[2016] UKFTT 0797 (TC)

TC05523

Appeal number: TC/2015/05775

VAT – misdeclaration penalties – two year time limit for assessment – whether time runs from withdrawal of appeal against substantive assessment – whether Tribunal bound by House of Lord's decision in* Anufrijeva *to find that assessment made only when notified – HMRC's failure to follow published guidance – issuance of notification to wrong person – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TELETAPE (a firm) **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR MARK BUFFERY

Sitting in public at the Royal Courts of Justice, Strand, London on 20 October 2016

William Hansen of Counsel, instructed by Burlingtons Legal LLP, for the Appellants

Philip Shepherd, of HM Revenue & Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. This was the appeal of the Teletape partnership ("the Appellants") against two VAT misdeclaration penalties, one of £507,369 for the period 05/06, and the second of £157,299 for the period 06/06.

2. The Appellants submitted that:

(1) the original Notices had been issued in the wrong name

(2) an assessment was not made until it was notified, as was clear from the House of Lords' decision in *R (oao Anufrijeva) v SSHD* [2003] UKHL 36 ("*Anufrijeva*");

(3) the assessments had been notified to the Appellants after the statutory two year time limit; and

(4) HMRC had failed to follow its published guidance on assessment and notification, and the Tribunal was required to take this into account when deciding the appeal.

3. HMRC submitted that:

(1) the use of the wrong name on the original Notices was remedied before the hearing, and this was sufficient to cure the defect;

(2) assessment and notification were separate operations, and *Anufrijeva* was not relevant;

(3) valid assessments had been made within the two year statutory time limit; and

(4) although HMRC had failed to follow its published guidance, that failure could only be challenged by judicial review.

4. We found that that *Anufrijeva* could be distinguished from the Appellants' position, and that the two year time limit ran from assessment, not notification. Although HMRC had breached its own guidance, the Tribunal did not have the jurisdiction to decide the case on that basis. We agreed that the original Notices were unenforceable because they had been issued in the wrong name, but their later replacement by valid Notices was sufficient to cure the defect. We upheld the penalty assessments and dismissed the Appellants' appeal.

The legislation

5. The penalties were levied under Value Added Taxes Act 1994 ("VATA") s 63. By subsection (b), this provides that a misdeclaration penalty will be "equal to 15 per cent of the VAT which would have been lost if the inaccuracy had not been discovered".

6. VATA s 76 is headed "Assessment of amounts due by way of penalty, interest or surcharge" and provides, so far as relevant to this decision, that:

> "(1) Where any person is liable…

(b) to a penalty under any of sections 60 to 69B…

the Commissioners may…assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly...

(3) In the case of the penalties, interest and surcharge referred to in the following paragraphs, the assessment under this section shall be of an amount due in respect of the prescribed accounting period which in the paragraph concerned is referred to as 'the relevant period'…

(d) in the case of a penalty under section 63, the relevant period is the prescribed accounting period for which liability to VAT was understated or, as the case may be, for which entitlement to a VAT credit was overstated."

7. VATA s 77(2) reads, so far as relevant to this decision:

"…an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3)…of that section may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined."

8. The appeal was made under VATA s 83(1)(n), which reads:

"83 Appeals

(1) Subject to sections 83G and 84, an appeal shall lie to [the tribunal with respect to any of the following matters…

(n) any liability to a penalty or surcharge by virtue of any of sections 59 to 69B…"

9. Section 83G is headed "bringing of appeals" and begins:

"(1) An appeal under section 83 is to be made to the tribunal before

(a) the end of the period of 30 days beginning with

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates…

(ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or

(b) if later, the end of the relevant period (within the meaning of section 83D)…

The evidence

10. Mr Ravi Darayanani and Officer Raffaela Lahi both provided witness statements, which were accepted. As a result, neither was called to give evidence. The Tribunal also had the benefit of a helpful bundle of documents provided by the Appellants, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) HMRC's record of particulars relevant to Teletape; and

(3) HMRC's internal assessment form VAT292, signed and dated on 23 June 2015.

11. On the basis of that evidence, the Tribunal found the following facts, which were not in dispute.

The facts

The input tax claims

12. At some point before 21 October 1985, Mr Manohar Daryanani, Mrs Shanta Daryanani and Mr Prakash Daryanani formed a partnership which they called "Teletape". We infer from Mr Ravi Daryanani's witness statement that he either later became a partner, or had authority from the partnership to act on its behalf. Neither party sought to argue that any such change was relevant to the issues in dispute.

13. Teletape was registered for VAT with effect from 21 October 1985. In this decision, where we refer to "Teletape" without more, this is a reference to the partnership registered for VAT purposes in that name, and to the partners who formed the partnership.

14. In period 05/06, Teletape claimed input tax of £3,560,490.50; in the following period, it claimed input tax of £1,103,856.25. Both claims related to the purchase of mobile phones. On 11 May 2007 HMRC refused to repay the input tax claimed, on the basis that Teletape knew or should have known that the transactions formed part of an overall scheme to defraud HMRC. Teletape appealed that decision to the VAT tribunal, but subsequently withdrew the appeal.

15. The Tribunal was notified of the withdrawal on 27 June 2013 by way of draft directions signed by Dass Solicitors for the Appellants and by HMRC Solicitors' Office. On 1 July 2013, Judge Berner wrote the words "approved and directed accordingly" on those directions.

16. Teletape de-registered from VAT with effect from 30 April 2014, because the partnership had ceased to trade.

17. Meanwhile, on 18 November 2005, a company called Teletape Ltd had been incorporated. Mr Ravi Daryanani was a director of that company, and its business address was 321 Caledonian Road, the same as that of the partnership. Teletape Ltd registered for VAT on 24 August 2009.

The misdeclaration penalties

18. On 27 March 2015, Officer Lahi began to consider whether to raise misdeclaration penalties in relation to the input VAT claimed by Teletape in 05/06 and 06/06. She decided that HMRC were in time to make the assessment and that the 15% penalty prescribed by VATA s 63(1)(b) should be mitigated by 5%. The penalty for period 05/06 was thus £507,369 (£3,560,490.50 x 15% x 95%) and that for period

06/06 was £157,299 (£1,103,856.25 x 15% x 95%). She completed a number of internal HMRC checks.

19. On 11 June 2015 Officer Lahi completed Form VAT292 by inserting the penalties, the partnership's VAT number, the VAT periods and the date of issue, namely 11 June 2015. The copy of the form provided to us does not show the name of the trader. Mr Hansen accepted that it was an authentic copy of the original form.

20. On 23 June 2015 another HMRC Officer reviewed Officer Lahi's decision to raise the penalties, their calculation and the mitigation. That Officer then forwarded the VAT292 to a senior HMRC officer, who countersigned the form. The penalties were keyed into the HMRC system and entered in the internal records for Teletape. HMRC's internal assessment of the penalties was now complete.

21. Later the same day, Officer Lahi typed up two Notices of Assessment. Both were addressed to "the Company Officers, Teletape Limited, 321 Caledonian Road" rather than to Teletape, the partnership. Officer Lahi printed out, signed and dated the two Notices. Either Officer Lahi or a colleague put the Notices in an envelope, attached a first class stamp, and took the envelope to a post box before the Post Office made the final collection from that box on that day.

