UT Neutral citation number: **[2022] UKUT 00139 (TCC)**

UT (Tax & Chancery) Case Number: UT/2021/000197

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Remote video hearing (treated as taking place in London)

Judgment given on 18 May 2022

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Between

HBOS PLC & LLOYDS BANKING GROUP PLC

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Amanda Brown QC, instructed by KPMG Law

For the Respondents: Eleni Mitrophanous QC, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

DECISION

Introduction and background

1. This decision deals with the appellants' objection to HMRC raising two particular issues in its Rule 24[1] Response to the appellants' notice of appeal. The appellants argue HMRC ought to have sought permission to appeal from the FTT for these issues, whereas HMRC maintain no such permission is required. The substantive appeal hearing in this matter is listed for October this year.

2. The full FTT decision under appeal is published as *HBOS Plc and Lloyds Banking Group Plc v HMRC* [2021] UKFTT 0307 (TC). The appeal related to HMRC's liability for interest under s78 Value Added Tax Act 1994 ("VATA 1994") (Interest in certain cases of official error) on VAT bad debt relief ("BDR") claims arising out of the appellants' car hire purchase business supplies in a period during which claims for BDR had to comply with certain conditions. One of these, ("the property condition") was subsequently found to be unlawful under EU law and disapplied in *GMAC UK v HMRC* [2016] EWCA Civ 1015.

3. HMRC paid the appellants interest from the dates the appellant claimed BDR, up until the dates HMRC paid the BDR, on the basis the appellants had suffered delay in receiving the BDR due to HMRC's error in insisting the property condition had to be fulfilled. The appellants argued they were entitled to interest from dates based on return dates linked to a statutory waiting period, or if later, the dates the debts were written off, which were many years before any claim for BDR had been made ("the earlier dates"). The agreed issue put to the FTT was whether interest arose from the claim dates (as HMRC argued) or the earlier dates (as the appellants argued).

4. Section 78 VATA 1994 provides, so far as relevant, as follows:

> "**78 Interest in certain cases of official error**
>
> (1) Where, due to an error on the part of the Commissioners, a person has—
>
> (a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or
>
> (b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or
>
> (c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or
>
> (d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,
>
> then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section."

5. The appellants' claim for interest from the earlier dates was based on s78(1)(c) or (d), it being common ground that a) or b) in that section did not apply. The FTT considered the enactment of the property condition was not an "error on the part of the Commissioners" for the purposes of s78(1) because it was an act of Parliament rather than of HMRC. It also found the reason the appellants did not claim BDR earlier was <u>their belief</u> that the property condition was legally valid. Section 78 was not engaged on the facts as there was not a causal connection between an "error on the part of the

[1] Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Commissioners" and one of the outcomes in 78(1)(c) or (d) (the "due to…" requirement in s78(1)) ([88] to [100]). The FTT went on (at [101] – [103]) to consider the other aspects of s78 that were argued at the hearing on the "hypothetical basis" that the "due to" requirement was satisfied, rejecting the appellants' case on 78(1)(c) but accepting it on 78(1)(d). The FTT, having satisfied itself its interpretation and application of s78 was in keeping with the relevant EU law principles, and that no settlement agreement had arisen dismissed the appellants' appeal against HMRC's decision to pay interest from the dates of claim (and not earlier).

6. HMRC had also raised an alternative argument that, even if s78(1)(d) was satisfied, the applicable period would begin later than the earlier dates because it was likely the appellants would have delayed claiming while discussing attribution of consideration issues regarding the finance and goods elements of the hire purchase supplies ("the Further Issue"). The FTT indicated that it did not determine the Further Issue as it had determined the agreed issue in HMRC's favour (although it is part of the appellants' case in the current application, that the FTT nevertheless did make an implicit determination rejecting the Further Issue).

7. In December 2021, the appellants filed a notice of appeal in the Upper Tribunal setting out five grounds in relation to which the FTT had granted permission. These included that the FTT erred in law in its conclusions regarding the enactment of the property condition not being an error of the Commissioners, consistency with the EU law principles, and accordingly that 78(1)(d) did not apply, and also in its conclusion that 78(1)(c) did not apply.

8. On 11 January 2022, HMRC filed its Rule 24 Response which included:

> (1) points alleging the FTT erred in law in its interpretation of s78(1)(d), and
>
> (2) arguments, made in the alternative, based on the Further Issue, that claims for interest should start from dates later than the earlier dates.

