Neutral Citation Number: [2017] EWCA Civ 1716

Case No: C1/2017/1845

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT
MR JUSTICE GREEN

Strand, London, WC2A 2LL

Date: 02/11/2017

Before:

LADY JUSTICE GLOSTER
LORD JUSTICE SALES
and
LORD JUSTICE SINGH

- -

Between:

THE QUEEN **on the application of** **GLENCORE ENERGY UK LIMITED**	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -

Sam Grodzinski QC, James Henderson and James Segan (instructed by **Freshfields Bruckhaus Deringer**) for the **Appellant**
Timothy Brennan QC and Georgia Hicks (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing dates: 10-11 October 2017

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Approved Judgment

Lord Justice Sales:

1. This case concerns the relationship between judicial review in the High Court and the tax appeal system involving the First-tier Tribunal (Tax Chamber) ("FTT"). It arises in the context of a new tax called Diverted Profits Tax ("DPT") which was introduced by Part 3 of the Finance Act 2015 ("FA 2015") with effect from 1 April 2015.

2. The FA 2015 makes detailed provision for the procedures to be followed when the respondent commissioners ("HMRC") consider whether to make a charge to DPT and then after they issue a Charging Notice setting out DPT which they say is due to be paid in respect of an accounting period. A Designated Officer of HMRC must first issue a Preliminary Notice within 24 months after the end of the relevant accounting period setting out the tax which she has reason to believe is due. The taxpayer then has 30 days in which to make representations and the Designated Officer has 30 days in which to consider those representations and decide whether to issue a Charging Notice for DPT and if so in what amount. The taxpayer is obliged to pay the tax set out in the Charging Notice within 30 days thereafter. The Designated Officer is then obliged to review the case and the charge to DPT in the following period of 12 months ("the review period"), and may issue an amending notice to reduce the DPT or a supplementary notice to increase the DPT assessed to be due. The taxpayer has 30 days from the end of the review period to institute an appeal to the FTT. There is no right of appeal before that point. The appeal is, like other tax appeals, a full merits appeal on the law and the facts. If the taxpayer succeeds on an appeal, it will have been out of its money during the period of the review and the appeal, but the amount of the tax will be repaid with interest.

3. In this case HMRC made an assessment that the appellant ("GENUK") was liable to pay DPT in relation to profits arising from its oil trading business which HMRC maintained had been diverted to its parent company in Switzerland, Glencore International AG ("GIAG"), so as to constitute "taxable diverted profits" within the meaning of Part 3 of the FA 2015. According to HMRC's assessment, GENUK has diverted profits to GIAG as a result of payment to GIAG by GENUK of a charge of 80% of GENUK's net operating profits in return for services provided by GIAG to GENUK pursuant to a contract called the Risk and Services Agreement ("the RSA"). Under the RSA, GIAG undertook to insure GENUK in relation to operating losses it might suffer and to give it priority for the provision to it of facilities under GIAG's control for oil storage and transportation.

4. HMRC's Designated Officer (Ms Maura Parsons) issued a Preliminary Notice dated 6 September 2016 pursuant to section 93 of the FA 2015 indicating that HMRC proposed to levy DPT from GENUK in the sum of £21,129,349 (plus interest) in relation to the nine month accounting period of 1 April 2015 to 31 December 2015. Despite representations by GENUK to oppose this, the Designated Officer issued a Charging Notice dated 3 November 2016 in that amount pursuant to section 95 of the FA 2015. GENUK paid the assessed DPT amount within the relevant time and the Designated Officer commenced a review as required by section 101 of the Act.

5. In the meantime, rather than waiting to appeal under the statutory scheme, GENUK issued a claim for judicial review of the Charging Notice, relying on four grounds: (1) in issuing the Charging Notice the Designated Officer wrongly applied the test for

issuing a Preliminary Notice rather than the stricter statutory test applicable in relation to a Charging Notice; (2) the Designated Officer failed to take account of GENUK's representations; (3) the Designated Officer failed to give any or any adequate reasons for the calculation of DPT in the Charging Notice; and (4) the calculation of DPT in the Charging Notice is irrational in two particular respects.

6. In a detailed judgment of 26 June 2017, Green J refused to grant GENUK permission to apply for judicial review. This is the judgment under appeal to this court. For the purposes of his judgment, Green J was prepared to accept that GENUK had arguable grounds of claim, though he regarded them as weak. However, he refused permission to apply for judicial review on the basis that GENUK had suitable alternative remedies available to it in the form of the statutory review of the charge to DPT under section 101 FA 2015 then on foot, in conjunction with GENUK's right of appeal to the FTT under section 102 of the Act if it was dissatisfied with the outcome of the review. The judge also considered that permission should be refused by reference to section 31(3C) of the Senior Courts Act 1981, on the basis that the outcome for GENUK would not have been substantially different if the conduct complained of had not occurred.

7. In this court, Hickinbottom LJ considered the application for permission to appeal on the papers. He considered that the case merited the grant of permission to appeal and decided that the best way in which the issues could be dealt with in this court was by granting permission to apply for judicial review under CPR Part 52.8(5) and directing that this court should retain the case and itself hear that judicial review claim with the benefit of full evidence from HMRC. The issue whether judicial review should be refused on the grounds that there is a suitable alternative remedy could be determined at the substantive judicial review hearing in this court, as could all the grounds of claim advanced by GENUK so far as that might be necessary. Also, although this court would not itself apply section 31(3C) of the 1981 Act, which only operates at the stage when permission to apply for judicial review is under consideration, the equivalent provision in section 31(2A) applicable at the stage of the substantive hearing of a judicial review claim would be relevant. That provides that if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred", then the court must refuse to grant relief on the application for judicial review.

The DPT regime

8. DPT is a tax introduced to counter the use of aggressive tax planning deployed by multinational corporate groups to divert profits which would otherwise have been subject to corporation tax in the UK away from the UK to low tax jurisdictions, thereby eroding the UK tax base. The tax becomes chargeable in relation to "taxable diverted profits" arising to a company in a relevant accounting period (section 77) under certain conditions, in an amount calculated by comparing the UK tax payable in relation to the arrangements which result in the diversion of profits with the notional tax payable in the UK if they had not been diverted. The assessment of whether the relevant conditions exist and the elaboration of the counterfactual scenario to work out the notional tax payable (i.e. the tax which would have been payable had a "relevant alternative provision" been in place between relevant parties: see section 82) can involve considerable complexity.

