[2014] UKUT 0485 (TCC)

Appeal number: FTC/67/2013

VAT – appeals against assessment – applications to be relieved of obligation to deposit amounts assessed on ground of hardship – whether First-tier Tribunal erred in dismissing applications – s. 84(3B) Value Added Tax Act 1994

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

TOTEL LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at the Rolls Building, London EC4A 1NL on 26-27 June 2014

Daniel Burgess (instructed by Litigaid LLP) for the Appellants

Rachel Kamm (instructed by the General Counsel and Solicitor for HM Revenue and Customs) for the Respondents

DECISION

Mr Justice Nugee:

Introduction

1. This is an appeal against two decisions of the First-tier Tribunal (**"FTT"**) (Judge Colin Bishopp), dated 11 May 2009, in which he dismissed hardship applications by ToTel Ltd (**"ToTel"**) in respect of two proposed appeals against assessment to VAT. A hardship application is an application by a proposed appellant for a direction pursuant to s. 84(3B) of the Value Added Tax Act 1994 (**"VATA 1994"**) that the appeal be entertained without payment or deposit of the disputed tax on the grounds of hardship.

Procedural history

2. These applications have an unusual procedural history which explains why it has taken so long for appeals against decisions made in 2009 to be heard. I will summarise it as briefly as I can:

(1) ToTel appealed the relevant VAT assessments in 2006 and 2008. At those dates appeals lay to a VAT and Duties Tribunal (**"VAT Tribunal"**), and ToTel's hardship applications were therefore also initially made to the VAT Tribunal. However they had not been heard by 1 April 2009 when the FTT replaced the VAT Tribunals, and they therefore continued thereafter as applications to the FTT (under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56).

(2) The FTT decided the hardship applications on 11 May 2009. Under the same Transfer Order, VATA 1994 had by then been amended by the introduction of s. 84(3C) which provided that the decision of the tribunal (that is the FTT) as to the hardship issue was final, notwithstanding the general right of appeal to the Upper Tribunal (**"UT"**) against decisions of the FTT under s. 11 of the Tribunals, Courts and Enforcement Act 2007.

(3) ToTel then brought judicial review proceedings. In those proceedings it relied on 4 grounds, of which Ground 1 challenged the abolition of the right of appeal by s. 84(3C) VATA 1994 as being *ultra vires*, and the others challenged the decisions of the FTT as being vitiated by errors of law and/or *Wednesbury* unreasonable, incompatible with general principles of the law of the European Union, and contrary to the Human Rights Act.

(4) The judicial review proceedings were heard by Simon J. By a judgment dated 24 March 2011 he dismissed all the grounds of challenge: *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber)* [2011] EWHC 652 (Admin).

(5) ToTel appealed to the Court of Appeal. By judgments dated 31 October 2012 the Court of Appeal allowed ToTel's appeal on Ground 1, holding that the introduction of s. 84(3C) was *ultra vires*: *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber)* [2012] EWCA Civ 1401. That meant that an appeal did lie to the UT against the decisions of the FTT on the hardship applications.

(6) None of the members of the Court of Appeal expressed any views about the merits of ToTel's other grounds. Moses LJ, who gave the leading judgment, said [37]:

> "Since I have reached that view [on Ground 1] I shall say nothing as to whether ToTel has any greater chance of success before the Upper Tribunal than it had before Simon J in establishing any error of law."

Arden LJ, who gave a short concurring judgment, said [43]:

> "It is unnecessary to express any view on the other grounds of appeal argued by Mr Beal."

Lord Neuberger MR agreed with both judgments and did not add anything [45].

(7) Having established its right of appeal to the UT, ToTel returned to the FTT to ask for permission to appeal. This was refused by the FTT (Judge Bishopp) on 4 April 2013, but granted by the UT (Judge Herrington) on 28 May 2013.

3. ToTel now advances in this appeal the same challenges to the decisions of the FTT as it had argued unsuccessfully before Simon J. It is common ground between Mr Burgess, who appeared for ToTel, and Miss Kamm, who appeared for Her Majesty's Commissioners for Revenue and Customs (**"HMRC"**), that I am not bound, sitting in the UT, by Simon J's decisions on these points. The general principle is that the UT is not formally bound by decisions of the High Court, any more than one High Court judge is bound by the decisions of another High Court judge, because the UT is not for these purposes to be equated to an inferior court but is exercising a jurisdiction of equivalent status: *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [40]-[47], *Gilchrist v HMRC* [2014] UKUT 0169 (TCC) at [85]-[101]. However this does not mean that the UT will readily depart from prior High Court decisions. The classic formulation is that one High Court judge will follow another as a matter of comity unless "convinced" that the earlier judgment is wrong: *Huddersfield Police Authority v Watson* [1947] KB 842 at 848 per Lord Goddard CJ. In *Secretary of State for Justice v RB*, the UT (Carnwath LJ and Judge Sycamore) said that this should be qualified where the UT was dealing with highly specialised issues where tribunals had particular expertise and that in such cases the UT might in a proper case feel

less inhibited in revisiting issues decided at High Court level (at [41]); subject to that, the UT should not depart from an approach adopted by the High Court unless "satisfied" that it was wrong (at [47]). In *Gilchrist v HMRC* the UT (David Richards J and Julian Ghosh QC) said that they did not consider that there was any difference between "convinced" and "satisfied" in this context (at [94]).

4. As I have said, it is common ground that these are the principles that I should apply, and it does appear from Moses LJ's judgment that he envisaged that an appeal to the UT would consist of a re-run of the arguments before Simon J. Yet I confess to finding the exercise an unusual one. In the cases to which I have just referred, the UT was being asked to depart from some legal principle that had been laid down by the High Court in previous cases. It is a familiar task for a court or tribunal to identify a principle of law applied in a previous decision and then either apply that principle to the case before it, or if convinced or satisfied that the earlier decision was wrong in that respect, depart from it. But the present exercise is rather different. I am being asked to consider effectively the same points of law arising out of the very same facts as have already been considered by Simon J, and to a large extent what is in issue is not any particular principle, but the application of the principles to the facts. This makes the exercise much more like a review of Simon J's decision, a task which is self-evidently more suited to the Court of Appeal than to me. Although I accept that judicial review can now be seen to be an inappropriate means of challenging the FTT's decisions on hardship given that an appeal lies to the UT against such decisions, it seems a slightly surprising and inefficient use of resources (both those of the parties and those of the court and tribunal service) for ToTel, having unsuccessfully deployed its arguments before one High Court judge sitting in the Administrative Court, to be able to re-run the same arguments on the same material before another High Court judge sitting in the UT. It is not as if there is anything in the Court of Appeal decision on Ground 1 (the *ultra vires* point) which by itself casts doubt on the reasoning or conclusions of Simon J on the remaining grounds.

5. Be that as it may, I will proceed to deal with the various points taken by ToTel on the basis that I should depart from Simon J's decision on any of them only if convinced or satisfied that he was wrong. It was not suggested to me, and in any event I do not consider, that this is one of those cases where the UT has such an expertise in highly specialised legislation that I should feel less inhibited than normal in revisiting the issues.

Facts

6. ToTel's principal business is that of selling mobile phones. In 2006 it submitted a VAT claim to HMRC for the VAT period 01/06. The documentation produced in connection with the claim showed ToTel to have purchased a number of Samsung and Sony Ericsson mobile phones in January 2006 at a price which included input tax of £205,625, and to have sold the same phones and exported them to Belgium in transactions which were zero-

rated. It therefore claimed the sum of £205,625 from HMRC which HMRC paid on 28 February 2006.

7. For the VAT period 03/06 ToTel made another claim for payment of the input tax, in this case on the purchase of mobile phones and satellite navigation systems. HMRC paid the majority, but not all, of the claim.

8. On 31 July 2006 HMRC wrote to ToTel refusing the claim for £147,000 of the input tax for 03/06. I have not seen the letter but it appears that the basis of the refusal was that the particular models of mobile phone said to have been acquired were not in fact generally available in March 2006. ToTel appealed this decision in August 2006. The appeal is proceeding under reference MAN/06/0597. This is a so-called 'withhold' appeal as HMRC had withheld the input tax claimed by ToTel.

9. On 22 September 2006 HMRC denied a further sum of £200,103.75 claimed as input tax for period 03/06, on the same grounds, it would appear, as the July decision. This was appealed by ToTel in October 2006 under reference MAN/06/0717. This is another withhold appeal.

10. Shortly after on 3 October 2006 HMRC wrote to ToTel about the input tax which it had claimed for 01/06 and which HMRC had already paid. Here too HMRC had concluded that the transactions could not have taken place (on the basis that the particular models in question were not available in January 2006) and hence was denying ToTel's right to deduct input tax. It therefore enclosed an assessment for the sum paid of £205,625. This is a so-called 'clawback' assessment as HMRC sought to reclaim input tax which it had already paid to ToTel.

11. By notice of appeal dated 15 December 2006 ToTel appealed to the VAT Tribunal against the assessment under reference MAN/06/0901. ToTel included in its notice of appeal a hardship application. Under the legislation as it then stood (s. 84(3) VATA 1994) an appeal of this type could not be entertained unless the amount assessed had been paid or deposited with HMRC or (s. 84(3)(b)):

> "on being satisfied that the appellant would otherwise suffer hardship the Commissioners agree or the tribunal decides that it should be entertained notwithstanding that that amount has not been so paid or deposited."

12. By letter dated 4 January 2007 HMRC stated that it was not satisfied that ToTel would suffer hardship. The hardship application thereafter proceeded as an application to the VAT Tribunal.

13. In December 2007, following an extended verification process, HMRC denied ToTel a claim for input tax of £2,478,751.40 for periods 04/06 and 05/06. ToTel appealed this under reference MAN/08/0056. This is another withhold appeal.

