TC03780

Appeal number: TC/2010/04359

CAPITAL GAINS TAX – assessment made outside ordinary time limit – s 36(1) TMA – whether loss of capital gains tax attributable to negligent conduct of taxpayer or a person acting on her behalf

JURISDICTION – whether First-tier Tribunal has jurisdiction to consider legitimate expectation and other public law arguments – construction of s 50(6) TMA

LEGITIMATE EXPECTATION – whether appellant had a legitimate expectation as a consequence of representations of HMRC either (i) that relief would apply to a gain on certain share disposals, and (ii) that no other reliefs would be available, at a time when a claim for EIS relief could have been made for a particular tax year

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS KAREN ROTBERG **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
MRS AMANDA DARLEY

Sitting in private at 45 Bedford Square, London WC1 on 10 October 2012 and 30 September to 1 October 2013

Hui Ling McCarthy, instructed by BDO LLP, for the Appellant

Paul Shea, HMRC, for the Respondents

© CROWN COPYRIGHT 2014

DECISION

Publication of this decision

1. By direction of the tribunal on 1 November 2011, all hearings in relation to these proceedings were directed to be held in private. The substantive hearing of this appeal was thus heard in private.

2. Under rule 32(6) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, if the tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including that information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private.

3. When publishing a decision where the proceedings have been directed to be heard in private, therefore, the tribunal must have regard to the purpose for which the hearing was in private. In this case no indication was given in the tribunal's direction of such purpose, although it was apparent that the direction had been made having regard to the fact that prior proceedings before the general commissioners had been directed to be held in private.

4. In light of that, the tribunal caused a letter to be written to the parties, enclosing a draft of this decision, without anonymisation, on an embargoed basis, and seeking representations from the parties on the question of anonymisation. A period of 10 days was given for the making of such representations.

5. In the event, the Appellant made no representations. HMRC did reply to say that there did not appear to them to be any particular features in this matter that would justify anonymisation, when compared with other typical matters brought by appellants to the tribunal. HMRC also helpfully provided the tribunal with a copy of the Appellant's letter to the general commissioners in August 2008 which set out the grounds on which the general commissioners had acceded to the appeal before those commissioners being in private.

6. Judge Berner has considered whether this decision should be published, with or without anonymisation. He has had regard to the grounds put before the general commissioners in 2008. He has decided that the publication of this decision without anonymisation will not undermine any of the reasons for which these proceedings were directed to be heard in private, in so far as any of those reasons have currency today. Hearings in private, and the anonymisation of decisions, are very much exceptions to the overarching principle of open justice. Judge Berner sees no reason in this case, in the absence of any reasons put forward by the Appellant, to depart from that principle. This decision is accordingly published without anonymisation.

Introduction

7. This case arises out of three disposals of shares by the Appellant, Mrs Rotberg, in two private companies. Those disposals fell into three tax years. For the first, 1999/00, HMRC[1] issued an assessment on 5 May 2006, more than six years after the end of the tax year; for the second, 2000/01, the assessment was also issued on 5 May 2006, and within the relevant six-year period; and for the third, 2003-04, following an enquiry, HMRC issued on 2 June 2006 an amendment to Mrs Rotberg's self assessment.

8. A number of issues fall to be determined. For 1999/00 the question is whether, under s 36 of the Taxes Management Act 1970 ("TMA") as was then applicable, the assessment is valid as being for a loss of capital gains tax attributable to the negligent conduct (no question of fraudulent conduct is raised) either of Mrs Rotberg or her accountant, Mr Peter Michell. That issue relates only to 1999/00. Subject to that, Mrs Rotberg argues that each of the assessments and the amendment for all relevant tax years should be reduced to nil under s 50(6) TMA because certain representations made by HMRC in October 1999 gave rise to a legitimate expectation on the part of Mrs Rotberg that no tax would be payable on the disposals. Finally, Mrs Rotberg also argues that, because of subsequent representations said to have been made by HMRC in 2006, she was denied the opportunity to arrange her affairs so as to obtain reinvestment relief in respect of the 2003/04 disposal under the enterprise investment scheme ("EIS"), by virtue of Schedule 5B of the Taxation of Chargeable Gains Act 1992.

9. The arguments raised as regards whether Mrs Rotberg had a legitimate expectation arising out of representations of HMRC in October 1999, and the effect of the alleged representations in 2006, give rise to a jurisdiction question as well as a substantive issue. At the time of the hearing in October 2012, the decision of the First-tier Tribunal in *Abdul Noor v Revenue and Customs Commissioners* [2011] UKFTT 349 (TC) had been released, but was under appeal to the Upper Tribunal. The hearing of argument on the legitimate expectation issue was accordingly adjourned to enable the tribunal to have the benefit of the Upper Tribunal's decision in Noor. That decision was released on 14 February 2013: see [2013] UKUT 71 (TC). The tribunal hearing in this case was concluded on 1 October 2013.

10. That there has been a significant delay since October 2013 in releasing this decision is due to the fact that, at the instigation of the tribunal, the parties have taken steps to ascertain whether there was any possibility of the dispute between them being resolved by some form of alternative dispute resolution. That has proved to no avail, and we have consequently finalised, and now release, our decision.

The facts

11. We heard evidence from only one witness, Mrs Rotberg herself. In addition we had a bundle of documents. From this we find the following material facts. In this

[1] In this decision we shall refer throughout to HMRC so as to include, where applicable, the former Inland Revenue.

section our findings relate to matters that were not the subject of material dispute. We shall make further more specific findings in the sections dealing with the separate issues between the parties.

12. Since the mid-1990s, Mrs Rotberg and members of her family have founded three internet businesses, namely Jobsite Limited ("Jobsite") in 1992, Auto Online Limited ("Auto Online") in 1998, and El Shaddai Business Development Limited ("El Shaddai") in 1999.

13. During the tax years under review, Mrs Rotberg sold the following shareholdings in Jobsite and Auto Online and reinvested the proceeds in subscribing for shares in El Shaddai:

(a) On 13 January 2000, Mrs Rotberg sold £996,000 of shares in Jobsite (which she had acquired on 31 August 1995). The proceeds were reinvested in El Shaddai on 4 April 2001.

(b) On 19 April 2000, Mrs Rotberg sold £1,184,369 of shares in Auto Online (which she had acquired on 2 July 1998). The proceeds were reinvested in El Shaddai on 17 January 2002.

(c) On 31 March 2004, Mrs Rotberg sold a further tranche of shares in Jobsite for £2,035,668. Out of the proceeds, £1,000,000 was reinvested in El Shaddai on 17 January 2005. The balance was retained by Mrs Rotberg and CGT was paid on that amount.

14. The two sales of the Jobsite shares were pursuant to a "tag along" clause under which Mrs Rotberg was obliged to sell her shares proportionally along with sales by other shareholders. The sale of the Auto Online shares was as part of a management buyout.

15. From about mid-1999 to late 2008, Mr Peter Michell FCA of Small Firms Accounts and Tax Limited was Mrs Rotberg's personal accountant as well as acting as the accountant for all of the companies under Mrs Rotberg's ownership and control. Mr Michell advised on all financial, tax planning, bookkeeping and dealing with company accounts, company records and returns. He was also responsible for advising Mrs Rotberg in respect of the various claims made for relief from CGT. In addition, Mr Michell was involved in the negotiations, financial and tax planning in respect of all three share sales, finalising personal and business accounts and Companies House formalities.

16. In October 1999 Mr Michell was provided with a draft contract for the sale by Mrs Rotberg of one-half (amounting to 6%) of her shares in Jobsite. Mrs Rotberg made clear to Mr Michell that she intended to reinvest any proceeds from the share sale into a new start-up company. With her husband, Mrs Rotberg met Mr Michell at his home office and discussed a number of options for achieving the reinvestment in a tax-efficient manner.

17. Mrs Rotberg was not aware of this at the time, but prior to that meeting, on 29 October 1999, Mr Michell had telephoned a Mr Hutchings, an inspector of taxes at a

local tax office in Chichester (not the one dealing with Mrs Rotberg's affairs) to make an enquiry as to whether rollover relief would be available in respect of the sale and reinvestment. Mrs Rotberg became aware of this conversation only when Mr Michell disclosed his file note of it to HMRC in 2006.

18. We had no evidence from either Mr Michell or from Mr Hutchings. The only evidence of the conversation between them was Mr Michell's file note, which we set out here in full:

> "**Karen Potts** [*Potts was Mrs Rotberg's maiden name*]
>
> File note 29 October 1999
>
> Conversation with Mr Hutchings – H M Inspector of Taxes – Chichester re roll over relief.
>
> Sale of 12% of equity of unquoted company – is roll over relief available – Yes.
>
> Purchase of unquoted shares in new company – can we roll over to that – Yes.
>
> (In the context of setting up a holding company to finance various ventures.)
>
> PM (*initialled*)"

19. It was accepted by HMRC that the telephone call took place (although there was no record of it at HMRC), and that, in the absence of other evidence, we could accept that Mr Michell's file note was a true record of the substance of the conversation.

