Neutral Citation: **[2023] UKUT 00069 (TCC)**

Case Number: UT/2021/000171

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

PROCEDURE – Whether HMRC's case on issue before FTT inadequately pleaded leading to procedural error on part of FTT in dismissing appeal – no – whether FTT wrong to proceed with determining appeal in full rather than determine issues only in principle as appellant requested post-hearing – no - appeal dismissed

Heard on: 25 January 2023
Judgment date: 17 March 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Between

KINGSTON MAURWARD COLLEGE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth, Counsel, instructed by VATangles Consultancy

For the Respondents: Peter Mantle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant is a rural studies college which supplies both grant-funded and fee-funded education. It also carries on commercial activities (such as selling goods and services from its on-site farm and blacksmith, providing equestrian activities, and venue hire for weddings and conferences). It appeals against the decision of the First-tier Tribunal (Tax Chamber) ("**FTT**") decision published as *Kingston Maurward College v HMRC* [2021] UKFTT 127 (TC) ("**FTT Decision**"). The FTT dismissed the appellant's appeals against HMRC's rejection of the appellant's claim for input VAT. The appellant now appeals, with the permission of the FTT, on two inter-related grounds concerning the procedural fairness of the FTT's decision.

2. Under the first ground, the appellant submits the FTT was wrong to find against it on an issue when that issue was not properly raised or particularised by HMRC in HMRC's Statement of Case. Under the second ground, the appellant argues the FTT unfairly proceeded to make a final determination on the quantum of the claim such that no input VAT could be claimed. The FTT should instead have determined the issues in principle, as the appellant had requested, leaving it to the parties to reach agreement on quantum and reverting to the FTT if there was no agreement.

FTT DECISION/BACKGROUND

3. The FTT Decision was a carefully considered and detailed decision running to 68 pages. We need refer only to a small part of it given the procedural focus of the grounds but it is nevertheless helpful first to outline, in very broad terms, the issues before the FTT.

4. The appellant's appeals were against various HMRC decisions refusing late claims to deduct additional input tax in the VAT accounting periods 1/8/10 to 30/4/16. For present purposes it is sufficient to note that there were three main issues before the FTT:

(1) Were the appellant's supplies of training to grant funded students supplies which were made for consideration (as the appellant argued) and accordingly taxable (but exempt) supplies ("**the consideration issue**")? The FTT invited submissions from the parties, after the hearing, but before issuing its decision, on the Upper Tribunal's decision in *Colchester Institute Corporation v. HMRC* ([2020] UKUT 368 (TCC) where the Upper Tribunal had agreed with the taxpayer in that case that the grant-funded education supplies there were supplies for consideration. The FTT agreed with the appellant that its circumstances were materially the same and found in favour of the appellant.

(2) Was the claimed tax "residual input tax" (in other words was it incurred on inputs used or to be used in making both taxable supplies and exempt supplies) ("**the residual input tax issue**")? It was common ground the supplies of training services were exempt, and that the supplies in relation to the appellant's commercial activities were taxable. The FTT rejected the appellant's argument that all of the relevant input tax was residual (i.e. that no inputs were attributable exclusively to making exempt supplies). The FTT did not accept the appellant's case, in view of the evidence before it, that everything the appellant did constituted a single integrated whole such that there was no distinction between its training and commercial supplies. The FTT accordingly dismissed the appellant's appeal with the effect that HMRC's rejection of the appellant's input tax claim was upheld in its entirety.

(3) The correct interpretation of the partial exemption special method ("**PESM**") which the appellant had agreed with HMRC in a letter in 1998. The FTT agreed with the appellant's interpretation. The FTT's reasoning on this was obiter given its decision on (2) above.

5. The procedural fairness grounds before us centre on issue (2) above, the residual input tax issue. In relation to that the FTT summarised its conclusion as follows having found in the appellant's favour on the consideration issue (issue 1) (that corresponded to Part C of the FTT's analysis):

> "131. It follows from the conclusion set out in Part C above that I accept that, so far as the claimed tax was incurred by KMC [*the Appellant*] to inputs used for the purpose of making supplies without charge, it is not excluded from qualifying as "input tax" (as defined in s 24 VATA) on the basis that it relates to non-business activity. However, on KMC's own case, KMC is entitled to "credit" for the claimed tax only if and to the extent that it constitutes "residual input tax". On that basis, it is for KMC to demonstrate that:
>
> > (1) The relevant inputs on which the claimed tax was charged were used or were to be used in making or, as it is put in the caselaw set out below, have "a direct and immediate link" with, both taxable and exempt supplies, or are "cost components" of KMC's business as a whole and were not used or to be used exclusively in making exempt supplies of training services.
> >
> > (2) To the extent that the claimed tax does constitute "residual input tax", it is properly attributable to taxable supplies under the terms of the 1998 letter
>
> 132. For the reasons set out below in this Part D [*the part of the FTT's Decision dealing with residual input tax issue*], in my view, KMC has failed to establish that […] the claimed tax constitutes "residual input tax" such that its appeal must fail. I have considered the point in [131(2)] in Part E."