9. These are the two points which the appellants submit HMRC ought to have first sought permission from the FTT for, in accordance with the principles discussed further below.

Legal principles – when is permission to appeal required?

10. In *Steven Price & others v HMRC* [2015] UKUT 164 (TCC), the appellants, as in this case, objected to HMRC raising certain grounds on the basis HMRC had not sought permission from the FTT. The UT (at [31] to [38]) set out the general principles from the relevant case-law and summarised the relevant statutory background (s11 Tribunal Courts and Enforcement Act):

> "…By s 11(2) any party to a case has a right of appeal. By s 11(3) that right may be exercised only with permission. By s 11(1) a right of appeal means a right to appeal to the UT 'on any point of law arising from a decision made by the [FTT]'….

11. The UT explained, by reference to the Court of Appeal's judgments in *Lake v Lake* [1955] 2 All ER and *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd; Cie Noga d'Importation et d'Exportation SA v Government of the Russian Federation* [2002] EWCA Civ 1142, a decision in which the Court examined the basis of *Lake v Lake*, that the starting point, as a matter of general principle, was that:

> "an appeal lies against a judgment or order, not against the reasons given by the judge for [the judge's] judgment" (*Price* [31]).

12. The basis for this principle was not tied to the words "judgment" or "order" (the terms used in the RSC (Rules of Supreme Court) Order dealing with the Court of Appeal's jurisdiction in *Lake v Lake*) but a broader one as to the nature of an appeal:

> "…the court only as jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all". (*Waller LJ in Noga at [27] whose analysis on this, although in a dissenting judgment, was agreed with by the majority as explained in Price* [33])

13. The UT accepted that "at first glance" the language of s11 TCEA "might be thought to give a right of appeal even to a party successful below". But it noted this argument was rejected by May J in the Employment Appeal Tribunal in *Harrod v Ministry of Defence* [1981] ICR 8 ([11]- [12]) in relation to the indistinguishably worded provisions relevant to appeals before the EAT.

14. The UT in *Price* continued (at [35]):

> "The corollary of the fact that a party cannot appeal if the decision below is in [the party's] favour is that a respondent to an appeal who seeks to uphold the decision below, but on different grounds to those relied on by the lower court or tribunal, does not need permission to do so."

15. Applying the principles to the facts, the UT pinpointed the need to identify what decision, in the above sense, the FTT had made ([39]) from the single document headed "Decision" that was both the decision notice, and which contained full findings of fact and reasons for the decision, as required by the FTT Rules. The facts of the *Price* concerned a tax avoidance scheme designed to create capital losses through large acquisition costs (£6 million) compared with small amounts on disposal. The FTT, disagreeing with both parties' positions, considered the relevant acquisition of shares was an arm's length bargain and that a market value provision for acquisition cost did not apply (labelled "Decision 1" in the UT's decision on appeal). Give the acquisition cost was not market value, the FTT went on to decide that cost, finding it was £600 (rather than the £6 million the taxpayer's scheme envisaged) because the £6 million was not given "wholly and exclusively" for the share acquisition under the relevant legislation. This was labelled "Decision 2" in the UT's decision. The most the loss could be was therefore £48 (the difference between £600 and the £552 received on disposal).

16. In the UT, the taxpayer argued HMRC needed the FTT's permission to appeal various grounds in relation to "Decision 1" because, if the FTT's decision were encapsulated in a notional order, that would contain a number of different declarations, one of which would be "Decision 1": that the taxpayer acquired the shares by way of an arm's length bargain. The UT rejected this argument holding the relevant decision was that "the amount of loss available to [the appellant] for offset against other income was £48" ([41]). That conclusion did not rest simply on textual analysis; an important consideration was what issues were referred for decision. That entailed looking at what was referred to under the statute giving jurisdiction – in that case the Taxes Management Act 1970. Upon analysis of the provisions the appeal was brought under, the FTT's jurisdiction, and the FTT's powers, the issues were ([46]) i) whether the appellant's "claim to offset capital allowances should have been allowed (the FTT decided it should) and ii) if so, the extent of allowance that was appropriate (the appropriate allowance was limited to £48). The UT went on to consider whether HMRC's ground sought, impermissibly if this was done in the Respondents' notice, to argue for a different result, but was satisfied HMRC was only seeking to affirm the decision ([48] – [55]).

