[2020] UKUT 0233 (TCC)

Appeal number: UT/2019/0081

VAT inaccuracy penalty under s63 VATA 1994 notified after appellant trader's Kittel appeal struck out – FTT's decision on time at which penalty liability accrued and whether FTT had jurisdiction under Garage Molenheide in relation to HMRC's set-off of penalty amounts against amounts due to appellant upheld – FTT's decision to strike out appellant's grounds on basis of Henderson v Henderson abuse of process, and in relation to Article 6 ECHR delay overturned - appeal allowed in part

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

DHALOMAL KISHORE	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: **MR JUSTICE ZACAROLI**
JUDGE SWAMI RAGHAVAN

Sitting in public by way of remote video hearing deemed to be at the Rolls Building, London, on 20 and 21 May 2020

Brendan McGurk, counsel, instructed by iTax UK Business Solutions Limited, for the Appellant

Christopher Foulkes, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. This appeal arises out of a £2.5 million misdeclaration penalty that HMRC imposed under s63 Value Added Tax Act 1994 on the Appellant ("Mr Kishore"). The penalty related to inaccuracies in his VAT returns concerning input tax claims of around £22 million. HMRC refused repayment on the basis that Mr Kishore knew or ought to have known the transactions were connected with the fraudulent evasion of VAT. HMRC imposed the penalty on 3 August 2017 following the strike out of Mr Kishore's appeals to the First-tier Tribunal (the "FTT") against HMRC's refusal of input tax.

2. The FTT was asked to determine a number of preliminary issues in the penalty appeals. It found against Mr Kishore on each in its decision (the "FTT Decision") released on 20 December 2018, published as *Dhalomal Kishore v HMRC* [2018] UKFTT 0759 (TC). The FTT also allowed HMRC's application to strike out various of Mr Kishore's grounds on the basis that pursuing those would amount to an abuse of process because they sought to raise matters which ought to have been raised in the earlier input tax appeals. With the permission of the FTT, Mr Kishore now appeals the FTT Decision to the Upper Tribunal ("UT").

Background

3. There is no dispute as to the basic chronology of events so far as they are relevant to the grounds of appeal.

4. Mr Kishore claimed input tax in his quarterly returns for the VAT periods 03/06 and 06/06 totalling £22,392,775.10. HMRC refused repayment of that input VAT, in their decisions of 13 July 2007 (for 03/06) and 28 March 2008 (for 06/06), on the grounds that Mr Kishore knew or ought to have known his transactions in those periods were connected with the fraudulent evasion of VAT. These grounds are commonly referred to as *Kittel* grounds after the case of the same name. Mr Kishore appealed HMRC's decisions to the tribunal on 8 August 2007 and 24 April 2008 ("the *Kittel* appeals").

5. It is also relevant to one of Mr Kishore's grounds concerning hardship and set-off, which we will come on to explain, that HMRC had previously repaid input tax of £22,892,998.42, in respect of Mr Kishore's trading in 12/05, but left it until early 2006 to do so. As HMRC made the repayment outside of the relevant statutory time limit Mr Kishore applied for the statutory recompense known as Repayment Supplement but that was refused by HMRC on 18 April 2006. Mr Kishore in turn appealed that refusal to the FTT ("the Repayment Supplement appeal").

6. Returning to the *Kittel* appeals, the litigation of these was protracted but ultimately came to an end when the appeals were struck out on 9 September 2015 because Mr Kishore had failed to comply with an "unless" order which had required him, as is standard practice in *Kittel* appeals, to specify what issues were in contention (commonly referred to as *Fairford* directions). His application, out of time, for reinstatement was

dismissed by the FTT (Judge Richards) on 2 November 2016. Mr Kishore's application for permission to appeal was refused by the FTT on 26 September 2017 because it was late. His renewed application to the UT for permission to appeal was refused following a decision on the papers on 2 November 2017.

7. Meanwhile, on 3 August 2017, after Mr Kishore's reinstatement application in relation to the *Kittel* appeals had been refused by the FTT, HMRC imposed the two misdeclaration penalties under s63 VATA 1994 with which the appeal before us is concerned. These totalled £2,519,186 (made up of £1,707,846.00 for 03/06 and £811,340.00 for 06/06).

8. Shortly after that, on 7 August 2017, HMRC conceded the Repayment Supplement appeal. They accepted that a Repayment Supplement of £1,144,649.92 in relation to the late payment of the input VAT for 12/05 was due to Mr Kishore but they did not pay it to him on the basis that the sum was set off by the greater £2,519,186 penalty amount above.

9. Mr Kishore appealed to the FTT against the misdeclaration penalties on 13 September 2017 ("the penalty appeal"). HMRC applied on 7 December 2017 to have the appeal struck out. Mr Kishore applied to have a number of matters determined as preliminary issues. These applications were heard by the FTT on 4-5 June 2018 and 31 July 2018. In its decision of 20 December 2018, the FTT found against Mr Kishore on the preliminary issues and struck out all but one of his grounds.

The FTT's Decision

10. In this section we deal briefly, in so far as they are relevant to the appeal before us, with the issues that were before the FTT and the FTT's conclusion on those issues. We address the detail of the FTT's consideration of the issues, however, when dealing with the substance of Mr Kishore's grounds of appeal below.

11. The FTT was first asked to resolve four points of law as preliminary issues:

> (1) there was no valid assessment because it referred to the wrong assessing provision;
>
> (2) there was no valid assessment because Mr Kishore had not been given a chance to state his defence before he was assessed;
>
> (3) the provision giving liability was repealed without saving before liability to a penalty accrued; and
>
> (4) the assessment was out of time.

12. The FTT determined each of these issues against Mr Kishore. There is no appeal against the first issue, and we need say no more about it. Mr Kishore appeals, however, in respect of each of the other issues (in his first three grounds of appeal).

13. Mr Kishore additionally challenged the set-off by HMRC of the repayment supplement (in respect of the 12/05 return) against the penalty assessments. His challenge was framed as, or at least wrapped up with, an application under the hardship

provisions under s83(3B) of VATA. The FTT concluded that it had no jurisdiction to entertain this challenge. This forms the basis of Ground 4.

14. HMRC sought to strike out the penalty appeal. Mr Kishore relied on numerous grounds of appeal from HMRC's decision and sought to amend those grounds at the hearing. The FTT permitted those amendments and considered the strike-out application as against the grounds, as amended. The FTT determined all but one of the grounds of appeal against Mr Kishore. We identify the substance of the relevant grounds of appeal, and the FTT's treatment of them, when considering the arguments advanced before us on this appeal at [23] onwards below. The principal point raised for consideration under this head is whether the FTT was right to conclude that it would be an abuse of process (under the principle derived from the case of *Henderson v Henderson* (1843) 3 Hare 100 "the *Henderson* principle") for Mr Kishore to be permitted to litigate in the penalty appeal the question whether he has a reasonable excuse for the misdeclaration. The potential for abuse arises from the overlap between that issue and the issue which was raised for determination (although not determined) in the *Kittel* appeals as to whether he knew or ought to have known of the fraudulent transactions.

15. The one point which the FTT determined in Mr Kishore's favour was that he should still be allowed to pursue the ground that the size of the penalty made the misdeclaration regime or the particular penalty imposed on him disproportionate. HMRC does not appeal against that conclusion.

The grounds of appeal

16. Mr Kishore advanced six grounds of appeal before us, as follows:

> **Ground 1:** the accrual of liability to a penalty under s63 of VATA requires the taxpayer to be given the chance to satisfy HMRC that there was a reasonable excuse for the misdeclaration;
>
> **Ground 2:** no liability to a penalty accrued prior to the repeal of s63;
>
> **Ground 3:** the assessment was out of time;
>
> **Ground 4**: HMRC had no right to set-off the repayment supplement against the penalty assessment;
>
> **Ground 5**: the penalty violates Article 6 of the European Convention on Human Rights ("ECHR");
>
> **Ground 6**: the FTT was wrong to strike out the penalty appeal.

