Neutral Citation Number: [2019] EWCA Civ 156

Case No: A3/2018/0068

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Mann and Judge Ashley Greenbank
[2017] UKUT 431 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

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Between:

METROPOLITAN INTERNATIONAL SCHOOLS LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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Mr James Ramsden QC and Mr Conrad McDonnell (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Miss Eleni Mitrophanous (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 23 January 2019

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Approved Judgment

Lord Justice Newey:

1. This appeal relates to the interpretation of section 84(10) of the Value Added Tax Act 1994 ("the VATA"). What is at issue is whether section 84(10) enables the appellant, Metropolitan International Schools Limited ("the School"), to advance a legitimate expectation claim in the context of appeals to the First-tier Tribunal ("the FTT") rather than by way of judicial review.

Narrative

2. The School provides distance learning courses. In a letter to the School dated 14 January 2000, HM Revenue and Customs ("HMRC", then HM Customs and Excise) agreed that course fees should be apportioned for value added tax ("VAT") purposes on the basis that the School was making both standard-rated supplies (of educational services) and zero-rated supplies (of books). The letter also stated, however, that the method "may be reviewed, amended or withdrawn by Customs and Excise at any time", and on 26 August 2009, in the light of the decision of the House of Lords in *College of Estate Management Ltd v Customs and Excise Commissioners* [2005] UKHL 62, [2005] STC 1597, Officer Rashid of HMRC informed the School in a letter that she had discovered that the VAT treatment of its supplies of distance learning courses was incorrect and that the supplies were in fact taxable at the standard rate. The School objected, and on 23 October 2009 Grant Thornton wrote on its behalf arguing that the "principal supply in all of [the School's] contact with the student is the zero rated teaching material in the form of study manuals and books", but also asking that, if HMRC's decision on the point were maintained, "the effective date from which the Company should account for VAT on its supplies should be six months from the date that decision is irrevocably confirmed". "In our view," Grant Thornton said, the School "has a legitimate expectation based on the conduct of HMRC, that the 2000 agreement was not affected by the College of Estate Management".

3. On 4 December 2009, Officer Rashid responded that the School had to account for VAT at the standard rate, and that was echoed three days later in a letter to Grant Thornton in which the decision that the School's supplies were standard-rated was upheld on review, with the author (Officer Piper) adding:

   > "I note your comments concerning legitimate expectation and the effective date of the liability ruling; this is a matter for the local officer."

   On 30 December, Officer Rashid said that she had made it clear that she would be applying her ruling retrospectively and that she was in the process of raising assessments on that basis.

4. On 8 January 2010, Grant Thornton both told HMRC that an appeal had been lodged with the FTT and raised once more the question of whether the School should be allowed a transitional period. On 22 January, Officer Harris of HMRC accepted that the School "have a legitimate expectation that they could rely on the 'agreed method of apportionment' of 14 January 2000 until the method was reviewed, amended or withdrawn" and said that he would "recommend that we take no retrospective action prior to 27 August 2009 over the VAT liabilities in question". Grant Thornton

returned to the need for a transitional period in a letter dated 4 February, but on 19 February Officer Winder of HMRC said that Officer Harris had been right not to offer such a period, and on 22 March Officer Winder went further, explaining that HMRC had "decided that it does not have power to refrain from collecting the tax which it believes is legally due in this case" and that remission was, after all, deemed inappropriate, while acknowledging that HMRC had "dealt with this case badly" and apologising for "the uncertainty and any confusion caused since Mr Harris advised you that he was recommending that concessionary treatment be applied". That position was itself, however, revisited, as a result of which on 27 May HMRC said that they could now "confirm … the original position that [the School] could indeed rely [on] the terms of the 2000 agreement until withdrawn on 27 August 2009", and on 18 June HMRC told the School that they accepted that "although the tax assessed was properly due, no further action will be taken on the tax due between 1 April 2006 and 31 August 2009 and a credit will be put 'on file' for this period". On the other hand, the School was "reminded that … [it] must with effect from 1 September 2009 account for VAT in accordance with [HMRC's] ruling dated 26 August 2009".