17. *HMRC v SSE Generation Limited* [2021] EWCA Civ 105 concerned an appeal against a closure notice and amendment related to number of disputed capital allowance items in a hydro-electric project. These included various technical components: headrace, tailrace, and different sorts of conduit, and the issue of whether certain elements could be described as aqueducts for the purposes

of the relevant legislation. HMRC successfully argued that the appellant needed to have sought permission from the FTT in relation to the on-site fabrication of one particular item, a "cut and cover" conduit.

18. The Court of Appeal (Rose LJ, as she then was, with whom Popplewell and David Richards LJJ agreed) agreed with HMRC's submission that the grounds referred to in Rule 24 were "the grounds on which the party relies in its character as a respondent to appeal". The judgment continued (at [77]):

> "Certainly, if the respondent succeeded on **an issue** before the FTT because the FTT accepted one of a number **of arguments while rejecting other arguments for the same result**, the respondent can raise those unsuccessful arguments if **its** success is challenged on appeal by the opposing party. But the respondent cannot raise **an issue** which it lost before the FTT unless it obtains permission to appeal for itself. (*the words in bold in this extract and below are emphasised by the appellants in support of an interpretation they advocate for to explain why HMRC need to have applied for permission to appeal*)

19. At [78] the Court of Appeal set out the appellant's argument that it would not have been worth its while appealing the comparatively small amount of the cut and cover conduit issue, unless HMRC were appealing too. The taxpayer pointed out there was no mechanism for an opposing party to be notified of the other's appeal, and that once they found that out they would then be out of time.

20. The judgment continued:

> "[79] The procedure established by section 11 TCEA, the FTT Rules and the UT Rules is different from the procedure which operates under the Civil Procedure Rules as set out in CPR 52.13. In that rule, a respondent may serve a respondent's notice which seeks permission to appeal from the appeal court as well as asking the appeal court to uphold the decision of the lower court for reasons different from, or additional to, those given by the lower court. The respondent does not therefore have to seek permission first from the lower court within the time limit set for an initial appeal. According to the different procedure adopted under the tribunal rules, the respondent cannot seek permission to appeal in the response notice served under rule 24 of the UT Rules. A respondent in the position of SSE which, **once an appeal is on foot, wants to reverse a point decided against it in the FTT must apply for permission to the FTT**. If the time limit for doing so has expired, it must request an extension of time… At that stage the FTT will consider whether the proposed appeal meets the test for the grant of permission and whether time should be extended. The latter point will require consideration of how far the respondent's appeal will enlarge the scope of the appeal and whether it is consistent with the overriding objective to grant permission. The fact that the respondent's application would open up several new fronts in the appeal leading to a longer and more complicated hearing, does not rule out the grant of permission. The original appellant is not entitled to insist that the scope of the appeal remains within the limited compass of the grounds that it has raised... A similar issue was considered by the Upper Tribunal in [*Price*]. I respectfully agree entirely with the analysis and reasoning set out there.
>
> [80] In considering whether a point raised in a respondent's notice can only be made if permission to appeal is granted, one must identify what decision of the FTT is being challenged. The outcome in relation to the 'cut and cover' conduits was the consequence of the Upper Tribunal having identified an error of law in the FTT's interpretation of the word 'aqueduct' in List B Item 1. That issue was before it because the grounds of appeal raised by HMRC in its appeal from the FTT to the Upper Tribunal challenged the FTT's decision that the headrace was not an aqueduct. In its response to the appeal filed with the Upper Tribunal, SSE submitted that the FTT should have

> concluded that the conduits and tailraces were not aqueducts. The conclusion that the drill and blast conduits, the uncovered channel conduits and the headrace are not aqueducts **leads to the same result** as the FTT arrived at for other reasons - the expenditure on them is allowable in full. Applying the narrower definition of 'aqueduct' to the 'cut and cover' conduits leads to **a different result** because the FTT allowed only part of the costs. **The decision challenged here is not as to the meaning of the word 'aqueduct' but as to whether HMRC's closure notice was correct** in disallowing the capital expenditure incurred on the 'cut and cover' conduits. The Upper Tribunal's decision increased the amount of allowable expenditure but that result could only be achieved if SSE had sought permission to do better than the partial allowance. No such permission had either been sought or granted and in my judgment HMRC are right to say that the Upper Tribunal erred in concluding at [161] that the expenditure was recoverable in full."

