



Neutral Citation: [2024] UKFTT 00137 (TC)

Case Number: TC09072

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2017/08854

*PRELIMINARY ISSUES – whether global assessment – no – whether five discrete time barred periods – yes – whether the whole assessment for time barred periods had been appealed – whether it matters whether or when that had been pled – given early stage in proceedings and Burgess and Brimheath – no – appeal allowed in full in respect of time barred periods*

**Heard on:** 5 May 2023

**Judgment date:** 12 February 2024

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**

**Between**

**MONMORE PROPERTIES LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Michael Ripley of counsel, instructed by Kieran Lynch & Co

For the Respondents: Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This was a preliminary hearing to determine the two issues in the Joint Application made by the parties dated 20 January 2023. Those issues, as articulated by the parties, are:-

- “(i) The scope of the Appellant’s appeals; namely whether the Appellant has appealed sums amounting to £3,859,888 in time or at all. And
- (i) Whether the Respondents’ assessment made on 8 July 2016, and subsequently amended on 3 April 2017 and 20 October 2017, was time-barred to the extent that it related to supplies in the period 1.4.11 to 30.6.12 and, if so, whether the assessment should be discharged to that extent.”

I describe them as the First and Second Issues respectively.

#### *The Substantive appeal and the assessments*

2. There are four appeals and they have been consolidated. It is the first appeal with which I am concerned.

3. Paragraphs 3 and 5 of the Respondents’ (“HMRC’s”) Amended Statement of Case state that “This consolidated appeal concerns supplies made in the period 1 April 2011 to 3 April 2014 inclusive (“the Relevant Period”) and that it “...is concerned with welfare services provided to “privately funded individuals” [see paragraph 17 below] in the Relevant Period”.

4. Paragraph 1 of the Appellant’s Re-Amended and Consolidated Grounds of Appeal (“the New Grounds of Appeal”) states that:

“The essential nature of the dispute...concerns the Appellant’s liability to VAT in relation to supplies of welfare services in the period 1 April 2011 to 4 April 2014.”

5. By email received by the Tribunal following the hearing it was confirmed that it was common ground between the parties that the New Grounds of Appeal should have referred to the period 1 April 2011 to 3 April 2014. The same issue arises with the original Ground of Appeal.

6. Under the heading “Details of Assessment(s)” the disputed Notice of Assessment(s) dated 8 July 2016 in the sum of £13,380,423 and the First and Second Amended Notices of Assessments(s) dated 3 April and 20 October 2017 in the sums of £13,617,940 and £13,085,000 respectively all scheduled the details of sums due to or from HMRC for the periods 06/11 to 05/15 inclusive. In every case for each period there was a total of tax underdeclared for the period; hence the Notices of Assessment(s).

#### *The Hearing*

7. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

8. The documents to which I was referred comprised a Joint Bundle of documents consisting of 272 pages, a Supplementary Bundle consisting of 93 pages including Skeleton Arguments for both parties and an Authorities bundle extending to 252 pages. A further authority, *HMRC v Le Rififi Ltd* [1995] STC 103 (“Le Rififi”) was subsequently lodged by the Appellant.

## The background facts

9. Fortunately, since there is a degree of opacity and conflicting evidence, the fine detail of the factual background is not material to the determination of the two preliminary issues. However, I set out an overview of the background to furnish a context and to provide the procedural history.

10. Before doing so it is perhaps helpful to expand slightly upon the First and Second Issues.

11. In this hearing, because the First and Second Issues arise out of what is a dispute about the extent of an admitted time bar, I am concerned only with the five prescribed accounting periods 06/11 to 06/12 inclusive. Ultimately the part of the Notice of Assessment(s) raised by HMRC relating to those periods, which I describe as the “Disputed Periods”, contains the following information:

<b>Period</b>	<b>Due to HMRC ie output tax</b>	<b>Due from HMRC ie input tax</b>
06/11	£438,588	£105,474
09/11	£894,669	£105,474
12/11	£1,035,968	£64,625
03/12	£992,137	£105,474
06/12	£987,467	£107,894
<b>TOTAL</b>	<b>£4,348,829</b>	<b>£488,941</b>

12. The figure of £3,859,888 in the First Issue is the difference between the two totals in the table.

13. The Appellant is the representative member of a VAT group of companies. Three of those companies, collectively “St Philips”, are concerned with the provision of welfare services across a number of care homes:

9. St Philips Care Limited (“SPC”). SPC is state regulated. There is a dispute as to when it started trading and what it did and when. It joined the VAT group on 6 March 2015.

10. St Philips Care (Caledonia) Limited (“Caledonia”). Caledonia is not state regulated. (It is described as St Philips Care Homes (Caledonia) Limited in the New Grounds of Appeal.)

11. St Philips Care (Trinity) Limited (“Trinity”). Trinity is not state regulated. (It is described as St Philips Care Homes (Trinity) Limited in the New Grounds of Appeal.)

The other companies in the VAT group did not make supplies of welfare services or supplies to parties outside of the VAT group.

14. St Philips is in the business of operating care homes and makes supplies of welfare and nursing services to residents who require this care due to old age, dementia and other physical or mental disabilities.

15. There is a wider dispute in these proceedings as to which of the three companies supplied the welfare services, and when, but that is a matter for the substantive appeal.

16. In the Relevant Period the majority of St Philips' supplies of welfare services were made to a number of local authorities throughout England and Scotland (supplies to "publicly funded individuals").

17. St Philips also provided welfare services directly to individuals who do not qualify for the costs of their care to be met wholly or partly by their local authority. Those individuals or their relatives pay directly for the full cost of care received (supplies to "privately funded individuals").

18. On 30 June 2015, through its then agent PwC, the Appellant made a voluntary and unprompted disclosure ("the Disclosure") of underdeclared output tax to HMRC; that was made in the form of an Error Correction Notice. It was to the effect that all supplies during the Relevant Period were made by Caledonia and Trinity and had been incorrectly treated as VAT exempt. Those supplies were taxable since neither company was state regulated.

19. The Disclosure indicated that SPC had commenced making supplies to privately funded individuals with effect from 1 April 2014. It was intended that all welfare services to local authorities would continue to be delivered by Caledonia and Trinity and would therefore be standard rated.