9. The judge provides a helpful summary of the statutory framework for DPT. It is not necessary to set out the full detail again here.

10. In this case, HMRC assesed that section 80 FA 2015 (headed "UK company: involvement of entities or transactions lacking economic substance") applied in respect of the nine month accounting period in 2015 and that DPT was payable in relation to profits which accrued to GENUK but which were paid on to GIAG pursuant to the RSA.

11. Section 80(1) provides:

> "This section applies in relation to a company ("C") for an accounting period if—
>
> (a) C is UK resident in that period,
>
> (b) provision has been made or imposed as between C and another person ("P") (whether or not P is UK resident) by means of a transaction or series of transactions ("the material provision"),
>
> (c) the participation condition is met in relation to C and P (see section 106),
>
> (d) the material provision results in an effective tax mismatch outcome, for the accounting period, as between C and P (see sections 107 and 108),
>
> (e) the effective tax mismatch outcome is not an excepted loan relationship outcome (see section 109),
>
> (f) the insufficient economic substance condition is met (see section 110), and
>
> (g) C and P are not both small or medium-sized enterprises for that period."

12. For the purposes of this provision, GENUK is a company resident in the UK and is "C"; and GIAG is "P". Neither were small or medium-sized enterprises in the accounting period. The RSA contains a "material provision". The relevant participation condition regarding the relationship between GENUK and GIAG is met. There is an issue between the parties whether the "insufficient economic substance condition" is met, i.e. whether the RSA is on terms equivalent to an arm's length commercial arrangement between GENUK and GIAG. HMRC's view is that the RSA satisfies the "insufficient economic substance condition", in that an arm's length commercial agreement between GENUK and GIAG would have been on materially different terms less generous to GIAG. There is also, as it transpires, an issue whether the RSA results in an "effective tax mismatch outcome" ("ETMO") as between GENUK and GIAG.

13. Section 82(5) provides:

> *"The relevant alternative provision"* means the alternative provision which it is just and reasonable to assume would have been made or imposed as between the relevant company and one or more companies connected with that company, instead of the material provision, had tax (including any non-UK tax) on income not been a relevant consideration for any person at any time."

14. For the ETMO condition to be satisfied, the resulting taxes payable by GIAG as a result of operation of the RSA must be less than 80% of the corporation tax payable by GENUK if the "relevant alternative provision" had been in place: section 107. HMRC's assessment to now has been that the ETMO condition is met in the relevant period because the profits of GENUK's trading in GENUK's hands (calculated without application of the provision in the RSA for onward payment to GIAG), taxed at the rate of UK corporation tax at 20%, would result in an ETMO as regards tax of the sums equivalent to those profits in GIAG's hands at the relevant effective rate of tax in Switzerland of between about 11% and 14%.

15. Section 93 of the FA 2015 governs the issuing of a Preliminary Notice. It provides in relevant part as follows:

> "**93 Preliminary notice**
>
> (1) If a designated HMRC officer has reason to believe that—
>
> (a) one or more of sections 80, 81 and 86 applies or apply in relation to a company for an accounting period, and
>
> (b) as a result, taxable diverted profits arise to the company in the accounting period,
>
> the officer must give the company a notice (a "preliminary notice") in respect of that period.
>
> (2) See sections 96 and 97 for provision about the calculation of taxable diverted profits for the purposes of a preliminary notice.
>
> (3) A preliminary notice must—
>
> (a) state the accounting period of the company to which the notice applies;
>
> (b) set out the basis on which the officer has reason to believe that one or more of sections 80, 81 and 86 applies or apply in relation to the company for that accounting period;
>
> (c) explain the basis on which the proposed charge is calculated, including—

> (i) how the taxable diverted profits to which the proposed charge would relate have been determined,
>
> (ii) where relevant, details of the relevant alternative provision (see section 82(5) or 88(7)) by reference to which those profits have been determined, and
>
> (iii) how the amount of interest comprised in that charge in accordance with section 79(2)(b) would be calculated,
>
> (d) state who would be liable to pay the diverted profits tax;
>
> (e) explain how interest is applied in accordance with section 101 of FA 2009 (late payment interest on sums due to HMRC) if the diverted profits tax is not paid, the period for which interest is charged and the rate at which it is charged.
>
> (4) Where the designated HMRC officer has insufficient information to determine or identify any of the matters set out in subsection (3), it is sufficient if the preliminary notice sets out those matters determined to the best of the officer's information and belief.
>
> (5) Subject to subsection (6), a preliminary notice may not be issued more than 24 months after the end of the accounting period to which it relates.
>
> …"

16. Section 94 makes provision for a taxpayer to have the opportunity to make representations after a Preliminary Notice is served. It provides in relevant part as follows:

> "**94 Representations**
>
> (1) This section applies where a designated HMRC officer gives a preliminary notice, in respect of an accounting period, to a company under section 93 (and that notice is not withdrawn).
>
> (2) The company has 30 days beginning with the day the notice is issued to send written representations to the officer in respect of the notice.
>
> (3) Representations made in accordance with subsection (2) are to be considered by the officer only if they are made on the following grounds—
>
> (a) that there is an arithmetical error in the calculation of the amount of the diverted profits tax or the taxable diverted

profits or an error in a figure on which an assumption in the notice is based;

(b) that the small or medium-sized enterprise requirement is not met;

(c) that in a case where the preliminary notice states that section 80 or 81 applies—

(i) the participation condition is not met,

(ii) the 80% payment test is met, or

(iii) the effective tax mismatch outcome is an excepted loan relationship outcome;

(d) that in a case where the preliminary notice states that section 86 applies—

(i) section 87 (exception for companies with limited UK-related sales or expenses) operates to prevent section 86 from applying for the accounting period, or

(ii) the avoided PE is *"excepted"* within the meaning of section 86(5);

(e) that in a case where the preliminary notice states that section 86 applies and that the mismatch condition (within the meaning of section 86(2)) is met, the condition is not met because—

(i) the participation condition is not met,

(ii) the 80% payment test is met, or

(iii) the effective tax mismatch outcome is an excepted loan relationship outcome (within the meaning of section 109(2)).