20. Mr Michell advised Mrs Rotberg that a new company should be set up, and that the new company would be eligible for rollover relief in respect of other companies that it invested in.

21. Following the signing of the agreement for the sale of the first tranche of the Jobsite shares, Mr Michell incorporated El Shaddai on 24 December 1999. This was understood by Mrs Rotberg to have been in line with Mr Michell's earlier advice.

22. Mr Michell continued to advise Mrs Rotberg. He participated in the negotiations in respect of Mrs Rotberg's sale of her shares in Auto-Online. Following that sale in April 2000, Mr Michell advised Mrs Rotberg that on the sale of the Auto-Online shares, apart from the first £7,200 which would be exempt from tax, the £1,184,368.75 would be rolled over so that no tax would be payable. Mr Michell then wrote to Mrs Rotberg on 9 November 2000 outlining that rollover relief for El Shaddai was in principle available.

23. Mr Michell continued to be the company secretary and accountant of El Shaddai, handling all of the company's financial and tax matters. At the same time, Mr Michell was also handling the company and tax aspects of the sale of Mrs Rotberg's remaining shareholding in Jobsite. Mrs Rotberg understood from Mr Michell's advice that rollover relief would be available. On 29 September 2004, Mr Michell wrote to Mrs Rotberg, saying: "I have been considering the position

regarding the gain to understand the tax consequences. We can just roll the gain over as before and pay no tax." Mr Michell went on to say that any part of the gain not rolled over would attract CGT at approximately 21%.

24. Mr Michell completed Mrs Rotberg's tax returns for all the relevant years, commencing with year 1999/00. Mrs Rotberg's evidence was that the sales of the shares in Jobsite and Auto Online were not referred to in the returns, although we take that to be a reference only to the disposals for which rollover relief was ultimately claimed. For years 1999/00 and 2000/01 we did not have evidence in the form of the paper returns themselves, but only screen prints of HMRC's records showing the figures extracted from those returns by HMRC. Those figures do not include any item in respect of the January and April 2000 sales. We did have a copy of the paper return for 2003/04. From that we note that the questions "Did you dispose of other chargeable assets worth more than £31,600 in total?" and "Answer 'Yes' if: … you want to make a claim or election for the year" were answered "Yes". In the capital gains tax summary pages, the disposal on 31 March 2004 is recorded with disposal proceeds of £1,035,668, representing the balance of the total proceeds after deducting the amount of £1,000,000 which was subsequently reinvested in El Shaddai. The transaction was recorded in the "white space" of the return as "Sale of interest in Jobsite Ltd an unquoted company. 6% of total share capital."

25. Although Mrs Rotberg could not recall precise details of the conversations, her evidence, which we accept, was that she had asked Mr Michell on two separate occasions whether the share sales (which we understand to mean the undisclosed share sales) needed to be mentioned in the returns. Mr Michell told Mrs Rotberg that this was not necessary because the time limit for making claims for relief had not expired, and that such claims would be made in due course.

26. Claims for rollover relief in respect of replacement business assets were made in respect of each disposal on 30 September 2005. The claim forms were signed by Mrs Rotberg and filed on her behalf by Mr Michell.

27. HMRC opened an enquiry into Mrs Rotberg's 2003/04 return on 13 January 2006. At the same time HMRC wrote to Mrs Rotberg advising her that consideration was being given to the making of discovery assessments for the years 1999/00 and 2000/01.

28. Shortly afterwards, following a letter from Mr Michell to HMRC, Mr David Graham, an inspector, wrote to Mrs Rotberg enclosing an authority for Mrs Rotberg to sign to enable HMRC to correspond with Mr Michell and stating:

> "… I note that the overall capital gain, before taper relief, reported for the tax year 2003/04 has been reduced by £1,000,000 following your claim for business asset roll over relief. Please note business asset roll over relief only applies if the old and new assets are of a certain type. Shares do not constitute qualifying assets for the purposes of this relief.
>
> I have considered the possibility of other reliefs, for example re-investment relief but again must say that such a claim will fail as this

> type of relief ceased to be available for shares acquired on or after 6 April 1998.
>
> It follows that I consider there has been a substantial understatement of the capital gain for 2003/2004 and indeed in earlier years. It is important that I receive your instructions over whether to deal directly with your agent or yourself as soon as possible."

29. Mrs Rotberg's evidence, which we accept, was that she took Mr Graham's statement as to the non-availability of other reliefs at face value and that it did not occur to her to question that position.

30. Having been authorised, Mr Michell wrote to HMRC on 21 February 2006. His explanation of the position was:

> "In order to clarify the position regarding roll over relief I spoke with Mr Hutchings, Inspector of Taxes, Chichester on 29th October 1999. The exact circumstances were discussed with Mr Hutchings who confirmed that roll over relief was available in my clients [sic] circumstances. As the circumstances were the same for the two following gains roll over relief was again claimed, in accordance with the advice received."

31. Following further correspondence, on 29 March 2006 Mr Michell sent HMRC a copy of his file note of the conversation with Mr Hutchings on 29 October 2006. In that letter Mr Michell makes the point that, if HMRC's interpretation of the rollover provisions is correct, then Mrs Rotberg had been "seriously misled by inaccurate information from the Inland Revenue".

32. There was further correspondence between Mr Michell and HMRC, and on 5 May 2006 HMRC issued notices of discovery assessment for the years 1999/00 and 2000/01. Appeals were made by Mr Michell on behalf of Mrs Rotberg on 25 May 2006. Notice of amendment to Mrs Rotberg's return for 2003/04 was given by HMRC on 2 June 2006. An appeal in this respect was received by HMRC on 9 June 2006.

33. A meeting was held at the Sussex Innovation Centre at Sussex University on 19 July 2006. Those present were Mrs Rotberg, her husband Douglas Rotberg and Mr Michell, and for HMRC Mr John Fernandez and Mr Kevin Small, both of whom were inspectors. At that meeting, a note of which was taken by Mr Small:

(1) Mr Michell said that he was a general practitioner and that issues such as rollover relief were not his "bread and butter". This was the reason why, having read the "Acts", he had telephoned Mr Hutchings.

(2) Mr Fernandez explained that the assets disposed of did not qualify for rollover relief. He said that if the new shares had been acquired before 1997 then reinvestment relief might well have been available, but that relief had subsequently been abolished.

(3) Mr Fernandez also said that Mr Graham had gone out of his way to research possible relief options for Mrs Rotberg but "had drawn a blank".

(4) Mr Fernandez explained the complaints procedure and handed over a booklet in that respect.

(5) Mrs Rotberg expressed her disappointment with the outcome of the meeting, saying that she had reinvested the monies from the relevant transactions in new ventures based on the advice she had received from Mr Michell about rollover relief.

34. Mrs Rotberg told us, and we again accept, that she believed what Mr Fernandez had said about the fact that there was no available solution, and that, believing there were no further options for obtaining relief, she did not seek any other advice in that respect. It was only in September 2007 that she received specialist advice to the effect that EIS relief could have been available in respect of the chargeable gains arising on the share sales. At that time, however, Mrs Rotberg was too late to make such a claim.

35. It was following receipt of that specialist advice, in a letter of 14 September 2007, that Mr Michell first raised with HMRC the possibility of EIS relief being available. In that letter he remarks that it "seems clear … that although Mr Hutchings talked about roll over relief the relief to which he was actually referring was Enterprise Investment Scheme reinvestment (or deferral) relief". Following that letter, on 24 October 2007, the inspector then dealing with the matter, a Mr Musgrove, contacted the Revenue office dealing with El Shaddai to enquire whether there had been any correspondence on EIS relief and whether the conditions for the relief could be met. The reply, on 8 November 2007, was that there was no reference in the company's file to EIS relief, nor had there been any claim. The time limits for the making of a claim, including that for 2003/04 (5 April 2007), had by that time expired.

The validity of the assessment for 1999/00

36. The assessment for 1999/00 was a discovery assessment. No issue arises on whether HMRC made a discovery or was entitled to make an assessment in that respect under s 29(1) TMA. The dispute is whether HMRC were able, on 5 May 2006, to make a valid assessment outside the then ordinary limit, provided by s 34 TMA, of five years from the 31 January following the end of the year of assessment (which had expired on 31 January 2006). The validity of such an assessment depends on s 36(1) TMA, which at the material time read as follows:

> "An assessment on any person (in this section referred to as 'the person in default') for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made not later than 20 years after the 31st January next following the year of assessment to which it relates."

37. As we indicated earlier, there is no allegation in this case of fraudulent conduct. HMRC argue that the loss of tax is attributable to the negligent conduct of either or both of Mrs Rotberg and Mr Michell, as a person acting on Mrs Rotberg's behalf.

Mrs Rotberg

38. A number of forms of the appropriate test to be applied in determining whether conduct is negligent have been suggested by the decided cases. Although the forms may be different, in substance they amount to the same test of reasonableness. Thus, in *Employee v Revenue and Customs Commissioners* [2008] STC (SCD) 688, the special commissioner held (at [61]) that the question was one of fact having regard to all the circumstances and facts, and (at [66]) that it was to be judged by reference to "the standards reasonably expected of the competent taxpayer and his adviser".