20. Correspondence ensued and PwC provided documentary evidence in support of the assertions in the Disclosure.

21. Based on the Disclosure and that evidence, on 8 July 2016, HMRC issued a Notice of Assessment(s) ("the Original Assessment") to the Appellant for net underpaid VAT in the sum of £13,380,423. As I have indicated (see paragraph 6 above), attached to the Original Assessment was a schedule with a breakdown for each of the periods from 06/11 to 03/15 inclusive. It is now common ground that five of those, being periods 06/11 to 06/12 inclusive, were out of time, ie they are the assessments for the Disputed Periods. Correspondence again ensued.

22. On 25 August 2016, PwC emailed HMRC arguing that the recent decision of the First-tier Tribunal in *Life Services Limited v HMRC* [2016] UKFTT 0444 (TC) ("*Life*") in favour of the taxpayer had implications for the Disclosure. That was on the basis that the Tribunal in *Life* had found that supplies of welfare services to privately funded individuals were exempt. That argument was rejected by HMRC on 23 September 2016. (Ultimately, the Upper Tribunal and Court of Appeal (permission to appeal to the Supreme Court was refused) upheld HMRC's stance in *Life* in relation to the welfare exemption; the supplies are standard rated.)

23. Correspondence again ensued. On 3 April 2017 the First Amended Assessment in the sum of £13,617,940 was issued by HMRC and again a schedule was attached identifying the amounts of output and input tax in each of the relevant periods.

24. On 20 October 2017 the Second Amended Assessment in the sum of £13,085,800 was issued. It covered the VAT periods as the original assessment. As with the Original Assessment it was headed:-

“Value Added Tax  
Notice of Assessment(s)  
and/or Overdeclaration(s)”

There followed the usual schedule, which in this case was six pages of what were described as details of assessment(s) for each of the periods and the net under declaration for each period. In each period there were sums due both to and from HMRC.

25. The sum of £13,085,800 included VAT relating to output tax on supplies to privately funded individuals in the sum of £1,587,898.11. The balance related to supplies to publically funded individuals. The total due in terms of the Second Amended Assessment has been paid.

26. On 17 November 2017, the Appellant appealed the Second Amended Assessment to the Tribunal (based on its then understanding in relation to *Life*). That Notice of Appeal stated that the Appellant appealed the assessment pursuant to sections 83(1)(b), (c), (e) and (p) of VATA.

27. At paragraph 15 the stated Ground of Appeal was that:-

“It is the Appellant’s contention that the Assessment is incorrect insofar as it in part relates to under-declared output VAT on supplies of welfare services made by Trinity and Caledonia to individuals in the period 1 April 2011 to 4 April 2014 totalling £1,587,898.11. For the avoidance of doubt the Appellant does not dispute the remainder of the Assessment (under-declared output VAT of £13,756,823.26 on Trinity and Caledonia’s supplies of welfare services to local authorities).”

As I have indicated that should have read 3 April 2014.

28. In oral submissions Ms Vicary relied on paragraph 16.5 in the original Grounds of Appeal which reads:

“With regards (sic) supplies of welfare services made by non-state regulated private welfare institutions to local authorities, as noted by the Tribunal in *Life Services* there can be no breach of fiscal neutrality, as the charging of VAT on such supplies would not increase the cost to the end user (local authorities being able to recover any such VAT charged to them). Accordingly such supplies are properly subject to VAT.”

29. The impact of the Second Amended Assessment was that in relation to the Relevant Period:

(a) Not having raised VAT invoices to the privately funded individuals, those supplies were treated as being VAT inclusive and the Appellant bore the burden of the output tax of £1,587,898.11.

(b) The tax burden of £13,085,800 was borne by the local authorities in respect of supplies to publicly funded individuals. VAT invoices were raised by the Appellant to the local authorities for the remaining output tax. Those were settled either directly with the Appellant or by way of assignment with the local authorities requesting that their entitlements to input tax be withheld and used to satisfy the Appellant’s output tax liabilities.

(c) The Appellant was able to claim input tax (£1,495,846.03) on the taxable supplies that had been made to both privately and publically funded individuals.

30. As I have indicated, the original Ground of Appeal had been predicated on the decision in *Life*. On 21 May 2019, following the release of the Upper Tribunal decision in a conjoined

appeal relating *inter alia* to *Life*, the Appellant's new agents intimated to HMRC that the Disclosure had been inaccurate because PwC had been acting under a misapprehension as to which company(s) had furnished the welfare services.

31. Under a heading "Background" they stated that the VAT charged to local authorities was being collected and paid over to HMRC "but the VAT on fees raised to private residents is currently subject to an appeal, awaiting the outcome of the Life Services Limited case."

32. They stated that the provision of welfare services to privately funded individuals had been made by SPC in the Relevant Period; the implication was that therefore those supplies should have been exempt supplies. They proposed that Caledonia would issue credit notes to "correct the error" and then SPC would issue new invoices. They sought agreement from HMRC by 30 June 2019.

33. On 26 June 2019, HMRC responded arguing that a section 80 VATA claim was the appropriate mechanism to correct an error. Correspondence then ensued with another new agent. The Appellant issued the credit notes and adjusted its VAT return for the period 06/19 accordingly. HMRC reversed that adjustment in a decision letter dated 22 October 2019 and that is the subject matter of the Second Appeal which is dated 22 November 2019.

34. At or about that time, the Appellant lodged a section 80 VATA claim for period 06/19 and on 6 February 2020 HMRC rejected that claim on the basis that it was time barred. That is the subject matter of the Third Appeal which is dated 4 March 2020.

35. The Fourth Appeal, which is dated 6 April 2021, followed unsuccessful Alternative Dispute Resolution ("ADR") discussions in relation to the Second and Third appeals. It concerned a decision dated 7 March 2021 by HMRC on section 80 VATA claims which followed on from the ADR Exit agreement dated 24 November 2020.

36. All four appeals were consolidated. On 15 July 2021, the appeal having been stayed until 31 May 2021, the Appellant lodged Consolidated Grounds of Appeal.