17. We address these grounds of appeal as follows. Each of Grounds 1 to 3 is premised upon the contention that liability under s63 accrues only when the taxpayer has been given the chance to satisfy HMRC of the existence of a reasonable excuse for the misdeclaration, and we deal with these grounds together at [23] –[41] below. Ground 4 is addressed at [42] to [65] below. Ground 5 involves a consideration of two separate

issues. The first is whether there has been unreasonable delay in relation to the penalty assessments such as to breach Mr Kishore's rights under Article 6. The second is (in summary) whether the fact that Mr Kishore is precluded from defending the penalty appeal by contending that there was a reasonable excuse for the misdeclaration is an abuse of his rights under Article 6. We deal with the former issue at [66] to [91] below. The latter issue is, however, closely bound up with the central question raised under Ground 6 (i.e. whether Mr Kishore is precluded from advancing the reasonable excuse defence by reason of abuse of process) and we consider it together with ground 6 at [92] to [123] below.

Law

18. Since the underlying VAT returns date from 2006 the relevant provision governing the misdeclaration penalty assessments is s63 of VATA. That provides (so far as relevant) as follows:

> "(1) In any case where, for a prescribed accounting period—
>
> (a) a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit, or
>
> (b) an assessment is made which understates a person's liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners,
>
> and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent. of the VAT which would have been lost if the inaccuracy had not been discovered.
>
> (2) The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent. of the relevant amount for that period.
>
> (3) Any reference in this section to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the understatement of liability or, as the case may be, overstatement of entitlement referred to, in relation to that period, in subsection (1) above.
>
> (..)
>
> (10) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if—
>
> (a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or
>
> (b) at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the Commissioners full information with respect to the inaccuracy concerned."

19. Assessment to penalties is dealt with in s76 which provides as follows:

> "(1) Where any person is liable—
>
> (a) to a surcharge under section 59 , section 59A , paragraph 16F of Schedule 3B or paragraph 26 of Schedule 3BA, or
>
> (b) to a penalty under any of sections 60 to 69C, or
>
> (c) for interest under section 74, or
>
> (d) a penalty under regulations made under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT,
>
> the Commissioners may, subject to subsection (2) below, assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly; and the fact that any conduct giving rise to a penalty under any of sections 60 to 69B or the regulations may have ceased before an assessment is made under this section shall not affect the power of the Commissioners to make such an assessment."
>
> (..)
>
> (3) In the case of the penalties, interest and surcharge referred to in the following paragraphs, the assessment under this section shall be of an amount due in respect of the prescribed accounting period which in the paragraph concerned is referred to as "the relevant period"—
>
> (…)
>
> (d) in the case of a penalty under section 63, the relevant period is the prescribed accounting period for which liability to VAT was understated or, as the case may be, for which entitlement to a VAT credit was overstated;"

20. The time within which assessments must be made is dealt with by s77, which provides as follows:

> "(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—
>
> (a) more than [4 years] after the end of the prescribed accounting period or importation or acquisition concerned, or
>
> (b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, [4 years] after the event giving rise to the penalty.
>
> (2) Subject to subsection (5) below, an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3) or (3A) of that section may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined."

21. In relation to Grounds 1-3 it is important to note that s63 was repealed on 31 March 2008. This was effected by Part 5(5) of Schedule 27 to the 2007 Finance Act. There were no transitional or savings provisions under Part 5(5). It is common ground that

s63 could not – after 1 April 2008 - be relied upon as the basis for establishing a liability upon which a penalty assessment might be raised. Whether such liability arose before that date is a matter of dispute but it is not in issue that if liability to a penalty accrued before 1 April 2008 then the penalty could be assessed under s76 VATA on the basis of the savings in respect of liabilities acquired and penalties incurred made by s16(1) of the Interpretation Act 1978. That section provides:

> "(1) Without prejudice to s 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,
>
> …
>
> (c) affect any … liability acquired, accrued or incurred under that enactment;
>
> (d) affect any penalty … incurred in respect of any offence committed against that enactment."

22. As regards Ground 4, HMRC's right of set-off is governed by s81, which provides:

> "(1) Any interest payable by the Commissioners (whether under an enactment or instrument or otherwise) to a person on a sum due to him under or by virtue of any provision of this Act shall be treated as an amount due by way of credit under section 25(3).
>
> (..)
>
> (3) Subject to subsection (1) above, in any case where—
>
> (a) an amount is due from the Commissioners to any person under any provision of this Act, and
>
> (b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,
>
> the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners, and the person concerned shall be discharged."

Grounds 1 to 3

23. The FTT (at [25] –[37]) dealt with and dismissed Mr Kishore's argument that, as a matter of statutory interpretation of s63, no liability accrued under s63(1) until he had been given the chance to explain what reasonable excuse or other defence he had. That interpretation, Mr Kishore argued, flowed from s63(1) being "subject to" subsection 10 which specified that conduct falling within s63(1) "shall not give rise to liability to a penalty" if the person concerned satisfies the Commissioners, or on appeal, a tribunal that there is a reasonable excuse for the conduct. The FTT rejected that interpretation. s63(10), when read literally referred not just to HMRC, but also to the tribunal, being satisfied. If the appellant's interpretation was correct it would lead to the impossible situation that no liability would arise until the as yet non-existent assessment had been appealed to the tribunal. Further, if correct, it would lead to the nonsensical result that a taxpayer who lacked a reasonable excuse would have no liability unless and until he

or she had been given the chance to put forward a defence (which the taxpayer, by definition, would not have).

24. Under Ground 1 Mr Kishore advances the same essential argument that s63(10) imposes a procedural requirement that operates as a pre-condition to liability. It is said that this is the true construction of s63 (construed as a piece of domestic legislation) but, even if not, this interpretation is mandated by the fact that s3 of the Human Rights Act 1998 ("HRA 1998") requires the provision to be construed so as to be compatible with Article 6.

25. So far as the construction of the provision is concerned, aside from Article 6, the contention is similarly based on the fact that s63(1) states that a person shall be liable (if there is an overstatement) subject to ss(10) and (11); the words "subject to" refer to subsections which impose pre-conditions to liability (not to sections which enable a liability that already accrued to be revoked).

26. It is contended that Mr Kishore's right to a fair trial under Article 6 depends upon him being given the opportunity to satisfy HMRC that he had a reasonable excuse.

27. It is common ground that s63 VATA misdeclaration penalties are "criminal" for the purposes of Article 6 ECHR. Article 6 provides so far as relevant:

> 1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….
>
> 2.Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and the facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) ….

28. Section 3 of HRA 1998 requires primary and secondary legislation to be read and given effect in a way which is compatible with Convention rights "so far as it is possible to do so", whether the legislation in question was enacted before or after the HRA 1998.

29. Reliance is placed on the regime implemented upon the repeal of s63 (under Schedule 24 to the Finance Act 2007) as illuminating the position under s63. Mr McGurk pointed to a passage in HMRC's internal guidance CH300400 (published on 11 March 2016). This states, among other things that: "In order to protect the person's rights under Article 6 of the ECHR you must tell them that they may be liable to a

penalty as soon as you find something wrong that could result in a penalty and before you discuss the behaviour." The Appellant contends that unless this procedure is followed, the taxpayer's human rights are not properly protected.

