[2020] UKUT 0113 (TCC)

Appeal number: UT/2019/0051

PROCEDURE – Permission to make a late appeal refused by FTT– appellant maintained underlying excise duty and penalty assessments invalid because they did not name a natural or legal person – FTT Decision on permission to appeal out of time set aside for errors of law and remade by UT – time limit for appealing to FTT still applied where appellant sought to challenge validity of assessments before the FTT - permission to appeal out of time refused.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Michael Coyle t/a Coyle Transport

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE JENNIFER DEAN

Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast on 25 February 2020. Further written submissions pursuant to the Tribunal's direction were made by the appellant on 4 March 2020 and HMRC on 9 March 2020.

Danny McNamee, solicitor, of McNamee McDonnell Solicitors, for the Appellant

Charlotte Brown, counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue & Customs for the Respondents

DECISION

Introduction

1. This is an appeal by Mr Michael Coyle against a decision of the First-tier Tribunal ("FTT") issued on 28 January 2019 published as *Michael Coyle trading as Coyle Transport v HMRC* [2019] UKFTT 60 (TC) ("the FTT Decision"). The FTT Decision concerned appeals against an excise duty assessment under s12(1A) Finance Act 1994 in the sum of £29,140 and a related penalty assessment of £5,828 under Schedule 41 Finance Act 2008 which the FTT considered had been made 4 years and 9 months late. The FTT refused permission to bring the late appeals.

2. The central issue, both before the FTT and before us, is the significance of the fact that Mr Michael Coyle was not named in any of the documents imposing the assessment; rather those documents referred to "Coyle Transport". Before the FTT, Mr Michael Coyle's argument, which the FTT rejected, was that the assessment and penalty on Coyle Transport did not relate to him but to the business run by his father, Mr Eamon Coyle. Before us, Mr Michael Coyle's core submission is that, having found as fact that the assessment and penalty did not name either a natural or a legal person as required by the relevant legislation, the FTT could not, as a matter of law, then conclude the assessment and penalty were valid. HMRC argue the FTT correctly considered, according to the relevant case-law principles, how a reasonable person looking at the documents addressed to Coyle Transport would read them and was correct to conclude, in view of the facts it found, that the documents, read objectively, were directed to Mr Michael Coyle.

Background facts and FTT Decision

3. As will be seen, the limited terms of the permission granted for the appeal before us mean there can be no challenge to the facts found by the FTT and which we summarise below. The relevance of some of those facts to the legal question, of whether an assessment or penalty was made on Mr Michael Coyle, is a matter of dispute which we will come on to. Given the appellant's case is that no valid assessments were made, the references in our summary of the FTT Decision to the term "assessment" should not be taken to express any conclusion on our part that the assessments were validly made.

4. The relevant assessment and penalty arose from a seizure of a lorry PHZ6538 and load of beer by HMRC (Officer McGuiness) on 12 December 2012 ([5][1]).

5. When Officer McGuiness pulled over the lorry - in Mitcham, the driver (Mr Hilley) was recorded as having told HMRC (i) that he worked for Michael Coyle; (ii) that the lorry was Michael Coyle's vehicle; (iii) that Michael Coyle gave him instructions in relation to the journey, and the swapping of trailers; (iv) that he presumed Michael

[1] Paragraph numbers refer to those in the FTT Decision unless the context requires otherwise.

Coyle had paid for the tickets and transport. Mr Hilley did not mention Eamon Coyle at all [19].

6. On 17 December 2012, Michael Coyle wrote to HMRC on 'Coyle Transport' headed notepaper, giving the address as 7 Dernalebe Road. He objected to the seizure 'of my truck and trailer' and confirmed that he gave the driver instructions. He asserted that the vehicle belonged to him, and that he was the person trading from 7 Dernalebe Road as Coyle Transport. The letter did not mention Eamon Coyle, or any of the matters subsequently relied upon by Michael Coyle in support of his appeal [20].

7. On 2 August 2013 HMRC issued an assessment and penalty explanation letter addressed to "Coyle Transport, 7 Dernalebe Road…", followed by a similarly addressed Officer's Assessment/Civil Penalty Excise (Form EX601) on 3 September 2013 [6].

8. On 15 July 2015, a 'Mr Coyle' - no first name was recorded - 'phoned HMRC and a copy of the original September 2013 assessment was sent to Coyle Transport at 7 Dernalebe Road [24].

9. On 23 January 2017, HMRC wrote to Michael Coyle, Coyle Transport, giving him warning that it would apply for a bankruptcy order against him. His response 'advised' that Michael Coyle 'has no liability to the Revenue in any regard and we are at a loss to understand why you have sent a warning of bankruptcy letter' [25].

10. Mr Michael Coyle filed a Notice of Appeal with the FTT dated 10 July 2018.

11. The date of decision sought to be appealed against was stated as 3 September 2013. In section 6, which asked for the latest time by which the appeal ought to have been made or notified, the date 3 October 2018 was inserted. No box was checked in response the instruction "If appeal is made or notified late, I request permission to appeal, or to notify the appeal, outside the relevant time limit", however the box headed "reasons why the appeal is made or notified late (if applicable, please specify)" was completed:

> "This assessment was brought in relation to vehicle PHZ6358, which is owned by the Appellant's father. This assessment was addressed to Coyle Transport which belongs to the Appellant's father. It was only when HMRC contacted the Appellant directly did he realise that they were not trying to fix him with this assessment". [8]

12. His substantive grounds of appeal were stated as follows:

> "Coyle Transport for which our client Michael Coyle was registered as sole proprietor was not the Coyle Transport which was operated by his father Mr Eamon Coyle, who was the registered owner of vehicle registration PHZ6358 which was the vehicle involved in the interception by HMRC.
>
> The address to which this correspondence was sent was not Michael Coyle's address. Michael Coyle only built at number 7 Dernalebe Road in 2014. The business Coyle Transport which related to this particular transport was the business of Michael Coyle's father, Mr Eamon Coyle.

