Neutral Citation: [2023] UKFTT 00635 (TC)

Case Number: TC08864

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2022/13428

Procedure – whether Tribunal has jurisdiction when appealable decisions withdrawn – whether proceedings should be transferred to Upper Tribunal to consider judicial review

Judgment date: 24 July 2023

Decided by:

TRIBUNAL JUDGE GREG SINFIELD

Between

JOHN STENHOUSE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the issues on the papers under Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and with the consent of the parties

DECISION

INTRODUCTION

1. In September 2022, Mr John Stenhouse made an appeal to the First-tier Tribunal ('FTT') against late payment penalties notified to him by the Respondents ('HMRC'). At the time the Notice of Appeal was submitted, HMRC had either cancelled the penalties or reduced them to nil. On being made aware of this by HMRC, the FTT wrote to Mr Stenhouse and said that, in the circumstances, it appeared that there were no longer any remaining matters within the FTT's jurisdiction and setting aside some case management directions.

2. Mr Stenhouse did not accept that the proceedings in the FTT had reached a conclusion and sought to continue them so that he could claim compensation from HMRC. This decision concerns two issues, namely:

(1) whether the FTT must strike out the appeal made by Mr Stenhouse on 14 September 2022 on the ground that the FTT does not have jurisdiction; and, if so,

(2) whether the FTT should exercise its power under rule 5(3)(k)(i) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') to transfer the proceedings or part of them to the Upper Tribunal (Tax and Chancery Chamber) ('UT').

3. For reasons set out below, I have decided that the FTT has no jurisdiction in relation to the matters which Mr Stenhouse wishes to raise and therefore his appeal must be struck out under rule 8(2)(a) of the FTT Rules. I have also decided that that the proceedings should not be transferred to the UT.

BACKGROUND

4. In October 2019 and January 2020, Mr Stenhouse made payments totalling £9,000 to HMRC at a time when no tax was actually due from him.

5. On 4 February 2020, HMRC issued a payable order for £8,060.27 to Mr Stenhouse. Subsequently, Mr Stenhouse asked HMRC to cancel the payable order and credit the amount to his self-assessment account. Unfortunately, this payable order was not cancelled and no amount in respect of it was credited to Mr Stenhouse's self-assessment account until 21 June 2022.

6. On 6 November 2021, Mr Stenhouse made two separate payments, one of £5,000 and another of £10,000, to HMRC. Unfortunately, these payments were not shown on Mr Stenhouse's self-assessment account at the time.

7. On 15 February 2022, HMRC sent a penalty notice to Mr Stenhouse imposing a penalty of £171 for late payment of tax for the 2019-20 tax year.

8. On 12 April 2022, HMRC sent a penalty notice to Mr Stenhouse imposing a penalty of £830 for late payment of tax for 2020-21.

9. On 15 August 2022, HMRC took the following steps in relation to the late payment penalties for 2019-20 and 2020-21 and the repayment credit of £8,060.27 on his self-assessment account:

(1) the penalties were either cancelled or reduced to nil; and

(2) the credit was reallocated to the earliest tax liabilities shown on Mr Stenhouse's self-assessment account at the time.

10. On 16 August 2022, HMRC issued a penalty notice imposing a penalty of £298 for late payment of tax for 2020-21 on Mr Stenhouse.

11. On 31 August 2022, HMRC sent a Statement of Account to Mr Stenhouse. It showed that all the late payment penalties had either been reduced to nil or cancelled. It also showed that a balance of £1,972.35 remained payable in respect of the 2020-21 tax year but the 30-day late payment penalty for the year had been cancelled.

12. On 14 September 2022, Mr Stenhouse emailed a Notice of Appeal, which purported to have been signed on 18 August 2022, and supporting documents to the FTT. The appeal was stated in box 6 to be about penalties related to direct tax and "statements of accounts/liabilities". The penalty amount was stated to be £1,433.

13. Attached to Mr Stenhouse's Notice of Appeal was a document entitled "What this Tribunal appeal is all about" dated 14 September 2022. This document starts with the following explanation:

> "This Tribunal Appeal is concerned with 3 things: -
>
> (A) an appeal against penalties for non-payment of tax due;
>
> (B) inconsistent and contradictory Statements of Account and Statements of Liabilities that present different amounts of tax that is said to be due and which all fail to record numerous payments credit payments on account and credits that should be accounted for in the Statements of Account and Statements of Liability;
>
> (C) compensation for the above failures."

14. Correspondence attached to the Notice of Appeal revealed that the penalties for non-payment of tax referred to at (A) were the three penalty notices referred to above for late payment of tax for the 2019-20 and 2020-21 tax years. The penalties amounted to £1,299 in total, not £1,433 as stated in the Notice of Appeal, and had been withdrawn on 15 August.

15. The last section of the "What this Tribunal appeal is all about" document is headed "Remedies" and is as follows:

> "14. The Appellant seeks an order that discharges all penalties for non-payment of tax and all interest on penalties for non-payment of tax and an order that no further penalties for non-payment or interest thereon be charged to the account;
>
> 15. The Appellant also seeks an order that HMRC provides to the Appellant within 21 days an up to date accurate and complete Statement of Account from May 2021 showing all tax due, all penalties that are properly levied, all interest that is properly levied, all payments and credits to the account, and gives the Appellant a definitive statement of the amount of any tax that is due (if any).
>
> 16. The Appellant also seeks an order that HMRC pays to the Appellant compensation consisting of: -
>
> (a) the sum of #1500.00 [sic] to compensate for the worry, anger, frustration and time suffered and wasted;
>
> (b) a daily sum of £50.00 for each day after the 21 day period referred to above during which HMRC fail to provide the up to date, accurate and complete Statement of Account, rising to #100.00 [sic] per day if an up to date, accurate and complete Statement of Account still has not been provided after 56 days following a decision in this appeal;
>
> (c) a costs order relating to the costs of the HMRC appeal and this Tribunal Appeal."

16. On 30 September 2022, HMRC traced the payment of £10,000 made by Mr Stenhouse on 6 November 2021 and allocated that amount to his self-assessment account on 3 November 2022.

17. On 24 October 2022, HMRC traced the payment of £5,000 made by Mr Stenhouse on 6 November 2021 and allocated that amount to his self-assessment account on 5 October 2022.

18. On 22 November 2022, the FTT notified HMRC that Mr Stenhouse's appeal had been received and had been allocated to the Basic category of cases under rule 23 of the FTT Rules. In the same communication, the FTT directed HMRC to provide Mr Stenhouse and the FTT with their Statement of Reasons for opposing the appeal, with any supporting documents, by no later than 13 January 2023.

19. On 7 December 2022, HMRC made further reallocations of payments on Mr Stenhouse's self-assessment account to correct the interest payments charged.

