

PUMP COURT  
TAX CHAMBERS

# Tax litigation: recent developments

Laura Poots and Calypso Blaj

# Introduction

1. Closure notice applications and incidental questions of law: *Eastern Power*
2. Enquiry notices and estoppel by convention: *Tinkler*
3. Interested Parties: *HSBC Electronic Data Processing (Guangdong)*
4. Public law issues within the jurisdiction of the FTT: *Henryk Zeman*
5. Delay in judgment as a ground of appeal: *Natwest Markets Plc v Bilta (UK) Ltd*
6. The scope of Respondent's Notices: *SSE Generation*

# Closure Notice Applications

*Vodafone 2 v HMRC* [2006] EWCA Civ 1132

- Taxpayer argued the provisions were contrary to EU law, enquiry should be closed
- Special Commissioners considered a reference to the ECJ was needed
- Court of Appeal:
  - SpC had jurisdiction to decide “incidental questions of law”
  - SpC to consider whether to exercise power to decide those questions in light of particular circumstances

# Closure Notices: *Eastern Power*

*Eastern Power Networks Plc v HMRC* [2021] EWCA Civ 283

- Consortium relief, and the application of an anti-avoidance provision with a “purpose test”
- HMRC seeking to investigate the purpose of complex arrangements
- Taxpayer argued purpose irrelevant because the provision could not apply in any event
- Deciding the questions of law required:
  - detailed analysis of complex facts, including identifying the arrangements
  - interpretation and application of two statutory conditions

# Closure Notices: *Eastern Power*

Rose LJ on procedure followed ([53] onwards):

- Enquiry stalled for over four years
- *Vodafone* was “a very particular instance” – fundamental, and could bring the enquiry to a halt
- Jurisdiction to decide incidental question of law should be “used sparingly”
- Taxpayers “should not be encouraged to pick and choose which information they provide and then ask the Tribunal to decide the applicability of one element”

# Closure Notices: *Eastern Power*

- Approach here required the Tribunals to apply the statutory provision "*in the absence of any clear findings of fact about the scheme as a whole and without any agreed statement of facts*"
- Issues of precedent and issue estoppel resulting from FTT decision on closure notice application
- Firmly discourage the FTT from embarking on the kind of hearing that occurred here

# Estoppel by convention

## *Tinkler v HMRC* [2021] UKSC 39, [2021] STC 1546

- Single ground before the SC: whether Mr Tinkler was estopped from denying that a valid enquiry had been opened
- Principles (*HMRC v Benschdollar* [2009] EWHC 1310 (Ch), [2009] STC 2342) ([45]):
  - Common assumption upon which estoppel is based is expressly shared between the parties (conduct to “cross the line”: see *Tinkler* at [49])
  - Party alleged to be estopped must have assumed some element of responsibility for it
  - Party alleging estoppel must have relied on the common assumption
  - Reliance occurred in connection with subsequent mutual dealing between the parties
  - Detriment suffered by person alleging estoppel / benefit conferred on party alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true position (although unconscionability is unlikely to add anything once the other elements have been established: see *Tinkler* at [64])

# Estoppel by convention

## Application to the facts

- HMRC mistakenly believed that it had opened a valid enquiry but BDO (Mr Tinkler's agents) **endorsed** HMRC's mistaken assumption by the contents of their letter of response ([57])
- Detriment / benefit – No further notice of enquiry / £635,000 of tax ([63])
- Unconscionability – HMRC's mistake insufficient / Mr Tinkler and/or his PA had knowledge of the enquiry prior to the deadline which was sufficient ([65])

# Estoppel by convention

## Implications?

- Relationship with statutory protections (*Keen v Holland* [1984] 1 All ER 75; [79] – [83])
- Exercise caution particularly in early correspondence with HMRC (and see further Lord Burrows' final paragraph at [85])

# Interested Parties

*HSBC Electronic Data Processing (Guangdong) Ltd v HMRC [2021] UKUT 0058 (TCC)*

- FTT directed hearing of preliminary issues on VAT grouping
- Preliminary issues transferred to the Upper Tribunal under Rule 28
- Barclays entities applied to:
  - Be added as interested parties
  - Permitted to make written and oral submissions

# Interested Parties

- Rules 9 and 1 of the UT Rules
- UT concluded that it did not have jurisdiction to add the Applicants as interested parties – definition of interested party very limited
- Even if UT had jurisdiction, would not have exercised that power:
  - Questions of law
  - Applicants can make submissions on their own facts to the FTT
  - Possible prejudice to existing hearing timetable

# Interested Parties

- Compare rule 5(3)(d) of both the UT Rules and the FTT Rules, and submissions from interveners (e.g. CIOT in *Lobler*)
- UT also declined to make a direction under Rule 5(3)(d)
- “Applicant’s motivation is to have a say in the conduct and ambit of the Hearing and the terms of the Tribunal’s decision”
- Their “status is that they are parties to another appeal before the FTT”

# Jurisdiction of FTT: Public Law Issues

*KSM Henryk Zeman v HMRC* [2021] UKUT 182

- Appeal against VAT assessment (s83(1)(p) VATA)
- Taxpayer argued legitimate expectation that it would not be assessed on certain supplies
- Alleged legitimate expectation:
  - Taxpayer completed a form which contained ambiguous questions/questions which not satisfactorily cover taxpayer's situation
  - Answers given were incorrect
  - HMRC responded saying that taxpayer not entitled to be registered, setting out the basis of that conclusion

