



Appeal number FTC/65/2013

*VAT—Self-billing- failure to complete a self-billing agreement- 4 traders  
deregistered - whether statutory appeal to be allowed and assessment discharged –  
No*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

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

**Appellants**

**- and –**

**G B HOUSLEY LIMITED**

**Respondent**

**Tribunal: Mr Justice Warren, Chamber President**

**Sitting in public in London in the Rolls Building on 16 January 2015**

**Vinesh Mandalia, counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, on behalf of the Appellants**

**Michael Thomas, counsel, instructed by CCH Taxation Services, on behalf of the  
Respondent**

## DECISION

### Introduction

1. This is the continuation of HMRC's appeal. I have already given one decision in the appeal. It was released on 10 July 2014. I shall refer to it as the UT Decision. This decision should be read as one with the UT Decision, with terms defined in the UT Decision having the same meanings in this decision.
2. In the UT Decision, I concluded that the Tribunal (F-tT) were correct to decide that HMRC did not properly exercise their discretion through Mr Day when he refused to allow the deduction of input tax in July 2009. I left open, however, for further argument whether the consequence of my conclusion is that Housley's statutory appeal should at this stage be allowed with the result that the assessment should be discharged. This decision is to deal with the further argument which I have now heard on this issue.
3. The way in which I raised the point at [74] of the UT Decision has resulted in submissions about the impact of a review on the original decision by Mr Day in March 2009 ("**the March decision**"). The argument which I raised was to the effect that the assessment might nonetheless stand, resulting as it did from an exercise of the discretion by Mr Day in March 2009. If the March decision was right on the facts before him at that time (a question which has not been decided by the Tribunal) then I thought it arguable that subsequent invalid decisions should not affect the end result. As the argument developed, there was a shift in focus. It is necessary, in the light of the arguments, to consider not only the decision made by Mr Day in March 2009 but also the decisions made by Mrs Thomas in June 2009 ("**the June decision**") and by Mr Day in July 2009 ("**the July decision**"). I will come to all of this in due course.

### Statutory provisions

4. I need to mention a few provisions of the VAT Act 1994, some of which I did not refer to in the UT Decision.
5. The Company's statutory appeal falls within the appellate jurisdiction of the F-tT by virtue of section 83(1)(c) and (p). The March decision refusing to exercise the discretion under Regulation 29(2) accordingly falls within section 83A. A review

had to be offered to Housley. The offer was accepted so that, under section 83C, HMRC became obliged actually to review the decision.

6. The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances: see section 83F(2). The review may conclude (see section 83F(5)) that the decision is to be
  - a. upheld,
  - b. varied, or
  - c. cancelled.
7. Where the review is delayed, for whatever reason good or bad, a taxpayer is not locked into the process of review for what might turn out to be a long period of delay. Instead, there is a default position specified in section 83F(8): where HMRC are required to undertake a review but do not give notice of the conclusions within a time limit (45 days or such other period as HMRC and the taxpayer agree) the review “is to be treated as having concluded that the decision is upheld”.

### **Jurisdiction**

8. I need to say a little more than I said in the UT Decision about the function and jurisdiction of the F-tT in relation to this matter and how they have come to be exercisable.
9. The matter came before the Tribunal by way of a statutory appeal against the assessment. The ultimate question on the appeal is whether the assessment should stand or not. Within that appeal, various issues have arisen. One issue is whether HMRC properly exercised their discretion when they refused to accept the evidence provided by the Company as sufficient for the proviso to Regulation 29(2) (“**the Proviso**”) to be invoked. HMRC maintained before the Tribunal that their decision was proper; the Company maintained that it was not. The Tribunal decided in favour of the Company. It allowed the appeal, that is to say the appeal against the assessment. As they said in [59] of the Decision:

“ We are satisfied that HMRC made no attempt to consider the discretion having decided that the lack of self-billing agreement was critical. We therefore allow the appeal as HMRC have acted unreasonably in not exercising the discretion and we agree with Mr Edwards’ submission that the failure of the officer to consider the discretion renders the assessment invalid *per se*.”