20. On 12 December 2022, Mr John O'Shea, HMRC litigator, wrote to Mr Stenhouse and included the following responses to matters raised in the Notice of Appeal:

> "**Penalties**
>
> …
>
> There is no tax owed for the years 2019-20 and 2020-21, and there are no late filing or late payment penalties charged for either year. In this case the Respondents consider there is nothing further under appeal and the Respondents will be requesting the Tribunal close their file.
>
> **Compensation**
>
> Your Notice of Appeal to the Tribunal includes a claim for compensation.
>
> If you wish to make a compensation claim you should refer this matter to HMRC Complaints Team. The Tribunal has no jurisdiction to deal with complaints.
>
> **Costs**
>
> Your Notice of Appeal states you want a costs order in relation to the HMRC appeal and the appeal to the Tribunal. If you wish to make a costs claim in relation to the appeal before the Tribunal, it must be made pursuant to Rule 10 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Any claim would need to include sufficient details of why you think costs should be awarded (bearing in the mind the starting point is that costs are generally not awarded) and include a schedule of costs detailing the costs you have incurred as a result of the Respondents' alleged behaviour. The Respondents will not respond at this point on costs, suffice to say that further to case law, costs claimed should be in relation to the Tribunal appeal i.e. it relates to conduct and the costs incurred during the litigation process. The Respondents will respond to any costs claim in detail should one be submitted."

21. Mr O'Shea sent a copy of his letter of 12 December 2022 to the FTT with a request that the FTT close the file as there was nothing further under appeal.

22. Mr Stenhouse responded to Mr O'Shea by email the same day. In his email, Mr Stenhouse made several points about the Statement of Account attached to Mr O'Shea's email. In relation to his claims for compensation and costs, Mr Stenhouse stated:

> "… the Tribunal has the power under section 15 Tribunals Courts and Enforcement Act 2007 to award damages against HMRC where the application or appeal to the Tribunal is seeking an effective review of the actions or failings of HMRC. Section 15 created for the 1st Tier [sic] Tribunal a 'judicial review' jurisdiction which is the equivalent of the High Court's Judicial Review jurisdiction under the Senior Courts Act 1981. Under section 31 SCA 1981 the High Court is empowered to award damages in any Judicial Review proceedings in the High Court. Therefore the effect of section 15 TCEA 2007 is to give to the 1st Tier [sic] Tribunal the same 'judicial review' powers as the High Court, including the power to award damages. It is not necessary for me to make an application directly to HMRC for compensation as a pre-requisite to applying to the Tribunal for an award of damages. My Appeal to the Tribunal essentially alleges that HMRC has been utterly incompetent in its handling of my tax account and seeks appropriate orders against HMRC. The matters I have referred to above establish that HMRC's incompetence is continuing.
>
> 8. Eighthly, with regard to costs, that is a matter that can be addressed in detail at a later date."

23. Mr Stenhouse concluded by saying:

> "… I reject the accuracy of your letter and its attached Statement of Account and I reject your assertion that 'there is nothing further under this appeal.' Therefore at this stage I do not withdraw the Appeal and I do not consent to the Appeal being dismissed (or 'closed' as you refer in [sic] your letter). Therefore I expect HMRC to continue to follow the Directions of the Tribunal in this matter dated 22 November 2022."

24. Mr O'Shea replied to Mr Stenhouse by email on 14 December. He set out an explanation of the entries in the Statement of Account. Mr O'Shea confirmed that it was HMRC's view that there was nothing under appeal and the file should be closed. In relation to Mr Stenhouse's points on compensation, he stated as follows:

> "Your reference to Section 15 Tribunals Courts and Enforcement Act 2007 has been misinterpreted. This section does not give any power to the First-tier Tribunal. The power is bestowed on the Upper Tribunal (UT) and an appeal would have to reach this stage before the UT could engage this section. I therefore disagree with your point, and as referred to before in my letter dated 12 December 2022, if you wish to make a complaint about the handling of your tax affairs, the correct avenue is HMRC Complaints procedure."

25. On 20 December, Mr Stenhouse emailed Mr O'Shea with detailed comments about the Statement(s) of Account and interest. Mr O'Shea replied the same day repeating HMRC's view that the Statement of Account was correct and saying again that there was nothing under appeal and that HMRC had requested the FTT close their file. Mr Stenhouse responded on 21 December saying that they would have to agree to disagree over whether there was anything else to deal with.

26. On 22 December 2022, HMRC issued a new Statement of Account to Mr Stenhouse showing a reduction in the interest charged as a consequence of the reallocations made on 7 December.

27. On 6 February 2023, Mr John Fairweather, a Senior Tribunal Caseworker (also known as Senior Legal Officer) in the FTT, emailed Mr Stenhouse, copying in Mr O'Shea, as follows:

"This appeal and the parties correspondence of December 2022 has been passed to me to consider. I am very sorry for the delay in responding.

Your appeal to the Tribunal, matters within our jurisdiction

The parties will be aware that the Tribunal can only consider matters that fall within our jurisdiction. Looking through the notice of appeal and the more recent emails - the matters that fall within our jurisdiction are appeals against late filing and late payment penalties, following the submission of self-assessment. HMRC have indicated that the penalties under appeal have been reduced to nil or cancelled.

Matters outside our jurisdiction

My understanding is that there is no right of appeal against interest charged on a direct tax or against a self- assessment, as it is a record of your own return. If, having received your self-assessment, HMRC thinks you have made a mistake they have the option to open a 'check' or 'enquiry' into your return. This is under section 9A TMA and must be done within certain time limits and is always done in writing. Following a section 9A check, HMRC will issue a closure notice under s28A TMA and this would be an appealable decision.

Alternatively, HMRC can simply 'correct' your return under section 9ZB TMA. This is not an appealable decision, rather you have the choice to accept the correction and it will stand in place of your own self –assessment or you can reject the correction and your own self-assessed figure must be reinstated. If HMRC persists in their view they may then make a check under s9AA TMA as above and this will lead to an appealable decision or, subject to certain conditions, make a discovery assessment which would again be an appealable decision.

The Tribunal does not have jurisdiction to deal with complaints about HMRC, if you wish to pursue a complaint you must do so with HMRC directly. If following the complaint procedure you remain unhappy you have the opportunity to continue with a complaint to the adjudicator.

Section 15 Tribunals Courts & Enforcement Act 2007 applies to the Upper Tribunal Chamber.

Next steps, costs and directions

As there does [sic] not appear to be any remaining matters within this Tribunal's jurisdiction, I have set out a direction below for the appellant to comply with. Should the appellant wish to pursue an application for costs, they are entitled to do so in accordance with Rule 10 of our rules and procedures.

Direction

1. Our direction of 22 November 2022 is set aside.

2. Within 14 days of the date of this direction the appellant should confirm to HMRC and the Tribunal how they wish to proceed with their appeal. If the appellant does wish to continue with an appeal to the Tribunal they should confirm the exact matters that remain in dispute, copies of decision letters that show the matters in dispute and confirmation of the legislation that provides a right of appeal to this Tribunal.