14. Finally, on 10 November 2008 HMRC notified ToTel that it had decided to deny input tax for the period 03/06 (which HMRC had already repaid) on the grounds that HMRC was satisfied that the relevant transactions were part of a scheme to defraud the revenue and that ToTel knew or should have known that that was the case, in accordance with the principles laid down by the European Court of Justice (**"ECJ"**) in *Axel Kittel v Belgium* (Case C-439/04) [2006] ECR I-6161. This was followed by another clawback assessment dated 12 November 2008 in the sum of £1,268,726.38.

15. By notice of appeal dated 26 November 2008 ToTel appealed this assessment to the VAT Tribunal under reference MAN/08/1485. Again ToTel included a hardship application in the notice of appeal. On 9 December 2008 HMRC objected to the hardship application which thereafter proceeded before the Tribunal.

16. In summary therefore Totel has outstanding two clawback appeals in each of which it made a hardship application, namely MAN/06/0901 in the sum of £205,625 and MAN/08/1485 in the sum of £1,268,726.38.

17. It also has three other appeals (MAN/06/0597, MAN/06/0717 and MAN/08/0056) which are not clawback appeals but withhold appeals, the total amount withheld being over £2.8m. Since HMRC has withheld payment of input tax, there is no assessment, and hence no requirement to deposit the amount assessed. They are not therefore of direct relevance (indeed Miss Kamm said they were of no relevance at all), but they form part of the background. They have been stayed pending the outcome of these proceedings although Miss Kamm said there was no reason why they should have been.

18. I will have to refer in some detail to the procedural history of the hardship applications, and the financial evidence available to the FTT, but it is more convenient to do so in the context of Mr Burgess's particular submissions.

The legislation

19. By April 2009, when the FTT heard the applications, the legislation had been amended but not so as to fundamentally change the substance. The clawback appeals fell within what was then s. 83(1)(p) VATA 1994. That meant they were subject to s. 84(3) VATA 1994 under which, subject to s. 84(3B) and (3C), the appeals could not be entertained unless the VAT amounts which HMRC had determined to be payable had been paid or deposited with them; s. 84(3B) provided as follows:

> "(3B) In a case where the amount determined to be payable as VAT … has not been paid or deposited an appeal shall be entertained if –
>
> (a) HMRC are satisfied (on the application of the appellant), or

(b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),

that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship."

As already referred to, s. 84(3C) purportedly provided that the tribunal's decision as to the issue of hardship should be final but the introduction of this provision was later held to be *ultra vires*.

The decision of the FTT

20. Judge Bishopp gave a carefully reasoned decision rejecting both hardship applications. In the light of the many criticisms made of his decision, it is probably simplest, as Simon J did, to set out effectively the entirety of his reasoning, found at [12] to [18] of his decision. After referring to the amended legislation in s. 84(3B) and (3C) VATA 1994 he continued:

"12. The procedure has changed slightly as a result of the amendment, but the substance of the requirement is unchanged. The purpose of requiring the payment in advance of the disputed tax is the obvious one of preventing the abuse of the appeal mechanism as a means of putting off its payment. The effect in some cases might be to stifle a meritorious appeal when the intending appellant is unable to pay, and the hardship provisions are designed to counter that possible effect.

13. I accept Mr Thornton's argument that hardship applications should ordinarily be decided by the tribunal on the basis of contemporaneous or near-contemporaneous information. However, that requirement must be balanced against the obligation of an appellant making such an application to pursue it diligently. I have recorded already that the appellant is not to blame for delays after July 2008, but even if its application had been heard in August or September, almost two years would have gone by since the letter demanding the repayment of the input tax credit had been made. It is necessary to make some allowance for the inevitable interval between the decision prompting the appeal and the hearing of a hardship application but, however generous the allowance, it is in my view an inescapable conclusion that the appellant was in this case guilty of more than a year's delay in pursuing its application. If the appellant was prejudiced by the exclusion of the more recent material on which it wished to rely, it had brought that prejudice on itself. I saw no good reason to vary the direction I had made in July 2008, and I declined to do so. I also came to the conclusion that although I was hearing the application in April 2009, it was in any event right that I should take into account the

appellant's financial circumstances in early 2007 when the tax should have been paid, or the hardship application resolved.

14. The information on which the appellant was permitted to rely in support of its first application consisted of a statement made by its managing director, Anthony Granger, its audited accounts for the year to 31 January 2007, a copy of a letter outlining a possible purchase by ToTel of another business, a copy of a charge taken by its bankers, Barclays, details of the balances held by ToTel in three Barclays accounts, an unsubstantiated cash flow forecast for the months of March to September 2008 and its draft profit and loss account for the year to 31 January 2008. I did not have a draft balance sheet, nor any notes to those accounts. Mr Granger gave oral evidence in support of both applications, and I have taken it into account in respect of both. Mr Granger explained that the company had no overdraft facilities but was required to deposit £175,000 with Barclays as a condition of its being able to bank there since Barclays, like other clearing banks, was cautious about providing facilities for wholesale dealers in telecommunications equipment, as ToTel is, and the charge was likewise designed to protect Barclays' position by preventing withdrawal of the deposit. He had unsuccessfully asked Barclays to release the money.

15. The critical evidence in relation to this application is that derived from the 2007 accounts. Its balance sheet shows that ToTel then had cash at bank and in hand of £2·4m, and net current assets of £2·7m. During the year to 31 January 2008—as the 2007 accounts record—it paid a dividend of £850,000. Against that background it seems to me impossible to conclude, whatever the company's current financial position, that it would have suffered hardship in paying the tax in early 2007. Mr Granger, as he gave evidence, sought to divorce the dividend payment from the company's resources, on the ground that dividends are shareholders' funds, but that argument in my judgment is quite wrong. Any company may pay dividends only out of resources for which there is no more compelling requirement and cannot avoid paying its creditors, whether HMRC or trade creditors, by the expedient of distributing money to its shareholders and rendering itself unable to pay. Taking account only of the material on which the appellant was permitted to rely I am satisfied not only that hardship is not made out, but that the appellant was well able to pay the disputed tax. Even when the excluded material is brought into consideration it seems to me that if the appellant is unable to pay this tax without suffering hardship it is because of its own action in paying the dividend. The first application must accordingly be dismissed.

16. The additional information available to me in support of the second application consisted of a second statement by Mr Granger, recent statements of the balances of the three Barclays accounts, ToTel's audited accounts for the years to 31 January 2006 and 2008, some information about payments and debtors but all dated May 2008 and Mr Granger's further oral evidence, in which he explained the nature of ToTel's business and recent changes in its trading pattern, much of which seemed to me to be irrelevant to the question whether Total could pay the disputed tax without suffering hardship. The critical information is that, now, ToTel has only about £169,000 in its three Barclays accounts, although it emerged that it has another account at Abbey National with a balance of about £50,000. I am aware too that the respondents have withheld a further large amount of claimed input tax—almost £3m, the subject of further appeals—and I recognise that their doing so must inevitably have had an adverse effect on ToTel's financial position. If all that information is taken at face value, and without further inquiry, it seems an obvious inference that ToTel cannot pay tax of £1·26m.

17. Mr Cannan, however, pointed out that the available evidence, when properly considered, was insufficient to demonstrate that the appellant would suffer hardship. I agree with him. Despite the history of the first application, and the fact that ToTel has been represented throughout by experienced solicitors and cannot have been unaware of what is required, and despite Mr Thornton's argument in relation to the first application that it should be determined on contemporaneous material, I was surprised to discover that almost everything made available to me was far from contemporaneous. The appellant's most recent accounting year ended almost three months ago, yet I did not have even draft accounts; and I had no management accounts, lists of debtors and creditors, cash flow forecasts or any other information demonstrating, for example, that ToTel had avoided making any further dividend payments, and that it had no other available funds. Mr Granger told me that the company's accountants had been too busy to provide the information; I found that an extraordinary comment against the background as I have related it. It is difficult to believe that the appellant could not prevail upon the accountants to attach a high priority to this application. I am also unpersuaded that the respondents' failure to reply to the solicitors' request that they explain why they were unwilling to agree to a hardship direction helps the appellant. It is not for one party to explain to another, at least when that party is represented by experienced solicitors, what it needs to do to make out its case; moreover, by this stage the application was in the course of being made to the tribunal, and not to the respondents.

> 18. The burden is on an appellant making a hardship application to satisfy the commissioners and, failing that, the tribunal that payment of the disputed tax would cause it hardship. So much is obvious from the replacement subsections of section 83, which reflect what was in fact the earlier practice. I have asked myself whether I can simply take what I have about the appellant's current bank balance at face value, and infer from that that it would suffer hardship if required to pay. I have concluded, however, taking into account the age of most of the material I have, the history of the case, particularly the payment of the dividend and the inexplicable failure to obtain recent accounting information, that I can be satisfied of no more than that it might not be able to pay, and that is not enough. The appellant has not discharged the burden and its application must consequently be dismissed."

21. It can be seen that his decision can be summarised as follows:

(1) He dealt with the two applications separately.

(2) In relation to the first application, that in appeal MAN/06/0901 concerning the assessment of £205,625, he considered in the light of the procedural history that although he was hearing the application in April 2009 he should take into account ToTel's financial circumstances in early 2007 when the tax should have been paid or the hardship application resolved [13].

(3) He further decided that ToTel should only be allowed for those purposes to rely on the material it had provided by 28 March 2008 [13].

(4) On that material, he found it impossible to conclude that ToTel would have suffered hardship in paying the tax in early 2007; indeed he was satisfied that ToTel was well able to pay the disputed tax [15].

(5) Even if however he looked at the 'excluded material' (that is the other material later provided by ToTel) he concluded that if ToTel was unable to pay the tax without hardship it was because of its own action in paying a dividend [15]. He therefore dismissed the first application.

(6) So far as the second application was concerned, that in appeal MAN/08/1485 relating to tax of £1.26m odd, he took into account all the material provided by ToTel and he considered ToTel's financial circumstances as at the hearing date in April 2009. He said that if that material were taken at face value and without further enquiry, it seemed an obvious inference that Totel could not pay tax of £1.26m [16].