39. More recently it has been held, in a case concerning a taxpayer's conduct, that the test to be applied is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done (*Anderson, deceased v Revenue and Customs Commissioners* [2009] UKFTT 258 (TC), at [22]).

40. The position is affected by whether or not a taxpayer takes professional advice. Thus, in *AB (a firm) v Revenue and Customs Commissioners* [2007] STC (SCD) 99, the special commissioners said (at [105]):

> "We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue. We also accept that a taxpayer who takes proper and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

41. The burden of showing that the loss of tax was attributable to negligent conduct, whether of Mrs Rotberg or Mr Michell, is on HMRC.

42. We are clear that, on the evidence before us, Mrs Rotberg herself was not negligent. We heard evidence from Mrs Rotberg and consider that she was a clear and reliable witness. We accept that she is an innovator and ideas person, a visionary who relies on advice in relation to matters outside her own knowledge and experience. In this case she relied on the advice of her accountant Mr Michell who was involved in many aspects of the financial affairs of Mrs Rotberg and her companies. It has turned out that such reliance was misplaced, but in our view there is nothing to suggest that Mrs Rotberg could have had any indication, at the time she was seeking and receiving advice from Mr Michell, that Mr Michell was unable to advise appropriately on the tax issues surrounding the share sales.

43. Mr Michell was a chartered accountant who held himself out as able to advise on tax and complete tax returns. The very name of his company – Small Firms Accounts and Tax Ltd – suggests that tax advice was part of the service offered by Mr Michell. The first indication in the evidence before us that Mr Michell might have had limited experience in the application of the relevant reliefs was the meeting on 19 July 2006.

44. Mrs Rotberg had no reason to believe, at the time she received Mr Michell's advice, or when she undertook the share sales and reinvestments, or when the tax returns and claims for relief were completed on her behalf and she signed them, that she was receiving anything other than proper and appropriate professional advice from an adviser qualified, both by training and experience, to give such advice. She herself exercised particular care when she specifically enquired of Mr Michell whether the share sales should be recorded in the returns, and she was entitled to rely on Mr Michell's specific assurance in that regard.

Mr Michell

45. We turn therefore to the position of Mrs Rotberg's adviser Mr Michell who, as the person who completed Mrs Rotberg's tax returns and claims, and who filed them with HMRC, was a person acting on her behalf for the purpose of s 36(1) TMA.

46. Again, we remind ourselves that the burden of showing that the loss of tax was attributable to the negligent conduct of Mr Michell lies on HMRC. Taking that into account, and having regard to all the evidence available to us, we have concluded that Mr Michell was clearly negligent, and that the loss of tax in this case was attributable to his negligent conduct.

47. We take as our starting point the law relating to the rollover relief that Mr Michell advised Mrs Rotberg would apply to her share disposals and the reinvestment of the proceeds. The relief was at the time, and remains, contained in Chapter 1 of Part V TCGA, although it was not at the relevant time a new relief, having been included in the capital gains tax code, by s 3 of the Finance Act 1965, since the inception of CGT.

48. Section 152(1) provides:

> "(1) If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ("the old assets") used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ("the new assets") which on the acquisition are taken into use, and used only, for the purposes of the trade, and the old assets and new assets are within the classes of assets listed in section 155, then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act—
>
> *(a)* as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise of a greater amount or value) of such amount as would secure that on the disposal neither a gain nor a loss accrues to him, and
>
> *(b)* as if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or of the interest in, the old assets over the amount of

> the consideration which he is treated as receiving under paragraph *(a)* above,
>
> but neither paragraph *(a)* nor paragraph *(b)* above shall affect the treatment for the purposes of this Act of the other party to the transaction involving the old assets, or of the other party to the transaction involving the new assets."

49. The rollover relief thus operates by treating the disposal of the old assets as being on a no gain/no loss basis, so eliminating what would otherwise be a chargeable gain, and as a corollary reducing the acquisition cost of the new assets by the amount of the reduction in the disposal value of the old assets.

50. What is clear from s 152(1) is that both the old assets and the new assets must be, first, used for the trade carried on by the person making the disposal, and secondly must be within the classes of the assets listed in s 155 TCGA.

51. We need not set out s 155. We need only say that it contains a list of assets in which shares are conspicuous by their absence. The relevant assets, those which can qualify for rollover relief, include, for example, buildings occupied and used for the purposes of the trade, fixed plant and machinery and goodwill, alongside certain other special categories of asset, none of which include shares.

52. We were shown the notes on capital gains for the year 1999/00 which provided guidance for the completion of tax returns for that year. The notes contain a guide to completing pages CG2 and CG3, which are used to give details of disposals (other than when all disposals are in quoted securities). The guidance takes the reader through each column, setting out what information is required to be entered. The first step, according to the guidance, is for details of each asset disposed of to be entered in column A. This specifically includes disposals of unquoted shares. There is nothing in the guidance in relation to column A which would lead the reader to conclude that no details need to be provided if a future claim for rollover relief is intended to be made.

53. In relation to column G, which deals with any disposals affected by a CGT claim or election, the notes refer to claims to business asset rollover relief and directs the reader to the optional claim form in IR290: Business asset roll-over relief. In the same way, the notes to column G refer to Section 7 of the notes, which describe the common reliefs and exemptions. Section 7 in turn describes rollover relief as allowing gains on the disposal of business assets to be deferred if replacement assets are acquired. This not only refers the reader to IR290, but makes the point that the definition of business assets for rollover relief is not the same as that for taper relief which is described in Section 7 as including shares and securities held in a qualifying company.

54. IR290 was a help sheet giving information to assist in the claim for business asset rollover relief so that the CGT pages of the tax return can be completed. It contains a summary of the law, including the list of eligible business assets, which does not include shares.

55. From this we can conclude that the reasonably astute reader of the notes would have understood that, even in a case where rollover relief could properly be claimed, the tax return would need to include the details of the relevant disposal in column A accompanied by details of the claim, or provisional claim, to relief in column G.

56. This corresponds to the legislative provision for provisional claims for relief contained in s 153A TCGA, with effect for CGT from tax year 1996/97. That section, so far as material, provides:

> "(1) This section applies where a person carrying on a trade who for a consideration disposes of, or of his interest in, any assets ("the old assets") declares, in his return for the chargeable period in which the disposal takes place—
>
> > *(a)* that the whole or any specified part of the consideration will be applied in the acquisition of, or of an interest in, other assets ("the new assets") which on the acquisition will be taken into use, and used only, for the purposes of the trade;
> >
> > *(b)* that the acquisition will take place as mentioned in subsection (3) of section 152; and
> >
> > *(c)* that the new assets will be within the classes listed in section 155.
>
> (2) Until the declaration ceases to have effect, section 152 or, as the case may be, section 153 shall apply as if the acquisition had taken place and the person had made a claim under that section."

57. The effect of s 153A, therefore, is to provide provisional relief in a case where there is to be a subsequent reinvestment of the consideration or part of the consideration for the disposal of the old asset within the relevant time limit in acquiring new assets of an appropriate type. Section 153A, like s 152, draws specific attention to the need for the new assets to be within the list set out in s 155. It is clear from s 153A that absent the making of the appropriate declaration in the tax return for the tax year of the disposal the disposal of the old asset will be chargeable to CGT for that year.

58. Having regard to Mr Michell's position as a chartered accountant and tax adviser, the standard by which his conduct falls to be judged is different from that applicable to Mrs Rotberg. It is the standard of the ordinarily competent accountant and tax adviser. That follows from the discussion of the proper test by Arnold J in the Upper Tribunal in *Leslie Smith v Revenue and Customs Commissioners* [2011] UKUT 270 (TCC) where, at [92], he rejected an argument on behalf of Mr Smith that the standard should be that of the reasonable lay person and not, as the First-tier Tribunal had found, that of a normally competent accountant and tax adviser.

59. Miss McCarthy submitted that Mr Michell was a general practitioner and not a specialist tax adviser. In the circumstances, she argued, it was reasonable, indeed sensible, of him to have telephoned HMRC to ask the straightforward question whether rollover relief was available on a disposal of shares and reinvestment of shares in an unquoted company. Having, as Miss McCarthy submitted, received from

Mr Hutchings a clear and unequivocal answer to this straightforward question, it was not unreasonable for Mr Michell to have made no further enquiries. He was the recipient of advice from HMRC which turned out to be wrong, but it was reasonable for Mr Michell to have relied on that advice as being a correct statement of the law.

60. We do not accept Miss McCarthy's submission in this respect. Whilst we accept that Mr Michell was not a specialist tax adviser, he purported to advise on tax as part of the service he offered to his clients. His conduct must be judged in that light. If Mr Michell was not in a position to advise on a particular matter, then, as Mr Shea rightly argued, he ought reasonably to have been aware of his own limitations and to have arranged for Mrs Rotberg to receive professional advice from another source. We do not accept that it is reasonable for an adviser in that position to rely on a response given by HMRC to a telephone call of the nature of that in October 1999.

