Neutral Citation Number: [2020] EWCA Civ 182

Case No: A3/2019/0507

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
[2018] UKUT 0363 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE SINGH
and
LORD JUSTICE LEGGATT

- -

Between:

ARIA TECHNOLOGY LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth (instructed under the **Direct Access Scheme**) for the **Appellant**
James Puzey (instructed by **Solicitor, HMRC**) for the **Respondents**

Hearing date: 29 January 2020

- -

Approved Judgment

Lord Justice Singh:

Introduction

1. The issue of law in this appeal concerns the meaning of an "assessment" in section 73 of the Value Added Tax Act 1994 ("the VAT Act"). The appeal arises from the decision of Her Majesty's Revenue and Customs ("HMRC") to deny the Appellant (Aria Technology Limited) input tax of £758,770.69 in relation to the purchase of computer parts in the VAT period 07/06.

2. The Appellant's appeal to the First-tier Tribunal (Tax Chamber) ("FTT"), comprising Judge Dean and Ms Stott, was dismissed on 16 February 2016. At that time the appeal was based on very many and wide-ranging grounds, most of which have now fallen away.

3. Permission to appeal to the Upper Tribunal (Tax and Chancery Chamber) ("UT") was granted on 25 January 2017 but the Appellant's appeal was dismissed by the UT (Roth J and Judge Richards) on 2 November 2018.

4. On 15 April 2019, Lewison LJ granted the Appellant permission to appeal against the decision of the UT to this Court on one ground only.

Factual Background

5. The Appellant is a company based in Manchester engaged in both the retail and wholesale trade in computer components and peripherals. In the year ended 31 July 2005, it declared a gross profit of £3.3 million; for the 18 months ended 31 January 2007, a gross profit of £4.6 million; and for the subsequent year ended 31 January 2008, a gross profit of £2.3 million. The managing director and sole shareholder is Mr Aria Taheri, who exercised overall control of the business. At the material time, the finance director was Mr Frank Harasiwka and the purchasing manager was Mr Eddy McFadden. The retail side of the business employed some 120 people, but the wholesale side was essentially run by Mr Taheri and Mr McFadden, with some involvement from Mr Harasiwka regarding the finances. The Appellant's wholesale deals involved purchasing central processing units ("CPUs") and flat screen monitors from UK suppliers for resale to customers abroad.

6. In its VAT return for the 07/06 accounting period, the Appellant claimed credit for input tax of £1,513,316.35. After setting off input tax against output tax, the Appellant claimed a repayment of £445,156.98.

7. In a letter by Mr Timothy Bailey dated 6 October 2008, HMRC informed the Appellant of their decision to deny input tax of £758,770.69 and informed the Appellant of their right to appeal against HMRC's decision within 30 days. The letter also stated that: "A further letter showing the corrected amount of VAT now due in respect of 07/06 is enclosed." That letter, dated 7 October 2008 and again written by Mr Bailey, amended the Appellant's return for the VAT period 07/06 to show input tax in the sum of £754,545.66 and the net tax due to HMRC as £313,613.71. The

letter also notified the Appellant of its right to appeal against HMRC's decision within 30 days.

8. The parties dispute the legal effect of the correspondence but the calculations are clear. The Appellant had claimed a repayment of £445,156.98 on the basis that all of its input tax was creditable. When HMRC decided that £758,770.69 of the Appellant's input tax was not creditable, the Appellant's repayment claim was reduced by £758,770.69, so that HMRC was owed £313,613.71. The Appellant has never paid that amount and, in practical terms, that is what this dispute is about.

9. The basis of HMRC's decision to deny input tax was that certain transactions carried out by the Appellant in the VAT period 07/06 were connected with the fraudulent evasion of VAT and that the Appellant, through its officers, knew or should have known of this fact. The decision of the UT notes that this was a case of so-called "missing trader" or "MTIC" fraud on the VAT system: see para. 2.

10. The alleged fraud relates to 11 transactions, all carried out in a short period between 17 May 2006 and 1 August 2006. As the Appellant also placed reliance on another wholesale deal carried out in that period which was not traced to any tax loss, the 11 disputed transactions were numbered chronologically for the purpose of the hearing at the FTT as deals 1-2 and 4-12, with the unobjectionable transaction referred to as deal 3.