30. We reject the essential premise that s63(10) imposes a procedural pre-condition to liability accruing. From first principles, s63(1) imposes a liability for a misdeclaration that, unless made subject to ss(10), would be strict. Because it is made subject to ss(10), however, the liability is not strict. Liability exists only in the absence of a reasonable excuse. The form of words "if … the person concerned satisfies…" establish that the burden of proving the existence of a reasonable excuse is on the taxpayer. While liability would not be *established* if the taxpayer can demonstrate a reasonable excuse (whether to the satisfaction of HMRC or a tribunal), that does not prevent liability *accruing* from the date of the misdeclaration whenever the defence of reasonable excuse is either inapplicable or fails.

31. The principle against doubtful penalization is not engaged therefore as there is no ambiguity over the circumstances in which the liability arises.

32. As to Article 6: (1) in agreement with HMRC's argument, it imposes procedural requirements which, although they may have a substantive effect, do not determine whether, or when, liability under the domestic statutory provision accrues; and (2) in any event, the rights which arise from Article 6, which include (as noted in the guidance issued in relation to Sch 24) the right to silence (or the right not to self -incriminate) and the right to be informed of such rights before being interviewed, do not extend to the right to satisfy the authorities as to any aspect of the offence, or a defence to it, before liability accrues.

33. Thus, in common with other instances of criminal liability, the fact that a person may not know that criminal liability has been incurred or has not yet had the chance to put forward a response does not preclude liability accruing. The person will of course be entitled to know the details of the offence and have a chance to defend against it once the offence has been notified.

34. In Mr Kishore's grounds of appeal, it was contended that unless s63(10) was interpreted as requiring the taxpayer to be given the opportunity to proffer a reasonable excuse *before liability accrued* it would have the effect of reversing the criminal burden of proof onto the taxpayer, which would be a breach of Article 6. For the reasons already given, we reject the contention that Article 6 has any relevance to the date upon which liability accrues. Although not expressed in this way in the grounds of appeal, we understood Mr McGurk additionally to argue that ss(10) should be interpreted, so as to be consistent with Article 6, as imposing the burden of proving the absence of reasonable excuse on HMRC.

35. He submitted, first, that the subsection is ambiguous and that interpretation in accordance with Article 6 requires the ambiguity to be resolved in Mr Kishore's favour. In our judgment there is no ambiguity in ss(10): it clearly requires the taxpayer to establish a reasonable excuse.

36. Alternatively, he submitted that even if there was no ambiguity ss(10) should be declared incompatible with Article 6. We agree with HMRC there is no general principle that placing the burden of proof on a defendant in the context of a criminal offence is necessarily inconsistent with Article 6. As HMRC point out, there are instances of domestic criminal offences in England & Wales placing the burden of proof in respect of a particular defence on the defendant without giving rise to an issue of compatibility with Article 6 of the ECHR. The offence for carrying certain bladed articles in public under s139 of the Criminal Justice Act 1988, punishable by imprisonment, is one such an example. Section 139(1) provides that any person who has with him in a public place such an article is guilty of an offence. Section 139(4) then provides that it shall be a defence for a person charged with an offence under s139(1) to prove that he had good reason or lawful authority for having the article with him in a public place.

37. Mr McGurk referred us to *King v Walden* [2001] STC 822, where in paragraph (4) of the headnote it was stated that "on appeal the burden of proof lay with the Crown." That was concerned, however, with a different statutory provision, under which a penalty could be imposed where a person "fraudulently or negligently" delivered an incorrect return. In that context, the burden of proving fraud or negligence clearly rested on HMRC.

38. The only other authority to which we were referred on this issue was *Eurowines (C&C) Ltd v Revenue and Customs Commissioners* [2018] 1 WLR 3248. That case concerned a penalty under paragraph 4(1) of Schedule 41 to the Finance Act 2008 on a wholesale trader in alcoholic drinks on the grounds it acquired goods which were not duty-paid. Section 154(2) of the Customs and Excise Management Act 1970 imposed on the trader the burden of proving that duty had been paid. The Court of Appeal rejected the appellant's contention that it was contrary to Article 6 for the burden to be imposed on the trader. Of particular note for our purposes, paragraph 20 of Schedule 41 provided a defence of reasonable excuse in materially the same terms as s63(10), but there was no suggestion that it was incompatible with Article 6 to impose the burden of establishing the existence of a *defence* on the taxpayer.

39. Reference was made, at [15] of the judgment of David Richards LJ, to *Salabiaku v France* (1988) 13 EHRR 397, in which the European Court of Human Rights stated, at [28] that Article 6 did not prohibit presumptions of fact or law in principle, but required them to be confined within reasonable limits. We have not been presented with any sufficient argument that ss63(10) falls outside such reasonable limits. Accordingly, we reject the argument that ss63(10) conflicts with Article 6.

40. Ground 2 (the repeal point) is wholly dependent on Ground 1 being correct. It is not, so Ground 2 fails. (As mentioned above, s16 of the Interpretation Act provides that the repeal of an enactment does not affect any liability incurred or accrued under the enactment).

41. Ground 3 (penalty assessment out of time) relies on the argument that a s76 penalty assessment is dependent on there being an accrued liability under s63, and that there

was no such liability as at 31 March 2008. It is also wholly dependent on Ground 1 being correct and therefore fails for the same reason.

Ground 4: no right of set-off

42. The FTT concluded that it had no jurisdiction over HMRC's exercise of set-off. Mr Kishore's argument before the FTT was that it had jurisdiction to make an order to the effect that HMRC could not exercise set-off pending final determination because the FTT had been given jurisdiction to determine applications for hardship and because of the interaction between that jurisdiction and the decision of the CJEU in *Garage Molenheide BVBA v Belgium* [1998] STC 126 ("*Garage Molenheide*"), which we consider below.

43. The FTT rejected that argument, concluding that although the CJEU in *Garage Molenheide* had concluded that provisions of law would be disproportionate if they made it impossible for "the court adjudicating on the substance of the case" to lift in whole or in part the retention of refundable VAT before a decision on the substance of the case became definitive would be disproportionate, that did not have the effect of conferring relevant jurisdiction on the FTT: it was sufficient for EU law purposes that Mr Kishore could challenge the set-off by judicial review ([67]-[83]).

44. Having concluded that there was no jurisdiction, it was unnecessary for the FTT to deal with Mr Kishore's substantive arguments regarding set-off. It nevertheless explained, at [86] – [109], why it would in any event have rejected those arguments:

> (1) certain of Mr Kishore's arguments fell away as a result of the FTT's conclusions on Grounds 1 to 3;
>
> (2) it rejected Mr Kishore's argument that EU law prohibited HMRC from exercising set-off, because his right to repayment was purely a domestic law right and not a fundamental principle of EU law;
>
> (3) it rejected Mr Kishore's argument that the set-off amounted to an unlawful refusal of hardship because this was, in essence, a challenge to HMRC's decision to exercise its right of set-off, which was something the FTT had no jurisdiction over; and
>
> (4) it rejected Mr Kishore's arguments that the set-off was in breach of the ECHR, as the exercise of set-off did not breach the presumption of innocence, did not bar his right to representation and there was no right to "equality of arms" but a right to a fair hearing, which was not infringed.

45. It is not suggested that there is any statutory right of appeal to the FTT against HMRC's decision to exercise set-off. On the face of it, therefore, there is no jurisdiction. The appellant's grounds and written submissions appeared at first sight to contend that the tribunal's statutory jurisdiction in relation to hardship applications provided a "hook". Mr McGurk accepted in oral submission, however, that it did not. He was clearly right to do so: the tribunal's hardship jurisdiction under s84 has no

application to an appeal against imposition of a penalty, since no payments or deposits are required for penalties (as distinct from the VAT due).

46. Mr McGurk maintained before us, however, the submission that the FTT's jurisdiction flowed from the CJEU's decision in *Garage Molenheide*. That case concerned a reference from the Belgian courts in four cases where VAT credits due to the taxpayers were withheld by the tax authority either because of tax evasion concerns or because of a contested VAT debt to the authority.