(4) But, unless they are representations under subsection (3)(a) in respect of arithmetical errors, nothing in subsection (3) requires the officer to consider any representations if, and to the extent that, they relate to—

(a) any provision of Part 4 of TIOPA 2010 (transfer pricing), or …

…

(7) *"The 80% payment test"* means the requirement in section 107(3)(d)."

17. Section 95 applies in relation to the issuing of a Charging Notice. It provides in relevant part as follows:

> "**95 Charging notice**
>
> (1) This section applies where a designated HMRC officer has given a company a preliminary notice under section 93 in relation to an accounting period.
>
> (2) Having considered any representations in accordance with section 94, the officer must determine whether to—
>
> (a) issue a notice under this section (a "charging notice") to the company for that accounting period, or
>
> (b) notify the company that no charging notice will be issued for that accounting period pursuant to that preliminary notice,
>
> and must take that action before the end of the period of 30 days immediately following the period of 30 days mentioned in section 94(2).
>
> (3) A notification under subsection (2)(b) does not prevent a charging notice being issued for the same accounting period pursuant to any other preliminary notice the person may be given in respect of that period.
>
> (4) See sections 96 and 97 for provision about the calculation of taxable diverted profits for the purposes of a charging notice.
>
> (5) A charging notice must—
>
> (a) state the amount of the charge to diverted profits tax imposed by the notice;
>
> (b) set out the basis on which the officer considers that section 80, 81 or 86 applies;
>
> (c) state the accounting period of the company to which the notice applies;
>
> (d) set out an explanation of the basis on which the charge is calculated, including—
>
> (i) how the taxable diverted profits to which the charge relates have been determined,
>
> (ii) where relevant, details of the relevant alternative provision (see section 82(5) or 88(7)) by reference to which those profits have been determined, and

> (iii) how the amount of interest comprised in the charge under section 79(2)(b) has been calculated;
>
> (e) state who is liable to pay the diverted profits tax;
>
> (f) state when the tax is due and payable;
>
> (g) explain how interest is applied in accordance with section 101 of FA 2009 (late payment interest on sums due to HMRC) if the diverted profits tax is not paid, the period for which interest is charged and the rate at which it is charged.
>
> …"

18. Section 96 applies in respect of HMRC's estimating profits for the purposes of issuing a Preliminary Notice and issuing a Charging Notice. Section 96(2) provides in relevant part:

> "(2) The taxable diverted profits are such amount (if any) as the designated HMRC officer issuing the notice determines, on the basis of the best estimate that can reasonably be made at that time, to be the amount calculated in accordance with sections 84 or 85 (as the case may be). …"

19. Section 98 provides that the DPT charged by a Charging Notice must be paid within 30 days after the date of the notice and that payment may not be postponed during any review under section 101 or any appeal.

20. Section 101 sets out the requirement for HMRC to conduct a review of the amount of the DPT claimed in a Charging Notice. It provides in relevant part as follows:

> "**101 HMRC review of charging notice**
>
> (1) Where a charging notice is issued to a company for an accounting period, a designated HMRC officer, within the review period—
>
> (a) must carry out a review of the amount of diverted profits tax charged on the company for the accounting period, and
>
> (b) may carry out more than one such review.
>
> (2) Subject to subsection (13), *"the review period"* means the period of 12 months beginning immediately after the period of 30 days mentioned in section 98(2).
>
> (3) Subsection (4) applies if—
>
> (a) the company has paid (in full) the amount of diverted profits tax charged by the charging notice, and

(b) the officer is satisfied that the total amount of diverted profits tax charged on the company for that period is excessive having regard to sections 83, 84, 85 , 89, 90 and 91 (calculation of taxable diverted profits).

(4) The officer may, during the review period, issue to the company an amending notice which amends the charging notice so as to—

(a) reduce the amount of taxable diverted profits to which the notice relates, and

(b) accordingly, reduce the charge to diverted profits tax imposed on the company in respect of the accounting period.

(5) More than one amending notice may be issued to the company in respect of the charging notice.

(6) Where an amending notice is issued, any tax overpaid must be repaid.

(7) Subsection (8) applies if a designated HMRC officer is satisfied that the total amount of diverted profits tax charged on the company for the accounting period is insufficient having regard to sections 83, 84, 85 , 89, 90 and 91 (calculation of taxable diverted profits).

(8) The officer may, during the review period, issue a notice (a "supplementary charging notice") to the company imposing an additional charge to diverted profits tax on the company in respect of the accounting period on taxable diverted profits which—

(a) arise to the company for that period, and

(b) are not already the subject of a charge to diverted profits tax.

(9) Only one supplementary charging notice may be issued to the company in respect of a charging notice.

(10) No supplementary charging notice may be issued during the last 30 days of the review period.

(11) Subsections (3) to (6) (amending notices) apply in relation to a supplementary charging notice as they apply to the charging notice.

(12) Section 95(5) (content of charging notice) and section 98 (payment of tax) apply in relation to a supplementary charging notice as they apply in relation to a charging notice.

> (13) If either of the following events occurs before the end of the period of 12 months referred to in subsection (2), the review period ends at the time of that event.
>
> The events are—
>
> (a) that following the issuing of a supplementary charging notice, the company notifies HMRC that it is terminating the review period;
>
> (b) that a designated HMRC officer and the company agree (in writing) that the review period is to terminate.
>
> (14) When determining on a review whether the total amount of taxable diverted profits charged on the company for an accounting period is excessive or insufficient—
>
> (a) the designated HMRC officer must not take any account of section 96 or (as the case may be) section 97 (which apply only for the purposes of the officer estimating the taxable diverted profits for the purposes of issuing a preliminary notice or charging notice), and
>
> (b) nothing in section 94 applies to restrict the representations which the officer may consider.
>
> …"

21. Section 102 provides for a right of appeal against a Charging Notice or supplementary charging notice. Notice of an appeal must be given to HMRC "within 30 days after the end of the review period": section 102(2).

Factual background

22. For a considerable time before the coming into effect of Part 3 of the FA 2015 there had been discussions between HMRC and GENUK regarding possible application of transfer pricing provisions of the UK tax code in relation to the service charge paid by GENUK to GIAG under the RSA, calculated at 80% of GENUK's profits. When Part 3 of the FA 2015 came into effect, those discussions expanded to cover a possible charge to DPT. The discussions were conducted by a specialist team within HMRC, which reported to Ms Parsons as the Designated Officer.

