[2018] UKUT 0059 (TCC)

Appeal number: UT/2016/0237

VAT – procedure – whether failure to offer review under s 83A VATA invalidated notice of penalty assessment – no – whether offer of review in fact made – yes

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Appellants**

- and -

NT ADA LIMITED (formerly NT JERSEY LIMITED) — **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE SARAH FALK

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 6 February 2018

Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Keith Gordon, instructed by NT ADA Limited, for the Respondent

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DECISION

Introduction and preliminary points

1. This is an appeal against one aspect of a preliminary decision of the First-tier Tribunal ("FTT") (Judge John Brooks) released on 19 September 2016 ([2016] UKFTT 0642 (TC)) (the "FTT decision"). The underlying substantive dispute between the parties relates to whether the respondent to this appeal, a Jersey incorporated company now called NT ADA Limited ("NT ADA"), was within the scope of UK VAT in respect of supplies made to UK-based customers. NT ADA appealed to the FTT against three decisions made by the appellants in this appeal, HMRC, namely that:

(1) NT ADA should be registered for VAT;

(2) a certificate of registration should be issued with effect from 1 May 2008; and

(3) a penalty of £234,883 should be imposed under s 67 of the Value Added Tax Act 1994 ("VATA") for failure to register.

2. Although NT ADA appealed the decisions on a protective basis it contended that the FTT did not have jurisdiction in respect of any of them. The FTT decision addressed this question as a preliminary issue, and concluded that HMRC's decisions on the first two matters were within its jurisdiction as appealable decisions, but that the FTT did not have jurisdiction in respect of HMRC's penalty decision and accordingly that the appeal against the penalty must be struck out. HMRC appealed to this Tribunal against the decision to strike out the penalty appeal. There is no appeal in respect of the other aspects of the FTT decision and we say no more about them. The substantive dispute between the parties remains unresolved.

3. In summary, the basis of the decision to strike out the penalty appeal was that HMRC had failed to comply with the requirements of s 83A VATA relating to the offer of a review, and that this failure invalidated the decision to impose the penalty.

4. On 19 October 2016, following the release of the FTT decision, HMRC wrote to NT ADA withdrawing the original penalty assessment and replacing it with an amended penalty, correcting what HMRC considered to be a calculation error. As a result of this action the FTT decision in respect of the original penalty assessment ceased to be of any practical relevance to the dispute between the parties to this appeal. Nevertheless, HMRC appealed to this Tribunal (with the permission of Judge Brooks) because from their perspective the issue raised is one of general importance which may affect a large number of other cases.

5. It is clear, and was not disputed before us, that despite the apparently academic nature of the appeal this Tribunal does have jurisdiction to consider it. This is on the basis that HMRC's appeal is an appeal on a point of law arising from the FTT decision, within ss 11(1) and 12 of the Tribunals, Courts & Enforcement Act 2007 ("TCEA"). This is consistent with the approach of the Immigration and Asylum Chamber of this Tribunal to the withdrawal of a decision which was the subject of an

appeal to the FTT: see *SM (withdrawal of appealed decision: effect)* [2014] UKUT 64 (IAC) at [27], considered in this Chamber in *HMRC v TGH (Commercial) Limited* [2017] UKUT 116 (TCC).

The statutory framework

6. Section 67 VATA, as in force for the relevant period, provided for a penalty of up to 15% of a trader's VAT liability for failure to comply with an obligation to notify liability to register for VAT.

7. Under s 76(1) VATA, where a person is liable to a penalty under (among other provisions) s 67:

> "… the Commissioners may … assess the amount due by way of penalty … and notify it to him accordingly …"

Section 76(9) also provides that:

> "If an amount is assessed and notified to any person under this section, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount shall be recoverable as if it were VAT due from him."

8. Section 83(1) and (2) VATA provide, so far as relevant:

> "(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> …
>
> (q) the amount of any penalty, interest or surcharge specified in an assessment under section 76;
>
> …
>
> (2) In the following provisions of this Part, a reference to a decision with respect to which an appeal under this section lies, or has been made, includes any matter listed in subsection (1) whether or not described there as a decision."

9. Section 83A(1) and (2) VATA provide:

> "(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
>
> (2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P."

10. Section 83C(1) and (2) VATA provide:

> "(1) HMRC must review a decision if—
>
> (a) they have offered a review of the decision under section 83A, and
>
> (b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.

> (2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G."