3. If the appellant does not comply with direction 2 the matter will be referred to a Judge to consider if proceedings should be struck out.

4. Either party can apply for these directions to be amended or suspended at any time."

28. Mr Stenhouse responded to Mr Fairweather in an email of 16 February 2023 and made the following points about the FTT's jurisdiction and power to award damages:

> "… with regard to the jurisdiction of the 1st Tier [sic] Tribunal Tax Chamber, that jurisdiction is derived solely from the Enforcement Courts and Tribunals Act 2007 [sic] and the 1st Tier [sic] Tribunal Tax Chamber Procedure Rules 2009. Neither of [sic] that Act nor those procedural rules makes any specific provision for the jurisdiction of the Tax Chamber and certainly neither of them specifically creates any limits to that jurisdiction. Furthermore, there is no provision that empowers the Tax Chamber to define or to limit its own jurisdiction on its own initiative. In addition, having considered the Practice Statements and Practice Directions that are published on the Tax Chamber website there are no Practice Directions or Practice Statements that define or limit the jurisdiction of the Tax Chamber. This absence of any limit to the jurisdiction of the Tax Chamber and absence of any provision that permits the Tax Chamber to define or limit its own jurisdiction is important because it appears from the email of John Fairweather below that HMRC/John O'Shea has informed John Fairweather, and John Fairweather has accepted, that my Appeal to the Tax Chamber falls outside the jurisdiction of the Tax Chamber because the jurisdiction of the Tax Chamber is limited entirely to 'the matters that fall within our jurisdiction, are appeals against late filing and late payment penalties.' It is said that HMRC has now dealt with late payment penalties raised against me and therefore there is nothing left in my Appeal that falls within the jurisdiction of the Tax Chamber and therefore my Appeal should be closed or struck out. John Fairweather also states in his email under 'Matters outside our jurisdiction' that 'My understanding is....' and then goes on to state what the Tribunal can and cannot do. He identifies no authority for this statement of the Tribunal's jurisdiction, which is plainly no more than what he has been instructed to say by HMRC/John O'Shea. I do not accept that his statements on jurisdiction are correct. The simple position is that since neither the 2007 Act nor the 2009 Procedural Rules create any specific limits to the jurisdiction of the Tax Chamber and since the Tax Chamber does not have any power to limit its own jurisdiction and has issued no Practice Directions or Practice Statements creating or imposing any jurisdictional limits, there are no limits.
>
> Fourth, with regard to my claim for damages, HMRC/John O'Shea has stated in its email dated 14 December 2022 that sections 15 and 16 only create a power to award damages for the Upper Tribunal (Tax Chamber) and not for the 1st Tier [sic] Tribunal. While that is correct as far as the provisions of the 2007 Act go, that does not mean there is nothing the 1st Tier [sic] tribunal [sic] Tax Chamber can do in relation to damages. Under rule 5(3)(k) of the 1st Tier [sic] Tribunal Tax Chamber Rules 2009 the 1st Tier [sic] Tribunal Tax Chamber has the power to transfer any proceedings before it to 'another tribunal', which must include the Upper Tribunal which is 'another tribunal' created by the Courts Tribunals and Enforcement Act 2007 [sic]. The 1st Tier [sic] Tribunal Tax Chamber can therefore transfer my Appeal to the Upper Tribunal to deal with my damages claim against HMRC for misfeasance and nonfeasance, inordinate delays and the levels of confusion and contradictions that HMRC has created in my Tax Account (as detailed in my Appeal Notice), and also the assertions made by HMRC in correspondence POST-DATING my Appeal that it has not been able to find

some of the payments made by me to HMRC's Cumbernauld Account as listed in my Appeal.

Fifth, with regard to what remains to be dealt with in my Appeal, I have raised a number of issues as set out in my Appeal Notice. I have also raised a number of issues that remain as set out in the correspondence to which John Fairweather refers in his email dated 06 February 2023, including the many inconsistent and contradictory Statements of Account issued by HMRC and the inconsistencies and contradictions between what HMRC now says in response to my Appeal and what it has said in previous correspondence sent to me all of which is attached to my Appeal Notice. In addition HMRC has more recently stated that it cannot find some of the payments that I have made to HMRC's Cumbernauld Account. It is perfectly obvious that HMRC does not wish to have to address or deal with these various matters and hence its attempt to close down/strike out my Appeal. Essentially the only thing that HMRC has done in response to my appeal is (a) cancel late payment penalties and (b) issue me with further Statements of Account which contradict all of the earlier Statements of Account it has previously issued to me. These actions go nowhere near to addressing the various issues I have raised in my Appeal and in the December 2022 correspondence. Since all of these matters are well set out in my Appeal Notice and in the correspondence from December 2002 which the Tribunal already has, I see no good reason why I should have to relist all of these matters as per John Fairweather's email dated 06 February 2023. Both the 1st Tier [sic] Tribunal Tax Chamber and HMRC/John O'Shea already know what they are.

If John Fairweather/the Tribunal and/or HMRC/John O'Shea continue to assert that there is nothing in my Appeal that falls within the jurisdiction of the 1st [sic] Tribunal Tax Chamber or which the Tribunal has any power to deal with they are required to identify the legal authority/authorities for the alleged limits of jurisdiction.

The Directions dated 22 November 2022 should be reinstated with new dates for compliance."

29. Mr Stenhouse's email was eventually passed to me and I drafted a response which was emailed to Mr Stenhouse on 4 April 2023. It was as follows:

"In his email of 16 February 2023, Mr Stenhouse has questioned whether Mr Fairweather is authorised to say what he did and what is his authority for it.

In relation to the first point, the Senior President of Tribunals issued a Practice Statement dated 15 March 2017 which permits a member of the Tribunal staff designated by the President of the Tax Chamber of the First-tier Tribunal as a Tribunal Caseworker ('TCW') to carry out the functions listed in that Practice Statement to the extent that the TCW has been authorised to exercise those functions by the Chamber President. I confirm that Mr Fairweather was authorised by my predecessor as Chamber President on 25 October 2016 to, among other things, "require a party to inform the Tribunal whether that party intends to pursue the proceedings".

In relation to the issue of the Tribunal's jurisdiction, Mr Stenhouse states in his email, that 'there are no limits' to that jurisdiction. That is (unfortunately, some may think) not correct. The Tribunal was created by section 3 of the Tribunals Courts and Enforcement Act 2007 'for the purposes of exercising the functions conferred on it under or by virtue of this Act or any other Act'. Its jurisdiction is therefore entirely statutory. The Tribunal has no inherent jurisdiction and can only deal with matters where

there is a right of appeal under a statute. This was confirmed by the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363, [2013] STC 225 at [36] et seq. In relation to Mr Stenhouse's proceedings, the Tribunal only has jurisdiction to decide whether penalties have been properly imposed and whether they have been correctly calculated (see paragraph 13 of Schedule 56 to Finance Act 2009). Once the penalties had been withdrawn, there was no appealable decision for the Tribunal to determine. As Mr Fairweather set out in his email, that does not mean that the proceedings are at an end as there may be further consequential applications, eg for costs, but any other matters must be the subject of proceedings elsewhere.

