TC04019

Appeal number: TC/2010/08879

VALUE ADDED TAX – preliminary issue – jurisdiction of the First-tier Tribunal – VAT assessment pursuant to section 73(1) VATA 1994 – appeal pursuant to section 83(1)(p) VATA 1994 – whether jurisdiction to consider HMRC's discretion to make an assessment – legitimate expectation – no jurisdiction – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLARE GORE **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 15 July 2014

Mr Nigel Ginniff of counsel instructed directly for the Appellant

Mr Alan Bates of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Background

1. The appellant commenced in business providing a children's indoor playcentre in 2005. She registered for VAT and charged VAT on all entrance fees. In November 2006 her husband was told by HMRC's VAT National Helpline that the entrance fees were not subject to VAT. She claims that as a result of the advice, which was incorrect, she ceased charging and accounting for VAT on entrance fees. There is a factual issue as to whether she relied or was entitled to rely on the advice given. The appellant also made a voluntary disclosure on 1 June 2007 seeking repayment of VAT for periods 10/05 to 07/06. The amount of the repayment claim was paid in full by HMRC on 7 August 2007.

2. In March 2010 a VAT audit visit took place. The officer identified, correctly, that the entrance fees were subject to VAT at the standard rate. In October 2010 the appellant was assessed to VAT in the sum of £36,310 for periods 10/06 to 09/09.

3. On 27 October 2010 the appellant appealed to the First-tier Tribunal ("FTT") challenging the assessment for £36,310. The grounds of appeal are broadly that the appellant had been acting on what turned out to be incorrect advice from HMRC. She claimed a legitimate expectation that she would be taxed in accordance with HMRC's advice and accordingly HMRC should not have issued the assessment.

4. On 27 August 2013 the FTT directed that there should be a hearing of a preliminary issue as to whether the FTT has jurisdiction in relation to the grounds of appeal. In determining this preliminary issue I am not concerned with any factual issues.

5. The assessments under appeal were made on the appellant pursuant to section 73(1) Value Added Tax Act 1994 ("VATA 1994") which provides as follows:

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

6. The appeal against the assessments was made pursuant to section 83(1)(p) VATA 1994. There are also other sub-paragraphs of section 83(1) referred to in the authorities considered below which I include in the following extract:

> "*83(1) Subject to sections 83G and 84, 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;

…

(p) an assessment -

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act …

or the amount of such an assessment;

...

(sa) an assessment under section 78A(1) or the amount of such an assessment;

(t) a claim for the repayment of an amount under section 80, an assessment under subsection (4A) of that section or the amount of such an assessment;

7. It is necessary for me to construe section 83(1)(p) in circumstances where the appellant seeks to appeal an assessment on the basis that HMRC should have exercised its discretion not to make the assessment.

Discussion

8. Mr Ginniff who appears on behalf of the appellant submitted that the FTT has jurisdiction on an appeal under section 83 VATA 1994 where that Act expressly gives it jurisdiction. The jurisdiction of the FTT is essentially a matter of statutory construction. Mr Bates did not take issue with that submission and I accept it as correct.

9. The real question on this preliminary issue is whether the VATA 1994 gives the FTT jurisdiction to supervise the decision of HMRC to assess the appellant under section 73(1). Mr Ginniff submitted that it did. In making that submission he relied principally on the words used in section 73(1) and on the discussion found in a decision of the Upper Tribunal in *Commissioners for HM Revenue & Customs v Abdul Noor [2013] UKUT 071 (TCC)*. That case concerned the extent to which the FTT has jurisdiction when dealing with a VAT appeal to consider a taxpayer's claims based on the public law concept of legitimate expectation.

10. In Abdul Noor the issue arose in the context of a claim for input tax credit. The appeal was pursuant to section 83(1)(c) VATA 1994. The Upper Tribunal also considered the matter in terms of general principle. Much of what it said is relevant for present purposes.

11. Mr Noor claimed entitlement to input tax credit. He relied on advice given by the HMRC National Advice Service in which he was told that he could recover input tax on certain invoices evidencing supplies relating to the construction of a property. He was told that he could reclaim the VAT incurred 3 years prior to registration. In due course Mr Noor registered for VAT. However HMRC later decided that Regulation 111 of the VAT Regulations 1995 prevented recovery of input tax on the invoices because the services had been supplied to Mr Noor more than 6 months before his effective date of registration.

