Neutral Citation: [2023] UKFTT 549 (TC)

Case Number: TC08848

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2020/00019

PROCEDURE – Strike out application – first appeal against the same decision dismissed in 2016 – second appeal against the same decision struck out in 2019 – third appeal made in 2020 - Whether the doctrine of res judicata applies and/or whether appeal is an abuse of process – yes – Johnson v Gore Wood & Henderson v Henderson considered and applied – Appeal struck out

Heard on: 27 April 2023
Judgment date: 29 June 2023

Before

JUDGE NATSAI MANYARARA
GILL HUNTER

Between

WATERLOO CAR HIRE (A PARTNERSHIP)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Albert Fox and Mr Daniel Gance

For the Respondents: Ms Gemma Truelove, litigator of HM Revenue and Customs' Solicitor's Office

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. The Appellant is a partnership which has been trading since 1979 and carries on a mini cab, car hire and courier business, and is based in south east London. It is advertised as a taxi business and has *circa* 45 self- employed drivers who accept taxi jobs via the Appellant's switchboard control.

2. The Appellant has made a late appeal (on new grounds) against HMRC's decision to issue closure notices and discovery assessments following an enquiry into the Appellant's partnership return. A previous appeal was heard and dismissed in 2016. HMRC have applied to strike out the Appellant's current appeal ('the Strike Out application') pursuant to rule 8(2) and/or rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Procedure Rules') on the grounds that the Appellant's appeal is an abuse of process and that the doctrine of *res judicata* applies. HMRC alternatively submit that any new ground of appeal is late.

3. This Decision is concerned, solely, with the Strike Out application.

4. There is a lengthy procedural history to this matter. What follows is a summary of the procedural history leading up to the Strike Out application, sufficient to set the scene for this Decision.

PROCEDURAL HISTORY

5. In the relevant years (2009-10 to 2012-13 (inclusive)), the Appellant purchased second-hand cars and made them available for use by its self- employed mini cab drivers. In 2012, the cars were included in the cost of sales figure by the Appellant as purchases.

6. In 2013, on receipt of the Appellant's 2012 return, HMRC informed the Appellant that they would be opening an enquiry under s. 12AC of the Taxes Management Act 1970 ('TMA'). On 5 August 2015, following a meeting on 25 March 2014 and the exchange of correspondence between the parties, HMRC decided to exclude from net trading income the disposal of the cars to drivers. HMRC subsequently issued closure notices under s. 28B TMA and discovery assessments under s. 30B TMA (for the purposes of this Decision we shall refer to these jointly as 'the Assessments') disallowing the purchase of cars by the Appellant to be treated as capital items, thereby excluding from net trading income the disposal of the cars to drivers.

7. HMRC's position was that the cars were the purchase of plant and machinery and should have been included in the capital allowance section of the Appellant's tax return. The Assessments were raised on income from the sale of the cars. HMRC issued their review conclusion on 21 December 2015 ('the 2015 decision'). This is the only decision that HMRC have made in relation to these proceedings.

8. In January 2016, the Appellant lodged an appeal with the First-tier Tribunal ('FtT'), against the 2015 decision to refuse its claim for the cost of the cars to be included in 'cost of sales' in its accounts as revenue expenditure, and to treat the cars as fixed assets where relief for the expenditure is by way of capital allowances legislation. The appeal was heard by Judge Connell and Member Cheesman on 5 September 2016 ('the 2016 appeal'). On 9 November 2016, Judge Connell issued a decision dismissing the Appellant's appeal and confirming the Assessments. Judge Connell concluded that the cars were fixed assets, subject to capital allowance legislation, and not items that could be included in cost of sales.

9. Permission to appeal against Judge Connell's decision was refused by the FtT on 23 January 2017 and by the Upper Tribunal ('UT') (Judge Berner) on 4 April 2017. Judge Berner's decision refusing permission to appeal was issued on 7 April 2017. The application for permission to appeal was renewed at an oral hearing, on 7 July 2017. Following the oral hearing, Judge Berner issued a decision refusing permission to appeal (on 13 July 2017). In refusing permission to appeal, Judge Berner commented that the Appellant was not precluded from seeking to agree figures with HMRC in order to take account of the conclusion that vehicles are capital assets subject to capital allowances.

10. On 6 March 2019, the Appellant lodged a further appeal against the 2015 decision with the FtT (the 2019 appeal'). In a decision dated 8 October 2019, Judge Sinfield struck out the 2019 appeal on the grounds that the 2019 appeal was based on grounds which entirely sought to re-litigate the 2016 appeal, which was outside of the FtT's jurisdiction under rule 8(2)(a) of the Procedure Rules. In striking out the 2019 appeal, Judge Sinfield said that any grounds of appeal must show that it is arguable that HMRC's capital allowances computations are wrong as the 2019 appeal only addressed the status of the cars, which was conclusively determined against the Appellant in the 2016 appeal.

11. On 28 August 2020, the Appellant's lodged the current appeal against the 2015 decision ('the 2020 appeal').

12. By an application notice, dated 14 December 2020, HMRC applied to strike out the Appellant's appeal.

THE WRITTEN SUBMISSIONS

13. In further amplification of the Strike Out application, HMRC submit (in the additional submissions dated 19 July 2022) that:

> (1) A decision has already been made that the cars purchased by the Appellant were not sold by the Appellant, but were hired to drivers for a fee. There is, therefore, no sale of motor vehicles included in the trading income and permission to appeal against the 2016 decision was refused by the UT. In the 2016 decision, Judge Connell confirmed that the cars were fixed assets subject to capital allowance legislation.
>
> (2) The Appellant failed to address the application of the capital allowances legislation in the 2016 appeal.

(3) The 2019 appeal was struck out based on *res judicata*. Judge Sinfield did confirm that the appeal would be an abuse of process if it were within the FtT's jurisdiction.

Cause of action estoppel

(4) The 2020 appeal is the same cause of action as the 2016 appeal and the 2019 appeal; that being an appeal against the Assessments issued on 05 August 2015 for the tax years 2009-10 to 2012-13, which made an adjustment to the Appellant's partnership statement.

(5) Whilst it is accepted that there is a distinction in the 2020 appeal in that the Appellant's grounds of appeal now focus on the proper computations in the relevant tax years, the underlying right of appeal is the same; that is the right under ss. 31 and 31A (subject to s. 49) of the Taxes Management Act 1970 ('TMA'). The Appellant is effectively asking the FtT to decide whether to exercise its power, under s. 50(6) TMA to reduce the amount of tax due under the Assessments because of HMRC's tax treatment of the cars.

(6) That the Appellant could have led alternative arguments about the alleged deficiencies in HMRC's capital allowances in their original Assessments is important. As outlined in the case of *Henderson v Henderson* (1843) 3 Hare 100, the doctrine of *res judicata* in relation to cause of action estoppel applies not only to the points made, but to every point which properly belonged to the subject of the litigation when exercised by a person of reasonable diligence. It is accepted that special circumstances can exist to take a case outside of the general rule, such as obtaining evidence of facts which a party could not have been aware of when the original proceedings were ongoing, but it is submitted that no such circumstances exist here.

(7) The Appellant failed to address the quantum of the Assessments in the original appeal proceedings, thereby leaving the result in a binary situation that their case would succeed on the facts, or fail. The Appellant then subsequently failed to address the point around the capital allowances calculations (as articulated by Judge Berner in the UT) appropriately in the 2019 appeal, as found by Judge Sinfield at [10] of the decision relating to the 2019 appeal.

(8) No special circumstances exist which remove this case from the normal operation of res judicata, which is that an Appellant is not entitled to a second, or third, bite at the cherry.

(9) The FTT must strike out the appeal under Rule 8(2)(a) of the Tribunal Rules.