47. The court held that while the Sixth Directive did not in principle preclude withholding measures such as those used in the four cases, "…in accordance with the principle of proportionality, the member states must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation" [46]. The proportionality principle applied "since if the [member state's] measures go further than necessary in order to attain their objective, they would undermine the principles of the common system of VAT …" [48].

48. The applicants in the cases referred by the Belgian courts highlighted the lack of effective judicial remedy in the proceedings concerning retention (which it referred to as the attachment proceedings) and also that where the tax authority appealed a decision favourable to the taxpayer it was impossible to have the retention lifted until the case was finally determined.

49. The ECJ went on to say:

> 55. In that connection, it must be observed that, in considering whether the adverse effect on the right of deduction is proportionate, the availability of effective judicial review is necessary both in the proceedings on the substance of the case and in those before the judge hearing attachment proceedings.
>
> 56. Consequently, provisions of laws or regulations which would prevent the judge hearing attachment proceedings from lifting in whole or in part the retention of the refundable VAT balance, even though there is evidence before him which would prima facie justify the conclusion that the findings of the official reports drawn up by the administrative authority were incorrect, should be regarded as going further than is necessary in order to ensure effective recovery and would adversely affect to a disproportionate extent the right of deduction.
>
> 57. Similarly, provisions of laws or regulations which would make it impossible for the court adjudicating on the substance of the case to lift in whole or in part the retention of the refundable VAT balance before the decision on the substance of the case becomes definitive would be disproportionate.

50. The court concluded at [64]:

> "The answer to be given must therefore be that it is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are

> proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interests of the Treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a construction on them. Moreover, in the event of the retention being lifted, calculation of the interest payable by the Treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality."

51. Mr McGurk's submission that the FTT must have jurisdiction in this case, rests on the court's statement at [57] above.

52. We reject Mr Kishore's reliance on *Garage Molenheide* in essence for the reasons the FTT explained (at [71]). All that the ECJ required, as is clear from its conclusion at [64] was that member states must have in place an effective judicial control mechanism for the taxpayer to challenge the exercise of set-off. That feature was lacking both in relation to attachment proceeding and the substantive proceedings on the facts of the referred cases. In contrast, the UK does have in place the necessary judicial control mechanism, namely judicial review proceedings. The ECJ did not need to, and therefore did not, define what was the court "adjudicating on the substance of the matter" or otherwise require that jurisdiction be conferred on a court before which an appeal on a related issue was brought.

53. This conclusion is consistent with the Court of Appeal's decision in *R (Teleos Plc and Others) v CEC* [2005] STC 1471. In that case the commissioners, having determined that the supply of mobile phones by the taxpayer was not zero-rated and was thus chargeable to VAT, exercised a right of set-off against input credits otherwise due to the taxpayer. Pending determination of the lawfulness of the commissioner's decision that the phones did not meet the conditions for zero-rating, the taxpayer applied for interim relief in the form of payment of 50% of the total amount set-off by the commissioners.

54. It was common ground that the commissioner's decision to refuse an interim payment was susceptible to challenge by way of judicial review. Moses J considered, however, that judicial review could not succeed, and there was no appeal against that part of his decision. It was also common ground that the conditions for interim payment set out in CPR 25.7 were not met. The taxpayer argued, however, that in light of *Garage Molenheide* the court had power to order an interim remedy under CPR 25 notwithstanding that it was not referred to in CPR 25.

55. The Court of Appeal rejected the taxpayer's argument that the civil procedure rules on interim relief, the terms of which were not met, nevertheless needed to be given a strained interpretation because of *Garage Molenheide.* Dyson LJ, at [29], having noted

that there was no challenge to the judge's rejection of a public law challenge on the facts of that case, said:

> "The critical point is that the courts of this country do provide a mechanism for ensuring that proportionate decisions are made by the Commissioners in relation to interim payments, and if they are not, the court can intervene. That is sufficient to meet the requirements of the EC as articulated in *Garage Molenheide*, and obviates any need to give a strained interpretation to CPR 25.1 or CPR 25.7. Our system is to be distinguished from the Belgian system where, as was made clear in *Garage Molenheide*, the national court had no power to interfere with a decision not to make an interim payment of VAT in any circumstances."

56. We reject Mr McGurk's arguments that *Teleos* is to be distinguished because it was concerned with interim relief under CPR Part 25 rather than vindication of right to deduct or because the taxpayer had also raised the issue of judicial review. The Court of Appeal's conclusion that *Garage Molenheide* did not require a remedy to be fashioned where (it was common ground) none existed as a matter of domestic law is equally applicable to the present case. The fact that the judge had concluded that judicial review was not available on the facts is irrelevant: it was the existence of the right to assert a claim for judicial review which distinguished *Garage Molenheide*, and that is equally the case here.

57. *Teleos* was applied (albeit *obiter*) in *R (on the application of Rouse) v HMRC* [2013] UKUT 383. In that case, HMRC set-off a VAT credit due to the taxpayer against a debit on the taxpayer's account. The UT determined, first, that there was in fact no debit on the taxpayer's account and so nothing against which the credit could be set off. Having heard full argument on the point, however, it went on to consider the taxpayer's argument that the exercise of set-off was a disproportionate remedy in light of *Garage Molenheide*. The UT, applying *Teleos*, held that since the taxpayer could apply to the court for judicial review of HMRC's exercise of discretion to set-off the credit against the debit, the principle in *Garage Molenheide* was not engaged. It was irrelevant that the application for judicial review would have to be made to a different court than the tribunal which would ultimately determine the validity of his claim. At [75] the UT said this:

> "We agree with Ms Simler, and follow Dyson LJ in concluding, that the availability of that remedy is sufficient, and that the CJEU was not seeking to lay down the principle that the court (here, the First-tier Tribunal) which is to determine the merits of the claim must also be able to suspend the effect of, in this case, s130."

58. Mr McGurk relied on two first instance decisions which he contends the FTT should have followed: *Coleman v CEC* [2000] BVC 2042 and *Guernsey Leasing Co v HMRC* [2006] UKVAT V 19974.

59. In *Coleman* the VAT and Duties Tribunal considered the proportionality of, among other matters, s84(2) and (3) VATA 1994 as it then was. Section 84(2) prevented the tribunal hearing assessment, penalty and surcharge appeals, unless the appellant had

made all its required returns and paid the tax shown in those returns. Section 84(3) required the appellant to deposit the tax in dispute unless he could satisfy the commissioners or the tribunal that to do so would cause hardship.

60. The tribunal concluded that there was no real argument that s84(3) was disproportionate in the *Garage Molenheide* sense, because there was full access to justice both to determine the propriety of the precondition and to determine the correct amount of the tax payable. Section 84(2) was different, however, and was found to be disproportionate. The tribunal took into account that it was automatic, with no opportunity for the tribunal to adjudicate on whether the taxpayer's default was reasonable. It also took account of the fact that the requirement to render returns and pay tax would usually relate to periods and matters that had nothing to do with the issue in the appeal, and that the primary justification for it was to use denial of justice as an incentive to compliance.

61. Of particular relevance to this case, the tribunal rejected the argument that the opportunity to seek judicial review of a decision of the commissioners saved s84(2) from overstepping the bounds of proportionality in the *Garage Molenheide* sense, noting that a person applying for judicial review required leave, so that effectiveness could not be assumed, and that the matters that would be raised by such an application were more appropriately addressed by appeal to the tribunal where the tribunal could substitute its own decision than on an application for judicial review.