(7) However he agreed with HMRC's counsel that the available evidence

was insufficient to demonstrate that ToTel would suffer hardship [17]. The burden was on ToTel and had not been discharged [18].

Grounds of appeal

22. Mr Burgess advanced ToTel's grounds of appeal under the following heads:

(1) The FTT's decision was vitiated by errors of domestic law and/or *Wednesbury* unreasonable. Mr Burgess identified 6 separate errors under this head.

(2) The FTT's decision was contrary to general principles of EU law.

(3) The FTT's decision infringed Totel's rights under the Human Rights Act and the EU Charter of Fundamental Rights (**"CFR"**).

I will deal with each of these in turn.

Ground 1(1) – dealing separately with each application

23. The first error which it is alleged Judge Bishopp made is that he considered each hardship application separately. Mr Burgess says that he should have considered whether ToTel could pay the whole outstanding tax due to be paid. He relied for this on the Court of Appeal decision in *Don Pasquale (A Firm) v Customs & Excise Commissioners* [1990] STC 556 (***"Don Pasquale"***).

24. Simon J disposed of this ground as follows (at [73]):

> "73 In the present case the tribunal was dealing with two hardship applications made two years apart in relation to two assessments; and was right to do so, not least because there was material which was admissible and relevant on MAN/08/1475 and which was not, by reason of the tribunal's case management directions, admissible in MAN/06/0901. I am not persuaded that the *Don Pasquale* case establishes any proposition which assists the claimant. In that case the Court of Appeal was considering whether there were 25 separate assessments contained in a single document and covering various return periods. The Court of Appeal held on the facts that there was one overall assessment."

25. I agree. In *Don Pasquale*, the taxpayers had been running a restaurant in Cambridge. They initially made no VAT returns at all, but when their affairs were investigated returns were made. The Commissioners however took the view that the returns were incomplete or incorrect and exercised a power under what was then para 4(1) of sch 7 to the Value Added Tax Act 1983 (**"VATA 1983"**) to:

> "assess the amount of tax due from [a person] to the best of their judgment and notify it to him."

They therefore served a notice (or notices) of assessment on the taxpayers. This consisted of 3 sheets of paper each headed Notice of Assessment. The first page contained 10 lines, each showing the amount assessed as due for a particular quarter (starting with 1 June to 31 August 1981) with a total at the bottom of the page; the second page covered another 10 quarters and the third page another 5 so that in all there were 25 quarters (ending on 31 August 1987). The total amount due was some £56,000 or, on average, slightly over £2,000 per quarter. The taxpayers appealed and made a hardship application. The tribunal member found that the taxpayers could pay the amounts shown due for the 5 quarters on the third page, being a sum a little over £10,000, and directed the taxpayers to lodge that sum.

26. On the wording of the legislation (then found in s. 40(3)(b) VATA 1983 but in the same terms as s. 84(3)(b) VATA 1994 as set out in paragraph 11 above) the Commissioners conceded, as they had before the tribunal, that if there was only one assessment in the total sum of £56,000 odd, and if the tribunal found (as it did) that the taxpayers would suffer hardship if they had to deposit the whole sum, then the tribunal had no power to require payment of part of the sum assessed as a condition of the appeal being entertained: see at 561g-h in the judgment of Dillon LJ.

27. The only point argued therefore was whether there was one assessment or 25, (neither party suggesting that the 3 sheets of paper constituted 3 assessments). This is repeatedly made clear by Dillon LJ, who gave the only reasoned judgment: see at 560e, 561f, 562b. For reasons that do not matter for present purposes, he concluded that there was only one assessment: see at 563c. Given the Commissioners' concession, it followed that the tribunal had no power to require payment of the £10,000 odd and the appeal should have been allowed to proceed without payment of any part of the sum in dispute.

28. As Simon J says this is no authority for any proposition that assists ToTel. It establishes (admittedly by concession, but there is nothing in Dillon LJ's judgment to suggest he had any doubts about this) that where there is one assessment there is no power to sever it and require payment of part of the sum due. It does not establish, or even suggest, that where there are two separate assessments the tribunal should assess hardship by considering whether the taxpayer could, without hardship, pay the global sum due. Indeed it clearly proceeds on the basis that the contrary is the case. Dillon LJ said that if there had been 25 assessments, there would have been 25 appeals, and that in that case the first 20 appeals would be able to proceed without payment or deposit, only the last 5 appeals being stayed and unable to be entertained until the £10,000 odd had been paid or deposited: see at 562a-b. He could only have said this if he accepted that in a case where there were separate assessments the tribunal should consider separately whether the taxpayer could without hardship pay the amount of each assessment rather than look at the global sum due.

29. In the present case there is not the slightest doubt that there were two separate

assessments which were the subject of two separate appeals and two separate hardship applications. The assessments were not only in respect of different periods but were over two years apart. They were also based on different grounds, the first assessment being based on HMRC's conclusion that the transactions apparently referred to in the invoices had not in fact taken place, the second assessment being based on HMRC's conclusion that ToTel knew or should have known that the transactions concerned were part of a fraud on the revenue.

30. Mr Burgess said that distinguishing *Don Pasquale* in this way would mean that HMRC could issue a series of small assessments each of which would not by itself entail hardship and hence would have to be paid before the appeal even if the taxpayer could not pay the total sum assessed. This is a misunderstanding of what *Don Pasquale* decides. If there were 25 assessments of £2,000 each, each of which were appealed, and the taxpayer could afford to pay £10,000 without hardship but no more, *Don Pasquale* indicates that the tribunal could and should require payment or deposit of £10,000 before 5 of the appeals could be entertained, but that the taxpayer could pursue the other 20 appeals without payment or deposit. Nothing in the decision suggests that because the taxpayer could afford to pay £2,000 viewed in isolation, he could be made to pay that sum 25 times over. This is simply not what it says.

31. Mr Burgess also referred under this ground to *Buyco Ltd & Sellco Ltd v Commissioners for Customs & Excise* [2006] UKVAT 19752 (***"Buyco"***), a decision of the VAT Tribunal (Dr Avery Jones). In that case Buyco had been assessed to £3.4m VAT and Sellco to £0.9m: see at [2(1)]. Mr Burgess relied on the following statement by Dr Jones at [6]:

> "It is also common ground that the burden of proof is on the Appellants. Also that the test is an "all or nothing" one; whether each of the Appellants would suffer hardship if it paid the full amount of VAT in dispute."

See also his conclusion at [12] that even taking certain matters into account Buyco:

> "would still be unable to pay the whole of the VAT in dispute without suffering hardship."

Mr Burgess suggested that these passages supported his submission that the FTT should have looked at the totality of the tax in dispute.

32. I do not accept this submission. There is nothing in the report of *Buyco* to suggest that there was more than one assessment on each company. All that these passages indicate is that the Commissioners accepted, as they had done in *Don Pasquale*, that the test for hardship in relation to an appeal against an assessment is an all or nothing one in the sense that the question is whether the

taxpayer can pay the whole amount assessed, there being no power in the tribunal to require payment of part of the tax in dispute in an appeal. There is nothing in *Buyco* which gives any support to the quite different proposition that where a taxpayer faces two separate assessments and brings two separate appeals in each of which he makes a hardship application, the tribunal should approach the hardship applications by asking if the taxpayer could pay the total amount of tax assessed. So far as appears from the report this point was not in issue.

33. I therefore agree with Simon J that this ground of appeal is not made out.

Ground 1(2) – the date at which hardship is to be assessed

34. The second error which it is alleged Judge Bishopp made is that he assessed the question of hardship on the first application by considering whether ToTel could have paid the amount assessed without hardship in early 2007.

35. Simon J said of this ground:

> "75. In my judgment the First-tier Tribunal was entitled to adopt the approach that it did. In most cases hardship will be assessed at the date of the hearing. Thus in the present case the tribunal assessed the hardship application in relation to MAN/08/1485 at the date of the hearing: see paras 16–17 of the reasons, where the judge set out the evidence which had been adduced by the claimant up to and the date of the hearing.
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> 76 The complaint therefore only arises in relation to the MAN/06/0901 application, where there had been very considerable delays, which the tribunal was plainly entitled to find were the claimant's fault.
>
> 77 The 1994 Act does not prescribe a date when the hardship is to be assessed. According to the evidence of Ms Rafferty, the commissioners have established a practice of dealing with such applications within ten days. If the commissioners do not accept the applications there may be some short delay while the matter is brought before the tribunal; but the delay should not be long, since the issue is one of fact and ought to be capable of being decided without a lengthy hearing. These applications should not be used as an excuse to delay substantive decisions. It is to the usual situation that the observations of the tribunal judge in the *Buyco Ltd* case, para 6 apply: "It is common ground that I am considering the position as it is today or within a reasonable time from today".
>
> 78 In para 13 of the reasons in the present case the tribunal decided that it ought to take into account the claimant's circumstances in early 2007, when the tax should have been paid or the hardship

> application resolved. This was a legitimate approach and was consistent with the beneficial purpose of avoiding delay and allowing relief against payment in case of hardship, but not otherwise. However, the tribunal also tested its provisional view about hardship by reference to all the material that was before it para 15; and concluded that the difficulties in paying the assessed sum of £205,625 were due to the payment of the dividend of £850,000 after the hardship application had been issued. In my view this discloses no error of law."

36. Mr Burgess relies on *Buyco* where Dr Jones said at [6]:

> "It is common ground that I am considering the position as at today or within a reasonable time from today, which I should specify if I considered that the VAT could be paid without hardship… In considering whether there is hardship I consider that I must take each of the Appellants as they are today."