23. In the course of the discussions, GENUK at first accepted that the ETMO condition in the DPT regime was satisfied and that the 80% payment test was met. The main debate between the parties was whether the insufficient economic substance test was met in relation to the RSA and also, if it was, what the relevant alternative provision would have been.

24. By a letter dated 27 April 2016 from GENUK to HMRC, GENUK confirmed its acceptance that the ETMO condition was satisfied because the tax rate for GIAG in Switzerland in relation to the service charge paid to it by GENUK under the RSA was

around 11%. That position remained a fixed point in the interchanges between GENUK and HMRC until very late in the day.

25. In the discussions and correspondence between HMRC and GENUK, HMRC also requested information as to the benefit of services provided by GIAG under the RSA, its commercial rationale and as to the working capital requirements of GENUK. The information provided by GENUK was sparse and did not allow HMRC to form a complete and fully informed view about these matters.

26. In a letter dated 13 June 2016 from HMRC to GENUK, HMRC recorded their understanding that there was agreement between them about the application of all the conditions in section 80(1) save for that in sub-paragraph (f) (i.e. whether the insufficient economic substance test was met in relation to the RSA).

27. On 21 July 2016 the HMRC team working on GENUK's liability to DPT sent a submission to the Board within HMRC with responsibility for administration of DPT (including Ms Parsons) ("the DP Board"). The submission analysed the information available and calculated a charge to DPT by reference to what the team considered would have been the notional additional tax amount due in relation to GENUK's profits under a relevant alternative provision in the arrangements between GENUK and GIAG. In their assessment, the reasonable alternative provision would have replaced the loss insurance aspect of the RSA with provision of working capital for GENUK (at a cost considerably lower than the sums GENUK in fact paid GIAG under the RSA) so that it could absorb any of its trading losses on its own account and would have valued non-routine contributions from GIAG in terms of giving priority of access to GENUK to oil storage and transportation facilities (i.e. apart from payment at usual market rates for the storage and transportation facilities actually provided in the relevant nine month period in 2015) at zero ($0), on the grounds that GENUK had not provided sufficient information about what those non-routine contributions had in fact involved or about their value in the relevant period to justify giving them any other value. On 28 July 2016 the team gave a presentation based on the submission at a meeting of the DP Board, chaired by Ms Parsons, and answered questions about it.

28. The HMRC team continued its analytical work thereafter. They were unable to ascertain from the information provided by GENUK what non-routine services were in fact provided by GIAG to GENUK in the relevant period or what their value might have been and continued to assess that a $0 valuation should be given for such services. They did further work to estimate the appropriate deduction from the notional profits of GENUK under the counterfactual scenario which would have arisen under the reasonable alternative provision in relation to provision by GIAG of an appropriate level of working capital to GENUK, in place of the insurance arrangement under the RSA.

29. The HMRC team prepared a supplementary submission dated 10 August 2016 for the DP Board, to deal with the estimate of taxable diverted profits including, in particular, the amount of any reasonable fee for the provision of working capital to GENUK and for the provision of non-routine contributions from GIAG to GENUK in the relevant period. The supplementary submission set out detailed reasoning for HMRC's proposed approach in relation to the cost of provision of working capital and noted that insufficient evidence had been provided by GENUK in relation to the non-routine

services in fact provided by GIAG in the relevant period nor as to their value. The supplementary submission was debated at a meeting of the DP Board on 17 August 2016, which was again chaired by Ms Parsons. The Board was content with the proposed approach on both these points.

30. On the basis of the work done by the HMRC team, on 6 September 2016 Ms Parsons, as Designated Officer, issued the Preliminary Notice to GENUK. The Preliminary Notice included the following passages:

> "I have reason to believe that section 80 Finance Act 2015 applies in relation to the company [GENUK] for the accounting period 1 April 2015 to 31 December 2015 and, as a result, taxable diverted profits arise to the company in this accounting period. I am, therefore, giving the company a preliminary notice in respect of this period.
>
> The basis on which I have reason to believe that section 80 applies in relation to the company for this period is:
>
> [GENUK] is a company ('C') for the purposes of s80 FA 2015 and provision has been made or imposed between C and [GIAG] ('P'), by means of a transaction or series of transactions ('the material provision').
>
> The conditions of s80(1)(a)-(g) FA 2015 are considered to be met as follows:
>
> [an explanation was given for (a) to (c)]
>
> (d) The material provision results in an effective tax mismatch outcome (s 107 and s 108 FA 2015).
>
> The material provision results in expenses of C for which a deduction has been taken into account in computing the amount of corporation tax payable to C. Based on our understanding that P is liable to relevant taxes in Switzerland at a rate of approximately 11% the resulting reduction of corporation tax payable by C exceeds the resulting increase in relevant taxes payable by P for its corresponding accounting period.
>
> P does not meet the 80% payment test described at s 107(7) FA 2015 and the exemption at s 107(6) FA 2015 does not apply.
>
> It was confirmed in a letter from C to HMRC dated 27 April 2016 that an effective tax mismatch outcome arises from the material provision.
>
> [an explanation was given for (e) to (g), including why the insufficient economic substance condition is met]
>
> The basis on which the proposed charge is calculated is as follows:

> S85 FA 2015 applies to determine the taxable diverted profits that arise to [GENUK] in the accounting period 1 April 2015 to 31 December 2015, by reference to the relevant alternative provision (RAP). This is the alternative provision which it is just and reasonable to believe would have been made had tax on income not been a relevant consideration (s82(5) FA 2015). Under the RAP, C would have been appropriately capitalised to absorb the risk of operating losses and would not have entered into [the RSA].
>
> It is assumed that C would have paid P for its provision of working capital funding and any identifiable support services, but the RAP would not have resulted in expenses in respect of P's temporary assumption of C's operating losses.
>
> …
>
> [A calculation of estimated taxable diverted profits in the relevant period of £84,517,396 was then set out, including among other items (i) a deduction of an amount of US$6,317,000 as an estimate of the reasonable fee for appropriate working capital funding as part of the relevant alternative provision in the counterfactual scenario posited by Part 3 of the FA 2015 ("deduction (i)") and (ii) a nil deduction for "service fee payable to P for provision of support services [during the relevant period]"] ("deduction (ii)")].