Issue estoppel

(10) If the FtT is minded to find that the 2020 appeal is a new cause of action, HMRC submit that issue estoppel would apply to prevent the appeal from continuing. To the extent that cause of action estoppel is not applicable, then issue estoppel is engaged and the FtT does not have jurisdiction to decide the 2020 appeal.

(11) The status of the FtT as a court of competent jurisdiction in relation to the 2016 appeal cannot be in doubt, nor can it be in doubt that the decision relating to the 2016 appeal was a final decision, satisfying the second condition of the estoppel.

(12) The parties in all three cases relevant to this appeal have always been the same, satisfying the third requirement in the test.

(13) In the 2016 appeal, the matter under dispute was the Assessments raised. Given that the adjustments made to the partnership statements included capital allowances, the question of what the right level of allowances was was in scope before the FtT during the 2016 appeal and the Appellant simply chose not to make submissions, preferring to rest its case on the capital or revenue arguments.

(14) It is accepted that in the 2016 appeal there were no submissions about whether the adjustments made by way of capital allowances were the correct amount. This point should have been raised as part of the 2016 appeal if the Appellant considered they were wrong, however, the Appellant failed to do so. The FtT reached its decision as regards the right level of profit applicable to the partnership statements, including the allowances given.

(15) Issue estoppel applies in this case on the basis of the above, subject to the question of whether special circumstances apply which require the FtT to disapply it. The Appellant should be able to demonstrate that there were circumstances which would have prevented a reasonably diligent person from identifying the need to make the submissions which they failed to make in the 2016 and 2019 appeals.

Abuse of process

(16) A separate and distinct principle applies which affords the FtT a power to strike out an appeal which is abusive of the tribunal process.

(17) If the FtT is not convinced that the Appellant is estopped on the basis that it is not satisfied that the issue was decided, it is open to the FtT under Rule 8(3) of the Procedure Rules to strike the appeal out as an abuse of process.

(18) HMRC's letter of 3 June 2020, in its proper context, clearly provides that the officer expected the Appellant to take the matter up with the FtT in relation to furthering its appeal, and that no further dialogue was expected on the issue until that appeal position was resolved. As such, HMRC submit that to the extent the Appellant was under the impression that HMRC supported the making of a further appeal, that impression was mistaken on the Appellant's part. That misinterpretation should not, in HMRC's view, outweigh the clear grounds that exist for ruling that the 2020 appeal is an abuse of process.

14. In reply, the Appellant submits that (in the Appellant's Skeleton Argument(s)):

(1) HMRC's position that a decision has been reached on capital allowances not being allowed is refuted. The entire position relevant to capital allowances (as noted by Judge Berner) can still be treated as open.

(2) At the hearing of the 2019 appeal, Judge Sinfield considered that it was still open to the Appellant to lodge an appeal. Judge Sinfield noted that the introduction of capital allowances could not be described as 'new' given that it had been brought up in discussion before the UT on 7 July 2017. The hearing on 8 October 2019 was concluded on the basis that there were grounds to proceed with capital allowances. It was only after

that hearing that the situation became clearer, with the result that the matter should go back to the FtT.

(3) The COVID pandemic came into effect, which delayed matters by several months and resulted in another appeal only being lodged in 2020.

(4) The Assessments were under constant review and had to be amended to reflect capital allowances. There have been regular exchanges of correspondence with HMRC in an attempt to settle the claim to capital allowances and, in that respect, the claim was treated as still active until it became apparent that no agreement could be reached. The letter, dated 3 June 2020, from HMRC stated that it would be in order for the Appellant to proceed directly to the FtT. The 2020 appeal was lodged because there was no possibility of reaching an agreement.

(5) Capital allowances that are permitted by statute have not been allowed by HMRC, even though full information has been supplied. Balancing allowances arising from the capital allowances have been excluded by HMRC even though full documentary evidence/information supporting such a claim should have been permitted.

(6) HMRC's points are predicated upon a false assumption. It is unclear why HMRC continued discussions with the Appellant's representatives if there was going to be a problem with the appeal.

THE PRELIMINARY HEARING

Preliminary discussions

15. At the commencement of the hearing, Mr Fox submitted that he had spent two days prior to the hearing making an application to the FtT, that had been misdirected. In further amplification of this submission, he stated that he had sent correspondence to the FtT, with a view to relying on case law in support of the Appellant's case. The case intended to be relied on was the case of *HMRC v Tasca Tankers Ltd.* [2022] UKUT 00088 (TCC) ('*Tasca*') (Johnson J and Judge Andrew Scott). He added that he had received a reply from the FtT to the effect that the case could not be relied on by the Appellant and that, therefore, he had been unable to prepare the Appellant's submissions. Mr Fox could not provide any further explanation as to why he could not make any submissions in support of the Appellant's case, other than that he had not been permitted to rely on *Tasca*, despite the fact that Directions had been made for both parties to file and serve their Skeleton Arguments as long ago as July 2022 and in light of the lengthy procedural history in this matter.

16. By a letter, dated 25 April 2023, the Appellant's representatives had written in the following terms:

> *"We refer to the above that is listed for Hearing on the 27th April, and can you inform the Tribunal that it is our intention to bring into evidence the following Case*
>
> *The Commissioners for HM Revenue & Customs v Tasca Tankers Limited [2022] UKUT 00088 (TCC)..."* [sic]

17. The letter was brought to the attention of the panel, attached to an email which stated the following:

> *"Dear Panel*
>
> *Please see attached correspondence from the appellants rep regarding bringing new evidence for the hearing."*
>
> [Emphasis added]

18. Unfortunately, the impression created by the wording of the email (without seeing the Appellant's representative's letter dated 25 April 2023) was that the Appellant's representatives wanted to introduce new evidence that had not been included in the bundle already filed (in accordance with the Directions) for the hearing. The Appellant's representatives were, therefore, informed that no new evidence that had not been served in accordance with the Directions could be relied on. It later became clear that the Appellant's representatives were only intending to rely on *Tasca*. The direction therefore given was that the Appellant's representatives were not prohibited from relying on *Tasca*. Unfortunately, this direction was not communicated to the Appellant's representatives prior to the preliminary hearing on 27 April 2023.

19. Despite the confusion created by the reference to the representatives' request as "new evidence", we were satisfied that both parties had been given ample opportunity to prepare for the hearing (from July 2022) and the delay now being created was no longer sustainable. It is pertinent to note that this matter was first listed for an application to make a late appeal on 20 July 2022. HMRC had earlier made the Strike Out application, on 14 December 2020. The application was granted.

20. Shortly before the adjourned hearing had been due to take place on 20 July 2022, HMRC filed and served "Additional Submissions", dated 19 July 2022, in support of the Strike Out application. The Additional Submissions were said by Ms Truelove to have been necessary in light of the limited submissions that had been included in HMRC's original submissions in support of the Strike Out application, which had largely been devoted to the issue of the late appeal. Ms Truelove had also made an application to admit late evidence, pursuant to rule 5(3)(d) of the Procedure Rules. The late evidence was included in a "Supplementary Bundle" and consisted of the following documents:

(1) Tribunal correspondence to both parties relating to the 2016 appeal;

(2) Appellant's notice of appeal in relation to the 2016 appeal;

(3) HMRC's letter to the Appellant, dated 30 June 2015 and attaching HMRC's capital allowance computations;

(4) Letter, dated 6 March 2019, from Mr Gance to the Tribunal (attaching the notice of appeal relating to the 2019 appeal);

(5) Appellant's capital allowance computations;

(6) Letter, dated 23 January 2019, from HMRC; and

(7) Section 31 TMA.