10. It is important to appreciate that the appeal before the Tribunal is, as I have just said, an appeal against the assessment; it is not an appeal against HMRC's decision in relation to the Proviso, which is no more than an issue within the appeal. There is no right to appeal against HMRC's decision as such. The reason why the point is important is because of the arguments which have been raised about whether the F-tT's function is appellate or whether it is supervisory.
11. For my part, I do not consider that there can be any doubt about the nature of the proceedings. In relation to the statutory appeal against the assessment, the F-tT has a truly appellate function. It (and, on appeal, the Upper Tribunal) will either uphold the assessment or discharge it. But in relation to the decision in relation to the Proviso, the F-tT's function and jurisdiction are purely supervisory. In other words, the F-tT is to examine whether the discretion has been properly exercised. The F-tT's function is to rule on whether the discretion has been properly exercised. If, as in the present case, it decides that it has not been, then it will identify why that is so; but it is not for the F-tT to substitute its own view for that of HMRC.
12. The legislation does not say anything expressly about how effect is to be given to the supervisory jurisdiction described in the immediately preceding paragraph. Instead, the courts and the tribunals have proceeded in a way which recognises that Parliament has given the discretion in such matters to HMRC and has adopted a similar approach to that which is adopted by the Administrative Court in relation to challenges to the exercise by public authorities of administrative decisions. I have been referred again to the cases which I looked at in the UT Decision. I think that I should revisit them in this decision. But before I do that, I want to draw a distinction between two types of case where the exercise of the supervisory jurisdiction might result in a decision being held to be invalid.
13. The first type of case is where the exercise of the power is invalid because there has been a failure to satisfy a pre-condition to the exercise of the power, or where there has been a failure to take relevant matters into account or where irrelevant matters have wrongly been taken into account. I will refer to this sort of case as giving rise to a "process defect". The second type of case is where, on the basis of the material before it, the decision-maker could not properly have reached the decision it did; in the language of public law, it has acted perversely or irrationally. I will refer to this sort of case as giving rise to a "merits defect". The

Tribunal in the present case based its decision on a process defect; there is nothing in its findings, and it said nothing, to establish a merits defect which would justify a conclusion that HMRC's decision was not valid.

14. Turning to the cases, I can start with the judgment of Schiemann J in *Kohanzad v Customs and Excise Commissioners* [1994] STC 967. This was an appeal against an assessment. The issue in essence was whether there was a merits defect; it was not suggested that there was a process defect. The tribunal concluded that Customs & Excise Commissioners had not acted unreasonably in declining to exercise their discretion in favour of the taxpayer. The taxpayer appealed on the ground that the Commissioners had not, on the facts, acted reasonably in refusing to allow input tax credit. In describing the nature of the tribunal's function, Schiemann J said this (at p 969d -f):

“...It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion. It is not an original discretion of the tribunal, it is one where it sees whether the commissioners have exercised the discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction, and indeed it has recently been decided that the supervisory jurisdiction is to be exercised in relation to materials which were before the commissioners, rather than in relation to later material.....”

15. Later in his Judgment, Schiemann J considered how the tribunal had approached their supervisory function. He said this (at p 971a-b):

“The tribunal asked itself whether the commissioners, in refusing to allow the appellant to deduct input tax, had acted in such a manner that no reasonable commissioners could have acted..... it seems to me that in substance it was the right question.”

16. He went on to dismiss the appeal, considering that it was well within the discretion of the Commissioners to have come to the decision which they had and of the tribunal to come to the conclusion which it did. It is to be noted that Schiemann J, in saying what he did, was addressing the tribunal's role in relation to the exercise of the discretion; he was not saying anything at all about the exercise of the tribunal's appellate function in relation to the underlying appeal. Clearly, since the Commissioners had acted reasonably, the exercise of their discretion was valid and there could be no possible attack on the actual assessment. Schiemann J's judgment has nothing to say about the consequences

for an appeal of a decision, within the appeal, that a discretion had been exercised improperly.

17. The next case is *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941, in the Court of Appeal. In this case, the Commissioners served a notice under the relevant statutory provision requiring the taxpayer to provide security as a condition of its making supplies. The power was available when the Commissioners considered its exercise to be “requisite for the protection of the revenue”. The taxpayer had a right to appeal to the tribunal against the notice and exercised that right. On appeal, the tribunal took the view that the Commissioners should have, but had not, considered the possibility of seeking further financial information from the taxpayer which could have assisted them in discharging their duties fairly. The tribunal went on to consider what a reasonable body of commissioners might have done if they had asked for and had taken into account financial information available at the date of the notice. The tribunal’s decision was that it was most likely that the Commissioners’ concern for the protection of the revenue would have been fortified by such material and concluded that, had they sought information, their decision would not have differed. Turner J allowed the taxpayer’s appeal on the ground that the tribunal’s jurisdiction on an appeal against a requirement to provide security was appellate and not supervisory so that, once it was satisfied that the decision was erroneous because of the failure to take account of a relevant matter, it should simply have allowed the taxpayer’s appeal.
18. The Commissioners appealed, contending that Turner J was in error in holding that the tribunal was bound to allow the appeal without considering whether the Commissioners would have reached the same conclusion even if such material had been taken into account.
19. The Court of Appeal held that, in the statutory appeal in question, the tribunal had to consider (i) whether the Commissioners had acted in a way which no reasonable panel of commissioners could have acted (ii) whether they had taken into account some irrelevant matter or disregarded something to which they should have given weight and (iii) (in some cases) whether the Commissioners had erred on a point of law. (These are the different categories which I have described as giving rise to a merits defect (case (i)) and a process defect (cases (ii) and (iii))). However, the tribunal could not exercise a fresh discretion.