5. On 18 June 2010, the School issued judicial review proceedings in respect of "HMRC letter dated 22nd March 2010". The relief sought included an order prohibiting HMRC from "raising further assessments … for the two prescribed accounting periods next beginning after 26th August 2009". On 25 January 2013, the judicial review proceedings were transferred to the Upper Tribunal (Tax and Chancery Chamber) ("the UT") and stayed subject to any further order of the UT.

6. The School's appeals came before the FTT (Judge Howard Nowlan and Mr Julian Stafford) in 2015. In a decision dated 2 October 2015, the FTT concluded that the School's services were "entirely zero-rated supplies of books" (see paragraph 175 of the FTT decision). It also, however, commented on an argument advanced by the School to the effect that HMRC should in any event have allowed it to continue to use the approach agreed in 2000 for a run-off period, in relation to contracts that it had entered into before 27 August 2009. The FTT expressed the view that "the pre-August 2009 contracts should have been protected from any change in basis" (paragraph 175), but also said that it would not rule on whether the School should be allowed to amend its pleadings to run the point (since "it was only after an interval of some years" that the School had advanced that claim – see paragraph 165) and concluded that it had no jurisdiction to adjudicate on the question (paragraph 175). The School had invoked section 84(10) of the VATA, but the FTT considered that "s 84(10) is not engaged because the relevant earlier decisions simply related to the periods prior to August 2009 and had nothing to do with the assessments in relation to the later supplies under the pre-August 2009 contracts" (paragraph 162).

7. HMRC appealed to the UT, and the School cross-appealed. Reversing the FTT, the UT (Mann J and Judge Ashley Greenbank) held that the School's supplies "do not fall within the zero-rating given to the supply of books" (paragraph 110 of the UT decision) but were standard-rated. Going on to consider the School's contention that it "had a legitimate expectation of a phased withdrawal of a previously agreed regime which would have allowed it to apply the old regime to the workout" of pre-August 2009 contracts, the UT considered that "the sensible and fair thing to do is to allow the point to be taken despite the formal absence of a pleading" (see paragraphs 113 and 137). Like, however, the FTT, the UT considered that section 84(10) of the

VATA did not apply. In contrast, the UT parted company from the FTT on the substance of the legitimate expectation claim, saying this (in paragraph 153):

> "It is therefore unnecessary for us to consider legitimate expectation and its applicability by the FTT or this tribunal on an appeal. We confine ourselves to observing that on the facts, that while HMRC plainly reserved a right to re-visit the question of the correct treatment of supplies, there was equally plainly a legitimate expectation that that would not be applied retrospectively. Nothing in the reservation in the relevant letter suggested that that might happen, and common sense and plain business dealings would have led to the expectation that it would not. The School was obviously entitled to rely on that. However, we do not consider that that legitimate expectation went so far as to allow the School to have a three-year run-off period for long-term contracts. The School was not entitled to assume that it was entitled to conduct its business affairs in such a way as to impose such a period on HMRC, and there was no evidence which would support the suggestion that HMRC indicated that such things were acceptable in the possible context of their revisiting the tax treatment of outputs."

The legislative framework

8. VAT was introduced by the Finance Act 1972 with the United Kingdom's accession to the European Economic Community. Section 40(1) of the 1972 Act provided for an appeal to lie to a VAT Tribunal against a decision with respect to any of the matters listed in section 40(1)(a) to (i).