21. Ms Truelove explained that the reason for the late evidence was that she had only stepped in to deal with the matter on 1 June 2022, to cover for a colleague who was unwell, and had previously been under the impression that everything had been done in readiness for the hearing on 20 July 2022.

22. In opposition to the application to admit late evidence, Mr Fox submitted that Ms Truelove had stepped in to deal with the matter well before 13 July 2022, when the Appellant had filed all of its evidence, including the skeleton argument in support of the application to make a late appeal, and that the Appellant should not suffer as a result of HMRC's oversight in failing to include the documents referred to at para. 20 above in the bundle.

23. Having considered the parties' respective positions, we decided to admit the evidence on the basis that the documents were familiar to both of the parties (having either been sent or received by either one of the parties in the past) given that they were part of the procedural background. Furthermore, the documents are relevant to the issue before us. In relation to the Additional Submissions, we were satisfied that these merely added greater detail to HMRC's Strike Out application and were not a departure from the Strike Out application. Due to the timing of service of the Additional Submissions and the application to admit late evidence, the hearing on 20 July 2022 was adjourned in order to give the Appellant's representatives time to consider the Additional Submissions and the late evidence.

24. The hearing was adjourned with Directions. HMRC were directed to file and serve a revised electronic bundle to include all of the new evidence. The Appellant's representatives were directed to file an amended skeleton argument addressing the Strike Out application, particularly the doctrine of *res judicata*. The Appellant's representatives were given until 5 August 2022 to do this.

25. In response to the Directions, the Appellant's representatives (or rather more specifically Ms Denise McConkey (Nominated Partner)) filed a skeleton argument, dated 5 August 2022.

26. We, therefore, proceeded to hearing the Strike Out application.

Submissions

27. In support of HMRC's Strike Out application, Ms Truelove submitted that the substantive decision under appeal concerns the Assessments (and the two closure notices) based on HMRC's 2015 decision on the capital allowance treatment of cars. She further submitted that HMRC's case was that the cars were capital in nature, leading up to the review conclusion. She proceeded to take us through the history of proceedings brought by the Appellant, and the decisions of the FtT (*supra*).

28. Ms Truelove re-iterated that the Appellant's appeal was an attempt to re-litigate a matter which was decided in the 2016 appeal. She added that this was an attempt already made by the

Appellant in the 2019 appeal, and that *res judicata* applies. In this respect, the principles of cause of action estoppel, or, in the alternative, issue estoppel or abuse of process apply. If estoppel applies, rule 8(2)(a) of the Procedure Rules applies. If abuse of process applies, the relevant rule, she submitted, was rule 8(3)(c).

29. In relation to cause of action estoppel, she submitted that the Appellant's cause of action was the same cause of action as both the 2016 appeal and the 2019 appeal. She added that all three of the appeals (including the 2020 appeal) were against HMRC's 2015 decision. She further submitted that the Appellant's failure to make the relevant points that the Appellant now seeks to make in the 2016 appeal is not sufficient to depart from the doctrine of *res judicata*, and that the only distinction between the 2016 appeal and the 2020 appeal was that the Appellant has sought to raise different capital allowance computations. In this respect, she submitted that during the 2016 appeal, the Appellant was aware of the capital allowances given and failed to exercise reasonable diligence in raising the ground of appeal now sought to be raised in (both the 2016 appeal and the 2019 appeal).

30. In relation to issue estoppel, Ms Truelove submitted that there was no dispute that the decision relating to the 2016 appeal was final, and that the Appellant hung its argument on the issue of whether the sale of the cars was capital, or revenue, in nature. She repeated that the capital allowance computations were part of the 2016 appeal and the issue has been decided. She concluded the submissions on issue estoppel by saying that the Appellant needs to show that special circumstances exist, and that no such arguments in respect of special circumstances have been made by the Appellant.

31. In relation to abuse of process, she submitted that the 2020 appeal is the Appellant's third appeal and that the Appellant has only recently advanced grounds on the capital allowance computations, which, once again, the Appellant had failed to do in the 2019 appeal. In respect of HMRC's letter, dated 3 June 2020, she submitted that this was not HMRC's consent to a new appeal. She further submitted that at no point did HMRC say that the appeal would not be opposed. She acknowledged that abuse of process arguments may carry less weight in respect of arguments that were not raised before, but submitted that a dangerous precedent would be set and evidence would be weakened by the lapse of time.

32. At the conclusion of Ms Truelove's submissions, Mr Fox made an application for an adjournment. This was after he had made brief submissions on why *res judicata* did not apply. In further amplification of his submission that *res judicata* did not apply, Mr Fox submitted that the issue of the capital allowance computations had never been litigated before. He added that Judge Berner had also agreed, in his decision refusing permission to appeal, that there had been no argument before the FtT in relation to the application of the capital allowance legislation.

33. Mr Fox submitted that the reason for his application for an adjournment was that he had intended to spend the two days prior to the hearing preparing submissions based on *Tasca*. He added that the decision in *Tasca* had only been published a few days before the hearing. This is not, however, correct as the decision was released on 18 March 2022. Mr Fox explained that what he meant was that the decision was published on a practitioners' website a few days before the hearing. Mr Fox further submitted that HMRC had failed to refer to all case law, including *Tasca*, that was relevant to the Strike Out application and failed to include *Tasca* in the bundle.

34. In reply, Ms Truelove submitted that whilst *Tasca* dealt with rule 8(3)(c) of the Procedure Rules, it did not establish a legal principle, or rule, to be followed and was decided on its own facts. Ms Truelove opposed the application to adjourn on the basis that the adjournment was solely for the purpose of formulating submissions in relation to *Tasca*, which was not relevant to the doctrine of *res judicata*. She added that the Appellant could have prepared submissions from 20 July 2022, when the hearing was last adjourned, and that the Appellant's representatives were merely attempting to drag out the proceedings.

35. We refused the adjournment application. The reason for refusing the application was that the Appellant's representatives had from July 2022 to prepare submissions in response to the Strike Out application. Indeed, the Appellant had filed its skeleton argument in response to Directions issued in July 2022. Furthermore, Mr Fox had still not explained why it had not been possible to prepare the Appellant's case despite the earlier confusion as to whether the Appellant could rely on *Tasca*, which was decided on its own facts. We nevertheless directed that the Appellant's representatives file and serve written submissions in reply to the Strike Out application by no later than 15 May 2023, before issuing this Decision.

36. On 15 May 2023, the Appellant's representatives filed the following written submissions:

(1) The entire capital allowance situation did not become material until 2017 and it was not dealt with by the FtT in the 2016 appeal.

(2) Capital allowances were not properly argued after the 2016 appeal and, therefore, the Appellant never had the opportunity to proceed on that basis.

(3) The doctrine of *res judicata* was introduced to prevent the re-litigation of a matter which has already been determined. The entire issue of capital allowances has never been litigated, or considered.

(4) The HMRC litigator had no knowledge of the case of *Tasca*. The Appellant's case is stronger than *Tasca*. *Tasca* involved the fraudulent evasion of VAT, which had criminal implications, and yet the appeal was still allowed.

(5) In the letter dated 4 August 2017, HMRC did not raise any issues with the capital allowance spreadsheet, which they were in possession of. Allowing fuller investigation of the matter is material.

(6) It is for the Appellant to present this information to the FtT, in reliance on the *a fortiori* principle.

37. In the written submissions, the Appellant's representatives continued to take issue with the confusion concerning whether reliance could be placed on *Tasca* at the hearing on 27 April 2023.

38. Having considered all of the arguments, we now proceed to give our Decision, with reasons.

APPLICABLE LAW

39. Rule 8 of the Procedure Rules provides that:

> "**Striking out a party's case**
>
> **8**.-…
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal— (a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

DISCUSSION

40. The Appellant has sought permission to make a late appeal against HMRC's decision relating to the capital allowance treatment of cars (i.e., the 2015 decision).

