Neutral Citation: **[2023] UKUT 00254 (TCC)**

Case Number: UT/2022/000122

**UPPER TRIBUNAL**
**(Tax and Chancery Chamber)**

Rolls Building, Fetter Lane, London

*VAT – default surcharge – whether s59(4) Value Added Tax Act 1994 is limited to cases where the taxpayer neither submits a return nor pays an amount of tax – no – whether an assessment under s73 Value Added Tax Act 1994 requires an officer of HMRC to have applied his/her mind to the amount to be assessed – no – appeal dismissed*

**Heard on:** 12 September 2023
**Judgment date:** 17 October 2023

**Before**

**JUDGE ASHLEY GREENBANK**
**JUDGE ANDREW SCOTT**

**Between**

**MJL CONTRACTS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Tony Woon-Sam, of Crown Accountants

For the Respondents: Ross Birkbeck, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

## DECISION

### INTRODUCTION

1. This is an appeal by the Appellant, MJL Contracts Limited ("MJL"), against a decision of the First-tier Tribunal, Judge Kevan Swinnerton (the "FTT"), dated 5 September 2022 (the "FTT Decision"). The Respondents are the Commissioners for His Majesty's Revenue and Customs ("HMRC").

2. The FTT Decision was made without a hearing under the provisions of rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The FTT dismissed the appeal of MJL against the imposition of a default surcharge under section 59 of the Value Added Tax Act 1994 ("VATA") in the amount of £720.76. MJL appeals with the permission of the FTT.

### THE FACTS

3. The facts are not in dispute. They are set out at paragraphs [11] to [21] of the FTT Decision. In summary, they are as follows:

(1) The business activity of MJL is silviculture, other forestry activities and specialized construction activities.

(2) MJL has been registered for VAT with effect from 1 October 2012. It submits returns on a quarterly basis.

(3) A surcharge liability notice ("SLN") was served on MJL on 12 July 2019 in respect of the 05/19 period.

(4) For the 05/20 period, the due date for the return and payment was 7 July 2020. The return was submitted on 6 July 2020. However, although some of the VAT shown in the return was paid to HMRC on or before the due date, part of the payment (being £33,927.30) remained outstanding on that date.

(5) On 17 July 2020, HMRC issued a SLN to MJL. The surcharge period was extended to 31 May 2021.

(6) For the period 08/20, the due date for the return and payment was 7 October 2020. The return was submitted on 7 October 2020. Once again, although some of the VAT shown in the return was paid to HMRC on or before the due date, part of the payment (being £36,038.26) remained outstanding on that date.

(7) On 16 October 2020, HMRC issued a further SLN to MJL. The surcharge period was extended to 31 August 2021.

(8) As we have described, HMRC issued SLNs in respect of the 05/20 period on 17 July 2020 and the 08/20 period on 16 October 2020. These notices were computer-generated and issued automatically.

(9) The SLNs were initially issued on the assumption that the 05/19 period should be treated as the first period of default. It would appear that the SLN for the 05/19 period was later withdrawn. The surcharge amounts were subsequently revised by a notice dated 16 June 2021 to £0 for the 05/20 period and £720.76 for the 08/20 period (being 2% of the outstanding amount of £36,038.26). This appeal relates to the surcharge for the 08/20 period.

### RELEVANT LEGISLATION

4. We will begin by setting out the legislation that is relevant to this appeal.

5. The legislation governing the default surcharge was repealed with effect from 1 January 2023. In the periods in question, the legislation governing the default surcharge was found in section 59 VATA. Section 59 was in the following form:

> 59.— **The default surcharge**
>
> (1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—
>
> (a) the Commissioners have not received that return, or
>
> (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,
>
> then that person shall be regarded for the purposes of this section as being in default in respect of that period.
>
> (1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.
>
> (2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—
>
> (a) a taxable person is in default in respect of a prescribed accounting period; and
>
> (b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.
>
> (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.
>
> (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—
>
> (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
>
> (b) has outstanding VAT for that prescribed accounting period,
>
> he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.
>
> (5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

> (11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

6. Mr Woon-Sam's submissions on behalf of MJL, to which we shall turn later in this decision notice, concern the interaction of the default surcharge provisions with various other provisions of the VAT legislation.