21. On behalf of the appellants here, Ms Brown argues there are two possible interpretations of *SSE*. One, with which HMRC basically agree, is that because SSE was unsuccessful as to the result of a part of its appeal (such that in part HMRC's closure notice conclusions and amendments were maintained), SSE could not appeal that part or result without first obtaining permission. The second interpretation, is that SSE could not raise in a Respondent's Notice any issue or point (as distinct from an argument) on which SSE had been unsuccessful without first obtaining permission. Which interpretation is right matters in this case because if the first interpretation is correct, then the appellants accept HMRC do not need permission to raise the s78(1)(d) point.

22. In agreement with HMRC, I consider the second interpretation above is not correct. In my view *SSE* does not purport to set out, or set out, new principles regarding when something must be raised by way of an appeal and when it therefore requires permission. The court in *SSE* agreed "entirely with the analysis and reasoning" set out in *Price*. Although that agreement came at the end of [79] it must, in my view, given the context, relate to what is later said at [80] because it was the issues referred to in [80] which were covered in *Price*. The preceding contents of [79]: the comparison with RSC Order process, the need to analyse, when considering permission whether scope of appeal enlarged, by contrast, were not covered in *Price*. Paragraph 79 (aside from the endorsement of *Price*) deals with the point raised in [78] that a party may not want to go to the trouble, given the amounts involved, of making an appeal on a point it is entitled to appeal without knowing if the other is appealing. In [79] the Court of Appeal explained that such a party nevertheless has to make an application for permission to appeal, albeit a late one.

23. Paragraph 77 simply emphasises that the grounds referred to in the provisions on response are grounds raised in the character of respondent. It does not alter the need to consider the prior question of whether a ground must be raised by a party by way of appeal because it is an issue on which the party lost. The references in [77] to "issue", which the appellants rely on in support of their second interpretation, must, as Ms Mitrophanous for HMRC points out, be read in the light of what the Court later set out at [80] regarding the step of analysing the "decision". That step reflects what was said about the case-law authorities in *Price*.

24. The importance of identifying the decision of the FTT, in considering whether permission to appeal was needed was also subsequently noted in the UT's analysis of *SSE* in *Fanning v HMRC* [2022] UKUT 21 (TCC) ([28(2)]). The UT also observed (by reference to [77] of *SSE*), that if a respondent's ground was seeking a different decision that would likely need permission to appeal. That point echoed the same point made in *Price*, although the UT did not specifically refer to that case. In *Fanning*, the UT considered HMRC could raise arguments on which it had been unsuccessful in its Respondents' Notice. It identified the FTT decision had concerned the correctness of HMRC's discovery assessment, and that HMRC were entirely successful on that ([29]).

25. There is also no difficulty, contrary to Ms Brown's submission for the appellants, of consistency with s11 TCEA's reference to a right of appeal on "any point of law". The appellants argue it is a powerful aid to construction that Parliament could have chosen to give a right of appeal against a decision or judgment, but did not. However, the relevant restriction on when someone can appeal, as explained in the case-law, stems from the nature of an "appeal" (which notion itself, according to authority, incorporates what the appeal is against: the unsuccessful decision). As set out in *Harrod*, cited in *Price,* that means only unsuccessful parties in the decision (to be identified as per the guidance given) can appeal. If they do, then the reference in s11 makes clear the appeal must be on a point of law (as opposed, for instance, on a point of fact).

26. A further point of principle arises on the facts of this application regarding a successful party raising grounds which relate to reasoning and findings given by the FTT in the alternative on the FTT's premise that the decision it has made is wrong. None of the authorities *Price*, *SSE* or *Fanning* specifically address this situation. HMRC are right, in my view, to point out that the structure of the procedural rules surrounding applications for permission to appeal in the FTT under Rule 39 – which mean that a party must apply for appeal without knowing whether, and if so what appeal, the other party is bringing - indicate that the question of whether a ground is one that requires permission must be capable of being answered without any assumption as to whether the opposing party is appealing.