31. The amount of deduction (i) (fee for provision of working capital) was said to be given after an estimate of average of GENUK's working capital funding costs was

> "reduced proportionately from a 4:1 to a 1:1 debt:equity ratio in line with debt:equity ratio of closest comparable to C identified by PwC's thin capitalisation benchmarking analysis (July 2015)."

32. The amount of deduction (ii) (a nil amount for service fee for support services) was explained on this basis:

> "$0 given the absence of evidence supporting what services have been rendered by P to C during the period and how these services have been both appropriately quantified and priced."

33. It is the reduction of deduction (i) by a factor of four to match a comparable in PwC's thin capitalisation benchmarking analysis of July 2015 and the nil value given to deduction (ii), which were both repeated in the Charging Notice, which GENUK contends under ground (4) in its judicial review claim are irrational parts of the calculation. We understand that PwC's thin capitalisation benchmarking analysis is a report containing comparative financial analysis conducted by PwC and submitted by GENUK to HMRC. The court was not provided with a copy of this report and no submissions were made by reference to it. Instead, the irrationality of HMRC's approach to its reduction of the amount of deduction (i) was said to be obvious from

the face of the Charging Notice. Nor did Mr Grodzinski QC in his submissions for GENUK take the court to the reasoning in the HMRC team's supplementary submission of 10 August 2016 on this point in an effort to show that it was irrational.

34. On 5 October 2016, the final day of the 30 day period for representations referred to in section 94(2) FA 2015, GENUK sent HMRC a letter of representations ("the 5 October representations"). These included a withdrawal of the concession made previously (in particular, in GENUK's letter of 27 April 2016) that the effective tax mismatch outcome condition was satisfied and a new assertion that the tax rate for GIAG in Switzerland in relation to fees paid by GENUK was 16.92% (i.e. more than 80% of the 20% rate of corporation tax to which GENUK's profits would be subject in the UK – "the 80% tax point"). GENUK did not give full details about this and said that the point "was being checked". The withdrawal of the concession and the new assertion about the tax rate for GIAG in Switzerland took HMRC by surprise.

35. The 5 October representations also stated that the calculation set out in the Preliminary Notice of the taxable diverted profits "contains various arithmetical errors" and in that regard disputed the amount of deduction (i) by reference to the PwC report and the nil amount given for deduction (ii). In relation to deduction (ii), GENUK included a one page appendix to the 5 October representations which gave "Examples of services provided by GIAG to GENUK". The appendix included very general statements regarding "the global presence" which GIAG's network of field offices around the world provide to GENUK; the "priority access" GIAG provides to GIAG's 100 tank farms and oil terminals worldwide and to sources of supply; and the "priority access" GENUK had to the tanker fleet of another related company, ST shipping. No details were provided. No calculations were provided for the value of these services in the relevant accounting period.

36. The HMRC team set to work on digesting and analysing the 5 October representations, in order to be able to decide whether to issue a Charging Notice within the further 30 day period referred to in section 95(2) FA 2015. By a letter dated 13 October 2016 HMRC asked GENUK for evidence in support of its case on the 80% tax point and its case in relation to deduction (i) and deduction (ii). The request for information on the 80% tax point was followed up in a telephone conversation between HMRC and GENUK representatives the next day.

37. On 21 October 2016 GENUK sent HMRC another letter to support its representations on the 80% tax point. Enclosed with this was a copy of a letter in German written by GIAG to the Swiss tax authorities (together with an informal translation into English) to set out GIAG's understanding of the Swiss tax provisions and practice to be applied to fee income received by GIAG under the RSA, which GENUK maintained would (if correct) give an applicable tax rate of 16.92%. The copy letter purported to be counter-signed by officials from the Cantonal authorities in Zug. It did not itself set out the 16.92% tax rate which GENUK said was the applicable rate, but just said that "service fee income is fully subject to Cantonal and Communal taxes in the Canton of Zug". It did not explain to the Swiss tax authorities the purpose for which this confirmation was being sought.

38. HMRC's own researches at this time into the relevant tax rate in Switzerland suggested that the effective rate paid by GIAG in relation to fees paid under the RSA was likely to be about 14% (i.e. less than 80% of the UK corporation tax GENUK

would have had to pay on its profits), so that the effective tax mismatch outcome condition for the imposition of DPT would be satisfied. HMRC noted that explicit confirmation of the relevant rate would be sought from the Swiss tax authorities in the review period.

39. The HMRC team produced a report dated 31 October 2016 for the Designated Officer with a recommendation that a Charging Notice be issued. The team also produced an analysis of 9 October 2016 of the representations made by GENUK. These documents were read by the Designated Officer. The team noted that the points made by GENUK in relation to deduction (i) (fee for working capital) did not appear to be an arithmetical error (see section 94(3)(a) FA 2015) but an objection to the principle adopted by HMRC in deciding how to calculate the relevant deduction. In relation to deduction (ii) (nil deduction for service fee), it was noted that the team and the DP Board were comfortable about this, "as [GENUK] has not provided evidence of actual services provided, benefits received by GENUK and pricing."

40. In her evidence, Ms Parsons explains that in her view neither of GENUK's objections in relation to deduction (i) and deduction (ii) constituted arithmetical errors within the meaning of section 94(3)(a) FA 2015. She was also satisfied that the amount of each deduction was the best estimate which could be achieved in the circumstances.

41. On 3 November 2016, Ms Parsons as Designated Officer issued the Charging Notice which is in issue in these proceedings. It stated that the notice was being issued under section 95 FA 2015 for a charge to DPT of £21,347,570.14. It went on in terms similar to the Preliminary Notice:

> "The basis on which I have reason to believe that section 80 applies in relation to the company for this period is:
>
> [GENUK] is a company ('C') for the purposes of s80 FA 2015 and provision has been made or imposed between C and [GIAG] ('P'), by means of a transaction or series of transactions ('the material provision').
>
> The conditions of s80(1)(a)-(g) FA 2015 are considered to be met as follows:
>
> [An explanation in relation to (a) to (g) was set out.] …"

42. The explanation in relation to sub-paragraph (d) repeated what had been set out under that sub-paragraph in the Preliminary Notice, quoted above. The reference to GENUK's letter of 27 April 2016 and its concession regarding satisfaction of the effective tax mismatch outcome condition was unchanged. No separate reasons were given why GENUK's representations on the 80% point in the 5 October representations and the letter of 21 October 2016 had not been accepted.