61. From subsequent statements made by Mr Michell, it seems that he had consulted the legislation. If he did so, then he was in our view plainly negligent in not having regard to the plain words of sections 152, 153A and 155 TCGA. This was not, as we have mentioned, new or untested legislation. In our judgment, even if an ordinarily competent accountant and tax adviser had not been familiar with the law in this respect, he would have been able to ascertain very readily, from the legislation itself and other published materials, that shares were not included amongst the assets that would qualify for business asset rollover relief. We do not consider that such an adviser would have placed reliance on the telephone conversation with Mr Hutchings to resolve any doubt that might have arisen.

62. In our view, the loss of tax is attributable to the negligent conduct of Mr Michell in failing to properly understand his own limitations and yet continuing to give tax advice as to rollover relief to Mrs Rotberg, in failing properly to research and take account of the clear legislation and published materials on the conditions for application of the relief and in negligently relying on a brief telephone conversation with an HMRC inspector who had no knowledge of Mrs Rotberg's affairs as the basis, and we find the sole basis, for advising Mrs Rotberg that a relief to which she was palpably not entitled was available to her.

63. We do not consider that this conclusion is affected by the fact that one of the issues before the special commissioner in *Buckley and another v Revenue and Customs Commissioners* [2005] STC (SCD) 860 was whether business asset rollover relief was available in respect of a gain on a disposal of shares in a private unquoted company. Miss McCarthy submitted that the mere existence of this case demonstrated that Mr Michell was not alone in his belief that shares were qualifying assets for the purposes of s 155 TCGA. It had been argued in *Buckley* that it was possible, in applying s 155, to look beyond the shares in the company to the company's own assets. The special commissioner, applying the detailed provisions of the legislation held that there was no room for a conclusion that Parliament, having enacted such detailed provisions, intended a wide, liberal construction so as to include assets other than those specified. He held that there was no merit in the argument.

64. We do not consider that *Buckley* can come close to describing the view that would reasonably be adopted by an ordinarily competent accountant and tax adviser. The argument raised in *Buckley* cannot be regarded as representative of that cohort, which is the standard by which the conduct of Mr Michell falls to be judged.

65. Miss McCarthy referred us to two other cases which, she argued, also showed that arguments that the tax treatment should be determined by looking beyond shares in a company to the company's own assets are not uncommon. The first, *Boparan v Revenue and Customs Commissioners* [2007] STC (SCD) 297, concerned business asset rollover relief. However, it was not a case where the assets in question were shares; the taxpayer had sold certain agricultural properties and bought replacement properties. The dispute centred on whether, where the assets were not used by the individual in a trade carried on by him but by a company, and that company was a subsidiary of a holding company controlled by the individual, that subsidiary was the individual's "personal company" within s 157 TCGA. The issue was, in essence, whether the ability of the taxpayer to exercise voting control over the holding company meant that the voting rights in the subsidiary were "exercisable" by him. The special commissioner held that the subsidiary was not the taxpayer's personal company.

66. We do not consider that *Boparan* can offer any insight into the likely approach of an ordinarily competent accountant and tax adviser to the question of the availability of rollover relief for disposals of shares. *Boparan* was concerned with the construction of s 157, and with issues of direct and indirect exercise of voting power. It is unrealistic to regard that as evidence that, at the time in question, such advisers might reasonably have considered that rollover relief could be obtained for a disposal and reinvestment in respect of shares in a trading company.

67. Nor is the second case, *Coombes v Revenue and Customs Commissioners* [2008] STC 2984 of any assistance in this context. That case concerned whether a taxpayer could be regarded as a settlor within the meaning of s 86(1)(c) TCGA where he had provided funds to enable a company owned by a trust to acquire a piece of land. It was held that he could not, as no part of the property held on trust (the shares in the company) had been provided by the taxpayer or represented property provided by him. Although Miss McCarthy described HMRC's argument as being that it was possible to look beyond the company to determine whether the land was settled property, we consider that the argument went no further than that the value of the shares in the company had increased by virtue of the funds having been contributed to the company. Nothing in *Coombes* suggests that the ordinarily competent accountant and tax adviser would at the relevant time have reasonably come to the view that shares could fall within the rollover provisions of s 152 and s 155 TCGA.

68. This is not in our view a case of Mr Michell simply getting the law wrong. When one considers how that error came about we are left, on the evidence, with the only reasonable explanation that Mr Michell failed to exercise any reasonable standard of care and attention to the issue before him, such as would have been exercised by an ordinarily competent accountant or tax adviser. In our view such an adviser would not only have understood from the legislation and other materials that

rollover relief was not available, but would not have placed exclusive reliance on what Mr Hutchings had said. We consider, in all the circumstances, that the ordinarily competent adviser would have realised that what Mr Hutchings had said was wrong in the context of the business asset rollover relief, and would not have advised Mrs Rotberg that the relief was available. At the very least such an adviser would not have placed total reliance on Mr Hutchings, but would have considered other readily available material which would have led to the inevitable conclusion that the relief could not be claimed.

69. The test to be applied, by reference to the ordinarily competent accountant or tax adviser, is an objective one. Although we were referred to the terms of a settlement reached between Mrs Rotberg and Mr Michell of court proceedings instigated by Mrs Rotberg and El Shaddai against Mr Michell and his companies, we have taken no account of that. We merely note that the agreement was reached without admission of liability by either party.

70. Even if, contrary to our view, Mr Michell could reasonably have taken the mistaken view that the share transactions were eligible for rollover relief, he would in our judgment have been negligent in not including the disposals in the tax returns for the relevant years. In the light of the express provision for provisional relief in s 153A TCGA and the clear guidance given in the notes relating to completion of the relevant returns, it is our view that an ordinarily competent accountant or tax adviser would not have considered it appropriate to omit any reference to the disposals.

71. Miss McCarthy argued that under s 36(1) TMA it was necessary for HMRC to demonstrate both that the conduct was negligent and that it had led to the tax loss; the loss of tax must be attributable to the negligent conduct. We have no doubt that the loss of tax in this case was attributable to the negligence of Mr Michell in failing to come to the view that the rollover relief was not available to Mrs Rotberg, and his reliance on Mr Hutchings. That is enough to satisfy the requirements of s 36(1). Miss McCarthy's argument on causation in respect of the failure to include the disposals in the returns would be relevant only if we had decided that Mr Michell was not negligent in the advice given to Mrs Rotberg. But in any event we do not accept Miss McCarthy's submission. Even if Mr Michell had reasonably taken the view he did on the question of liability, the loss of tax would nevertheless be attributable to his unreasonable, and negligent, failure to make an appropriate return.

72. It is necessary, when considering whether the provisions of s 36 are satisfied, to consider all the circumstances. Where a series of events leads to a particular result, such as a loss of tax, it is not sufficient to identify the earliest event in that series and to conclude that the loss flowed from that event, and so cannot have arisen from any subsequent event, either individually or in concert with other events. All events in a course of conduct that results in the loss are elements of the same causative process. In this case, in any event, we can conclude that if the disposals had been included in the returns along with a claim for provisional relief it would have been clear on the face of those returns that the gains were taxable, and tax would have become due as part of the normal self assessment and enquiry process. As the tax liability did not so arise, that was a loss of tax attributable to the negligent conduct of Mr Michell in

failing to make an appropriate return, even if he had not been negligent in advising Mrs Rotberg that the rollover relief would become due.

73. Nor, in our view, does the causation of the loss of tax alter if HMRC fail to raise an assessment within the normal time limit, and so have to satisfy the conditions in s 36 TMA. In this case the normal time limit expired on 31 January 2006. The claims for rollover relief were made on 30 September 2005. It would have been feasible, therefore, for the assessment for tax year 1999/00 to have been made before the 31 January 2006 deadline. But that fact does not detract from the fact that the loss of tax was attributable to the negligent conduct of Mr Michell. In particular, it cannot be said that it was attributable instead to the failure by HMRC to issue an assessment within the normal time limit.

74. The only requirement for the loss of tax for s 36 TMA purposes is that it must be attributable to fraudulent or negligent conduct of the taxpayer or a person acting on the taxpayer's behalf. The loss of tax in question arises because it has not been assessed to capital gains tax. In the ordinary course it would have fallen to be assessed through Mrs Rotberg's own self assessment return. By not being so assessed, it represents a loss of tax, and we have found that such loss was attributable to the negligent conduct of Mr Michell. That position is not altered by anything done or not done subsequently by HMRC. Even if the lost tax could have been assessed earlier by HMRC, the loss remains that which arose when the relevant disposal was omitted from the return and it is the attribution of that loss, in this case to the negligent conduct of Mr Michell, that is material for the purpose of s 36 TMA.