20. Nonetheless, where the Commissioners' error was to fail to take into account something which they should have taken into account, the tribunal could dismiss the appeal if the decision would **inevitably** have been the same had account been taken of the additional material. Since there was no finding to that effect (the only finding being that it was most likely that that would have been the case), the appeal was, on that narrow ground, dismissed.
21. There are two observations which I would make about the case. The first is that (subject to the "inevitably the same" exception) the invalidity of the decision (whether because of a process defect or a merits defect) meant that there was no valid decision requiring security to be given. The inevitable consequence of that (subject to the exception) had to be that the appeal to the tribunal by the taxpayer should be allowed. The appeal, after all, was against the notice; it was not simply against an assessment or tax liability in the context of which the validity of the notice needed to be determined. The tribunal was thus faced with a binary choice: either the notice was valid, in which case the appeal should be dismissed; or it was invalid, in which case the appeal should be allowed. This would be a straightforward application of public law principles or at least of very similar principles.
22. The second observation relates to the "inevitably the same" exception. That exception reflects the way in which the law works in relation to decision-making authorities generally. Remedies in this field are discretionary. They are, putting the matter very broadly, designed to protect the citizen against decisions by a public authority which have not been taken properly because such a decision may unfairly impact on the citizen's rights. But there is no such unfairness where the authority's decision would inevitably have been the same even if it had taken account of the incorrectly disregarded material. For my part, I see no difference in principle between that sort of case where material is wrongly ignored and a case where material is wrongly taken into account, provided that the decision would inevitably have been the same had the material been ignored. Indeed, even an error of law might be treated in the same way if it is the case that the decision would inevitably have been the same had the law been properly understood and applied.
23. The next case is *Best Buys Supplies Ltd v Revenue & Customs Commissioners* [2012] STC 885 (following the earlier decision concerning the nature of the

jurisdiction *ie* supervisory, and the “inevitably the same” exception). In order to see precisely what the case decided, I need to say something about the facts and the stages of the process leading to the appeal to the Upper Tribunal which, for this purpose can be taken from the headnote:

The taxpayer traded in alcohol and confectionery wholesale. In early June 2006 the taxpayer was informed by an officer of HMRC that its main supplier ('**Samson**') had been deregistered for VAT on 21 April 2006. In its VAT return the taxpayer claimed input tax in relation to a number of invoices from Samson. HMRC refused to refund the input tax, on the grounds, *inter alia*, that some of the invoices had no VAT registration number on them and were therefore invalid. The taxpayer asked HMRC to reconsider its decision, and sent HMRC amended invoices from Samson. HMRC subsequently informed the taxpayer that it would be reconsidering its decision. Following an exchange of correspondence between the two parties, HMRC eventually wrote to the taxpayer and informed it that owing to the taxpayer's failure to provide relevant documents, there was no active reconsideration of HMRC's original decision, and that the resulting VAT assessment would be desuspended.

The taxpayer appealed to the F-tT against HMRC's decision. The F-tT held (1) that the relevant HMRC officer had accepted in evidence that in the absence of further information from the taxpayer, HMRC had not fully reconsidered its original decision; (2) that if HMRC had exercised its discretion on whether to allow the input tax in the absence of a valid VAT invoice under Regulation 29(2), it would have done so in accordance with its Statement of Practice of July 2003; (3) that the supplies had in fact been made by Samson to the taxpayer in respect of the invoices on which input tax had been disallowed; (4) that in exercising its discretion HMRC had failed to take into account all relevant matters; (5) the taxpayer would not have been able to satisfy the requirements of HMRC's Statement of Practice if HMRC had reviewed its decision.

The F-tT dismissed the taxpayer's appeal on the basis that although HMRC had acted unreasonably in the exercise of its discretion, HMRC would have reached the same decision had it exercised its discretion reasonably, as it would have done so in accordance with its Statement of Practice, the requirements of which the taxpayer did not satisfy.