37. Miss Kamm accepted that the normal rule was that the tribunal should look at the position as at the date of the hearing. I agree: s. 84(3B) requires the tribunal to decide whether the requirement to pay or deposit the amount determined "would cause the applicant to suffer hardship". In other words the question the tribunal must ask itself is: "Would it cause the applicant hardship if he is required to pay or deposit the tax assessed ?" As a matter of ordinary language this looks to the future; it is not the same as asking: "Would it have caused the applicant hardship if he had been required to pay or deposit the tax assessed when the appeal was brought ?"

38. Miss Kamm however says that it must be open to the tribunal to look at this question by reference to an earlier date. Otherwise an appellant could, by delaying the hearing of the application, too easily manipulate the process. She accepted, rightly in my view, that the statutory provisions do not confer a general discretion on the tribunal, if it finds hardship, to decide whether to waive the requirement to pay or deposit the sum assessed: this is because s. 84(3B) provides that "where the amount determined … has not been paid or deposited an appeal *shall* be entertained if … the tribunal decides that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship." Nevertheless she submitted that where an appellant has caused a delay in the hearing of the application, the tribunal can choose the date at which to assess the question of hardship having regard to any delay caused by the appellant. That decision must be a proper one (that is one that is not *Wednesbury* unreasonable, that is proportionate etc), but subject to those familiar constraints the tribunal can decide.

39. I have not found this an easy question. It is helpful to note at the outset that this question (does the tribunal have the power to determine the question of hardship by reference to a date other than that of the hearing ?) is a separate question to the question of what evidence the tribunal should take into account

in assessing hardship. The latter is a case management decision and in this case is the subject of a separate argument advanced by Mr Burgess which I address below under Ground 1(5). The present question however is one of what question the tribunal is entitled to decide, rather than what material it is entitled to decide it on.

40. There are obvious practical difficulties that may arise if an application takes over two years to be heard, as it did in the present case where the first hardship application was made in ToTel's notice of appeal filed in December 2006 but not heard until April 2009. An appellant's financial circumstances may have changed radically in the meantime. He may have been unable to pay at the outset but by the time of the hearing be able to pay without hardship, in which case it would seem surprising if he could avoid paying or depositing the tax in issue. Conversely he may have been well able to pay without hardship at the outset but no longer able to do so by the time of the hearing, and in such a case the change in his circumstances may be due to his own acts or omissions, or to events beyond his control; and again the delay in hearing the application may be due to his own default or not. On the one hand it may be hard if an appellant, who is by the time of the hearing genuinely unable to afford to deposit the amount required, is nevertheless required to do so as the practical effect is likely to be that he will have to abandon what may be a meritorious appeal. On the other, Miss Kamm is undoubtedly right that to require the tribunal in every case to confine itself rigidly to the position at the date of the hearing, regardless of who is responsible for the delay, will be a powerful incentive for appellants to seek to manipulate the timing of the hearing to their advantage, and it is not obvious that an appellant, who could, and therefore should, have paid the tax in issue without difficulty at the time of bringing the appeal, should be able to benefit from the hardship provisions.

41. One solution to the practical problems would be to confer on the tribunal a general discretion to waive the requirement in cases of hardship. That would enable the tribunal to respond flexibly to the position and take into account the extent to which the appellant was himself responsible for the position he found himself in. But as I have said Miss Kamm accepts that this is not an interpretation open on the wording of the statute as it stands, and it would therefore require the legislation to be amended.

42. In the absence of such a general discretion, the question arises whether the tribunal has any room for manoeuvre. I see the force of the submission that on the language of s. 84(3B) the question the tribunal has to decide – namely "Would the requirement cause the appellant to suffer hardship ?" – is one addressed to the then state of affairs. It is not a question addressed to a past state of affairs such as "Could the appellant have met the requirement without suffering hardship ?"

43. On the other hand, Dr Jones in *Buyco* said at [6] :

> "Mr Angiolini [counsel for the Commissioners] may voice objections

> to the purchases of the J Lane and X Road sites and the putting of the latter into a FURBS after the present appeal arose, pointing out that the Appellants can find funds when they need it for business but not for payment of the VAT in dispute, but unless it can be shown that the transactions were outside the ordinary course of its business (in the widest sense to include the acquisition of capital assets for the business) with the purpose of enabling it to avoid paying the tax in dispute, about which there is no evidence, I consider that I must take these transactions as having occurred and look at the situation as it is today."

Mr Burgess accepted that Dr Jones was right, and that if an appellant had paid away money deliberately this could be taken into account in assessing hardship.

44. It does indeed seem only right that if, for example, a taxpayer is assessed for VAT of £100,000 and at the time of bringing the appeal has spare cash of £200,000 out of which he could easily afford to deposit the tax in issue, he should not be able to bring himself within the hardship provisions by deliberately paying away the £200,000 before the application is heard. Yet if the statutory language rigorously confines the tribunal to looking at the state of affairs at the date of the hearing, it is not easy to see how this can be taken into account: at the date of the hearing such a taxpayer is no longer able to pay without hardship.

45. I consider that the principle, accepted by Mr Burgess, that the tribunal can take into account the fact that transactions have been undertaken with a view to avoiding payment of the disputed tax, can best be reconciled with the statutory language (with its apparent requirement to assess the question of hardship at the date of the hearing) as follows. The statute requires the tribunal to decide whether the requirement to pay or deposit the amount determined "would cause" the appellant to suffer hardship. In the example I have given, it may well be that the appellant will be in financial difficulty if he now has to find the £100,000. But the real cause of that is not the requirement to pay or deposit the £100,000; the real cause is the appellant's own deliberate act in paying away the £200,000 which would otherwise have been available to him for that purpose.

46. This seems to me the most satisfactory way both to enable the tribunal to take into account the fact that the appellant is himself responsible for being unable to pay, and to respect the statutory language which requires the tribunal to assess whether the requirement to pay or deposit the tax would cause the appellant hardship rather than assessing whether it would have caused him hardship.

47. But if this is right, then similar considerations apply where the appellant has been responsible for delaying the hearing of the application. If for example, the appellant can easily afford the £100,000 when the appeal is brought, but is

responsible for the hearing of the hardship application being delayed by two years, by which time he will be in difficulties if he has to find it, I do not see why the tribunal should not conclude in an appropriate case that the appellant is again himself the real cause of any hardship that may be caused. Had he not delayed the application, the requirement to pay or deposit the tax in issue would not have caused him hardship, so it is not so much the requirement that is the real cause of the hardship as his own delay.

48. Judge Bishopp may not have articulated it in precisely this way but this is in effect what he was doing when he decided, in a case where he held that ToTel had been responsible for very substantial delays in pursuing the application, that he should take into account ToTel's financial position in early 2007 when the tax should have been paid or the hardship application resolved. The fact is (as explained in more detail below) that ToTel could have easily afforded to pay the £205,000 when it brought its appeal and there is no reason to think that this would have caused it any hardship. Had it accepted the position and deposited the tax, there would have been no need for the hardship application at all and the appeal would no doubt have long ago been decided. This is what should have happened and it is only ToTel's own actions first in making a hardship application and then in delaying the resolution of that question which means it has not.

49. Thus although I have admittedly not found this entirely straightforward, I conclude that Judge Bishopp was entitled to approach the question as he did. At any rate I am not convinced or satisfied that Simon J was wrong on this point.

50. In practical terms, it is obviously unsatisfactory for hardship applications to be dragged out over months and years. What can be done about this must primarily be a matter for the FTT, but it may be that early listing of hardship applications, together with short time-limits for the serving of evidence and rigid adherence to them will go some way towards reducing the difficulties. It is the appellant who has the burden of establishing hardship and all the evidence will usually be in his possession so if he does not produce the requisite evidence when required to do so his application will fail.

51. Miss Kamm had an alternative submission which was that it made no difference anyway, as it is apparent from Judge Bishopp's decision on the second application that even if he had assessed hardship as at the date of the hearing he would not have reached a different decision. It is more convenient to consider this particular submission in the context of Grounds 1(5) and 1(6) below.

Ground 1(3) – applying the wrong test

52. The third error which it is alleged Judge Bishopp made is that he assessed whether ToTel was capable of paying the tax in issue rather than whether or not the payment of the tax would cause it hardship.

53. Mr Burgess referred to the following parts of his decision (emphasis added):

At [12]:

> "The effect in some cases might be to stifle a meritorious appeal *when the intending appellant is unable to pay*, and the hardship provisions are designed to counter that possible effect."

At [15]:

> "Taking account only of the material on which the appellant was permitted to rely, I am satisfied not only that hardship is not made out, but that the appellant was *well able to pay* the disputed tax."

At [16]:

> "If all that information is taken at face value, it seems an obvious inference that Totel *cannot pay* tax of £1.26 million."

At [18]:

> "I can be satisfied of no more than that it *might not be able to pay*, and that is not enough."

54. Simon J said of this ground:

> "83 I do not accept that the tribunal adopted the wrong approach to the issue it had to decide in the present case. There are repeated references to the hardship tests (in paras 13, 15 and 18); and if one looks at the tribunal's reasons as a whole, it is clear that the tribunal was deciding the issue on the basis of capacity to pay without hardship."

55. I entirely agree. Mr Burgess relied on *Seymour Limousines Ltd v HMRC* [2009] UKVAT V20966 (Judge Wallace) at [58] where he said:

> "Under section 84(3) of the VAT Act 1994 an appeal shall be entertained without prior payment of tax if Customs or the Tribunal are "satisfied that the Appellant would otherwise suffer hardship". The test which Customs applied in this case was not whether payment would involve hardship, which in the context is financial hardship, but whether the Appellant had the capacity to pay. The correct test is whether the Appellant had the capacity to pay without financial hardship, which is very different."

56. Judge Wallace was plainly right in identifying the test as he did, and although this was by reference to the legislation as it then stood, the changes in 2009 do not affect this. But there is no reason to think that Judge Bishopp in the present case failed to understand or apply the correct test. As Simon J said,

there are repeated references to hardship in his decision.