22. On 27 June 2015, the Post Office delivered a note to "The Company Officers" at 321 Caledonian Road. The note said "unfortunately we can't deliver your item" because "the sender did not pay the full postage". This was because the postage had not been sufficient for a "large letter". The shortfall was £0.11, to which the Post Office had added a £1 handling fee. The note did not identify the sender of the item. Mr Ravi Daryanani paid the £1.11 over the telephone using a credit card, and the Notices were delivered to 321 Caledonian Road on 30 June 2015.

23. The first of the Notices begins:

> "This notice of assessment of misdeclaration penalty is issued following HM Revenue & Customs decision/s to disallow a credit to input tax of £3,560,490.50 notified to you on 11/5/07 concerning Value Added Tax period 05/06…As the Value Added Tax return for this period contained a large inaccuracy that resulted in an overstatement of your entitlement to a repayment [HMRC]…have made an assessment of misdeclaration penalty in the sum of £507,369."

24. The Notice ends by saying that "the sum of £507,369.00 is now due and should be paid immediately". The VAT number on the Notice is that of Teletape. The wording of the second Notice is identical, other than in relation to the period and the amount of the penalty.

25. On 22 July 2015 the Appellants' then representative, Jeffrey Green Russell Ltd ("JGRL"), emailed Officer Lahi, attaching a letter which stated that the firm was acting on behalf of both Teletape and Teletape Ltd. The letter pointed out that the Notices were addressed to the company, although it was the partnership which had

claimed the input tax credits. JGRL said that the assessments were invalid and asked for a statutory review. On 24 July 2015, Officer Clifford acknowledged the appeal.

26. We considered whether JGRL's letter of 22 July 2015 was an appeal by Teletape. There was some ambiguity, because the firm stated that it was acting on behalf of both Teletape and Teletape Ltd. But the letter also asked for a statutory review, and when HMRC responded by treating the letter as an appeal by Teletape against the assessments, Teletape did not deny that it had appealed. On a fair view of the facts we find that an appeal was made by Teletape on 22 July 2015.

The statutory review, the further Notices and the Tribunal

27. On 26 August 2015, Officer Champion, an HMRC Review Officer, issued the results of her statutory review upholding the penalties. On the following day Officer Lahi wrote to JGRL. Her letter is headed "Teletape" and begins:

> "Further to my colleague Judith Clifford's letter dated 24 July 2015 in which she acknowledged your appeal against the misdeclaration penalties issued on your client Teletape…
>
> I write to apologise that the correspondence was incorrectly addressed to 'the Company Officers, Teletape Ltd' this was done in error as the confusion arose due to both Teletape (the partnership) and Teletape Ltd being at the same address, however the correct Registration Number of Teletape (the partnership) was quoted on the letter and the charges have been raised under this VAT Registration Number."

28. On 21 September 2015 Teletape appealed to the Tribunal. On 25 November 2015 HMRC issued its Statement of Case, attaching two further Notices of Assessment. These were identical in all respects to the earlier Notices, other than that neither was dated, and both were addressed to "Teletape (Partnership)". On 15 December 2015 those new Notices were also appealed to the Tribunal, and on 21 August 2016 that appeal was consolidated with Teletape's original appeal.

The issues

29. There were four issues in dispute:

(1) the date from which the statutory two year time limit began to run;

(2) when the penalties were notified;

(3) whether an assessment is "made" only when notified;

(4) whether, and if so in what way, HMRC's failure to follow its published guidance was relevant to the appeal.

30. We address each of those issues in turn.

ISSUE 1: THE DATE FROM WHICH TIME BEGAN TO RUN

31. As already noted, VATA s 77(2) provides that a penalty assessment must be made "before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined".

Mr Hansen's submissions on behalf of Teletape

32. Mr Hansen said that the VAT due for periods 05/06 and 06/06 had been "finally determined" on 27 June 2013, when the Tribunal was sent the draft directions recording that Teletape had withdrawn its appeal against the substantive assessments. That final determination date was, he said, a question of historical fact. It followed that the penalty assessments had to be made by 26 June 2015, being two years after 27 June 2013.

33. He relied on *RS Garments v HMRC* [2014] UKFTT 1120 ("*RS Garments*") (Judge Poole and Mrs Akhtar). That case also involved a misdeclaration penalty, and the key issue in dispute was identical, namely when "the amount of the VAT due for the prescribed accounting period concerned has been finally determined", see [28] of that decision.

34. In *RS Garments*, HMRC's Counsel, Mr Charles, relied on *Liaquat Ali v HMRC* [2006] EWCA Civ 1572 ("*Liaquat Ali*"), where Arden LJ said at [55] that the term "finally determined":

> "refers to the final determination of the VAT due whether by assessment and the expiration of the time for appeal against that assessment or by appeal so far as an appeal lies."

35. Mr Charles submitted that:

> "…the VAT due for accounting period 04/07 only became 'finally determined' on 1 June 2011 when the appellants withdrew their appeal against the decision to refuse the relevant input tax claimed for that period."

36. The Tribunal in *RS Garments* said at [30] that:

> "We essentially agree with the submissions of Mr Charles. It seems clear, on the basis of the comments of the Court of Appeal in *Liaquat Ali*, that if the appeal against the original assessment had been continued to a conclusion and decided by the Tribunal, the liability to VAT for the relevant period would have been 'finally determined' by that decision (subject to any appeal). We consider that the appellants' withdrawal from the appeal (as a result of which HMRC's decision to deny the input tax became final) should be regarded in exactly the same way."

37. Mr Hansen went on to say that his reading of s 77(2) was also in accordance with HMRC's own guidance. The VAT Civil Penalties Manual at VCP10807 is headed "Misdeclaration Penalty: calculation and notification of a misdeclaration penalty: Time limits for assessing the penalty", and includes the following passage (Mr Hansen's emphasis):

> "The tax in a period is finally determined on the later of:
>
> - the date of receipt of a return
> - the date of issue of the VAT 655 (notification of an officer's assessment)

- the date of any amendment to that officer's assessment
- the date of issue of a VAT 657 (notification of voluntary disclosure)
- the date of any section 85 agreement
- the date an appeal is withdrawn, or
- the date of release of a Tribunal decision or a judgement of the court being delivered, this includes cases where the amount of the tax assessment is upheld as originally issued."

38. He added that Officer Lahi and Officer Champion, the HMRC Review Officer, had both read s 77(2) in the same way. Paragraph 2 of Officer Lahi's witness statement states that when considering whether to levy a misdeclaration penalty, "the first step was to establish whether the case was within the 2 year time limit provided by section 77(2)". Paragraph 7 reads (again, Mr Hansen's emphasis):

> "In this appeal, the time when the amount of VAT due for the prescribed accounting periods was finally determined is the date the Appellant withdrew its appeal against the denial of the input tax, namely 27 June 2013. Until that date, the amount of VAT due was in dispute; it had not been finally determined."

39. In the review decision, Officer Champion said that "the date of determination in this case is the date that the Tribunal advised that Teletape had withdrawn its appeal – 27 June 2013".

Mr Shepherd's submissions on behalf of HMRC

40. Mr Shepherd submitted that, in deciding when the amount of VAT due was "finally determined", it was necessary to take into account Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), which reads:

> "(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
>
> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each other party in writing of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
>
> (a) the date that the Tribunal received the notice under paragraph (1)(a); or

> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

41. Mr Shepherd said that the date on which the VAT in dispute was "finally determined" was therefore the date after which no reinstatement application could be made. In the case of Teletape, this was 24 July 2013, being 28 days after the appeal was withdrawn. It followed that the assessments were both made and notified within the two year time limit.