11. Deals 1-2, made on 17 and 19 May 2006, involved the purchase of Giga CPUs from Supreme Distribution Ltd and their resale to Mitz International FZE based in Canada. Deals 4-9, in the period 8 June to 10 July 2006, involved the purchase of Intel Pentium 4 CPUs from Supreme Distribution Ltd and their resale to a purchaser referred to simply as Mona in Luxembourg. Deals 10-12, in the period 21 July to 1 August 2006, involved the purchase of, again, Intel Pentium CPUs from Ashtec Distribution Ltd and their resale to Silver Pound Trading LDA in Portugal.

12. By a Notice of Appeal, dated 3 November 2008, the Appellant appealed to the FTT against HMRC's decision to deny input tax. The Notice of Appeal also appealed against the assessment of tax arising from HMRC's amendment to the Appellant's return for the relevant period.

The letters from HMRC

13. As will become apparent, this appeal turns on the true construction of the two letters from HMRC dated 6 and 7 October 2008. It is important therefore to set out what they said in more detail here.

14. The letter from HMRC dated 6 October 2008, which was written by Mr Bailey, had the heading 'Notification of decision to deny input tax'.

15. So far as material the letter said:

> "The Commissioners are satisfied that the transactions set out in the attached appendix form part of an overall scheme to defraud the revenue. The Commissioners are also satisfied that

> there are features of those transactions, and conduct on the part of Aria Technology Ltd, which demonstrate that you knew or should have known that this was the case.
>
> Accordingly your right to deduct the input tax claimed in respect of these transactions is denied.
>
> This decision affects input tax of £758,770.69 claimed on the purchase of Computer Chips in period 07/06. …"

16. Towards the end of the letter it was said:

> "A further letter showing the corrected amount of VAT *now due* in respect of period 07/06 is enclosed.
>
> You have the right of appeal against this decision to the VAT & Duties Tribunal and any appeal must be made within 30 days of the date of this letter." (Emphasis added)

17. The letter from HMRC dated 7 October 2008, again written by Mr Bailey, was headed 'VAT Return for period: 1st May 2006 to 31st July 2006'. The body of the letter said:

> "As you have been notified, HM Revenue & Customs consider that the amounts shown should properly be amended as follows:
>
Box 4 Input tax	£754,545.66
Box 5 *Net tax due to HMRC*	£313,613.71

> "
>
> (Emphasis added)

18. The letter continued:

> "The reasons for this are detailed in my letter to you dated 6th October 2008."

19. Finally, the letter said that the taxpayer had the right of appeal to the VAT Tribunal.

Material Legislation

20. Section 73(1) of the VAT Act provides:

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

21. Section 73(9) provides:

> "Where an amount has been assessed and notified to any person under subsection (1) … above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

22. Section 77 sets out what were described at the hearing before us as "long stop" time limits for the making of an assessment under (among other provisions) section 73. There are also what were described before us as "short stop" time limits in section 73(6).

23. It is important to appreciate that:

(1) The provisions of section 73(1) confer a discretionary power ("may assess") even where the conditions for the existence of that power are present.

(2) Although section 73(1) makes a distinction between the making of an assessment and the notification of it, it is clear from section 73(9) that the amount assessed only becomes due, and may be recovered accordingly, from the time of notification.

24. An appeal in respect of an assessment under section 73(1) lies to the FTT under section 83(1) of the VAT Act.

The Judgment of the FTT

25. On 16 February 2016, the FTT dismissed the Appellant's appeal on the basis that the Appellant knew, or should have known, that the transactions in question in the appeal were connected with the fraudulent evasion of VAT: see paras. 370-371 of the FTT

judgment. Furthermore, the FTT dismissed the Appellant's claim that the decision of HMRC contained in the letters of 6 and 7 October 2008 did not amount to an "assessment" and the challenge to its jurisdiction to determine this issue: see para. 51 of the FTT judgment.

26. The FTT heard live evidence from Mr Bailey, the official at HMRC who had made the relevant decisions. This Court has seen a transcript of that evidence.