41. HMRC have applied to strike out the Appellant's appeal in reliance on the doctrine of *res judicata*. In the Strike Out application, HMRC submit that (i) the Appellant is bound by the original decision in the 2016 appeal as the 2019 and 2020 appeals relate to the same cause of action as the original matter. On that basis, the appeal should be struck out under rule 8(2)(a) of the Procedure Rules; or (ii) if the FtT does not agree that the 2020 appeal is based on the same cause of action as the 2016 appeal, issue estoppel applies to provide that the appeal must be struck out under Rule 8(2)(a); or (iii) if the FtT does not consider that estoppel applies in relation to the capital allowances computation, the 2020 appeal is an abuse of process, which means it should be struck out under rule 8(3)(c) of the Procedure Rules.

42. The Appellant submits that (i) the letter dated 3 June 2020 from HMRC stated that it would be in order for the Appellant to proceed directly to the FtT and the 2020 appeal was lodged because there was no possibility of reaching an agreement with HMRC; (ii) capital allowances were not properly argued after the 2016 appeal and, therefore, the Appellant never had the opportunity to proceed on that basis; (iii) the doctrine of *res judicata* was introduced to prevent the re-litigation of a matter which has already been determined but the entire issue of capital allowances has never been litigated, or considered; and (iv) allowing fuller investigation of the matter is material.

Does the doctrine of res judicata apply to the circumstances of this appeal?

43. Finality is a fundamental objective of any dispute resolution process. 'Finality' has two meanings: (i) whether there is any possibility of an appeal within a single piece of litigation which may overturn a decision; and (ii) whether a decision in one set of proceedings can be re-litigated in later proceedings. Regarding the second sense of finality, there is an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct: *Zurich Insurance plc v Hayward* [2011] EWCA Civ 641, [2011] CP Rep 39, at [45] (Smith LJ). This is encapsulated by saying that judicial decisions are '*res judicata*'. *Res judicata* is a substantive rule of law. The full Latin maxim of this doctrine is "*res judicata pro vertitate acciputur"*, which translates to 'a matter adjudged is taken as truth'. A judgment binds the parties so they cannot, thereafter, sue a second time if their first claim was defeated, or contest issues in later proceedings that were decided in earlier litigation. If a claim was successful, the rights and obligations of the parties are now defined by the judgment and they cannot revert to their original positions and start again.

44. The doctrine of *res judicata* is premised on two principles. An important insight into the principles underlying the doctrine of *res judicata* can be gathered from the speech of Lord Bridge of Harwich in *Thrasyvoulou v Secretary of State for the Environment; Oliver & Ors v Havering London Borough Council* [1989] 2 AC 273:

> "The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro una et eadem causa*.' These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field... In relation to adjudications subject to a comprehensive self- contained statutory code, the presumption, in my opinion, must be that where the statute has created *a specific jurisdiction for the determination of any issue which establishes the existence of a legal right*, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions. (Emphasis added)"

[Emphasis added both above and below]

45. In *Virgin Atlantic v Zodiac Seats UK Ltd.* [2014] AC 160 ('*Virgin Atlantic*'), at [17], the modern formulation of the doctrine of res judicata was encapsulated by Lord Sumption in the following principles:

> "*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. ... Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. 'Issue estoppel' was the expression devised to describe this principle

> by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

46. The purpose of these principles is to limit abusive and duplicative litigation: *Virgin Atlantic*, at [25]. Each case turns on its own facts.

47. The constituent elements of *res judicata* were clearly specified by Lord Clarke JSC in *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England & Wales* [2011] 2 AC 146 ('*Coke-Wallis*'), where he endorsed the Spencer-Bower & Handley criteria as authoritative:

> "34 In para 1.02 Spencer Bower & Handley, Res judicata, 4th ed makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are:
>
> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was— (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem."

48. The doctrine applies where a body is given jurisdiction to determine any issue which establishes the existence of a legal right. It is a fundamental principle which applies to successive proceedings. Hence, *res judicata* supports the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation. The principle that the parties should not be permitted to re-litigate their disputes after a final decision is one of almost universal application in most legal systems. It is clear from the authorities that the doctrine of *res judicata* can apply in the context of traditional courts, and tribunals.

49. The appeal in *Coke-Wallis* concerned the relevance and application of the principles of autrefois acquit, *res judicata* and abuse of process, in the context of successive proceedings before a regulatory or disciplinary tribunal. The appellant in that case relied on the principle that *nemo debet bis vexari pro una et eadem causa*. The question in that case being 'what is the legal effect of the conclusion that the second complaint raised is the same as the first?' The substance of the underlying conduct was the same in the case of both complaints. The cause of action merges in the judgment and is extinguished. A second action cannot be brought on that cause of action, not because there is an estoppel, but because there is no longer a cause of action. Lord Clark's judgment in *Coke-Wallis*, at [26], referring to *Thoday v Thoday* [1964] P 181 ('*Thoday v Thoday*'), considered that:

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "causa" bears its literal Latin meaning. The second species, which I will call "issue estoppel," is an extension of the same rule of public policy.

50. Lord Atkin's words in *Workington Harbour & Dock Board v Trade Indemnity Co. Ltd. (No 2)* [1938] 2 All ER 101, 43 Com Cas 235, were also considered by the Supreme Court in *Coke-Wallis*, at [45]. Lord Atkin had described the position concisely at pp 105-106:

> "The question will always be open whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of res judicata will prevail. In the present case, in my opinion, the Plaintiffs are suing on precisely the same breaches as those in the first action, and for the same damages, though on different evidence…I am satisfied that the first action raised the issue of all the contractors' breaches, and treated, and meant to treat, the engineers' certificate as conclusive proof of both the breaches and the losses arising therefrom… The result is that the Plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim nemo bis vexari debet pro eadem causa."

51. *Res judicata* is, therefore, a broad all-encompassing term as it embraces both 'cause of action estoppel' and issue estoppel', amongst others that fall within its purview. Through the doctrine of estoppel, the power of estoppel branches out into these two rules. The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which ought to have brought in the first set of proceedings.

52. From the authorities, these are the three relevant concepts for the present purposes: cause of action estoppel, issue estoppel and abuse of process. We proceed to consider these in turn.

53. Firstly, where the requirements for cause of action estoppel are met, the earlier decision is an absolute bar to later proceedings and the court has no discretion to hold that *res judicata* does not apply to the later case: *Virgin Atlantic.* This was considered and applied by Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ('*Arnold v National Westminster Bank*'), at p. 104:

"Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of a new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened… Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings…"

54. As considered and reaffirmed in *Virgin Atlantic*, at [22] (Lord Sumption):

"Arnold is accordingly authority for the following propositions:

(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

55. In *Coke-Wallis*, Lord Clarke said this, at [50]:

"50…a cause of action estoppel will only arise if, among other things, the first determination involved a judicial assessment or evaluation of the facts constituting the cause of action in the light of the applicable legal principles."

56. Therefore, cause of action estoppel operates where a party brings a new appeal with an identical cause of action involving the same subject-matter as has been determined in an earlier appeal. Where cause of action estoppel applies, there is also an abuse of process, unless there is a relevant exception.

57. In *Thoday v Thoday*, Diplock LJ said this concerning estoppel:

"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff to…establish his causes of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission…neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has

in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

58. Secondly, issue estoppel operates where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided. In *Arnold v National Westminster Bank plc*, at p 105, Lord Keith defined issue estoppel in the following manner:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue." (105E)

59. At p 109, he said this:

> "the purpose of the estoppel is to work justice between the parties."