6. We cover the further relevant detail of the FTT Decision, the pleadings in the run up to it and the parties' post-hearing submissions in our discussion of the grounds of appeal.

GROUNDS OF APPEAL

7. Before the Upper Tribunal, the appellant raises the following grounds:

> (1) The FTT was wrong to decide not to make any finding on the extent to which the claimed VAT constituted residual input VAT (i.e. on supplies received by the appellant which were used to make both taxable commercial supplies and exempt supplies). That was because that issue had not been properly raised and particularised by HMRC in its Statement of Case.
>
> (2) The FTT wrongly failed to treat the hearing as determining issues of principle rather than finally determining quantum.

Ground 1 – FTT erred in dismissing the appeal given the inadequacy of HMRC's pleading in its Statement of Case

8. The parties' dispute before us in relation to this ground centred on the *application* of the background legal principles relating to the requirement on HMRC to set out its position in its Statement of Case with respect to the particular circumstances of this case, rather than the *content* of those legal principles.

9. The starting point is Rule 25(2) of the FTT Rules which requires the statement of case must:

> "…(a) in any appeal, state the legislative provision under which the decision under appeal was made, and
>
> (b) set out the respondent's position in relation to the case"

10. The interpretation of that rule was elaborated on by Judge Mosedale in *Allpay Limited v. HMRC* [2018] UKFTT 273 (TC). The context was an appeal where the appellant's success in

its appeal against various VAT decisions and assessments made in relation to its bill payment services depended on it falling within the VAT exemption for financial services. To fall within the exemption the appellant's services had to: 1) be "payment services" but 2) fall outside the exclusion for "debt collection". The parties' pleadings had focussed on issue 2) "debt collection". The FTT ultimately concluded HMRC were not allowed to dispute issue 1) "payment services", because on proper analysis HMRC had conceded that issue. However, it first considered whether the FTT had to consider whether issue 1) needed to be pleaded in order for HMRC to raise it, and in doing so analysed the requirement for HMRC to "set out [its] position". At [14] it explained

> "The Tribunal's rules require HMRC to set out its position in respect of a case; what that means is that HMRC should explain its position in sufficient detail to enable the appellant to properly prepare its case for hearing. Anything less may lead to injustice"

11. Judge Mosedale went on to reject HMRC's argument in that case that HMRC did not have to plead anything as burden of proof was on the appellant on the basis of the following reasoning (at [18]):

> " And there is no logic or justice in HMRC's suggestion in any event. If the person with the burden of proof was required to prove everything, even those matters which the other party had not clearly disputed, then preparation for, and hearings of, appeals would be much longer and a great deal of time and money would be wasted. Moreover, trial by ambush is not justice: each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must therefore state in advance in summary terms what is in dispute and why."

12. She also extracted the following proposition from the Upper Tribunal's decision in *Fairford Group plc v HMRC* [2014] UKUT 329 (TCC):

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

13. We agree with the above propositions, as do the parties. We would add that how those propositions fall to be applied, and the particular level of detail which will be sufficient to enable an appellant to properly prepare, will depend on the circumstances of the particular appeal.

14. As regards ascertaining what it is that is in dispute, this will obviously require consideration of both parties' positions. The appellant's case will be framed by their grounds of appeal. Here the appellant's ground of appeal in relation to the first of the two sets of appeals (which related to the same material issue but to different VAT periods) (dated 11 December 2015) were as follows:

> "That the effect of the Appellant's partial exemption special method is that all VAT incurred on purchases and expenses is reclaimable in full.
>
> The Appellant does not have any "non-business" activities whether or not the provision of wholly grant-funded further education and/or vocational training to students aged 19 and under in mainstream colleges is correctly "non-business" since the education and training courses supplied by the Appellant are supported by both grant funding and commercial activity.
>
> The Respondents accept that where an activity is supported by both grant and commercial activity, it is a business activity."