> It is noteworthy that Mr Eamon Coyle was the person assessed for this debt. This can be seen from documentation obtained by HMRC. Therefore, this assessment does not relate in any way to our client". [9]

FTT Decision

13. The FTT started by noting that the appellant's application turned on the submission that the assessment addressed to "Coyle Transport" was not properly addressed and therefore that time did not begin to run at all in relation to any appeal [11].

14. In a finding, which is central to Mr Coyle's case before us, the FTT accepted that "Coyle Transport" was neither a natural person "(e.g. Mr X trading as "Coyle Transport") or a legal person (e.g. Coyle Transport Limited)". It noted the appellant's submission, based on *Queenspice Ltd v HMRC* [2010]UKUT 111 (TCC) summarising the decision of May J (as he then was) in *House (trading as P&J Autos v CCE* [1994] STC 211, that the test was whether the relevant documents contained between them, in unambiguous and reasonably clear terms a notification to the taxpayer containing, amongst other things, the taxpayer's name. The FTT rejected the submission as misconceived, first by reference to s114 Taxes Management Act 1970 and then on the basis of case-law, which suggested the relevant question was "…how a reasonable person, looking at the notices addressed to "Coyle Transport" at 7 Dernalebe Road, would objectively have read them." ([12] [13]). (We come on to discuss the relevance of that case-law, which HMRC relied on before us, in our discussion section below).

15. The FTT then went on to set out a number of features which it considered relevant to the objective reading of the notices. In summary, these were: 1) the details Mr Coyle had given when applying to be registered for VAT, which described himself as a sole proprietor trading as Coyle Transport at 7 Dernalebe Road, 2) what the driver was recorded as having told HMRC at the time of the seizure namely: that he worked for Mr Michael Coyle whose lorry it was and who had given him instructions in relation to the journey and who he presumed had paid for the tickets and transport; that the driver did not mention Mr Eamon Coyle at all and 3) the contents of Mr Coyle's letter of 17 December 2012 to HMRC appeared on "Coyle Transport" headed notepaper. The FTT noted no evidence had been put forward pertaining to Mr Eamon Coyle and rejected the submission that there were two "Coyle Transport" businesses trading from the same premises, one run by the father, one by the son; only Michael Coyle was trading under that name from those premises [18]-[23].

16. The FTT found the correspondence and notices were sent to Coyle Transport and were received by Michael Coyle; it concluded that, read objectively, they would have been understood at the time as being directed Michael Coyle who was the person conducting the haulage business of "Coyle Transport" at 7 Dernalebe Road and which operated the seized vehicle [26]. The FTT also found that, in so far as it was material, Mr Coyle knew that the documents being sent to 7 Dernalebe Road addressed to 'Coyle Transport' were meant for him [27].

17. The FTT then went on to apply the three-stage approach explained in *Martland v HMRC* [2018] UKUT 178 (TCC) at [44] to [46] of that decision. The length of delay (4 years and 9 months – calculated from 3 October 2013, which was one month after 3

September 2013, to 10 July 2018 when the notice of appeal had been filed) was serious and significant [33]. Referring to its rejection of the reasons for the delay given above, the FTT dismissed the merits of the explanation given for the delay; Mr Coyle knew of the assessments when they happened and further copy correspondence was sent in 2015. No action was taken until early 2017 and even then, no notice of appeal was filed until mid-July 2018 [34]. It noted the passage of time since the seizure and the assessment inevitably affected the availability and reliability of evidence. The FTT then considered the version of events set out in Mr Coyle's letter of 17 December 2012 written in response to HMRC's seizure of the lorry, trailer and load but in essence concluded there were no inferences from that which helped his case regarding the assessment and penalty [36]-[39]. It considered the respective prejudice to the parties and went on to conclude that, taking all the factors it had set out earlier, that permission to appeal out of time should be refused [40][41].

The Law

18. The statutory provisions relevant to the purported excise duty assessment and penalty upon which Mr Coyle's appeals to the FTT were based are as follows.

19. As regards the assessment, s12 (1)(A) Finance Act 1994 ("FA 1994") provides:

> "Subject to sub-section (4) below where it appears to the Commissioners –
>
> a) that any person is a person from whom the amount has become due in respect of any duty of excise;… The commissioners may assess the amount of duty due from that person…. and notify that amount to that person or his representative."

20. In relation to the penalty, Schedule 41 Finance Act 2008 provides:

> "A penalty is payable by a person (P) where –
>
> a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, moving, depositing, keeping or otherwise dealing with the goods, and…."

21. Under Paragraph 16 of Schedule 41, where P becomes liable to such a penalty:

> "…HMRC shall –
>
> (a) assess the penalty
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed"

22. There is no dispute between the parties that where the legislation refers to "person" this must be to a natural or legal person.

23. The time limit for appealing a s12 assessment is set out, so far as relevant, in s16(1B) FA 1994:

> (1B) …an appeal against a relevant decision[2] … may be made to an appeal tribunal within the period of 30 days beginning with—
>
> (a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates…

24. However, under paragraph (1F) of s16, "an appeal may be made after the end of the period specified in subsection … (1B) …if the appeal tribunal gives permission to do so".

