision for withdrawal. Rule 17 provides:

"**17 Withdrawal**

(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
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> (a) the date that the Tribunal received the notice under paragraph (1)(a); or
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> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

Discussion

20. Two features of Rule 17 are readily apparent. The first is that it provides for the process of withdrawal (and reinstatement) of a party's case, but it does not provide for the consequences of withdrawal. The second is that it is expressly subject to statutory provisions relating to both withdrawal and settlement. It is to those statutory provisions that we must look to determine the consequences of withdrawal.

21. In doing so, we should have regard to the relevant context. The statutory powers under which, on an appeal, the FTT may vary an assessment, which are now contained in s 50(6) and (7), are the modern embodiment of what Henderson J (as he then was) described in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2008] STC 3366, at [115], as "a venerable principle of tax law" in the following terms:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest. This principle finds expression in cases such as *R v Income Tax Special Comrs, ex p Elmhirst* [1936] 1 KB 487, 20 TC 381, and in the need for special legislation (now contained in s 54 of TMA 1970) to enable tax appeals to be settled by agreement between the parties without the need for a hearing. The precise nature and scope of this principle in the twenty-first century is a controversial topic, having regard in particular to changes which have taken place over the years in the functions of the general and special commissioners, and to the introduction in 1994 of procedural rules regulating appeals to both tribunals. Furthermore, the whole question may become academic when appeals to the commissioners are replaced next year by appeals to the new tax tribunal. For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

22. The context for those remarks, in an appeal from the Special Commissioners, was an argument about the jurisdiction of the Commissioners to consider certain grounds for rejecting a claim to capital allowances having regard to the reasons given

in the closure notice. The case proceeded to the Supreme Court [2011] 2 AC 457, [2011] STC 1143 where, at [15], Lord Walker (with whom the other Justices agreed) approved what Henderson J had said.

23. As Henderson J noted, the principle may be traced back to *R v Income Tax Special Commissioners, ex p Elmhirst* [1936] 1 KB 487. By reference to the precursors of s 50(6) and (7) TMA in s 137(4) and (5) of the Income Tax Act 1918, Lord Hewart CJ said, at p 489:

> "In my view, it is quite plain on the wording of these sections that the fact that an appeal has been started makes it obligatory on the Commissioners to take steps, not merely or even primarily in the interest of the person appealing, but in pursuance of the duty imposed on them in the interest of the general body of taxpayers, to ascertain what the true assessment ought to have been. That process, directed to public needs, cannot be stopped by the whim of an appellant who, perhaps, begins to realize that, if he pursues his appeal, it may be the worse for him. The matter has passed out of his hands after he has given the notice of appeal. By that notice he also gives the Commissioners not only the opportunity, but also the duty, of performing a public task which may have a result of a character entirely opposite to that which he anticipated when he gave the notice of appeal."

24. On appeal, the Court of Appeal reached the same conclusion, albeit expressed in different terms. After reviewing the statutory code as a whole, Lord Wright MR said, at p 500-501:

> "I find it quite impossible to accept the argument that the giving of the notice of appeal is merely a sort of offer or an act from which the taxpayer can at his discretion at any time resile, subject to his obeying the precepts and so forth, and that he can at any moment prevent the Commissioners from ascertaining and settling the sum to be assessed by the simple process of intimating by word or by deed that he withdraws the notice of appeal, and that in such circumstances there is no appeal pending at all. It seems to me that the code contained in these sections is quite inconsistent with any such argument. It would indeed be a curious position if, notice of appeal having been given by the taxpayer in the hope of reducing his assessment, he should be able, when the information elicited shows quite conclusively that the assessment, so far from being an overcharge, was an undercharge, to prevent the Commissioners from estimating or valuing or assessing his liability according to the true facts which have been elicited, or that they should be debarred from proceeding further to develop the facts so as to ascertain the true position. The whole trend of these sections seems to be quite inconsistent with, and quite contrary to, any such view."

25. The statutory code which formed the context for the judgments in *Elmhirst* was different from that of today, in that the role of the Special Commissioners was wider, encompassing not only jurisdiction over appeals from assessments and other determinations, but the making of the assessments themselves. As the FTT in this

case noted, at [22], it was not until 1964 that the functions of the Commissioners as an appellate body and those of an inspector of taxes as the officer responsible for making assessments were separated. There then followed procedural changes in 1994 for both the General and Special Commissioners in their appellate role, and the transfers of the functions of those bodies in 2009 to the FTT pursuant to the reforms implemented by the Tribunals, Courts and Enforcement Act 2007.