The Judgment of the UT

27. The first limb of the Claimant's appeal to the UT comprised a detailed textual analysis of almost every paragraph and in some cases almost every sentence within a paragraph of the FTT's factual findings: see para. 161 of the UT decision. The UT concluded that there was no error of law vitiating the FTT's decision. It was satisfied that the conclusion that the Appellant knew or should have known that the 11 disputed transactions were connected to fraud was open to the FTT on the evidence, for reasons which were sufficiently and clearly explained in the FTT decision: see paras. 162-165 of the UT judgment.

28. The second limb of the Appellant's appeal (and the only issue that is live before this Court) concerned the characterisation of the decision contained in HMRC's letters of 6 and 7 October 2008. Following consideration of the authorities the UT was satisfied, at para. 181, that the FTT had correctly summarised the law as follows, at para. 44 of its judgment:

> "The 'making' of an assessment refers to the determination that an amount is due;
>
> There is no set formula by which an assessment must be made;
>
> The processes of assessing and notification of that assessment are separate;
>
> The assessment process involves a decision that tax is due and a calculation of that amount;
>
> Notification can take any form so long as the terms are clear to the taxpayer."

Furthermore, the UT confirmed its agreement with the FTT's application of the above principles, which led to the clear conclusion that HMRC had, in the letters of 6 and 7 of October 2008, communicated an "assessment" to the Appellant. Those letters demonstrated that HMRC had concluded that, because input tax been disallowed, far from being owed money by HMRC, the Appellant owed HMRC the sum of £313,613.71. The UT was of the view that the letters sent by HMRC communicated that conclusion clearly and succinctly: see para. 182 of the UT judgment.

The Appellant's submissions

29. The Appellant has been granted permission to appeal on Ground 1(f) only, that the UT erred in:

> "adopting an incorrect approach to the legal test for whether there was an assessment. In particular, the case law shows that what is required is a deliberate decision to assess whereas in this case there was a deliberate decision not to assess. The consequences of the Upper Tribunal's decision that an assessment arises whenever an officer believes tax is due are wide-reaching and potentially chaotic. Such an approach leaves no room for the officer to consider whether even though tax has been underpaid, he or she has power and wishes to assess the tax at that point."

30. On behalf of the Appellant Mr Firth submits that, in order to raise a VAT assessment, it is necessary to have a deliberate decision to assess. In its letters of 6 and 7 of October 2008, HMRC did not raise an assessment against the Appellant as the author of the letters, Mr Bailey, admitted in his evidence before the FTT that he had not made an assessment. All that happened in this case was that HMRC denied input tax and thereby did not accept the VAT return as filed by the Appellant as being correct. That did not, without more, mean that there was any assessment by HMRC requiring the Appellant to pay any VAT.

31. Mr Firth submits that the point can be tested by reference to a hypothetical case, in which the input tax entered on the VAT return is less than the output tax, so leaving a positive figure of VAT to be paid to HMRC. Suppose in that case HMRC denies the input tax and so the correct figure in Box 5 remains a positive one but is increased. Mr Firth submits that that does not amount to an assessment that that figure is owed to HMRC, since the taxpayer would already have accepted that it was liable to pay the (lower) amount it had entered in Box 5. Mr Firth submits that the true analysis cannot be affected by the fact that, in the present case, the figure put in Box 5 by the Appellant was a negative one.

32. Mr Firth also submits that the UT's approach, which allows an officer of HMRC to make an assessment "inadvertently", would give rise to extraordinary uncertainty, contrary to the EU law principle of legal certainty. Furthermore, there may be reasons why an officer may not wish to decide to assess an amount of tax, the most obvious of which are the applicable time limits in sections 73(6) and 77 of the VAT Act.

Relevant authorities and the principles to be derived from them

33. In *Don Pasquale (a firm) v Commissioners of Customs and Excise* [1990] STC 556, at 562, Dillon LJ said:

> "It appears that on a strict analysis there is a distinction between the decision of the commissioners to make an assessment, the making of the assessment and the notification by such notices as I have mentioned. However, from the point of view of the taxpayer it is only from the notification that he can discern what it is that he is required to do and what assessment has been made."