25. As for the Schedule 41 penalty, a right of appeal against a decision of HMRC that a penalty is payable is provided for under paragraph 17 of that Schedule. Such penalty appeals are similarly subject to a thirty-day time limit from notification of the penalty decision, but the appeal may also be made outside of that time limit if the appeal tribunal permits it. This is because paragraph 18 provides the penalty appeal "shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, …[*and*] about determination of the appeal by the First-tier Tribunal…)".

Grounds of appeal and parties' submissions

26. In the UT, Judge Richards granted permission on the following grounds:

> "The First Tier Tribunal erred in law by concluding from the facts that it found, insofar as it has jurisdiction to consider whether valid assessments (including penalty assessments) had been made, (i) that HMRC had made assessments and (ii) that those assessments were made against Mr Michael Coyle and not against Mr Eamon Coyle."

27. Mr McNamee's submissions before us, on the appellant's case, were straightforward: the assessment and penalty had to be made on a natural or legal person. The FTT's conclusion, given the assessment and penalty documents, which all referred to just "Coyle Transport" and its findings that Coyle Transport was neither a natural nor a legal person meant its conclusion on the assessments' validity could not stand. The exercise of looking objectively at how a recipient would understand the notice, as had been adopted by the FTT and endorsed by HMRC, was wrong – it would cause a "world of uncertainty". It was not just a question of notifying the assessment but about the power to make an assessment; there was no provision in the legislation for a nebulous "holding assessment" in relation to which HMRC could later slot in a natural or legal person. No amount of factual evidence as to who HMRC intended to assess could change who they did in fact assess. The only reasonable conclusion was that Mr Michael Coyle was not assessed.

[2] Pursuant to s13A(2)(b) FA 1994 "so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12" is a "relevant decision"

28. Further the FTT impermissibly conducted a fact-finding "mini-trial" on the merits of the appeal. Those merits, in the context of the out of time application should have been taken at their highest.

29. Ms Brown's submission, on behalf of HMRC, was that the FTT was correct, according to the authorities which we come on to discuss, to consider the relevant documents HMRC had sent objectively from the point of view of a reasonable recipient. The FTT was right to reach the conclusion it did and correctly followed the approach suggested in *Martland.*

Discussion

UT's jurisdiction on appeals from FTT

30. Under s11 of the Tribunal Courts and Enforcement Act 2007, appeals to the UT are limited to points of law and thus to the question of whether the FTT made an error of law in its decision which needs to be corrected. There is no challenge to the underlying facts. In those circumstances, as set out in *Martland* at [22]:

> "22. ….The question therefore is whether the FTT either misdirected itself as to the correct law, or plainly misapplied the law to the facts. before it. Such a misapplication might be obvious on the face of the FTT's decision or it might become apparent because the decision made by the FTT was outside the possible range of decisions which it could properly have made by applying the correct legal approach to the facts found by it."

31. Contrary to Ms Brown's submissions for HMRC, that Mr Coyle's case amounted to a disguised attack on findings of fact, Mr Coyle's critique of the FTT Decision, in our view, clearly goes to whether the FTT misdirected itself as to the correct law, or else to whether the FTT plainly misapplied the law to the facts. However, the issue of what the correct law to be applied was, must itself be put in its proper context; in particular it must be taken account of that the issue arose on an application before the FTT for permission to appeal to the FTT out of time. This point was effectively raised in Judge Richards' decision granting permission which flagged the concern of whether the FTT's determination regarding the assessment was within its jurisdiction (hence the caveat in the grounds stated above "insofar as [the FTT] has jurisdiction to consider whether valid assessments (including penalty assessments) had been made"). In our view, the determination of whether or not the assessments were valid, did not fall within the FTT's jurisdiction on the permission to appeal out of time application before it because that issue only needed to be determined once permission to appeal out of time had been granted. So far as the permission to appeal out of time application was concerned, the relevance of the validity issue was that it was the ground argued by Mr Coyle, as to why he was not liable, in the substantive appeal he was seeking permission to bring before the FTT. As such the task of the FTT, as summarised by the UT in *Martland*, was to consider the parties' respective arguments in outline, in order to form a general impression of the strength or weakness of the appellant's case to weigh in the balance. The UT at [46] of its decision explained:

> "It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

32. It is in that light that we should consider Mr Coyle's arguments before us. In essence, the error of law he puts forward is that the FTT ought to have considered his arguments regarding validity as overwhelmingly in his favour instead of dismissing them as it did. As will be seen, Mr Coyle's challenge encompasses both how the FTT directed itself in law as to the question of validity, and in any event, the FTT's application of such a test to the relevant facts. (We should note that the issues surrounding whether assessments were in fact validly made on Mr Michael Coyle were also relevant to the permission to appeal out of time in so far as Mr Coyle was arguing 1) that there was no delay - because time could not start to run where an assessment had not been made (and also because in that event HMRC had applied to strike out the appeal on the basis of there being no assessment against him, Mr Michael Coyle did not have standing) and 2) even if there was a delay, that the uncertainty of whether an assessment had been made went to the merits of the explanation for that delay. However, as we shall explain later, a definitive finding on whether the assessments were valid was not necessary for either of these aspects.)