62. *Guernsey Leasing* concerned a set-off by Customs of input tax repayments due for certain periods against the output tax assessed for other periods. Customs argued the set-off meant the disputed tax on assessments had been paid or deposited such that no issue of hardship arose. The taxpayer argued the set-off unlawfully pre-empted the tribunal's decision on hardship, infringing proportionality under *Garage Molenheide*. The tribunal (at [30]) rejected Customs' argument that the availability of judicial review of a refusal to make an interim payment by customs would meet the concerns; the tribunal (and not the High Court on a judicial review application) was the court "adjudicating on the substance of the case" and was thus the court, pursuant to *Garage Molenheide* that should be able to lift the retention.

63. Neither *Coleman* nor *Guernsey Leasing* is binding on us, and we consider that neither case advances Mr Kishore's case that the FTT was wrong to conclude it lacked jurisdiction. *Guernsey Leasing* is distinguishable on the ground that it involved an appeal in which the hardship jurisdiction was engaged. Unlike in this case, therefore, the ability to make a hardship application provided a jurisdictional "hook". The circumstances in *Coleman* were very different. It concerned the validity of a statutory provision which absolutely precluded a taxpayer, who had not complied with certain preconditions, from bringing an appeal against an otherwise appealable decision of HMRC. It is one thing to conclude that the disproportionate nature of the statutory provision creating an absolute bar on appealing a decision could not be saved because of the existence of a lesser right to challenge the same decision. That is not the case here, however, where HMRC's decision on set-off is not subject to any right of appeal. The question, therefore, is whether HMRC's right to set-off is disproportionate in the

first place. The existence of a right to challenge it by way of judicial review means that it is not.

64. In any case, to the extent that the decision in *Guernsey Leasing* or *Coleman* rested on an assumption that judicial review could not be sufficient from the point of view of proportionality as a route to challenging HMRC's decision on set-off, then we consider, for the reasons set out above, that they misinterpret the ratio of *Garage Molenheide* as explained in *Teleos* and *Rouse*. We prefer the analysis in the latter decisions.

65. In light of our conclusion that the FTT correctly decided it had no jurisdiction to review the exercise of set-off, it is unnecessary to address the FTT's conclusions on the substance of the question on the assumption that it did have jurisdiction.

Ground 5: Penalty violates Art 6 ECHR

66. Before the FTT, Mr Kishore contended that the penalty was in breach of the right to a hearing 'within a reasonable time' (under Article 6(1) of the Convention) and of the right to 'be informed promptly' of the accusation made against him (under Article 6(3)(a) of the Convention).

67. The FTT dealt with the issue of delay and Article 6 at [184] to [202] of its decision, deciding (at [202]) that Mr Kishore's case that the delay constituted a breach of the Convention was unarguable and should be struck out. It concluded (at [191]) that delay should be measured from "the assessment". It appears, from the fact that the FTT identified the delay (in [192]) as being at least 9 years, that by "the assessment" it meant HMRC's decision in 2007/2008 to refuse repayment of input tax.

68. Delay was relevant, however, only if it was prejudicial (see [192], relying on *AG Reference No 2 of 2001* [2004] 2 AC 72, at [24]). In this respect, it determined, first (at [193]), that any prejudice arose from the time taken to dispose of the *Kittel* appeals which would have occurred even if HMRC had charged the penalty at the moment that it issued the input tax refusal letters in 2007/2008. Accordingly, "the cause of the alleged prejudice was not the lateness with which the penalties were imposed but the time the *Kittel* proceedings took to resolve."

69. Second, the FTT concluded (at [194]) that: (1) insofar as Mr Kishore sought to argue he was prejudiced through lack of funds as a result of HMRC's conduct, it would be abusive for him to advance that argument since he ought to have put that case to the tribunal hearing his application to reinstate the *Kittel* appeals; and (2) insofar as he sought to argue that he was prejudiced through lack of witnesses, that went only to the question of knowledge/means of knowledge and "he cannot now allege that there was no misdeclaration and/or he had a reasonable excuse because … it would be abusive to do so."

70. The FTT saw Mr Kishore's core complaint as being that it conflicted with Article 6 for any penalty to be imposed after determination of liability. It rejected that argument, noting (at [198]) that s77(2) VATA unequivocally permits a penalty to be imposed after liability is determined. The most that Mr Kishore could say was that he

might have taken more active steps to pursue the appeal had he known that he might be penalized. The FTT (at [200]), however, said that would be insufficient since he must be taken to know the law.

Issues before us in UT

71. Both Grounds 5 and 6 arise in the context of the FTT's decision to strike out Mr Kishore's grounds of appeal because they stood no reasonable prospect of success. There was no dispute before the FTT or before us as to the relevant principles. The FTT (at [118]) referred to Lewison LJ's summary of the authorities in *Mellor & Others v Partridge & Anor* [2013] EWCA Civ 477. Where the issue involves a short point of law or construction, in relation to which the court has the necessary evidence and argument, it should "grasp the nettle" and decide the point. On the other hand a court should "hesitate to make a final decision without trial…where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

72. Before us it was common ground that we are not in a position to determine whether, in the context of the *Kittel* appeals, there was in fact unreasonable delay on the part of HMRC, because that involves issues of disputed fact. HMRC's arguments before us, as before the FTT, proceeded on the basis that it was not relevant to consider whether the period of delay was unreasonable because Mr Kishore's arguments were bound to fail for other reasons.

73. Mr Kishore supports the FTT's conclusion that time started to run for the purposes of Article 6 from the issue of the *Kittel* decisions in 2007/8. Before us he maintained the submission that the period of delay from then until the conclusion of the penalty proceedings (currently 13 years) was manifestly unreasonable.

74. In its skeleton, HMRC commented that the FTT's reasoning at [184]-[200] was unimpeachable. Accordingly, it accepted that the starting date was the date of the assessments. In oral argument, however, Mr Foulkes did not accept Mr McGurk's contention that time began to run for the purposes of Article 6 from 2007/2008. He contended it was arguable that it ran only from the date that Mr Kishore was informed of the risk of penalties (which, since there was no prior warning, was the date of the penalty assessments in 2017), but that it was unnecessary to decide this point, since HMRC supported the FTT's conclusions at [193]-[195] that there was no prospect of Mr Kishore's case that he was prejudiced by the delay succeeding.

75. Before addressing the question of prejudice, we should say something about the date upon which time starts to run for the purposes of Article 6.

The reasonable time for the purposes of Article 6(1)

76. In *AG Reference No 2 of 2001* (above) Lord Bingham posed the question (at [26]) when, for the purposes of Article 6(1), does a person become subject to a criminal charge. Applying the decision of the European Court in *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 27 to the UK's procedural system, he said (at [27]):

> As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him. This formulation gives effect to the Strasbourg jurisprudence but may (it is hoped) prove easier to apply in this country. In applying it, regard must be had to the purposes of the reasonable time requirement: to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods. The Court of Appeal correctly held (at p 1872, para 10 of its judgment) that the period will ordinarily begin when a defendant is formally charged or served with a summons, but it wisely forbore (pp 1872-1873, paras 11-13) to lay down any inflexible rule.

77. At [28], Lord Bingham went on to consider a variety of possible starting points in the context of criminal proceedings: interviewing for the purposes of a regulatory enquiry would not meet the test; arrest would also not ordinarily mark the beginning of the period, but an official indication that a person will be reported with a view to prosecution may, depending on all the circumstances, do so. In stating that, ordinarily, time would not begin to run until after a suspect had been interviewed under caution, Lord Bingham took account of the fact that "Code C", made under the Police and Criminal Evidence Act 1984, generally required the charging process to be set in train once an interviewing officer considered that there is sufficient evidence to prosecute a detained person and there was sufficient evidence for a prosecution to succeed.