Legitimate expectation and reliance on HMRC representations

75. This ground of Mrs Rotberg's appeal has two elements. The first, which relates to the assessments and amendments for each of the tax years in issue, is the contention of Mrs Rotberg that in the October 1999 telephone call between Mr Michell and Mr Hutchings of HMRC it was agreed that relief from CGT would be available in respect of Mrs Rotberg's disposals of shares. In other words, Mrs Rotberg's liability to CGT would be nil. Putting the point another way, the contention is that HMRC's representations gave rise to a legitimate expectation that rollover relief would be available, the consequence of which being that Mrs Rotberg would have no liability to CGT. It is submitted that, by acting on the outcome of the October 1999 telephone call, Mrs Rotberg was denied the opportunity to structure her affairs in such a way as to obtain some other relief (principally EIS relief) or indeed to avoid any charges to CGT arising altogether by simply not disposing of her shares had HMRC not in fact agreed that rollover relief would be available.

76. The second element of this ground relates only to the amendment to Mrs Rotberg's self assessment for 2003/04 and relies on the representations said to have been made by HMRC in 2006 to the effect that HMRC had thoroughly researched the position and had concluded that no other reliefs (that is, reliefs other than business asset rollover relief) were available. This is put on the basis that, at the time HMRC's representations were made, there remained the opportunity for El Shaddai to issue the

appropriate certificate (EIS 1) which would have enabled Mrs Rotberg to obtain EIS relief in respect of the disposal of the Jobsite shares in 2003/04.

The tribunal's jurisdiction

77. As we indicated earlier in outline, this ground of appeal gives rise, in the first instance, to a question of jurisdiction. HMRC submit that it is not within the jurisdiction of this tribunal to consider whether HMRC should give up tax that is agreed to be due in accordance with the statute nor Mrs Rotberg's claim to have a legitimate expectation to business asset rollover relief such that to collect the tax would be unfair. HMRC submit that claims to unfairness are a matter of public law and that the correct procedure is for Mrs Rotberg to have applied for judicial review.

78. By contrast, Mrs Rotberg accepts, first, that this tribunal has no general supervisory jurisdiction and no jurisdiction to grant any of the prerogative remedies available only on judicial review, and secondly that this tribunal's jurisdiction goes only to determining how much tax is lawfully due, and not to the question whether or not HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due.

79. This is not, therefore, a question of the jurisdiction of the tribunal to consider arguments based solely on fairness. That falls squarely into the category of matters capable of being considered only by way of judicial review, in respect of which this tribunal has no jurisdiction. That much is clear from the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TC). The jurisdiction of this tribunal is confined to that which has been conferred on it by statute.

80. The question therefore is whether the tribunal's statutory jurisdiction enables it to discharge the assessments and amendment on the grounds put forward by Mrs Rotberg. As regards the October 1999 telephone call it is submitted by Miss McCarthy that this (and the agreement and/or legitimate expectation arising as a result of those discussions) went to the availability of rollover relief which in turn went to the amount of GCT lawfully due. It did not go to some promise made on HMRC's part to withhold from collecting tax that was otherwise due. As regards the 2006 representations said to have been made, the argument is that as those representations resulted in Mrs Rotberg not taking further action until it was too late to do so that is a matter that enables the 2003/04 amendment to be discharged.

81. The starting point therefore is the tribunal's statutory jurisdiction. This is to be found in s 50(6) TMA. Before referring to that section, we should say that there was no dispute that s 31(1) TMA, under which a person may appeal against an amendment or an assessment, contains no restriction on the grounds on which such an appeal may be brought. The question is not on the grounds of an appeal, however, but on the powers of the tribunal in relation to the amendment or assessment. Section 50(6) provides:

> "If, on an appeal notified to the tribunal, the tribunal decides –

> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

82. There is no definition of what is meant by "overcharged" for this purpose. Miss McCarthy submitted, relying on a dictionary definition in the Shorter Oxford English Dictionary (3rd edition), that this should be regarded as meaning "charged more that is justly due". On this footing, it is submitted on behalf of Mrs Rotberg that this tribunal does have the jurisdiction to consider, first, whether the parties had agreed the availability of rollover relief (and consequentially the CGT liability) in the 1999 telephone call, and secondly the issue of legitimate expectation in so far as those arguments go to Mrs Rotberg's liability to CGT and are relevant to the remedy she seeks, namely a reduction in the amendment and assessments made by HMRC on the basis that Mrs Rotberg is overcharged.

83. The issue of the tribunal's jurisdiction to consider legitimate expectation in particular has been the subject of two recent authorities of equal authority in terms of precedent binding on this tribunal. It is necessary to consider those decisions in some detail.

Oxfam

84. In *Oxfam v Revenue and Customs Commissioners* [2010] STC 686, Oxfam appealed to the High Court from a decision of the then VAT and Duties Tribunal. The issue before the tribunal and the court was whether certain expenditure should be removed from the denominator of the fraction for determining the deductible portion of input tax in a partial exemption method approved by HMRC. The tribunal dismissed Oxfam's appeal, holding that there was no evidence of an intention by the parties to create contractual relations with the approved method, so that there was no binding agreement that the formula would operate as asserted by Oxfam. In the High Court, Sales J upheld the tribunal, and went on to decide in addition that Oxfam's claim based on legitimate expectation also failed.

85. It was common ground that the VAT and Duties Tribunal, a predecessor of this tribunal, had jurisdiction to consider the contract claim. The legitimate expectation claim had not been made before the tribunal having regard to the practice of the tribunal not to entertain public law claims that might be brought by way of judicial review. A separate judicial review claim was therefore brought by Oxfam, and was before Sales J alongside the appeal from the tribunal. However, Sales J decided that Oxfam's claim based on public law principles and the doctrine of legitimate expectation could properly have been raised in its appeal to the tribunal. On that basis, he treated the legitimate expectation argument as a new argument raised on the appeal under the Value Added Tax Act 1992 ("VATA") and ruled upon it in the context of the appeal.

86. Mr Justice Sales explained his reasons for concluding that the legitimate expectation issue could have been dealt with by the First-tier Tribunal in a separate passage of his judgment starting at [61]. His focus was on the construction of the relevant statutory provision from which the tribunal's jurisdiction derived, s 83(1)(c) VATA. That section provides, so far as was material in *Oxfam*, that:

> "(1) … an appeal shall lie to the tribunal with respect to any of the following matters - …
>
> (c) the amount of any input tax which may be credited to a person …"

87. The conclusion reached by Sales J, stated at [71], was that, apart from any authority on the question, that provision should bear its ordinary and natural meaning, with the result that the issue of legitimate expectation between Oxfam and HMRC fell within the tribunal's jurisdiction. He described his analysis of the ordinary meaning of s 83(1)(c) at [63], as follows:

> "On the ordinary meaning of the language of that provision, it appears that it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula, including both the contract issue and the legitimate expectation issue. The words, 'with respect to', in s 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer. The tribunal's jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter."

88. On the basis of that construction, Sales J reasoned, at [66], that there was no sensible basis in the language of s 83(1)(c) for differentiating between Oxfam's contract claim, which he regarded as within the tribunal's jurisdiction, and the legitimate expectation claim. Each was capable of exposing an error of law on the part of HMRC in arriving at the amount of input tax to be credited to Oxfam, and each would, on the face of it, be a proper basis for an appeal to the tribunal against HMRC's decision within the terms of s 83(1)(c).

89. Whilst acknowledging that certain appeals under the various heads listed in s 83(1) would give rise to no questions of either private or public law, this did not, in the view of Sales J, inhibit the jurisdiction of the tribunal to consider those maters where necessary to determine an appeal against a decision of HMRC whose subject matter falls within one of those heads. The judge did not regard his construction of s 83(1)(c) as being open to doubt by reason of it having the effect that, where relevant, issues of public law might require to be addressed by the tribunal.

90. In support of his analysis Sales J referred to the experience elsewhere in courts and tribunals whose jurisdiction, like that of the tribunal, was defined by statute in general terms, without conferring any express power to apply public law. He held that the absence of express words was no impediment, saying, at [68], that "[n]o

special language is required to achieve that effect", and that there was no presumption that public law issues were reserved to the High Court in the exercise of its public law jurisdiction. Thus, Sales J referred to issues in possession proceedings (*Wandsworth London BC v Winder* [1985] AC 461), criminal proceedings (an example being of the validity of a byelaw: *Boddington v British Transport Police* [1999] 2 AC 143) and employment proceedings in employment tribunals, such as to determine whether a contract of employment with a public authority is vitiated as having been made ultra vires. The same approach could be adopted to the interpretation of the tribunal's jurisdiction under s 83; there was no competence issue, and the judge discerned a clear public benefit in the tribunal being the forum to hear all matters relevant to the determination of a question under s 83 (judgment, at [69] to [70].

91. Mr Justice Sales then went on to consider the authorities, in particular that of *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 and the dictum in that case, in relation to the predecessor of s 83, of Lord Lane (with whom Lord Diplock, Lord Scarman and Lord Simon of Glaisdale agreed) at pp 239-240 to the effect that if it had been intended to give a supervisory jurisdiction in terms of assessing the reasonableness of a decision of what was then HM Customs and Excise, clear words would have been necessary, and that the specific headings of appeal appeared by inference to negate the existence of any general supervisory jurisdiction.