The taxpayer appealed to the Upper Tribunal, on the grounds: (1) that the F-tT had misdirected itself in deciding that it could dismiss the taxpayer's appeal on the basis that the decision by HMRC would have been the same on a reasonable exercise of the latter's discretion, for the Tribunal's jurisdiction on the exercise of HMRC's discretion under Regulation 29(2) was supervisory in nature, whereas such a power would only have been exercisable if the F-tT's jurisdiction on that issue had been appellate; (2) that if the Tribunal had not so misdirected itself, it had failed to apply the correct test, namely whether the decision would inevitably have been the

same under the test prescribed in *John Dee Ltd v Commissioners of Customs and Excise* (3) that if the Tribunal had applied the correct test, it had been wrong to conclude that HMRC's decision would inevitably have been the same, as the Tribunal's factual finding was that the supplies did take place.

24. The Upper Tribunal held, at [49] of its decision, that the F-tT's jurisdiction was appellate as the appeal was against a decision as to the amount of input tax; it was nonetheless common ground, and accepted by the Tribunal, that the jurisdiction in respect of the decision by HMRC under the Proviso was supervisory so that the Tribunal could not substitute its own decision but could only decide whether the discretion had been exercised reasonably. The burden of proof was on the taxpayer to satisfy the Tribunal that the decision was incorrect. The Tribunal had no power to direct HMRC to review the original decision (that is to say the decision to refuse to repay input tax because, among other reasons, the invoices from Samson contained no VAT registration number). This was in contrast to the position under section 16(4)(b) Finance Act 1994.
25. I do not disagree with anything in [49]. I only add for completeness that the function of the F-tT is to decide (i) whether the HMRC's decision was reasonable in the sense that it was not a decision which no reasonable panel of commissioners could have made and (ii) whether there were other grounds which would render the decision invalid (as discussed at paragraph 19 above).

## **Remedies**

26. In [50] of the decision in *Best Buys* is to be found the following:

“If the appeal had involved issues which did not depend on the exercise of the Commissioners' discretion, the FTT would have had a full appellate jurisdiction. Since the appeal was solely in relation to the exercise of the discretion the FTT could only allow or dismiss the appeal.”

27. Mr Thomas relies on that in support of his contention that the faulty exercise of the discretion in the present case leads to the conclusion that the assessments cannot stand; accordingly, the statutory appeal should be allowed and the appeal from the F-tT to the Upper Tribunal should be dismissed.
28. For my part, I do not understand what point the UT was making in the first sentence of [50]. A “full appellate” jurisdiction is to be contrasted with a supervisory jurisdiction in precisely those sorts of case where a tribunal with full

appellate jurisdiction can, having detected a flaw in the original decision or decision-making process, review the whole case and itself make a decision.

29. As to the second sentence, it seems to me that it merely asserts a conclusion without explaining how it is arrived at. If one deconstructs the sentence, the first assertion it makes is that the appeal was solely in relation to the exercise of the discretion: if by that it is meant that the only issue raised in the appeal was the exercise of the discretion, that may, as a matter of fact, be right. But the appeal itself was against the assessment so it is not correct to say that the appeal was solely in relation to the exercise of the discretion.
30. The second assertion in the sentence is that the F-tT could only allow or dismiss the appeal. It is true that the F-tT could only decide whether the exercise of the discretion was valid or not; and it is true that, in the ultimate analysis, it can only allow or dismiss the appeal against the assessment. But it does not follow from those truths that because the exercise of the discretion was invalid therefore the taxpayer's appeal must be allowed with the result that the assessment is to be discharged.
31. The argument against that conclusion in this context is that, applying public law principles and exercising the supervisory jurisdiction which it has, the F-tT (or on appeal the UT) ought not simply to allow the taxpayer's appeal against the assessment since that would be to produce the result that the discretion is to be treated as having been exercised in favour of the taxpayer when it has not in fact been so exercised and when it might be impossible to conclude, on the merits, that it would have been so exercised. In *Best Buys* it may have been accepted, or the point may not have been thought of, that if the discretion had not been properly exercised, then the assessment should not stand. For whatever reason, the point was not considered. *Best Buys* cannot be treated as having decided it. It is open to me to do so; and in doing so, I do not think that *Best Buys* provides even a pointer to the correct answer.
32. Mr Mandalia's argument runs as follows. He submits that, in the present case, the assessment was, *prima facie*, a perfectly valid assessment. It was made on the basis that the Company was not entitled to deduct the disputed input tax; that was a correct approach since, without any doubt, there were no proper invoices by reference to which the input tax could be claimed. The only circumstances in which the Company ought to be allowed its input tax claim is if it is entitled to

have the discretion under the Proviso exercised in its favour. This is not a case where the assessment itself is open to challenge as having been improperly raised. The proper course now is for the decision refusing to exercise the discretion under the Proviso to be quashed leaving HMRC to exercise the discretion properly. This is not a case where the “inevitable conclusion” is that HMRC will exercise its discretion in favour of the Company (although, as I said in the UT Decision, it is not the inevitable conclusion that it will not do so).