60. Issue estoppel is, in principle, binding between the parties in subsequent litigation raising the same issue as the second and third applications. Henderson J in *Littlewoods Retail Ltd. & Ors v HMRC* [2014] EWHC 868 (Ch) ('*Littlewoods*') said this, at [152]:

> "152. Issue estoppel is a well-established part of the law of res judicata. It is common ground that, in order for an issue estoppel to arise, three conditions need to be satisfied:
>
> (i) the same question must previously have been decided;
>
> (ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and
>
> (iii) the parties to the prior judicial decision (or their privies) must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised (or their privies)."

61. The severity of this rule is tempered by a discretion to allow the issue to be re-opened in subsequent proceedings when there are 'special circumstances' in which it would cause injustice not to do so: *Arnold v National Westminster Bank plc*. In *Virgin Atlantic*, Lord Sumption formulated the 'special circumstances' exception at [22(3)], as follows:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised…"

62. It was not until *Arnold v National Westminster Bank plc* that it was firmly established that an exception for 'special circumstances' applies to issue estoppel, but not to cause of action estoppel. Cause of action estoppel and issue estoppel do not depend on the earlier claim being

determined by a reasoned decision, but turn on whether there was a competent tribunal and whether a final order has been made.

63. Thirdly, the principle of abuse of process applies where a party is misusing, or abusing, the process of the court by making a claim in relation to the same subject-matter as has previously been decided. Whilst *res judicata* is a substantive rule of law, abuse of process is a principle that is used by a court when exercising its procedural powers. An overlap arises in that *res judicata* is concerned with preventing abuse of process. Abuse of process was first crystallised in *Henderson v Henderson* (1843) 3 Hare 100, where the following principle was enunciated by Sir James Wigram VC:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

64. The decision in *Henderson v Henderson* was a conventional application of the rules governing cause of action estoppel. At a certain time, it was thought that a second claim would be an abuse of process if it raised a claim that could have been brought in earlier proceedings. It was firmly established in *Johnson v Gore Wood & Co.* [2002] 2 AC 1 ('*Johnson v Gore Wood*'), that this went too far, and that the opposite tendency of looking for an abusive element was too restrictive. Before *Johnson v Gore Wood*, it had been thought that the court had first to consider whether the second claim was potentially an abuse of process, and then to consider whether there were special circumstances which would justify allowing it to continue. Lord Bingham of Cornhill modified this approach, at [31f] of the decision in *Johnson v Gore Wood*. Lord Bingham explained the idea behind the rule in *Henderson v Henderson*, as follows:

> "The rule in *Henderson v Henderson*…requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the courts so that all aspects of it may be finally decided…once and for all. In the absence of special circumstances the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. *The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel.* It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed. [emphasis added]"

65. Lord Sumption quoted from the words of Lord Bingham, at [24] of the decision in *Virgin Atlantic*:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. ... It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits- based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

66. In *Moorjani & Ors v Durban Estates Ltd.* [2019] EWHC 1229, Pepperal J described the approach to be taken in determining whether there has been an abuse of process:

> "17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:
>
> a) The onus is upon the applicant to establish abuse.
> b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
> c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
> d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
> e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

67. It is important to note that the rule in *Henderson v Henderson* does not require the court to have determined the issue in previous litigation in order for an abuse to arise.

68. The modern test is, therefore, to consider whether "in all the circumstances" a party's conduct is an abuse, rather than to ask whether the conduct is an abuse and, if so, to ask whether the abuse can be excused or justified by special circumstances. A distinction was drawn between the same cause of action and raising entirely new issues. This was the form of abuse of process described by Sir James Wigram VC in *Henderson v Henderson*, at 114-115. Lord Sumption's final view in *Virgin Atlantic* was that there is nothing in the speeches of Lord Bingham or Lord Millett that suggests that because the rule in *Henderson v Henderson* is concerned with abuse of process, it cannot be part of the doctrine of *res judicata*.

69. With those principles in mind, we turn to the circumstances of this appeal.

70. HMRC firstly argue that the Tribunal must strike out the appeal on the basis of estoppel. In the alternative, HMRC argue that the appeal is an abuse of process. It is submitted on behalf of the Appellant that *res judicata* does not apply as there is a fundamental issue that has yet to be considered by the FtT. That is the issue concerning the capital allowance computations

which, the Appellant submits, has never been argued before having been raised for the first time after the 2016 appeal.

71. Rule 8 of the Procedure Rules is the source of the jurisdiction to strike out an appeal. The Tribunal is obliged to strike out the whole, or part, of any proceedings in respect of which it does not have jurisdiction. Rule 8(2)(a) provides that:

> "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal— (a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

72. During the 2016 appeal, the Appellant's grounds of appeal were:

> "The partnership contends that part of the trade is the buying and selling of motor vehicles. The profit or loss on said transactions are of a revenue nature. HMRC contends that income received in respect of the above are payments for hire, and motor vehicles are treated as capital (items). The dispute is in relation to the correct accounting treatment of the vehicles in the partnership's accounts."

73. Following the 2016 appeal hearing, Judge Connell decided that the vehicles were fixed assets that were subject to capital allowance legislation. He made the following material findings in the decision, dated 5 September 2016:

> "70. The available evidence shows that the second hand vehicles were being hired to the drivers. There is no evidence that the cars were, during the period of use by the drivers, being purchased under some form of instalment plan.
>
> ...
>
> 73. ... The cars were, in our view, fixed assets subject to capital allowance legislation and not items that could properly be included in 'cost of sales'.
>
> ...
>
> 75. The cost of purchase of the vehicles represented revenue expenditure and not capital expenditure."

74. The FtT subsequently confirmed HMRC's amendments to the Appellant's partnership returns for the tax years 2009-10 to 2012-13 and dismissed the appeal. The Assessments were, accordingly, upheld.

75. Following applications for permission to appeal, which were refused by the FtT on 23 January 2017 and the UT on 4 April 2017, the Appellant made a renewed application for

permission to appeal at an oral hearing before Judge Berner, on 7 July 2017. Judge Berner refused permission to appeal in a decision dated 13 July 2017. At the end of that decision, Judge Berner said this, at [9] to [11]:

> "Further steps
>
> 9. That concludes the proceedings in this Tribunal. But, as I discussed with Mr Fox and Mr Gance at the hearing, that does not preclude the Applicant from seeking to agree figures with HMRC in order to take account of the conclusion that the vehicles are capital assets subject to capital allowances. I do not have any information as to the nature of any possible claim by the Applicant in this respect, or any applicable procedure or time limit, and this is not something within the jurisdiction of this Tribunal, but if there are adjustments that should be made, then that is something that may be addressed outside of these proceedings.
>
> 10. As part of the general discussion, I noted that, in principle, the system of capital allowances enables a measure of relief for capital expenditure to be obtained. That involved, in broad terms, writing-down allowances, at fixed rates which may differ from accounting depreciation, but also a system of balancing allowances (and charges) which apply, for example, on the disposal of the asset. The system of balancing allowances enables relief in principle to be obtained by reference to the sale price or the market value of the asset in question on disposal. To the extent that, in the periods in question, and going forward, the applicant disposed of capital assets, in principle it appeared to me that balancing adjustments would fall to be made and would be brought into account in a capital allowances pool. That would require separate tax computations, which will be different from the accounting entries.
>
> 11. None of that is something over which this Tribunal has any jurisdiction, and my high-level comments in the hearing, which I was asked to summarise in this decision, have no particular significance. Any further dispute between the parties would, as I indicated at the hearing, have to be the subject of a separate appeal to the FTT. I would hope, however, that further dispute can be avoided by discussion."

76. We find that Judge Berner's comments, at [10] of his were in relation to the pre-2009 treatment of cars. Schedule 11 of the Finance Act 2009 has changed the way that cars are treated for capital allowance purposes (from 6 April 2009) to a CO2 emissions basis. Therefore, since April 2009, balancing allowances have not been given and relief is given over time, depending on the CO2 emissions.