7. The first such provision is section 73(1) VATA which sets out certain circumstances in which HMRC may make an assessment of VAT. Section 73(1) provides as follows:

> 73.— **Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

8. Mr Woon-Sam also refers to section 76(1) VATA, which contained the power of HMRC to assess an amount due by way of default surcharge. In the periods in question, section 76(1) was in the following form:

> 76.— **Assessment of amounts due by way of penalty, interest or surcharge**
>
> (1) Where any person is liable—
>
> (a) to a surcharge under section 59 or 59A, 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.

9. Mr Woon-Sam also refers to section 84(3) VATA, which in the relevant periods was in the following form:

> (3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra), (rb) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.

As can be seen, section 84(3) provides that certain appeals cannot not be entertained by the tribunal unless the amount of VAT determined to be payable has been paid to or deposited with HMRC. Those appeals include appeals against a default surcharge (by virtue of section 83(1)(n) VATA), an assessment to VAT under s73(1) VATA (section 83(1)(p) VATA), and an assessment to a default surcharge under s76(1)(a) VATA (section 83(1)(q) VATA).

10. In the course of the hearing, we raised with the parties the potential relevance of section 103 Finance Act 2020 ("FA 2020"). Section 103 is in the following form:

103.— **HMRC: exercise of officer functions**

(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).

(2) Accordingly, it follows that HMRC may (among other things)—

(a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return);

(b) amend a return under section 9ZB of that Act (correction of personal or trustee return);

(c) make an assessment to tax in accordance with section 30A of that Act (assessing procedure);

(d) make a determination under section 100 of that Act (determination of penalties);

(e) give a notice under paragraph 3 of Schedule 18 to FA 1998 (notice to file company tax return);

(f) make a determination under paragraph 2 or 3 of Schedule 14 to FA 2003 (SDLT: determination of penalties).

(3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or, where the function is conferred on an officer of a particular kind, an officer of that kind).

(4) In this section—

"HMRC" means Her Majesty's Revenue and Customs;

references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment.

(5) This section is treated as always having been in force.

(6) However, this section does not apply in relation to anything mentioned in subsection (1) done by HMRC if—

(a) before 11 March 2020, a court or tribunal determined that the relevant act was of no effect because it was not done by an officer of Revenue and Customs (or an officer of a particular kind), and

(b) at the beginning of 11 March 2020, the order of the court or tribunal giving effect to that determination had not been set aside or overturned on appeal.

**THE FTT DECISION**

11. The FTT took the grounds of MJL's appeal from its notice of appeal to the FTT and from correspondence involving MJL's representative, Mr Woon-Sam. It treated those grounds as being:

(1) that section 59 VATA could not apply in the circumstances of MJL; and

(2) that the word "assess" in section 76(1) VATA required an officer of HMRC to apply his or her mind to arrive at an appropriate amount and no such assessment had been made in MJL's case.

12. The FTT concluded that "[MJL] has not put forward any valid points to support the contention that section 59 VATA is not engaged in this case" (FTT [44]).

13. MJL's grounds of appeal before this tribunal are essentially the same as its grounds before the FTT.

**GROUND 1**

## The parties' submissions

14. Before us, Mr Woon-Sam argued on behalf of MJL that section 59 was not engaged in this case. He made the following points:

(1) A default surcharge is only imposed in a case where the taxpayer neither submits a return nor pays VAT following an assessment under section 73(1) VATA. In this case, MJL has made a return and there has been no assessment under section 73(1).

(2) This is because, he submits, the scheme of the legislation is as follows:

(a) If a taxpayer does not submit a return by the due date for a period, HMRC has the power to make an assessment under section 73(1). The amount set out in the assessment becomes the VAT due for the quarter until it is superseded by a return.