33. Mr Thomas submits that this whole approach is misconceived. The right course now is to allow the appeal and discharge the assessment. The litigation has determined that the discretion has not been properly exercised. The assessment stands and falls with the validity of the rejection of the Company’s claim to input tax; since that claim has not been validly rejected, an assessment which relies on its rejection must be discharged. It may be open to HMRC to start all over again by considering the exercise of its discretion afresh. If it can, and does, make a valid decision refusing to exercise its discretion in favour of the Company, then it can, if it is in time, make a new assessment.
34. Mr Thomas says that the March decision is water under the bridge. The relevant decision is the July decision which, in his submission, formed part of the review procedure and which has wholly superseded the March decision. Although, as will be seen, nothing much if anything turns on the point, I do not agree that the July decision was part of the review process.
35. It may be possible, although I do not decide the point, for a review to include a process under which a decision is referred to a reviewing officer who remits the matter to the original decision maker to make another decision in accordance with some criteria which the reviewing officer has determined: section 83F(2) is widely drafted and may cover this possibility. But that is not what happened in the present case. Instead, the matter was referred to Mrs Thomas. She reviewed the March decision. The result of her review was to uphold the March decision: see [42] of the UT Decision quoting from her letter dated 2 June 2009. The final paragraph of her letter advised that, if it was wished to pursue the matter further, an appeal should be formally lodged with the Tribunals Service within 30 days. In response to Hart Shaw’s request to Mrs Thomas to reconsider her decision, she replied on 3 July 2009 that there was “no mechanism in place to ask the review officer to undertake a further review..... If you have new or further information

following the review, this must now be put to the original decision making officer”.

36. In these circumstances, it is clear, in my judgment, that the review to which the Company was entitled (the nature and extent of which, in accordance with section 83F(2) were to be such as appeared appropriate to HMRC) came to an end with Mrs Thomas’ letter dated 2 June.
37. That, however, was not an end of the matter because Mr Day in fact addressed the issue again, giving his decision in July. This was the decision which the Tribunal regarded as flawed, although it is necessarily implicit in its whole approach that the June decision was also flawed. In each case, the flaw was a process defect and not a merits defect. I recorded in the UT Decision (see at [60]) that it had not been suggested by HMRC that Mr Day did not have the power to reconsider the Company’s request for HMRC to apply the Proviso. I detected in Mr Mandalia’s submissions at the recent hearing a suggestion that Mr Day in fact had no power to do so but it seems to me to be far too late for that point to be raised.
38. So the position is this:
  - a. A decision was made by Mr Day, the March decision, which may or may not have been one which was reasonable for him to make. It did not suffer from a process defect (at least, there has been no suggestion that it did) and there has been no decision either way whether it suffered from a merits defect.
  - b. A decision was made by Mrs Thomas, the June decision, to uphold the March decision. That was the end of the review procedure. That decision suffered from a process defect.
  - c. A second decision was made by Mr Day, the July decision, to the same effect as the March decision. That decision also suffered from a process defect. It was not part of the review process.
  - d. There has been no decision in relation to the June decision or the July decision that, had there been no process defect, the actual decision would have suffered from a merits defect; indeed, the question of what it would have been reasonable for HMRC to decide was not addressed by the Tribunal.
39. Mr Thomas’ position is that it is necessary only to consider the July decision which represented HMRC’s ultimate conclusion, a conclusion reached on the

basis of the fullest of the information made available and in the light of a full consideration by HMRC of the legislative provisions. The March and June decisions have become irrelevant.

40. Further, Mr Thomas submits that HMRC's approach relies on there being a power in the F-tT to quash HMRC's decision and to order them to reconsider the exercise of their discretion. But there is, he says, no power for the F-tT to quash HMRC's decision. It can, in the exercise of its supervisory jurisdiction, decide that the exercise of the discretion was invalid. But if does so, the remedy which it can provide is to be found elsewhere; in the present case the remedy is to allow the appeal. As to directing HMRC to carry out a review or to consider the exercise of its discretion again, he draws attention to the absence of any express power to make such a direction and to the contrast with section 16(4)(b) Finance Act 1994 which does contain such a power, a contrast drawn by the F-tT in *Best Buys*.