77. Ongoing discussions then took place between the Appellant's representatives and the HMRC tax inspector, Mr De Forges. By a letter dated 23 January 2019, Mr De Forges referred to Judge Berner's decision of 7 July 2017 and said this:

> "[Judge Berner] said that if we could not agree on the capital allowance calculations, that there would need to be a separate appeal to the First-tier Tribunal.
>
> I do not accept your approach to the capital allowance computations and nor am I prepared to consider standing over any tax until I am notified by the First- tier Tribunal that your appeal has been received and accepted."

78. On 4 March 2019, the Appellant submitted the 2019 appeal to the FtT. The notice of appeal stated that the amount in dispute was £44,250. The grounds for appeal were as follows:

> "The grounds of the Appeal are, that for the years ended 31 March 2011 – 31 March 2012 – 31 March 2013 and 31 March 2014, HMRC have raised assessments on income that includes the sale of motor vehicles.
>
> On the other hand HMRC have disallowed the purchase of such vehicles as being Capital Items.
>
> If the purchases are disallowed then it follows so should the sale of those vehicles be taken out of income.
>
> The reason is that these vehicles were purchased by drivers from the partnership in the year of original purchase, and the sale value thereof should be excluded from sales, HMRC are not in agreement.
>
> Evidence clearly demonstrates that these vehicles were sold to drivers and should be included within the capital allowance computation.
>
> The Appeal therefore is simply that sales of motor vehicles should be excluded from trading income, particularly when the purchases thereof have been excluded from trading costs.
>
> The Tribunal is therefore being asked to allow the extraction from trading income of the sale of motor vehicles, which should be subject to offset by the purchase of such vehicles.
>
> Attached herewith is a spreadsheet covering all the financial periods under review that clearly demonstrate sales of motor vehicles and also produced herewith is a summarised calculation thereof covering all the financial periods under review.
>
> These calculations demonstrate that the partnership suffered a net deficit of £14,242."

79. On 24 May 2019, HMRC applied to strike out the 2019 appeal on the grounds that if the Appellant was seeking to appeal the capital allowance computations and HMRC's application of the legislation, that would constitute a new ground of appeal in a case which had already been determined by the FtT in the 2016 appeal. Further, HMRC contended that it was too late to introduce a new ground of appeal.

80. During the 2019 appeal hearing before Judge Sinfield, Mr Fox submitted that the Appellant was appealing against the figures in HMRC's review conclusion letter of 21 December 2015. He further submitted that he understood Judge Berner's words at [11] of the decision dated 7 July 2017 to mean that the Appellant could go back to the FtT with the appeal. He also referred to a letter, dated 24 August 2017, from Mr De Forges to Mr Gance. The last sentence of the second para. was worded as follows:

> *"... there are elements of the spreadsheet, we might not necessarily agree on.*"

81. Mr De Forges then asked:

> "*Please could I now have your explanation of how you feel the vehicles should be treated for capital allowances purposes.*"

82. Mr Fox submitted that this showed that the capital allowance treatment was still in dispute and had not been agreed with HMRC. He submitted that the calculations could be the subject of another appeal.

83. In his decision, Judge Sinfield said this, at [11] – [13] and [15]:

> "11. I consider that Mr Fox had not given sufficient weight to Judge Berner's use of the words "further dispute" and "separate appeal" in paragraph 11 of his decision. It seems clear to me that Judge Berner was not suggesting that the Appellant could re-argue the 2016 Appeal but that if a further dispute arose in relation to the calculations of the capital allowances then another appeal might be possible. Judge Berner's comments were restricted to a new appeal raising new issues and which did not either explicitly or implicitly challenge the 2016 Decision. I understood Mr Fox to accept that was the position when I put it to him at the hearing.
>
> 12. Whether there is any further appeal is a matter for the Appellant and its advisers but, as I pointed out to Mr Fox, there are a number of hurdles to overcome before any further appeal can proceed.
>
> 13. The first matter that the Appellant must address is the grounds of appeal of any further appeal. The Appellant cannot rely on the grounds used in the 2016 Appeal as it has effectively done in this appeal. Instead, the Appellant must produce grounds that show that it is arguable that HMRC's capital allowances computations are wrong. If the grounds do not contain any such arguable points then the FTT may consider that the appeal has no reasonable prospect of succeeding and strike it out.
>
> …
>
> 15. Even if the appeal were in time or permission was given for the Appellant to make a late appeal, it might be said that to introduce a new ground at this stage when it could have been raised in the hearing of the 2016 Appeal is an abuse of process. That point carries less weight when the matter was not in issue at the hearing. Judge Berner observed at paragraph 7 of his decision of 7 July that "no arguments were addressed to the FTT as to the proper application of the capital allowances regime." Certainly, the 2016 Decision does not contain any findings or decision about the final calculation of the capital allowances. Further, the letter dated 24 August 2017 from Mr De Forges, quoted from at [9] above, shows that HMRC were still willing, at that stage, to discuss the capital allowances treatment of the cars, which I take to mean the calculation of the amendments to the partnership tax returns following the 2016 Decision."

84. Judge Sinfield, therefore, found that the grounds of appeal relating to the 2019 appeal did not address any issues in relation to the capital allowance computations.

85. In the 2020 appeal (the appeal before us), the Appellant's grounds of appeal are that:

> "At a hearing at the Upper Tribunal at the High Court on 2nd October 2019 the Judge indicated ttiat there were grounds to proceed with respect to Capital Allowances
>
> Following these comments there was yet communiocations with HMRC
>
> In a letter of 3rd June 2020 HMRC commentes that it would now be in order for the Partnership to proceed directlt to a Tribunal and to quote the Inspector dealing with the case

"If you wish to proceed with your applea to the Tribunal then continue to do so"

HMRC are therefore well aware that an appeal can properly proceed to a Trlbunal as evidence of the above."

Grounds for the Appeal are ,that Capital Allowances that are permitted by Statute have not been allowed by HMRC ,even though though full information in support thereof have been supplied

Additional grounps ,are that Balancing Allowances arising from the Capital Allowabces have been excluded by HMRC even though full documentary information supporting such a calim should have been permitted."

[sic]

86. Prior to lodging the 2020 appeal, there were further exchanges of correspondence between the parties. By a letter dated 15 October 2019, the Appellant's representatives said this:

> *"The Judge in the decision issued on 8th October 2019 referred to a letter of 24th August 2017 from HMRC, that demonstrated that HMRC were still willing at that stage to discuss the capital allowance treatment of the cars."*

Rule 8(2)(a) – cause of action estoppel

87. In considering whether the 2020 appeal arises out of the same, or substantially the same, facts, we have looked at all of the circumstances of the case. In the event that a new claim is being made in the 2020 appeal, we have considered whether there are any special circumstances that apply. We are satisfied that:

(1) A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

(2) In the search for what constitutes a new cause of action, it is the essential factual allegations that must be compared.

(3) Raising an issue or point which is different from that raised originally will usually assert a new cause of action.

88. The definition of a cause of action was given by Brett J in *Cook v Gill* (1873) LR 8 CP 107:

> "'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse…"

89. The term cause of action was also described in *Letang v Cooper* [1965] 1 QB 232, at 242 ('*Letang v Cooper*') per Diplock LJ. In *Paragon Finance v DB Thackerar & Co (A Firm)*

[1999] 1 All ER 400, Chadwick J cited the definition offered by Diplock LJ in *Letang v Cooper,* which was approved in *Steamship Mutual Underwriting Assn Ltd. and Anor v Trollope & Colls* (1986) 6 Con LR:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

90. HMRC's Assessments (and 2015 decision) followed an amendment to the Appellant's 2012 partnership tax return. The Appellant appealed against the Assessments in the 2016 appeal. In this respect, s. 31 TMA provides that:

> *"***31Appeals: right of appeal**
>
> (1) An appeal may be brought against—
>
> (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
>
> (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
>
> (d) any assessment to tax which is not a self-assessment."