(b) A surcharge liability notice should then be sent to the taxpayer. If the taxpayer submits a return or pays the tax specified in the assessment under section 73(1), the notice has served its purpose. It is only if the taxpayer neither submits a return nor pays the VAT under the assessment under section 73(1) VATA that a default surcharge becomes due.

(c) This scheme, he says, explains the structure of section 59(4). The reference to a person being "in default in respect of a prescribed accounting period" in subparagraph (a) is to being in default by failing to file a return by the due date; the reference to "outstanding VAT" in subparagraph (b) is to the VAT due under an assessment under section 73(1).

(d) This reading of the provisions is supported by section 84(3) VATA. The reference to "the amount which HMRC have determined to be payable" is to an estimated assessment under section 73(1).

(3) Schedule 55 Finance Act 2007 ("FA 2007") applies to impose a penalty for late VAT returns (see item 7A in the table in paragraph 1). It cannot be the case that two provisions apply (Schedule 55 FA 2007 and section 59 VATA) to impose a penalty for the same failure.

15. Mr Birkbeck, for HMRC, submits that the FTT Decision is correct. Section 59 clearly applies in these circumstances:

(1) The FTT found that MJL submitted returns for the periods 5/20 and 8/20 on time, but that payment, in part, was made late. Section 59(1)(b) VATA applied, and MJL was in default in respect of those periods.

(2) The FTT found that HMRC had served SLNs which specified those periods (under section 59(2) and (3) VATA).

(3) It followed that MJL was liable to a default surcharge calculated as the specified percentage of the outstanding VAT for those periods (section 59(4) VATA).

(4) The specified percentage was calculated in accordance with section 59(5) VATA and, in this case, was 2% of the outstanding VAT for the 08/20 period.

(5) Section 73(1) VATA applies where no return is filed, or any return that is made is incomplete or incorrect. It is not relevant in this case. Section 84(3) VATA does not assist.

(6) Schedule 55 FA 2007 is also not relevant. The prospective amendment to paragraph 1 of that Schedule to include VAT has not been brought into force.

**Discussion**

16. Mr Woon-Sam's description of the scheme of the legislation relating to the default surcharge is not one that we recognize.

17. The default surcharge regime applies where a taxable person is "in default in respect of a prescribed accounting period". The circumstances in which a taxable person is in default in respect of a prescribed accounting period are described in section 59(1) VATA. In short, a person is in default if either (a) HMRC have not received a VAT return by the last day on which the person is required to make a return for that period (which we have referred to as the "due date") or (b) HMRC have received the return, but HMRC have not received the VAT shown on the return by the due date.

18. Where a taxable person is in default in respect of a prescribed accounting period, HMRC serve a SLN on the taxable person (section 59(2)). The notice specifies the "surcharge period" which generally runs from the date of the SLN until the first anniversary of the end of the relevant accounting period. If the taxable person defaults again within the surcharge period, a default surcharge becomes payable (see below), and the taxable person may be served with another SLN which may extend the surcharge period (section 59(3)).

19. The relevant operative provision that imposes the default surcharge is section 59(4) VATA. In summary, under section 59(4), a taxable person is liable to default surcharge if:

(1) that person has been served with a SLN;

(2) that person is "in default in respect of a prescribed accounting period" ending within a surcharge period specified in, or extended by, an SLN; and

(3) that person has outstanding VAT for that prescribed accounting period.

20. The circumstances in which a taxable person is in default in respect of a prescribed accounting period for the purposes of section 59(4) are those described in section 59(1) VATA, which we have summarized at [17] above.

21. A person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which that person is liable in respect of that period has not been paid by the due date (section 59(6) VATA).

22. The amount of the surcharge is the greater of the specified percentage of the outstanding VAT and £30. The specified percentage is set by section 59(5). It depends on the number of accounting periods that the taxable person has been in default within the surcharge period and ranges from 2% to 15%.