## **Discussion**

41. I have found it helpful to start with a consideration of how the statutory scheme would operate if a taxpayer did not seek a review of a decision or if there were no review procedure at all. A taxpayer wishing to challenge a decision not to apply the Proviso and who has been assessed accordingly would bring an appeal against the assessment.
42. Suppose that the challenge is based on a merits defect and that it is successful. The F-tT would be saying that no reasonable body of Commissioners could, on the material before it, have refused to apply the Proviso. It would then be appropriate to allow the taxpayer's appeal. HMRC should adduce before the F-tT all the material on which they seek to rely to justify their decision; the F-tT should not give HMRC another opportunity to find further material which might justify the decision which they in fact made when, all along, the nature of the challenge was known. In those circumstances, the F-tT would not be substituting its own exercise of the discretion for that of HMRC but would be doing no more than give effect to its conclusion that no reasonable Commissioners could act as HMRC had in fact acted.

43. But now suppose that the challenge is based only on a process defect and is again successful. The position is then very different. The F-tT will not have investigated the merits of HMRC's decision at all; indeed, HMRC themselves may not have done so because of their misunderstanding of the law. It may be that, on the facts, it would have been entirely within the proper exercise of their discretion on the merits for HMRC to refuse to apply the Proviso if there had been no process defect. The F-tT will, in the exercise of its supervisory function, rule that the discretion was not properly exercised. It does not follow that it should then, in the exercise of its appellate function on the statutory appeal, allow the appeal against the assessment.
44. It seems to me that whether the assessment is ultimately to be upheld depends on whether HMRC's discretion under the Proviso is to be treated as having been exercised. In the case of a merits defect, it inevitably follows from a finding that no reasonable body of Commissioners would have made a decision refusing to exercise their discretion in favour of the taxpayer that the discretion is to be treated as having been so exercised. The result is that the appeal against the assessment succeeds. It does not matter that there may be no power actually to quash the decision.
45. In contrast, in the case of a process defect, all that follows is that the decision has not been properly made and the discretion has not been exercised in favour of the taxpayer. It does not follow that the contrary decision has been made, that is to say that HMRC are to be treated as having made a decision to exercise their discretion in favour of the taxpayer. In contrast with the situation in *John Dee*, the F-tT is not faced with binary choice.
46. The starting point, in my judgment, must be that the assessment is valid unless and until it is shown that the taxpayer is entitled to have the discretion exercised in his favour. This he can do by establishing a merits defect; but he cannot do it by establishing only a process defect. This is to do no more than apply the same, or similar, principles to the exercise of HMRC's powers (which are subject to the supervisory jurisdiction of the F-tT) as are applied to the exercise by other public bodies of their powers (which are subject to the supervisory jurisdiction of the Administrative Court). It is correct, in my judgment, to adopt the same, or a similar, approach. This conclusion reflects the reasoning of the judgments in both *Kohanzad* and *John Dee*. In particular, it reflects the "inevitably the same"

exception to what would otherwise result in an invalid decision as discussed in paragraph 22 above.

47. So where does this leave the assessment once a process defect has been established? As Mr Thomas says, HMRC cannot be directed to reconsider the exercise of their discretion. It does not, however, follow that HMRC should not be able, without the need for a direction, to reconsider the exercise of their discretion. Consider the position if they could and would do so. If they decide in favour of the taxpayer, that will be an end of the matter and the statutory appeal will be allowed. If they decide against the taxpayer, then the taxpayer can continue with his statutory appeal on the basis of a merits defect if he considers that the facts warrant it. There is no need for the original decision to be quashed in either of these cases and the absence of an express power to do so does not matter.
48. But what if HMRC simply sit on their hands and do nothing? In those circumstances, it would remain open to the taxpayer to continue with its appeal by seeking to establish a merits defect, in other words to attempt to persuade the F-tT that no reasonable body of Commissioners could refuse to exercise the discretion in his favour. If that were established, it would not matter whether or not HMRC had in fact reconsidered the exercise of their discretion. Having made a decision, in the exercise of its supervisory jurisdiction, that no reasonable body of Commissioners could refuse to exercise the discretion in favour of the taxpayer, the F-tT could then properly go on to allow the statutory appeal.
49. In principle, I consider this to be the correct approach. What might be said against that conclusion is that it means that a process defect has no significant consequence since it will always be open to HMRC to revisit the exercise of the discretion. It is true that such a course will be open to HMRC. But that does not mean that the process defect has no serious consequences; indeed, the remedy – namely a decision about the invalidity of the relevant decision – is precisely the protection which the taxpayer needs so that a valid decision, one way or the other, can be obtained and the correct amount of tax due established.
50. The question then is whether the review procedure shows the approach to be wrong. In my view, it does not do so. This is because, even accepting for the moment Mr Thomas' argument that all that matters now is the July decision, that decision is subject to analysis which I have carried out above. The July decision

suffered from a process defect. The consequence is that there has not been a valid exercise, one way or the other, of HMRC's discretion. HMRC should now be allowed to exercise the discretion afresh. If they make a decision which is not in favour of the Company, then within the existing statutory appeal (which will need to be remitted to the F-tT for this purpose) the Company can raise a merits challenge if it is so advised.