78. *Eckle* was also considered and applied by the High Court (Jacob J) in the earlier case of *King v Walden* [2001] STC 822. That case concerned penalties imposed on Mr King under s95(1) Taxes Management Act 1970 for fraudulent or negligent delivery of incorrect tax returns (which the court found were classified as criminal for Article 6 purposes), for tax years in the period 1971/72 to 1986/87. The Revenue issued a "Hansard letter" warning of the possibility of a criminal prosecution or determination of civil penalties late in 1987. A determination was reached on the appeal against assessments on 18 November 1991. An appeal against that decision was concluded on 14 January 1993. A further warning that penalties were contemplated was given in January 1994 and penalty determinations were issued on 17 October 1994. The penalty appeal was not resolved until May 2000.

79. Mr King contended that the start date was 1987 (alternatively the date of the tax assessments in January 1989 or the date of the commissioners' decision in 1991). The Revenue contended that the start date was October 1994, the date of the penalty determinations. Jacob J agreed with Mr King, stating (at [90]): "Look at the substance. The Revenue knew what their case for a penalty determination was by the time they wrote the Hansard warning letter. Indeed, the fact that they have contended that the 1991 decision was conclusive of liability to penalties shows that the penalty hearing could have taken place at the same time. The period from then on was avoidable." Since the argument advanced by Mr King was put on the basis of three alternatives, Jacob J's acceptance of it means that it is not entirely clear which date he held to be the start date. His reference to the Revenue knowing what its case was by the time of the Hansard warning letter, however, suggests that he was landing upon that date. That was certainly the date adopted by the ECtHR in its judgment upon Mr King's reference

to it (at [33]): "taking the Hansard warning date of 21 November 1987 as the commencement of the relevant period… The total period is accordingly 13 years, 10 months and 12 days."

80. After considering all the circumstances, Jacob J found the delay was not unreasonable and thus did not violate Article 6(1). The ECtHR, however, held that notwithstanding the deliberate time-wasting by the applicant, the authorities had contributed to the delay "which on any analysis took an excessive length of time" and there had accordingly been a breach of Article 6(1).

81. From a close review of the above authorities, it is clear that they do not explicitly support the FTT's conclusion that the start date for the purpose of Article 6(1) is the date of the HMRC's decision to refuse a repayment of input tax. While it was correct to note (at [187]) that in *King v Walden* Mr King had been warned of the possibility of penalties at about the time of the tax assessments, it was wrong to say (at [188]) that the High Court had taken the tax assessment as the start date for Article 6(1). Instead, as noted above, the event which commenced time running was the warning of potential criminal liability. On the strict application of that principle in this case, time would only start running for the purposes of Article 6(1) on 3 August 2017, the date that HMRC imposed the misdeclaration penalties.

82. We note that Lord Bingham's reasoning *AG Reference (No 2 of 2001)* (above) would appear to support a similar conclusion as to the relevant start date for considering whether a person "charged" is "informed promptly" of the nature and cause of accusations against him under Article 6(3). That is because the question Lord Bingham posed, at [26] of his judgment, was when does a person become subject to a "criminal charge" (according to the autonomous meaning of that phrase) and that phrase is used in both Article 6(1) and Article 6(3).

83. What is not, however, addressed in the case-law is the situation where the prosecuting authorities delay issuing a warning, or as in this case, do not issue any warning before imposing the penalties. It is counter-intuitive that the authorities can avoid the consequences of Article 6(1) and (3) altogether by refraining from issuing any warning of potential liability for penalties. That is particularly so where HMRC's own guidance requires a person to be told that they may be liable to a penalty as soon as something wrong is found (see [29] above). Although this guidance post-dates the repeal of s63 of VATA, it was expressly given "in order to protect the person's rights under Article 6", which rights subsisted throughout the relevant time-period in this case.

84. This is not a point that we need to address in this case, however, given HMRC's acceptance in its skeleton argument that the FTT's decision on the point was correct (and its submission in oral argument that even if it was not correct it was unnecessary to decide the point). Accordingly, we will proceed for the purposes of this appeal on the assumption that the start point for Article 6(1) delay purposes coincides with HMRC's decisions of 13 July 2007 and 28 March 2008 to refuse repayment of input tax.

Was the delay potentially prejudicial?

85. In our judgment, the FTT's first ground for concluding that there was no arguable case of prejudice (that is, because the prejudice was caused by the time it took to resolve the *Kittel* appeals, not the lateness with which the penalties were imposed) reveals an error of law. Once it is accepted (which was the FTT's starting point) that the relevant period commenced in 2007/2008, then on the assumption that there was unreasonable delay on the part of HMRC between then and the date of final determination of the penalties appeal, we do not think that the consequences of that delay can be side-stepped by contending that the delay occurred in the course of establishing whether there was any entitlement to a repayment of input tax (as opposed to the lateness of imposing the penalties). That, it seems to us, is the logical consequence of adopting, as a start date for the purposes of Article 6, a date when the only proceedings on foot were those relating to the underlying tax assessment: delay *in the course of those proceedings* can constitute unreasonable delay relevant to the later penalty proceedings for the purposes of the appellant's rights under Article 6.

86. We address the question of abuse of process under Ground 6 below. It follows from our decision on that question that we consider there was also an error of law in the FTT's second reason for its conclusion under Ground 5 (that it would be an abuse of process for Mr Kishore to argue that he was prejudiced in the *Kittel* appeals through lack of funds). Our reasoning is set out under Ground 6.

87. For the above reasons, we disagree with the FTT's conclusion that Mr Kishore's case that his Article 6 rights were infringed due to unreasonable delay which has prejudiced him has no prospect of success. As noted above, we are not in a position to resolve the factual questions whether there was indeed unreasonable delay and whether that prejudiced Mr Kishore. Those matters will need to proceed to trial.

88. Mr Kishore also contends that the failure to impose the penalties until August 2017 was itself a breach of Article 6(1). Given the FTT's conclusion (which we assume to be correct for the purposes of this appeal) that time for Article 6 purposes started to run from the *Kittel* decisions in 2007/8, we do not think it is relevant to focus separately on the date the penalties were imposed. That is because the relevant question is whether there was unreasonable delay between 2007/8 and the *determination* of the penalty appeal.

89. The point can be tested by reference to a hypothetical case where a warning of possible penalty liability is given at the same time as the underlying tax assessment and where the resolution of the appeal against the tax assessment takes a number of years but without any unreasonable delay on the part of HMRC. In that case, we do not think that the fact that a penalty was not imposed until after the determination of the tax appeal would give rise to a breach of Article 6.

90. The FTT correctly noted at [189] that while the High Court in *King* recommended penalties be assessed at the same time as the tax assessment, there was nothing in there to suggest it was unlawful for the penalties to be assessed after the tax assessments.

91. Consistently with that, as the FTT noted, s77 clearly permits HMRC a two-year period after the conclusion of the underlying tax appeal within which to issue a penalty assessment. The section is unambiguous and there is no basis for reading it down in reliance on Article 6. We consider, in agreement with HMRC, that there is in any event a sound basis for this extended limitation period, given that HMRC has a choice of penalties (a s63 VATA misdeclaration penalty or a s60 dishonest evasion penalty) depending on the degree of culpability of the taxpayer. At least in some cases (the present case being one) that degree of culpability is not established until after the underlying tax appeal has been concluded. Mr McGurk's contention that s60 (dishonest evasion) cannot have been in issue in this case because the penalty notices specifically disavowed dishonesty is beside the point, because this says nothing about whether a dishonest penalty might have been a possibility prior to the conclusion of the *Kittel* appeals. We note that HMRC's decisions dated 13 July 2007 and 28 March 2008 contended in the alternative that Mr Kishore knew or that he ought to have known of the fraudulent nature of the fraudulent scheme to defraud the revenue. At that stage, therefore, both options in terms of penalty remained open.