9. The scope of section 40 of the 1972 Act fell to be considered in *Customs and Excise Commissioners v J H Corbitt (Numismatics) Ltd* [1980] STC 231. The taxpayer company, which dealt in antique coins and medals, accounted for VAT pursuant to a "margin scheme" which, by virtue of article 3(5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972, applied only if such records and accounts were kept as "the Commissioners may specify in a notice published by them for the purposes of this order or may recognise as sufficient for those purposes". Records satisfying the requirements of the notice that HMRC had published for the purposes of the Order not having been maintained, and HMRC "not recognis[ing] the records in fact kept by the company as being sufficient for the purposes of the 1972 order in the exercise of the discretion given to them by the second half of art 3(5)" (per Lord Lane, at 238), HMRC assessed the company on the basis that the margin scheme could not be used. An appeal by the company raised the question of whether HMRC's failure to exercise their discretion in favour of the company was "something which the value added tax tribunal were entitled to review" or was "an exercise of discretion which was subject to review, if at all, only by way of judicial review in the High Court" (see 238).

10. The House of Lords concluded that the VAT Tribunal had no power to review HMRC's exercise of their discretion under article 3(5) of the 1972 Order. In the course of his judgment, Lord Lane, with whom Lords Diplock, Simon and Scarman agreed, said (at 239-240):

> "Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the 1972 Act. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."

11. A new subsection (section 40(6)) was added to the 1972 Act "[f]ollowing a Ministerial review of the VAT appeal arrangements in the light of the House of Lords decision in Corbitt" (see paragraph 25.4.12 of the 1983 report of the "Committee on Enforcement Powers of the Revenue Departments" chaired by Lord Keith). The provision was carried forward into the Value Added Tax Act 1983 (as section 40(6) of that Act) and has since become section 84(10) of the VATA. As its heading suggests, section 84 of the VATA contains "Further provisions relating to appeals". Section 84(10) reads:

> "Where an appeal is against an HMRC decision which depended upon a prior decision taken in relation to the appellant, the fact that the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

12. The principal statutory provision relating to VAT appeals is now section 83 of the VATA, headed "Appeals". That states that an appeal lies with respect to any of the matters listed in section 83(1)(a) to (zc). Section 83(1)(b) ("the VAT chargeable on the supply of any goods or services") and section 83(1)(p) ("an assessment") have been in point in the present case.

13. We were referred to three cases in which section 84(10) of the VATA or its predecessor in the Value Added Tax Act 1983 featured. The VAT Tribunal (Dr Avery-Jones and Mr Smith) applied section 40(6) of the 1983 Act in *Christopher Gibbs Ltd v Commissioners of Customs and Excise* [1992] VATTR 376 in circumstances comparable to those in the *Corbitt* case. In contrast, section 84(10) was held not to be applicable in *Customs and Excise Commissioners v Arnold* [1996] STC 1271 (Hidden J) and *Customs and Excise Commissioners v National Westminster Bank plc* [2003] EWHC 1822 (Ch), [2003] STC 1072 (Jacob J). Understandably, the VAT Tribunal described section 40(6) as "difficult" in *Christopher Gibbs*.

The present appeal

14. The sole ground on which the School has been granted permission to appeal to this Court is that the UT misinterpreted the scope of section 84(10) of the VATA.

15. The UT noted (in paragraph 114 of its decision) that section 84(10) appears to have this effect:

> "Where the FTT is considering an appeal from HMRC's decision B, and decision B depended on a prior decision A, the tribunal can allow the appeal on decision B if it would have allowed an appeal on decision A even if decision A is not a decision which itself could have been appealed."

The UT commented (in paragraph 145):

> "The important word in the subsection is 'depended'. We consider that in its context it imports a greater degree of dependency on the prior decision than its merely being part of a factual chain of decision-making. It connotes a decision A which has to be taken before decision B both as a matter of fact and as a matter of legal necessity or requirement."

Here, the UT said in paragraph 150:

> "there was no prior decision A which was one on which decision B (the assessment) was dependent in any relevant legal sense. The decisions to require a full assessment were prior in time, but they were not ones which it was legally necessary to take before directing the assessments in the same sense as the Commissioners' decision on the books and records was a necessary legal precursor to the operation of the scheme in *Corbitt*. On the facts, HMRC had to deal with it first because it was raised in negotiation by the taxpayer, but it did not otherwise have to. The point might have arisen after the assessment, in which case HMRC would still have had to have dealt with it. That cannot be said of the relevant prior decision in *Corbitt*."