37. On 22 April 2022, HMRC (timeously) lodged a Statement of Case in the consolidated appeal. Under the heading "Time-barred periods" HMRC stated:-

"65. It has come to HMRC's attention that certain collected VAT, arising from Relevant Supplies made in the 6/11 to 06/12 prescribed accounting periods was time-barred when included in the First Assessment ("the time-barred periods").

66. The combination of ss.80(1A), 80(4) and 80(4ZA)(d) VATA means any s.80 claim for credit to be applied to the Appellant's VAT account (as a result of the time-barred periods) must have been made within four years from the end of the prescribed accounting period ("PAP") in which the First Assessment was made i.e. by 30 September 2020.

67. The Appellant has not made a s.80 claim in respect of the time-barred period. VATA provides no discretion to HMRC to vary the applicable time limit. HMRC notes dicta from the Court of Appeal in *Leeds City Council v HMRC* [2015] EWCA Civ 1293 and *British Telecommunications plc v HMRC* [2014] EWCA Civ 433, [2014] STC 1926 confirming that well-founded claims may be barred for limitation reasons."

38. The footnotes indicated that in the former case that was L J Lewison at paragraph 46 and in the latter it was L J Rimer at paragraphs 106 and 123.

39. That was the first mention of any time bar.

40. On 22 June 2022, the Appellant's agents wrote to HMRC referring to those paragraphs in the Statement of Case asking HMRC to clarify:-

“1. What is HMRC’s case as to the consequence of the contention that the assessment of 8 July 2016 was partly time-barred?”

1. What is the total amount of VAT which HMRC says is due pursuant to that assessment (as subsequently amended on 3 April 2017 and 20 October 2017)?
2. What are the matters of fact or law on which HMRC rely in relation to points 1 and 2 above?”

41. On 30 June 2022, HMRC responded in relation to those questions as follows:-

1. The original assessment was still extant. Any section 80 VATA claim would have had to have been made within four years from the end of the PAP in which it was made, ie 30 September 2020. Since the Appellant had not made a section 80 claim, in accordance with section 80(7) VATA, HMRC are not liable to repay any amount paid other than in accordance with a section 80 claim. Since there was no claim in respect of the time barred periods, VATA provides no discretion to HMRC to vary the applicable time limit and therefore HMRC cannot repay any amount of VAT.
2. The total amount of VAT due is £13,085,000 being the amount in the Second Amended Assessment. That was simply an amendment which is not a separate appealable decision.
3. The appellant was referred to sections 80(1A), 80(4) and 80(4ZA)(d) and 80(7) VATA and to paragraph 67 of the Statement of Case.

42. The Appellant then sought to amend the Grounds of Appeal and on 1 August 2022, the New Grounds of Appeal were lodged with the Tribunal.

43. On 23 August 2022, the Tribunal granted the application to amend the consolidated Grounds of Appeal such that the New Grounds of Appeal, now attached to the application, stand as the Grounds of Appeal in these proceedings.

44. Insofar as relevant to what is narrated in this decision:

1. Paragraph 12 reads:-

“PwC were acting under the misapprehension that ‘Trinity’ and ‘Caledonia’ were making supplies to self-funding individuals. The voluntary disclosure, made by the appellant at PwC’s instruction therefore overstated the output tax due, which ought properly to have been restricted to output tax due on supplies to local authorities. Whilst PwC sought, on the appellant’s behalf, to amend the erroneous voluntary disclosure to reflect the fact that it had exaggerated the amount due by £1,587,898.11, they did so on the basis of the Life Services case. In fact, that case was irrelevant to the appellant’s position, because the supplies in question had been made by SPC and should properly have been treated as VAT exempt, irrespective of the outcome of the Life Services appeal.”

2. Paragraph 13 reads “PwC lodged an appeal against HMRC’s ‘Original Assessment’ on the grounds that it incorrectly treated supplies to private individuals as taxable, whereas they ought to have been treated as VAT exempt”.

3. Paragraphs 14 to 18 also related to the First Appeal but only refer to privately funded individuals.

4. The only reference to time bar is at paragraph 19 which reads:-

“In addition, HMRC wrongly assume that, in the absence of a claim under s.80 VATA 1994, an assessment which is time-barred pursuant to s.77 VAT Act 1994

cannot be corrected. The appellant has appealed the Original Assessment and it has not yet been determined. In particular, s.80(7) VAT Act 1994 does not prevent the Tribunal from correcting an assessment which is partly time-barred pursuant to s.85A(2)(a) VAT Act 1994.”

45. HMRC were then granted leave to lodge an amended Statement of Case and that was lodged on 4 October 2022. At paragraph 67, HMRC repeated paragraph 67 in the original Statement of Case and went on to state:-

“...It is considered that paragraph 19 of the Re-Amended Grounds of Appeal misrepresents the Respondents’ pleaded position. Notwithstanding this, in the event that the Appellant seeks to develop its argument that the Tribunal has the discretion to reduce the First Assessment in respect of the time-bar periods, on the basis of the grounds of appeal as presently advanced, then it is put to strict proof on the same.”

46. On 10 November 2022, the Appellant lodged an application for a hearing on what is currently the Second Issue. HMRC’s response, dated 1 December 2022, was to seek Further and Better Particulars in relation to a number of issues, namely:-

(a) Confirmation of the period to which the application related on the basis that HMRC understood that the application related solely to the periods 06/11 to 06/12 inclusive.

(b) The basis on which the Appellant contended that the value at stake in relation to the time bar issue was £3,859,888 given that:

(i) In the original Grounds of Appeal the Appellant had stated at paragraph 15 that £1,587,898 was disputed but

“For the avoidance of doubt the Appellant does not dispute the remainder of the Assessment (under-declared output VAT of £13, 756,823.26 ...);”

(ii) In the New Grounds of Appeal the Appellant had not stated that it disputed the entirety of the assessment;

(iii) The amounts stated on the face of each of the four Notices of Appeal are £1,587,898.11, £1,400,000, £1,413.987.17 and £1,413,987.17 respectively.

(c) The basis on which the Appellant contends at paragraph 18 of its application that the “value at stake in relation to the Time Bar Issue is £3,859,888...”.