42. Mr Shepherd cited in his support *Foneshops v HMRC* [2015] UKFTT 2010 ("*Foneshops*"), a decision of Judge Mosedale. The background facts are set out at [4]-[12] of the decision, and can be summarised as follows:

(1) HMRC had decided not to repay certain amounts of input tax claimed by Foneshops on the basis that they related to missing trader intra-community trade ("MTIC"). Foneshops appealed that decision.

(2) Foneshops failed to serve its witness evidence by the date specified in the Tribunal's directions. Judge Berner made an "unless order" stating that that a failure to comply would lead to the proceedings being struck out.

(3) Foneshops did not comply with the unless order, and on 27 June 2012, the proceedings were struck out.

(4) On 31 July 2012, Foneshops applied for its appeal to be reinstated.

(5) On 22 November 2013, the Tribunal released its decision refusing reinstatement.

(6) Foneshops applied for permission to appeal that decision. Permission was refused by the First-tier Tribunal and on 3 March 2014 by the Upper Tribunal.

(7) On 27 June 2014, HMRC issued Foneshops with a misdeclaration penalty. Foneshops appealed that penalty on a number of grounds, one of which was that it was out of time.

43. Foneshops submitted that the date the VAT had been "finally determined" was the date it had failed to comply with the unless order. HMRC's position was that the VAT was finally determined when permission to appeal the refusal of its reinstatement application had been refused by the Upper Tribunal on 3 March 2014. Judge Mosedale considered the competing submissions, saying:

> "[90] …What does 'finally determined' in s 77(2) VATA mean? There is no statutory definition. Applying a normal meaning to the phrase, it is clear that 'finally' is meant to qualify 'determined'. So Parliament was not referring to something which merely determined the proceedings; it was referring to something which finally determined the proceedings.
>
> [91] It seems unarguable to me that Parliament clearly had in mind proceedings coming to a final end; it had in mind the end of any appeal process and, it necessarily follows, any reinstatement process. The strike out…while it 'determined' the proceedings, could not have been final until the time for a reinstatement application elapsed without such

> application being made, or if such application was made, until it was finally resolved. Final resolution in this appeal was when the appeal against the reinstatement refusal was finally determined in the Upper Tribunal on 3 March 2014.
>
> [92] I do not consider that the contrary is arguable. It is well understood that 'finally determined' means that the determination is no longer subject to any further appeal process; that must necessarily mean it is no longer possible to reverse the order by a reinstatement application..."

44. Mr Shepherd said that *Foneshops* therefore supported his submission that the appeal was "finally determined" when it was no longer possible to reverse the withdrawal, so on 24 July 2015.

Mr Hansen's Reply

45. Mr Hansen said that the situation in *Foneshops* was different. There, the appellant had sought to challenge the striking out of its appeal. Until the Upper Tribunal refused permission to appeal that decision, there was no finality. As a question of historical fact, Foneshops' appeal was not "finally determined" until then.

46. Here, HMRC's argument did not rest on historical fact, but on what Mr Hansen called "an inchoate right [to reinstate the appeal], which was never exercised".

Discussion and decision Issue 1

47. Issue 1 concerns the meaning of the words "finally determined". It is well-established that courts and tribunals should adopt the ordinary meaning of statutory words, unless the context shows that it is used in some unusual sense, see *Brutus v Cozens* [1973] AC 854. Here, there is nothing to suggest any unusual meaning is intended.

48. We agree with Mr Hansen that the term means "when the liability is fixed and agreed", and that this is a question of historical fact. The Appellants' position was therefore "finally determined" when their appeal was withdrawn. It follows that we reject Mr Shepherd's submission that the VAT due was only "finally determined" at the end of the 28 day period during which an application for reinstatement could have been made under Rule 17(4) of the Tribunal Rules.

49. Mr Shepherd is also placing too much weight on that Rule. The end of the 28 day period is not the last possible date on which a person could apply for his appeal to be reinstated, because the Tribunal has the discretion to allow a late application. For example, an appeal was recently reinstated after having been struck out over six years previously, see *Hattons v HMRC* [2016] UKFTT 0710 (TC).

50. In coming to our conclusions we of course considered *RS Garments, Foneshops* and *Liaquat Ali*.

(1) Our decision is the same as that of the Tribunal in *RS Garments,* where the position was "finally determined" when the appeal was withdrawn.

(2) The date on which Foneshops VAT liability was "finally determined" was "when the appeal against the reinstatement refusal was decided in the Upper Tribunal on 3 March 2014". That outcome is completely consistent with our analysis and that in *RS Garments*, because as a matter of historical fact Foneshops' liability became final when the Upper Tribunal refused permission to appeal. We respectfully disagree with the *dicta* in *Foneshops* that "finally determined" means that "it is no longer possible to reverse the [strike-out] order by a reinstatement application". That is to move away from historical fact into the realm of possibility, which is not contemplated by the words of the statute.

(3) We also carefully considered Arden LJ's *dictum* in *Liaquat Ali* that VAT can be "finally determined" either "by assessment and the expiration of the time for appeal against that assessment" or "by appeal so far as an appeal lies". There is a difference between withdrawing an appeal, and being allowed time to appeal against an assessment when it is first made. It would clearly be wrong to find that an assessment had been "finally determined" on the date it was sent out, before a trader had had time to consider whether or not to appeal against it. But once that appeal window has ended, the VAT is finally determined, unless the assessment is under appeal. As soon as the appeal has been withdrawn, then clearly "no appeal lies". Our conclusion, like that of the Tribunal in *RS Garments*, is therefore consistent with *Liaquat Ali*.

51. The VAT here was "finally determined" on 27 June 2013, the date the Appellants' substantive appeal was withdrawn. It follows that the penalty assessments had to be made before the expiry of the period of two years beginning with 27 June 2013, so by 26 June 2015. We decide Issue 1 in favour of the Appellants.

ISSUE 2: WHEN WERE THE PENALTIES NOTIFIED?

52. In *Queenspice Ltd v HMRC* [2011] STC 1457 ("*Queenspice*") Lord Pentland summarised May J's earlier *dicta* in *House (t/a P&J Autos) v C&E Commrs* [1994] STC 211 ("*House*"). The statutory provision in both judgments was VATA s 73(1), which reads (emphasis added):

> "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, <u>they may assess the amount of VAT due from him</u> to the best of their judgment <u>and notify it to him</u>.

53. The underlined words are very similar to those in s 76(1) with which we are concerned, namely that where a person is liable to a penalty "the Commissioners may…assess the amount due…and notify it to him accordingly". Neither party suggested that there was any relevant difference between the wording of s 73(1) and 76(1).

54. In *Queenspice* Lord Pentland said at [25]:

> "(i) Like its predecessor, s 73(1) of the 1994 Act lays down no particular formalities in relation to the form, or timing, of the notification of the assessment.
>
> (ii) A notification pursuant to s 73(1) can legitimately be given in more than one document.
>
> (iii) In judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates."

The notifications made on 30 June 2015

55. Mr Hansen said that the notifications made on 30 June 2015 were invalid as they were in the wrong name. They therefore did not satisfy point (iii)(a) of the passage cited above from *Queenspice*.