92. Having, at [74] to [76], considered *Corbitt* in some detail, having regard to the particular context in which the issue of jurisdiction arose in that case, Sales J held that it was clear that s 83 did not confer on the tribunal any general supervisory jurisdiction. However, he held that it did not follow that the tribunal was precluded from applying public law principles if those principles were relevant to an appeal in respect of a decision of HMRC which did fall within the terms of one of the headings of jurisdiction set out in s 83. The question was one of remoteness of the issue to the relevant decision, as in *Corbitt*, or its immediacy, as Sales J found to be the case in *Oxfam*. Whilst recognising that the issue was not straightforward, the judge held, at [78], that he was not bound by *Corbitt* or any other authority to reach a conclusion contrary to that given by the natural and ordinary meaning of the words used in s 83(1)(c).

Abdul Noor

93. The conclusions reached by Sales J on the jurisdiction question in *Oxfam* were considered at length by the Upper Tribunal (Warren J and Judge Bishopp) in *Noor*. Like *Oxfam*, *Noor* was a case that concerned the scope of the jurisdiction of the First-tier Tribunal under s 83(1)(c) VATA. The substantive issue in the appeal was whether Mr Noor was entitled to deduct VAT shown on invoices as if it were input tax under certain VAT regulations even though the conditions under those regulations had not been satisfied. Mr Noor's case, which had been accepted by the First-tier Tribunal, relying on *Oxfam*, as being within its jurisdiction, and which that tribunal upheld, was that by reason of assurances given to him over the telephone by HMRC's National Advice Service, he had an enforceable legitimate expectation that the input tax shown on the invoices could be recovered.

94. At [31], and in common with the approach adopted by Sales J in *Oxfam*, the Upper Tribunal identified the real question as one of statutory construction, namely the extent of the jurisdiction conferred by s 83(1)(c). Accepting that there were examples of courts and tribunals with no judicial review function giving effect to public law rights, such as those referred to by Sales J at *Oxfam* [68], the Upper Tribunal said that it would be open to the First-tier Tribunal to consider public law issues "only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction".

95. After dealing with the status of that part of Sales J's judgment concerning the jurisdiction of the First-tier Tribunal under s 83(1)(c), the Upper Tribunal in *Noor* went on to consider the substantive reasons for the conclusion in *Oxfam* on this issue. Having referred to the analysis of the ordinary meaning of that provision in *Oxfam*, [63], which was that the language was wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer, the Upper Tribunal, at [57], described Sales J's conclusion as being that s 83(1)(c) covered *all* issues regarding the amount of input tax.

96. The Upper Tribunal disagreed with the parallel drawn by Sales J, at *Oxfam* [66], between the contract issue and the legitimate expectation issue in *Oxfam*. As we have described, that was on the footing that there was nothing in the language of s 83(1)(c) that formed a sensible basis for any differentiation between the two. The Upper Tribunal reasoned, at [60] to [64], that a distinction had to be drawn between contracts within HMRC's powers to make and those outside those powers, and that the only useful parallel was that between legitimate expectation and contracts that were not within the powers of HMRC to make. By contrast, there was a sound basis for differentiating between a claim to give effect to a legitimate expectation and a claim under a contract that was within the powers of HMRC to make. On this basis, whether Sales J had been referring to an intra vires or ultra vires contract in making his comparison, the Upper Tribunal was unable to accept his reasoning in *Oxfam* [66].

97. On that basis the Upper Tribunal turned, at [71], to the single question whether it agreed with the "wide interpretation" given to s 83(1)(c) by Sales J at *Oxfam* [63], and if it did not then whether the disagreement was such that it was appropriate to depart from his conclusion. The Upper Tribunal turned first to considering the conclusion of Sales J that it was no valid objection to his interpretation that sometimes the tribunal would have to apply public law concepts. Whilst regarding the cases from other jurisdictions referred to by Sales J at *Oxfam* [68] as not providing a close analogy, the Upper Tribunal accepted this conclusion.

98. However, the Upper Tribunal doubted what Sales J had said at *Oxfam* [70] in relation to the public benefit of the tribunal hearing all matters relevant to determination of a question under s 83. The Upper Tribunal considered that the approach taken by Sales J to the ordinary and natural meaning of s 83 would, in effect if not in name, have been to give the tribunal a power of judicial review in relation to the matters covered by s 83(1) (*Noor* [76]). On that basis the Upper Tribunal, for the reasons it set out at [77], disagreed with the view taken by Sales J as to the plausibility of Parliament having in mind the public benefits he had identified when "legislating

in the wide terms of s 83”. Its own view, at [78], was that those reasons pointed strongly to the conclusion that Parliament did not intend to confer a judicial review function on the First-tier Tribunal in relation to appeals under s 83.

99. In considering the analysis of Sales J on the question whether he was constrained by authority to come to a different view, the Upper Tribunal focused in particular on the difficulty identified by Sales J, *Oxfam* [77], in reconciling the dictum of Lord Lane in *Corbitt* with the general approach to the interpretation of statutory jurisdiction provisions in areas outside the tax tribunal. The Upper Tribunal saw no such problem, reasoning, at [81], that the cases referred to by Sales J at *Oxfam* [68] were examples of a court needing to decide a point of public law either to be able to exercise its jurisdiction or to decide whether it had jurisdiction in the first place. The Upper Tribunal considered that this was different to the issue in both *Oxfam* and *Noor*, which was one of the statutory construction of s 83(1)(c).

100. On the basis of the Upper Tribunal’s own view of the parallel drawn by Sales J between the contract issue and the legitimate expectation issue and its conclusion that Sales J had been wrong to perceive any difficulty reconciling *Corbitt* with the other cases he had referred to, the Upper Tribunal declined to follow *Oxfam*. In its view, the First-tier Tribunal did not have jurisdiction in *Noor* to give effect to a legitimate expectation in relation to any credit for input tax. It gave, at [87] to [93], the following reasons for its conclusion:

> (1) The right of appeal given by s 83(1)(c) is an appeal in respect of a person’s right to credit for input tax under “the VAT legislation”. That might include any statutory provision which, directly or indirectly, has an impact on the amount of credit due, such as a statutory power of HMRC to enter into an agreement as to a different entitlement to credit for input tax than would have resulted in the absence of the agreement.
>
> (2) A right based on legitimate expectation which goes beyond a person’s entitlement ascertained in accordance with the VAT legislation, in the extended sense, is a matter for remedy by judicial review in the Administrative Court and is not within the jurisdiction of the First-tier Tribunal on an appeal under s 83.
>
> (3) The First-tier Tribunal has no general supervisory jurisdiction over the decisions of HMRC. Where the First-tier Tribunal does exercise what might be described as a supervisory jurisdiction in its examination of the exercise of a discretion, that can only be in respect of the exercise of a discretion that the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their statutory powers.
>
> (4) The subject matter of s 83(1)(c) (“the amount of input tax which may be credited to a person”) is the input tax which is ascertained applying the VAT legislation. A legitimate expectation to be credited with input tax of a different amount may, in an appropriate jurisdiction, be given effect to by a financial adjustment, but that financial adjustment will not represent either “input tax” of something that can “credited” as input tax under the legislation. The First-tier Tribunal has no jurisdiction to effect such a financial adjustment, since its

jurisdiction under s 83(1)(c) relates only to "input tax which may be credited" to a person.

(5) The words "in respect of" are not, contrary to what Sales J found at *Oxfam* [63], wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be attributed to a taxpayer, at least not in relation to the "amount of input tax" which should be so attributed. The financial credit to which Mr Noor might be entitled to give effect to any legitimate expectation, which the Upper Tribunal considered to have been clearly included by Sales J within the phrase "amount of input tax", was not itself "input tax".

(6) The construction given by Sales J departs from the natural meaning of s 83(1)(c) which is focused on the large numbers of decisions on rights and obligations under the VAT legislation which HMRC have to make and in respect of which a specialist tribunal is provided. The reasoning of Sales J, applying as it did to all of the paragraphs of s 83(1), would give the First-tier Tribunal an extensive if not comprehensive judicial review jurisdiction. It was not plausible that this was the intention of Parliament.

Oxfam and Noor discussed

101. Both *Oxfam* and *Noor* were concerned with the statutory construction of a single provision giving the VAT tribunal or the First-tier Tribunal jurisdiction in cases concerning the crediting of VAT as input tax. Those cases are not therefore directly applicable to cases concerning other taxes, as in this case capital gains tax, or to the construction of other provisions, such as s 50(6) TMA. Nevertheless, as *Noor* was relied upon by HMRC in support of their argument that this tribunal does not have jurisdiction to consider Mrs Rotberg's public law arguments, we have reviewed both *Noor* and *Oxfam* in some detail.

102. The difficulty faced by the First-tier Tribunal, especially one concerned with an appeal under s 83(1)(c) VATA, is that it has two decisions of equal binding authority to grapple with. Unless it is possible to reconcile the two, it will be necessary for the tribunal in each case to analyse the two decisions in order to decide which should be followed, or whether some other authority, such as *Corbitt*, is binding on the tribunal in respect of the particular issue before it.