(d) The basis on which the Appellant contends that an appeal in relation to sums exceeding £1,587,898.11 had been appealed within time, or at all, given that section 83G VATA specifies a 30 day time limit.

(e) Who accounted for VAT in relation to supplies made by Trinity and Caledonia to local authorities; and insofar as the same was accounted for by relevant local authorities-

(i) whether the Appellant accepts that it would be unjustly enriched by any recovery of such sums;

(ii) and if not, why not.

(f) Confirmation of the identity of the documents upon which the Appellant relied for any sums claimed for the periods 06/11 to 06/12 inclusive. HMRC argued that in terms of section 80 VATA and regulation 37 of the Value Added Tax Regulations 1995, as explained by the Court of Appeal in *Bratt Autoservices Company Limited v HMRC* [2018] EWCA Civ 1106, a claim under that section had to be in writing, stating the



amount of the claim and the method by which it was calculated and the amount claimed for any prescribed accounting period.

47. On 6 December 2022, the Appellant responded, effectively advancing the arguments for this hearing, stating that:-

(a) The application relates only to the period 06/11 to 06/12 inclusive which is time barred in terms of section 77(1)(a) VATA.

(b) The assessment under appeal includes £3,859,888 relating to time barred periods.

(c) It is irrelevant whether a particular sum of VAT has been appealed on time since the statutory question is whether HMRC's decision (ie the Second Amended Assessment) was appealed on time because the appeal is against the assessment (see section 83(1)(p) VATA) which had been appealed on time. The original Grounds of Appeal are wholly irrelevant not least because they have been amended with the approval of both the Tribunal and HMRC.

(d) The question of unjust enrichment is wholly irrelevant in relation to whether the assessments were raised out of time. It is a concept used by section 80(3) VATA in relation to claims under section 80 VATA. Paragraph 19 of the Grounds of Appeal explains that an assessment that is out of time falls to be corrected regardless of whether any section 80 VATA claim has been made. For the purposes of the preliminary issues the Appellant does not rely on any section 80 claim. Unjust enrichment is not relevant to the time bar issue.

(e) For the same reasons the questions about what documents constitute a valid section 80 claim are irrelevant to the preliminary issues which are not pursued on the basis of any section 80 VATA claim. Whether there is a valid section 80 claim relates only to the Fourth Appeal and is not relevant to the preliminary issue.

### **Legislation**

48. Insofar as relevant section 73 VATA reads:-

“(1) ...where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

...

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed period must be made within the time limits provided for in section 77 ...

...

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

49. The four year time limit is imposed by section 77(1) VATA which reads:-

“(1) Subject to the following provisions of this section, an assessment under sections 73 or 76, shall not be made –

(a) more than 4 years after the end of the prescribed accounting period or importation concerned,...

50. Insofar as relevant section 80 VATA provides:-

## **80 Credit for, or repayment of, overstated or overpaid VAT**

....

(1A) Where the Commissioners:-

- (a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and
- (b) in doing so have brought into account as output tax, an amount that was not output tax due,

they shall be liable to credit the person with that amount.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

...

(4) The Commissioners shall not be liable on a claim under this section –

- (a) to credit an amount to a person under subsection (1) or (1A) above ...
- (b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years after the relevant date.

(4ZA)The relevant date is –

...

- (d) in the case of a claim by virtue of subsection (1A) in any other case, the end of the prescribed accounting period in which the assessment was made;

....

(7) Except as provided by this section the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.”

51. Section 83 VATA, insofar as relevant, 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 –

...

- (a) the VAT chargeable on the supply of any goods or services ...
- (b) the amount of any input tax which may be credited to a person;
- (c) ...
- (d) the proportion of input tax allowable under section 26;

...

(p) an assessment –

- (i) under section 73(1) or (2) in respect of a period to which the appellant has made a return under this Act; or
- (ii) under subsections (7), (7A) or (7B) of that section;

or the amount of such an assessment;

...”.

52. Insofar as relevant section 83G VATA provides:-

**“83G – bringing of appeals**

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

...

1. An appeal may be made after the end of the period specified in subsection (1), (3) (b), (4)(b) or (5) if the tribunal gives permission to do so.”

53. Insofar as relevant section 85A VATA reads:-

“(1) This section applies where the tribunal has determined an appeal under section 83.

(2) Where on the appeal the tribunal has determined that-

- (a) the whole or part of any disputed amount paid or deposited is not due,

....

So much of that amount, ... as the Tribunal determines not to be due ... shall be ... repaid ...”.

**Overview of the Appellant’s arguments**

54. Mr Ripley argues that:

1. Appeals are not made against particular amounts but rather against decisions in respect of particular matters (see sections 83(1) and 83G(1)(a) VATA).
2. Although Grounds of Appeal may be limited to a particular aspect of a decision, they can be amended.
3. The Grounds of Appeal have already been amended with the approval of the FTT and without objection from HMRC and they do address the time bar issue as is the case with HMRC’s Statement of Case.
4. Accordingly, the time bar issue is within the scope of the appeal.
5. In any event, it is incumbent upon the Tribunal to address the timing and competency of any assessment (see *Burgess and Another v Revenue and Customs* [2015] UKUT 578 (TCC) (“Burgess”)).
6. As a result of section 77(1) VATA, the earliest period in respect of which HMRC could have competently and timeously raised an assessment on 8 July 2016 was that of 09/12.
7. Where an assessment relates to periods that are out of time the first question is whether the assessment is a global assessment and if so the whole assessment falls to be set aside (see *International Language Centres Limited v CCE* [1983] STC 394 (“International”)). In this case the Appellant accepts that it is not a global assessment.
8. Section 80 VATA has no bearing on its appeal under section 83(1)(p) VATA. The Appellant relies upon Chadwick LJ in *Rahman v CCE* [2002] EWCA Civ 1881 at paragraph 5 which reads:

“Section 83(p) of the 1994 Act provides both for an appeal ‘with respect to ... an assessment under section 73(1)’ and for an appeal ‘with respect to ... the amount of such an assessment’. That distinction reflects the two distinct questions which may arise where an assessment purports to have been made under section 73(1) of the Act. First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount of VAT for which the taxpayer is accountable.”