12. The Upper Tribunal in Abdul Noor re-stated the well established principle that the FTT does not have any judicial review function. At [31] it stated:

> " *It does not follow from the analysis above that the F-tT can never take account of or give effect to matters of public law, and in particular legitimate expectation. There are many examples in the authorities of a court or tribunal with no judicial review function giving effect to public law rights. Examples are given by Sales J in Oxfam and we will identify them when addressing his judgment. It would, however, be open to the F-tT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in deciding an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994, which comes down to a point of statutory construction.*"

13. The Upper Tribunal declined to follow the decision of Sales J in *Oxfam v Commissioners for Revenue & Customs [2009] EWHC 3078 Ch.* Both parties before me relied on the decision of the Upper Tribunal in Abdul Noor, The conclusions of the Upper Tribunal were stated at [87] to [95], and in particular the following passages at [87]:

> " *In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric "VAT legislation" it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising "under the VAT legislation" as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with*

the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FtT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83. As Mr Mantle puts it, the jurisdiction of the F-tT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The F-tT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg Best Buys Supplies Ltd v HMRC [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which 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 powers."

14. In *Best Buys Supplies Ltd v Commissioners for HM Revenue & Customs [2011] UKUT 497 (TCC)* the Upper Tribunal considered the discretion of HMRC to accept alternative evidence input tax. It was accepted by both parties in that case that the FTT did have jurisdiction in relation to HMRC's exercise of discretion. HMRC had to exercise that discretion in order to identify the amount of tax properly due from the taxpayer as a matter of law. The issue in the case was as to the nature of the jurisdiction. Whether it was a full appellate jurisdiction or a supervisory jurisdiction.

15. Mr Ginniff's submissions were essentially as follows:

(1) Use of the words "may assess" in section 73 gives the Commissioners discretion as to whether or not to assess VAT which falls due under the VAT legislation.

(2) The exercise of that discretion is within the jurisdiction of the FTT under section 83(1)(p). The present appeal challenges the exercise of that discretion and is therefore "with respect to" an assessment under section 73.

16. Mr Bates submitted that the words of section 83(1)(p) are not wide enough to give the FTT jurisdiction over HMRC's discretion to make an assessment under section 73.

17. It is clear that there is no general supervisory jurisdiction in relation to the discretion of HMRC. Mr Ginniff submitted that whenever HMRC had a discretion that would engage a supervisory jurisdiction. That submission cannot be right and is inconsistent with the House of Lords decision in *C & E Commissioners v J H Corbitt (Numismatists) Ltd [1980] STC 231*, cited by Jacob J in *C & E Commissioners v National Westminster Bank [2003] EWHC 1822 (Ch)* at [49]:

" *There is authority which supports the conclusion that general conduct towards taxpayers is outwith the Tribunal's jurisdiction. I turn first to Lord*

Lane (with whom Lords Scarman and Simon agreed) in CCE v Corbitt [1980] STC 231 at p.239h:

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

(Section 83 is the successor to the s.40(1) of the 1972 Act referred to. There are now more specific headings but no general supervisory jurisdiction has been conferred.)”

18. Mr Bates distinguished an assessment and the decision to make an assessment. The latter he submitted was an application of HMRC’s enforcement powers. HMRC always had a discretion in relation to the enforcement of tax liabilities under its powers of care and management. Use of the words “may assess” in section 73 simply recognised that discretion. The jurisdiction of the FTT was limited to whether the assessment was correct as a matter of law, including where appropriate whether it was made to best judgement. Otherwise there would be a distinction between decisions in relation to input tax where legitimate expectation arguments could not be raised and decisions giving rise to output tax assessments where such arguments might be raised. He submitted that there was no logical basis for such a distinction and the appellant had not suggested one.

19. I would add that it is also possible that an input tax credit previously given might be the subject of an assessment. There would have to be clear words to give jurisdiction over the discretion of HMRC to deny credit and recoup tax by way of assessment but not in the case of a decision simply refusing an input tax credit.