34. In *House (trading as P&J Autos) v Commissioners for Customs and Excise* [1996] STC 154, at 162, Sir John Balcombe said:

> "… the assessment of the amount of tax considered to be due and the notification to the taxpayer are separate operations."

35. Those two passages were cited in *Commissioners of Customs and Excise v Bassimeh* [1997] STC 33, at 39, where Evans LJ said:

> "… the … authorities have considered what may be involved in defining and distinguishing between 'assessment' and, on the other hand, 'notification' of the assessment made. It has come to be accepted that this is a three-stage process; the decision to assess, followed by the assessment, then by the notice given (see in particular *Don Pasquale (a firm) v Customs and Excise Comrs* [1990] STC 556 at 562 per Dillon LJ, and the decision of His Honour Stephen Oliver QC, the value added tax tribunal chairman in *Georgalakis Partnership v Customs and Excise Cmrs* (1993 VAT Decision 10083). The position is complicated by the fact that where there is no evidence of the internal processes of VAT offices or of the assessment in fact carried out, the terms of the notice must be relied upon to indicate what the assessment was. This has led to the suggestion that the assessment is contained in the notice of assessment, but that analysis is wrong (see Sir John Balcombe in *House (trading as P & J Autos) v Customs and Excise Cmrs* [1996] STC 154 at 162, where he said that 'the assessment of the amount of tax considered to be due and the notification to the taxpayer are separate operations')."

36. In *BUPA Purchasing Ltd v Commissioners of Customs and Excise (No 2)* [2007] EWCA Civ 542; [2008] STC 101, at para. 37, Arden LJ (as she then was) said:

> "There is no statutory definition of 'assessment'. It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT, interest, penalty or surcharge that is due (see generally, *Courts plc v*

> *Customs and Excise Comrs* [2004] EWCA Civ 1527, [2005] STC 27)."

37. In *Courts* the main judgment was given by Jonathan Parker LJ, with whom Pill and Hooper LJJ agreed.

38. Mr Firth emphasised before us that, as appears from para. 18 of the judgment, there was in that case a "Notice of Assessment". In that respect the case is distinguishable from the present. Mr Firth emphasised the terms of HMRC's internal guidance, which is set out at paras. 13-14 of the judgment. He also drew our attention to the procedure, including the use of a standard form called a "VAT 641", at para. 10 of the judgment.

39. At paras. 97-99, Jonathan Parker LJ said:

> "97. In the first place, Mr Cordara's reliance on Dillon LJ's reference in *Don Pasquale* to the decision to assess as being distinct from the assessment itself is in my judgment misplaced. The distinction between the assessment itself and notification of the assessment to the taxpayer is, of course, clear on the face of s 73. Thus, under s 73(1) the commissioners are empowered to 'assess the amount of VAT due from [the taxpayer] … and notify it to him'; under s 73(6) time runs from the making of the assessment; and under s 73(9) no debt arises until the assessment has been notified. However, the distinction between the decision to assess and the assessment itself is not one which is expressly drawn by s 73; nor, in my judgment, does s 73 require such a distinction to be drawn. At one extreme, a mere decision to assess which is not reflected in action plainly cannot of itself amount to an assessment. An assessment, after all, has to be capable of being notified to the taxpayer, and on notification it creates a debt: hence a *mere* executory decision to assess can have no statutory consequences. At the other extreme, where the steps taken by the commissioners, objectively viewed, constitute the making of an assessment, in my judgment s 73 leaves no room for an issue as to whether the commissioners decided to make – which is another way of saying, intended to make – the assessment which (objectively) they made.
>
> 98. In my judgment, Mr Cordara is seeking to place more weight on Dillon LJ's words than they can have been intended to bear. As already noted … the issue in *Don Pasquale* was whether there was a single global assessment, or whether there were 25 separate assessments. If Mr Cordara were correct in his approach, one would have expected to find some analysis and discussion in Dillon LJ's judgment as to what the commissioners had decided (intended), and in particular as to whether they had decided (intended) to make a single global