Ground 6: FTT wrong to accede to strike-out

92. The central issue under this ground is the appellant's contention that he is facing a criminal penalty but being denied the opportunity to defend it because the question of reasonable excuse is deemed to have been disposed of (against him) as a result of the strike out of the *Kittel* appeals. It is contended that the FTT was wrong to conclude that it would be an abuse of process for Mr Kishore to advance a case based on reasonable excuse. It is further contended that this constitutes a violation of his Article 6 rights because it results in him being unable to defend the criminal charge.

93. We address first the question whether the FTT erred in concluding that there was an abuse of process.

Law on abuse of process

94. In *Henderson v Henderson* 3 Hare 100, 114-115, Sir James Wigram said:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

95. The modern approach to the *Henderson* principle is that set out by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at p.31:

> "… *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

96. It follows from the fact that the question of abuse requires a "broad, merits-based judgment which takes account of all the facts of the case" that an appellate court should be slow to interfere with that overall judgment: see *Proctor & Gamble* [2009] EWCA Civ 407 at [9]-[11] and the authorities there referred to. While the court there was concerned with a value judgment in the context of a statutory test which required "a multi-factorial assessment based on a number of primary facts", Jacob LJ referred to his own decision in *Rockwater v Technip* [2004] EWCA Civ 381 where, at [73], he noted the importance of appreciating the kind of issue to which the principle applied, citing Lord Hoffman in *Designer Guild v Russell Williams (Textiles) Ltd* [2001] IP & T 277:

> "…because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle" .

97. The FTT first concluded (at [135], in Mr Kishore's favour) that in some instances lack of funds, particularly where the other party was to blame, might mean that it was not abusive to re-litigate a matter that had already been decided. Accordingly, since there was a disputed issue of fact as to whether the reason the *Kittel* appeals were not pursued was because the appellant ran out of funds and whether this was the fault of HMRC, this issue would ordinarily have to go to trial.

98. The FTT then concluded, however, that the penalty appeal should nevertheless be struck out on the basis of a second, and different, abuse of process. This involved the following steps (with references to the paragraphs in the FTT Decision):

> (1) The appellant made an application to reinstate the *Kittel* appeals. One of the issues in the reinstatement application was the reason why the appeal was struck out in the first place [136];
>
> (2) This gave rise to the question whether it would be abusive for the appellant to litigate for a second time (in the Penalties Appeal) the issue of why the *Kittel* appeals were struck out [137];
>
> (3) Although the tribunal, on the reinstatement application, was required to (and did) address the question why that application was made late, it was impossible to see that as entirely separate from the question why the unless order was not complied with. That was because the reinstatement application had to be made within 28 days of the strike out "so in effect the question before the Tribunal in 2016 was why Mr Kishore did nothing to progress the litigation from around mid-2015 to the application for reinstatement in May 2016, which is the same question that this Tribunal would have to address if it is to consider the question of whether its abusive to allow Mr Kishore to re-litigate the issues in the *Kittel* appeal" [138];
>
> (4) Moreover, "the explanation now to be given for the strike out was that it was long-term shortage of funds to progress the litigation due to HMRC's long-term behaviour in (allegedly) stretching out the *Kittel* litigation over the previous 9 years. That explanation only makes sense if it continued over time and indeed Mr McGurk's position was that it continued to the present day" [138];
>
> (5) It was fanciful to say that this was not abusive, first because the appellant unsuccessfully appealed the reinstatement decision to the Upper Tribunal and allowing him to put virtually the same case again would be a second challenge to the same FTT decision and, second, the reason and evidence given by the appellant to the tribunal dealing with the reinstatement application for the failure to progress the litigation from mid-2015 was not the same as he now intends to give. His evidence in the reinstatement application was that he had assumed that his solicitors were dealing with the

> appeals; he did not put the case that he was unable to progress the appeals due to lack of funds or that the lack of funds was the fault of HMRC [140].

99. We consider, in agreement with Mr McGurk, that the FTT's reasoning contains the following two errors of law.

100. First, we consider that the FTT adopted too narrow an approach to the *Henderson* principle in concluding that, if Mr Kishore could not contend in the penalty appeal that the *Kittel* appeals were struck out through lack of funds due to HMRC's conduct, that was fatal to his contention that it was not abusive to advance a reasonable excuse defence in the penalty appeal. As was common ground before us, *Johnson v Gore Wood* mandates a broad merits-based test, requiring an analysis of all of the circumstances in deciding whether it would be an abuse of process to relitigate a point that could have been litigated on a previous occasion between the same parties. The FTT's focus on just one issue (that lack of funds led to the strike out of the *Kittel* appeals) was at the expense of other arguments advanced by Mr Kishore, including that it would not be abusive to advance arguments in the penalty appeal relevant to reasonable excuse, even though they were also relevant to the issue of knowledge in the *Kittel* appeals, in circumstances where throughout the *Kittel* appeals there had been no intimation by HMRC of an intention to make a penalty assessment. Mr Foulkes for HMRC accepted that the FTT did not separately consider this contention in its evaluation exercise under *Johnson v Gore-Wood*.

101. The relevance of lack of intimation of a possible penalty until after determination of the underlying tax appeal arose in *HMRC v Lindsay Hackett* [2016] UKFTT 781. There, the FTT had to consider, amongst other matters, whether it was an abuse of process for the director of a taxpayer company to litigate a personal liability notice based on a deliberate inaccuracy penalty imposed on the company. The *Henderson* abuse argument arose because although the company, in relation to *Kittel* liability, had litigated one VAT period and lost, it had also, in relation to other VAT periods, withdrawn its appeals allegedly due to financial difficulties caused by HMRC.

102. The FTT in *Lindsay Hackett* concluded (at [41]) that the *Henderson* principle was engaged, notwithstanding that the tax appeal concerned the company and the personal liability concerned the director, because there was a sufficient degree of identification between the two. It noted (at [44]) that it was relevant that at the time the company appeals were withdrawn the director was unaware that he might be exposed to a penalty assessment which had not then been made on the company. At [45], the FTT said this:

> "To fix Mr Hackett with deemed findings in respect of those appeals, in the circumstances where he is appealing against a personal liability which has arisen only after those appeals were withdrawn would in my judgment be contrary to the interests of justice. Nor do I consider that requiring HMRC, on whom the burden of proof is accepted to fall in this appeal, to prove relevant facts which have so far not been substantively determined could be regarded in any sense as oppressive."

103. This decision is not binding upon us, but we agree that the absence of any notification of an intention to impose a misdeclaration penalty on Mr Kishore prior to the strike out of the *Kittel* appeals is at least a relevant consideration to the question

whether it would be abusive for him to contend that he had a reasonable excuse under s63 of VATA. That is particularly so in light of the length of time it took to resolve the *Kittel* appeals.

104. The FTT's response (in this case) that Mr Kishore must be taken to know the law, so that he should have appreciated the possibility of a penalty being imposed is not in our judgment a sufficient answer to this point. There is a difference between (i) being taken to know that that a finding of actual or constructive knowledge of the fraudulent transactions in the *Kittel* appeals would give rise to the possibility of a penalty being imposed, and (ii) the appreciation that it was HMRC's intention to impose such a penalty. Moreover, "the law" of which someone in Mr Kishore's position is taken to have knowledge would be informed by the specific HMRC guidance requiring a taxpayer to be warned at an early stage of potential liability to a penalty. While that related to the penalty regime relating to post-2008 VAT periods (see [29] above), it was stated to reflect rights under Article 6 which would have existed throughout.

105. In response to Mr Kishore's suggestion that he might have acted differently had he known earlier of HRMC's intention to impose penalties, HMRC said that it was difficult to believe that his decision to concede a £22 million appeal would have been affected if he knew there was the risk of a £2 million misdeclaration penalty. While there is merit in that argument, we do not think that the likely actions of Mr Kishore, in the counter-factual world where HMRC had warned him of the likelihood of a penalty being imposed at an early stage, can be determined on a strike-out application. It is a question of fact which would need to be determined at a trial.