15. In its subsequent (17 November 2016) notice of appeal, the grounds stated:

> "The terms of the PESM dated 6 May 1998 are agreed to be binding on both the Commissioners and the on the taxpayer.
>
> Since the taxpayer is a rural studies college all of its educational and training activities are also tied up with its taxable activities of farming, dairy, equestrian and the blacksmith shop.
>
> As such, although there is input tax that is directly attributable to the appellant's taxable activities there is none that is so applicable to its exempt or, using HMRC's definition "non-business" activities.
>
> The result of all this that, under the terms of the PESM, all input tax is reclaimable."

16. Two features in the appellant's case are worth noting at this point. First, the appellant's sole argument for why none of the inputs were attributable exclusively to exempt supplies hinged on its case that all its educational and training activities were tied up with its taxable activities. (As will be seen, various shorthand formulations (references to the "single business" or the "inter-related", "interlinked" or "conflated" nature of the activities) were used by the parties and the FTT to capture this argument). Second, the appellant's case on this point was "all or nothing" in the sense that it was not arguing any alternative case. In other words, if the single business argument were not accepted, then although not all of its input VAT was residual, no argument was being run that some part of it was.

17. The introduction to HMRC's Combined Statement of Case of 1 April 2019 for the two sets of appeals (Statement of Case) summarised the overall matters in dispute as follows:

> "[2]…The Appellant asserts that the provision of [free educational and vocational courses to under 19s] is a business activity and that the input VAT on the cost components and overheads of delivery falls to be categorised as fully recoverable input tax in accordance with its approved deduction methodology.
>
> [3] The Respondents first maintain that the provision of free education and vocational training is a non-business activity, lacking the requisite consideration for the supply to be brought within the scope of the VAT system. Further, the Respondents do not accept that all relevant input tax is residual input tax, or that it cannot be attributed to non-economic activity and/or exempt supplies."

18. After setting out the background, the relevant law and guidance, the Statement of Case then summarised the appellant's arguments in more detail in a series of numbered points (at [35]): i) state funded education to under 19s was a taxable (exempt) supply ii) in any case as the courses were funded partly from commercial activities they were wholly business activities iii) the close integration of the manner of delivery of free education with wider commercial activities and with education supply to fee paying students meant education to under 19s took on the economic characteristics of those other supplies iv) the appellant incurred no VAT referable to non-business or non-economic activity, and incurred no VAT relating wholly and directly to exempt business activities.

19. The Statement of Case then addressed the above arguments in turn i) the consideration issue, and then ii) to iii) together under the heading "Funding through State Grants and Commercial Activity and the Conflation of Supplies" ([43] to [47]) and iv) at ([48] to [50]). HMRC dealt with the "conflation of supplies" at [46], stating the farm and other commercial outlet supplies were discrete and separate supplies to the education supplied. The farm's

taxable produce was supplied to an entirely different customer base than its student population for separate consideration.

20. The Statement of Case continued at [50]:

> "HMRC does not accept that all of the VAT incurred by the Appellant was deductible in full. Not only was a business/non-business attribution necessary, but also an attribution of input tax, (that is VAT incurred by the Appellant attributable to its economic activities) was required. HMRC are not satisfied that no input tax was incurred on goods or services used exclusively in making exempt supplies. Input tax incurred on goods or services used exclusively in making exempt supplies was irrecoverable, and a proportion of residual input tax used in part in making taxable supplies and in part in making exempt supplies was irrecoverable. HMRC denies that the Appellant's contention that it incurs, aside from input tax wholly attributable to the making of taxable supplies, only fully recoverable residual income tax. By HMRC's letter dated 20 July 2016 and the accompanying schedule, following receipt of further information from the Appellant, HMRC accepted that the Appellant was entitled to certain further amounts input tax credit."

21. Mr Mantle, who appeared for HMRC before us and below, took us to the 20 July 2016 letter referred to in that last sentence above. The letter set out HMRC's response to the appellant's VAT returns (submitted by the appellant, in line with subsequent correction notices for earlier periods, on the basis that there was no input VAT directly attributable to exempt supplies). Contrary to Mr Mantle's submissions, we are not however persuaded the passages he took us to in that letter (in which HMRC maintained the correctness of the appellant's *original* returns, which *had* identified input tax which was directly related only to exempt supplies and therefore non-recoverable), add anything to the analysis of how HMRC put its position in its Statement of Case. Mr Mantle rightly accepted the letter was not incorporated by reference. It is plain to us the only relevance of the letter was to clarify that the Statement of Case was not seeking to cut across the agreement HMRC had stated later on in the 20 July 2016 letter to the appellant nevertheless being entitled to certain further amounts of input tax credit.