43. The Charging Notice contained the same calculation of the taxable diverted profits in the relevant period as had been set out in the Preliminary Notice, including the figures and supporting explanations for deduction (i) and deduction (ii) as quoted above.

44. On 4 November 2016, before the Charging Notice was delivered to GENUK, HMRC sent GENUK an email to say that GENUK's representations had been considered; that HMRC's team was working on detailed explanations why the representations had not been accepted which would be sent shortly; and that HMRC was happy to meet GENUK to discuss its points in greater detail. On 9 November 2016 HMRC (acting by Elba Virto, a member of its DPT team) sent GENUK a letter to set out HMRC's reasoning in relation to the various points in issue with GENUK ("the 9 November letter"), including why HMRC considered that the effective tax mismatch outcome condition was satisfied and did not accept GENUK's representations on the 80% point because the information provided did not constitute sufficient evidence for HMRC to conclude that GIAG's income under the RSA would be higher than 16% (i.e. 80% or more of the 20% UK corporation tax chargeable in relation to GENUK's profits) and why GENUK's representations in relation to deduction (i) and deduction (ii) were not accepted.

45. In relation to deduction (i), having explained how HMRC arrived at its estimate for working capital funding of GENUK in the counterfactual scenario envisaged by Part 3 of the FA 2015, Ms Virto also referred to GENUK's complaint that the calculation did not take account of the significantly higher capitalisation of GENUK in the counterfactual scenario and wrote:

> "I accept that this is potentially a valid point. I refer to our email of 13 October 2016 and telephone conversation of 14 October 2016, where we asked you for further information, but I understand that given the short time-frame, you have not been able to provide it. In order to get a better understanding of the impact of this point, we would seek to obtain further information during the review period, e.g. in the form of your analysis of the impact of the GENUK's higher capitalisation on its thin capitalisation position and, so, deductible working capital funding costs, for the period under review."

46. In relation to deduction (ii), Ms Virto wrote:

> "62. The pricing of GENUK's service fee payable to GIAG is a transfer pricing matter which is specifically excluded as a representation ground under section 94(4)(a). The work undertaken in the course of the ongoing transfer pricing enquiry to determine a service fee for GIAG's services (referred to as non-routine services) is ongoing. In particular, no agreement has yet been reached, and no evidential support yet provided, on what services have been actually provided to GENUK in the years under enquiry (and 2015, in particular) or what the arm's length price for these services should be.
>
> 63. I refer you to HMRC's letter of 5 April 2016, where my transfer pricing colleague listed a number of key issues to address in order to determine whether GIAG's activities or contributions (as you refer to them) constitute the provision of intra-group services in the context of the arm's length principle (paragraphs 7.5 to 7.18 of the 2010 OECD TP Guidelines). You

> responded to these points in your 27 April 2016 letter. In HMRC's view, the level of detail provided to date is insufficient to support that services for which a third party would be willing to pay have been provided (paragraph 7.6 of the 2010 OECD TP Guidelines), rather than shareholder activities, incidental benefits or benefits arising from group synergies.
>
> 64. Given the lack of detail in the actual services provided by GIAG to GENUK in the period 1 April to 31 December 2015, it is difficult to assess what the most appropriate method to price these services is (e.g. cost plus, profit split or other).
>
> 65. During the review period, we would like to ascertain what services (as defined by Chapter VII of the OECD TP Guidelines) were provided by GIAG to GENUK during the period covered by the charging notice, how these services were provided (including the role of GIAG and specific GIAG's personnel in performing these activities) and, then, identify an appropriate transfer pricing method and price for this element of the RAP."

47. In the judgment below, the judge placed weight on the 9 November letter as a document setting out the reasoning of the Designated Officer in deciding to issue the Charging Notice. Mr Grodzinski now points to the witness statement of Ms Parsons which has been filed by HMRC, in which she says that she was not involved in drafting the letter, did not see it before it was sent and did not know that it would be sent (although she appreciated that a letter would be sent by the HMRC team to request more information from GENUK). Mr Grodzinski also points out that the statutory function concerned (under section 95 FA 2015) was given by Parliament to the Designated Officer and to no one else, and that the *Carltona* principle (*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, CA) does not apply so as to make the reasoning of the HMRC team count as the reasoning of the Designated Officer. Therefore, he says, this court should not treat the reasons in the 9 November letter as attributable to the relevant decision-maker here, who is Ms Parsons as the Designated Officer.

48. In my view, however, the proper inference on the facts – not as a result of application of the *Carltona* principle - is that the reasoning in the 9 November letter does reflect the reasoning of the Designated Officer as well as the HMRC team working on the case. The Designated Officer was reliant on the detailed work done by the team and had been briefed by them about it. As Mr Brennan QC for HMRC showed us, the points made in the 9 November letter reflect points in the report of 31 October 2016 which was sent to Ms Parsons and read by her. There is little doubt that the substance of the reasoning in the 9 November letter was in the Designated Officer's mind when she issued the Charging Notice. To the extent that any specific point of detail was not, there is little doubt that she would have adopted the reasoning in that letter as an appropriate amplification of the substance of the reasoning in it.

49. Thereafter, HMRC commenced its review under section 101 FA 2015 as they were required to do. GENUK paid the DPT as assesed in the Charging Notice as it was

required to do. It has engaged with HMRC in the review. In parallel with that process, GENUK commenced the present judicial review proceedings.

50. HMRC say that in the course of the section 101 review HMRC and GENUK have agreed that the effective tax rate which GIAG would have paid if it had Swiss profits would be around 14.47% (i.e. below 80% of the relevant UK tax rate in relation to GENUK, so that the effective tax mismatch outcome is capable of being satisfied for the purposes of imposition of DPT). It has also emerged that during the period 1 April 2015 to 31 December 2015 GENUK was in fact lending GIAG large sums in excess of US$1 billion, which calls in question the amount of working capital GENUK usually needs or might require in the counterfactual scenario envisaged by Part 3 of the FA 2015.

Discussion

Suitable alternative remedy

51. For the purposes of this part of my judgment, I make the assumption that GENUK's grounds for seeking judicial review are reasonably arguable. This is the same as the basis on which the judge addressed the question of suitable alternative remedy in his judgment.