56. Mr Shepherd submitted that the notifications were valid. He emphasised the words "reasonably clear terms" in point (iii)(a) of the same passage, saying that:

> (1) Officer Lahi's reference to the company rather than the partnership was a "minor error";
>
> (2) the VAT reference number on the Notices was correct; and
>
> (3) the penalties had been imposed because of the input tax claims made by the partnership. This was clear from the detail set out in the Notices, and because the company was not VAT registered in 05/06 or 06/06.

57. We again agree with the Appellants. In *Queenspice* Lord Pentland set out four requirements for a valid notification. One of these is that it shows the name of the taxpayer, not only in "reasonably clear terms" but in "*unambiguous* and reasonably clear terms". That requirement is not met by notifying penalties to the officers of a limited company instead of to a partnership with a similar name, even one at the same address. It follows that, as Mr Hansen said, the original Notices were defective.

The later notifications

58. Mr Shepherd submitted that even if the original Notices were invalid, any deficiency was mended by the Notices which had been subsequently attached to HMRC's Statement of Case. He relied on *Ali (t/a The Bengal Brasserie) v C&E Commrs* (2000) VAT Decision 16952 ("*Bengal Brasserie"*), a decision of Lady Mitting. At [40] she said:

> "In summary therefore we accept that the assessment was not received by the Appellant when originally addressed to the Bengal Brasserie. This, however, would not render it invalid but, subject to the question of section 98 referred to below, would merely render it unenforceable until properly notified which we believe it was by virtue of it being attached to the Commissioners' statement of case. We accept Mr Poole's contention that the statutory time limits refer to the making of the assessment not its notification (s. 73(6)). The assessment was made within the specified time limits."

59. Mr Hansen did not dispute that these later Notices satisfied the statutory requirements.

60. However, here we agree with neither party. In *Queenspice* Lord Pentland states, following *House*, that a notification "can legitimately be given in more than one document". We find that the requirements for notification were met by a combination of the original Notices and Officer Lahi's letter of apology dated 27 August 2015. That letter made it clear that the Notices were intended for Teletape and that "charges have been raised" under the VAT registration number for the partnership. Teletape had therefore been notified of the penalties when it received Officer Lahi's letter dated 27 August 2015. In other words, that letter, read together with the original Notices, constituted valid notification to Teletape of the penalties assessed.

ISSUE 3: WHEN IS AN ASSESSMENT MADE

61. We have already found that Officer Lahi and her colleagues completed all the HMRC formalities necessary to raise the penalty assessments on 23 June 2015, three days before the expiry of the two year time limit. However, the penalties were not notified until Teletape received Officer Lahi's letter of 27 August 2015. This was around two months after the statutory deadline.

62. Issue 3 is whether an assessment is made when HMRC record it in their internal systems, or when it is notified to the taxpayer. If the former, the penalty assessments in issue here were made within the statutory time limit; if the latter, they are outside that time limit, and so invalid.

The parties' submissions

63. Mr Shepherd's case was that the assessments were "made" when Officer Lahi and her colleagues completed the required internal steps. The time limit applied to the internal assessments, not the notification of liability.

64. He relied, first, on the statutory wording. Section 76(1) provides that where a person is liable to a penalty, HMRC may "assess the amount due by way of penalty…and notify it to him accordingly". It follows, Mr Shepherd said, that assessment and notification are two separate operations. Section 77(2) then provides that the two year time limit runs from "assessment", not from "notification".

65. He also relied on a number of VAT case law authorities. So far as relevant to this appeal, we have set these out in the next part of our decision, together with his submissions and those of Mr Hansen. In relation to *Anufrijeva* he made a single brief submission, saying that the case was not relevant because it dealt with "notification", whereas VATA distinguishes between assessment and notification.

66. Mr Hansen said, in reliance on *Anufrijeva*, that an assessment was only made when it had been notified to the appellants. The Tribunal drew Mr Hansen's attention to Lord Steyn's statement that the decision made by the Immigration Officer in *Anufrijeva* "involves a fundamental right". Mr Hansen said that the fundamental right here engaged was the same, namely the right of access to justice.

The VAT case law

67. Mr Hansen placed particular weight on May J's *dicta* at page 222 of *House,* where he considers a submission made by Mr Sankey QC, acting for HMRC:

> "The context of the inquiry was whether the notice of assessment was invalid because time limits had been infringed. Mr Sankey (after taking a deep breath) contended…that 'assessment' throughout para 4 referred to the commissioners' internal assessment and not to its notification to the taxpayer. Thus, he contended for this meaning in para 4(5), so that the time limits would run from an event undisclosed to the taxpayer and not from the date when the taxpayer was notified. He blenched at, but did not eventually shrink from the consequence, that the commissioners could make a secret assessment and put it in a drawer for five years and then notify it with the contention that the relevant time was when they put it in the drawer and not when they notified. I do not need to decide in this case whether this superficially astonishing contention is correct, nor whether it is permissible to look at undisclosed material. The limited part of this submission which, in my judgment, is correct, is that what the commissioners have to do is to 'assess the amount of tax due ... to the best of their judgment' and then to notify 'it' to the taxpayer. 'It' is 'the amount of tax due'. Strictly, we are concerned with the characteristics and sufficiency of the notification, not the assessment."

68. Mr Hansen emphasised that May J had described the submission that HMRC "could make a secret assessment and put it in a drawer for five years and then notify it with the contention that the relevant time was when they put it in the drawer and not when they notified" as a "superficially astonishing contention" which he explicitly did not endorse. Mr Shepherd responded by saying that, on the facts of this case, the assessments had not been "put in a drawer for five years" but had instead been notified soon after being made.

69. Despite the weight which Mr Hansen sought to place on this judgment, it is not a binding authority on the issue we have to decide. That is because May J limited his decision to the issue of whether the amount of tax due had been notified to the best of the Commissioners' judgment, see the final sentence of the cited passage above. The passage on which Mr Hansen relies is therefore *obiter dicta.*

70. Of more assistance was the Court of Appeal decision in *Courts,* to which we have already made reference at §70. Parker LJ gave the leading judgment, with which both Pill and Hooper LJJ both agreed. He said at [3] that the issue to be decided was "what constituted an assessment for the purposes of s 73 of the 1994 Act", and he answered that question as follows:

> "[97]…The distinction between the assessment itself and notification of the assessment to the taxpayer is, of course, clear on the face of s 73. Thus, under s 73(1) the commissioners are empowered to 'assess the amount of VAT due from [the taxpayer] ... and notify it to him'; under s 73(6) time runs from the making of the assessment; and under s 73(9) no debt arises until the assessment has been notified…

> [106] The statutory requirement for notification of an assessment to the taxpayer demonstrates that in enacting s 73 Parliament regarded the process of making the assessment itself is an internal matter for the commissioners. However, given that the time limits in s 73(6) apply to the making of an assessment, as opposed to the notification of the assessment, it is clearly important that the commissioners' internal processes and procedures in relation to the making of assessments should, so far as practicable, be standardised; and that in relation to any particular assessment the process which has been followed, and the date or dates on which the various steps comprised in that process were taken, should be readily verifiable by contemporary documentary evidence…The absence of any statutory time limit within which an assessment, once made, must be notified to the taxpayer means that, in theory at least, it is open to the commissioners to delay notification for some considerable time…However, it is clearly undesirable that that should occur, and the commissioners' policy of not relying on any earlier date for the making of an assessment than the date on which the assessment was notified to the taxpayer ensures that no unfairness will be caused to the taxpayer in this respect.
>
> [107] …an assessment only 'exists' when it is made, and the point in time at which an assessment is made is the relevant point in time for the purposes of the s 73(6) time limits."