22. Turning then to how the FTT addressed the above issues, in dealing with the appellant's submissions on why none of the relevant inputs were directly attributable only to exempt supplies the FTT noted (at [143]) that the appellant:

> "…did not approach this by seeking to demonstrate what inputs the claimed tax relates to and how those inputs were used by KMC. KMC simply said that (a), in practice, it had not been able to identify "input tax" which is attributable exclusively to its exempt supplies, and (b) this is unsurprising given that all the taxable and exempt activities of KMC are very closely integrated such that it carries on a single "interlinked" and "integrated" business as a rural studies college... KMC seemed to suggest that it must follow from the closely integrated nature of its outputs that all of its "input tax" (other than that wholly attributable to taxable supplies) must relate to both its exempt supplies of training services and its taxable commercial supplies."

23. The FTT then referred to evidence elicited in HMRC's cross-examination of the appellant's witnesses that many students were not involved, as part of the appellant's courses in work relating to the appellant's taxable commercial supplies.

24. It referred at [144] to submissions both at the hearing and after the hearing where

> "…KMC maintained its stance that all or virtually all of its input tax is "residual" and suggested that there is a de minimis amount of tax attributable to exempt supplies exclusively".

25. The FTT rejected that position by reference to the reasons it explained earlier as to why it was rejecting the single business argument. It continued at [146]:

> "It is an inherent feature of the test set out in the case law for determining whether a taxpayer is entitled to "credit" for "input tax", that an examination is required of both sides of the VAT equation. The test requires an assessment of precisely what inputs the relevant VAT relates to and whether and how those particular inputs were used by the taxpayer in making onward taxable supplies/taxed transactions (or other outputs). Moreover, it is for KMC to establish (to the required standard (on the balance of probabilities)), that it is entitled to "credit" for the claimed tax on the basis that it constitutes "residual input tax" and, accordingly, that HMRC are wrong to deny its claim. However, KMC has not done so:"

26. The points the FTT went on to mention in explaining why the appellant had not established the claimed tax was "residual input tax" included that:

> "…(3) KMC has chosen to argue its case, therefore, by reference only to the output side of the equation, namely, on the basis, that all the inputs must relate to all its supplies due to the integrated and interlinked nature of its output activities. It has not made any reference to the nature of the relevant inputs and to how those are used for the purposes of all or any of those output activities. However, KMC cannot sidestep the required analysis to establish that it is entitled to "credit" for the claimed tax simply on the basis that there are various strands to its business which, to some extent, are interrelated.
>
> (4) Without any example of what kinds of input the claimed tax relates to and what the inputs were used for it is guesswork whether the inputs to which the claimed tax relates have a "direct and immediate" link with both taxable and exempt supplies (or whether the relevant VAT is a cost component of an overall business activity) rather than only with its exempt supplies, as accords with the basis on which KMC originally submitted its VAT returns for the relevant periods."

27. Mr Firth, who appeared for the appellant before us, but not below, submitted the FTT erred in proceeding unfairly, in determining the issue of residual input VAT in HMRC's favour when, as was clear from the relevant legal principles, HMRC's Statement of Case was inadequate. His oral submission in reply emphasised that in *Allpay*, the amended pleadings HMRC sought to make (which Judge Mosedale explained did nothing but briefly state that payment services issue was in dispute) were rejected as inadequate. Similarly, here, HMRC's denial was a bare denial. It did not, as required, set out the key parts of HMRC's legal and factual case.

28. For the reasons below, we consider however, that once HMRC's Statement of Case is considered in conjunction with the appellant's case, as it was disclosed in its grounds before the FTT, the appellant's case that the FTT erred in law must be rejected.

29. As regards whether HMRC's Statement of Case marked out the "extent of the dispute", it must be recognised that the appellant's case on why there was no input VAT exclusively attributable to exempt supplies rested entirely on the single business argument (which HMRC responded to at [46] of its Statement of Case). If successful, that would have provided a complete answer to HMRC's case. If it was wrong however, then the appellant did not run any kind of argument in the alternative to explain why none, or at least not all, of the input VAT was not exclusively attributable to exempt supplies. As regards HMRC's "case" on why the