33. We turn then to the FTT's consideration of the relevant legal approach. The FTT referred first to s114 Taxes Management Act 1970 ("TMA 1970") in its explanation of why it did not consider Mr Coyle was correct on his arguments regarding the invalidity of the assessments. However, as highlighted in Judge Richards' decision granting permission, and as is accepted by HMRC, s114 TMA 1970 does not apply to excise duty assessments and related penalties made under respectively Finance Act 1994 and Schedule 41 Finance Act 2008. This follows from the fact s114 TMA 1970 applies to any provision "in pursuance of any provision of the Taxes Acts", and the way the "Taxes Acts" are further defined. In this regard we consider the FTT misdirected itself as to the correct law and that there was accordingly an error of law in its decision.

34. HMRC submit the reference to s114 TMA 1970 does not affect the FTT's decision as s114 is just one of the mechanisms that may be used to construe notification of a document. They emphasise the FTT was ultimately correct to consider how a reasonable recipient would view the HMRC documents objectively.

35. At this point it is convenient to deal with the parties' submissions on the Court of Appeal's decision in *Aria Technology Limited v HMRC* [2020] EWCA Civ 182. As that decision had been issued just before the oral hearing and neither party had addressed it in their arguments before us, we directed the parties to provide written submissions after the hearing on the relevance or otherwise of the decision to their case.

36. The sole issue in *Aria Technologies* was the meaning of "assessment" in s73 of the Value Added Tax 1994 ("VATA 1994"). The context was an appeal against HMRC's decision denying input tax credit on the basis the taxpayer had been involved in MTIC fraud. The appellant argued that HMRC had not raised an assessment requiring the appellant to pay any VAT by the two letters sent by HMRC according to the statutory requirements, as the HMRC officer who wrote the letters had admitted in his evidence that he had not made an assessment.

37. After surveying the relevant authorities, the Court of Appeal (in a unanimous judgment given by Singh LJ) extracted the following principles at [48]:

> (1) There is no statutory definition of "assessment". It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT that is due.
>
> (2) There is no particular formality required by either statute or regulations.
>
> (3) There is no magic in the use of any particular form, for example one headed "Notice of Assessment". A notification of an assessment can be contained simply in a letter. It can also be contained in more than one document.
>
> (4) The question whether an assessment has been made or not is to be determined on an objective analysis. The decision-maker's subjective state of mind cannot alter that objective fact.

38. Proposition (3) derived from the High Court's judgment in *P&J Autos* which referred to the assessment notification document(s) containing in "unambiguous and reasonably clear terms the substantial minimum requirements…" These were set out at [223] of that decision as: the name of the taxpayer (which Mr Coyle emphasises was missing in the documents in his case), the amount of the tax due, the reason for the assessment and the period of time to which it related.

39. The Court of Appeal went on to reject the appellant's submission that the objective analysis was subject to, what the appellant in that case had termed a "subjective override", emphasising (at [45]):

> "The test is exclusively an objective one: how would the document or documents said to record an assessment be understood by the reasonable reader? It is essential to the fair administration of the tax system that a taxpayer should be able to know with certainty whether or not an assessment has been made of an amount of VAT due from him. There would be very considerable uncertainty if the question whether an assessment has been made were to depend on the subjective intentions and beliefs of individual officers of HMRC."

40. We start our consideration of the relevance of *Aria* by looking at the specific statutory provisions that were relevant there:

41. Section 73(1) VATA 1994 provides:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

42. HMRC's position is that s73 VATA 1994 is analogous to the assessment under s12 FA 1994. Similarly, the appellant does not raise any point regarding the legislative context in which the term "assessment" arises being different from the Finance Act provisions concerning excise duty in this case. His written submissions do however maintain that the ratio of the decision is only concerned with the *form* of the assessment. Nevertheless, he relies on the case for the Court of Appeal's reference to the minimum requirements for an assessment ,which he says are binding on the UT, in particular, that the document should, as an absolute minimum, name the person being assessed. He reiterates that in his case none of the documents purporting to amount to an assessment complied with that requirement.

43. We reject Mr Coyle's argument that the ratio of *Aria Technologies* was confined to the form of assessment rather than its contents. While one of the principles Singh LJ extracted was that no particular formality was required, the point squarely raised before the Court of Appeal concerned whether an assessment had been made.

44. The significance of *Aria Technologies* to the present appeal is that it suggests an objective approach must be taken to the question of whether an assessment (which is analogous to that in issue in this case) has been made. Thus, HMRC argue, *Aria* makes it clear that the question in Mr Coyle's case of whether the documents addressed to "Coyle Transport, 7 Dernalebe Road" validly raised an assessment against him is an objective question, based upon the view of the reasonable reader.

45. HMRC submit the principles Singh LJ extracted are binding on us in this case. On the face of it, there would appear to be no reason to disagree with that. However, we remind ourselves that we are dealing with the issue in the context of an outline evaluation of merits for the purposes of an appeal in relation to an extension of time application. Accordingly, we need not, and therefore do not, set out to determine whether the principles are binding in relation to the type of excise duty assessment before us.

46. But, to the extent the appellant pursues an argument that an objective analysis cannot be taken, following the Court of Appeal's decision in *Aria* the prospects of such an argument succeeding are, in our view, remote. The better view is that an objective approach should be taken. While the appellant maintains this would lead to a "world of uncertainty", as the Court of Appeal's decision explains (see [39] above) that is precisely why an objective approach needs to be taken.

47. In the hearing before us, HMRC had relied on two other authorities to support the proposition that an objective approach should be taken: *GDF Suez Teeside Power Ltd v HMRC* [2017] UKUT 68 and *HMRC v Mabutt* [2017] UKUT 0289. Both concerned whether errors in the identification of, an accounting period and a tax year respectively, HMRC had sought to enquire into, invalidated the purported notice of enquiry. In both cases the Upper Tribunal concluded there was a valid enquiry under the terms of the relevant direct tax legislation by considering how the recipient of the relevant communication would understand it when it was objectively construed. The source for that proposition was traced back to the House of Lords decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co ltd* [1997] AC 749 where an error in the date of a termination notice, which a tenant served, did not invalidate the notice.