11. Section 83G provides so far as relevant:

> "(1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) … the date of the document notifying the decision to which the appeal relates …
>
> …
>
> (2) But that is subject to subsections (3) to (5).
>
> (3) In a case where HMRC are required to undertake a review under section 83C—
>
> (a) an appeal may not be made until the conclusion date, and
>
> (b) any appeal is to be made within the period of 30 days beginning with the conclusion date.
>
> …
>
> (5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b) … or (5) if the tribunal gives permission to do so.
>
> (7) In this section "conclusion date" means the date of the document notifying the conclusions of the review."

Section 83F(6) (referred to in s 83G(5) above) sets out the period within which HMRC must give notice of the conclusions of a review. Section 83F(8) states:

> "Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld."

12. It was common ground between parties that any penalty assessment under s 67 VATA must be made under s 76, that s 76 requires both the making of an assessment and the notification of it to the person liable, and that any appeal against such an assessment would be made pursuant to s 83(1)(q) VATA.

13. It was also clear at the hearing that it was common ground between the parties that s 83A imposes an obligation on HMRC to offer a review. This is in contrast to the position in relation to direct taxes under the Taxes Management Act 1970 ("TMA"), where HMRC has a discretion to offer a review. The real dispute between the parties is over whether HMRC did in fact comply with its obligation under s 83A, and the consequences of any failure to comply.

The FTT's decision to strike out

14. The FTT decision deals with the penalty appeal at paragraphs [24] to [31]. The penalty was imposed by a letter dated 4 April 2016. The FTT referred at [25] to the following text which was included in the letter containing notice of the penalty, under the sub-heading "What to do if you disagree with this notice":

> "If you disagree with this decision you can ask for a review by an independent HMRC Officer by writing to the address above within 30 days of the date of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished."

(In fact NT ADA chose not to request a review and instead appealed to the FTT on 29 April 2016: see paragraph [2] of the FTT decision.)

15. After addressing a question about whether the penalty notice was notified to NT ADA, Judge Brooks made the following findings in respect of a submission made by Mr Gordon (for NT ADA) that the letter did not comply with s 83A on the basis that it was more akin to an invitation to treat than an offer:

> "29. I accept Mr Gordon's submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant "can ask for a review" without any assurance that it will be granted. Rather it should have been stated, as it was in the 29 October 2012 letter[1], that an appellant has "a statutory right to a review". In my judgment the failure to make it clear to [NT ADA] that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it.
>
> 30. Under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal must strike out "the whole or part of the proceedings" if it does not have jurisdiction. Having found that the Tribunal does not have jurisdiction in relation to the penalty it follows that I must strike out the appeal against the s 67 VATA penalty."

The parties' submissions in summary

16. Mr Jones, for HMRC, submitted (as he did before the FTT) that the 4 April 2016 letter did comply with s 83A VATA. It would be clear to any reasonable reader that the recipient was being given the opportunity to have the decision reviewed, and the use of the word "opt" made it clear that it was within their control to do so.

17. Mr Jones also submitted that it is clear from s 83A(1) that it is a condition precedent to the requirement to offer a review that the decision is appealable under s 83, so even if no review had been offered that failure would not prevent the decision

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[1] This was an earlier letter relating to HMRC's claim that NT ADA should have registered for VAT.

from being appealable. This was the case even if the failure affected the validity of the decision. However, the FTT had provided no legal basis for its conclusion that a failure to offer a review rendered the decision invalid. The legislation contained no express provision dealing with the consequences of a failure to offer a review and it would need to be shown that Parliament intended, by necessary implication, that a decision would be invalid in those circumstances. Such implications as there were suggested that a decision would not be invalid. The net effect of the FTT decision was to leave NT ADA facing an assessment which it could not challenge.

18. Mr Gordon, for NT ADA, submitted that compliance with s 83A was compulsory and required an offer that was capable of acceptance. This was reflected in the wording of s 83C, which requires HMRC to undertake a review where one has been offered and the offer has been accepted. The terminology was that of a contractual arrangement. Merely being able to ask for a review was not the same thing. Parliament had made it clear that, in VAT cases, taxpayers must be notified that there is a route of challenge, as of right, that does not involve going to the Tribunal. Failure to comply meant that there was not a valid notice, and therefore no decision that could be considered by the FTT. Any other conclusion would render s 83A nugatory.

19. In argument before us Mr Gordon clarified that he was submitting that the failure to offer a review meant that the assessment was not validly notified, rather than that there was no decision at all (as the FTT decision suggests). Accordingly, he accepted that if HMRC had realised their error and written again in the correct form the position might be different, at least if the error was corrected quickly.