103. We are bound to say that we do not consider *Oxfam* and *Noor* to be irreconcilable. In our view the different approaches adopted can be explained by the different substantive issues before the High Court in *Oxfam* and the Upper Tribunal in *Noor*. In *Oxfam*, the issue before the VAT Tribunal concerned the attribution of what was clearly input tax to taxable supplies on the one hand and exempt or non business supplies on the other. The effect of the claim to a legitimate expectation was therefore to alter that apportionment. In *Noor*, as the Upper Tribunal emphasised, the claim was for something that was neither input tax, nor something that could be treated, under the legislation, as input tax.

104. Viewed in this way, we do not think that Sales J was intending in *Oxfam* to construe s 83 so as to give an extensive judicial review jurisdiction to the VAT Tribunal so as to include power to determine financial adjustments that fell outside the scope of what was input tax. That issue did not arise in *Oxfam*. What Sales J was concerned with was simply whether s 83(1)(c) enabled the VAT Tribunal to consider a legitimate expectation issue between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula of apportionment. Like the Upper Tribunal in *Noor*, Sales J was equally clear that s 83 did not confer any general supervisory jurisdiction on the VAT Tribunal or the First-tier Tribunal. His focus was not on such a jurisdiction, but on the application of public law principles relevant to the determination of an appeal under s 83(1)(c). He drew, at *Oxfam* [76], a clear distinction between the two.

105. By contrast, and what the Upper Tribunal in *Noor* described (at [92]) as its main reason for reaching its conclusion that the ordinary meaning of the language used in s 83(1)(c) in the context of VATA as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers), the Upper Tribunal's conclusion was founded upon its analysis of what was meant by "input tax" and "credit", and the fact that, in the case of Mr Noor, what was sought was a deduction for something that was neither input tax nor something assimilated to input tax under the legislation.

106. Viewed in this way, it is we suggest possible to reconcile *Oxfam* and *Noor* into a single proposition that s 83(1)(c) can be construed so as to provide jurisdiction to the First-tier Tribunal to consider public law arguments where what is at issue is the credit of input tax (that is, actual or deemed input tax under the legislation), but not where what is sought to be credited is not such input tax.

107. We should also say that we do not share the view expressed by the First-tier Tribunal in *Sygma Security Systems v Revenue and Customs Commissioners* [2013] UKFTT 329 (TC), at [71], that the Upper Tribunal decided in *Noor* that the tribunal only has the jurisdiction to consider public law issues when the power to do so is explicitly stated to exist. That summary appears to have been based on how the tribunal in *Sygma* described, at [70], what the Upper Tribunal had said in *Noor* [87] concerning the ability of the First-tier Tribunal to review the exercise of HMRC's discretion. Contrary to the analysis of the tribunal in *Sygma*, the Upper Tribunal in *Noor* did not restrict the tribunal's review jurisdiction to cases where the review power had been explicitly given by statute; it could not have done, as it was considering cases where such reviews may be undertaken under s 83(1)(c), which does not have such an explicit review power. The Upper Tribunal was describing cases where the legislation clearly conferred a discretion on HMRC, as opposed to cases where HMRC were acting altogether outside their powers.

108. Although parallels between contract and legitimate expectation issues were referred to in *Oxfam* in its context, and the matter was considered at some length in *Noor*, we do not ourselves consider that light is shed on the jurisdiction question by an analysis of parallels between issues of contract, whether intra or ultra vires, and issues

of legitimate expectation. The giving of assurances, short of an agreement, is not outside the statutory functions of HMRC, even in cases where there is no statutory duty to do so (*R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd and others* [1990] 1 All ER 91). If the issue falling to be determined is within the subject matter of the appeal jurisdiction, properly construed, then questions of the vires, whether of contracts or non-contractual assurances will be part of the matter to be determined by the tribunal within that jurisdiction. That is not therefore in our view something that can determine the proper construction of any relevant statutory provision.

Section 50(6) TMA

109. What we can derive from *Oxfam* and *Noor* is that, once it is accepted (as it was in both cases) that the First-tier Tribunal has no general supervisory jurisdiction, the question of jurisdiction is not one of principle but one of statutory construction. In the case of s 50(6) the answer to that question turns on the meaning to be ascribed to "the appellant is overcharged" in s 50(6)(a) and (c).

110. Miss McCarthy submitted that "overcharged" should be construed as synonymous with "excessive", arguing that "excessive" had a broader meaning than simply whether the tax charge had been calculated correctly. By the same token she submitted that the question whether a taxpayer has been "overcharged" by an amendment or assessment looks to the determination of the tax lawfully due, and that whether or not such a determination is lawful (in other words, in accordance with the law) is capable of encompassing public law arguments.

111. Although Miss McCarthy referred us to certain decisions of the First-tier Tribunal (*Brian Lewis v Revenue and Customs Commissioners* [2010] UKFTT 327 (TC) and *Bosher v Revenue and Customs Commissioners* [2012] UKFTT 631 (TC)) on appeals against non-fixed penalties, where the tribunal had entertained proportionality arguments, the jurisdiction of the tribunal in those cases was under s 100B(2)(b) TMA, which expressly includes power to reduce the penalty if it appears to be excessive. We do not consider that those cases can assist in the construction of s 50(6), which employs different statutory language. (We should note, for completeness, that although *Bosher* has since been appealed to the Upper Tribunal, [2014] STC 617, on the question of the powers of the First-tier Tribunal in respect of fixed penalties, there was no appeal on the determination of the non-fixed penalties under s 100(2)(b) TMA.)

112. Nor do we consider that "overcharged" can be construed so as to focus, not on the charge itself, but on the determination of the tax lawfully due. In our view, s 50(6) is confined to the lawfulness of the charge under the legislation, and not to its determination. For that reason, we do not consider that reliance can be placed on cases in the Asylum and Immigration Tribunal, such as *AA and Others (Highly skilled migrants: legitimate expectation) Pakistan* [2008] UKAIT 0003, in which public law arguments, including legitimate expectation, were held to be within the tribunal's jurisdiction under a statutory ground of appeal under s 84(1)(e) of the Nationality, Immigration and Asylum Act 2002 that applied if "the decision is otherwise not in

accordance with the law". The jurisdiction in those cases is in relation to the decision, and as such the tribunal is able to consider whether the Secretary of State had failed to act in accordance with established principles of administrative or common law; in s 50(6) TMA it is confined to the question whether the appellant is overcharged. Our view on the impact of the immigration cases corresponds to that taken by the Upper Tribunal in *Noor* (at [86]) in relation to *Nipa Begum v Tower Hamlet London BC* [2000] 1 WLR 306, a case on the particular right of appeal under s 204 of the Housing Act 1996.

113. Of more relevance to a case in the direct tax field, however, is that of *Aspin v Estill* [1987] STC 723. In that case the taxpayer, Mr Aspin, a British subject, had worked in the United States for 20 years before returning to the UK in 1978. He was entitled to a US pension. Mr Aspin's evidence was that on arriving in the UK in January 1978 he had asked a member of a tax office whether his US pension was subject to UK tax, and he had been informed that it was not. Relying on that statement he purchased property in the UK and, in due course, before discovering that the Revenue's position was different, he lost his right to return to the US on his visa. On appeal against assessments to the general commissioners, it was held that the income from the US pension was taxable under Case V of Schedule D, the general commissioners taking the view that the matter of what Mr Aspin had been told was not relevant to the issue before them.

114. That position was endorsed both in the High Court and in the Court of Appeal. There the principal judgment was given by Sir John Donaldson MR, with whom Mustill LJ and Nicholls LJ agreed. It was held that if Mr Aspin had a remedy it could only lie in judicial review, which could be considered only by the High Court. In expressing his agreement with this conclusion, Nicholls LJ said (at p 727c):

> "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."

115. The circumstances of Mr Aspin are analogous to those of Mrs Rotberg in this case. In both cases there is no question as to the proper application of the tax provisions themselves. In both some measure of assurance was sought and obtained from HMRC, in Mr Aspin's case by the taxpayer himself, and for Mrs Rotberg by her accountant, in advance of the relevant taxable event. In both cases the submission is that the taxpayer has both done something to their detriment, and lost the opportunity to rectify matters.

116. *Aspin* is therefore, in our view, authority that the jurisdiction of the First-tier Tribunal in direct tax cases of this nature is limited to considering the application of the tax provisions themselves. On that basis, s 50(6) falls to be construed so as to refer only to the case where the charge to tax made on the assessment or amendment

exceeds that which the tax legislation provides. There is thus no jurisdiction for the tribunal to apply the public law principle of legitimate expectation, even in a case where a relevant degree of assurance is provided before the event, and the taxpayer has done something to his detriment in reliance on that assurance. On this reading of s 50(6), therefore, a challenge can only arise in respect of the enforcement of the liability. That, according to *Aspin*, is something that can only be achieved on judicial review.