20. Mr Bates relied on the Court of Appeal decision in Aspin v Estill (Inspector of Taxes) [1987] STC 723 which was also referred to by the Upper Tribunal in Abdul Noor. In that case the Inland Revenue assessed a taxpayer to income under Schedule D Case V. The taxpayer claimed that he had been given information over the telephone that such income would not be subject to tax and it was unfair and oppressive for the Revenue to assess him. At 727c Nicholls LJ stated:

“ *The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In*

my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

21. It as well established that challenges to HMRC's decisions to enforce a liability by way of assessments to income tax are outside the jurisdiction of what were the general or special commissioners. Against that background I consider that very clear words would be required to bring such decisions in relation to VAT assessments within the jurisdiction of what was the VAT Tribunal and is now the FTT.

22. In making his submissions Mr Ginniff relied on a decision of the FTT (Judge Hellier and Mr Williams) in *Hollinger Print Ltd v Commissioners of HM Revenue & Customs [2013] UKFTT 739 (TC)*. In that case, like the present, the appellant argued that the decision to assess VAT was an unfair exercise of discretion. The appeal was pursuant to section 83(1)(p) VATA 1994. The FTT relied on an earlier decision of the VAT Tribunal in *Technip Coflexip Offshore Ltd v Commissioners of HM Revenue & Customs (Decision 19298)* where the tribunal allowed an appeal because HMRC had failed to consider their discretion to make an assessment.

23. The FTT in Hollinger considered that section 73(1) conferred a discretion on HMRC whether or not to make an assessment. That is clearly correct. The FTT referred to *Rahman (No 2) v C & E Commissioners [2003] STC 150* and *C & E Commissioners v Pegasus Birds [2004] STC 1515* where the Court of Appeal identified two distinct questions in appeals under section 83(1)(p). First whether the assessment has been made under the power conferred by section 73(1) including the use of best judgement. Second whether the amount of the assessment is correct. In relation to best judgement where a tribunal is satisfied that the commissioners have made a mistake in the assessment the Court of Appeal in Pegasus Birds at [21] re-affirmed the question to be asked in the following terms:

" *… the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary.*"

24. At [58] the FTT in Hollinger stated as follows in relation to these cases:

" *What, in view of our discussion of the meaning of "may" in section 73, is striking about these cases is the concentration on the use of "best judgement" to assess the tax. There is no express consideration of the question whether, if it is found that to the best of HMRC's judgement tax is due, it should in fact be assessed, even though the Wednesbury principles, which are clearly in the (sic) linked to the requirement properly to consider the exercise of any discretion by a public body, were in the minds of the judges. But that approach must be viewed in the light of the arguments in the appeals before the courts. The attack in each case had not been on the decision to assess, but on the judgement used*

in making the assessment. It seems to us that the test is described is equally applicable to both questions and that the two questions are not to be addressed separately; there is one question only and that is whether it was wholly unreasonable to make the particular assessment."

25. The FTT in Hollinger seems to be saying that the discretion whether to make an assessment is bound up with the issue of whether an assessment is made to best judgement. If the answer to the single question is that it is "*wholly unreasonable*" to make the assessment then it can be set aside.

26. I do not consider that approach can be right, given the way in which the Court of Appeal has interpreted what is meant by best judgement. Indeed in Pegasus Birds at [22] Carnwarth LJ stated:

"*In the light of that authoritative statement of the law, I would caution against attempts to refine or add to it, by reference to individual sentences or phrases from previous judgments …. Even the term "wholly unreasonable" (also used in Van Boeckel) may be misleading if it is treated as a separate test, rather than as simply an indication that there has been no "honest and genuine attempt" to make a reasoned assessment.*"

27. The Court of Appeal in Pegasus Birds and previous cases closely scrutinised the wording of section 73(1). It seems to me inconceivable that it would have analysed best judgement in the way it did if the tribunal had an overriding power to consider whether HMRC were justified in exercising their discretion to make an assessment. If that was right it seems to me that the concept of best judgement would be almost redundant.

28. The FTT in Hollinger had been referred to Abdul Noor but distinguished it on the basis that it was concerned with section 83(1)(c). Similarly it distinguished Aspin, National Westminster Bank and J H Corbitt (Numismatists) Ltd principally on the basis that they concerned different statutory provisions.