26. The FTT considered that these changes made all the difference, and that the adversarial process in the tribunal, and the procedural changes which included the introduction of Rule 17 with respect to withdrawal, had the consequence that the principle in *Elmhirst* could not be regarded as having survived. At [24], it held, in essence, that contrary to what Lord Hewart CJ had said in *Elmhirst*, Rule 17 did enable the process to be "stopped at the whim of an appellant".

27. We consider that the FTT was wrong to reach this conclusion. It wrongly took the view that *Tower MCashback* was not authority for the proposition that the principle in *Elmhirst* had indeed survived. It is clear that that principle retained its vitality in the form of s 50(6) and (7) TMA. The fact that *Tower MCashback* was an appeal from the Special Commissioners is nothing to the point; the judgments were given in the context of the current self-assessment regime and in the context of the statutory provisions which are applicable in this case. The removal of the assessment role of the Commissioners had taken place as long ago as 1964. But the separation of the assessment and appellate functions had no effect on the right and duty of the Commissioners to increase the assessment. That was confirmed by Millett LJ (as he then was) in the Court of Appeal in *Glaxo Group Ltd v IRC* [1996] STC 191, at p 199j, a case which was not cited to the FTT. Nor could the change to the tribunal system in 2009 and the adoption of new procedural rules have any material effect in these circumstances. Rule 17 could not override the effect of s 50(6) and (7). It says nothing about the consequences of withdrawal. A withdrawal by a party will inevitably affect the conduct of an appeal, but the consequences of withdrawal depend on the statutory provisions which apply in the particular circumstances.

28. The circumstances at issue in this case are that HMRC has indicated that it is unwilling that the appeal should be treated as withdrawn. It has done so because it considers that the Assessments ought to be increased. Those circumstances are themselves the subject of statutory provision in s 54(4) TMA. Under that sub-section, where an appellant wishes not to proceed with an appeal, and gives notice to that effect (which in the context of the FTT's procedure could only be done by withdrawal under Rule 17), it is only where HMRC have not given notice within 30 days that they are unwilling that the appeal should be treated as withdrawn that the original assessment is treated as agreed and thereby has effect, under s 54(1), as if the FTT had determined the appeal and had upheld the assessment without variation. Where that is not the case, there is no basis upon which the original assessment is to be treated as upheld.

29. The position was explained by Millett LJ in *Glaxo* in the following terms (at p 200b):

> "A further indication that the inspector is entitled to invite the commissioners to increase the assessment under appeal is to be derived from the terms of s 54(4), which preclude the taxpayer from withdrawing his appeal without the consent of the inspector. Since the only effect of the withdrawal of the appeal is to leave the assessment as it stands, the only reason for the inspector withholding his consent to the withdrawal of the appeal is that he intends to ask for the assessment to be increased."

30. In light of *Glaxo*, we do not agree with the FTT's conclusion at [15] and again at [28], that the effect of a notice given by HMRC under s 54(4)(b) that they are unwilling to accept that the appeal be treated as withdrawn has the sole effect that there is no agreement under s 54(1) and that in the absence of an appeal the original assessment must stand. It is true that there is no s 54(1) agreement. But that does not have the effect that the original assessment stands. Where HMRC have given notice under s 54(4)(b), and put the case for an increase, the FTT continues to have the power, under s 50(7), and indeed the duty, to increase the assessment to the extent that the FTT decides that the appellant is undercharged by the assessment.

31. The FTT placed particular reliance on another decision of the FTT (Judge Sinfield) in *Orchid Properties v Revenue and Customs Commissioners* [2012] UKFTT 651 (TC). In that case, in unusual circumstances, the FTT declined to accede to an application by HMRC to set aside the withdrawal of an appeal by the appellant. The circumstances were that an amended statement of case had been served by HMRC which had erroneously stated a particular figure for an increase in partnership profit, instead of that figure being described as the profit per partner. That was in contrast to HMRC's original decisions, which had been put in the alternative, and which at the material date had resolved into a single decision under appeal which put the partnership profit at a considerably higher figure than that set out in the amended statement of case. It was accepted that there had been a valid withdrawal of the appeal by the appellant. HMRC had not objected to the withdrawal within the time provided by s 54(4)(b).