> assessment or 25 separate ones. Yet not only is that aspect not explored at all in Dillon LJ's judgment, but by his citation from Woolf J's judgment in *International Language Centres Ltd v Customs and Excise Comrs* [1983] STC 394 at 398, Dillon LJ makes it clear that he is approaching the issue as one of construction of the relevant documents.
>
> 99. In my judgment, therefore, if what Mr Gurd did in December 1999 amounted, on an objective analysis, to the making of an assessment … then there can be no room for any further inquiry as to whether he had decided to do what he did. Conversely, if on an objective analysis what Mr Gurd did in December 1999 did not amount to the making of an assessment, his state of mind cannot alter that fact." (Emphasis in original)

40. At para. 107, Jonathan Parker LJ said:

> "107. **…** In my judgment, given that the making of an assessment is an internal matter for the commissioners, in respect of which there is no prescribed statutory procedure, it is simply not possible to arrive at a formula which will determine in every case whether or not an assessment has been made. The commissioners may, for example, decide to treat certain cases as special or exceptional cases, to which their normal internal processes should not apply. …"

41. Mr Firth emphasised the following passage, at para. 119, where Pill LJ said:

> "What this case has highlighted is the importance of officers of the respondents being clear in their own minds what they are doing at each stage; whether they are making an assessment or a decision to assess or some other exercise. Secondly, when an assessment is made, what is being done should be plain on the face of readily disclosable documents so that a taxpayer who queries whether and when an assessment has been made can be informed of the position."

42. I have already referred to the judgment of Sir John Balcombe in *House (trading as P & J Autos) v Commissioners of Customs and Excise* when that case reached the Court of Appeal. It is also appropriate to refer at this juncture to what was said at first instance: [1994] STC 211, at 226. May J (as he then was) said:

> "Although the commissioners choose to use printed forms headed 'Notice of Assessment', there is in my judgment no

> magic about such forms. They are not required by statute or regulation which prescribe no particular formality at all. All that is required is that the commissioners should make an assessment to the best of their judgment and notify it to the taxpayer. There is perhaps an understandable tendency to merge the assessment with the notification and to look only or mainly at a single document if it is called notice of assessment. But there appears to be no reason why notification should not be given by letter, nor any reason why in this case the letter dated 24 May 1990 should not be seen as, or part of, due notification. That letter states the amount of the assessment and refers to the schedules for the details of the build up of the amount. I do not see why a notification cannot be contained in more than one document provided that it is clear which document or documents are intended to contain the notification and that that document or those documents contain in unambiguous and reasonably clear terms the substantial minimum requirements to which Mr Cordara has referred."

43. Those "minimum requirements" were set out earlier in the judgment, at 223: the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates. For present purposes I would be prepared to accept that those are the minimum requirements but, in case the issue may arise in the future, I should stress that this is not necessary for the disposal of the present appeal and we did not hear full argument about this.

44. In my view, the following relevant principles can be derived from the authorities:

(1) There is no statutory definition of "assessment". It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT that is due.

(2) There is no particular formality required by either statute or regulations.

(3) There is no magic in the use of any particular form, for example one headed "Notice of Assessment". A notification of an assessment can be contained simply in a letter. It can also be contained in more than one document.

(4) The question whether an assessment has been made or not is to be determined on an objective analysis. The decision-maker's subjective state of mind cannot alter that objective fact.

45. It is clear, both as a matter of principle and on the authority of what was said by Jonathan Parker LJ in the *Courts* case, at para. 99, that Mr Firth's submission must be rejected insofar as he suggested before this Court that the objective analysis is subject to what he called a "subjective override". The test is exclusively an objective one: how would the document or documents said to record an assessment be understood by the reasonable reader? It is essential to the fair administration of the tax system that a taxpayer should be able to know with certainty whether or not an assessment has been

made of an amount of VAT due from him. There would be very considerable uncertainty if the question whether an assessment has been made were to depend on the subjective intentions and beliefs of individual officers of HMRC.

46. I would accept the general proposition that, in principle, and for the purposes of analysis a conceptual distinction can be drawn between three stages: (1) a decision to assess; (2) the assessment itself; and (3) notification of that assessment. So much is supported by statements in this Court: see the quotations I have set out above from *Don Pasquale* and *Bassimeh* but also note what was said in *Courts*.