20. Mr Gordon submitted that the text of the penalty notice was not sufficient to convey the message that the recipient had the right to insist upon a review. To a reasonable reader the notice merely advised that an internal review would not preclude a later appeal to the FTT.

Consequences of failure to offer a review

21. There is no doubt that s 83A VATA imposes an obligation on HMRC to offer a review in respect of an appealable decision, and to do so at the same time as notifying the decision. That is clear from its express terms. The key question of principle raised by this appeal is whether a failure to offer a review in accordance with s 83A affects the jurisdiction of the FTT to consider an appeal. We address this point first, and then turn to consider whether s 83A was complied with on the facts.

22. The effect of non-compliance with s 83A is a matter of statutory interpretation. The legislation contains no express provision dealing with the consequences of a failure, so the question is what Parliament must be taken to have intended. Both parties referred us to *R v Soneji* [2005] 4 All ER 32. In that case the House of Lords considered the validity of confiscation orders made more than six months after the date of conviction, potentially in contravention of a provision in the Criminal Justice Act 1988 which prevented a postponement of more than six months in the absence of

exceptional circumstances. The unanimous decision was that the confiscation orders remained valid.

23. Lord Steyn (with whose reasoning Lord Carswell and Lord Brown also agreed) referred at paragraph [14] to a "recurrent theme" that Parliament "casts its commands in imperative form without expressly spelling out the consequences of a failure to comply". Lord Steyn explained that the courts initially addressed this by developing a distinction between a mandatory requirement, where failure to comply always invalidated the act in question, and a directory requirement where a failure to comply did not necessarily have that effect. However, a different approach was proposed by Lord Hailsham in *London & Clydeside Estates Limited v Aberdeen DC* [1979] 3 ALL ER 867 at 883, and was adopted by the Privy Council in *Wang v IRC* [1995] 1 All ER 367 and in *Charles v Judicial and Legal Service Commission* [2002] UKPC 34, and by the House of Lords in *A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577. Lord Hailsham's approach recognised that Parliament "expects its authority to be obeyed down to the minutest detail" but required the courts to focus on the legal consequence of non-compliance, rather than on labels such as mandatory or directory. Lord Steyn described the effect of Lord Hailsham's comments as follows at paragraph [15] in *Soneji* (page 330g):

> "This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."

24. Having referred to the UK case law, and also to authorities in New Zealand, Australia and Canada, Lord Steyn summarised the position at [23] by stating that:

> "…the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

25. HMRC's power to assess a penalty under s 67 VATA is contained in s 76(1) VATA. This enables an amount due by way of penalty from any person to be assessed and notified to him. No further provision is made as to the details of any assessment or the content of any notification of it. Under s 76(9) an amount assessed and notified is recoverable, unless the assessment is withdrawn or reduced. Nothing in s 76 suggests that an offer of a review is an essential part of this process, or that an assessment unaccompanied by an offer of a review is either invalid or invalidly notified.

26. Section 83 contains a right of appeal against an assessment made under s 76 and, again, there is nothing to indicate that this right is dependent on the assessment having been made or notified in a particular form, or on it having been accompanied

by an offer of a review. It simply requires there to have been an assessment made (and we would add notified) under s 76.

27. Section 83A, the provision which imposes an obligation to offer a review, refers to a "decision" of HMRC in respect of which "an appeal lies under section 83". The term "decision" does not appear in s 76 but s 83(2) makes it clear that the reference to a decision with respect to which an appeal lies under s 83 includes any matter listed in s 83(1). In other words, it includes the amount of any penalty assessed under s 76, within s 83(1)(q).

28. Whilst it is clear that Parliament did intend that a person receiving an appealable decision should be offered a review, we can see nothing in the terms of s 83A to support the proposition that failure to do so renders an assessment invalid, invalidly notified, or not capable of appeal. Rather, the language indicates that the opposite is the case.

29. In our view both s 83A(1) and (2) are written in terms of the offer of a review being separate from, albeit something that should be issued alongside, the notification of an appealable decision. The decision itself is the assessment, or strictly the "amount" assessed (s 83(1)(q)). Section 83A(1) is written on the basis that there is a decision in respect of which an appeal lies. If there was no valid, notified, assessment under s 76 then it is hard to see how any obligation to offer a review would arise. It is the existence of an appealable decision which gives rise to the obligation to offer a review.