57. In particular his conclusion on the first application at [15] was that "hardship was not made out", and only after that conclusion did he add that Totel was well able to pay; and in reaching his conclusion on the second application at [18] he said he asked himself whether he could infer that Totel "would suffer hardship if required to pay."

58. To pick out the isolated instances above where Judge Bishopp refers to ability to pay and suggest that as a result he was applying the wrong test is quite misconceived. The reference in [12] is a general reference to the purpose behind the statutory provisions; that in [15] comes immediately after the conclusion that hardship is not made out; that in [16] is in no way inconsistent with the correct test (as if Totel cannot pay at all, it follows that it cannot pay without hardship); and that in [18] has to be read in context where Judge Bishopp has just referred to whether Totel "would suffer hardship if required to pay."

59. I have no doubt that Simon J was right to dismiss this ground.

Ground 1(4) – taking into account the payment of a dividend

60. The fourth error which it is alleged Judge Bishopp made is that he took into account the fact that ToTel had paid a dividend without considering the explanation that was given for it or putting to ToTel's director that it had been made improperly.

61. The facts relevant to this point are as follows:

(1) As appears from his decision at [13], Judge Bishopp not only decided the first application by looking at Totel's financial circumstances in early 2007, but by confining the evidence on which it could rely.

(2) The details of that decision and the reasons for them are dealt with under Ground 1(5) below, but the practical effect was that the critical evidence taken into account by Judge Bishopp was that derived from Totel's audited accounts for the year ended 31 January 2007. Those accounts showed Totel to have cash at bank and in hand of over £2.4m, and net current assets of over £2.7m. Judge Bishopp refers at [15] to the 2007 accounts also recording the payment of a dividend of £850,000 (which was paid on 3 May 2007), but the copy of the accounts before me (which is incomplete) does not appear to include any reference to the dividend.

(3) If however regard was had to all the material available to the tribunal, it included the 2008 accounts. These restated the figures in the 2007 accounts to take account of the VAT withheld by HMRC, with the result that although cash at bank and in hand in the balance sheet for 2007 was still shown as about £2.4m, the net current assets were

shown as £875,943. The 2008 accounts also showed the payment of the (interim) dividend on 3 May 2007 of £1172.41 per ordinary share which amounted in total to £850,000.

(4) ToTel's Managing Director, Mr Granger, gave evidence before the FTT. I have no note of his evidence, but in a witness statement made for the judicial review proceedings, Mr Thornton, a paralegal employed by Aegis Tax LLP who appeared for ToTel at the hearing of the hardship applications, said that Mr Granger gave evidence that the dividend of £850,000 had been arranged and voted on before the company received the first clawback assessment from HMRC and had been allocated to shareholders funds in the company accounts.

(5) In his own witness statement for the judicial review proceedings, Mr Granger said that the dividend was voted on and approved by the company on 25 August 2006 (over a month before the first clawback assessment) although not paid until May 2007. It was arranged this way so that the dividend would fall into the next tax year (the purpose of the dividend being to enable Mr Granger to meet a tax liability arising from receipt of a dividend of £1.5m paid in May 2006). Mr Granger added that it was not suggested by HMRC that the purpose of the dividends was some sort of device to avoid payment of the VAT assessments subsequently raised and that he was not asked about the purpose behind the dividend payments during his very brief cross-examination at the hearing of the hardship applications.

62. Simon J dealt with this point as follows:

> "86 I am extremely doubtful whether this can be properly described as an error of law or that it necessarily followed from Mr Thornton's submission that the claimant did not have the capacity to pay the £205,625 without hardship in January 2007. However the main difficulty with this submission is that it was not evidence or material made available before the 28 March 2008 deadline for the admission of evidence on the hardship application in relation to the MAN/06/0901 assessment. Once it is accepted, as it must be, that it was open to the tribunal to fix a cut-off point for the admission of material to be relied on, there can be no error of law or procedural unfairness in ignoring evidence which was produced later."

63. Mr Burgess accepted in terms that if Judge Bishopp was entitled to consider the question of hardship as at early 2007, then he was entitled to conclude that at that date ToTel could pay the first assessment without hardship. But he said that at the end of [15] Judge Bishopp found that if ToTel were unable to pay the tax without hardship this was because of Totel's own action in paying the dividend. On the basis of what Dr Jones had said in *Buyco*, he said Judge Bishopp should not have had any regard to the payment of the dividend unless

it were not in the usual course of business and deliberately paid in order to avoid having to pay or deposit the tax. That was not an allegation that had been put to Mr Granger and was not something that Judge Bishopp had been entitled to find or place any reliance on, either in relation to the first application or in relation to the second where he again referred to the payment of the dividend (at [18]).

64. Miss Kamm said that whether or not Judge Bishopp might have been entitled to conclude that the payment of the dividend was deliberately made in order to avoid paying or depositing the tax assessed, he had not in fact done so.

65. My conclusions are as follows:

(1) I agree with Miss Kamm that Judge Bishopp did not find that the dividend had been deliberately paid to manipulate ToTel's financial position in relation to the appeal. It is true that by 25 August 2006 when the dividend was voted on, ToTel's management already knew that HMRC had (by letter dated 31 July) refused to allow ToTel to claim £147,000 of input tax for 03/06, apparently on the basis that the transactions concerned could not have taken place as the models involved were not available; and it might have been possible, although I doubt it would have been easy, for HMRC to mount a case that ToTel's management realised that HMRC might reopen the 01/06 claim and demand repayment, and that the dividend was voted on to avoid that future claim. But any allegation of that type would have to have been put to Mr Granger before the FTT could be asked to find it to be the case, and I consider it clear that Judge Bishopp did not find, or proceed on the basis, that the dividend had been deliberately voted and paid in order to manipulate ToTel's ability to meet an assessment which had not then been made.

(2) So far as the first application is concerned, I have already said (for reasons given under Ground 1(2) above) that I accept that Judge Bishopp was entitled to assess the question of hardship on the first application by reference to the position in early 2007. I also agree with Simon J (as explained further under Ground 1(5) below) that Judge Bishopp was entitled to confine himself to the material provided by ToTel before May 2008. In those circumstances, as already indicated, Mr Burgess does not dispute that Judge Bishopp was entitled to reach the conclusion he did. Since that material showed ToTel to have cash at bank and in hand of over £2.4m and net current assets of £2.7m, that is clearly right, whether or not there was in fact any indication in that material of the payment of the £850,000 dividend in May 2007.

(3) I will therefore dismiss this ground of appeal. That makes it unnecessary to consider whether Judge Bishopp was also right in his view that if one did look at the later material the position was the same. The 2007 figures as restated in the 2008 accounts showed that ToTel

had ample cash (£2.4m) to pay the tax but net current assets had reduced to some £875,000. By itself that would give no reason to think that ToTel could not afford to pay the £205,000. In [15] Judge Bishopp was addressing Mr Granger's point that as the £850,000 dividend had already been voted it had in effect ceased to be available to the company as it had become shareholders' funds. Judge Bishopp was not saying that he disbelieved Mr Granger's account that the dividend had been voted on for other reasons before the assessment had been made; he was making a different point, namely that the company's assets should be used to pay its liabilities first before distributions to shareholders.

(4) I do not propose to express any view on this. Although the dividend had been voted on in August 2006, and was no doubt then thought to be affordable, it was not paid until May 2007, by which stage HMRC were withholding significant amounts of input tax that had been claimed – a letter of March 2007 referred to HMRC retaining some £2.9m which had been claimed as input tax – and it was presumably not so obvious that the dividend could easily be paid. I can see there might be a question as to what the directors ought to do in such a situation, but neither Mr Burgess nor Miss Kamm addressed me on the duties of the directors and since it does not arise I do not think it necessary or appropriate to consider it in the absence of argument.

66. Mr Burgess also referred to the fact that Judge Bishopp referred again to the payment of the dividend when considering the second application (at [18]). It is more convenient to deal with this when considering Judge Bishopp's conclusion on the second application under Ground 1(6) below.

Ground 1(5) – the decision to restrict ToTel to evidence served by 28 March 2008

67. The fifth error which it is alleged Judge Bishopp made was his decision to restrict ToTel to the evidence it had served by 28 March 2008, thereby preventing it from relying on up to date information.

68. The facts relevant to this ground are set out by Simon J in his judgment and since there is no dispute as to them, I can adopt his account of the history of the first application in its entirety, as follows:

> "48 On 17 January 2007 the tribunal listed the application for hearing on 28 March 2007. On 16 March 2007 the claimant applied for the hearing to be adjourned for a period of two weeks (until 11 April 2007) on grounds that:
>
> > "the appellant requires additional time in which to collate the relevant documents in support of their application for leave to appeal without payment or deposit of the tax to HMRC."

49 On 30 May 2007 a prehearing review took place before the tribunal and by an order of 1 June 2007 the claimant was directed by 29 June 2007 to "provide [the commissioners] with all information necessary to enable them to process its said hardship application".

50 By 29 June 2007 no documents had been provided. Instead the claimant applied for a second extension of time up to 18 July 2007. It was said that additional time was required to compile "all necessary information". The further application to extend time was allowed. However, no documents or information were provided.

51 On 18 July 2007 the claimant sought a third extension of time up to 20 August 2007. This application was opposed by the commissioners, and was listed for hearing on 17 September 2007. No evidence or information of any kind had been provided in support of the hardship application by 17 September 2007, when the claimant's application to extend time came before the tribunal. At the hearing the tribunal directed that the claimant either (a) serve its evidence by 14 December 2007, or (b) pay the tax by that date. In default of either (a) or (b) the tribunal directed that the appeal would be struck out.

52 On 14 December 2007 the claimant served its evidence. This consisted of abbreviated accounts for the year ended 31 January 2007, and a letter in connection with a proposed business acquisition. On 14 December the claimant sought a fourth extension of time up until the end of January 2008, stating that by this time it would be able to provide management accounts and cash-flow forecasts. In the event neither was provided by the end of the January.