47. Nevertheless, in my view, depending on the circumstances of a particular case, there may be no distinction in substance between stages (1) and (2), and indeed between stages (2) and (3), for example where it is decided to make an assessment and it is set out in a notification sent to the taxpayer. The fact that there has been such a decision will usually be implicit in the very fact that an assessment has been made; and the fact that an assessment has been made will be implicit in the notification of it. Conversely, on facts very different from those of the present appeal, there may be circumstances in which the deliberate decision is made *not* to assess. In principle there does exist a discretion, not a duty, in section 73(1) of the VAT Act, so that situation could arise. I would also accept in principle that the discretion has to be exercised lawfully, in accordance with public law principles. None of that, however, is material to the present appeal. As I have said, the crucial question in the present appeal is what was the true meaning of the two letters of 6 and 7 October 2008: when objectively construed did they record the fact that an "assessment" had been made and notify the Appellant of that fact?

Analysis of the present case

48. In my view, the reasonable reader would have understood the letters of 6 and 7 October 2008, read together as they had to be, as recording and notifying a determination by the Commissioners of the amount of VAT assessed as being "due" and, moreover, as being due "now". On an objective analysis, they did record an "assessment" of the VAT due and were not simply a correction of the figures set out in the VAT return which had been submitted by the Appellant.

49. Clearly it would have been better if the letter or letters had been headed "Notice of Assessment" but, in my view, nothing can turn on such labels. It is the substance, not the form, which matters.

50. I now turn to consider the authorities to which Mr Firth referred in seeking to persuade us to reach a different conclusion.

51. In his written submissions Mr Firth placed reliance on the decision of the Upper Tribunal (Tax and Chancery Chamber) in *Benridge Care Homes Ltd v Commissioners of Revenue and Customs* [2012] UKUT 132 (TCC); [2012] STC 1920, at para. 37, where the Tribunal said:

> "An assessment is, as Arden LJ said, the determination of an amount of VAT that is due. It is the way in which the VATA

> permits the Commissioners to quantify their claim on the taxpayer, and part of the mechanism by which that amount becomes a debt due to the Crown under s 73(9) and paras 5(1) Sch 11."

52. In my view, that passage needs to be read in the context of the facts of that case, in particular what was said at paras. 40-42. It is clear from those paragraphs that, in the circumstances of that case, "the practical effect was that all amounts in the return netted off to nil." In effect "the Commissioners were agreeing not to take steps to recover the net amount of VAT due by assessment."

53. In his submissions at the hearing before us, Mr Firth relied in particular on *Ali (trading as Vakas Balti) v HMRC* [2006] EWCA Civ 1572; [2007] STC 618, at para. 9 in the judgment of Lloyd LJ. In *Ali* the Court of Appeal (Tuckey, Arden and Lloyd LJJ) allowed the appeal by HMRC from the decision of Hart J [2006] EWHC 23; [2006] STC 1872. The case concerned the means available to HMRC for the enforcement of the obligations of traders in respect of VAT and, in particular, the civil evasion penalty regime governed by section 60 and other provisions in Part 4 of the VAT Act. In his judgment Hart J held that a civil evasion penalty could not validly be imposed in respect of VAT which the taxpayer was not liable to pay. The question before the Court of Appeal was whether that was correct.

54. In *Ali* what was crucial was the *timing* of the assessment. At the hearing before the VAT and Duties Tribunal (the predecessor for this purpose of the FTT) the Commissioners accepted that the amended tax assessment in the sum of £14,284 was invalid and withdrew that assessment as there was no power to amend an assessment. At para. 9, Lloyd LJ noted that the right way to proceed would have been to issue a supplementary assessment or an additional assessment. The crucial point was that, by the time of the hearing before the Tribunal, it was too late to take either of those steps. Thus, HMRC accepted that the taxpayer's liability for VAT in respect of the relevant period was defined by the original assessment at £6,971.95. Nevertheless, they contended that for the purposes of the civil evasion penalty regime, the tax evaded was the higher sum in the "amended" assessment.

55. In *Ali* it was held that there was no reason why HMRC should not be able to impose a civil evasion penalty assessment relying on the dishonest conduct of the taxpayer, even though they could no longer make a tax assessment for the higher amount of tax under section 73(6) of the VAT Act.

56. There is nothing in the *ratio* of *Ali* which is inconsistent with the analysis I have set out above. That case concerned a different question of law.