32. In deciding that HMRC's application to reinstate could not fall within the set aside provisions of Rule 38 of the FTT Rules because the tribunal had made no decision which disposed of proceedings, the FTT in *Orchid Properties* made the point, at [25] of its decision, that a withdrawal by a party to an appeal did not require a decision of the tribunal. As the FTT said, the tribunal could do nothing but accept a withdrawal that was validly made.

33. There is no doubt that the FTT in *Orchid Properties* was right to say that on a withdrawal no decision of the FTT is required in order to give effect to the withdrawal. But that in itself said nothing about the consequences of a withdrawal. Those consequences were considered by the FTT in the particular circumstances of that case. Where HMRC had not objected to the withdrawal within 30 days, the consequence was clear. It was the decision under appeal that was treated as upheld without variation. A separate argument that the amended statement of case and the withdrawal of the appeal was a section 54(1) agreement was rejected.

34. Those circumstances are very different from those in this appeal. *Orchid* cannot support the conclusion that, in a case where HMRC do give notice of objection to the withdrawal of the appeal, the original assessment must stand. The FTT's reliance on *Orchid* in this context was misplaced.

35. In our judgment, the effect of statutory provisions of the TMA (and by extension those relating to NICs) is clear and supported by authority. In a case where HMRC give notice of objection to the appeal being treated as withdrawn, and puts the case for an increase, the FTT retains its jurisdiction, and it continues to have a duty, to increase the assessment or determination in accordance with s 50(7) (and analogous provisions) to the extent that it decides that the appellant has been undercharged by the original assessment or determination.

36. Rule 17 is entirely compatible with that analysis. Not only is it expressly subject to statutory provisions relating to withdrawal or settlement (of which s 54 is plainly one), and says nothing itself about the consequences of withdrawal, it is also drafted in terms that it is the case of the party seeking to withdraw that is the subject of the withdrawal. Where it is the appellant who withdraws, that does not necessarily mean that the whole of the proceedings must be regarded as having come to an end. The proceedings remain to be determined, whether as a matter of statute, as for example, where HMRC do not object, by a combination of s 54(4) and s 54(1), or by a decision by the tribunal, which in relevant circumstances will include consideration of whether the appellant has been undercharged and the assessment should be increased accordingly.

37. On the basis of our conclusion, it is necessary, we think, respectfully to qualify the generality of the obiter remarks of Sir Stephen Oliver QC, sitting as a judge in this Tribunal in *St Annes Distributors Ltd v Revenue and Customs Commissioners* [2010] UKUT 458 (TCC), at [39], to the effect that under Rule 17 an appellant has "the unilateral right to withdraw the appeal without permission of [the FTT] and without the intervention of HMRC." That remark, in a case concerning the purported withdrawal and an application for reinstatement of a VAT appeal, was evidently made without considering the terms of s 85 of the Value Added Tax Act 1994 ("VATA"), which mirror those of s 54 TMA. It is clear that, by virtue of s 85(4) VATA, it is open to HMRC to make an intervention by way of a notice that they are unwilling that the appeal should be treated as withdrawn. That is the same under s 54(4) TMA, and the comments made by Sir Stephen Oliver in *St Annes Distributors* should be read subject to that qualification.

38. Our conclusions do not depend on the nature of the FTT's jurisdiction. The FTT in its decision placed some reliance on the adversarial process of the tribunal in concluding, wrongly in our view, that the principle in *Elmhirst* has lost its vitality. Mr Vallat referred us to a number of authorities on the nature of the FTT's jurisdiction, and in particular to the remarks of Lord Carnwath in the Supreme Court in the recent judgment in *Volkswagen Financial Services (UK) Ltd v Revenue and Customs Commissioners* [2017] UKSC 27, [2017] STC 824, at [17], to the effect that in certain circumstances it may be appropriate for the tribunal to adopt an inquisitorial role. But we do not consider that the nature of the FTT's jurisdiction, or the role the tribunal

might be able to adopt in order to do justice in a particular case, is any guide to the question of the consequences of the withdrawal of a party's case in an appeal.

39. Nor, in a case where HMRC have sought an increase in an assessment as part of their stated case, does the fact that the process is an adversarial one, and not of its nature inquisitorial, have any impact on the duty of the tribunal to consider increasing the assessment. That such a duty does not arise independently of any such case made by HMRC was the conclusion reached, albeit obiter, in the recent decision in this Tribunal, *Revenue and Customs Commissioners v C Jenkin & Son Ltd* [2017] UKUT 0239 (TCC) (Norris J and Judge Sinfield), at [31] – [36]; but that is not the case here. Where such an increase has been sought, and HMRC have objected to the withdrawal by the appellant in accordance s 54(4) TMA, or any equivalent provision, that duty remains, notwithstanding the notice of withdrawal given by the appellant.