48. In the light of what we have said about the Court of Appeal's decision we do not need to deal with these cases in detail except to note the following. We reject the appellant's argument for distinguishing those cases on the basis they concerned, what he maintained was, the less important matter of the identification of the period in question rather than the crucial question of the identity of the taxpayer. In both *GDF Suez*, and *Mabutt* there was nothing to suggest that the *principle* that an objective approach should be taken to a communication was any less relevant because of the particular type of error.

49. As to Mr Coyle's point that *Aria Technologies* sets out that it is a binding minimum requirement that an assessment contain the taxpayer's name, the Court of Appeal stressed (at [43]) that although it was prepared to accept the list of minimum requirements (see [38] above) for the purposes of the case before it, that acceptance was not necessary for the disposal of the case. Any endorsement the Court of Appeal gave regarding the minimum requirements for an assessment was thus obiter. Nevertheless, we do not overlook the fact that authority for the proposition that a taxpayer's name is a minimum requirement can be sourced from the High Court's decision in *P&J Autos.* (Mr Coyle had made this point before the FTT – see [14] above). Crucially though, there is no indication from the analysis in *Aria*, that the question of whether any minimum requirements for an assessment are met (whatever those might be) in order to determine whether an assessment has been made on the taxpayer, is immune from an objective analysis carried out from the point of view of a reasonable reader. Indeed, it is difficult to think what useful role the objective analysis referred to by the Court of Appeal could serve as regards whether an assessment was made, subject to any contrary indications in the relevant statute, if it could only apply to attributes of an assessment that were non-essential. By definition nothing would turn, as far as the question of whether an assessment had been made, on matters which went beyond the minimum requirements.

50. So, if it is Mr Coyle's argument that an objective analysis is not possible as regards the specification of the taxpayer's name, then we do not regard that as a strong argument; not by reference to s114 TMA 1970, which as we have said is not applicable, but by reference to the principles, as set out in *Aria*, regarding whether an assessment has been made.

51. Mr Coyle did not seek to draw any distinction between the approach to be taken for the excise duty assessment and the penalty assessment. We note however that *GDF Suez* (at [118]) and *Mabutt* (at [73]), on their face, allude to a more promising basis of distinction of those cases than that argued by Mr Coyle, namely that of statutory context. Those cases concerned a notice of an intention to open an enquiry (respectively under Schedule 18 Finance Act 1998 and s9A Taxes Management Act 1970). In explaining why *Baylis v Gregory*[3], a case concerning a direct tax assessment, did not help, they highlighted that the statutory context to assessments, as opposed to enquiries, required a more prescriptive and formal approach. That basis of distinction, certainly in relation to the excise duty assessment, appears less arguable post *Aria*. There appears nothing on the face of it to suggest that the objective approach required by the Court of Appeal there to certain VAT assessments, would not apply to the analogous excise duty assessment at issue here. But, as regards the penalty assessment[4] we note that in *GDF Suez* (again at [118]) the Upper Tribunal distinguished an FTT case (*Sokoya v HMRC* [2009] UKFTT 163 (TC)) because it dealt with the different context of penalty provisions adding that "it is well established that in a penal context any ambiguity must be construed in favour of the person penalised". In that case the FTT concluded a penalty notice, in respect of a penalty charged for not complying with an information notice, was invalid. That was because the penalty notice had incorrectly specified the compliance deadline for the information notice. We note that neither *Aria*, nor any of the cases we were referred to, had to address the application of the objective test in the context of an assessment for a penalty. That does not mean Mr Coyle is correct in his submission that an objective approach is irrelevant. But we acknowledge it means that, as far as Mr Coyle's appeal regarding permission to appeal the penalty assessment out of time is concerned, there is more room for argument.

Error in FTT's application of objective analysis to facts?

52. It seems to us that, following his written submissions, the focus of Mr Coyle's disagreement, in any case, shifts to the FTT's *application* of any objective analysis to the facts. The next issue is, remembering the context in which the appeal arises is on a permission to appeal out of time application, whether the FTT erred in its assessment of its merits of Mr Coyle's case in that respect. Mr Coyle argues the objective fact is that the assessments were not directed to him.

53. The relevant features, which are summarised at [15] above, covered the terms in which Mr Michael Coyle described himself in his communications with HMRC and what the driver of the seized lorry was reported to have told HMRC. Mr Coyle did not put in issue whether the findings of fact made were correct, rather his case is the facts did not permit the FTT to reach the conclusion it did.

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[3] Reported as *Craven v White, IRC v Bowater Property Developments ltd, Baylis v Gregory* [1989] AC 398

[4] Although there was no reference in the notice of appeal before the FTT, it appears to us the FTT nevertheless (see [35]) dealt with both. HMRC took no point on the penalty not being referred to, and the terms of the UT's grant of permission decision also mentions the penalty assessment. We proceed therefore on the basis the penalty assessment is also within the scope of the appeal before the UT.