The UT went on in paragraph 151:

> "An alternative way of approaching the matter, which may amount to different way of carrying out the same analysis, is the alternative approach apparently used by Hidden J [in *Customs and Excise Commissioners v Arnold*]. On one reading of his judgment he considered whether there was, in substance, one decision, and not two, and concluded there was just the one. If one applies that to the present case then one reaches the same result. The decision to raise an assessment for the full amount was the real decision, and in arriving at that decision there had to be a consideration of any factors which might point against it, one of which (if not the only one of which) was a decision not to accede to a request not to assess in the full amount. But that decision making process was all part of one decision, not one decision based on a separate dependent prior decision."

16. Mr James Ramsden QC, who appeared for the School with Mr Conrad McDonnell, took issue with this approach. He maintained that the HMRC decisions which the School appealed to the FTT depended on prior decisions, confirmed in letters from HMRC to the School between 22 January and 27 May 2010, not to allow a transitional period beyond 27 August of the previous year. In the terminology adopted by the UT, the decisions under appeal represented "decision B" and the refusal of a transitional period "decision A". While, accordingly, section 83 of the VATA did not extend to the refusal, that did not prevent the FTT from allowing an appeal "on the ground that it would have allowed an appeal against the prior decision [i.e. the denial of a transitional period]". In the present case, HMRC ought to have granted the School a transitional period on the strength of its legitimate expectation and so an appeal against their denial of such a period ought to have been allowed, had section 83 been applicable. That being so, Mr Ramsden submitted, section 84(10) is in point and the School's appeals against "decision B" should be allowed as regards the provision of a transitional period.

17. It is to be noted that what Mr Ramsden contended for was a transitional period of six months from 7 December 2009. This position broadly corresponded to Grant Thornton's proposals in 2009-2010 and the relief sought in the judicial review claim form. What, however, the School argued for before the FTT and the UT was not a transitional period of that kind, but rather a run-off period in relation to pre-existing contracts. That, therefore, was what the FTT and UT addressed, not the question of whether a six-month transitional period should have been afforded. Miss Eleni Mitrophanous, who appeared for HMRC, argued that the School should not be allowed another bite at the cherry. On that basis, she said, the School's appeal should be dismissed even if we accepted that section 84(10) of the VATA could in principle apply. Her principal submission, however, was that the UT was right to consider section 84(10) to have no application at all.

18. Miss Mitrophanous contended that there are compelling reasons to conclude that section 84(10) of the VATA does not have the wide scope that the School's contentions would suggest. I agree. In the first place, a decision under appeal plainly cannot have "depended upon a prior decision" if the latter decision post-dated the former decision. In other words, there can be no question of section 84(10) applying where the supposed "decision A" was not made until after "decision B". It follows that section 84(10) cannot permit the FTT to entertain a legitimate expectation argument that was raised with HMRC only after the appealed decision had been taken. Yet, as Miss Mitrophanous pointed out, "whether assessments are made before or after decisions relating to claimed legitimate expectations is mere happenstance". Parliament is therefore most unlikely to have intended section 84(10) to enable an appellant to ventilate before the FTT a legitimate expectation claim put forward before the decision under appeal was made, but not one made afterwards.

19. Secondly, the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do so, it could be

suggested that the assessment depended on a prior decision that could be impugned on public law grounds.

20. That would be a very surprising result. In *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998, the UT (Warren J and Judge Bishopp) held, departing from views expressed by Sales J in *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), [2010] STC 686, that "the right of appeal given by s 83(1) [of the VATA] is an appeal in respect of a person's right to credit for input tax under the VAT legislation" and that the FTT did "not have jurisdiction to give effect to any legitimate expectation which [the taxpayer] may be able to establish in relation to any credit for input tax" (paragraph 87). The UT observed:

> "a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83" (paragraph 87).