27. However, requiring a party who has won on the decision the FTT did make, but lost on the alternative, to apply for permission to appeal to the FTT regarding grounds on the alternative decision would require that party to apply on the assumed basis the other party was appealing. It would not be a ground of appeal that stood in its own right. It would also be a ground which was inevitably prefaced with the would-be appellant's support for the decision which the FTT did make. To insist that this kind of ground required permission would go against the principle that an appeal is something brought by the unsuccessful party to the decision. Also, insisting such a ground required permission would imply it was a ground in relation to which permission was capable in principle of being granted. If it were granted, it would result in an appeal proceeding before the UT on a hypothetical basis, namely that the decision the FTT did in fact make, was wrong. As Ms Mitrophanous points out, the basis why such appeals are not entertained is the same reason why tribunals do not entertain appeals where the appellant is content with result but seeks to make an appeal because it disagrees with the tribunal's reasoning. The appeal would be academic.

28. Another way of understanding the conclusion that permission is not required in these circumstances is to recognise that when a tribunal gives views on how it would have concluded the decision, on the hypothesis that it was wrong in the decision it did make, these views, by definition would not be part of the decision (identified in accordance with the relevant principles). The fact the party was unsuccessful in relation to the alternative views would not give rise to a right of appeal in its own right.

29. The above principles may be summarised as follows:

(1) Appeals lie against the decision, (as identified below).

(2) To identify the decision, one needs to look at the tribunal's jurisdiction and issues put before the tribunal.

(3) A party can only appeal against the decision when it is unsuccessful.

(4) A party who was successful in the decision cannot appeal reasons in that decision that went against it.

(5) It follows from 3) and 4) that a successful party to the decision, as properly identified, cannot appeal other findings or reasoning which were not even part of the reasons in that decision. This includes views of the tribunal on how it would have concluded the decision on the hypothesis that it was wrong in the decision it did make. By definition those are not part of the decision so it does not matter the party was unsuccessful on those.

30. Further to my invitation on the significance, if any, on the changes to Rule 24 of the UT Rules (the consultation for which was flagged by the UT in *Fanning*) that had come into force on 6 April 2022, neither party suggested the changes apply to HMRC's response in this case, which was filed prior to the commencement date. Nor was it suggested that the changes altered the underlying analysis of when it is that permission to appeal is required.

Application of principles to facts

31. The provision giving the FTT jurisdiction on the appeal before it was s83(1) VATA which provides that:

> "…an appeal shall lie to the tribunal with respect to any of the following matters - …s) any liability of the Commissioners to pay interest under section 78 or the amount of interest so payable;"

32. Ms Brown emphasised the jurisdiction regarding interest is "any liability" not "the liability". This, in her submission, recognised the different types of liability that arose. For instance, there could not be both a liability under 78(1)(a) and (1)(b) because (1)(a) applied to overpaid output tax and (1)(b) to input tax credit. In relation to (1)(c) and (d), although it did not make a difference in this case, "the applicable period" between those two heads of interest were specified differently in subsections s78(6) and (7). In contrast to the discovery assessment in *Fanning,* or the closure notice amendment in *SSE,* there were multiple matters upon which decisions were required. In this case there were three decisions albeit it that only one of them (statutory error) which drove the result. There were nevertheless decisions regarding (1)(c) and (1)(d).

33. These submissions do not advance the appellants' application. Identifying the decision relies, not only in considering the relevant jurisdictional provision in the abstract, but identifying the issue(s) referred to the tribunal for decision (see *Price* [42] which derives this from *Noga*). The issue before the FTT (as reflected in full at [8] of its decision) was whether interest was due from the claim dates (as HMRC argued) or the earlier dates (as the appellants argued).

34. As HMRC correctly identify, the issue before the tribunal was simply whether further interest was due under s78. The relevant decision was that the appellants were not entitled to any further interest at all under s78. This was reflected in the FTT's conclusion at [113]: "The appeal against HMRC's decision to pay interest from the dates of claim (and not earlier) is accordingly dismissed."

35. Turning to the two grounds which the appellants object to HMRC raising, only the Further Issue needs consideration. As mentioned above, the appellants accept that a conclusion that the second interpretation of *SSE* (namely that a challenge to any issue or point upon which the respondent lost requires permission) is not possible, means HMRC will not need permission to appeal to rely on the s78(1)(d) issue. The appellants are right to make this concession. The reasoning on s78(1)(d) was not part of the relevant decision and in pursuing that issue HMRC, the successful party in the decision, do not seek to change the decision of the FTT that no further interest is due.