In relation to that latter point, Mr Stenhouse acknowledges that he was wrong to state in his email of 12 December 2022 that the First-tier Tribunal had a 'judicial review' jurisdiction which gave it the power to award damages but states that does not mean that there is nothing that the Tribunal can do in relation to damages. He states that the Tribunal should transfer his appeal to the Upper Tribunal to deal with his claim for damages under rule 5(3)(k) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'). Unfortunately for Mr Stenhouse, rule 5(3)(k) does not assist him in this case. This power can only be exercised where the First-tier Tribunal has jurisdiction in relation to proceedings but then either ceases to do so or considers that another forum would be a more appropriate forum for the determination of the case. The transfer is purely administrative and cannot require the other tribunal to accept jurisdiction. In particular, rule 5(3)(k) cannot be used to circumvent the need for an application for judicial review to the Administrative Court first (see *R (oao Hankinson) v HMRC* [2009] EWHC 1774 (Admin) at [24]).

Rule 8(2) of the FTT Rules provides that the Tribunal must strike out the whole or part of the proceedings if the Tribunal does not have jurisdiction in relation to them and does not exercise its power under rule 5(3)(k)(i) FTT Rules. It appears to me that such a strike out is appropriate in this case but before doing so I give Mr Stenhouse 14 days from the date of this letter to make any representations as to why these proceedings should continue."

30. Mr Stenhouse replied by email on 16 April which he amended on 17 April. The amended response was as follows:

"With regard to the jurisdiction of the FTT and the question of any judicial review jurisdiction, while it is correct that the FTT does not have a general judicial review jurisdiction equivalent to that of the High Court, it is NOT correct that the FTT has no public law jurisdiction at all.

The position of the FTT as regards public law functions was confirmed by the Upper Tribunal in *R & J Birkett (t/a Orchards Residential Home) v R & C Commrs* [2017] BTC 511 where the UT concluded that the FTT may consider questions of public law in the course of exercising the jurisdiction that the FTT does have. In reaching this decision the UT summarised the authorities on the FTT's jurisdiction and expressed the applicable principle as follows:

(1) The FTT is a creature of statute. It was created by TCEA 2007, s. 3 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. Its jurisdiction is therefore entirely statutory.

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under TCEA 2007, s. 15 and 18.

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *R & C Commrs v Hok Ltd* [2012] BTC 1,711 at [52] the UT accepted that in certain cases where there was an issue concerning a public body's actions and decisions, such issues could give rise to questions of public law for which judicial review was not the only remedy and which the FTT would have to consider and rule on when dealing with matters that fell within the jurisdiction of the FTT.

My appeal raises issues concerning the propriety of penalties raised against me and the procedures that have been followed by HMRC is raising those penalties. My appeal therefore raises issues that fall directly within the jurisdiction of the FTT (penalties) and also involve public law issues that directly concern the way in which those penalties have been raised and notified, including the issuance by HMRC of repeated Statements of Account and statements made in correspondence that are internally inconsistent and externally contradictory. These are public law matters that are an integral part of the appeal and an integral part of the decisions and actions of HMRC in relation to penalties.

It is NOT the case that because HMRC now states that is [sic] has issued yet another new Statement of Account (I believe it is now the 7th Statement of Account issued by HMRC) which is yet another contradiction of all earlier Statements of Account, and claims that it has now cancelled penalties, there is now nothing left for the FTT to deal with and therefore the Appeal should be dismissed or struck out. The public law element of my appeal remains outstanding which includes the question whether the latest 'new' Statement of Account is correct.

My appeal raises matters that fall within FA 2009 Schedules 53 and 56 and the appeal raises public law issues that are integral to the matters that fall within Schedules 53 and 56.

In addition I would refer to the decision of the UT in *KSM Henryk Zeman v HMRC* [2021] UKUT 182 (TCC) @ paras 27 - 34 and 41 - 42 and 70. In that decision that UT expressly recognised and accepted that (a) a taxpayer has an inherent right in the interests of the rule of law and fairness to raise public law issues as part of the taxpayer's challenge against the actions and decisions of HMRC concerning the taxpayer - the starting point is that the taxpayer has the right to raise public law issues; and (b) the a [sic] public law jurisdiction in the FTT to consider and decide such public law issues as may be raised by the taxpayer entirely depends on the construction of the relevant statutory provision that is applicable to the tax payer's challenge; and (c) exclusion of a public law jurisdiction from the FTT will only arise if the relevant statutory provision expressly excludes a public law jurisdiction, which depends on an interpretation of the relevant statutory provisions. In KSM the UT went on to review the authorities and came to the conclusion that the relevant statutory provisions that were engaged in the KSM appeal did NOT exclude any public law jurisdiction from the FTT and therefore the taxpayer was entitled to raise public law issues within the appeal and to have those public law issues determined by the FTT.

In relation to my appeal there is nothing in the provisions that are engaged by my appeal that either expressly or by implication excludes any and all public law jurisdiction from the FTT.

> Therefore the FTT does have jurisdiction to deal with and decide the public law issues raised in my appeal concerning the decisions, actions and conduct of HMRC.
>
> With regard to a transfer to the Upper Tribunal under FTT Rules r5(3)(k) the following response has been given: -
>
> > 'Unfortunately for Mr Stenhouse, rule 5(3)(k) does not assist him in this case. This power can only be exercised where the First-tier Tribunal has jurisdiction in relation to proceedings but then either ceases to do so or considers that another forum would be a more appropriate forum for the determination of the case. The transfer is purely administrative and cannot require the other tribunal to accept jurisdiction. In particular, rule 5(3)(k) cannot be used to circumvent the need for an application for judicial review to the Administrative Court first (see *R (oao Hankinson) v HMRC* [2009] EWHC 1774 (Admin) at [24]).'
>
> I can find no authority for this proposition regarding the operation of FTT Rules r5(3)(k). The case of *Hankinson* is NOT authority for this proposition regarding the exercise by the FTT of its own case management power under FFT [sic] Rules r 5(3)(k). The case of *Hankinson* concerned the discretionary exercise by the High Court of its power to transfer to the Upper Tribunal. *Hankinson* made no decision about how the FTT should exercise its discretionary case management powers under FTT Rules rule 5(3)(k). I therefore do not accept that the response quoted above in italics is a correct statement of the law. The statement that a transfer under rule 5(3)(k) cannot compel the UT to accept jurisdiction is particularly absurd given that what would be transferred are issues for judicial review and the UT has a statutory judicial review jurisdiction under section 15 of the 2007 Act. The UT can hardly refuse to accept jurisdiction where the statute expressly confers jurisdiction.
>
> The issue under rule 5(3)(k) is simply one of discretion. There are no proper grounds or reasons for refusing to exercise the discretion to transfer under rule 5(3)(k) and none have been identified either by HMRC or by the FTT."