117. We conclude therefore, on this construction of s 50(6), that we have no jurisdiction to consider Mrs Rotberg's arguments on legitimate expectation. We should add that, even if a wider reading of s 50(6) had been possible, it would not in our judgment have been of sufficient breadth to cover this particular case. In considering the question of jurisdiction, it is relevant in our view to have regard, as the Upper Tribunal did in *Noor*, to the remedy that would be required to give effect to the taxpayer's legitimate expectation. The starting point in that analysis must be the nature of the expectation that has arisen. In this case it was not simply that the gains on the share disposals would be free of tax; it was that there would be no gain on the share disposals because of the operation of a deferral relief under which there is deemed to be an adjustment in the acquisition cost of the replacement shares.

118. Under s 50(6), the sole power of the tribunal is to reduce the assessment. It is unable to make any adjustment to the acquisition cost of the replacement assets. In a case where the issue is one of the proper application of provisions such as those in relation to rollover relief, a finding that the relief applies according to its terms would necessarily result in the relevant consequences, not only for the disposal but also for the acquisition. But where those provisions do not apply, there is no scope for the tribunal to replicate the effect on the replacement assets of them applying. On any construction of s 50(6), therefore, it must be confined by the remedies available to the tribunal.

119. We do not consider that the application of human rights principles or the Human Rights Act 1998 ("HRA") can affect this conclusion. Although those principles, along with the then recently-decided authority of *Oxfam*, led the First-tier Tribunal in *CGI Group (Europe) Ltd v Revenue and Customs Commissioners* [2010] SFTD 1001 to conclude that it was within the powers of the tribunal to consider a legitimate expectation argument in an appeal under s 83(1)(b), (c) and (p) VATA, the decision was also based on the tribunal's view that, in accordance with s 8 HRA, the case could lead to a remedy that was within the powers of the tribunal. For the reasons we have given, we do not consider that such a remedy is possible in this case.

120. Our conclusion, accordingly, on the jurisdiction question is that we do not have jurisdiction under s 50 TMA to give effect to any legitimate expectation or other public law argument of Mrs Rotberg.

Is Mrs Rotberg's case on legitimate expectation made out?

121. Our conclusion on the jurisdiction question disposes of Mrs Rotberg's appeal in that respect, but in case we are wrong we consider here whether, on the assumption

that we had jurisdiction to decided the issue, Mrs Rotberg has made her case that she had a legitimate expectation for which a remedy should be provided. In this respect, in contrast to the position under s 36 TMA, the burden of proof is on Mrs Rotberg.

122. We should start by saying that, although Miss McCarthy expressed her arguments in relation to the 1999 telephone call in terms of both an agreement and the creation of a legitimate expectation, we can quite clearly conclude that there was no agreement as to Mrs Rotberg's tax position. There is no evidence that any of the ingredients for an enforceable contract were present: there was no offer, no acceptance, no consideration and no evidence of any intention, on the part of either Mr Michell or Mr Hutchings, to enter into a binding agreement.

123. We turn therefore to the issue of legitimate expectation. We have already made the point, referring to *ex parte MFK*, that the giving of advice and guidance is within the statutory function of HMRC. *MFK* concerned a case in which, as a result of a number of approaches made by certain banks and their solicitors and accountants to the Revenue, it had been indicated by Revenue officials that a particular return on certain securities would be regarded as capital and taxable, if at all, to capital gains tax. The Revenue had subsequently determined that the return in question was taxable as income. The applicants applied for judicial review of that decision on the ground that it was unfair, inconsistent and discriminatory, and an abuse of power.

124. We need only refer to the headnote in the report at [1990] 1 All ER 91 for a summary of the findings of the Divisional Court (Bingham LJ and Judge J):

> "In carrying out its statutory function under the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970 to administer and manage the taxation system in the way best calculated to achieve its primary duty of obtaining for the Exchequer the maximum amount of tax that it was practicable to collect, the Revenue could give advice and guidance to taxpayers, but a taxpayer could only have a legitimate expectation that he could hold the Revenue to a ruling or statement in respect of his fiscal affairs if on his part he approached the Revenue with clear and concise proposals about the future conduct of his fiscal affairs, made full disclosure of all the material facts known to him and made it plain that a considered ruling was being sought, indicating the use he intended to make of the ruling, and if on its part the Revenue gave him an unequivocal statement about how his affairs would be treated."

125. It needs also to be noted that, as Bingham LJ said at [111a], "[t]he doctrine of legitimate expectation is rooted in fairness" and, at [109h], "So if, in a case involving no breach of statutory duty, the Revenue makes an agreement or representation from which it cannot withdraw without substantial unfairness to the taxpayer who has relied on it, that may found a successful application for judicial review." Fairness does not, however, operate in one direction only. A person seeking to rely on a representation of HMRC must deal openly and fairly. Not only can HMRC be bound only by a clear unambiguous and unqualified representation, but such a representation must be given on the basis of full disclosure.

126. In our judgment the confirmation provided by Mr Hutchings to Mr Michell in the circumstances in which it was sought falls well short of the threshold at which a legitimate expectation could be regarded as having been created for Mrs Rotberg. The evidence is only of a brief and general conversation, a general enquiry only and an unspecific and unparticularised response from Mr Hutchings. Mr Hutchings cannot be regarded as having understood that what was sought was a considered ruling, and his response could not reasonably be regarded as such a ruling. It does not appear that any details were given by Mr Michell of the identity of the taxpayer, the shares that were to be sold, the details of the actual proposed transaction, the identity of the company into which the proceeds were to be re-invested or the amounts involved. Notably, Mr Michell's enquiry was directed to a local office in Chichester and not to the tax office dealing with Mrs Rotberg's affairs.

127. In these circumstances a claim for relief on the basis of legitimate expectation cannot, in our view, be fairly made by Mrs Rotberg. She could on this basis have no legitimate expectation that she would be taxed otherwise than in accordance with the statutory provisions. We do not accept the submission of Miss McCarthy that the failure by Mr Mitchell to conduct himself in accordance with the behaviour described in *MFK* would have made no difference to the outcome of the advice given by Mr Hutchings, because the issue was a simple one of relief or no relief. Not only are we not prepared to make the inference Miss McCarthy invites us to make as to the nature of Mr Hutchings' likely advice in those circumstances, that is not the correct approach, which is to require there to have been full disclosure as a matter of fairness.

128. Applying the same principles, we also reject the submission that the statements made by HMRC in 2006, first by Mr Graham in his letter of 16 February 2006 and then by Mr Fernandez at the meeting on 19 July 2006 could have given rise to any legitimate expectation such that it was reasonable for Mrs Rotberg to treat those statements as an unequivocal representation that no further reliefs might be available. Those statements cannot be regarded as in the nature of a ruling on Mrs Rotberg's position. In their context they were at most statements made by HMRC officials to back up their own conclusion that the share disposals gave rise to a liability to CGT. It was, in our view, unreasonable for Mrs Rotberg (and, more importantly, Mr Michell) to have relied on those statements as being the last word on the subject and not to have explored any available alternative reliefs. No argument that HMRC's conduct in this respect gave rise to a legitimate expectation on the part of Mrs Rotberg can fairly be made.

129. Accepting that HMRC had no responsibility to give tax planning advice to taxpayers, nevertheless Miss McCarthy argued that this was precisely the exercise that Mr Graham had purported to undertake. Whilst there was no obligation on HMRC to advise Mrs Rotberg as to the possibility of some other relief, such as EIS relief, being available, HMRC made clear and unqualified representations and as a result Mrs Rotberg did not pursue a second opinion until after negotiations with HMRC had broken down and it was too late for El Shaddai to submit an EIS 1 certificate.

130. This argument – that HMRC did not need to express a view on this matter, but having done so it would be unfair for Mrs Rotberg to be taxed – has echoes of the

argument of the applicants in *MFK* (see the judgment of Bingham LJ at p 108c). It is clear from *MFK* that the mere fact of HMRC having expressed a view is not sufficient to found a claim of legitimate expectation. In the circumstances of the statements made by HMRC in this case in respect of other reliefs, we are satisfied that Mrs Rotberg could have had no legitimate expectation capable of giving rise to any remedy.

131. For these reasons, were we to have jurisdiction to consider the legitimate expectation arguments, we would decide that Mrs Rotberg had no legitimate expectation based on the conduct of HMRC, either that she would obtain rollover relief under s 152 TCGA or otherwise on her disposals of shares, or that she would not be entitled to any other relief, with the result that a claim to EIS relief was not made on time in respect of the 2003/04 disposal.

Concluding remarks

132. We have reached our decision on all aspects of this case without enthusiasm. We have every sympathy for Mrs Rotberg who, on the findings we have made, has been ill-served by Mr Michell, and is faced with an unexpected, and considerable, liability to tax that ought to have been capable of being deferred if she had received appropriate advice. Further, although if we had jurisdiction so to do we would have found that statements made by HMRC officers did not give rise to any legitimate expectation on the part of Mrs Rotberg, the fact that those statements were either wrong or incomplete must, we consider, be a matter of considerable regret for HMRC.

Decision

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

Application for permission to appeal

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 7 July 2014