The preliminary issues are concerned with whether HMRC had the power to raise an assessment in relation to the Disputed Periods; that encompasses the amount of the assessment.

9. The question as to whether or not there is a valid section 80 VATA claim does not arise in the context of the preliminary issues.

10. Insofar as the Notice of Assessment(s) relates to the time barred periods they must be discharged in full.

### **Overview of HMRC’s arguments**

55. Ms Vicary argues that:

1. Where an amount of tax has been assessed and notified it remains due until such time as the assessment is withdrawn, reduced or successfully appealed (see section 73(9) VATA).

2. Where an assessment is appealed, HMRC bear the burden of proving that the assessment has been validly issued within the time limits provided by the applicable legislation and the authority for that is *Burgess*. Thereafter the burden rests with the taxpayer to displace that assessment.

3. She relied upon Judge Mosedale in the following paragraphs in *Allpay Limited v HMRC* [2018] UKFTT 273 where, in considering whether or not a point needed to be pleaded as being in issue, she said that:

“13. ...I was not referred to it but the authorities on the CPR on this say as follows:

[185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him.

Lord Millett in *Three Rivers District Council v Bank of England* [2001] UKHL 16:

‘The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. ...This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.’

Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A

...

18. ... If the person with the burden of proof was required to prove *everything*, even those matters which the other party had not clearly disputed, then preparation for, and hearings of, appeals would be much longer and a great deal of time and money would be wasted. Moreover, trial by ambush is not justice: each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must therefore state in advance in summary terms what is in dispute and why.

19. It was not cited to me but the decision of the Upper Tribunal in *Fairford Group* plc [2014] UKUT 329 (TCC) seems in point here. In that case, it was accepted that HMRC had the burden of proof. The taxpayer's attitude had been to state that HMRC was put to strict proof of every part of its case. The Upper Tribunal said:

[48] ...Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

20. In other words, it is not procedurally fair for the party without the burden of proof to do no more than say the other party must prove every part of their case. Both parties should set out the key parts of their legal and factual case in advance.

...

25. For the reasons given above, my conclusion is that it is not enough for HMRC to say that the appellant bears the burden of proof and must prove everything, including those matters which are neither expressly nor impliedly in issue in HMRC's statement of case. On the contrary, HMRC's statement of case should outline the issues which are disputed and outline the facts relied on to support their position.”

1. By its expressly pleaded Grounds of Appeal both “New” and original the Appellant made plain that it had not appealed the whole of “an assessment” but rather “the amount of such an assessment”.
2. The first intimation that the Appellant sought to appeal the whole of the sums assessed in respect of the Disputed Periods was in the application dated 10 November 2022 and there was nothing to that effect in the pleadings.
3. The original Grounds of Appeal expressly limited the remit of the appeal to the sum of £1,587,898.11 in respect of output tax due on supplies made to privately funded individuals.

4. The New Grounds of Appeal do not further address the scope of the appeal. Paragraphs 1 to 12 set out an overview and the background to the dispute. Paragraph 13 re-iterates the limited basis of the appeal as issued. Paragraphs 14 to 18 refer only to privately funded individuals.

5. Paragraph 19 criticises the argument on time bar at paragraphs 65-67 of HMRC's Statement of Case but does not advance any arguments in relation to any additional sums that have been appealed. In particular, paragraph 19 does not extend the appeal to include output tax relating to publically funded individuals. It references section 80(7) VATA but the Appellant has consistently argued that section 80 VATA is not relevant to either the preliminary issues or the First Appeal.

6. The Appellant's pleaded case means that only the £1,587,898.11 is in dispute. In terms of the Disputed Periods, the balance relates to supplies to publically funded individuals and that has not been appealed. In summary there is no extant appeal in relation to supplies to publically funded individuals and thus that is not a matter that is before the Tribunal.

7. HMRC rely upon *Chandra v Brooke North and Another* [2013] EWCA Civ 1559 ("Chandra") citing paragraph 92 for the propositions that one must compare the original Ground of Appeal with any "new" ground and that the wording of paragraph 92, which reads as follows, applied in this instance.

"92. On the other hand once the Claimant serves particulars of claim on a Defendant, he pins his colours to the mast as against that Defendant. Particulars of claim are normally narrower in their scope than the original claim form. Those particulars then constitute the ongoing claim against that Defendant. If the Claimant applies to amend as against that Defendant, what the court has to do is to compare the original particulars of claim with the proposed amendments. If the Claimant is seeking to add a new claim after expiry of the limitation period, he cannot escape from the tentacles of s 35(3) to (5) of the 1980 Act by relying upon the broad wording contained in his original claim form."

In her Skeleton Argument Ms Vicary said "The same is true here".

8. The entirety of the assessment in respect of the Disputed Periods does not fall to be struck down as the issue of supplies to publically funded individuals was not before the Tribunal. The appeal is expressly restricted to the issue of supplies to privately funded individuals and thus only the percentage of the £1,587,898.11 arising in the Disputed Periods is at stake and to that extent, because of the admitted time bar, the appeal should be allowed.

## **Discussion**

1. On first reading, the arguments for both parties had a beguiling simplicity but, of course, it was not that straightforward.

2. Where the parties differ is that whilst HMRC concedes that the appeal should be allowed in relation to the sums assessed in respect of supplies made to privately funded individuals in the Disputed Periods, the Appellant argues that the entirety of the assessments for those periods should be quashed.

3. For completeness, although it is not in dispute between the parties, I have considered *International* which deals with different and older legislation but it makes it explicit that:

(a) HMRC has a wide power of assessment but that that power can only be exercised within the prescribed time limits, and

(b) The use of global assessments is confined to those cases where it is not possible to identify a specific period for which the tax claimed is due.

As can be seen from paragraph 6 above, the schedule attached to the Notices of Assessment(s) identifies the details for each individual period. I accept that in this instance there is not a global, or single, assessment. Therefore, the time bar issue affects only the Disputed Periods. The decision in *Le Rififi* reinforces that view.