36. In what I understood as an attempt to query the premise that the tribunal should not be too quick to assume that HMRC should not be expected to appeal, because they had not lost on a decision, Ms Brown referred to *Eynsham Cricket Club v HMRC* [2019] UKUT 0047 (TC). The decision arose from

a case management hearing, prior to the substantive hearing, where the UT, in the light of an agreed position of the parties that the FTT had erred in law in the reasons for its finding on a particular issue, remade the FTT decision such that when it came to the substantive hearing HMRC were then the unsuccessful party despite being the formal respondents. This was because the remaining points were ones HMRC had lost on and were challenging.

37. I do not consider this authority assists the appellants. The UT acknowledged HMRC's eventual status to be "odd" and noted the parties' circumstances were unusual (see [79]). Ms Brown sought to draw a parallel between the cases. The reasoning that there was no official error on the part of HMRC, because it was Parliament's error, was so weak and undefendable that the ensuing issues considered by the FTT, to the extent they appeared obiter, ought not be viewed as such. They were therefore ones where HMRC could be viewed unsuccessful, and if they wanted to challenge them, the onus was on them to seek permission. But, in the current proceedings no determination has yet been made on the strength of any of the grounds; that will await the substantive hearing. As regards the FTT decision, identified as discussed above, HMRC were entirely successful.

Permission required for Further Issue?

38. HMRC point out the FTT reached no determination on the Further Issue. This was clear from its concluding paragraph at [113] where, after stating that the agreed issue was determined in HMRC's favour, it continued: "This means that the "further" issue…does not arise". There was nothing therefore that HMRC could have appealed against. The appellants submit the FTT implicitly determined the Further Issue against HMRC because, at [103], (absent the error the FTT made regarding finding the legislative error could not be an error on the part of the Commissioners) the FTT found the bad debt refunds "were due to the appellants…from the earlier dates".

39. I reject that submission. The FTT's analysis at [103] was offering a view on the applicability of s78(1)(d) in the alternative (which went in the appellants' favour) and without any consideration in relation to the Further Issue point. To suggest the FTT was nevertheless deciding the Further Issue would contradict the FTT's explanation that the fact that the agreed issue had been determined in HMRC's favour <u>meant</u> the Further Issue did not arise. HMRC could not, having won on the decision, have sought permission to appeal against an issue which the FTT did not decide, or purport to decide, let alone decide against HMRC.

40. The appellants nevertheless argue, relying on the principles explained in *Price* and *Fanning* that because the result HMRC seek under the Further Issue leads to a different outcome to the FTT decision, that that alone means permission is required. In *Price*, the only reason HMRC did not need permission to run the ground was because they were content to stick with the same result the FTT reached; that the allowable loss was £48. Ms Brown submits that HMRC's argument that the Further Issue does not seek a <u>better</u> result than the FTT's decision is irrelevant.

41. HMRC agrees the Further Issue, in the event it arises, seeks a different result but emphasise this issue is an argument in the alternative. Their primary ground remains that the FTT decision, in their favour, should be maintained. It is only if the appellant is successful in their appeal that the Further Issue becomes relevant.

42. If one were to test the proposition HMRC ought to have raised the Further Issue by way of appeal, by considering whether HMRC could have put their permission application to the FTT without being sure the appellants would seek, and be granted permission to appeal then, on the face of it, HMRC, the successful party in the identified decision (that no further interest was due from the alternative dates) could not have sought permission to appeal. An analysis that HMRC ought to seek permission, would, if the FTT granted permission, also raise the unattractive prospect of an appeal proceeding to

the UT on hypothetical facts: it would be an appeal where HMRC would be seeking the FTT decision to be upheld (contrary to the apparent nature of an appeal) but then be asking the UT to assume that if HMRC were wrong on that, the UT agreed with HMRC on the Further issue.

43. Nevertheless, it must be acknowledged that the reasoning in *Price*, which suggested permission would have been required, but for HMRC's clarification that it would not seek a different decision, was applied in circumstances where HMRC's grounds (related to "Decision 1") were conditional on the appellants succeeding on their grounds on "Decision 2" (see [11]). While the UT did not specifically consider the point, it does not appear the UT assumed any difficulty with HMRC being required to apply for permission, if it had sought a variation of the FTT's decision, despite that variation being conditional on the appellant's appeal succeeding. While I therefore agree with HMRC's submissions on the difficult implications that arise if permission is considered to be required from the FTT, where the ground is conditional on an FTT decision which the party supports being overturned, those difficulties do not necessarily obstruct a conclusion that permission is still required given the way in which the reasoning in *Price*, (which reasoning was fully endorsed by the Court of Appeal in *SSE*), was applied to the facts in *Price*.