30. This is also supported by s 83A(2). This requires the offer of a review to be made "at the same time" as the decision is notified. This carries a clear implication that the decision has an existence that is independent of the review offer, and that such offer is not part of the decision, or its notification, but is to be notified alongside it.

31. This interpretation of s 76, s 83 and s 83A is reinforced by a consideration of the wider context and the consequences that would flow both from this approach and from the approach contended for by Mr Gordon.

32. On the interpretation we have adopted it is clear that a breach by HMRC of its duty to offer a review does not prevent an appeal being made to the FTT. We disagree with Mr Gordon's suggestion that s 83G is entirely predicated on the assumption that s 83A has been complied with. If a review is not offered then an appeal can still be brought within the 30 day period referred to in s 83G(1), or later with the permission of the tribunal under s 83G(6). In contrast, NT ADA's case is that the FTT has no jurisdiction. Although Mr Gordon submitted that this was because the decision itself was invalid (or more accurately invalidly notified), so that no action need be taken to challenge it, the absence of any recourse to the FTT would be a surprising result.

33. Sections 83A to 83G VATA were included in the legislation as part of the changes made in 2009 to reform the tax appeals process and create the new tax tribunal system. Prior to that time there was no statutory review process, and VAT appeals were notified direct to the VAT and duties tribunals. The reforms made a

significant number of changes, which included giving an additional right in VAT cases, namely the right to opt for a review before deciding whether to appeal to the (now unified) tribunal. In the absence of clear words we do not think that Parliament can be taken to have intended to have removed the (pre-existing) right to appeal to a tribunal against a decision falling within s 83 VATA in the event that HMRC failed to carry out its new obligation to offer a review, or to have intended that future decisions that were not accompanied by an offer of a review should be invalid.

34. We have already touched on the point that the legislation contains no express requirements at all for the content of assessments or notifications. This means that, strictly, there is not even a requirement for HMRC to inform the person assessed that they have a right to appeal to a tribunal, or indeed that the basic time limit for doing so is 30 days. The effect of Mr Gordon's approach is that a notification which fails to offer a statutory review would be invalid, but a notification which offers a review but omits to mention that there is a right of appeal to a tribunal within a certain period would be valid. We do not think that Parliament can be taken to have intended there to be such a distinction. A more rational approach is to have regard to the discretion of the tribunal to admit late appeals, the exercise of which could undoubtedly be influenced by a failure by HMRC to include important information of this nature, particularly about appeal rights but potentially (and depending on the circumstances) about the right of review as well.

35. Mr Jones also relied on s 83F(8), which deals with the situation where HMRC are actually required to undertake a review but do not notify their conclusions within the specified time period. It provides that in those circumstances the review is to be treated as upholding the original decision. Mr Jones submitted that, given that the decision would be upheld in those circumstances, it was difficult to see why a failure to offer a review in the first place should lead to the decision being invalidated. There was no logical reason for such a radically different consequence. Mr Gordon submitted that s 83F(8) did not assist HMRC because s 83F was predicated on prior compliance with s 83A.

36. Although Mr Jones' point on s 83F(8) has some force, we do not find it as persuasive as the points already discussed. It is clear from s 83G that it is not possible for an appeal to be made to the tribunal where a review has been requested and has not been concluded. Section 83F(8) is required to bring the review period to an end in order to enable an appeal to made. Without that provision the taxpayer would potentially be left in limbo, unable to take any further action to challenge the decision. Some provision had to be made to address this point. Having said that, it is of some support to HMRC's case that Parliament chose to provide that the decision should be upheld in those circumstances, rather than struck down. The contrast with the situation where HMRC fails to offer a review in the first place would be very marked if Mr Gordon's submissions were correct.

37. The conclusion that a failure to offer a review does not affect the validity of a decision or the ability to appeal it obviously leads to the question of what, if any, consequences there would be of a failure to offer a review, and whether Parliament can sensibly be taken to have intended that they should be no sanction. We do not

think it is surprising that an obligation placed on a public body such as HMRC does not bring with it an obvious sanction for non-compliance. Parliament simply expects obligations that it places on HMRC to be fulfilled. In practice, any failure to offer a review is highly likely to be remedied when pointed out, and if it was not then an aggrieved taxpayer would in principle have recourse to judicial review proceedings to compel the offer of a review. As already indicated, a failure by HMRC to provide adequate notification of appeal or review rights in the decision letter could also influence the exercise of the FTT's discretion to admit a late appeal.