4. It is common ground that:

(a) in its pleadings, having amended the original Grounds of Appeal the Appellant has not explicitly quantified the sums at stake in the Disputed Periods, and

(b) nor has HMRC done so in its Amended Statement of Case which was served in response to the New Grounds of Appeal.

What HMRC did do is to say at paragraph 5 thereof that “The consolidated appeal is concerned with welfare services provided to privately funded individuals...”. Clearly, their view was, and is, that that is the case.

5. As can be seen from paragraph 55 above, Ms Vicary’s Skeleton Argument advanced a number of arguments based on the parties’ pleadings. However, in oral submissions her primary stance was to the effect that, “in stark terms”, the Appellant was asking the Tribunal to allow an appeal in relation to an assessment to tax, which was properly due, and which had not been appealed. Her starting point was that the Appellant had not taken a point that had not been pled but rather that there was no appeal before the Tribunal in relation to supplies to publically funded individuals. It was now out of time to lodge such an appeal.

6. Ms Vicary argued that both parties had always known what was being appealed and it was not an appeal about supplies to publically funded individuals. Apart from the pleadings, she relied upon two letters in the correspondence. The first was from HMRC dated 22 March 2018, relating to a hardship application by the Appellant, HMRC wrote that “...we understand that only part of the above decision is under appeal...You do not dispute the remainder of the assessment”. She argued that that had never been challenged.

7. I am not surprised that it was not. The next paragraph in that letter went on to confirm that hardship was not an issue in the appeal and the appeal could proceed without challenge from HMRC because of the provisions in section 84 VATA. No further correspondence in that regard has been produced.

8. The second letter was the letter from the new agents dated 21 May 2019, to which I refer at paragraphs 30 to 32 above, and in particular she relied upon the quotation cited in paragraph 31 arguing that that demonstrated that the Appellant had not appealed the assessments insofar as they related to supplies to publically funded individuals.

9. She also pointed out that the Second, Third and Fourth Appeals all relate to supplies to privately funded individuals. Those appeals and the two letters all ante-dated both HMRC’s disclosure about the Disputed Periods and the New Grounds of Appeal. I note the position in regard to the other appeals but they deal with other issues. I am not persuaded that those letters are of any relevance and if they are they carry very little weight.

10. There seems to be no dispute that the Appellant did appeal the Second Amended Assessment and did so timeously, albeit HMRC argue that the Appellant simply appealed the amount of the assessment. Before considering what it was that has been appealed it is logical to consider the pleadings.

11. I was not persuaded by the arguments predicated on *Chandra*. Firstly, paragraph 3 of that decision reads:

“The resolution of this appeal will involve a review of Court of Appeal decisions under the former Rules of the Supreme Court (“RSC”) and consideration of whether the principles stated in those decisions remain valid under the Civil Procedure Rules (“CPR”).”

The RSC Rules have no application in the Tribunal and it is trite law that whilst the CPR are helpful guidance to the Tribunal they do not apply in the Tribunal. I do not accept the argument that paragraph 92 of *Chandra* reflects the approach to be adopted in the Tribunal.

12. The Tribunal procedure is specifically designed to be flexible. Whilst Rule 20(2)(f) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) (“the Rules”) does require an appellant to specify the grounds for making an appeal, Rule 5(3)(c) read with Rule 2 of the Rules mean that the Tribunal has the power to allow amendment of the Grounds of Appeal and, of course that has already happened in this case. In theory, it could happen again.

13. I observe, as Mr Ripley pointed out, that Judge Hellier at paragraph 5 in *Vale Europe Ltd v HMRC* highlighted the fact that Rule 2(2)(c) of the Rules makes it incumbent upon the Tribunal (a) not only to allow flexibility but to seek it, and (b) not to tolerate unnecessary formality but to avoid it. I agree.

14. In the following paragraph Judge Hellier made it clear that “...The need to understand the case may be met less formally and flexibly by other means [than the formal pleadings]”. The Appellant’s case is that once it was appreciated that there was a time bar issue and the full implications of that, the application dated 10 November 2022 followed by the response dated 6 December 2022 made the Appellant’s case very clear. It did not have to rely on the pleadings that had previously been lodged.

15. However, I observe that Judge Hellier also made it clear at paragraph 8 that “The formal pleadings should make clear the general nature of the case.” I have added emphasis because the Appellant relies upon paragraph 19 of the Grounds of Appeal for the proposition that effectively, in general terms, the Appellant is stating that the Disputed Periods should be “corrected” (see paragraph 44.4 above). That paragraph certainly impliedly appealed the Disputed Periods. What it did not do was to specify the quantum. However, it made it explicit that it was for the Tribunal to “correct” the assessment in that regard.

16. I will revert to that since it encompasses the issue of what was appealed.

17. Mr Ripley also referred me to Mr Justice Nugee and Judge Hellier in the Upper Tribunal in *HMRC v Ritchie* [2019] UKUT 0071 (TCC) (“Ritchie”) at paragraphs 34 and 37 to 40 where they emphasised that the Tribunal must at all times bear in mind the requirement to be fair and just to both parties and avoid formality. In particular at paragraphs 37 and 38 they said:

“37. ...Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.



38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account."

The Tribunal went on to consider the situation where a new point was taken at a very late stage but that is not an issue in this appeal since no witness statements have been served, no substantive hearing has been fixed and all procedural Directions are currently stayed.

18. Ms Vicary's oral argument is that *Ritchie* is not relevant because the issue here is not the taking of an unpleaded point but rather about an appeal that was not before the Tribunal. I will revert to the nature of the appeal. However, her written arguments were primarily predicated on the pleadings or lack of them. In oral argument she restricted her argument in that regard to:

- (a) relying on the lack of reference in the pleadings to supplies to publically funded individuals,
- (b) the focus, and therefore restriction, in the pleadings to supplies to privately funded individuals , and
- (c) an assertion that recent authorities such as *BPP Holdings v HMRC* ("BPP") in the Supreme Court ([2017] UKSC 55 (TC) and Lord Justice Ryder in the Court of Appeal ([2016] EWCA Civ 121) did not advocate a flexible approach.