53 On 15 January 2008 the commissioners applied to strike out the appeal for failure to comply with the tribunal's directions. The application was heard on 4 March 2008. The chairman (Mr Richard Barlow) declined to strike out the appeal, but ordered that (a) the claimant serve any witness statement and document on which it intended to rely by 28 March 2008, and (b) if no such evidence was served, the claimant could only rely on the evidence served in December 2007.

54 On 28 March 2008 the claimant served a witness statement of its managing director and majority shareholder, Mr Granger. This exhibited: (a) a cash-flow statement for the period March–September 2008, (b) credit balances as at 28 March 2008, (c) a Barclays Bank deed of charge over the balances, and (d) a draft profit and loss account for the year ended 31 January 2008. The

claimant stated that a letter from its accountant would be provided in the following week. The promised letter was not provided.

55 It follows from this summary that it had taken the claimant from mid-December 2006 to the end of March 2008 (nearly 15 months) to provide the information on which it wished to rely in support of its hardship application.

56 The hardship application had been listed for hearing on 15 April 2008; but the date was vacated by consent, so as to permit the commissioners to consider (and if necessary respond to) the disclosure which had been provided on 28 March 2008.

57 On 7 May 2008 the commissioners requested further information, since the information which had been provided was, in their view, insufficient to enable the commissioners to form a view as to whether the claimant would suffer hardship if it were required to pay the amount in dispute. On 16 May 2008 the claimant asked for time to respond (until 2 June 2008), and the commissioners agreed to this request.

58 On 3 June 2008 the claimant provided further information and documents. The commissioners regarded this material as wholly inadequate. In particular, (a) no management accounts were served, (b) the only balance sheets provided were abbreviated balance sheets dated 31 January 2006 and 31 January 2007, and (c) no details of a dividend of £850,000 paid after 31 January 2007 were provided.

59 On 18 June 2008 the commissioners again applied to strike out the appeal. The commissioners contended that the claimant had (a) caused inordinate and inexcusable delay in what ought to have been a straightforward application; (b) caused prejudice to the commissioners and the administration of justice by reason of that delay; and (c) failed to respond in full to the reasonable requests for further information so as to permit them to decide whether or not to accept the hardship application.

60 The commissioners' application to strike out was refused by the tribunal on 22 July 2008. However the tribunal made directions that (a) if the hardship application were pursued, it was to be listed for half a day, and (b) the claimant was only permitted to rely on the evidence and other material disclosed on or before 28 March 2008. The directions envisaged that the claimant would either pay the tax in dispute by 19 August 2008 or notify the tribunal before that date if it were unable or unwilling to do so."

69. Simon J's conclusion on this ground was as follows:

> "91 The fifth complaint is that it was unfair not to permit the claimant to adduce up-to-date information. Again, I am doubtful whether this can be properly characterised as an error of law; but even if it can, the argument is without merit. The documents produced on 3 June were incomplete; and the tribunal made a decision on 22 July 2008 that the claimant be confined to evidence disclosed by 28 March. That was a case management decision of a type which courts exercising appellate and review functions regard as particularly for the decision of the lower court. In my view this point discloses no error of law."

70. Mr Burgess accepted that this was a case management decision, and that the general principle is that the UT should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the UT is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC) per Sales J at [56].

71. He said however that Judge Bishopp adopted an incorrect approach to the exercise of his discretion, failed to take relevant matters properly into account and reached a conclusion which cannot be regarded as just, fair or in accordance with the overriding objective: cf *HMRC v Ingenious Games* LLP at [60]. In particular he referred to the fact that HMRC had requested further information and it was therefore unfair to exclude it.

72. I do not accept that Judge Bishopp's decision was flawed. On the contrary I entirely agree with Simon J. As the history set out by him shows, (i) by 17 September 2007 ToTel had served no evidence of any sort, but were given an opportunity by the tribunal to do so by 14 December 2007; (ii) ToTel did serve some evidence by 14 December 2007 but HMRC took the view that this was inadequate and applied to strike out the appeal; (iii) on 4 March 2008 the tribunal did not strike out the appeal but gave Totel another chance to serve evidence by 28 March 2008; (iv) ToTel did serve some more evidence on 28 March 2008 but HMRC again took the view that this, and the answers to its request for further information, were wholly inadequate and again applied to strike out the appeal. That was the position when the matter came before the tribunal on 22 July 2008 when, instead of striking out the appeal as HMRC requested, the tribunal directed that it be heard on the material provided by 28 March 2008.

73. In other words, ToTel had been given, after repeated extensions, not one but two further opportunities to file its evidence. If that evidence was

inadequate, as HMRC contended, the tribunal would have been justified in striking out the appeal on 22 July 2008. Rather than doing so, the tribunal gave ToTel an opportunity to preserve the appeal by either paying the tax or demonstrating that the material it had provided by the cut-off date of 28 March 2008 was in fact adequate, and that it established hardship.

74. It seems to me impossible to regard this decision as wrong in principle or open to criticism. The tribunal must have the power to impose a deadline or cut-off date by which evidence is to be served. Otherwise it would be impossible to manage cases efficiently and effectively. Given that it has such a power, the tribunal must also have the corollary power to refuse to allow an applicant to rely on evidence provided after the cut-off date, as otherwise its directions would be no more than aspirations which could be ignored. Whether it is appropriate in a particular case to exercise that power is a matter for the tribunal and depends on all the circumstances.

75. Mr Burgess said that in the present case the excluded material had a potentially significant impact on the appeal, that a 'lot was riding' on this decision and that this was one of those rare cases where the decision should be revisited on appeal. The importance of the decision on hardship made it all the more important for the applicant to provide comprehensive and timely information, but as Mr Burgess himself admitted, ToTel 'could have been more forthcoming and undoubtedly caused some delay' – which is something of an understatement. So far as I can see there was no reason at all why it could not have explained the position by 28 March 2008, and I see nothing unjust, unfair, or contrary to the overriding objective in deciding the first application on the basis of the material in fact provided by that date.

Ground 1(6) – the only reasonable conclusion was that ToTel would suffer hardship

76. The sixth point taken by Mr Burgess is that Judge Bishopp, in failing to conclude that ToTel would suffer hardship, had reached a conclusion that was clearly wrong, where the only reasonable conclusion was that it would do so: *Edwards v Bairstow* [1956] AC 14 at 36 per Lord Radcliffe.

77. Given my conclusions under Grounds 1(2) and 1(5) above that Judge Bishopp was entitled to assess the first application by reference to the position in early 2007, and on the material provided by ToTel by 28 March 2008, this ground can only apply to the second application, as Mr Burgess accepts that he cannot in those circumstances challenge the conclusion in relation to the first application: see paragraph 65(2) above.

78. This ground was not advanced as a separate point before Simon J but he made some pertinent observations under Ground 1(4) as follows:

> "87 So far as the MAN/08/1485 application was concerned, the

tribunal took into account all the material which was available and came to the conclusion that there was a failure to discharge the burden of showing hardship. It is clear from paras 17 and 18 of the reasons that the tribunal was surprised at how little material had been put before it and, whether or not the court might have reached the same view, the assessment of the evidence does not give rise to an error of law.

88 In *Megtian Ltd v Revenue and Customs Comrs* [2010] STC 840, paras 8, 9, and 11 Briggs J described the very limited scope of appeals from the former VAT and Duties Tribunal:

> "8. A common theme in grounds 1, 3, 4 and 5 of the grounds of appeal is the allegation that the tribunal made errors of law in its conduct of its fact-finding task. Thus, each of grounds 1, 4 and 5 asserts that relevant findings of the tribunal were 'contrary to the evidence'. Ground 3 is put in different terms but, as will appear, is also closely related to the fact-finding process.
>
> 9. Grounds of appeal of this type call for cautious treatment by the appeal court, because of their tendency, if not strictly controlled, to degenerate into free-ranging attacks on the correctness of the lower court's evidential conclusions, disconnected from the identification of any specific error of law. In *Georgiou (trading as Marios Chippery) v Customs and Excise Comrs* [1996] STC 463, 476, Evans LJ said this: 'it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made?' …
>
> 11. There are numerous authoritative statements of the precise meaning of the concept that a finding of fact involves an error of law when it is based upon non-existent or inadequate evidence. They were very

> recently summarised by Christopher Clarke J in *Red 12 Trading Ltd v Revenue and Customs Comrs* [2010] STC 589, paras 113–120. The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact. As Lord Radcliffe put it in *Edwards v Bairstow* [1956] AC 14, 39: 'Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado'."
>
> 89 In the present case, the evidence (or more particularly the lack of material evidence) before the tribunal was sufficient to support the reasons; and cannot be characterised as inconsistent with the only reasonable conclusion on the facts (such as they were)."

79. Mr Burgess made a number of points. First he said that Mr Granger had given oral evidence before the tribunal that ToTel could not afford to pay, and that this was not challenged. However I accept Miss Kamm's submissions on this point. These were that Judge Bishopp was surprised by the fact that he had very little recent material and no up to date accounts of any sort, neither management accounts nor annual accounts, even in draft, for the year ended 31 January 2009, and that in a case such as this a surprising and significant omission in the evidence is something which the tribunal is entitled to take into account and give considerable weight to. Otherwise the appellant could simply turn up and assert in oral evidence that he could not afford to pay without any supporting information at all. Since HMRC is unlikely to have much if any accounting information about the appellant, in the ordinary case the appellant is the only one who can demonstrate hardship; and the absence of contemporaneous accounting information is in itself a justification for the tribunal to conclude, in an appropriate case, that it can place little if any weight on the appellant's oral assertion that it is unable to afford to pay.