# Jurisdiction of FTT: Public Law Issues

- Both FTT and UT concluded that there was no legitimate expectation
- UT went on to consider jurisdiction re the legitimate expectation argument
- Basic principles:
  - The FTT does not have a *general* supervisory jurisdiction
  - Nature of the FTT's jurisdiction depends on proper construction of the relevant statutory provision (section 83(1)(p))
  - Exclusivity principle: in general an abuse of process to challenge the validity of public acts otherwise than by judicial review

# Jurisdiction of FTT: Public Law Issues

- UT viewed the taxpayer as “defending part of an enforcement action” ([34])
- Limit to the exclusivity principle: taxpayer is entitled to defend himself by challenging the validity of the enforcement decision on public law grounds, unless that entitlement is excluded by the relevant statutory regime ([34], [70])
- Was it excluded? No:
  - HMRC’s power to assess (s73) is permissive, not mandatory ([72])
  - Appeal right (s83(1)(p)) is “with respect to” an assessment under s73 ([74])
  - That does not exclude a general public law defence ([75])
  - Policy reasons – duplication, delay and potential injustice ([82])

# Jurisdiction of FTT: Public Law Issues

Compare/contrast:

- **Oxfam** [2009] EWHC 3078 (Ch). Appeal under section 83(1)(c) VATA “with respect to” amount of input tax. FTT had jurisdiction to consider issues of public law.
- **Noor** [2013] UKUT 071 (TC). Also an appeal under section 83(1)(c). Jurisdiction was to determine the amount of input tax “under the VAT legislation”. Not entitled to consider issues of public law.

# Jurisdiction of FTT: Public Law Issues

## Impact

- Uncertainty
- Scope of application – other decisions by HMRC based on “permissive” statutory powers
- Taxpayers continuing to run dual challenges

# Delay in judgment as a ground of appeal

## *Natwest Markets Plc v Bilta (UK) Ltd (In Liquidation)* [2021] EWCA Civ 680

- MTIC case (loss to the Revenue in excess of £44M)
- Trial of 5 weeks
- Delay of 19 months in handing down the judgment (described as “plainly inexcusable” at [45] and “serious” ([52])).
- Key ground of appeal:

“... the complaint at the heart of RBS’s appeal was that, when making his findings of dishonesty [...] the Judge failed to refer to what were said to be key documents or evidence pointing in the other direction, or corroborating the Traders’ account of events, and did not address the submissions made by the Appellants about that evidence. [...] because of the delay, it could not be assumed that the Judge had paid attention to these matters even though they were not mentioned in his lengthy (168-page) judgment”.

# Delay in judgment as a ground of appeal

## Review of case law

- General, unwritten rule: judgment within 3 months even in long and complex cases ([44])
- Delay not, on its own, enough to set aside a judgment but an important factor when reviewing the trial judge's findings and treatment of the evidence ([45])
- Must be a "causal link" between the excessive delay and the alleged failings in the judgment ([55])
- If the judge's recollection of the evidence is "at fault" on any material point, the court will order a retrial if not satisfied that the judge came to the right conclusion ([56])
- Judge's recollection of the evidence being "at fault" **includes** a failure to address material evidence in the judgment ([57])

# Delay in judgment as a ground of appeal

## Application to the facts

- 3 items of evidence that the trial judge had not referred to in the judgment
- Credit advanced to judges in respect of timely judgments but not in respect of delays of this magnitude ([96] – [97])

# Delay in judgment as a ground of appeal

- See The Tax Law Review Committee report: “The tax tribunals: the next 10 years” (July 2021)

## Note of caution!

- 1) MTIC case / factually complex / allegations of dishonesty / evidence in relation to one dinner
- 2) Trial judge’s reservations in his consequential judgment ([2020] EWHC 2598 (Ch))
- 3) *Dansingani v Canara Bank* [2021] EWCA Civ 714

# Respondent's Notices: Appeal to the UT

*HMRC v SSE Generation Ltd* [2019] UKUT 332 (TCC), [2020] STC 107

- Capital allowances claim (c. £227M in dispute before the FTT)
- Respondent's Notice filed comprising 5 arguments:
  - 4 in relation to expenditure that the FTT held was allowable
  - 1 in relation to expenditure that the FTT held was partially allowable
- Rule 24(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698:
  - “(3) The response must state –
    - (e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) **any grounds** on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal”

# Respondent's Notices: Appeal to the UT

## *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105, [2021] STC 105

- See [70] – [80]
- The “grounds” referred to in Rule 24(3)(e) of the UT Rules are the grounds on which the party relies “in its character as a respondent to the appeal” ([77])
- Contrasted with Respondent’s Notices in the civil courts ([79]). See CPR 52.13(2)-(3):
  - “(2) A Respondent who –
    - (a) is seeking permission to appeal from the appeal court; **or**
    - (b) wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court,must file a respondent’s notice.
  - (3) **Where the respondent seeks permission to appeal from the appeal court it must be requested in the respondent’s notice”.**

# Respondent's Notices: Appeal to the UT

## Implications?

- *Northern Gas Networks Ltd v HMRC* [2021] UKUT 157 (TCC) at [5], [34] and [52]
- “One must identify **what decision of the FTT is being challenged**” (*SSE Generation Ltd* (CA) at [80])
- *Euromoney Institutional Investor Plc v HMRC* [2021] UKFTT 321 (TC)

# PUMP COURT TAX CHAMBERS

## Q&A

## moderated by Edward Waldegrave

16 SEPTEMBER 2021

**Thank you for attending.**

Our next webinar will be Thomas Chacko and Quinlan Windle on “Pensions Taxation” on 13 October 2021.