19. Undoubtedly, there is no reference of any note to supplies to publically funded individuals and there is a focus on supplies to privately funded individuals. Firstly, I attach no weight to the argument that paragraph 13 of the New Grounds of Appeal restates the focus on the latter. It does not. It simply reports the history. More relevantly, I must weigh in the balance Mr Ripley's argument that the New Grounds of Appeal, do not have to expressly address the full implications of a time bar. That is a matter for the Tribunal looking at all of the relevant circumstances (see paragraph 77 below) and in the context of the applicable law.

20. As far as *BPP* is concerned it was a bland assertion and Ms Vicary did not refer to particular paragraphs but I am conversant with both decisions. Firstly, *BPP* was concerned with Rule 8 of the Rules which is very different to Rule 5 and *BPP* was dealing with sanctions and compliance. In that regard Ryder LJ did say at paragraph 38 in the Court of Appeal decision that "A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis...". However, I do not take the view that that is the same as saying that there should not be flexibility in case management decisions in terms of Rule 5 of the Rules.

21. I do consider that *Ritchie* is of relevance when considering pleadings and the sufficiency, or not, thereof and, of course, Ms Vicary has relied upon the propositions set out by Judge Mosedale in *Allpay*.

22. She was correct to do so and I say that because, although I was not referred to the case, the Upper Tribunal, at paragraph 13 in *Kingston Maurward College v HMRC* [2023] UKUT 00069 (TCC) expressly approved Judge Mosedale's reasoning in *Allpay*. However, they did so subject to the caveat that:

"... We would add that how those propositions fall to be applied, and the particular level of detail which will enable an appellant to properly prepare, will depend on the circumstances of the particular appeal".

The reference to proper preparation related, in particular, to paragraphs 14, 18 and 20 of *Allpay*. Ms Vicary did not quote paragraph 14 but it indicates that the impact of the Rules is

that parties need to explain their position in sufficient detail to enable the other party to properly prepare the case for hearing.

23. Ms Vicary also did not quote from paragraphs 21 to 23 inclusive from *Allpay* where Judge Mosedale stated that she had taken into account *Burgess* and she made observations thereon. I agree with her when she stated that *Burgess* was “not about the adequacy of the pleadings” but was authority for the proposition that “... where a party expressly (and perhaps impliedly) disputes a matter sought to be proved by the other party, the Tribunal cannot assume, when that issue is not referred to at the hearing, that it has been conceded”. She had quoted from paragraph 49 of *Burgess* which had stated that:

“...the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC’s case depended, did not have to be determined in their favour. Those matters formed an essential element of HMRC’s case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made.”

24. *Burgess* means, as both parties recognise, that the Tribunal must consider the validity of any assessment which has been appealed to it.

25. The issue of time bar was very belatedly, but very properly, raised by HMRC. The Appellant then raised a very limited issue which I see as being: Given that the assessments relating to the Disputed Periods were raised outside the statutory time limit, which is acknowledged to be four years, the issue for the Tribunal, if it decides to “correct” the assessments, is whether it is the whole or only part of the assessments which is not due? The Appellant argues that it is the whole, and HMRC argue that it is only part.

26. Both parties accept that as far as the timing and competency of assessments are concerned, firstly, HMRC bear the burden of proof and secondly that this Tribunal is bound by the Upper Tribunal in *Burgess*. Therefore it is irrelevant that the issue of time bar was only raised latterly.

27. Both parties very properly referred to *Burgess* and, in my view it is very much in point. In fact, I also take the view that the latter part of paragraph 49 is also very relevant although the factual matrix is different:

“49. The assertions on behalf of the appellants ... may not have been expressed in the form of challenges to the competence and time limit issues, but it should have been clear to HMRC that that was their effect.”

28. What then of paragraph 19 of the New Grounds of Appeal? Ms Vicary argues that there is nothing in the New Grounds of Appeal that challenges the time limits. To an extent the Appellant did not require to raise a challenge *per se* since paragraph 65 of the Statement of Case had conceded that “certain collected VAT...was time-barred”. There was no quantification. However, it is clear from paragraph 19 that the Appellant was referring to paragraphs 65 to 67 of the Statement of Case and therefore the issue of time bar. The Appellant was asking that the Tribunal correct the assessment. It should have been clear that the Appellant was challenging the Notice of Assessment(s) on that basis.

29. Beyond arguing that the Tribunal should correct the assessment, the Appellant did not seek to state in what way until after the Amended Statement of Case was lodged on 4 October 2022. It was the addition to paragraph 67 which triggered the application of 10 November 2022.

30. I find that HMRC knows what the issue is and has prepared to argue it and in some detail. HMRC has had adequate time to prepare and as far as the pleadings are concerned, taken with the application and the response, the Appellant does not require to apply to further amend its pleadings.

31. If I am wrong in that, although I was not referred to it I am bound by, and would rely on, *Denley v HMRC* [2017] UKUT 340 (TC) (“Denley”). At paragraph 31 the Tribunal cited the law on new Grounds of Appeal, concluding at paragraph 33 that an application to amend would be “very late” if it would cause the appeal date to be lost. As I have indicated, this appeal is at a very early stage and a long way away from a hearing date.

32. The facts in *Denley* are very different to those with which I am concerned but I agree with the Tribunal’s reasoning at paragraph 34 which reads:

“On balance, it seems to us that we should grant Mr Denley permission to rely on the further grounds of appeal. The issues he seeks to raise are essentially legal ones and can be addressed with no evidence beyond that which was before the FTT and is available to us. In the circumstances, it seems to us to be just, and not unfair to HMRC, to exercise our discretion to allow Mr Denley to amend his grounds of appeal in the way he wishes.”

33. In this appeal having only discovered the possibility, if not probability, that the assessments for the Disputed Periods were not timeously made and therefore were not valid, which is a legal Ground of Appeal, the Appellant should be permitted to amend. HMRC did not have the statutory right to raise those assessments. If amendment were necessary, which I do not accept, I would permit it.

34. Paragraph 39 of *Burgess* reads:

“37. In relation to the legislative framework, it is the case that... objections to the making of an assessment may only be made on an appeal against the assessment.... We do not construe those provisions, however, as mandating that, for competence or time limits to be in issue, an appellant is required to make an express objection or challenge to the validity of the making of an assessment. We agree with Mr McDonnell that those provisions are properly to be understood as confining the forum for such disputes to an appeal before the tribunal. They do not prescribe the manner in which such issues may be brought before the tribunal.”