71. In *Queenspice* the Upper Tribunal followed *Courts*: Lord Pentland first cited at [106] of Parker LJ's judgment, which he said makes clear that:

> "…(i) the assessment of the amount of tax considered to be due pursuant to s 73(1) of the 1994 Act, and (ii) the notification thereof to the taxpayer, are separate operations."

72. Were we only to consider the VAT case law, we would have no hesitation in finding that *Courts* provides binding Court of Appeal authority to support Mr Shepherd's submission that assessment and notification are separate operations, and that the two year time limit runs from the date of the assessment, not the date of notification.

73. However, we also have to consider whether *Courts* was correctly decided, given the House of Lords' judgment in *Anufrijeva*, to which we now turn.

Anufrijeva: the judgment

The facts and issues

74. We first set out our summary of the facts and issues. This is taken from the House of Lords' judgment in *Anufrijeva*, together with the decision of the Court of Appeal, published under reference [2002] EWCA Civ 399 ("the CoA decision"), so far as that judgment identifies the issue which was under appeal and sets out the facts:

> (1) In 1998, Ms Anufrijeva arrived in England from Lithuania and claimed asylum. She was awarded income support.

(2) At the relevant time, Regulation 70(3A)(b) of the Income Support (General) Regulations 1987 ("the IS Regs") provided that a person ceases to be an asylum seeker:

> "(i) in the case of a claim for asylum which, on or after 5 February 1996, is recorded by the Secretary of State as having been determined (other than on appeal) or abandoned, on the date on which it is so recorded…"

(3) On 20 November 1999 a Home Office official noted on an internal departmental file that for reasons set out in a draft letter:

> "…this applicant has failed to establish a well-founded fear of persecution. Refusal is appropriate. Case hereby recorded as determined."

(4) It was common ground that the Home Office had thereby "determined" Ms Anufrijeva's asylum claim under Reg 70(3A)(b)(i).

(5) The Home Office informed the benefits agency of the determination, and on 9 December 1999 that agency wrote to Ms Anufrijeva saying that, because of "a change to do with your income support" she was to return the "order book" which allowed her to claim that benefit. No reasons for that "change" were given, see [9] of the CoA decision.

(6) Under the immigration rules then in force, the determination was followed by consideration of whether Ms Anufrijeva should nevertheless be granted leave to enter the UK. She was not able to claim income support during this further period.

(7) An Immigration Officer tried but failed to interview Ms Anufrijeva. This was because she did not have the funds to pay for her train ticket to Gatwick to attend an interview.

(8) On 25 April 2000 the Home Office notified Ms Anufrijeva that she was refused leave to enter. Included with that notification was a copy of the now finalised letter of 20 November 1999 setting out the reasons for refusing her asylum claim and her appeal rights. Ms Anufrijeva had no right of appeal until receipt of that letter, see the CoA decision at [30] and Lord Bingham's judgment at [14].

(9) Ms Anufrijeva sought judicial review of the decision made by the Immigration Officer on 20 November 1999. The CoA at [10] summarised the issue as being whether Ms Anufrijeva "is entitled to receive income support between December and April", see also Lord Scott at [53].

(10) The period after 25 April 2000 was not relevant to Ms Anufrijeva's case, because both parties accepted that she was not entitled to income support from that date unless she successfully appealed against the decision to refuse her leave to enter.

75. The majority in the House of Lords upheld Ms Anufrijeva's appeal; Lord Bingham dissented.

Lord Bingham's reasoning

76. Although we would not normally cite a minority judgment, some of Lord Bingham's reasoning is relevant to the case we have to decide. He said at [12] that:

> "the language of regulation 70(3A)(b)(i) is not in any way ambiguous. It defines a date by reference to the recording by the Secretary of State of the claim for asylum as having been determined. It makes no reference to notification of the claimant. The reference to 'recorded' is, as Hobhouse LJ pointed out in *Ex p Salem* [1999] QB 805, 812, 'a formal criterion which must be applied by looking at the records kept by the Secretary of State. It is used in contrast and contradistinction to any concept of notification'…Parliamentary draftsmen have no difficulty in distinguishing between the making of a determination or decision and giving notice of it to the party affected."

77. He went on to say, referring to a submission of Mr Drabble QC, Counsel for Ms Anufrijeva:

> "[14] Mr Drabble's second major submission was that the statutory scheme imposed a public law duty on the Home Secretary to notify the appellant of the asylum decision, that a decision only recorded in an uncommunicated file note could not be other than provisional, since it could be altered at any time before notification was given to the appellant, and that accordingly there was no determination for purposes of regulation 70(3A)(b)(i) until 25 April 2000. This submission drew on the revulsion naturally felt for an official decision, taken privately, recorded in an undisclosed file and not communicated to the person to whom the decision relates. This somewhat Kafkaesque procedure was to some extent mitigated in this case by the fact that the appellant and her solicitors learned of the decision, although indirectly, relatively soon after it was made, that she would have received formal notice of the refusal with reasons two months earlier than she did if she had not cancelled the meeting fixed for 11 January 2000 and that her right of appeal would not have arisen until she had been refused leave to enter even if notice of the asylum decision had been given earlier. This is, however, an unhappy feature of the case and it is reassuring to learn that the practice has been changed.
>
> [15] I would readily accept that the Home Secretary was subject to a public law duty to notify the appellant of his decision on her asylum application and, if it was adverse, his reasons for refusing it. Such an obligation is expressed explicitly in rule 348 of the Rules and would in any event be implied. But there is inevitably, in a written procedure, some gap between the making and notifying of a decision. Rule 348 prescribes no time limit. Any implied duty would be to give notice within a reasonable time. Failure to give notice within a reasonable time would be a breach of the Home Secretary's public law duty but would not necessarily nullify or invalidate his decision. In any event, it was not argued that notice of the Home Secretary's reasons was not given within a reasonable time."

78. He ended his judgment by saying at [20]:

> "…effect should be given to a clear and unambiguous legislative provision. There is nothing in any way unclear or ambiguous about the words 'recorded by the Secretary of State as having been determined ... on the date on which it is so recorded'. They define the moment when a person ceases to be an asylum seeker and so disentitled to income support. The words do not say and cannot be fairly understood to mean 'recorded by the Secretary of State as having been determined ... on the date on which it is so recorded and notice given to the applicant'… While I share the distaste of my noble and learned friends for the procedure followed in this case, that distaste should not lead the House to give regulation 70(3A)(b)(i) anything other than its clear and obvious meaning."

The judgments of the majority

79. Lord Steyn gave the leading judgment. He said at [25]:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system…"

80. At [26] he cited and endorsed Lord Hoffman's words in *R v SSHD, ex p Simms* [2000] 2 AC 115:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual…"

81. Lord Steyn said those words applied "to fundamental rights beyond the four corners of the [European] Convention [on Human Rights]" and went on to say that his view was:

> "reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e g arrests and search warrants, where notification is not possible. But it is difficult to visualise a

> rational argument which could even arguably justify putting the present case in the exceptional category."