38. Mr Gordon suggested that the new statutory review provisions had been included as a set of new sections (ss 83A to 83G) for ease of drafting, and that we should therefore not place any reliance on the fact that the requirement to offer a review is contained in a separate section to s 76, which contains the assessment and notification obligation. He submitted that the notification obligation in s 76 must now be read as encompassing the requirements of s 83A. We do not agree. Section 83A is not written with any specific reference to s 76, and covers the full range of appealable decisions referred to in s 83 VATA. This is an extensive list, covering a number of decisions which may have been communicated to the taxpayer without any formal assessment or notification, for example decisions as to registration, VAT chargeable or input tax creditable (s 83(1)(a) to (c)). We can discern no intention to amend the requirements of s 76 VATA.

39. Mr Gordon referred to a number of other cases in support of his submission that the decision as communicated was invalid. We did not find any of them of particular assistance. The first was *Prince and others v HMRC* [2012] UKFTT 157 (TC). The key dispute in that case was whether the FTT had jurisdiction to consider the application of an extra-statutory concession. However, Judge Bishopp also made some comments about whether a form P800, a document produced by HMRC to reconcile PAYE records after the end of each tax year, amounted to an assessment and therefore could be appealed to HMRC under s 31 TMA. HMRC submitted that it could not be because it did not satisfy the requirements of s 30A TMA (s 30A requires among other things that assessments are made by an officer of the Board, are notified to the taxpayer and that the notice states the date of issue and the time within which any appeal must be made). But although Judge Bishopp agreed with HMRC that the P800 was not an assessment this was not for the reasons given by HMRC. Instead, he made it clear at paragraph [31] that his conclusion took account of the context in which a P800 is issued, as a mechanical reconciliation of a PAYE record, rather than as a result of the ordinary assessment or self assessment process. An appropriate appeal route was also provided by provisions in the PAYE Regulations which permit an appeal against a new or amended notice of coding resulting from the P800 process.

40. We would also make the point that s 30A TMA governs the assessing procedure, and contains express requirements for the content of a notice of assessment. In that sense it can be regarded as definitional of what a notice of assessment is, and a failure to meet its requirements may (subject to s 114 TMA, referred to below) call into question the validity of the document as a notice of assessment. In contrast, the amendments to VATA to include the obligation to offer a review did not provide that a decision, or notice of it, must itself contain an offer of a

review, but merely that such an offer should be made at the same time. Section 83A does not seek to define or describe an appealable decision.

41. A similar point applies to another FTT decision referred to by Mr Gordon, *O'Donnell v HMRC* [2016] UKFTT 743 (TC). In that case Judge Richards was considering the scope of the FTT's jurisdiction in relation to a partner payment notice ("PPN") issued pursuant to Schedule 32 to the Finance Act 2014. Mr Gordon relied on a footnote to paragraph 37 of the decision which suggested that the FTT might be able to consider an argument that a document was not a PPN because it did not contain the information specified in paragraph 4 of Schedule 32. We make no comment about the correctness of this observation (which was not necessary for the decision), other than to point out that paragraph 4 prescribes what a PPN "must" specify. In that sense it is similar to s 30A TMA, and can be contrasted with s 83A for the same reason.

42. Mr Gordon also referred us to the Court of Appeal decision in *R (oao Archer) v HMRC* [2018] STC 38. In that case the question was whether alleged defects in closure notices purportedly issued under s 28A TMA on completion of an enquiry prevented them from being valid, and whether Mr Archer should have appealed to the FTT rather than having sought judicial review in respect of steps taken by HMRC towards bankruptcy proceedings in reliance on the notices. In summary, s 28A(1) and (2) requires a closure notice to state the officer's conclusions and make any amendments of the return required to give effect to those conclusions. The Court of Appeal concluded that the closure notices did not comply with the latter requirement, and that this was not cured by HMRC amending Mr Archer's online return. Lewison LJ, who gave the only judgment, referred at [22] to [24] to comments by the FTT in *Wong Yau Lam (t/a Sunlight Takeaway Meals) v HMRC* [2016] UKFTT 659 (TC) in support of the proposition that, to be a valid closure notice, the requirements of s 28A(1) and (2) must be met. He also referred to the principle established in *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] STC 237 that an assessment is required to state the amount payable, and concluded at paragraph [31] that, unless s 114 TMA could be invoked, the closure notice did not create a debt. (In fact, the Court of Appeal went on to conclude that s 114 TMA, which broadly provides that defects of form do not render assessments or other proceedings invalid, validated the closure notices. Section 114 TMA is not relevant for VAT purposes.)