In the UT's view, a number of features "point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the FTT in relation to appeals under s 83 of the VATA 1994" (paragraph 78). The UT noted that the Tribunals, Courts and Enforcement Act 2007 conferred a judicial review function on the UT but not the FTT (paragraph 29) and that the approach Sales J had favoured would have conferred a very extensive judicial review jurisdiction on the FTT "without any of the procedural safeguards, in particular the filter of permission to bring judicial review, and time-limits to which ordinary applications for judicial review in the Administrative Court are subject" (paragraph 76). The UT also cited this passage from the judgment of Nicholls LJ in an income tax case, *Aspin v Estill* [1987] STC 723 (at 727):

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

21. Mr Ramsden did not attempt to persuade us that the UT was wrong in *Noor*. Were, however, his contentions as to the ambit of section 84(10) of the VATA well-founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims. The jurisdiction would, moreover, have been conferred through a provision introduced in response to the *Corbitt* decision (viz. section 84(10)) ("by the back door", as Miss Mitrophanous would say), rather than under section 83, the main appeals section. Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT

without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review (see CPR 54.4 and 54.5). It is highly improbable that Parliament intended this when it enacted what has now become section 84(10).

22. In my view, the UT was right that section 84(10) of the VATA is of relatively limited scope. For section 84(10) to apply, the decision under appeal must have "depended upon a prior decision". The provision thus requires both a "prior decision" and that the appealed decision "depended" on it. The need for a "prior decision" implies, I think, that section 84(10) cannot be invoked to challenge something that amounted to no more than a factor in the subject of the appeal, not a distinct "prior decision". The subsection would not, therefore, be in point merely because, for instance, HMRC had chosen to take a particular matter into account in making the decision under appeal, even if they had resolved on their attitude to the matter in question in advance of the appealed decision. Any challenge to what HMRC had done would have to be mounted under section 83, as part of the appeal against the (final) decision, or perhaps by way of judicial review, not under section 84(10).

23. Turning to the significance of the word "depended", the UT considered that it "connotes a decision A which has to be taken before decision B both as a matter of fact and as a matter of legal necessity or requirement". This formulation seems to me to capture the sense of section 84(10) of the VATA. In the context, "depended" signifies that decision B (i.e. that under appeal) could not have been taken but for decision A. Parliament had in mind a "prior decision" comparable to the "necessary legal precursor" in *Corbitt*.

24. In the context of an appeal against "the VAT chargeable on the supply of any goods or services" (section 83(1)(b) of the VATA) or an assessment (section 83(1)(p)), I find it hard to see how the decision under appeal could have "depended" on any prior decision in the relevant sense unless the latter decision dictated whether or not there was legal liability. A decision as to whether, for example, it was "oppressive to enforce that liability" (to quote from the judgment of Nicholls LJ in *Aspin v Estill*) would, it seems to me, appropriately be the subject of judicial review proceedings rather than an appeal to the FTT.

25. In the circumstances, the UT arrived, in my view, at the correct conclusion. Section 84(10) of the VATA is inapplicable both because HMRC's view on whether the School should be granted a transitional period amounted to no more than a factor in their decision to assess and because the assessments could have been raised without HMRC reaching any decision on any legitimate expectation contention. The legitimate expectation point did not bear on whether there was "VAT chargeable" or a liability to assess and, in the words of the UT, "HMRC had to deal with it first because it was raised in negotiation by the taxpayer, but it did not otherwise have to". If the School wishes to pursue its legitimate expectation argument, it must seek to do so in its judicial review claim, not in the context of these proceedings.

26. The present case is very different from *Corbitt*. There, the liability on which the assessment under appeal was based arose only because HMRC had decided, exercising the discretion given to them by article 3(5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972, that the company's records were not sufficient for the purposes of the Order and, hence, that the margin scheme

was not available. The article 3(5) decision was not merely a factor in the decision to assess but, in the UT's words, a "necessary legal precursor". The assessment could not otherwise have been made.

Conclusion

27. I would dismiss the appeal.

Lord Justice David Richards:

28. I agree.

Lord Justice McCombe:

29. I also agree