106. We therefore conclude the FTT erred in law in adopting too narrow approach to the evaluation exercise and failed to take into account a material factor.

107. Second, we consider that the FTT erred in finding a second abuse of process by reason of Mr Kishore's failure to argue, in the reinstatement application, that the Kittel appeals were struck out for lack of funds.

108. As we have noted above, the application in fact made to the FTT (Judge Richards) on 28 October 2016, was for an extension of time within which to make a reinstatement application. Judge Richards said that applying the "traditional" guidelines set out in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), he would refuse to allow the late application. Taking each of those guidelines in turn, he concluded that: (i) the purpose of the time limit was to ensure finality in litigation; (ii) the length of the delay was over seven months; (iii) no good explanation had been given by Mr Kishore for that delay; (iv) if he reinstated the appeal he was concerned that Mr Kishore would still not comply with the Fairford directions, noting that Mr Kishore had admitted that he had not yet taken any steps to do and that he was still without legal representation to enable him to pursue the appeals; and (v) the consequence of refusing to extend time would be that Mr Kishore would lose any prospect of recovering over £22 million but that this was counterbalanced by Mr Kishore's failure to take any action to pursue the appeals since mid-2015 which was not indicative of a serious desire to pursue that sum. He then said he was reinforced in that conclusion applying the Court of Appeal's approach in *BPP Holdings Ltd v Revenue and Customs Commissioners*

[2016] EWCA Civ 121 (which mandated applying by analogy the rigorous approach a court would apply on an application for relief from sanctions under the CPR): Mr Kishore had not complied with the time limit, he had not provided any good reason for failing to do so, and he had not, before the expiry of the time limit, applied for an extension.

109. While (as we explain below) the question why the *Kittel* appeals were struck out was a potentially relevant factor in the overall discretion to be exercised under the *Data Select* guidelines, it was not an issue that was squarely raised for decision by Judge Richards, and not one that he in fact determined.

110. We do not think that either of the reasons given by the FTT (at [138]) to justify its conclusion that the question at issue in the reinstatement application was not an "entirely separate" issue is correct. Its first reason was that, since the reinstatement application had to be brought within 28 days of the strike out of the *Kittel* appeals, the question before the tribunal was why Mr Kishore had done nothing to progress the appeal since mid-2015 and that was the same question that would have to be addressed in deciding whether it would be abusive to re-litigate issues in the *Kittel* appeals. This confuses, however, two separate time periods. In the application to extend time to make the reinstatement application, the only relevant time period was the period *after* the *Kittel* appeals were struck out whereas, in resolving the issue of abuse, the focus is on the action (or more properly the inaction) of Mr Kishore in the period leading up to (and thus necessarily prior to) the strike out of the *Kittel* appeals.

111. We similarly think that the FTT's second reason (that the long-term shortage of funds only made sense if it extended over a long period of time) does not distinguish adequately between the different time periods involved.

112. We also consider that the FTT erred in concluding (at [140]) that, because Mr Kishore applied for permission to appeal Judge Richards' decision to the Upper Tribunal, "allowing him to put the same case again would be a *second* challenge to the FTT decision" (emphasis added). His application for permission to appeal to the Upper Tribunal was itself out of time and, for this reason, his application was not admitted. Even if it had been, since the appeal was against the FTT's refusal to allow a late application for reinstatement, the application for permission involved no more consideration of the reasons why the *Kittel* appeals had been struck out than (as explained above) did the application to Judge Richards.

113. The essential submission made by Mr Foulkes, for HMRC, was that because the circumstances in which the *Kittel* appeals were struck out were at least a relevant consideration on the reinstatement application, and because it was up to Mr Kishore to explain those circumstances, his failure to do so gives rise to an abuse of process pursuant to the *Henderson* principle.

114. We accept that the circumstances in which the *Kittel* appeals were struck out were a potentially relevant consideration to the overall exercise of discretion. They were relevant to the fifth of the guidelines in the *Data Select* case (set out above), namely the consequences of refusing to extend time. On this aspect, Judge Richards discounted

the fact that the consequence would be the loss of a claim worth over £22 million because Mr Kishore had demonstrated inertia in pursuing the *Kittel* appeals. It would have been relevant in order to answer this point to say that he was *unable* to pursue the appeal due to lack of funds.

115. The most that this establishes, however, is that lack of funds was a *factor* that was relevant to the exercise of discretion within the reinstatement application.

116. In considering whether the failure to identify this factor in the reinstatement application renders it abusive for Mr Kishore now to rely on lack of funds to justify re-litigating issues that were raised in the *Kittel* appeals, we return to first principles.

117. First, as was emphasized by Lord Bingham in *Johnson v Gore Wood* (in the passage quoted above) the fact that Mr Kishore *could* have raised a point does not mean that he should have done so. It is still necessary to consider, in light of all the circumstances, whether it would be abusive to raise it now.

118. We consider that an important consideration is the relevance of the point (that was not raised) to the issue that was determined in the first proceedings and its likely impact on the determination of that issue. As we have already pointed out, the fact (if it is so) that the *Kittel* appeals were struck out as a result of Mr Kishore's lack of funds was a relevant factor to weigh in the balance as part of the fifth of the guidelines derived from the *Data Select* case.

119. We consider, however, that its relevance to the issue that had to be determined on the application (namely whether to extend time so as to permit the late application at all) would have been peripheral at best. That is because one of the factors which Judge Richards expressly took into account was the unlikelihood of Mr Kishore pursuing the *Kittel* appeals in the event that they were reinstated. As to this, he noted that Mr Kishore had taken no steps to comply with the *Fairford* directions notwithstanding the passage of many months since the appeal had been struck out, and that Mr Kishore remained without legal representation.

120. In other words, even if Mr Kishore could show that he had failed to pursue the appeal due to lack of funds with which to obtain legal representation, it was evident that he was in no better position to do so at the time of the reinstatement application. There is accordingly a real likelihood that the argument that the appeal was struck out as a result of his lack of funds would not have had a material impact on the outcome. This is an important factor in deciding whether a point which *could* have been raised *should* have been.

121. On the alternative analysis referred to by Judge Richards (following the approach of the Court of Appeal in *BPP Holdings*) the argument had no relevance at all.

122. In those circumstances, we consider that the FTT erred in striking out the penalty appeal on the basis that there was no more than a fanciful defence to the claim that it was abusive for Mr Kishore to re-litigate in the penalty appeal issues that were live in the *Kittel* appeals.

123. Since, as a result of our conclusions on the first aspect of Ground 6, the penalty appeal will proceed to trial, there is no need to consider whether it would alternatively have been a breach of Article 6 for it to be have been struck out. Mr McGurk also advanced a number of other points in support of Ground 6 appeal, including the significance of Mr Kishore's lack of representation and that the FTT impermissibly conducted a mini-trial. In light of the conclusions we have already reached, we do not need to address these.

Conclusion

124. For the above reasons, we conclude that the FTT erred in striking out those of Mr Kishore's penalty appeal grounds which it did on the basis that there was no arguable case that Mr Kishore's Article 6 rights were breached as a result of unreasonable delay and on the basis that it was an abuse of process for Mr Kishore to advance a defence of reasonable excuse. We otherwise dismiss the appeal on Grounds 1 to 4.

125. We remit the matter to the FTT to make the necessary directions for Mr Kishore's penalty appeal to be progressed towards a substantive hearing before the FTT.

Disposition

126. We allow Mr Kishore's appeal in part.

MR JUSTICE ZACAROLI

JUDGE SWAMI RAGHAVAN

RELEASE DATE: 22 July 2020