31. I asked Mr Fairweather to respond to Mr Stenhouse in terms drafted by me which he did by email on 20 April. It said:

> "I acknowledge receipt of your emails of 16 and 17 April in reply to mine of 4 April. Judge Sinfield has seen the email of 17 April. He has asked me to tell you that he proposes to deal with the various matters raised by you in correspondence in a decision so that, if you disagree with any part of it, you can apply for permission to appeal to the Upper Tribunal if you wish to do so. Judge Sinfield has also said that he is prepared to deal with the matters you have raised on the papers or, if you prefer, after a hearing (which would take place using the Tribunal's video hearing system). In either case, Judge Sinfield would give HMRC an opportunity to make representations in response, either in writing or at a hearing, but he would not require them to do so.
>
> Accordingly, please let me know whether you wish to have a hearing or would prefer Judge Sinfield to deal with matters entirely on the papers. If the former, please let me have an estimate of how long will be required for the hearing and two or three dates in the period 30 May to 30 June when you are available. Please also confirm whether you wish to make any further submissions either in writing or at a hearing and by what date you will be able to submit them.

> In order to ensure that this matter proceeds without any delay, please let me have your response by no later than the end of next week."

32. In an email on the same day, Mr Stenhouse asked for clarification and I drafted a response which was sent on 21 April and included the following:

> "Thank you for your email requesting clarification of the issues that Judge Sinfield will deal with in his decision. I passed your latest email to Judge Sinfield who has responded as follows and asked me to pass it on.
>
> As I said previously, I propose to deal with the various matters raised by Mr Stenhouse in correspondence in a decision which will then give him the right to appeal, subject to being given permission, if he disagrees with anything in it. It seems to me that there are two main matters that fall to be decided in order to determine whether Mr Stenhouse can go forward with his appeal and/or claim for damages/judicial review. The first issue is whether the Tax Chamber has any jurisdiction following HMRC's withdrawal of the penalties, ie is there an appeal at all? That is probably best considered in the context of a decision whether to strike out the proceedings under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Tax Rules'). That leads naturally to the second issue which is Mr Stenhouse's application for the Tax Chamber to transfer the proceedings to the Upper Tribunal under rule 5(3)(k) of the FTT Tax Rules. It is clearly a nonsense to suggest that I should consider Mr Stenhouse's penalty appeal before deciding whether there is an appeal and/or whether the proceedings belong in the Tax Chamber or the Upper Tribunal.
>
> Those are the issues that I thought should be considered but Mr Stenhouse may have others. I am happy to deal with any of the issues arising from the correspondence since February when the Directions issued on 22 November 2022 were set aside and the appeal in the Tax Chamber was effectively stopped from proceeding. The other issues that I have in mind are the submissions on questions of law and fact that he has made and not withdrawn or conceded in his emails of 16 February and 19 April."

I then summarised some of those further issues.

33. Mr Stenhouse did not immediately take up my offer to consider the further issues in my email of 21 April when he responded later that day. Instead, Mr Stenhouse simply confirmed that he had already made his further submissions in his amended email dated 17 April. In a further email on 25 April, Mr Stenhouse confirmed that he did not wish to make his submissions again at an oral hearing of his applications.

34. On 27 April, the FTT emailed Mr O'Shea of HMRC as follows:

> "Judge Sinfield considers that the emails from Mr Stenhouse raise two matters that fall to be decided in order to determine whether he can go forward with his appeal in the First-tier Tribunal and/or claim for damages/judicial review in the Upper Tribunal. The first issue is whether the First-tier Tribunal has any jurisdiction following HMRC's withdrawal of the penalties, ie is there an appeal at all and, if so, does it have any reasonable chance of success? That is probably best considered in the context of a decision whether to strike out the proceedings under rule 8(2) and (3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Tax Rules'). That leads naturally to the second issue which is Mr Stenhouse's application for the First-tier Tribunal to transfer the proceedings to the Upper Tribunal under rule 5(3)(k) of the Rules.

> Judge Sinfield proposes to deal with the issues on the basis of the submissions made by Mr Stenhouse, principally in the attached emails. If HMRC wish to make any submissions in relation to these issues then they are invited to do so in writing within 14 days of the date of this letter. If HMRC make submissions, Judge Sinfield will give Mr Stenhouse an opportunity to respond to them before he makes a decision."

35. Mr O'Shea provided HMRC's response to the FTT's email of 27 April on 11 May and copied it to Mr Stenhouse. The response set out the background facts which are set out in paragraphs [4.] to [21.] above and concluded as follows:

> "Statements of Account are always issued where certain qualifying financial transactions, credits and debits, unsettled charges and unallocated credits, and any charges becoming due, have taken place during the statement period. The correct position in respect of the penalties was the Statement of Account issued 31 August 2022. However, as some of the payments were not allocated to the Self-Assessment account until after this date, the correct position for the payment allocation and interest is the Statement of Account dated 22 December 2022.
>
> The Respondents' view is that as the penalties under appeal have either been cancelled or reduced to nil, the Respondents have withdrawn, and therefore there is no appealable matter. This being the case, the Respondents are in agreement with Judge Sinfield that the Tribunal has no jurisdiction to consider any of the issues raised by the Appellant, and in accordance with rule 8(2)(a) of the Tribunal rules, the Tribunal must strike out the whole of the proceedings."

36. On 12 May, as I had said I would do, I instructed Mr Fairweather to ask Mr Stenhouse to provide a response to HMRC's submissions or confirmation that he did not wish to say anything further within seven days.

37. On 22 May, Mr Stenhouse provided his replies to the submissions of HMRC. They were as follows:

> "1. The issue being considered is whether FTT has jurisdiction to deal with issues that arise under a 'judicial review' challenge to the conduct of HMRC in dealing with the tax affairs of a UK tax payer.
>
> 2. I have made extensive submissions on this issue. HMRC's response does not address the submissions I have made. The Responses of HMRC therefore do not do what they are supposed to do. It is not good enough to say that HMRC agrees with the Tribunal since the FTT has not made a ruling in this matter so far and my submissions demonstrate that the arguments presented by the FTT so far are in fact outdated and have been overtaken by more recent legal developments, which neither the FTT nor HMRC have addressed.
>
> 3. I will not repeat the legal arguments that I have presented to date. However it may be helpful if I were to very succinctly set out why my case raises 'judicial review' issues that need to be determined and which the FTT should determine.
>
> 4. As already demonstrated, the law concerning the jurisdiction of the FTT to hear "judicial review" challenges to HMRC's conduct of a tax payer's tax affairs revolves around the concept of "legitimate expectation." In simple terms, if HMRC has created a legitimate expectation on the part of the tax payer that the tax payer's tax affairs will be dealt with in a certain way or that an issue relating to the tax payers tax affairs will be dealt with in a

certain way by HMRC, then a failure of HMRC to deal with the tax payer in the way that meets the legitimate expectation that HMRC has caused the tax payer to have, will give rise to a legitimate judicial review jurisdiction in the FTT unless HMRC can demonstrate that the specific tax provisions that are engaged by the tax payer's tax affairs or by the issue raised in the tax payer's affairs under consideration expressly ousts any judicial review jurisdiction.