51. The consequence of my analysis is that the Tribunal should not have allowed the Company's appeal against the assessment (although it does not follow from that that they should have dismissed it). The F-tT can only properly allow the appeal once it has decided that no reasonable body of Commissioners could refuse to exercise the discretion under the Proviso in favour of the Company or once HMRC have decided to exercise their discretion in favour of the Company.
52. The analysis above addresses a different question from the one which I had identified at the end of the UT Decision. The focus there was on the possibility that the March decision could be upheld and thus justify the assessment remaining in place. Thus, even though the July decision (and the June decision for that matter) was flawed by reason of a process defect, it would remain open to HMRC to argue that the March decision was valid so that, to succeed in its appeal, the Company would have to demonstrate a merits defect in the March decision. Paragraphs 53 to 60 below address this aspect of the case; it is an aspect which arises, I emphasise, only if my conclusion at the beginning of paragraph 51 above is wrong.
53. It is in the context of that argument that Mr Thomas' submission, to the effect that it is only the July decision which now matters, is relevant. His main point is that it is at the end of the review when HMRC are finally placed in a position to make a decision based on all of the material including new material produced since the original decision. It is on the basis of all of the material on which the conclusion on the review is to be reached. He relies on section 83F(5) to show that the review altogether supersedes the original decision.
54. I see the force of Mr Thomas' submission where the review has reached a decision on the merits. If no reasonable body of Commissioners could have reached the decision on the basis of the material before the reviewing officer, then the review decision is flawed by a merits defect. In those circumstances, I accept that HMRC could not rely on the original decision, seeking to justify it by

reference to the material which was before the original decision maker ignoring any extra material and arguments adduced since the review. One purpose, if not the whole purpose, of the review is to give the taxpayer a further opportunity to make representations (see section 83F(4)) which would include, I consider, adducing further factual material as well as additional argument. It would make a nonsense of that if HMRC could then uphold their decision by reference to some, but not all, of that material. He can find support for that in the decision of Judge Walters QC in *Everycar Contracts Limited; Sabrina Hamilton T/A SJM Group* [2013] UKFTT 405 (TC), on which he relies although I do not think it really adds anything to the discussion which I have carried out.

55. But where the review does not address the merits, reaching a conclusion based on a process defect, the position is entirely different. In those circumstances, HMRC ought, I consider, to be able to rely on the original decision on the merits when it has been found that their actual decision on the review was flawed because of a process defect, for instance, a misunderstanding of the law.
56. This is not to say that HMRC can simply assert the validity of the original decision on its merits on the basis of the material then available to the relevant officer. It is clear that the taxpayer must succeed if he is able to show, on all the material available on the review, that no reasonable body of Commissioners could refuse to exercise its powers in his favour – in the present case that no reasonable body of Commissioners could refuse to exercise its discretion under the Proviso in favour of the Company. And this will be so even if, on the material before the relevant officer when the original decision was made, his decision was a reasonable one.
57. In my view, this conclusion is not only consistent with but is supported by the provisions of section 83F(8) (mentioned at paragraph 7 above) under which, in default of a decision on the review within a time-limit, the review is to be treated as having concluded that the decision is upheld. That subsection applies whatever the reason for the failure to complete the review in time: its application does not depend on HMRC being guilty of unreasonable conduct of some sort but applies even if the delay has been caused by circumstances beyond their control. When it does apply, the original decision is treated as being upheld even though there has in fact been no review decision at all. It is to be noted that the subsection does not specify the reason why the decision is to be treated as upheld. Thus, it seems to

me, it does not matter why the decision is to be treated as upheld since it is the decision which carries consequences (in *John Dee*, the invalidity of a notice requiring security, in the present case validity or otherwise of an assessment) rather than the reasons for it.