appellant's case failed, in the event the single business argument was not accepted, (if it is right to describe it as such, given what we come on to say about the lack of the appellant's alternative case), it does not make sense in our view to label HMRC's non-acceptance (of there being no input VAT that was exclusively linked to exempt supplies) as a bare denial. Before a position can be denied, there must first have been a position that was advanced or at least be taken to have been advanced. Thus, in *Allpay* the appellant's case that it did not fall within the exclusion for "debt collection" would not have served any purpose unless the appellant was also maintaining that the supplies were "payment services" in the first place. It can well be seen why in those circumstances the FTT in that case viewed HMRC's proposed pleading as a bare denial and therefore inadequate. (The inadequacy was all the more clear given, as the FTT then explained (at [39] and [40]), the taxpayer there was left wondering which of at least two possible lines of argument, which HMRC had aired in correspondence, HMRC was relying on in respect of the issue). Similarly, in *Fairford* (which the FTT in *Allpay* relied on for its proposition at [12] above) where one party's stance (in that case the taxpayer's) in response to the other's evidence was to put the other to proof, rather than identify what evidence was challenged, it can readily be seen why such bare denial would be viewed as inadequate. Here, beyond the single business argument, there were no other facts or legal arguments advanced by the appellant in relation to which HMRC could meaningfully set out its legal or factual stance in order to mark out the parameters of the dispute.

30. The appellant argues HMRC's lack of adequate pleading, with the consequence the appellant did not have the proper opportunity to identify and submit evidence relevant to the issues raised because they were not set out when they should have been, or to quantify the effect of the issues raised, results in an injustice. Again, this wrongly depicts the scope of the dispute between the parties and misses the point that it was for the appellant to plead a case in the alternative if it wished. The reason the appellant did not submit such evidence, or raise such issues was because it failed, as it could have done, to put a case in the alternative to its all or nothing single business argument. It would have been open, as indicated by the FTT's reasoning (at [146]), for the appellant to indicate what kinds of input the claimed tax related to and what the inputs were used for to show the extent to which inputs were residual, in the event the single business argument was not accepted by the FTT. If the appellant had set out an alternative case on, for instance, the types of inputs the appellant received, and why those were not directly and immediately linked to exempt supplies, then HMRC would of course have needed to have responded in more detail than it did.

31. In reply, Mr Firth argued it was difficult for a taxpayer and perilous to anticipate HMRC's objections. Again, that in our view overlooks that is was for the taxpayer to put an alternative case. That omission proved, it turned out, far more perilous. It is also not correct to view the appellant has having been ambushed. Rather the outcome in HMRC's favour was simply a consequence of the combined effect of the FTT rejecting the single business argument, upon which the appellant had pinned all its hopes, the factual findings elicited by HMRC in addressing that argument in legitimate cross-examination that not all of the students were involved with the taxable activity, and with the absence of any further case in the alternative.

32. Mr Firth also relied in reply on *Burgess & Brimheath* [2015] UKUT 578 (TCC) (which the FTT in *Allpay* considered might on the face of it assist HMRC's argument there but ultimately did not) for the proposition that it cannot be assumed from a party's silence that a point has been conceded. However, as explained in the excerpts [43] and [49] of *Burgess, (*which the FTT in *Allpay* referred to at [21] of its decision) the burden to show the competence of the discovery assessment was on HMRC, and the fact that the appellant did not say anything did not mean HMRC, in the circumstances of that case, was relieved of the burden of showing the relevant conditions had been met. It does not assist in a case where, as here, the appellant

did not say anything on an alternative case that fell to it to run if it so wished. The appellant's silence on its alternative case did not give rise to any question of concession. It simply reflected that the appellant was not running an alternative case.

33. HMRC's statement of case was not therefore inadequate and there was accordingly no error on the part of the FTT in deciding the issues as it did. The above is sufficient to dispose of the ground of appeal. We do not therefore address Mr Mantle's further arguments (which attached significance to the appellant not objecting to the FTT regarding the adequacy of HMRC's Statement of Case or seeking further and better particulars of it).

Ground 2 – FTT erred in not issuing decision in principle

34. Under this ground, the appellant argues the FTT was wrong to reject the appellant's submission that the FTT should issue a decision in principle and remit the matter of the quantum of residual input tax to the parties. As set out above, the FTT dismissed the appeals on the basis that the appellant had not established on the balance of probabilities that it was entitled to credit for residual input tax.

35. The appellant's submission arose in the context of post-hearing submissions which the parties provided pursuant to the FTT's direction to provide any submissions on the impact of the Upper Tribunal's decision in *Colchester* as regards the consideration issue (whether grant funding was consideration for the supply of education or training). The parties both made their initial submissions on 20 January 2021. HMRC accepted *Colchester UT* decided the consideration point in the appellant's favour (reserving the right to argue *Colchester* was wrong on a further appeal) but reiterated the points it made in written and oral submissions that the overall appeal should be dismissed. The appellant's submissions accepted, on the basis of HMRC's arguments made at the hearing in relation to courses that had no interaction with commercial matters, that there was a small element of input tax that was wholly and directly attributable to exempt activities, but suggested that the application of de minimis limits "could possibly result in all input tax being reclaimable" by the appellant. The submissions invited the tribunal:

> "…to allow [the Appellant's] appeal, with an instruction for the parties to agree the figures for repayment. In the event that such agreement cannot be reached, the [Appellant's] request that the matter be directed to be remitted to the Tribunal for its adjudication."