See submissions set out in email dated 17 April 2023 (as amended).

5. The Notice of Appeal raises the issues of HMRC's delays, failures by HMRC to account for substantial payments made by me in satisfaction of tax liabilities, and the repeated issuing of Statements of Account by HMRC that contradict earlier Statements of Account and which are themselves internally wrong and contradictory, and the effect of all of this on me as the tax payer.

6. There is no doubt that HMRC has made numerous and continuing representations to me as the tax payers [sic] that (a) Statements of Account issues [sic] to me are accurate and complete; (b) that substantial payments that I have previously made have either not been made or cannot be traced; and (c) that various problems raised by me would be dealt with within stated time limits.

7. The actions of HMRC have created legitimate expectations for me as the tax payers [sic] and those legitimate expectations have not been met or satisfied by HMRC.

8. HMRC is subject to the requirements and operational obligations that are set out in the HMRC Charter. The Charter is a statutory creation, issues [sic] under section 16A of the Commissioners for Revenue and Customs Act 2005 (by way of an amendment made by section 96 Finance act 2009). The standards that are set out in the Charter are therefore legal obligations acting on HMRC at all times and they create legitimate expectations on the part of tax payers whose affairs are being dealt with by HMRC.

9. The following statements of statutory standards are made in the Charter:-

[Mr Stenhouse then quoted passages from the Taxpayers' Charter which it is unnecessary to set out.]

10. All of the above statements in the HMRC Charter are statements made by HMRC under statutory authority of what HMRC WILL DO. These are not statements of intent or statements of best of best practice or statements of aspirations. They are statements of the actions and conduct that HMRC will follow when dealing with a tax payer's affairs.

11. In effect, because the Charter is imposed on HMRC through statute, the Charter creates clear legal duties and obligations on HMRC. Phrasing this within the framework of judicial review, there has been a serious breach of statutory duty by HMRC in its dealings with my tax affairs which is a legitimate subject of judicial review.

13. These statements within the Charter give rise to legitimate expectations on the part of the tax payers in relation to HMRC's dealings with each tax payer's tax affairs.

14. In addition to the Charter, the documents that I have included with my Notice of Appeal in this case clearly record HMRC giving to me clear statements about what HMRC is doing that it is obvious that I am expected to rely on and have every right to rely on. These are statements that in themselves create legitimate expectations on my part quite apart from the Charter.

Clear examples of this are: -

(a) the letter of HMRC dated 15 February 2022 – the matters that HMRC stated would be done were not done (Appeal Bundle pp 64-65)

(b) all of the Statements of Account pre-dating my Notice of Appeal and which were issued and presented by HMRC on the basis that they are accurate and up to date – clearly HMRC cannot possibly argue that it issues Statements of Account that are NOT accurate and up to date;

15. Statements of Account issued by HMRC to me and correspondence with HMRC that post-dates the issue of my Notice of Appeal have continued to create legitimate expectations – see copies attached to these Responses. Despite my appeal to the FTT HMRC has continued to issue to me Statements of Account that are wrong, that contradict earlier Statements of Account, and which I have been expressly told by HMRC are accurate and up to date.

See for example

(i) the Statement of Account dated 12 October 2022 (Attachments pages 4 – 5) – this Statement of Account states that it is "your most recent statement and payments have been allocated." This is patently incorrect on both points. This Statement of Account contradicts all earlier Statements of Account and it records no payments and certainly not any of the substantial payments that were made and were the subject of my complaint to HMRC;

(ii) the HMRC Letter dated 03 October 2022 concerning HMRC's inability to trace the payment of £5000 on 06 November 2021 and my response providing more copies of the same documents and records previously provided to HMRC earlier in 2021 (Attachments pages 12 – 18). It should be noted that I have never had any confirmation from HMRC since this line of correspondence that my payment of £5000 made on 06 November 2021 has been found.

(iii) the latest Statements of Account issued to me by HMRC by email through Mr John O'Shea with the assertions that these Statements of Account are accurate and up to date, and which contradict all earlier Statements of Account issued to me by HMRC – see Attachments pages 19 -35. However despite the assertions of HMRC that the latest Statements of Account are accurate and up to date I continue to be chased by debt Collection Agencies acting on behalf of HMRC seeking payment of sums that are well in excess of the sums said to be due in the latest Statements of Account sent to me via John O'Shea – see Debt Collection Agency letters attached dated 10th and 24th March 2023. It is interesting to note that if the sum of £5000 is deducted from the £8611.50 one arrives at the sum of £3611.50 which is very similar to the amount of tax that the latest Statement of Account state [sic] that I owe. This calls into question the accuracy of the latest Statements of Account sent to me by Mr O'Shea;

(iv) my correspondence with Mr John O'Shea post dating the Notice of Appeal record that he states that he is not going to deal with my concerns as set out in my email dated 20 December 2022 and that if I have further queries I should raise them with the HMRC Complaints Team. This of course contradicts the statements made in the Charter concerning complaints by the tax payer. Mr O'Shea states that in his opinion the latest Statements of Account are accurate but also states that it is not his role to deal with my complaints. Mr O'Shea is not qualified to

pronounce opinions on the accuracy of the Statements of Account he has been instructed to send to me, and no attempt has been made by HMRC to answer my queries and issues via a properly qualified person;

(v) Mr O'Shea's assertions in this appeal that penalties for late payment have been cancelled and there is nothing else to deal with and the FTT has no jurisdiction to deal with anything else and therefore the appeal should be dismissed is [sic] plainly wrong.

16. In simple terms since I commenced my Appeal to the FTT HMRC has continued to deal with my tax affairs in exactly the same way as before my Appeal.

Specific Aspects of HMRC's Submissions – Letter dated 11 May 2023

17. Quite apart from the above matters, there are numerous inaccuracies within the Submission of HMRC contained in their letter dated 1 [sic] May 2023.

18. Para 1 – there were 3 payments that could not be traced not 2. The re-credit was separate to the 3 payments that were not accounted for by HMRC. A list of the 3 payments and the dates of payment is set out in the Notice of Appeal. HMRC has made no attempt to explain why the 3 substantial payments made by me could not be traced, and has not confirmed that in fact they have now been re-traced. The fact that HMRC has issued a Statement that appears to show payments allocated does not mean that the payments have been traced.

19. Para 2 – this only deals with 2 of the 3 payments that were made.

20. Para 3 – No explanation has been provided for the inexcusable delays. My queries regarding the allocation of the re-credit set out in my email dated 20 December 2022 remain unanswered.

21. Para 5 – the Statement of Account issued 31 August 2022 did not record any payments made by me as credited to my tax account. No explanation is given.