91. Section 50(6) TMA, in turn, provides that:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, …, the appellant is overcharged by a self-assessment;
>
> (b) that, ..., any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

92. The burden of proof rests on the Appellant to show that the Assessments are incorrect. Therefore, unless the Appellant can produce evidence to show that, on the balance of probabilities, it has been overcharged by the Assessments, the Assessments 'shall stand as good'.

93. The FtT in 2016 confirmed the Assessments and permission to appeal against that decision was refused by both the FtT and the UT (Judge Berner). Following the 2016 appeal, the Assessments were confirmed. The Appellant's 2020 notice of appeal clearly suggests that

the Appellant seeks to appeal against the Assessments by way of different capital allowance computations. This is so as no new decision has ever been made by HMRC following the 2016 appeal. I shall return to this point later.

94. We find that whilst the Appellant never submitted the capital allowance computations now sought to be relied on during the 2016 appeal, we are satisfied that subject matter (factual situation) and the underlying right of appeal in the appeal before us is the same as that which was in play during 2016 appeal and the 2019 appeal (in relation to the subject matter and factual situation). We find that on a proper analysis of the facts, the issue of capital allowance computations is not a new matter. Our reasons for so finding are that prior to, and during, the 2016 appeal HMRC had based their capital allowance figures on information provided by the Appellant. Indeed, Judge Connell said this in his decision:

> "35. In the 2012 year, the cost of vehicles acquired in that year (£57,325) was claimed in full, as 'Cost of Sales' expenditure, Capital allowances would have been allowable at £13,613 on the vehicles purchased that year and on the written down values carried forward from 2011. HMRC therefore proposed to make additions to Partnership net profit for 2012 of £43,712.
>
> 36. For other years, HMRC assumed the treatment was the same for vehicles purchased in those years and proposed additions as follows:

Year	Car cost (£)	Capital Allowances (£)	Additional (£)
2010	5,766	1,153	4,613
2011	39,067	6,269	32,798
2013	43,855	14,648	29,207

> The capital allowance figures shown included those given on the written down value from the previous year, with the exception of 2010. The new rules did not apply for 2009."

95. Paragraph 36 of Judge Connell's decision was taken directly from HMRC's letter dated 30 June 2015. In that letter, the Appellant's representatives were given 30 days to either agree to HMRC's proposals, or provide alternative documentary evidence. By a further letter, dated 5 August 2015 ('the 2015 decision'), HMRC informed the Appellant of the decision to proceed on the basis described in the letter dated 30 June 2015. HMRC's 2015 decision was followed by statutory review, the conclusion of which was issued on 21 December 2015. We are satisfied that HMRC's Assessments included calculations of what the capital allowance computations should be, as notified to the Appellant. We are further satisfied that the amount of the Assessments had to be decided as part of the decision in the 2016 appeal. In confirming the Assessments, the FtT was upholding those calculations. That decision was reached by a tribunal of competent jurisdiction.

96. It is trite law that an appeal lies against a decision. We find, however, that there has been no further decision giving a further right of appeal against the Assessments which were confirmed by the FtT in 2016. Indeed, the Appellant's own representatives appreciated that there was no new decision which would trigger a further right of appeal. The letter, dated 12

September 2018, from the Appellant's representatives to HMRC included the following statement:

> *"…can you please confirm the "decision" that is being appealed against, so that the Tribunal can be notified thereof."* [sic]

97. This was the same position in the Appellant's representatives' letter, dated 2 June 2020, to HMRC:

> *"The issue outstanding is that the Tribunal requires notification of a decision that is to be appealed against.*
>
> *However we cannot trace such a formal decision from HMRC that can be formally confirmed to the Tribunal."*

98. By way of reply, HMRC said this in the letter, dated 3 June 2020, to the Appellant's representatives:

> *"Notices and Amendments for 2010 to 2013 were issued on 5 August 2015. The basis of the additions herein (the decision), were detailed in my letter of 30 June 2015."*

99. Therefore, no new decision was made following the Appellant's representatives' discussions with HMRC after the 2016 appeal against the 2015 decision.

100. In refusing permission to appeal against Judge Connell's decision, Judge Berner commented that the Appellant was not precluded from seeking to agree capital allowance figures with HMRC. He added that he did not have any information as to the nature of such a claim, or any applicable procedure or time-limit. Materially, whilst Judge Berner's comments were also that the Appellant may seek to agree proper capital allowance figures with HMRC, he unequivocally stated that this was not within the jurisdiction of the FtT (i.e., that adjustments may be addressed outside of the tribunal proceedings).

101. Having considered all of the information before us, we find that the capital allowance computations now sought to be relied on by the Appellant were invited by HMRC because of what was said by Judge Berner at the end of his decision. It is submitted on behalf of the Appellant that HMRC invited a further appeal to the FtT. We do not agree with this. We have found that Judge Berner made clear that further discussions between the Appellant and HMRC were not within the jurisdiction of the FtT. Indeed, HMRC's letter of 19 August 2019 made clear that:

> *"The purpose of directing you back to the Tribunal Service, after our prolonged correspondence, was your reluctance to accept that there were no further grounds for appeal on this point exactly."*

102. Contrary to the assertion made on behalf of the Appellant that Judge Sinfield's decision, at [15], *"…effectively provided a 'green light' so as to enable the process to recommence",* we are satisfied that all that Judge Sinfield was saying there was that no arguments had been raised before Judge Connell as to the final calculation of the capital allowances and that an abuse of process argument may carry less weight when the matter was not in issue at the hearing. We do not agree that Judge Sinfield's decision provided a 'green light' for the process to continue an appeal to the Tribunal.

103. We find that the fact that the Appellant chose to focus its arguments on the capital allowance treatment of the cars, and not the amount of the Assessments, does not displace the cause of action at play during the 2016 appeal. The Appellant is, essentially, asking the FtT to, once again, exercise its power under s. 50(6) TMA to reduce the amount of tax due under the Assessments by relying on new capital allowance computations. We hold that the Appellant cannot appeal to the FtT against a matter which, by virtue of being dismissed in the 2016 appeal, has already been determined by the FtT. The FtT has no jurisdiction to entertain such an appeal and must strike it out under rule 8(2)(a) of the Procedure Rules.

104. Cause of action estoppel applies to every point which properly belonged to the cause of action when reasonable diligence is exercised. We find that the Appellant has not provided any explanation as to why the capital allowance computations were not relied on before, apart from saying that discussions concerning the capital allowance computations only commenced after the 2016 appeal. We have found that Judge Berner made clear that any ongoing discussions were not within the jurisdiction of the FtT. We have further found that HMRC invited new figures from the Appellant because of Judge Berner's comments and not because HMRC were considering whether to issue a new decision. While the capital allowance computations that the Appellant now seeks to rely on relate, peripherally, to the 2015 decision, the capital allowances nevertheless relate to the outcome of the 2015 decision and that is the only decision that has been made by HMRC in the circumstances of this appeal. We find that the facts of this appeal have remained the same.

105. While the point was left open in *Shiner & Anor v R & C Commrs* [2018] EWCA Civ 31; [2018] BTC 8 ('*Shiner*'), the weight of the authorities suggests that issue estoppel has a much smaller part to play in the context of tax appeals. However, it may be abusive for a party to contest a point which has been decided against them in later proceedings and, in that context, the court will make a broad merits-based evaluation.