54. In our view, the FTT was clearly entitled to take account of those features in applying the reasonable recipient objective test. The documents, said by HMRC to assess Mr Michael Coyle, did not exist in a vacuum and the context provided by the prior communications between HMRC and Mr Michael Coyle trading as Coyle Transport, or those maintaining they were acting on his behalf, were pertinent to how the relevant documents would be understood. This is also consistent with the approach of the Upper Tribunal outlined in *Mabutt* which described the test (at [45]) in terms of the reasonable taxpayer "in the circumstances of the taxpayer in question". In applying that test, they interpreted the tax year to which the letter referred to by reference to the return which the taxpayer had actually submitted (see [64]). Similarly, in *GDF Suez* the Upper Tribunal applied that test to the facts it reached its conclusion on the relevant return by reference to the return whose receipt the writer was acknowledging (see [117]).

55. While, as regards the merits of Mr Coyle's argument on the validity of the assessment against him, the FTT went further than it needed to because it only had to assess the merits of that issue in outline in the application before it, its conclusion necessarily imports the view that it considered his case as regards the *application* of the objective test to the facts to be extremely weak. In our view, that was a view which it was clearly open for the FTT to reach. Taking account of the features the FTT relied on, there was a strong case that a reasonable recipient in the appellant's circumstances would have understood the relevant documents to be directed towards the natural person conducting the haulage business at 7 Dernalebe Road namely Mr Michael Coyle.

56. Mr McNamee, replying to HMRC's reliance on the letter Mr Coyle sent to HMRC shortly after the seizure in 17 December 2012, highlights that the letter was written in response to seizure of vehicle – proceedings in rem – and says nothing about whether assessment then made was correct. However, the different nature of such proceedings does not undermine the relevance of the letter because it indicates, consistent with the position set out in his VAT registration, that Mr Michael Coyle traded as Coyle Transport. Mr McNamee's complaint, that given the FTT's findings on what HMRC had received from Mr Coyle, it was all the more incumbent on HMRC to assess the right entity also does not assist; the question is not what HMRC could have stated or ought to have stated in the documents but the objective construction by a reasonable recipient of what was in fact stated.

57. Mr McNamee further maintains it could not be known with certainty that an assessment had not been made against Mr Eamon Coyle. This, he submits, is clear from a copy of HMRC's own internal collection records, apparently handed over during HMRC's distraint proceedings, which suggested an assessment for alcohol duty had initially been raised on Mr Eamon Coyle. The documents also, Mr McNamee suggests, showed HMRC did not appear to know with certainty who the purported assessment was addressed to - an HMRC officer had appeared to remove the ambiguity by writing in Mr Michael Coyle's name by hand.

58. The document, which we taken to in the hearing, was entitled "IDMS Call Sheet" and showed a printing off date of 2 January 2018. In addition to the manuscript insertion

of Michael Coyle's name to the head of the document under Coyle Transport, the part of the note relied on by the appellant stated:

> "Debt of £60,980.00 that was written off in April 2014 relating to Alcohol Duty was initially raised in name of Eamon Coyle but Compliance have confirmed this was in fact wrong and should be for Michael Coyle/Coyle Transport and issued to a different address.
>
> As it is an aged asst they are withdrawing assessments but unable to re-issue to legal entity"

59. Mr McNamee accepts this document was not before the FTT but submits it is relevant because if we were to remit the appeal back to the FTT, it would be something that they would take account of. He submits the document is relevant because it showed: there was evidence in HMRC's internal note of an assessment having been made on Mr Eamon Coyle and therefore that there was evidence of his existence. Also, the note showed that HMRC themselves appreciated that assessments had to be made on a legal entity. Furthermore, the manuscript change showed how they tried to insert Michael Coyle into assessment documents after the event.

60. While it was not formally put to us in these terms, we regard Mr McNamee's reliance in effect to amount to an application to admit the document in evidence before us. The issue is a matter of discretion, to be exercised fairly and justly in accordance with the overriding objective, which is guided but not constrained by the criteria suggested in *Ladd v Marshall*[5]: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial (in this case that means the FTT hearing); second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

61. Our view is that we should not exercise our discretion to allow the application for the following reasons. While, in terms of the third factor, there is no obvious reason to think the document is not credible, the other two factors are not satisfied. There appears to be no reason why the document, which was handed to the appellant, well before his notice of appeal with the FTT was filed, could not have been adduced before the FTT. We cannot accept the evidence would have an important influence on the result of the case. Even, putting aside HMRC's view that the notes were referring to an unrelated assessment, at best the notes indicate HMRC, at one point, thought they were assessing Mr Eamon Coyle when they had meant to assess Mr Michael Coyle. However, it seems clear from *Aria Technologies* that HMRC's subjective views are irrelevant to the question of whether an assessment was made. HMRC's understanding, as to who needed to be identified in the assessment for it to be valid, also appears irrelevant. Further, to the extent the manuscript addition of the name is said to demonstrate HMRC's subsequent uncertainty and an attempt to mitigate any fear a valid assessment had not been made for want of identifying a legal or natural person, then that too does

[5] [1954] 1 WLR 1489; as to the relevance of the criteria to UT proceedings see [32] of *Cavendish Green Limited v HMRC*: [2018] UKUT 0066 (TCC) which in turn refers to *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 0214 (TCC).

not help on the question of how a reasonable recipient would understand the documents received in August 2013 from an objective viewpoint. While the reference to Mr Eamon Coyle in HMRC's record is consistent with his existence, that fact alone could not, in our view, be said to exert an important influence on the FTT's conclusion that there were not two Coyle Transport businesses being operated at the same time from the same address at the relevant time. Standing back and looking at whether it is fair and just to exercise our discretion to admit the evidence, we consider the evidence should not be admitted.

62. In conclusion then, as regards the FTT's application of the objective test to the facts, as explained above, it was implicit that it viewed the appellant's arguments in the alternative on this point as extremely weak. That was a view which we consider was open to the FTT to reach and which reveals no error of law.