44. I do agree with HMRC, however, that it not enough, so far as permission is required, to simply say that the order a party seeks varies the decision. As HMRC submit, it is relevant to ask whether the party seeks to "do better" in the terminology used by the Court of Appeal in *SSE* (at [80]). In my view this is because when a party seeks to "do better" that normally reveals that they have otherwise failed in some respect in relation to the decision (as construed in accordance with the relevant principles) by not achieving the success or level of success they could have. Thus, in *Price,* the terms of the objectionable variation, which if HMRC had sought it, would require permission, were ones which were discussed in terms of the capital allowance loss being less than the £48 achieved, and therefore were outcomes where HMRC would have improved on the success that it might otherwise have achieved. Similarly, in *SSE*, the relevant ground which was found to require permission sought to improve the party's success. If the principle that permission is required where someone seeks to vary the decision, but without regard to whether the party seeks to "do better", it risks inconsistency with the principle that appeals only lie to parties who were unsuccessful. A successful party to an FTT decision, who if certain conditions are met, advocates a position that is worse than the FTT decision (because it is not as bad as the outcome that would otherwise occur if the FTT decision is overturned) does not require permission.

45. The UT in *Fanning*, in summarising the principles it took from *SSE*, explained that if a party's ground seeks a different decision from the FTT "it is likely" to require permission to appeal. That the UT did not express a variation of decision as a hard and fast determinant of permission wisely foresaw there may be circumstances, as illustrated in this case, where the fact a variation is sought, does not inevitably mean permission is required.

46. The variation sought in HMRC's Further Issue, assuming it become relevant, by contrast to those relevant in *Price* and *SSE* does not seek to improve on HMRC's success in relation to the FTT's decision, which was that no further interest was due. A conclusion that HMRC, the wholly successful party in the decision, as identified in the requisite way, and who does not seek to "do better" requires permission to appeal if they want to advance it as a ground, would go against the principle that only persons who are unsuccessful in the decision can appeal.

47. Describing the order HMRC seek, as the appellants do, in line with the analogy the UT drew in *Price* in relation to the possible orders under the RSC Order 59, as the equivalent of a notice to vary, or a notice of cross-appeal also does not take the matter any further. There is no dispute that the Further Issue, if it were to become relevant, would entail a different result being sought to that reached

by the FTT. The question is whether that inevitably means HMRC are bound to ask for permission in relation to it. For the reasons already explained, I consider it would not.

48. The appellants also argue HMRC have taken an inconsistent stance to when permission is required (which HMRC dispute) for instance in *Euromoney Institutional Investor Plc v HMRC* [2021] UKFTT 321. The stance a party takes on the opposing parties' grounds cannot however help on the correct legal analysis of when permission to appeal is required.

49. Although this was not within the scope of the preliminary issues to be dealt with at the hearing, I mention, for the sake of completeness, that the appellants raised an argument that HMRC could not rely on the FTT's reasoning that the error of Parliament was not an error on the part of the Commissioners because the FTT adopted that on its own initiative without HMRC pleading it. The appellants can, and do, take issue with the FTT's approach in this regard in the grounds in relation to which they have received permission. I see no objection in principle as to why a respondent in these circumstances cannot by way of response, affirm the result of the FTT decision and in doing so say that it agrees with the FTT's reasons, even if those reasons were not points the respondent advanced. No authority was put forward to suggest why this was impermissible.

50. The conclusion that HMRC do not need to apply for permission to appeal in relation to, either the s78(1)(d) ground, or the Further Issue, means the consequential issues argued before me regarding whether, any permission, if it had been required from the FTT, could be waived by the UT, and if so, whether such permission should be granted by the UT out of time, do not arise for decision.

Decision

51. The appellants' application, objecting to HMRC raising the s78(1)(d) issue and Further Issue, is dismissed.

52. Costs of the application are to be dealt with as part of any costs orders made following the substantive hearing.

Signed On Original

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

RELEASE DATE: 19 May 2022