Rule 8(3)(c) – Abuse of process

106. Further and alternatively, the appeal may be struck out as an abuse of process. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock said this:

> "… [abuse of process] concerns the inherent power which any court of justice must possess to prevent the misuse of the procedure in a way, which although not inconsistent with the literal application of its procedure rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right-thinking people."

107. As confirmed in *Shiner*, rule 8(3)(c) may be used to strike out an appeal due to the appeal being an abuse of process. The court said this, at [19]:

> "19. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed."

108. Cases that amount to an abuse of process can, therefore, properly be struck out in accordance with the tribunal's inherent powers of case management, without reference to rule 8. However, rule 8(3)(c) is drafted sufficiently widely to permit strike outs under rule 8 as well, when a case amounts to an abuse of process. In *Shiner*, the Court of Appeal held that it had been correct for the FtT to strike out part of the taxpayers' appeals on the basis that it would have been an abuse of process to allow the taxpayers a second attempt to challenge issues which had already been the subject of a failed judicial review. Even if it were otherwise permissible, there were no special circumstances which justified the re-opening of the point in issue.

109. Rule 8(3)(c) is a discretionary power to strike out. In this respect, we have had regard to the overriding objective under the Procedure Rules.

110. In considering whether to strike out the appeal as an abuse of process, we have asked the crucial question of whether, in all the circumstances, the Appellant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before: *Henderson*; *Laing v Taylor Walton* [2008] PNLR 11. We are conscious of the fact that to say that because a matter could have been raised in earlier proceedings renders the raising of it in later proceedings necessarily abusive is too restrictive: *Johnson v Gore Wood & Co*, at [30]-[34]. In the appeal before us, the private interest at hand is that of a party not being vexed twice for the same reason and the public interest is that of not having the same issues repeatedly litigated: *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646; *Hunter*; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

111. In these circumstances, the test enunciated by Lord Bingham in *Johnson v Gore Wood* is relevant:

> "…there should be finality in litigation … a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings … It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise the issue which could have been raised before … it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse

than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

112. Where a point was not raised in a set of proceedings, but could have been raised, it may be an abuse of process for the party to raise it in later proceedings. When decided whether that is the case, we have made a broad merits-based judgment.

113. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC) ('*Spring Capital*'), Judge Mosedale noted that the fact that issue estoppel does not apply to tax cases appears to be no bar to a court concluding that the re-opening a decided issue is an abuse of process, and that cases such as *Littlewoods* make it clear that the operation of the doctrine of abuse of process appears similar to issue estoppel, except that there is flexibility where there are special circumstances. In *Spring Capital*, the taxpayer had appealed against the daily penalties assessed by HMRC under Schedule 36 of the Finance Act 2008 for failing to comply with an information notice. The taxpayer had previously lost an appeal in the FtT against a fixed penalty of £300 for non-compliance with the information notice. The FtT did not allow the taxpayer to argue in the daily penalty that part of the information notice was invalid because the taxpayer could, and should, have argued these matters in the original £300 penalty appeal. The FtT found there to be no special circumstances to enable the taxpayer to have a second bite of the cherry.

114. Even taking into consideration that the capital allowance computations were not argued by the Appellant in the 2016 appeal, we have found that the Assessments (and the computations relied on by HMRC) had to be decided as part of the decision in the 2016 appeal. Therefore, the amount of the Assessments was necessarily common to the 2016 appeal and the appeal before us. In this respect, the amount of the Assessments was a condition which had to be fulfilled in order for the Assessments to be confirmed in the 2016 appeal. The capital allowance computations would go to fulfilling that condition and the issue formed a necessary ingredient of the cause of action. The Appellant has not provided any explanation as to why the capital allowance computations were not available during the 2016 appeal. We are satisfied that the Appellant cannot seek to rely on the sole argument that the capital allowance computations were the subject of ongoing discussions with HMRC after 2017 as providing a basis for lodging a further appeal.

115. We find that the decision of the FtT in 2016 was a judicial decision and that decision was pronounced on 5 September 2016. We are further satisfied that the FtT had jurisdiction over the parties and the subject-matter of the appeal by virtue of the right of appeal under TMA. The decision was final in the sense that it was un-appealed or, rather, challenges to the decision were unsuccessful on 23 January 2017, 4 April 2017 and 13 July 2017. That the Appellant is now appealing on different evidence does not detract from the fact that the Appellant did not seek to challenge the evidence produced by HMRC in raising the Assessments. We find that during the 2016 appeal, the Appellant was primarily focusing its arguments on the status of the cars, to the detriment of the amount of the Assessments. That, we find, does not give the Appellant the right to a "second-bite at the cherry".

116. We are satisfied that the Appellant has merely taken on a new focus in the appeal before us. That the Appellant was required to bring forward its whole case in 2016 when exercising the right of appeal against the 2015 decision is an argument that has considerable force. The

new point properly belonged to the litigation in 2016. We find that it would have been a relatively simple and straightforward task for the Appellant to submit all of the evidence now sought to be relied on during the 2016 appeal. We are fortified in our view by the arguments raised in the Appellant's skeleton argument as follows:

> *"capital allowances that are permitted by statute have not been allowed by HMRC even though full information had been supplied."*

117. We find that the description (label) of the 2020 grounds of appeal by the Appellant is distracting from the contents of the bottle. We find that if a party were permitted to rely on evidence, the unavailability of which at the time of the original decision has not been substantiated, this would open the floodgates in litigation. Even if a better analysis is now being pleaded, the case of *Ladd v Marshall* [1954] 1 WLR 1489 held that the applicant must show that the evidence could not with reasonable diligence have been obtained. The standard required is reasonable diligence. This has not been shown by the Appellant before us.

118. It is trite law that litigation should not drag on forever. This matter has now been ongoing since 2013 and we have found that no reasons have been put forward for the failure on the part of the Appellant to bring forward its whole case in 2016, having appealed pursuant to s. 31 TMA. We have undertaken a broad merits-based judgment, taking into account the public and private interests involved, as well as a balanced appraisal of all of the facts of the case, taking care not to conduct a mini-trial of the issues.

119. Lastly, but by no means least, the Appellant's representatives have relied on *Tasca*. We find that the Appellant's representatives have not, however, said how *Tasca* applies to the Appellant's case, apart from the reference to rule 8(3)(c) in *Tasca*. It is correct that HMRC should consider the range of tribunal decisions which have a bearing on the application (including those which are unfavourable to HMRC) and not present a single decision which would seem to support them: *Hill v HMRC* [2017] UKFTT 277 (TC). However, whilst the Appellant's case is that *Tasca* is relevant, it is trite law that each case is decided on its own facts.

120. The strike out application in *Tasca* was based on rule 8(3)(c) of the Procedure Rules. The question before the UT was whether the judge was wrong, as a matter of law, in the decision which he made and, if so, whether that error vitiated the decision such that it should be set aside. *Tasca* was an MTIC appeal which concerned the refusal of the FtT to strike out Tasca's appeal against HMRC's decision to deny input tax on the basis that Tasca knew, or should have known, that the relevant transactions were connected with the fraudulent evasion of tax.

121. The UT identified a critical gap in the judge's reasoning in declining to strike out the appeal, at [75], where the judge had failed to apply the relevant legal tests and had failed to engage with the case. The only similarity between *Tasca* and the appeal before us is rule 8(3)(c).

CONCLUSION

122. We have considered the relevant tests in deciding whether this appeal should be struck out. Having considered the oral and written submissions, together with the relevant legal principles, we are satisfied that the appeal must be struck out under rule 8(2)(a) of the Procedure Rules. In this respect, we are satisfied that statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right. Further, and alternatively, we are satisfied that the appeal is otherwise an abuse of process.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

123. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 29th JUNE 2023