Decision

40. We have found that the FTT erred in law in its conclusion that it could not increase the Assessments in this case following the withdrawal by CMU and HMRC's notice of objection. It should have concluded that the FTT not only had the power, under s 50(7) TMA (and the analogous NICs provisions) to increase the Assessments, but had a duty so to do if it decided that CMU had been undercharged by the Assessments. We allow the appeal of HMRC and re-make the decision accordingly.

41. In re-making the decision of the FTT by virtue of s 12 of the Tribunals, Courts and Enforcement Act 2007, s 12(4) provides that this Tribunal may make any decision which the FTT could make if the FTT were re-making the decision, and may make such findings of fact as it considers appropriate. We therefore turn to the question whether the Assessments undercharge CMU and should be increased.

42. A question whether an assessment undercharges an appellant is a mixed question of fact and law. Here there is now no dispute as to the law; the burden in that respect was on CMU, and it has withdrawn its case. The only question to be determined is one of quantum. Where HMRC wishes to assert that an assessment is to be increased, the burden is on them to show that the original assessment undercharges the appellant. That, as Millett LJ said in *Glaxo* at p 199j, is a question of evidence. The withdrawal of the appellant's case is a factor to be taken into account, but it is not decisive of the matter of an undercharge.

43. We emphasise that, where an appellant has withdrawn, each case must be considered on its own merits. It will be for the FTT to decide on the nature of the evidence in any particular case which will enable it to decide whether, and if so to what extent, there has been an undercharge. The FTT has wide powers, under Rule 15 of the FTT Rules, both to give directions as to the nature of the evidence it requires, and to admit evidence whether or not such evidence would be admissible in a civil trial. In exercising those powers it must, too, seek to give effect to the overriding objective of fairness and justice, including flexibility and proportionality.

44. In some cases that may require witness evidence. In others, it may be sufficient for the FTT to have regard to HMRC's unchallenged statement of case, if it sets out in sufficient detail not only the adjustment sought but the basis on which the adjustment has been arrived at. It may be able to make its decision on the basis of a combination of the statement of case and other supporting documents and correspondence.

45. In this case, the argument for the Assessments to be increased was contained in paragraph 48 of the statement of case. On its own, we would not consider that paragraph, referring as it did only to totals of the PAYE and NICs for the relevant years, to have been sufficient to enable us, even in the absence now of any contrary case on the part of CMU, to have decided the undercharge question. But paragraph 48 itself referred to HMRC's letter of 8 May 2014 where, in Appendix 4, HMRC itemised the PAYE and NICs by reference to the tax years and the individual directors and employees. It is also apparent from that letter and Appendix 4, that the revised figures had arisen as a result, first, of HMRC not having taken all the trusts into account in the period 2007-08 with respect to the PAYE determinations, and secondly that there had been insufficient information when the original Assessments had been made.

46. We have considered whether this amounts to sufficient evidence to enable us to conclude, as we must if we are to increase the Assessments, that CMU was undercharged by those Assessments. We have taken into account that CMU no longer makes any contrary case in that regard. However, whilst we have no doubt that there is an element of undercharge, we have not been able, on the basis of the evidence before us, to reconcile the various figures and conclude that the Assessments have undercharged CMU in the amounts put forward by HMRC and should be increased by those amounts. Something more is needed to demonstrate how the figures, itemised as they are in Appendix 4, have been arrived at.

47. As a result, we are releasing this decision in principle. We do not consider that there is any merit in remitting the case to the FTT, and so we adjourn the question of the increase of the Assessments to be determined by us after HMRC have been given the opportunity to support the figures they have set out in Appendix 4 with evidence. That evidence, which should take the form of a witness statement by an HMRC officer with knowledge of the facts and supporting exhibits, is to be filed with the Tribunal and served on CMU not later than 14 days from the date of release of this decision.

48. As CMU remains a party to this appeal to the Upper Tribunal notwithstanding its non-participation, and notwithstanding the withdrawal of its case before the FTT, we will give CMU the opportunity, if it wishes to do so, to make representations with respect to the witness statement to be served by HMRC. Any such representations must be made within 14 days after the date of service of HMRC's witness statement. We shall then make our determination with respect to the proposed increase of the Assessments.

MR JUSTICE ARNOLD
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 27 July 2017