23. In this case, the requirements of section 59(4) VATA were met for the 08/20 period:

(1) MJL had been served with a SLN;

(2) MJL was in default in respect of the 08/20 period because it had not paid the VAT shown on the return by the due date for that period and that period ended within the surcharge period set by the SLN for the 05/20 period; and

(3) MJL had outstanding VAT of £36,038.26 on the due date.

24. MJL was therefore liable to pay a default surcharge. As MJL had also been in default for the 05/20 period. The specified rate of the surcharge was 2%.

25. It follows that we agree with Mr Birkbeck's construction of the relevant provisions.

26. We reject Mr Woon-Sam's submission that a default surcharge is limited to cases where the taxpayer neither submits a return nor pays VAT following an assessment under section 73(1) VATA. This is simply not the case.

(1) Section 59(4) applies on its terms where a taxable person is "in default in respect of a prescribed accounting period". As we have described, the circumstances in which a person is in default in respect of a period are defined in section 59(1) VATA to include both cases where HMRC have not received a VAT return by the due date for the period and cases where HMRC have received the return, but HMRC have not received the VAT shown on the return by the due date.

(2) Section 73(1) applies to permit HMRC to make an assessment for VAT in certain circumstances, including where the taxpayer has not made a return, or where any return that a taxpayer has made is incomplete or incorrect. It does not inform the construction of section 59 VATA.

(3) Section 84(3) sets out the circumstances in which a taxpayer is required to pay the VAT that is in dispute before the taxpayer can bring an appeal. It is not relevant to the construction of section 59 VATA.

(4) The provisions of Schedule 55 FA 2007 to which Mr Woon-Sam refers have not been brought into force.

27. We dismiss the first ground of appeal.

**GROUND 2**

## The parties' submissions

28. For MJL, Mr Woon-Sam submits that a default surcharge can only be imposed by an assessment under section 76(1) VATA. Section 76(1) provides that HMRC "may assess" the amount due. The legislation should be given its natural meaning. An assessment requires an officer of HMRC to apply their mind to arrive at the appropriate amount. It is that amount that can be the subject of an appeal under section 83(1)(q) VATA.

29. For HMRC, Mr Birkbeck makes the following points.

(1) The words "assess" and "assessment" in tax legislation are technical terms referring to the quantification by HMRC of a liability to tax (see, for example, *Robertson v HMRC* [2019] UKUT 202 (TCC) at [20]).

(2) An assessment does not require any mental process or any consideration by an officer of HMRC. The issue of a penalty notice is an assessment. In this respect, Mr Birkbeck relies on the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*") (see *Donaldson* [14]), although he submits the point is clearer in the case of section 76(1) VATA as the amount to be assessed is prescribed by the default surcharge legislation.

(3) Although section 76(1) appears to confer a discretion on HMRC, through the use of the words "may assess", the courts and tribunals accept that there is no requirement on HMRC to exercise that discretion at the level of individual cases (see *HMRC v Total Technology Ltd* [2012] UKUT 418 (TCC) at [96]).

(4) The decisions of the FTT in *Murphy v HMRC* [2017] UKFTT 0381 (TC) and *Burford v HMRC* [2021] UKFTT 0047 (TC) also support his submissions.

30. As we have mentioned, during the hearing, we raised with the parties the potential relevance of section 103 FA 2020 to this ground of appeal. We invited the parties to address this point in written submissions following the hearing.

(1) In the context of its potential application to section 76(1) VATA, Mr Woon-Sam says that section 103 FA 2020 does not affect his argument. It is still necessary for HMRC to "assess" an amount. It is not open to HMRC simply to set the amount of the surcharge at the maximum allowed by section 59(5) VATA.

(2) Mr Birkbeck makes the following points.

(a) Section 103 FA 2020 does not apply to the imposition of the default surcharge by section 59 VATA which does not involve anything "capable of being done by an officer of Revenue and Customs" within subsection (1) of section 103. It may apply to an assessment by HMRC under section 76(1) VATA.