52. In my view, GENUK's appeal on the ground that the judge erred in refusing to grant permission to apply for judicial review on the grounds that the section 101 review coupled with the availability of an appeal on the merits at the end of the review period provided a suitable alternative remedy should be rejected. The availability of the review and appeal as a suitable alternative remedy is also a ground on which this court should dismiss the application for judicial review of the Charging Notice at this substantive hearing.

53. The principle that judicial review will be refused where a suitable alternative remedy is available is not in doubt. However, Mr Grodzinski submits that the section 101 review, taken with an appeal under section 102, is not a suitable alternative remedy, in particular because of one or more of the following features of the case. Under the statutory regime, GENUK has had to pay in excess of £21 million as DPT charged as set out in the Charging Notice and will be out of its money (without the possibility of appealing) for the 12 months of the review period under section 101 and then for the further period of any appeal, even though it may transpire as a result of the appeal that no sum of DPT was due at all. If a court can see in judicial review proceedings that there was an error (or at any rate what could be regarded as a "fundamental" error) on the part of the Designated Officer in issuing the Charging Notice, the reviewing court should step in immediately to quash the notice without waiting for the review and appeal procedure to be followed. Further, the complaints made by GENUK under grounds (1) to (3) only affect the issuing of the Charging Notice in the first place, which triggered the obligation of GENUK to pay the sum claimed in it, and do not go to the ultimate question whether that amount of DPT was or was not due from GENUK. The FTT on an appeal will address that ultimate question, but it has no jurisdiction to exercise a review function in relation to the issue of the Charging Notice in the first place. Instead, the review court should be prepared to step in to address the distinct complaints about the lawfulness of issuing the Charging Notice in the first place and to quash it if they are made out.

54. In order to evaluate these submissions, it is necessary to consider the basis for the suitable alternative remedy principle. The principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.

55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

57. In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due,

which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal.

58. For reasons of this kind it has long been established at the highest level that "Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision": *In re Preston* [1985] 1 AC 835, 852D per Lord Scarman; see also p. 852F ("I accept that the court cannot *in the absence of special circumstances* decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair" [emphasis in original]); and p. 862B-F per Lord Templeman, with whom the other members of the appellate committee agreed ("Judicial review process should not be allowed to supplant the normal statutory appeal procedure"; unless the circumstances are exceptional and involve an abuse of power of a serious character, as explained at pp. 864F-H and 866G-867C). In that case, the allegation was that the Inland Revenue Commissioners had made a promise not to collect tax in certain circumstances (i.e. had created what would today be called a legitimate expectation not to collect an amount of tax), and although the allegation was not made out the House of Lords was prepared to accept that such a claim could be made by way of judicial review. In fact, the tax appeal process would have been incapable of dealing with such a claim of unlawfulness on the part of the commissioners, which did not go to the merits of whether the criteria for imposition of tax were or were not met (a subject fit for examination on appeal) but rather to enforcement of fundamental rule of law standards against the commissioners if they had in fact made a promise not to initiate the tax collection process in the first place.

59. In my view, *Preston* provides relevant guidance in the present case. Apart from the review procedure under section 101 FA 2015, the statutory context here is a typical one of assessment by the HMRC of a taxpayer to tax with the taxpayer having a right of appeal against that assessment on the merits. There is nothing exceptional about the nature of the objections which GENUK has raised in relation to the Charging Notice.

60. The arguments GENUK puts forward under Ground (4) go directly to the underlying merits of the assessment to tax which has been made and are clearly suitable for determination on an appeal, which is where they should be dealt with. If GENUK wishes to contend that the objections it makes to the charge to DPT are obvious and can be disposed of in a summary way, it is open to it to apply to the FTT to exercise its wide case-management powers on the appeal to do that. Recourse to judicial review in an attempt to achieve such an objective is not appropriate.

61. The arguments GENUK puts forward under Ground (1) (wrong test applied) also relate to the merits of the assessment, even though the precise way in which it is put, as a challenge to the issue of the Charging Notice, would not be the form in which the argument would be examined on an appeal. But that is not enough to turn GENUK's case into an exceptional one, of a kind in relation to which the House of Lords in *Preston* would have accepted that judicial review should be available. Parliament

must of course have contemplated that sometimes HMRC would make errors of law in their assessment of DPT as set out in a Charging Notice, and the appeal process laid down by Parliament allows any error of assessment to be rectified. It is not any and every arguable error of law by a Designated Officer in issuing a Charging Notice which takes a case outside the contemplation of Parliament that an appeal is the appropriate remedy and which outweighs the general arguments why ordinarily judicial review should not be available, but only where there is some serious error amounting to an abuse of power. It is only in that exceptional type of case that there is a compelling need for the court to intervene by way of judicial review in order to vindicate the rule of law, overriding the usual considerations which ordinarily mean that the appeal should be treated as the suitable remedy to be pursued.

62. That might be the position if, for example, there was evidence that a Designated Officer had been bribed to issue a Charging Notice; or if she did so in breach of a promise not to issue a Charging Notice which gave rise to an enforceable legitimate expectation for the taxpayer of a kind which could not be vindicated in an appeal (the kind of exceptional case discussed by the House of Lords in *Preston* and the kind of case in which this court held in *R (Veolia ES Landfill Ltd) v Revenue and Customs Commissioners* [2015] EWCA Civ 747; [2015] BTC 23 that the taxpayer could seek judicial review); or possibly if there was a clear failure by the Designated Officer, manifest on the face of the Charging Notice, even to attempt to comply with the requirements of section 95(5) (for instance, if she had said nothing at all to identify the basis on which she considered that section 80 applied). But those types of case are very far indeed from the present case.

63. The approach which I would apply, as set out above, derives from *Preston*. It is consistent with the approach of the Privy Council in *Harley Development Inc. v Comr of Inland Revenue* [1996] 1 WLR 727, PC and with the observations of Underhill LJ (with whom Lewison LJ and Arden LJ agreed) in *CC & C Ltd v Revenue and Customs Commissioners* [2014] EWCA Civ 1653; [2015] 1 WLR 4043 at [43]-[44]. In that passage, in which he referred to the *Harley Development* case, Underhill LJ pointed out that judicial review of a tax decision would not be allowed in every ordinary case of alleged unlawfulness of approach on the part of HMRC, but that some "additional element" would be required involving impropriety or unfairness of a fairly fundamental character.