82. To hold that "an uncommunicated administrative decision can bind an individual" was, he said, "an astonishingly unjust proposition", and continued at [30]:

> "Fairness is the guiding principle of our public law. In *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787, Lord Diplock explained the position:
>
> > 'Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision.'
>
> Where decisions are published or notified to those concerned accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication."

83. At [31] he said:

> "...it is plain that Parliament has not expressly or by necessary implication legislated to the contrary effect. The decision in question involves a fundamental right. It is in effect one involving a binding determination as to status. It is of importance to the individual to be informed of it so that he or she can decide what to do."

84. In the following paragraph he said that, although the file note reflected the Immigration Officer's decision, that "does not mean that the statutory requirement of a 'determination' has been fulfilled. On the contrary, the decision is provisional until notified".

85. Lord Hoffman agreed with Lord Steyn. Lord Millet also found in favour of Ms Anufrijeva, but took a slightly different approach. In particular he disagreed with Lord Steyn that the decision made in November 1999 was "provisional". Instead he found that it was final, in that it brought to an end Ms Anufrijeva's right to income support, see [40]. He phrased the question which the House of Lords had to decide as "whether the refusal…had immediate effect for the purpose of ending her entitlement to income support or took effect for this purpose only when she was notified of it." He went on to say at [43]:

> "The presumption that notice of a decision must be given to the person adversely affected by it before it can have legal effect is a strong one. It cannot be lightly overturned. I do not subscribe to the view that the failure to notify the appellant of the decision invalidated it, but I have come to the conclusion that it could not properly be recorded so as to deprive her of her right to income support until it was communicated to her; or at least until reasonable steps were taken to do so."

86. Lord Scott took the same approach, saying at [53]:

> "the issue for your Lordships on this appeal is whether the un-notified decision of the Secretary of State to refuse the appellant's asylum claim, 'recorded as determined' according to the 20 November 1999 note, effectively deprived her as from that date of her status as an asylum seeker for income support purposes, or whether she retained that status until she was notified on 25 April 2000, by her eventual receipt of the letter of 20 November 1999, of the refusal of her asylum claim."

87. At [57] he said:

> "My noble and learned friend, Lord Steyn, has cogently explained why an uncommunicated decision terminating an asylum seeker's right to income support offends against well-established principles of legality and access to justice."

88. Lord Scott also found that the statutory context provided two additional reasons why Ms Anufrijeva's appeal should be allowed. At [55] he said that Reg (3A)(b)(i) must be read in the context of the Immigration Rules:

> "Rule 333 [of the Immigration Rules] makes clear that the refusal of an asylum claim is to be notified to the asylum seeker by a 'notice of refusal' which will inform him or her of the reasons for the refusal. Rules 331 and 348 underline the point. It is, indeed, inherent in the concept of a 'refusal' that it should be communicated to the person to whom it is directed. The communication of a refusal may be either by words or by conduct from which the requisite inference can be drawn, but without communication there will be no more than a non-acceptance, a quite different concept from that of a refusal. The Immigration Rules require a refusal and that the refusal is to be communicated by a 'notice of refusal'.

89. At [57] he said that there is nothing in the enabling Act under which Reg (3A)(b)(i) was made which allows those regulations to override the fundamental principles set out by Lord Steyn:

> "Parliament can, of course, override these principles. But in section 11(1) of the 1996 Act Parliament has not done so expressly. There is nothing in the empowering provision to suggest a Parliamentary intention that an asylum seeker's status as an asylum seeker entitled to income support can be terminated not only without the asylum seeker being told the reasons for the termination of the status but without the asylum seeker even being notified of the termination."

Anufrijeva: points of similarity

90. We begin by saying that we do not agree with Mr Shepherd that *Anufrijeva* could be distinguished from the Appellants' position because it dealt only with notification. Instead, we found that there were a number of striking similarities between *Anufrijeva* and the case we have to decide:

(1) Reg 70(3A)(b)(i) of the IS Regs provided for an Immigration Officer to make a determination, just as VATA s 76 provides for an HMRC Officer to make an assessment.

(2) Neither Reg 70(3A)(b)(i), nor the VATA provisions with which this appeal is concerned, contains any explicit requirement as to the date that determination/assessment should be notified;

(3) In Mrs Anufrijeva's case there was a delay of some four months between the making of the determination and the notification; the Appellants were notified some two months after HMRC made the assessment.

(4) The following points were made by Lord Bingham, but his analysis was not followed by the majority:

(a) "Parliamentary draftsmen have no difficulty in distinguishing between the making of a determination or decision and giving notice of it to the party affected";

(b) "there is nothing in any way unclear or ambiguous" about Reg 70(3A)(b)(i); and

(c) that Regulation should not be given "anything other than its clear and obvious meaning".

There is equally "nothing in any way unclear or ambiguous" about either the distinction between assessment and notification in VATA s 76(2), or the statement in s 77(2) that the two year time limit runs from "an assessment under section 76", not from notification.

91. We also noted the similarity between May J's statement in *House* that HMRC "could make a secret assessment and put it in a drawer for five years and then notify it" as being a "superficially astonishing" contention, and Lord Bingham's reference to "the revulsion naturally felt for an official decision, taken privately, recorded in an undisclosed file and not communicated to the person to whom the decision relates". Lord Bingham described the procedure in *Anufrijeva* as "Kafkaesque"; Lord Steyn echoed that phrase at [26].

Anufrijeva: points of difference

92. However, we also found that there were significant differences between *Anufrijeva* and the position of the Appellants.

Rights not adversely affected

93. The issue in *Anufrijeva* was the Immigration Officer's decision to remove a right to income support, whether that was itself a final decision (Lords Millett and Scott) or a provisional decision on Mrs Anufrijeva's right to remain (Lords Steyn and Hoffman). Her appeal was allowed because the majority found that an unnotified decision could not have "legal effect", namely the removal of her income support between 9 December 1999 and 25 April 2000. Her rights were therefore "adversely affected" by the Immigration Officer's decision.

94. There is a difference between the removal of Ms Anufrijeva's right to income support and the penalties imposed on the Appellants. Income support should have been paid to Ms Anufrijeva on a regular basis during some four months, and instead she received nothing. The Immigration Officer's decision therefore removed Ms

Anufrijeva's right to receive a quantifiable sum of money during that period, which would have provided her with a basic income.

95. In contrast, HMRC assessed the Appellants to fixed penalties. The quantum would have been the same, whenever those penalties were notified. In other words, the Appellants lost nothing during the period between assessment and notification, so their rights were not adversely affected.

96. It is true that, because of the delay, the penalties were notified after the end of the two year time limit. But there was no evidence that this late notification had, of itself, any adverse consequence for the Appellants. Indeed, it could even be said that the Appellants have put their case on the basis that the delay has an adverse consequence *for HMRC*, because the Tribunal should hold that the penalties are thereby invalidated.

Right of appeal

97. Ms Anufrijeva was aware of the Immigration Officer's decision before receiving the notification, but did not have a right of appeal until the notification itself was received. As Lord Bingham said at [14]:

> "…the appellant and her solicitors learned of the decision, although indirectly, relatively soon after it was made…[but] her right of appeal would not have arisen until she had been refused leave to enter even if notice of the asylum decision had been given earlier."

98. Lord Steyn said Ms Anufrijeva's appeal must be allowed because "the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so".