29. The FTT in Hollinger stated its conclusion at [62] as follows:

"*It seems to us that the width of the words in section 73(1)(p) "against the assessment" indicate that this tribunal's role is not confined solely to the question of whether it was made to the best of HMRC's judgment. The section does not limit the appeal to one "against the question of whether the amount of assessment was made to the best of HMRC's judgement". But in our view the scheme of section 73 does not require a separate formal decision to exercise the power to assess, and a second separate formal decision as to what amount should be assessed. The two decisions are one, and, on appeal against the assessment, there is one question which is to be asked in relation to that single decision: was it made wholly unreasonably? If the answer is yes, then the appeal against the assessment must succeed. In any event if it was made wholly unreasonably it cannot have been made to the best of the judgement of the Commissioners.*"

30. For the reasons given above the scheme of section 73(1) and section 83(1)(p) envisages two questions for the tribunal. Firstly whether the assessment was made to best judgement pursuant to the power in section 73(1). Secondly whether the amount of the assessment was correct. I agree with Mr Bates that the decision as to whether an assessment should be made is essentially a matter of enforcing the liability provided for by the statute.

31. Notwithstanding the view it had taken as to jurisdiction, the FTT in Hollinger found that on the facts the decision to assess was not unreasonable. The reasons it gave for reaching that decision are set out at [64] and illustrate tension with the conclusion that it had jurisdiction over the discretion to assess.

32. At [64(1)] the FTT said that the effect of making an assessment on the survival of the taxpayer's business was not a relevant factor. The FTT stated "*An assessment is concerned with determining the amount of tax which is due; the second stage is the collection of tax*". In my view it is the specific terms of VATA 1994 and associated legislation that determines the amount of tax lawfully due. Assessment of the tax is part of the collection process (see Aspin). Various stages in the process of enforcement no doubt involve consideration of policy issues which might include for example the weight to be attached to the amount of the assessment, the circumstances of the appellant and the circumstances generally in which the liability arose.

33. At [64(4)] the FTT stated as follows:

> " *In making his assessment we consider that Mr Donnelly acted fairly and honestly on the information available to him. He took a decent length of sample period, he asked for the Appellant's comments on his conclusions and on the representative nature of the period before making his assessments. He adjusted the assessments for the Zenith bad debt. He considered the taxpayer's representation on individual items. In his evidence before us, he said that he had addressed the issue of whether the disputed supplies were "one-offs" and thus whether it was fair to extrapolate calculations about their effect into earlier periods: he said that he had invited Mr Hollinger's comments on the point but concluded that, if anything, the incidence of similar supplies to those in dispute was probably greater in earlier periods, such that a detailed review of those periods might produce more additional tax than a mere extrapolation.*"

34. These are factors which might be relevant to whether best judgement has been exercised or to the proper amount of tax due. The question in relation to best judgement is whether the officer made an honest and genuine attempt to make a reasoned assessment. If the answer to that question is that best judgement has been used, I do not consider that the Court of Appeal intended either as a further question or as part of the same question consideration of the broader issue as to whether the decision to assess was reasonable.

35. The decision of the FTT in Hollinger has subsequently been considered by the FTT (Judge Berner and Mr Jenkins) in *Southern Cross Employment Agency Ltd v Commissioners of HM Revenue & Customs [2014] UKFTT 088 (TC).* HMRC had

assessed VAT under section 80(4A) of VATA 1994 and interest under section 78A(1). The appellant contended that there was a binding agreement compromising a claim for repayment of VAT and interest. One issue was whether, even if HMRC had power to make assessments under section 80(4A) and section 78A(1), it was unlawful for them to exercise their discretion to do so. In the light of its decision on the other issues, consideration of this issue was not necessary for the FTT's decision. However it did say something about the issue.

36. Section 80(4A) in so far as relevant provides as follows:

> " *(4A) Where—*
>
> *(a) an amount has been credited under subsection (1) or (1A) above … and*
>
> *(b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,*
>
> *the Commissioners may, to the best of their judgement, assess the excess credited to that person and notify it to him.*"

37. Section 78A(1) in relation to interest was in similar terms.

38. It is notable that if the present appeal was concerned with assessments by HMRC to recover amounts repaid to the appellant following the voluntary disclosure that was made in June 2007 then those assessments would have been made pursuant to section 80(4A).