58. In such a case, the taxpayer can then appeal; the appeal itself, as in the present case, will be an appeal against an assessment. In the course of that appeal, HMRC will be able to seek to justify the decision which they are to be treated as having made. The mere fact that they have failed to make a decision on the review does not carry with it the automatic consequence that the appeal against the assessment has to be allowed. The F-tT, in exercising its supervisory jurisdiction, will as under the scenario considered at paragraphs 55 and 56 above, take account of all of the material available on the review
59. In the preceding paragraph, I said that HMRC will be able to seek to justify the decision which they are to be treated as having made. In my view, it is clear that that is the case where the original decision was valid on the basis of the information then available to the officer making the decision. Once a valid merits decision has been made, it is to be set aside (or to use the language of section 83F(4), it is to be varied or cancelled) only on the basis of further material which, had it been taken into account as it should have been, could only have led to one conclusion, namely that the discretion is to be exercised in favour of the taxpayer. In the present case, if the March decision was valid, it should be set aside if, but only if, no reasonable body of Commissioners, acting properly on the basis of the information made available to them on the review, could have failed to exercise the discretion under the Proviso in favour of the Company. To allow the Company's statutory appeal against the assessment on the basis of a process defect on the review would, in my judgment, be to give an excessive remedy to the Company.
60. The position is, I accept, less clear if the original decision itself is flawed because of a process defect, with no decision being made on the merits at all. But that is not the present case. For reasons explained in the UT Decision, the March decision was an exercise of the discretion by Mr Day and not a refusal by him to exercise it. His decision may or may not have been flawed by reason of a merits defect, but no decision to that effect has been made by the Tribunal. I do not propose to say anything more about this point.

## **Conclusions**

61. The Tribunal should not have allowed the Company's statutory appeal. That appeal should be allowed only in one of the two following circumstances:
- a. HMRC revisit the exercise of their discretion under the Proviso and decide to exercise it in favour of the Company; or
  - b. It is decided by the F-tT (or possibly the UT) that no reasonable body of Commissioners could reach a decision not to exercise the discretion under the Proviso in favour of the Company. The information by reference to which that issue is to be decided clearly includes everything which was made available by the Company on the review and up to the time of the July decision. So far as I am aware, there is no further material on which the Company would wish to rely. However, it seems to me that if HMRC make a further decision, they should do so on the basis of all the material available when they do so and that any challenge by the Company should be on the basis of all of that material.
62. Those conclusions show that the issue which I raised in [74] of the UT Decision did not focus on quite the right question. It is, I think, strictly unnecessary for the separate question whether the March decision was valid or not to be answered. In any case, I do not think it needs answering since, if HMRC can now properly refuse to exercise the discretion under the Proviso in favour of the Company, it is not easy to see how the March decision could be invalid. Conversely, if HMRC could not now properly refuse to exercise the discretion in favour of the Company, it is irrelevant whether the March decision was valid or not.
63. The matter must be remitted to the F-tT for it to decide whether HMRC would be acting within the proper exercise of their powers to decide not to exercise their discretion under the Proviso in favour of the Company. Judge Porter having now retired, any further hearing should be before a differently constituted panel. The F-tT is to take account of the contents of this decision when it determines the date as of which the enquiry is to be carried out and the evidence on which it is to make its decision. In the meantime, HMRC should consider whether to revisit the exercise of their discretion. If they do so, and if they exercise it in favour of the Company, that should be an end of the statutory appeal which will be allowed, but if they exercise it against the Company, the F-tT's enquiry should focus on that decision and all of the material on which it is properly to be based. If HMRC

decline to revisit the exercise of their discretion, the F-tT should carry out its enquiry as if HMRC had decided not to exercise the discretion in favour of the Company.

### **Postscript**

64. Mr Mandalia invites me to make an order for the Company to provide any further evidence within 28 days, for HMRC to have 42 days thereafter to make a decision about the further exercise of their discretion based on all the material then available and for the matter to be listed for further directions before the F-tT on the first available date after 3 months.

65. Mr Thomas objects to that. He contends

- a. that no order should take effect until the Company has decided whether to appeal or not;
- b. that the facts go back some years, the Company needs to be given a fair opportunity to gather appropriate evidence and it is impossible fairly to impose a time-limit at this stage; and
- c. that given the history of this case, what is needed is careful gathering and presentation of the relevant evidence followed by appropriate consideration by HMRC; imposing an arbitrary timetable in the manner suggested by HMRC is likely to undermine this objective.

66. Although the Company has no objection to the listing of directions hearing after 3 months, Mr Thomas submits that the more sensible course is to send the case back to the F-tT and let the parties make applications to the F-tT which are appropriate in the light of how the case progresses.

67. I can see that the time-table which Mr Mandalia proposed may not give the Company time to prepare what it needs to prepare. To lay down 28 days as the period for providing the further evidence is, as Mr Thomas says, somewhat arbitrary. I consider that all procedural aspects should now rest with the F-tT and that I should not pre-empt in any way what it considers to be sensible.

68. Accordingly, I propose simply to allow the appeal and to remit the matter to the F-tT for it to make a further decision in accordance with the principles set out in this decision. The F-tT will need to allow an appropriate time for the provision of further evidence and for HMRC to revisit the exercise of their discretion before embarking on a further substantive hearing.

**Mr Justice Warren, Chamber President**

**Release Date 13 February 2015**