(b) Section 103 FA 2020 does not, however, determine the point at issue in this case. The fact that HMRC may make an assessment under section 76 by means involving the use of a computer or otherwise does not, in and of itself, compel the conclusion that a fully automated assessment is valid.

(c) However, the purpose of section 103 is clearly to facilitate policy-based actions and assessments and to remove any doubt that the use of computer processes to make assessments is valid. In that sense, the introduction of section 103 supports the argument that the principles behind the Court of Appeal's decision in *Donaldson* should extend to the imposition of the default surcharge.

**Discussion**

31. We should note that Mr Woon-Sam's challenge to the FTT Decision on this ground is not to the exercise of any discretion by HMRC which may be implied by the words "may assess" in section 76(1). His point is a more fundamental one as to nature of assessment for these purposes.

32. As regards the meaning of the term "assess" in section 76(1) VATA, we were referred by Mr Birkbeck to the well-known passage in the judgment of Lord Dunedin in *Whitney v Inland Revenue Commissioners* [1926] AC 37 where he said (at page 52):

> …Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

33. As can be seen from that passage, "assessment" is simply the process by which the amount of tax that a taxpayer has to pay is fixed. It is an essential part of the means by which a liability to tax is imposed. The term "assess" has to be seen in that context.

34. The legislation does not prescribe the manner in which HMRC can make an assessment for the purposes of section 76(1). However, in this respect, we agree with Mr Birkbeck that the comments of Lord Dyson MR in *Donaldson* are instructive.

35. *Donaldson* concerned the imposition of penalties under Schedule 55 FA 2007. Lord Dyson MR said this (at *Donaldson* [14]):

> 14. I start by saying that I agree with the observation made at para 43 of the decision of the UT:

> "We do not think it could have been within the contemplation of the draftsman that HMRC should be required to make a decision on a taxpayer-by-taxpayer basis, since he must have been aware that it would be impractical to exercise a discretion (meaning a discretion exercised in respect of each taxpayer individually, rather than in relation to defaulting taxpayers as a body) in that way. Rather, we think, this provision too contemplates what HMRC have in fact done, that is decide in advance that all taxpayers who default for more than three months should suffer daily penalties. In other words, what was contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers who default for the requisite period, or none; and if that is so the purpose of the notice is to inform taxpayers who are in danger of incurring daily penalties that HMRC have decided to impose them."

He continued at [16], when addressing an argument from counsel for the taxpayer that the wording of Schedule 55 referred to a penalty decision taken by HMRC with reference to a particular taxpayer and accordingly Parliament intended that HMRC should exercise its judgment to decide whether the taxpayer should be liable to a penalty with regard to the circumstances applicable to that taxpayer:

> 16. … With these considerations in mind… I do not consider that the words "such a penalty" shed any light on whether or not a decision can be a generic decision applicable to all taxpayers where the condition in para 4(1)(a) is satisfied, or whether it can only be an individual decision made by reference to the particular circumstances of P. In my view, Ms Murray places on the words "such a penalty" a weight that they cannot bear. At most, they are consistent with a decision under para 4(1)(b) being an individual decision taken having regard to the circumstances of the particular taxpayer. As a matter of language, however, they do not compel such an interpretation which, for the reasons I have given, it is inherently unlikely that Parliament intended.

36. We acknowledge that *Donaldson* is a case on the application of Schedule 55 FA 2007 where the relevant language – which refers to "HMRC decide…" – is rather different from that in section 76(1). However, the point is the same. In our view, Parliament cannot have intended that HMRC should be required to determine on a taxpayer-by-taxpayer basis whether and how to "assess". It must be open to HMRC to make those decisions on a generic basis and to automate the process, any other conclusion would simply be impractical.

37. We agree with Mr Birkbeck that section 103 FA 2020 is not directly relevant to the issues in this appeal.

38. We dismiss the second ground of appeal.

**DISPOSITION**

39. For the reasons we have given, we dismiss this appeal.

**ASHLEY GREENBANK**
**ANDREW SCOTT**

**UPPER TRIBUNAL JUDGES**

**Release date: 18 October 2023**