99. The position here is different: s 83(1)(n) provides that "an appeal shall lie to a Tribunal…against any liability to a penalty under [s 63]". Thus, the appeal is against the liability; it is not triggered by notification. Section 83G merely provides that any such appeal must be made within 30 days of notification; it does not prevent an appeal being made earlier if the person affected is aware that a decision has been made as to the liability.

100. That this is correct can also be seen from the decision in *Bengal Brasserie*, on which Mr Shepherd relied in relation to Issue 2. In that case Lady Mitting held that a notification could be made by attaching the amended Notice to a Statement of Case. This would be impossible if the appeal right arose only on notification.

101. Macpherson J came to a similar conclusion in *Grunwick Processing Laboratories Ltd v C&E Commrs* [1986] STC 441 ("*Grunwick*"), where the appellant's first ground of appeal was that the liability had not been properly notified. Macpherson J said (at page 441):

> "The matter could be and indeed, in my judgment, has been rectified by notification now. There has been formal notification in accordance with the 1983 Act so that any irregularity is cured, and the taxpayer

> company can no longer have the protection, in my judgment, of that argument."

102. In *Queenspice* Lord Pentland recorded at [37] that the appeal had originally been adjourned following the submission on behalf of the appellant that:

> "intimation of the appeal acted as a 'cut off' preventing the respondents from notifying (or completing notification) to the appellant pursuant to s 73(1) of the 1994 Act."

103. However, when the hearing resumed, HMRC's Counsel submitted that *Bengal Brasserie* and *Grunwick* "clearly showed that the taking of an appeal did not operate as a barrier to notification of the assessment". The appellant accepted that this was the position, and Lord Pentland concluded "I need not, therefore, say any more about that particular aspect of matters".

104. The Appellants thus had a right of appeal as soon as they were aware an assessment had been made; unlike Ms Anufrijeva, they did not have to wait until notification. Moreover, they relied on those rights when they appealed on 22 July 2015, over a month before Officer Lahi's letter of 27 August 2015 was received.

105. It was therefore the assessment of the penalties which triggered the Appellants' appeal rights, not their notification.

No fundamental right engaged

106. Lord Steyn said, in relation to Ms Anufrijeva's appeal, that:

> "The decision in question involves a fundamental right. It is in effect one involving a binding determination as to status. It is of importance to the individual to be informed of it so that he or she can decide what to do."

107. Lord Scott similarly referred to Ms Anufrijeva's "status as an asylum seeker for income support purposes"; he also said that her right "of access to justice" had been breached.

108. Mr Hansen submitted that the fundamental right here breached was the same, namely the right of access to justice. However, as we have already established, Appellants' position was not the same as that of Ms Anufrijeva. She could not appeal until she received notification, but the Appellants both could and did appeal once they were aware of the assessments.

Lord Scott's additional reasons

109. We add that neither of the additional reasons given by Lord Scott apply to the Appellants:

> (1) the enabling legislation relevant to *Anufrijeva* required that the asylum seeker be informed by "a notice of refusal" that her claim had been rejected: Lord Scott said at [55] that it was "inherent in the concept of a 'refusal' that it should be communicated to the person to whom it is directed". The statutory provisions at issue here contain no such wording.

(2) Lord Scott said that the enabling legislation in *Anufrijeva* "did not empower the Secretary of State to make regulations which have the effect that an asylum seeker can be deprived of that status for income support purposes without notification". In other words Reg 70(3A)(b)(i) was *ultra vires* the primary legislation. The VAT provisions at issue here are contained in primary legislation and are not *ultra vires.*

Anufrijeva: conclusion

110. Although there are similarities between Ms Anufrijeva's case and that of the Appellants, the two can be distinguished. The Appellants' rights were not adversely affected in the period between assessment and notification because they suffered no financial detriment and because their appeal right arose following assessment, not notification; no fundamental right was engaged by the delay in notification, and neither of Lord Scott's additional reasons for allowing Ms Anufrijeva's appeal applied to the Appellants.

111. We also observe that the House of Lords gave judgment in *Anufrijeva* on 26 June 2003 and the Court of Appeal decided *Courts* on 17 November 2004. If Mr Hansen's submissions were correct, *Courts* would have been decided *per incuriam.* That would be surprising, as *Anufrijeva* was a significant decision made just over a year earlier.

Decision on Issue 3

112. We therefore follow *Courts,* and find that the statutory time limit runs from the date of the assessment, not the date of notification. Issue 3 is decided in favour of HMRC.

ISSUE 4: HMRC'S FAILURE TO FOLLOW ITS GUIDANCE

The guidance

113. HMRC's VAT Assessments and Error Correction ("VAEC") Manual at VAEC6080 sets out its position on assessment and notification. That guidance was amended by HMRC Brief 40 (2013), published on 27 December 2013. So far as relevant to this case, VAEC6080 reads (emphasis added):

> "HMRC's view of the law is that the making of the assessment for the amount of tax due and its notification to the taxpayer, by either a manual assessment notification or a computer produced form VAT655, are separate and distinct operations
>
> This is based on the wording of Section 73(1) (2) and (9) VAT Act 1994.
>
> The VAT legislation prescribes time limits only for the making of an assessment. It does not prescribe any time limits for the notification of an assessment.
>
> In the past HMRC defended assessments where we could demonstrate that we had made an assessment, i.e. finished quantifying the amount and had taken the decision to assess, before the time limit for the

> making of the assessment had expired, although it may have been notified at a later date.
>
> However, it is clearly undesirable that our time limit rules should attach to a made date which is neither, obvious or routinely disclosed to taxpayers.
>
> Consequently, all assessments must have be [sic] notified to the taxpayer within the time limit for making the assessment in order to demonstrate that it was indeed made in time.
>
> Any detrimental revenue affect [sic] of using the notification date for time limit purposes is relatively insignificant and more than compensated for by the removal of contentious litigation surrounding the made date."

114. Although VAEC6080 refers to "assessments", HMRC Brief 40/2013 stated that it replaced Notice 713 which applied to "procedures for making and notifying assessments to VAT, other indirect taxes and penalties". Mr Hansen submitted that VAEC6080 therefore also covers penalties such as those in issue here, and we agree.

Mr Hansen's submissions

115. In his skeleton argument, Mr Hansen said that HMRC, as a public authority "must follow its own stated policy and the Tribunal ought to hold them to that policy". He submitted that the Appellants had a legitimate expectation that HMRC would comply with its guidance, and it had clearly not done so.

116. He also cited *Mandalia v SSHD* [2015] UKSC 59 at [29], where Lord Wilson, delivering the unanimous judgment of the Supreme Court, approved and followed the principle set out by Laws LJ in *R (Nadarajah) v SSHD* [2005] EWCA Civ 163 at [65], which is as follows:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

117. Lord Wilson described that principle as "no doubt related to the doctrine of legitimate expectation but free-standing".

118. Mr Hansen said that "it would be wrong in law" for the Tribunal to allow HMRC "to depart from its published policy in this or any other case" because of the potential injustice which would arise.

119. Mr Shepherd did not make any submissions in response. However, the Tribunal drew Mr Hansen's attention to recent decisions of the Upper Tribunal on the nature

and extent of this Tribunal's jurisdiction. We referred in particular to *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) ("*Noor*") (Warren J and Judge Bishopp).