22. Para 7 – There is no statement of Account issued on 22 December 2022. There are 2 Statements of Account issued to me in December 2022 – one dated 12 December 2022 (issued to me via Mr O'Shea on 12 December 2022) and the other dated 14 December 2022 (issued to me via Mr O'Shea on 20 December 2022). HMRC states in these Statements of Account that I owe £3535.66 in unpaid tax, but HMRC is chasing payment by me of £8611.50 through Debt Recovery Agencies.

23. Para 8 – It is correct that HMRC maintains that the FTT has no jurisdiction to deal with judicial review matters including compensation/damages arising out of judicial review. …

…

24. Para 10 – what is stated here is incoherent and contradictory and is factually incorrect. The Statement of Account "issued 31 August 2022" plainly cannot be correct and accurate if it fails to record and account for payment allocation and interest. HMRC states that "some of the payments were not allocated … until after … 31 August 2022." In fact NONE of my payments and no part of the re-credit were allocated until long after 31 August 2022.

Conclusion

> 25. It is quite clear that HMRC have acted over a prolonged period of time in complete contradiction of the legitimate expectations that I have had and continue to have in relation to the treatment of my tax account by HMRC. No explanations or reasons have been provided. These are matters that are legitimate maters [sic] for judicial review and the FTT has the jurisdiction to deal with them under my Notice of Appeal for the reasons previously set out in detail, which HMRC does not address."

DISCUSSION

38. The extensive written representations made by Mr Stenhouse raise two issues of jurisdiction and procedure and contain an allegation of criminal misconduct. The jurisdictional and procedural questions are:

(1) whether the FTT has any jurisdiction in relation to the matters pleaded by Mr Stenhouse in his Notice of Appeal, and, if not,

(2) whether the FTT can and should transfer the proceedings to the UT under rule 5(3)(k) of the FTT Tax Rules.

39. I have set out Mr Stenhouse's submissions on the procedural issues in full above and do not repeat them here. In short, those submissions are wholly misconceived. I set out the correct position below.

Jurisdictional and procedural issues

40. As Mr Stenhouse acknowledges in his email of 16 April 2023, citing *Birkett v HMRC* [2017] UKUT 89 (TCC) ('*Birkett*'), the FTT is a creature of statute. It was created by section 3 of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') 'for the purpose of exercising the functions conferred on it under or by virtue of [the TCEA] or any other Act'. The FTT's jurisdiction is entirely statutory and it can only hear an appeal if a statute provides that there is a right of appeal.

41. Paragraphs 13, 14 and 15 of Schedule 56 to the Finance Act 2009 ('FA 2009') deal with appeals against penalties for late payment of tax. Paragraph 13 provides that a person who has been assessed for a penalty may appeal against the decision of HMRC that the penalty is payable and/or a decision as to the amount of the penalty. Paragraph 14 states that an appeal in relation to a penalty is treated in the same way as an appeal against an assessment to the tax concerned subject to some irrelevant exceptions. Paragraph 15 states that, on an appeal against a decision that a penalty is payable, the FTT may affirm or cancel HMRC's decision. Paragraph 15 also states that, on an appeal against a decision that as to the amount of the penalty, the FTT may affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make.

42. In the document entitled "What this Tribunal appeal is all about" that accompanied his Notice of Appeal, Mr Stenhouse stated that the appeal was against penalties for non-payment of tax due. He also stated that the appeal concerned inconsistent and contradictory Statements of Account/Liabilities and compensation for failures by HMRC. Mr Stenhouse now accepts that the FTT has no power to award compensation. It is also the case that there is no right of appeal against a Statement of Account or Statement of Liabilities. That leaves the issue of the penalties against which there is a right of appeal under Paragraphs 13 of Schedule 56 to FA 2009. However, when Mr Stenhouse submitted his Notice of Appeal to the Tribunal on 14 September 2022, he had already received the Statement of Account issued by HMRC on 31 August 2022 showing that all the late payment penalties had either been reduced to nil or cancelled. It follows that, at the time that he submitted his Notice of Appeal, Mr Stenhouse was not liable to pay any penalty and so there was no decision by HMRC that a penalty was payable (nor, it follows, any decision as to the amount of any

penalty) against which Mr Stenhouse could appeal. As there was no appealable decision, there was no right of appeal and the FTT never had any jurisdiction in the matter of Mr Stenhouse's dispute with HMRC.

43. It is irrelevant that Mr Stenhouse had a right of appeal until the penalties were reduced to nil or cancelled by HMRC before he lodged his Notice of Appeal. The FTT has no jurisdiction in relation to income tax assessments that have been withdrawn by HMRC because, in the absence of any assessment, there is nothing to appeal against and the FTT does not have any jurisdiction in relation to the circumstances of the making of an assessment that has been withdrawn before the appeal is made to it (see *Hannigan v HMRC* [2009] UKFTT 334 (TC)). The same considerations apply to the penalties in this case (see paragraph 14 of Schedule 56 FA 2009).

44. Mr Stenhouse does not accept that the fact that there is no appealable decision is the end of the matter. In his email of 22 May 2023, Mr Stenhouse stated that his case raises 'judicial review' issues that need to be determined and which the FTT should determine. He claims that HMRC have created a legitimate expectation that they would deal with Mr Stenhouse's tax affairs in a particular way and then acted in contravention of that legitimate expectation.

45. Mr Stenhouse argues that there are no limits to the jurisdiction of the FTT and it can deal with his judicial review claim. In his email of 16 April quoted at [30.] above, Mr Stenhouse refers to *Birkett* in which the UT considered whether the FTT has a judicial review jurisdiction in the context of an appeal concerning daily penalties imposed for failing to comply with information notices. Mr Stenhouse quotes three of the five points set out by the UT at [30] but he failed to refer to the fourth and fifth which are as follows:

> "(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

46. Mr Stenhouse has misunderstood *Birkett*. The UT is not saying that the FTT has an independent jurisdiction to consider judicial review claims or public law points. The UT is stating only that the FTT may consider public law points, including legitimate expectations, where the section granting the right of appeal, properly construed, permits. Further, in *Birkett*, the UT held that the FTT had no jurisdiction to consider a legitimate expectation argument in an appeal brought pursuant to paragraph 47(a) and (b) of Schedule 36 to the Finance Act 2008 which, as in this case, provide a right of appeal against a decision of HMRC that a penalty is payable and against a decision as to the amount of the penalty.

47. In this case, as I have explained above, there is no appealable decision because the penalties were cancelled or reduced to nil before the Notice of Appeal was lodged and thus there is no statutory jurisdiction for the FTT to construe. Even if that were wrong, I consider that the decision in *Birkett*, which is binding on me, in relation to materially identical provisions shows conclusively that the FTT does not have jurisdiction to consider public law points such as Mr Stenhouse's arguments based on legitimate expectations. However, there have been some other cases on whether the FTT has jurisdiction to consider public law points decided after *Birkett* which I must consider before reaching a final conclusion on this point.