39. At [95] the FTT in Southern Cross Employment stated as follows:

> " *… As Noor has confirmed, the Tribunal is a creature of statute, and its jurisdiction is defined by statute. In this case, the relevant statutory provisions are s 83(1)(t) and (sa) VATA. Whilst there can be no doubt that the jurisdiction under these provisions extends to the question of construction of s 80(4A) and s 78A(1), and to findings as to the making and validity of a compromise agreement in order to apply those sections as so construed to the facts of a particular case, we do not consider that the VATA provides a jurisdictional base for examining the lawfulness of the administrative exercise of any power to assess under those sections. It seems to us that there is a jurisdictional dividing-line, and that arguments that look to the policy of HMRC and the factors which HMRC should, or should not, have taken into account in deciding to assess fall, along with arguments whether HMRC should not have refused to withdraw the assessments, on the judicial review side of that line.*"

40. The words of section 80(4A) include "*may…assess*" as does section 73(1) relied on in the present appeal. The FTT in Southern Cross Employment did not consider that this together with section 83(1)(t) and (sa) were sufficiently clear to give a

supervisory jurisdiction over the decision to assess. I respectfully agree with that conclusion. I would add that in the context of the present appeal there is no reason to think that Parliament intended a different result in relation to assessments under section 73(1).

41. It is clear also from [96] to [99] that the FTT in Southern Cross Employment reached a different conclusion on this point to Hollinger, although it did not expressly say that Hollinger was wrong. At [98] and [99] it said as follows:

> "*98. Unlike the position in Hollinger, there is authority, in the High Court in Customs and Excise Commissioners v National Westminster Bank plc [2003] STC 1072, in the context of one of the particular provisions with which we are concerned in this case, s 83(1)(t), that this Tribunal has no jurisdiction in relation to the supervision of HMRC's conduct. Although the focus in National Westminster Bank was not on an assessment, but on the refusal of the commissioners to pay a claim under s 80, and the court did not expressly consider the jurisdiction in s 83(1)(t) over both "an assessment" and "the amount" of an assessment (similar wording to that in s 83(1)(p) which the Tribunal in Hollinger regarded as decisive), we regard the tenor of the judgment in National Westminster Bank as pointing clearly against this Tribunal having jurisdiction over the exercise of discretion by HMRC in the making of an assessment under s 80(4A).*
>
> *99. As Lord Lane (with whom Lord Diplock, Lord Scarman and Lord Simon of Glaisdale agreed) said in Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd [1980] STC 231, at p 239, clear words would be necessary to give the Tribunal a supervisory jurisdiction. With respect to the Tribunal in Hollinger, we do not consider that either s 83(1)(t) of s 83(1)(sa), notwithstanding the references in those provisions to "assessment" as well as to "the amount" of the assessment, do provide such clear words.*"

42. For the reasons given above, and for those expressed in Southern Cross Employment, I consider that Hollinger was wrong in relation to jurisdiction under section 83(1)(p). There is no material difference between the provisions being considered by the FTT in Southern Cross Employment and the provisions being considered by the FTT in Hollinger which in turn are the same as those in the present appeal.

43. Recently the FTT in *Rotberg v Commissioners of HM Revenue & Customs TC/2010/04359* (Judge Berner and Mrs Darley) again considered the decision in Abdul Noor and sought to reconcile at least the result in that case with the decision of Sales J in Oxfam. At [106] and [109] the FTT stated as follows:

> "*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.

…

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."

44. I agree with Mr Bates that the appellant's argument on this preliminary issue would remove much of the distinction between the jurisdiction of the tribunal and that of the Administrative Court in this context. Clear words would be required for that result and the wording of section 83(1)(p) does not clearly give that result. I do not consider that the words "*with respect to … an assessment*" in section 83(1)(p) are capable of incorporating within the jurisdiction of the tribunal HMRC's discretion whether or not to make an assessment. They are limited to whether the assessment is correct as a matter of law, including whether the assessment is made to best judgement.

Conclusion

45. For the reasons given above I do not consider that the FTT has any supervisory jurisdiction over HMRC's discretion to make an assessment under section 73(1). I therefore determine the preliminary issue accordingly. That being the only ground of appeal I must dismiss the appeal.

46. By way of postscript I must make reference to the fact that the appellant was seriously misled by HMRC. If she relied on the advice given then she ought to have a remedy. Her legal remedy would lie by way of judicial review. Otherwise she could complain to the Adjudicator or to the Parliamentary Ombudsman.

47. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 18 September 2014