36. The appellant provided further submissions on 22 January 2021 suggesting that the only live issue for the FTT to determine was the consideration issue.

37. HMRC's further submissions, noting that the appellant's approach raised the prospect of a further hearing in the FTT at a later date, argued (at [5]):

> "…[the Appellant], in effect, seek[s] to obtain a position from which they can subsequently raise again before the Tribunal for a second time, at a later date matters covered by Issue 3 [*i.e. the extent of any residual input VAT*] that have been addressed at the appeal hearing and should be decided now to finally decide this Appeal".

38. The submissions pointed out that the issue of direct link between different types of inputs and taxable outputs was a substantial issue of mixed fact and law, not a quantification issue, nor a matter of figure-work, and was to be resolved on the evidence that been adduced at the (full) hearing which had taken place.

39. The appellant's further submissions of 2 February 2022 maintained its request for a decision in principle submitting:

> "…If the parties adopt a pragmatic approach then, it is suggested, the correct quantum of underclaimed input tax should easily be quantifiable. Accordingly, the suggestion that the Tribunal should issue a decision in principle is entirely sensible and pragmatic."

40. The appellant's submissions referred to *General Motors (UK)* [2015] UKUT 605 (TC) and *NHS Lothian Health Board* [2020] CSIH 17, cases which the appellant made submissions on before us and which we discuss below (although by the time the issue came before us the appellant's reliance was on the Supreme Court's decision in *NHS Lothian Health Board* [2022] UKSC 28 rather than the Court of Session Inner House's decision in that litigation, the Supreme Court having allowed HMRC's appeal against the Inner House's decision).

41. The FTT then finalised its decision. That dealt with the attribution issue in the way that we have already set out above under Ground 1 (see [22] to [26] above). The FTT dismissed the appellant's appeal accordingly.

42. The appellant's case is that a fair and just approach meant allowing the parties to quantify the claim, or else revert back to the FTT. The FTT should have adopted that approach, in line with the appellant's request. The FTT erred in law in failing to do so.

43. The wider point of principle raised, in the appellant's submission, is that where a point, not identified before, comes up in a hearing before a tribunal, the tribunal must act fairly to allow the affected party to address the point. In support, the appellant relies on a passage from the Supreme Court's decision in *NHS Lothian Health Board* (at [76]). That case concerned appeals against HMRC's rejection of the appellant's claim for input VAT where the claim related the period 1974 to 1997 and in relation to which there was minimal evidence. In its discussion of the extent to which the FTT, in that case, was right to question the extrapolation basis advanced by the appellant, the court explained the FTT was not required under the EU principle of effectiveness to take on the role of "forensic accountant" on behalf of the appellant. It continued:

> "That does not however mean that the figure determined by the FTT must be either the taxpayer's claim or zero. The process of preparing for hearings and appeals, the forensic process of the tribunal hearing itself and the judges' subsequent deliberations identify errors or alternative approaches which refine the case ultimately set out in the decision. The judge arrives at the right figure in accordance with his or her assessment of the facts and the law and that may end up being somewhere in between the figures for which the opposing sides were contending. That is legitimate subject, of course, to the judge ensuring that both parties have an opportunity to comment on any new method the judge alights on which was not raised by the parties or fairly explored at the hearing".

44. A similar point, that a tribunal was not confined to the figures put forward by the parties, was made in *HMRC v General Motors* [2015] UKUT 605 (TCC), a case which concerned an appeal against HMRC's rejection of the taxpayer's claim for overpaid VAT (and which the Supreme Court in *NHS Lothian Health Board* went on in the passage above to confirm it did not cast doubt on). The Upper Tribunal explained (at [68]):

> "So far as they could properly do so, it was their duty (applying their own expertise as a specialist tribunal) to ascertain the true amount of VAT (if any) which GMUK had overpaid. This result could be achieved either by the FTT performing the appropriate calculations itself, or by stating the principles by reference to which they considered the calculation should be made. In performing this task, the FTT had to act with procedural fairness, and there had to be a proper evidential foundation both for their findings of fact and for their conclusions. But their preferred solution did not have to be one for which

> either side had specifically contended, either before or in the course of the hearing."