48. The Court of Appeal in *Beadle v HMRC* [2020] STC 1058 ('*Beadle*') considered whether the FTT had jurisdiction to consider a challenge to Partner Payment Notice ('PPN')

on public law grounds in the course of a statutory appeal against a penalty notice for non-compliance with the PPN. The penalty in *Beadle* was imposed and appealed under the same provisions in Schedule 56 FA 2009 as in this case. Simler LJ set out the correct approach to the issue at [44]:

> "Where a public body brings enforcement action against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act."

49. Having applied that approach, Simler LJ concluded at [55] that "the FTT has no jurisdiction to entertain a public law challenge to the validity of a PPN given pursuant to the FA 2014, in the course of an appeal against a penalty notice".

50. The conclusion in *Beadle* that the FTT had no jurisdiction to consider public law points in the context of an appeal against a penalty is entirely consistent with the UT's decision in *Birkett*. The same penalty provisions were in issue in *Beadle* as in this case and the Court of Appeal's decision confirms that, even if there were an appealable decision against which he could appeal, the FTT would not have jurisdiction to consider Mr Stenhouse's public law points on legitimate expectation.

51. In his email of 16 April 2023, Mr Stenhouse referred to *KSM Henryk Zeman v HMRC* [2021] UKUT 182 (TCC) ('*Zeman*'). That case concerned an appeal under section 83(1)(p) of the VAT Act 1994 ('VATA') against an assessment for VAT. The starting point was clearly set out by the UT at [27]:

> "We have no doubt that the nature of the FTT's jurisdiction depends on the proper construction, in the context of the statutory provisions to which it relates, of the statutory provision by which it is given, in this case, s 83(1)(p)."

52. The UT concluded at [69] of *Zeman* that the FTT does not have a general supervisory jurisdiction in appeals under section 83 VATA but went on to hold, applying the same approach as Simler LJ in [44] of *Beadle*, that the FTT had jurisdiction to consider a public law defence of legitimate expectation in an appeal under section 83(1)(p) against a VAT assessment. The UT summarised its approach and conclusion in [84] as follows:

> "… the critical question in this case … is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law defence of legitimate expectation … For all the reasons given above, we do not consider that section 83(1)(p) does exclude that ability. On the contrary, on the facts of this case and given the broad subject-matter of section 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case."

53. It is significant that, in *Zeman*, the UT was considering an entirely different statutory provision relating to an assessment for VAT and its conclusion is based on its construction of

that provision. The UT specifically stated that the FTT does not have a general supervisory jurisdiction in VAT appeals.

54. For the reasons stated above, Mr Stenhouse does not have (and has never had) a valid appeal in the FTT. Accordingly, the FTT has never had jurisdiction in relation to Mr Stenhouse's dealings with HMRC. It follows that no question of whether the FTT has jurisdiction to consider and determine public law issues arises. Rule 8(2) of the FTT Tax Rules provides:

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

55. In the circumstances (and as the FTT did in *Hannigan*), Mr Stenhouse's appeal must be struck out under rule 8(2)(a) of the FTT Rules as the FTT has no jurisdiction in relation to the matters which he wishes to raise.

56. Even if the FTT had jurisdiction in relation to an appeal by Mr Stenhouse against the penalties, it would not have jurisdiction to consider his submissions on legitimate expectation or any other public law issues.

57. In the event that the FTT does not have jurisdiction to deal with his "issues that arise under a 'judicial review' challenge to the conduct of HMRC in dealing with the tax affairs of a UK tax payer", Mr Stenhouse submits that the FTT should use its power under rule 5(3)(k) of the FTT Tax Rules to transfer the proceedings to the UT so that it can deal with his damages claim (see email 16 February). Rule 5(3)(k) of the FTT Tax Rules provides:

> "(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—
>
> (i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> (ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;"

58. I refuse to make a direction transferring Mr Stenhouse's case to the UT because the criteria in Rule 5(3)(k) are not satisfied for the following reasons.

59. First, such a direction can only be made where there are proceedings in the FTT. As explained above, there has never been a valid appeal and the FTT has never had any jurisdiction over Mr Stenhouse's issue with HMRC and, therefore, there are no proceedings that can be transferred.

60. Secondly, even if it could be said that proceedings had started, there has not been a change of circumstances since the start of the proceedings.

61. Thirdly, it cannot be said that the FTT "no longer has jurisdiction in relation to the proceedings" when it has never had jurisdiction.

62. Fourthly, I do not consider that the UT is an appropriate forum for the determination of the issues raised by Mr Stenhouse. As the "What this Tribunal appeal is all about" document and his email of 12 December 2022 make clear, what Mr Stenhouse is seeking is compensation for HMRC's alleged failings in their dealings with him. Mr Stenhouse is not challenging an unlawful decision or act by HMRC (which could be the subject of a judicial review) but making a complaint that HMRC have been incompetent in their dealings with him (see his email of 12 December 2022). The UT is not the appropriate forum to deal with complaints about alleged administrative failings by HMRC

63. Finally, it would not be appropriate for the FTT to transfer proceedings to the UT as a judicial review thus circumventing the need for an application for judicial review to the Administrative Court to be made first in the proper form and subject to the usual time limits followed by an application under section 19 of the TCEA for the transfer of a judicial review to the UT. Such a transfer must be made if Court is satisfied that the four conditions in section 31A of the Supreme Court Act 1981 ('SCA 1981') are met. Two of the conditions are not met in this case and it cannot be appropriate for the FTT to transfer proceedings to the UT as judicial review proceedings where the High Court could not do so.

64. Condition 1 is that the application for judicial review does not seek anything other than relief under section 31(1)(a) and (b) (or permission to apply for such relief) or an award under section 31(4) SCA 1981 or interest and costs. Section 31(1)(a) and (b) refer to an application for relief in the form of (a) a mandatory, prohibiting or quashing order and (b)a declaration or injunction. Mr Stenhouse has never made any application for relief under section 31(1)(a) and (b). He has only ever sought compensation (including costs and interest). As the opening words of section 31(4) make clear, the power to award damages is only arises on an application for judicial review under section 31(1). In the absence of any such application by Mr Stenhouse, Condition 1 is not met and the High Court is not required to transfer the proceedings to the UT.

65. The High Court may transfer judicial review proceedings to the UT if it is satisfied that all of the conditions are met save for Condition 3 and the Court considers that it would be just and convenient to do so. Condition 3, referred to in section 31A(6), is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007. In relation to that condition, the then Lord Chief Justice (Lord Judge) made a practice direction in 20008 stating that challenges could be made in relation to any decision of the FTT where there is no right of appeal to the UT and the decision is not an excluded decision for the purposes of section 11(5)(b), (c) or (f) of TCEA 2007. In this case, there is no decision of the FTT so Condition 3 is not met and I do not regard it as just or convenient to transfer Mr Stenhouse's case to the UT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 24 July 2023