Accordingly, *Burgess* makes it clear that the Tribunal must consider the timing (and competency) of the assessments whether or not the parties raise those points but there must be an appeal.

35. I also accept that the Appellant is entitled to run the argument that the Tribunal has the power to “correct” the assessments for the Disputed Periods if those have been appealed. That takes me to whether or not the Appellant has appealed only part of the assessments as HMRC aver or the whole as the Appellant argues.

36. HMRC’s amended paragraph 67 suggests that the Appellant is arguing that the Tribunal has a “discretion to reduce” the assessments in respect of the Disputed Periods. Mr Ripley made it explicit that it is not argued for the Appellant that the Tribunal has any discretion in relation to the time barred periods. Rather, because it is not in dispute that the five periods are time barred, the simple fact is that, standing the terms of section 77(1) VATA, the sums assessed covering those periods are not competent and therefore not due in terms of section 85A VATA.

37. I was not taken to the case but I observe that in *HMRC v BUPA Purchasing Ltd and Others* [2007] EWCA Civ 542 (“BUPA”) Lady Justice Arden, as she then was, confirmed at paragraph 37 that there is no statutory definition of “assessment” pointing out that it is a legal act on the part of HMRC constituting their determination of the amount of VAT that is due.

38. I did not ask for submissions on that point because it is wholly consistent with the very well known dicta of Lord Dunedin in *Whitney v Commissioners of Inland Revenue* [1925] UKHL TC 10 88 where he said:

“My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that Liability effective. A statute is designed to be workable; and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.” (Emphasis added)

39. At paragraphs 38, 39 and 41 of *BUPA* Lady Justice Arden went on to say that:

“38. S 73(1) states that an assessment under that section is of ‘the amount of VAT due’. Accordingly, unless the assessment determines the net amount of VAT due it cannot be an assessment for the purpose of s 73(1). Similarly, in s 73(6) the assessment is described as an assessment ‘of an amount of VAT due’. Thus there cannot be an appeal against an assessment under s73(1) unless it assesses that there is a net amount of VAT due...

39. Indeed there are reasons for concluding that in some contexts VATA uses the expression ‘amount of the assessment’ and ‘assessment’ interchangeably....

...

41. However, the critical figure for the purpose of the assessment remains the bottom line figure – the amount of VAT due. The figures for input tax and output tax are of course legally significant, and this is recognized in s 83, dealing with appeals. Those figures form part of an assessment but they are not the figures that make the act of the Commissioners an assessment for the purposes of s 73(1).” (emphasis added)

40. I find that in this instance the appeal is indeed in relation to the “bottom line figure” namely the £3,859,888.

41. For completeness I must address Ms Vicary’s argument that section 83(p) VATA provides for what are effectively alternative Grounds of Appeal being either the assessment or the amount and the Appellant has opted for the latter only. As can be seen from paragraph 54 above Mr Ripley argues that on the basis of *Rahman* the two provisions are, in effect, complementary.

42. In fact in *BUPA*, for other reasons relating to the reasons for an assessment, Mr Cordara (for the appellant) relied upon section 83(p) VATA for the proposition that there was a “distinction between an assessment and the amount due under an assessment”. That is effectively Ms Vicary’s argument albeit in this instance it relates to the reasons for appealing

an assessment as opposed to the reasons for an assessment. Those are two sides of the same coin.

43. At paragraph 47, having noted the argument, Lady Justice Arden rejected his argument and went on to say:

“Accordingly, the wording of s 83(p) cannot determine the issue in this case. Moreover the drafting approach in s 83(p) has to be taken into account. The drafter has created a long list of appealable matters, and it is likely that the drafter has erred on the side of caution rather than precision in creating this list”.

44. Whilst I accept that that may be an *obiter* observation, nevertheless I agree with the rationale and it is consistent with *Rahman*. I find that the “amount of the assessment” and the “assessment” are used interchangeably in section 83(p) VATA.

45. For all these reasons, I find that the Appellant appealed the sums due in terms of the assessments for the Disputed Periods and those are clearly defined in the schedules in the Notices of Assessment(s). The Appellant had identified an argument in relation to an element of the assessments, which may or may not succeed, but the assessments for the Disputed Periods are what the Tribunal must consider.

46. I understand why Ms Vicary argued that this was an “opportunistic seeking of a windfall” on the part of the Appellant because the Appellant had not borne (all) of the burden of the tax and, effectively, that was not fair. It is trite law that this Tribunal has no jurisdiction to consider the question of fairness or not (see paragraph 58 of *HMRC v Hok* [2012] UKUT 363 (TCC)).

47. I agree with Mr Ripley, that that is not a relevant argument. Ultimately the issue for the Tribunal is whether the assessment was timeously and competently raised. If it was not the outcome may indeed be harsh and unfair as Ms Vicary argues. However, in that regard, I can do no better than to quote the Upper Tribunal at paragraph 59 in *Burgess* which reads:

“59. The result, viewed objectively, may appear unsatisfactory. Each of the appellants has been found by the FTT to have seriously understated their taxable income over an extended period. That taxable income will remain untaxed. It must be recognised, on the other hand, that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to ... assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met. If HMRC fail to do so, for whatever reason, the fact that a taxpayer might escape tax that would otherwise have been due is simply the consequence of the operation of a system that provides such a balance. It is not for this tribunal to seek to achieve any result other than that prescribed by the law.”

48. In this case it is not a failure to pay tax but rather there is tax that is undoubtedly due and would have been payable had an assessment been raised timeously. The simple fact is that it was not.

#### **DECISION**

49. For all these reasons the appeal is allowed to the extent that the assessments in respect of the Disputed Periods namely periods 06/11 to 06/12 inclusive are not valid, as they are out of time, and therefore the sums of tax purported to be due in terms thereof are not due.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**ANNE SCOTT  
TRIBUNAL JUDGE**

**Release date: 12<sup>th</sup> FEBRUARY 2024**