57. As I understand it, Mr Firth submits that an amended assessment would simply be an "assessment", and there would be no need to issue a supplementary or additional assessment, unless there is a requirement that, in order to be valid, an assessment must be a purported exercise of the power under section 73(1) of the VAT Act. He then argued that the two relevant letters in this case were not – or at least were not unequivocally – a purported exercise of that power. In my view, the answer to that is that, to be a valid exercise of the power under section 73(1), the making and notification of an assessment do have to be, objectively, an exercise of that power but

that the letters in this case (unlike the amended tax assessment in *Ali*) were, objectively, an exercise of that power.

58. Mr Firth drew our attention to the power to open an enquiry under section 9A of the Taxes Management Act 1970, as amended, which was considered by this Court in *Raftopoulou v HMRC* [2018] EWCA Civ 818; [2018] STC 988: see in particular paras. 15 and 41-43 in the judgment of David Richards LJ. I have not found that decision of assistance, concerning as it does a different statutory power contained in a different statute.

59. Mr Firth also cited the decision of the Supreme Court in *HMRC v Eclipse Film Partners No 35 LLP* [2016] UKSC 24; [2016] STC 1385, in particular at para. 24 in the judgment of Lord Neuberger PSC. As I understand it, Mr Firth relies on that passage for the proposition that the mere fact that something could, as a matter of law, be done in a different way does not mean that it has been done. That may well be so as a general proposition but, in my view, it takes matters no further in the present appeal. The crucial question for this Court to decide is what was the true construction of the two letters of 6 and 7 October 2008. If, on their true construction, they do record an "assessment" within the meaning of section 73 of the VAT Act, that is the end of the matter.

60. Finally, Mr Firth sought to rely on two cases concerned with trust powers: *Kain v Hutton* [2008] NZSC 61; 11 ITELR 130, which was cited by Newey J (as he then was) in *Briggs v Gleeds* [2014] EWHC 1178 (Ch); [2015] Ch 212. I am doubtful whether reference to cases about trust powers is going to be helpful in the present context, where we are concerned with statutory powers and in particular the powers in the VAT Act but, in any event, I do not consider that those two cases assist the Appellant's argument in the present case.

61. In *Kain* Mr Firth placed particular reliance on para. 35, where Blanchard J said:

> "Where trustees have attempted to use a power they did not in fact enjoy, the courts will not come to their rescue by treating their action as if they had been engaged in exercising a quite different power that they did actually possess. A court of equity will not exercise a power which a donee has a discretion to exercise but has failed to exercise."

62. In *Briggs v Gleeds*, at para. 95, Newey J found the reasoning in *Kain v Hutton* as being "not wholly consistent" with that in other cases, which he thought he should follow. Nevertheless, he continued:

> "Even so, the courts must, as it seems to me, beware of deeming trustees to have exercised a power that they did not in fact have in mind if the exercise of that power required 'examination of materially different considerations' from those relevant to the power that the trustees saw themselves as exercising."

63. Again, with respect to Mr Firth, it seems to me that those propositions, while they may be correct in their context, are of no material assistance in the present appeal. They do not help this Court to answer the crucial question which I have identified earlier, which concerns the true meaning of the two letters of 6 and 7 October 2008.

64. As I have said, in my view, on their true construction, those letters did record an "assessment" within the meaning of section 73(1) of the VAT Act.

Conclusion

65. For the reasons I have given I would dismiss this appeal.

66. Before concluding I would observe that it must be in the interests of everyone, including HMRC and, more importantly, the general public that the internal procedures of HMRC should be reformed, if they have not already been reformed, to take account of the difficulties which have arisen in this case. As I understood it from the hearing before us, the difficulty has arisen because it was mistakenly thought within HMRC that an assessment could not be issued where a VAT return had not been "processed". It should be a simple matter in practice of ensuring that, in circumstances such as these, the fact of assessment is internally recorded within HMRC and a Notice of Assessment is given as well. If the return can be corrected that would be desirable but the statutory powers in this regard were not dealt with in any detail before us and I say no more about that.

Lord Justice Leggatt:

67. I agree.

Lord Justice McCombe:

68. I also agree.