80. Mr Burgess said that the material that was provided, if taken at face value, indicated that ToTel could not afford to pay, as indeed Judge Bishopp himself recognised at [16]. The lack of further evidence did not affect the fact that the evidence that was available showed that ToTel could not pay; and in the absence of any evidence to the contrary, the decision should have been made on such evidence as there was. But the answer to this is that Judge Bishopp was not satisfied that one could simply infer that the position was the same at

April 2009 when he had very little up to date information to go on. This was a conclusion he was in my judgment plainly entitled to reach. Again otherwise it would mean that an applicant who could in fact pay without hardship at the time of the hearing could rely on information that was 15 months out of date showing that he could not pay, and then submit that his application had to be allowed as there was no evidence to contradict that. This again cannot sensibly be supposed to be the law.

81. Mr Burgess said that resort should not be had to the burden of proof save in the case of an absence of evidence or if the matter were finely balanced. But it seems to me that what Judge Bishopp was saying was that there was an absence of contemporaneous evidence, and that he did not consider that a reasonable explanation had been given for this. Again this was a conclusion he was entitled to reach.

82. Mr Burgess said that Mr Granger did explain to Judge Bishopp that ToTel's accountants had had difficulty producing accounts, and referred to a witness statement from Mr Doyle of Clive Owen & Co, ToTel's accountants, prepared for the judicial review proceedings in which Mr Doyle said that any draft 2009 accounts prepared for the tribunal would have been too rough and unreliable. This evidence was not however before the FTT, and what Judge Bishopp at [17] records Mr Granger as saying is that the accountants were 'too busy' to provide the information. The effect of this evidence is exactly the sort of point that is for the tribunal of fact to assess, and gives rise to no error of law.

83. Mr Burgess referred to evidence given by Mr Sarocka, an officer of HMRC, in the judicial review proceedings. Mr Sarocka had made a report dated 21 October 2009, which was based on all the financial information provided by ToTel at that date, and his evidence was to the effect that it would appear from this information that ToTel would have suffered hardship if it had paid the outstanding assessments at 31 January 2009 because it would have had to obtain substantial overdraft facilities to make the payment. But Mr Sarocka makes it clear that the information available to him in October 2009 included information that had not been put before the FTT in April 2009, and in particular it is clear from para 3.7 of his report that this conclusion is based on the balance sheet of ToTel as at 31 January 2009. It is therefore in no way inconsistent with Judge Bishopp's conclusion that in the absence of accounts, even in draft, for the year ended 31 January 2009, he did not know what ToTel's financial position was, and he did not find the burden of proof discharged. It is noticeable that Mr Sarocka himself says in his report that he had very little accounting information on ToTel for the period after 31 January 2009 (para 3.9) and that in those circumstances he did not have sufficient financial information to form an opinion as to whether ToTel would suffer hardship if they were required to pay the amount assessed 'at today's date' that is in October 2009 (para 4.1).

84. In summary, an analysis of the points made by Mr Burgess under this head serves only to demonstrate that there is in truth here no error of law at all. It

was a matter for Judge Bishopp to assess the overall effect of the evidence before him, both the evidence that was given and the evidence that he would have expected to have but did not have. I entirely agree with Simon J that his conclusion cannot be regarded as one that was not open to him.

85. Finally I should pick up two discrete points left open above. First, there is Miss Kamm's point that even if Judge Bishopp had assessed the first application at the date of the hearing (and on the most up to date material), he would have reached the same conclusion: see paragraph 51 above. I agree: it follows from what he said on the second application that whether the question had been whether ToTel could pay £1.26m or £1.47m without hardship, he would not have been satisfied that they could not.

86. Second, there is Mr Burgess's criticism of Judge Bishopp's reliance in this context on the payment of the dividend in 2007: see paragraph 66 above. I accept that one cannot tell from the way his decision is expressed quite what impact Judge Bishopp thought that this had on the assessment of hardship, but I do not think this detracts from the conclusion he reached, based at it was on the absence of reliable contemporaneous information as to ToTel's finances.

Ground 2 – ToTel's EU rights

87. Mr Burgess submits that Judge Bishopp's decision is contrary to general principles of EU law in that it:

(a) constituted a disproportionate interference with ToTel's entitlement to deduct input tax;

(b) left ToTel with no effective remedy and no effective judicial protection of its rights; and

(c) impaired ToTel's right to a fair hearing under art 47 CFR.

88. Simon J's conclusions on this ground were as follows:

> "109 This case raises no issue about equivalence. The issue is whether the domestic rules render it excessively difficult to exercise rights conferred by EU law. Section 84 of the 1994 Act provides that an assessment which is appealed must be paid or secured unless that would cause hardship to the appellant. Mr Beal rightly accepted that section 84 was capable of being applied consistently with EU law. In my judgment the provisions of section 84 (and particularly section 84(3C)) do not make it excessively difficult to exercise rights under EU law. What it requires is a decision as to hardship, initially by the commissioners and then by an appropriately constituted and independent tribunal.
>
> 110 Once it is accepted, as it must at this stage of the argument, that

there has been a proper determination by such a tribunal that the payment of the assessed sums would not cause hardship, EU law does not require further consideration of the same issue by this court. It is implicit from the decisions of the tribunal that the claimant has not demonstrated that making the payment will cause hardship, and it follows that the exercise of rights conferred by the EU are not rendered impossible or excessively difficult. The tests of irrationality under English domestic law and proportionality under EU law are unlikely to lead to different results: see *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 439 c–f, per Lord Slynn of Hadley.

111 *R v Minister of Agriculture, Fisheries and Food, Ex p Roberts* [1991] 1 CMLR 555, also relied on by Mr Beal, was concerned with whether the defendant had correctly applied Community law. There the judge concluded that the ministry had not and that it could not be a matter of administrative discretion for the ministry to decide what the law was. It was ultimately a matter for the courts. However, that principle does not assist the claimant here. The procedure for safeguarding EU rights is for the domestic legal system, subject to issues of equivalence and effectiveness and, for the reasons already given, the tribunal's decision cannot be properly impugned on the basis of errors of law or irrationality."

89. There was no dispute as to the principles of EU law and they can be summarised quite briefly. So far as relevant they are as follows. First, ToTel has a prima facie right to deduct input tax that it has paid. The ECJ has consistently held that the right to deduct input tax forms an integral part of the VAT mechanism: see eg *Finanzamt Gummersbach v Brockenmühl* (Case C-90/02) [2004] ECR 1-3303 at [37]-[40].

90. Second, ToTel has a right to an effective judicial remedy for the protection of its rights under EU law. In *Marks & Spencer plc v Commissioners of Customs and Excise* (Case C-62/00) [2002] ECR 1-6325, the Commissioners had required Marks & Spencer to pay VAT on the face value of gift vouchers. When this was later held to be incorrect, Marks & Spencer claimed back the VAT wrongly levied. The issue was as to the legality of UK legislation retrospectively reducing the time limits for such claims. The ECJ said at [34] that in the absence of Community rules:

"it is for the domestic legal system of each member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and second, that they

> do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)."

As Simon J said, there is no issue here about the principle of equivalence; the question is about the principle of effectiveness.

91. Third, ToTel has a right to a fair hearing under art 47 CFR. At the time of the judicial review proceedings before Simon J this was not common ground, and he held that art 47 CFR did not go any further than art 6 of the European Convention on Human Rights (**"ECHR"**) and that the latter did not extend to tax disputes. Before me however Miss Kamm accepted that HMRC now acknowledge that the scope of art 47 CFR is wider than the scope of art 6 ECHR and that art 47 is engaged in a tax case such as this. The content of the art 47 right was summarised by Lord Dyson MR in *R (Evans) v Attorney General and Information Commissioner* [2014] EWCA Civ 254 at [43] as follows:

> "Anyone whose EU law rights are violated has the right to an effective remedy before a tribunal which complies with the requirements of article 47 of the Charter. By article 52, that right is equivalent to the right of access to a court under article 6 of the European Convention on Human Rights…. That right includes (i) the right of access to a court or tribunal which can give decisions binding on all parties, including the Government; (ii) the right to legal certainty and the finality of judgments; and (iii) the right to a fair hearing (including the equality of arms)."

92. It is also common ground that the combined effect of ToTel's EU rights is that the FTT's hardship decisions could not stand if they were disproportionate. As Mr Burgess put it, the standard of review when considering the application of general principles of EU law is not restricted to a classic *Wednesbury* analysis but involves a more rigorous scrutiny: see eg *R v Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 437 per Lord Slynn. This was accepted by Miss Kamm.

93. Mr Burgess referred to *Garage Molenheide BVBA v Belgium* (Case C-286/94) [1997] ECRT I-7281, and *Ampafrance SDA v Directeur des Services Fiscaux de Maine-et-Loire* (Case C-177/99) [2000] ECR I-7013. In *Molenheide* a Belgian garage challenged Belgian provisions which allowed the tax authorities to exercise a power of retention of tax in dispute which operated as a form of preventive attachment until the dispute had been settled. The ECJ said at [55]-[57] that provisions which prevented the judge hearing attachment proceedings from lifting the attachment even though there was evidence before him prima facie justifying the conclusion that the tax authorities was wrong should be regarded as going further than necessary to ensure effective recovery and would adversely affect the right of deduction to a disproportionate amount. In *Ampafrance* a French company challenged

French provisions which excluded the right to deduct input tax on expenditure on accommodation, food, hospitality and entertainment. The ECJ said at [60]-[62] that national legislation which excluded the right to deduct VAT on such expenditure without making any provision for the taxpayer to demonstrate the absence of tax evasion or avoidance was not a means proportionate to the objective of combating tax evasion and avoidance.

94. Both cases are therefore examples where what was under challenge as disproportionate was the legislative scheme adopted by the member state in question. But Mr Burgess accepted that s. 84(3B) VATA 1994 is capable of being operated in a proportionate fashion. As I understand it therefore Mr Burgess does not challenge the legislative scheme of s. 84(3B) VATA 1994 as such.