43. In our view *Archer* does not assist Mr Gordon. As Mr Gordon recognised, it is a question of statutory interpretation. The courts have concluded that Parliament intended that assessments, including an amendment to a self-assessment in the form of a closure notice, must state the amount payable or the amendment to the return in order to be valid. There are obvious reasons for this: a taxpayer must be able to understand what is being demanded from him. The inclusion of this essential information delineates what is or is not a valid assessment or closure notice. An offer of a review under s 83A VATA is not in the same category.

Was a review offered?

44. The relevant text of the letter containing the penalty assessment is set out [14] above, but the critical words are worth repeating for ease of reference:

> "If you disagree with this decision you can ask for a review by an independent HMRC Officer … Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished."

45. The FTT concluded that this simply told NT ADA that it could ask for a review but gave no assurance that one would be granted. Mr Gordon submitted that this was the correct interpretation, and was also consistent with the approach taken in *Thames & Newcastle Ltd v HMRC* [2014] UKFTT 667 (TC). An offer must be unambiguously understood to be one that is capable of acceptance in a binding manner, rather than a mere invitation to treat. The reference to an ability to "opt" for a review did not convey the concept of an offer with sufficient clarity, because it had to be read in the context of the reference to "ask".

46. *Thames & Newcastle* related to penalties for late payment of PAYE. Under s 49A TMA an appellant against such penalties may either notify HMRC that it requires a review (under s 49B), or HMRC may notify an offer of a review (under s 49C). The decision refers at paragraph [13(3)] to HMRC correspondence stating that "if you do not agree with my decision, you can ask for… an internal review", and states at [16] that this letter "did not offer a review, but merely informed the company that it could ask for one". In fact the appellant did ask for a review, which the FTT said therefore fell within s 49B and not s 49C.

47. In this case, as in *Thames & Newcastle*, the letter referred to the recipient's ability to "ask" for a review. However, it went on to describe the alternative of appealing to the tribunal and also stated that if "you opt for a review" it would still be possible to appeal to the tribunal subsequently. Reading the passage as a whole we consider that the reasonable reader would understand that they were being given a real choice, namely an independent review or an immediate appeal to the tribunal. This is clearly reinforced by the reference to opting for a review, and the ability to appeal to the tribunal after the review "has finished". The clear implication is that any review asked for will indeed be carried out. We find, therefore, that the letter dated 4 April 2016 did amount to an offer by HMRC to NT ADA of a review of the decision to impose the penalty for the purpose of s 83A VATA.

The appropriate course of action

48. We have found that there was an error of law in the FTT decision. A failure to offer a review in accordance with s 83A VATA does not invalidate either the decision or its notification, or render it unappealable. We have also concluded that, properly interpreted, the letter notifying the penalty did include an offer of a review.

49. Accordingly, the appeal is allowed on the basis that there was an error of law. The question then arises as to what, if anything, should be done in relation to the FTT decision. The effect of s 12(2) TCEA is to confer a discretion, where an error of law is

detected, to set aside the FTT decision. There is no obligation to do so. However, if the Upper Tribunal does decide to set the decision aside it "must" then either remit the case to the FTT with directions for reconsideration or remake the decision.

50. We have concluded that there is nothing to be gained by exercising the discretion to set aside the FTT decision. The penalty assessment in question has been withdrawn. In those circumstances there is nothing of substance for the FTT to reconsider, and there is nothing to achieve by us remaking the decision. In our view any such reconsideration or remaking would have to take account of the circumstances as they now exist, namely that the assessment has been withdrawn, rather than remaking the decision as it would have been made at the date of the original decision if there had not been an error of law. In those circumstances, the FTT would have no jurisdiction to entertain an appeal against the original penalty assessment.

Disposition

51. For the reasons set out above the appeal is allowed on the basis that there was an error of law in the FTT decision, but we do not exercise our discretion to set that decision aside.

Costs

52. The skeleton arguments for both parties included requests for costs to be awarded in their favour. Whilst we will of course consider any application for costs, we should point out that the circumstances of this case are unusual. There was no need for HMRC to pursue the appeal for the purposes of the substantive dispute between the parties, because the original penalty assessment has been withdrawn and replaced. HMRC's sole reason for pursuing the appeal was to establish a point of principle. NT ADA has chosen to defend the appeal, but presumably again not for reasons directly related to the ongoing substantive dispute. In those circumstances we would anticipate that the appropriate result is for the parties each to bear their own costs.

JUDGE ROGER BERNER
JUDGE SARAH FALK

RELEASE DATE: 22 February 2018