45. That there is a duty to find the "right" or "true" figure, which may not correspond to the figures advanced by the parties, does not however help the appellant in showing the FTT in the present case erred in law. Both passages above make clear the tribunal's figures must be grounded in the facts. As Mr Mantle's submissions highlighted, that will depend on there being a proper evidential foundation. That was clearly lacking in this case, with the FTT rightly describing the effect of the absence of such evidence to the issue it had to grapple with as "guesswork" ([146(4)]). (Mr Mantle was also right to query the appellant's depiction of the remaining issue as one of "quantum". The amount of claim depended on ascertaining which inputs or types of inputs were directly or immediately linked to which supplies. That was a mixed question of fact and law. In the end, while the terminology of "quantum" downplays the nature of the exercise of attribution nothing of significance turns on this point).

46. The appellant's ground, in essence, amounts to a challenge to the FTT's discretion not to accede to the appellant's request for an "in principle only" hearing. Mr Mantle submitted the appellant's suggestion was just an informal request and had not amounted to, and was not treated by the FTT as an application, (because if it had then it would be expected the FTT would have directed submissions from HMRC in relation to it). However, we consider it clear from the content of the post-hearing submissions (which set out each party's stance on whether a final decision, or just an in principle one should be made) that the FTT was able to, and did, treat the appellant's request as an application. Equally, contrary to Mr Firth's submission, we consider the FTT then went ahead and exercised its discretion to reject the application by proceeding in the terms it did, to make a final decision dismissing the appeal. Although the FTT did not address the case-law the appellant had referred to, there was no need for it do so in the light of what we have said above about that case-law not being on point.

47. As regards how FTTs should exercise such discretion, the appellant and HMRC supported their positions (for respectively agreeing or rejecting the "in principle only decision" request) by reference to two FTT authorities involving input tax claims.

48. The appellant points to *Hedge Fund Investment Management Limited v HMRC* [2022] UKFTT 340 (TC) where the FTT, having accepted the appellant's case that he had the requisite intention to make taxable supplies at the time the input tax was incurred, directed the parties to endeavour to agree the extent to which the appellant was entitled to credit for the input tax (which involved considering whether the input tax was attributable to the expected taxable supplies or reflected overhead costs), or else revert to the FTT to resolve the matter. The FTT explained that it was reluctant to come to a conclusion on the point; the evidence before it had made it difficult to come to a definite view on the issues ([32][34]).

49. HMRC referred to *ING Intermediate Holdings Ltd v HMRC* [2014] UKFTT 938 (TC). In that case there was a dispute, regarding whether the appellant had to prove its claim was justified not only in principle but in amount. The FTT's views on this turned out to be obiter because it decided the appellant had lost in principle. The FTT (Judge Mosedale) noted variously the appellant's argument that its hearing time estimate would have been longer if it was thought quantum was in issue, that HMRC had not followed up on the appellant's adviser telling HMRC that invoices were not available for inspection, and that the invoices were not in the bundles ([188]). Against that it noted the appellant had not provided any evidence of quantum to HMRC, or anything else which amounted to explicit or implicit acceptance by HMRC that the tribunal would only decide a point of principle ([190]). Judge Mosedale continued:

> “I have the power to make an (effectively belated) direction that the hearing is only to determine the matter in principle…If quantum had been relevant, without any evidence that HMRC explicitly or implicitly accepted that this hearing, which was to determine the validity of the appellant’s voluntary disclosures, was only on a point of principle, I would have been inclined to dismiss the appeal on the basis that the appellant had failed to prove the quantum of its claim or to agree with HMRC or, prior to the hearing, ask the Tribunal to direct, that this would be a hearing in principle only.”

50. Neither case suggests to us that, in the circumstances of this case, the FTT was bound to have decided the question of whether to restrict its decision to one of principle in a particular way. Both are illustrations of how the discretion the FTT has on how to manage the case before it will depend on the circumstances. It does not appear the approach to be taken was a matter of dispute, in *Hedge Fund* so there was not the same consideration of factors as there was in *ING* albeit that consideration was obiter. What the cases also show is that there is tension on the one hand between making a final overall decision which provides certainty, but which may not then take account of all the relevant detail and argument that could have been considered, if further discussions or a further hearing were allowed, with the lack of finality, certainty and delay, that comes with allowing such further deliberations. Where the right balance is to be struck will be a matter for the FTT to consider in accordance with the overriding objective. In considering the fairness and justice of proceeding to make a decision which is only in principle it will be relevant in our view, as the FTT noted in *ING*, to consider 1) the scope of the hearing that took place (in that case the FTT described it as a hearing to determine the validity of the appellant’s voluntary disclosures) 2) what if anything the parties explicitly or implicitly agreed which altered that scope and 3) whether any direction on the scope of the hearing had been sought by the party seeking a decision in principle only.