120. In his Reply, Mr Hansen referred to *Newell v HMRC* [2015] UKFTT 535(TC), a decision of Judge Raghavan. Although Mr Hansen did not cite a particular passage from that decision, we understand him to be relying on [96]-[97], where Judge Raghavan first set out an extract from paragraph [31] of *Noor,* and then said:

> "While this passage at [31] makes the point that the absence of a supervisory jurisdiction does not preclude public law rights being considered or given effect to it makes it clear that whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction."

121. Mr Hansen said that the provisions conferring jurisdiction in this case were VATA s 76 and s 77(2), which should be interpreted in line with VAEC6080, particularly as that guidance was (in his submission) consistent with the House of Lord's judgment in *Anufrijeva.* Mr Hansen asked the Tribunal to find that such an interpretation was in line both with the principles of ordinary statutory construction and with the requirement in the Human Rights Act 1998 ("HRA") s 3(1) that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

122. Mr Hansen said that any other reading of the statutory provisions would breach the Appellants' rights under Article 6 of the European Convention of Human Rights ("the Convention"), namely the right to a fair trial. He referred to Lord Steyn's *dicta* in *Anufrijeva* that notification of a decision is "not a technical rule. It is simply an application of the right of access to justice."

Mr Shepherd's further submissions

123. It is clear from the above paragraphs that in his Reply Mr Hansen had relied on the HRA and the Convention; he had also sought to distinguish the Appellants' position from that considered by the Upper Tribunal in *Noor*. These were new submissions, not made in his skeleton argument or in opening. We therefore gave Mr Shepherd the opportunity to respond.

124. Mr Shepherd said, in reliance on *Noor,* that the Tribunal did not have the jurisdiction to consider Mr Hansen's new submissions. Furthermore, HMRC did not accept that misdeclaration penalties were "criminal" for the purposes of Article 6 of the Convention and so HRA s 3(1) was not engaged. He referred the Tribunal to the VAT Civil Penalty Manual at VCP10160, which he said explained why HMRC took that position, although Mr Shepherd did not have a copy of that page to hand. This was unsurprising, given that he had been given no warning of these new submissions.

Discussion

125. We begin with *Noor.* The first paragraph set out the issue to be decided:

> "The central issue raised on this appeal is whether the First-tier Tribunal ('the F-tT') has any jurisdiction, when dealing with a VAT appeal, to consider a taxpayer's claims based on the public law concept of 'legitimate expectation'."

126. At [25] of its judgment, the Upper Tribunal reiterated the conclusion reached in *HMRC v Hok* [2012] UKUT 363 (TCC) ("*Hok*") that the First-tier Tribunal has no general supervisory jurisdiction. In the passage relied on and followed by Judge Raghavan in *Newell*, the Upper Tribunal continued at [31]:

> "It would, however, be open to the FtT 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."

127. The relevant statutory provisions here are VATA s 76(1) and s 77(2). As we have already said, it is well-established that courts and tribunals should adopt the ordinary meaning of statutory words, unless the context shows that the words are used in some unusual sense. The ordinary meaning of VATA s 76(1) is that assessment and notification are different, and s 77(2) clearly states that the time limit runs from assessment, not from notification. We therefore find that the Tribunal is not able to read s 77(2) as if the two year time limit ran from "a notification under s 76" instead of from "an assessment under s 76". That would be a re-writing of the statute, not a matter of statutory construction.

128. Turning to the Convention and the HRA, we first considered VCP10160, the guidance referred to by Mr Shepherd, but we did not find it of assistance in clarifying his submission that the misdeclaration penalties charged on the Appellants were not "criminal" for the purposes of the Convention. We decided, however, that it was not necessary to revert to Mr Shepherd so he could explain this point further. That was because, whatever HMRC's guidance says, we are confident the misdeclaration penalties in issue here are "criminal" under the Convention: see the helpful recent discussion in *Euro Wines v HMRC* [2016] UKUT 359 (TCC) (Birss J and Judge Berner) at [13]-[29], and the authorities on which it relies, which include in particular *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, *Öztürk v Germany* [1984] ECHR 8544/79, at [49]-[50] and *Janosevic v Sweden* [2002] ECHR 34619/97 at [67]. To summarise that case law, a penalty will be criminal if it is both "deterrent" and "punitive"; those factors weigh more heavily in the balance than a penalty's domestic classification as civil.

129. The penalties in issue here total £664,668; they are clearly both deterrent and punitive, and Article 6 is therefore engaged. That Article gives the person charged with a criminal offence the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

130. We were, however, unable to identify any breach of Article 6. Although the Europe Court of Human Rights has decided that undue delay can constitute such a breach, there is no parallel between the facts of the decided cases and the position of the Appellants. Relevant authorities include *King v UK (No 3)* [2005] ECHR 13881/02) where the delay was over 13 years, and *Multiplex v Croatia* [2003] ECHR 58112/00 where, as at the date of that judgment, the delay had already lasted three years.

131. Here, the delay was around two months, from the assessment on 23 June 2015 to receipt of Officer Lahi's letter of 27 August 2015. Not only is the period relatively short, but the Appellants received the first of the two documents which made up the notification on 30 June 2015, only a week after HMRC had made the assessments, and that document set out the reasons for the penalties and how they had been quantified.

132. Even we were to be wrong in this, so that the delay did breach Article 6, we would not have been able to rely on HRA s 3 so as to read s 77(2) as if the two year time limit ran from "a *notification* under s 76" instead of from "an *assessment* under s 76". In *Gaidan v Godin-Mendoza* [2004] UKHL 30 at [33] Lord Nicholls said:

> "Parliament, however, cannot have intended that in the discharge of this extended interpretative function [given by HRA s 3] the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'."

133. VATA s 76 clearly distinguishes between "assessment" and "notification" and s 77(2) states that the time limit runs from assessment. To read s 77(2) as if the word "assessment" was instead "notification" would be to "adopt a meaning inconsistent with a fundamental feature of legislation" and would "cross the constitutional boundary" so as to interfere with Parliament's law-making powers.

134. We therefore find that neither the ordinary canons of statutory construction, nor HRA s 3, allows us to read VATA s 77(2) as if the time limit ran from "notification" rather than from assessment.

135. In coming to those conclusions we did not rely on *Anufrijeva*, because we have already distinguished the facts and conclusions of that case from the Appellants' positon, see Issue 3.

136. We therefore decide Issue 4 against the Appellants.

137. We fully accept, and Mr Shepherd did not seek to argue otherwise, that HMRC did not follow its public statement in VAEC6080 that all assessments "must have be[en] notified to the taxpayer within the time limit for making the assessment".

Bingham LJ said in *R v IRC ex p MFK Underwriting Agencies* [1990] 1 WLR 1545 that a "statement formally published by the Revenue to the world" was binding on HMRC in any case falling clearly within its terms. Whether that is the case here, and whether the Appellants have a remedy, is not an issue over which this Tribunal has any jurisdiction. As Mr Shepherd said, it is instead a matter for judicial review.

Overall decision and appeal rights

138. We found in favour of the Appellants on Issues 1 and 2, but in favour of HMRC on Issues 3 and 4. It follows that the Appellants lose their appeal, and we uphold the penalties.

139. This document contains full findings of fact and reasons for the decision. If the Appellants are dissatisfied with this decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. 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.

ANNE REDSTON

TRIBUNAL JUDGE
RELEASE DATE: 30 NOVEMBER 2016