Errors of law

63. Returning to the wider matter of the appeal before us, we concluded above that there were nevertheless errors of law in the FTT Decision regarding the application of s114 TMA when that was not relevant, and also in determining the merits of Mr Coyle's sole ground of appeal relating to validity when that question only needed to be evaluated in outline. That was essentially the point Mr McNamee raised in his oral submissions when he submitted the FTT had impermissibly conducted a "mini-trial" on the appellant's case. Although HMRC did not formally concede this point we note they made clear that, in the event we decided to set aside the FTT decision and remake it, their position was that we should not (as Mr Coyle was arguing for) make a pronouncement on the validity of the assessments but leave this issue to be decided by the FTT at a subsequent substantive hearing. That position is consistent with the view that a final pronouncement on the issue of validity was not the function of the application hearing before the FTT, which concerned whether permission to make an appeal out of time should be granted.

64. As we pointed out above (at [32]), the validity of the assessment was also potentially relevant to the question of whether the application to appeal was out of time in the first place such that the tribunal's permission was required and secondly, if there was a delay in appealing, to the merits of Mr Michael Coyle's explanation for such delay. However, for the reasons below, neither of those issues, in the context of these proceedings, required the FTT to make a conclusive finding on validity.

65. As regards the first issue, Judge Richards' grant of permission decision pointed out the difficulties Mr Michael Coyle's arguments entailed for his own position: 1) if the appellant was correct that no assessment had been made – how then could the FTT give permission in relation to a non-existent assessment? 2) if an assessment was made, but made in regard to Mr Eamon Coyle – how was it then that Mr Michael Coyle had a right of appeal?

66. In terms of the relevant legislation (set out at [23] to [25]) the rights of appeal to the FTT only appear to arise once there is something which amounts to an excise duty assessment and something which amounts to a penalty assessment. Therefore, *if* Mr

Coyle were correct and no "assessment" had been made for the purposes of the legislation, then there would be no jurisdiction on the part of the FTT to deal with his purported appeal. But, in principle there is no bar to the logically prior question of *whether* something purporting to amount to an assessment was actually an assessment for the purposes of the legislation, then being litigated as part of the proceedings before the FTT as a ground of appeal in its own right. The litigation in *Aria* illustrates that such a question is capable of being addressed before the tribunal. Moreover, the UT's decision in that case[6] rejected the taxpayer's argument that the tribunal had no jurisdiction to consider whether the relevant letters in that case amounted to an assessment. While the specific reasons for the UT's conclusion on the point hinged on the particular way the appellant had filled its notice of appeal out (ticking a box referring to assessment, and requesting a determination by the tribunal (the predecessor VAT tribunal) on hardship, the broader point that might be drawn is that where a taxpayer invites the FTT, through its notice of appeal, to make a determination in relation to an assessment whose status as such is put in issue, the question of *whether* the FTT has jurisdiction to make such a determination is not necessarily outside the FTT's jurisdiction.

67. In essence Mr Coyle wished to use the vehicle of proceedings before the FTT to get a judicial determination that he was not liable for sums pursued by HMRC because he considered the documents HMRC were relying on to notify an assessment did not amount to a valid assessment on him. In a similar vein a taxpayer might run the sole ground of appeal that he or she was not liable to the assessment because HMRC had made it outside of the relevant statutory time limits in s12 FA 1994 and the assessments were therefore invalid. But, if a person seeks to use the tribunal proceedings in this way, it seems to us that they are in effect arguing that the scope of "assessment" for the purposes of the appeal provisions (s13A(2)(b) FA 1994 which in turn informs the meaning of the "relevant decision" in s16 FA 1994) and consequently, as regards the penalty, paragraph 18 of Schedule 41 Finance Act 2008, is extended to encompass appeals where it is argued no liability arose because no valid assessment was made in the first place. However, where that is the footing upon which the appeal is brought, there is nothing then in the legislation to suggest that the 30-day statutory time limit in s16(1B) FA 1994 for bringing appeals before the tribunal should not equally apply.

68. In so far as Mr Coyle sought to bring an appeal before the FTT, the fact that he disputed whether an assessment had been made on him in the first place did not alter the fact that he was still subject to a time limit for notifying his appeal to the tribunal. The argument Mr Coyle made, both before the FTT and before us, that there was no egregious delay because there was no assessment against him and therefore time had not begun to run gets him nowhere because, if correct, it necessarily entails accepting that there was no statutory appeal in relation to which the permission to appeal out of time that was sought could be granted. It is also the case that the FTT did not need to reach a conclusion on whether a valid assessment had been made in order to determine whether the 30-day time limit applied. Having received something which, from the appellant's point of view was not an assessment but whose validity he wished to

[6] [2018] UKUT 0363 (TCC) (see [171] to [176])

challenge in tribunal proceedings, the appellant was nevertheless subject, as Ms Brown submitted on behalf of HMRC, to a 30-day time limit. Whether the assessment was invalid would remain to be determined at any eventual substantive hearing, assuming permission to appeal late was granted.

69. As regards the second issue of how the appellant's arguments concerning validity impacted on the merits of the explanation for any delay, the FTT was right to engage with the arguments that were put forward to it. It was also open to it to conclude Mr Michael Coyle had not given a good explanation for the delay. But, in view of what we say above, in doing so it did not need to determine whether the assessment was valid; rather it needed to consider the merits for any explanation as to why a notice of appeal challenging the validity of the assessment could not have been filed sooner. We appreciate the FTT may have been steered to making findings on what was in effect a premature determination on the validity of the assessments in large part due to the way the issues were framed by the appellant's notice of appeal and perhaps also through HMRC's cross application for strike out in the event the assessment was found to be invalid.