51. Mr Mantle submitted that the appellant’s request for an in principle only hearing was analogous to an application for a direction of preliminary issues. He argued the key principles relevant to that, as set out by the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 0637 (TCC) (at [28]), applied but were not met. We consider that while there is some overlap in the principles mentioned there (which is not surprising given they are rooted in the need to deal with cases fairly and justly) we do not consider they are of direct relevance to situations where as here, and in both *Hedge Fund* and *ING* the issue of what the decision should deal with is raised <u>at or after</u> the relevant substantive hearing. The principles in *Wrottseley* clearly address the situation where the question of whether to direct a preliminary issue arises at an earlier stage in the proceedings before the relevant hearing has already taken place.

52. As is well-established (see for instance *Wrottesley* [9] to [13] and the authorities referred to there) the Upper Tribunal will be slow to interfere with the FTT’s exercise of a case management discretion unless it is so plainly wrong that it is outside the generous ambit of discretion entrusted to the judge. Mr Firth argues the decision was plainly wrong because it failed to consider the relevant factor of the inadequacy of HMRC’s pleadings and the circumstances in which the quantification issue arose.

53. We disagree. As discussed above, the appellant’s pleaded case was on an all or nothing basis. The FTT had a discretion whether, nevertheless, to allow the appellant the further opportunity to agree and, if necessary, litigate the question of the extent of residual tax but chose not to. We consider the approach the FTT took was one that was clearly open to it. The decisions were under appeal were against decisions in which HMRC refused the appellant’s claims for specified amounts of input tax in respect of specified periods. The hearing which took place before the FTT over three days in May 2019 was listed as a final hearing. There was nothing to suggest any agreement had been reached, or direction sought from the tribunal that the hearing only deal with issues in principle. We have concluded above that HMRC’s pleading

was not inadequate and described how the evidence in relation to some courses not having any link with the appellant's commercial activities arose in cross-examination of the appellant's witnesses in relation to the appellant's case that all of its activities constituted a single integrated whole. There was nothing in the way the issue arose which meant that the FTT was wrong in law to proceed as it did.

54. Mr Firth also argues, the fairness of allowing a remittal back to the parties is borne out by the fact the FTT would, in his submission, have had to have referred the matter back to the parties anyway, if for instance the FTT had found that the PESM the appellant had relied on was invalid. In that scenario HMRC argued the standard method (under Regulation 101 VAT Regulations 1995) would apply yet HMRC had not provided any standard method calculation or supporting evidence. This point assumes, however, that the FTT would inevitably (if the point had become relevant) have directed that the matter be remitted to the parties. That outcome cannot be assumed. HMRC's position was that the application of Regulation 101 was a matter of arithmetic and was not analogous to the exercise contemplated if the quantification of the residual input tax, a mixed question of fact and law, were remitted to the parties. But in any case whether such direction for remittal to the parties for agreement would be granted, even if sought, would have been made would be a matter of FTT discretion.

55. Mr Firth also submits the parties do not have to anticipate and provide evidence on every possible permutation regarding quantum, including those not clearly identified by the pleadings. We do not consider that position, which assumes the tribunal will treat the litigation of an appeal as an ongoing iterative process, reflects the normal features of the way substantive tax appeals are litigated before the FTT. First, the FTT will normally be expected to deal with all of the appeal before it at the substantive hearing unless otherwise agreed or directed. Second, the tribunal will only be able to decide the issues within the scope of that appeal on the evidence before it. Parties will be well aware of this, and if they are not, then they ought to be. If the relevance of the evidence depends on the outcome of certain issues then the party should adduce the evidence so they are covered, should the alternative arise, and not assume the tribunal will put the matter back to the parties for agreement or hold a further hearing. By not putting in evidence to cover off decisions in the alternative, the party runs the risk of an adverse decision being made due to an insufficiency of relevant evidence. Alternatively, if the party considers it makes sense to have a more restricted scope of hearing, the party should broach the scope of the hearing with the other side and the tribunal at a suitably early stage, so the more limited scope of the hearing can be settled in good time before the hearing takes place.

56. We therefore reject the appellant's case that the FTT erred in law by omitting to treat the decision as one of principle. We accordingly dismiss the appellant's appeal under Ground 2.

57. As regards the ground raised in HMRC's Respondents' notice concerning the consideration issue which argued *Colchester Institute UT* was wrongly decided we should record that by the time of the hearing HMRC chose not to argue the point before us but reserved the position to argue those points if the appeal went further.

CONCLUSION

58. The appellant's appeal is dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN

Release date: 21 March 2023