95. It seems to me that he was right not to do so. As it was put by Mann J in *O'Brien v Revenue and Customs Commissioners* [2007] EWHC 3121 (Ch) at [11]:

> "Section 84(3) is a provision which … I would, if necessary, find to be compliant with [the Human Rights Act 1998]. It does not unfairly and improperly exclude access to justice, because if there is no hardship in paying the tax up front it will be paid and access to justice can be had. If there is hardship in paying, then the money does not have to be paid so there is no impeding of access to justice."

Simon J agreed and so do I. The principle that an appellant who can afford to do so without hardship should have to deposit the tax before appealing does not render it excessively difficult for such an appellant to vindicate his rights to deduct input tax, challenge the decision of the Commissioners to raise an assessment against him, or have such a challenge heard before an independent and impartial tribunal in accordance with art 47 CFR, because he can pursue the appeal by depositing a sum of money which, *ex hypothesi*, he can afford to pay without hardship. Nor did Mr Burgess suggest that it was disproportionate to require the appellant to demonstrate hardship. Again I consider he was correct not to do so: once it has been accepted that it is proportionate for there to be a scheme under which appellants are exempt from the requirement to deposit the tax only in cases of hardship, it seems self-evidently proportionate to require an appellant to demonstrate hardship as an appellant is the only person likely to have detailed information about his own finances.

96. Mr Burgess however said that the FTT should have carried out an assessment in the individual cases as to whether the interference with ToTel's rights was proportionate, and that as it did not do so, its decisions were flawed. He said that the practical effect of the FTT's decisions would be to stifle the appeals. This would mean that even if the withhold appeals went ahead and HMRC were unable to prove their case at the substantive hearings, HMRC would in practice obtain judgment in default on the clawback appeals; moreover there

was a significant risk that ToTel, being unable either to challenge or meet the clawback assessments, would go into insolvency and the withhold appeals would not be pursued at all. These were such serious consequences that a high degree of justification was required to avoid an infringement of ToTel's rights.

97. Miss Kamm accepted that the UT on appeal was engaged in a more intensive review and that this entailed looking at proportionality. But she said that all the reasons which led to the conclusion that the FTT's decisions were lawful as a matter of domestic law were also reasons to conclude that the decisions survived the intensive review required by the need for proportionality. I could not assume, she said, that ToTel would go into insolvency as this would require assuming that the FTT was wrong in its assessment.

98. So far as the first decision is made, Judge Bishopp concluded that at the time the appeal was brought ToTel was able to pay or deposit the disputed tax without hardship. For reasons given above in relation to the domestic law challenges, this is a conclusion that I consider he was clearly entitled to reach. I agree with Miss Kamm that this decision was not disproportionate: the purpose of the hardship provisions, as Judge Bishopp said, is the obvious one of reconciling the aim of preventing abuse of the appeal mechanism as a means of putting off payment with the desire not to stifle meritorious appeals where appellants are unable to pay without hardship. But where a taxpayer is able to pay or deposit the tax in dispute at the time of bringing an appeal, there is nothing disproportionate in requiring him to do so; nor is there in the FTT assessing the question of hardship at the time that the application should have been determined had the applicant not delayed the proceedings.

99. So far as the second application is concerned, this comes down to a question of the burden of proof. I have already said that I do not regard it as disproportionate to require the applicant to bear the burden of proof on the issue of hardship, as it is only the applicant who can explain what his financial position is and what effect payment would have on it. But once this position is reached, it seems to me inevitable that the conclusion that Judge Bishopp came to is one that must be regarded as proportionate. In circumstances where ToTel had failed to produce reliable, comprehensive, contemporaneous evidence as to its finances, I see nothing disproportionate in the FTT concluding that it was not satisfied that ToTel would suffer hardship. Mr Burgess says that Judge Bishopp's conclusion was perverse as it involved supposing that ToTel's finances had radically improved since the 2008 accounts; but in truth where the FTT does not have reliable evidence on which to base a conclusion, it would be perverse for it to conclude that an applicant *would* suffer hardship where the only conclusion it could safely draw was that it did not know what the position was. And it follows that Judge Bishopp was entitled not to take into account the matters that it is now said that he ought to have taken into account – the likelihood that Totel's appeals would be stifled, the likely insolvency of ToTel – as these consequences would only follow if ToTel were in fact unable to pay, and that was the very question which the lack of evidence left Judge Bishopp unable to conclude in its favour.

100. Simon J's conclusion at [110] was that ToTel had failed to demonstrate hardship and that it followed that the exercise of its EU rights was not rendered impossible or excessively difficult. I am not convinced or satisfied that he is wrong: indeed for the reasons given above I agree.

Ground 3 – Human Rights Act

101. Mr Burgess relies on Article 1 of the First Protocol to the ECHR (**"A1P1"**). This provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the rights of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

102. Mr Burgess also relies on art 17 of the CFR. This is intended to reflect the provisions of A1P1, and no separate argument was addressed to me on it.

103. Simon J dealt with this ground as follows:

> "122 In my judgment the claimant gets very little assistance from the *Bulves* case. First, in the *Bulves* case the court was able to identify the applicant company's right to claim a deduction of input VAT as a legitimate expectation of obtaining the effective enjoyment of a property right which amounted to a possession. In the present case the court cannot identify such a right. Whether or not the claimant has complied with all the conditions for claiming input tax is the substantive issue between the claimant and the commissioners. Until that issue is resolved it is difficult to see how the claimant can have a legitimate interest which could amount to a property right. Secondly, the claimant faces formidable difficulties when it comes to the further and necessary question: whether (assuming the establishment of a property right) the interference with the property right was justified. This will depend on the balancing of interests and issues of proportionality. In *Jokela v Finland* (2002) 37 EHRR 581, the European Court of Human Rights set out its overall approach to the question of justification for the interference in property rights, at paras 45–49. The court said, at para 45:
>
> > "Although article 1 of the First Protocol contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible

> authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied a comprehensive view must be taken of the applicable procedures."
>
> 123 There is no difficulty in challenging the substantive assessment to tax. It is done by way of challenge before the tribunal, and there is then a right to appeal where there is an error of law; and to the extent that this right is inhibited by the requirement to pay tax as a condition of advancing an appeal, there is the right to argue hardship before an independent and impartial tribunal.
>
> 124 In the light of the wide margin of appreciation afforded to contracting states in the area of taxation, this approach cannot be described as "devoid of reasonable foundation": see the *Bulves case* [2009] STC 1193, para 63."

104. Mr Burgess relied on *Bulves v Bulgaria* (A/3991/03) [2009] ECHR 143. In that case Bulves sought to deduct input tax which it had paid to its supplier. When a cross-check of the supplier revealed that the latter had not recorded the supply in its records for the month in question, the tax office issued an assessment and ordered Bulves to pay the amount of input tax into the state budget. The Court held that, Bulves having complied fully and in time with the VAT rules, its right to claim a deduction of the input VAT amounted to at least a legitimate expectation of obtaining effective enjoyment of a property right and that this amounted to a 'possession' within A1P1 [57]. Separately the effect of the authorities' refusal to recognise Bulves' right to deduct the input tax was that Bulves had been ordered to pay the VAT a second time to the State budget, and had also lost the right to recognise the first payment of VAT as an expense for corporate income tax purposes thereby increasing its liability for corporate income tax for the tax year in question. The Court said of this (at [58])

> "These amounts, which the applicant company incurred as a result of the authorities' refusal to allow it to deduct the input VAT, unquestionably constituted possessions within the meaning of Article 1 of Protocol No 1."

I do not see any relevant distinction between these amounts and the amounts which ToTel has been assessed to under the clawback assessments, amounts which have been incurred as a result of HMRC's refusal to allow it to deduct input VAT. I therefore accept that A1P1 is engaged.

105. In *Bulves* the Court went on to hold that it was not necessary to decide whether the actions complained of were to be regarded as a deprivation of possessions within the second sentence of paragraph 1 of A1P1 (as Bulves contended), or as a control of the use of property to secure the payment of

taxes within paragraph 2 (as the Government contended), and that it should examine the interference in the light of the first sentence [61].

106. It continued:

> "62. The Court reiterates that according to its well-established case law, an instance of interference, including one resulting from a measure to secure payment of taxes, must strike a "fair balance" between the demands of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No 1 as a whole, including the second paragraph: there must be a reasonable relationship of proportionality between the means employed and the aims pursued.
>
> 63. However, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation, and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."

107. Mr Burgess also referred to *Jokela v Finland* (App No 28856/95) [2003] 37 EHRR 26 for the proposition that there was a procedural requirement in A1P1 for an affected person to be able to challenge a deprivation of property: see the citation from [45] quoted above in the judgment of Simon J at [122], referring to 'a reasonable opportunity of putting his or her case".

108. In the present case the challenge is not to the legislative scheme under which HMRC can issue clawback assessments in order to prevent abuse of the VAT system. As Simon J said, the taxpayer has a right to challenge the substantive assessment to tax by way of appeal to the FTT. The challenge is rather to the operation of the hardship provisions. But I agree with Simon J that the hardship provisions, which require the appellant either to deposit tax or demonstrate hardship, cannot be said to devoid of any reasonable foundation.

109. That means that the challenge effectively collapses, as Miss Kamm submitted, into a claim of being deprived of the right of access to the Court. For reasons given above when considering Art 47 CFR, I do not see that there has been here any illegitimate interference with that right. ToTel had the opportunity to demonstrate financial hardship before the FTT but failed to do so. If that means that it cannot pursue its appeals, that is not because it was not afforded a 'reasonable opportunity to put [its] case', but because it did not avail itself of the opportunity. When a comprehensive view is taken of the applicable procedures, that does not in my judgment infringe the procedural requirements of A1P1 as laid down in *Jokela*.

Conclusion

110. In my judgment none of the challenges made by ToTel to the decisions of the FTT succeed, and I dismiss this appeal.

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MR JUSTICE NUGEE

RELEASE DATE: 27 October 2014