70. Nevertheless, we must conclude the FTT Decision did contain errors of law in so far as 1) it identified that s114 TMA 1970 applied in principle to the documents in issue when that legislation was not applicable 2) in determining the issue of whether there was a valid assessment when that was an issue which fell to be determined in outline only and ought only to have been addressed conclusively once it was clear permission to appeal out of time on that ground had been granted.

71. Where the FTT Decision contains an error or errors of law, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that (1) the UT may (but need not) set aside the FTT Decision; (2) If the UT does set aside the FTT Decision, it may either (i) remit the case back to the FTT with directions for its reconsideration, or (ii) re-make the FTT Decision.

Set aside of FTT decision and remaking of decision

72. In the circumstances, given the identified errors of law go to the approach the FTT took to exercising its discretion, and that we cannot rule out that a different decision would not be reached if the correct approach was followed, we consider we should set aside the decision and remake it. In applying what we consider to be the correct approach we use the FTT's underlying findings of fact in relation to which there was no substantive challenge.

73. In addressing the parties' arguments before us we have already dealt with much of the analysis relevant to a remade decision. Following the approach suggested in *Martland* we note the following.

74. Regarding the length of the delay, as we have explained, where Mr Michael Coyle sought to challenge before the FTT what in his view were invalid assessments, he ought to have lodged his notice of appeal within 30 days of the purported assessments: i.e. by 3 October 2013. The delay of four years and nine months was serious and significant.

75. Moving on to the reasons for the delay, before us, Mr McNamee suggested that anyone advising Mr Coyle would have suggested he take no action on the basis nothing constituting a valid assessment had been made on him. We disagree; the reasonable and safe course in those circumstances would have been, if there was a concern that a valid assessment had not been made on him, and as HMRC point out, to lodge an appeal with the FTT as soon as possible and in compliance with the relevant time limit making it clear that validity of the assessment was a contested issue. In any event, as the FTT noted, even though Mr Michael Coyle was threatened with bankruptcy in early 2017 he did not file a notice of appeal until mid-July 2018 and no explanation was provided even for that lesser, albeit serious and significant, period of delay of a year and a half. While Mr McNamee submitted that Mr Coyle could not be criticised for any delay after the collection proceedings started given the unexplained delay on the part of HMRC in taking those collection proceedings, this does nothing to explain why Mr Coyle, even on his case, could not have appealed to the tribunal sooner.

76. Regarding all the circumstances of the case, in terms of the respective prejudice to the parties, as identified by the FTT, the prejudice to HMRC, should permission be granted, would be in dealing with a matter it had long treated as closed. Mr McNamee's point above about the length of time HMRC had taken after the assessment to initiate collection does not take away from the underlying point which is that HMRC would have to divert resources to litigating liability on a matter which, but for the permission they would have otherwise assumed was a closed issue.

77. The prejudice to Mr Michael Coyle if permission were not granted would be the loss of the right to contest the excise and duty and penalty for significant sums. We have considered above in outline the prospects of success of Mr Coyle's grounds regarding the invalidity of the assessment as elaborated in the appeal before us. (We do not consider the letter Mr Coyle had written in response to the vehicle and goods seizure, as the FTT did, as none of the points raised there featured in the grounds of appeal or were pursued before us).

78. As far as the assessment is concerned, following *Aria,* it seems highly likely that an objective approach would apply to the question of whether or not an assessment was made. Based on the facts found by the FTT, and even taking into account the points Mr McNamee sought to rely on as emerging from HMRC's internal collection proceedings notes (see [59] above), it seems to us the prospects that the application of such test would lead to it being concluded that no assessment had been made, are extremely weak. The overall prospects of success regarding the assessment are therefore extremely weak. But, because we acknowledge there is more room for argument on whether an objective test should apply to the penalty assessment, while in our view the appellant's position is not overwhelmingly strong, differing from the contrary conclusion implicit in the FTT Decision, we consider the prospects of success as regards the penalty appeal are neither overwhelming weak nor overwhelmingly strong but fall somewhere in between.

79. Taking account, variously, the significant length of delay of 4 years and 9 months, the lack of a good explanation for it, that the appellant's case on the assessment is extremely weak and on the penalty assessment that it is certainly not overwhelmingly

in his favour, the need for litigation to be conducted efficiently, at proportionate cost, and for time limits to be respected, in our judgment permission to appeal both the excise assessment and penalty assessment out of time should be refused.

Decision

80. We set aside the FTT Decision having identified errors of law in it. We remake the FTT's decision on the permission to appeal out of time application in relation to the contested excise duty assessment and penalty assessment. But having done so we reach the same conclusion the FTT did. Permission to appeal those assessments out of time is accordingly refused.

Right of appeal

81. A party who wishes to appeal this decision onwards to the Court of Appeal in Northern Ireland, must first obtain leave to appeal from the Upper Tribunal. The application must be made in writing to the Upper Tribunal and must be received by the Upper Tribunal within one month of the release date of this decision[7]. The application for leave should identify the alleged error or errors of law and state the result asked for.

Swami Raghavan
Judge of the Upper Tribunal

Jennifer Dean
Judge of the Upper Tribunal

Release date: 8 April 2020

[7] s13 Tribunal Courts and Enforcement Act 2007 and Rule 44 of The Tribunal Procedure (Upper Tribunal) Rules 2008.