64. Similar points apply in relation to the arguments GENUK puts forward under Grounds (2) and (3). It is true that they go to an attack on the Charging Notice itself rather than necessarily to the issues which will be addressed on the appeal, but there is a clear overlap between them. On the appeal the Designated Officer will seek to defend the Charging Notice and will probably do so by reference to the sort of reasons she had or which were available to her for issuing it in the first place, though they may be supplemented or amended in light of the evidence and arguments put forward by the taxpayer. There is no compelling need for the court to intervene by way of judicial review to uphold the rule of law. The appeal process is suitable and sufficient to do that, focusing as it does upon protecting the critical interest of the taxpayer to be able to show that it should not be liable to pay the tax with which HMRC have sought to charge it.

65. Thus far I have been focusing on the availability to GENUK, eventually, of a right of appeal. Does the interposition of the mandatory review period under section 101 in

the statutory regime in Part 3 of the FA 2015 change the position? In my view it does not. If anything, I think it tends to reinforce the view that the court should in the exercise of its discretion decline to exercise its judicial review jurisdiction.

66. It can be said that the review period may mean that an ultimately successful taxpayer is kept out of its money for longer. But that feature does not make this type of case an exceptional one within the principle laid down in *Preston*. Parliament has established a regime in which the DPT charged is to be paid at an early stage, with a period for review to follow before appeal, but on the footing that if the taxpayer is ultimately successful on appeal HMRC will have to repay the money with interest. Parliament's view is that this regime creates a fair balance between the interest of the public in the timeous payment of tax which is due and the interest of the taxpayer should it eventually show that tax was not in fact due. That cannot be said to be an unreasonable position to take. I do not consider that the court should try to second-guess Parliament's view about this and in effect seek to supplement the remedies Parliament has set out in the legislation for ordinary cases by allowing claims of the type in issue here to proceed by way of judicial review. There is no clear or fundamental unfairness to the taxpayer which could justify the court in subverting the statutory process in that way.

67. Parliament has introduced the mandatory review under section 101 with a legitimate objective in view, to encourage the taxpayer to engage with HMRC to seek to agree what may well be complex aspects of the counterfactual scenario to be addressed under Part 3 of the FA 2015 in circumstances where there may well be more relevant information held by the taxpayer than will initially be known to HMRC. HMRC has to act fairly speedily if they wish to issue a Preliminary Notice within the statutory time limit, and may well have very limited information at that stage (as section 93(4) FA 2015, in particular, recognises). They then have to act very promptly to comply with the time limit for issuing a Charging Notice in section 95(2). In that context, it makes sense to provide for a review period in which relevant issues can be assessed with the benefit of a more relaxed timetable and, as is to be hoped, more information from the taxpayer. It is reasonable to characterise the review as a form of mediation or alternative dispute resolution procedure in which HMRC and the taxpayer are encouraged to seek to agree what DPT is actually due and to limit the issues which may have to be disputed on an eventual appeal at the end of the review process. That legitimate objective would be undermined if the court proceeded by way of judicial review of the Charging Notice in a case like this. This could only be justified in the type of exceptional case referred to above.

68. Before the judge and again before us, Mr Grodzinski submitted that the review process could not be regarded as a satisfactory alternative remedy because on the proper interpretation of section 101(3)(b) FA 2015 the Designated Officer could not in the course of a review decide that in fact no DPT should be charged, but could only deal with questions of quantum in the calculation of the DPT due. The judge held that the powers of the Designated Officer on a review are not so limited. In an appropriate case she could conclude that no DPT should be charged, e.g. because information was given to her during the review which led her to the conclusion that one or more of the conditions for application of section 80 FA 2015 had not in fact been satisfied.

69. I regard this issue of statutory interpretation as peripheral to the analysis I have set out above. Whether or not section 101 is limited in the way contended for by Mr

Grodzinski, the relevant alternative remedy in this context is not a review by itself, but a review in conjunction with a right of appeal at the end of it. The right of appeal is not limited in any way and there is no unfairness to the taxpayer in requiring the review process to be gone through before an appeal is brought.

70. However, I also reject Mr Grodzinski's submission about the meaning and effect of section 101(3)(b). The judge's interpretation of section 101 is correct. The point turns on the effect of the words, "having regard to sections 83, 84, 85, 89, 90 and 91 (calculation of taxable diverted profits)" in sub-paragraph (b). Does that phrase mean, "having regard only [to those provisions]", as Mr Grodzinski contends, or "having regard in particular [to those provisions]" (i.e. but not exclusively), as Mr Brennan submits. In my view, Mr Brennan's proposed interpretation is correct. The drafter uses much stronger language in the same section where the intention is to forbid the Designated Officer having regard to particular matters: see subsection (14) ("must not take any account"). Further, subsection (14)(b) emphasises the width of the representations which the Designated Officer may consider in the review. Mr Grodzinski's proposed distinction between quantum and liability in this context makes little sense: there is no good reason why the Designated Officer should be empowered to adjust the quantum of DPT assessed down to, say, £1, but not be able to review her assessment that liability to the tax is established and conclude that no tax is due. Furthermore, Mr Grodzinski's interpretation would undermine the object of the review procedure, which is to provide HMRC and the taxpayer with an opportunity to clarify each other's case so that the issues for an appeal can be narrowed down or an appeal avoided altogether. In the context of a review procedure intended to achieve that objective, there is no discernible reason to suppose that the drafter intended to remove critical issues affecting liability to DPT from discussion and re-assessment during the review period. (Mr Brennan referred to some materials relating to ministerial statements in Parliament, but he did not contend that these satisfied the test for them to qualify as aids to interpretation of the statute so it is not necessary to consider them further.)

71. For the reasons given above, I consider that the judge was correct to hold that there was a suitable alternative remedy in this case and to refuse to grant permission to apply for judicial review. If I had been in his position I would have done the same. Since permission to apply for judicial review has been granted by the order of Hickinbottom LJ, we are considering the claim for judicial review at the substantive hearing stage, but the same reasoning leads me to conclude that this court should exercise its discretion to refuse to grant any relief by way of judicial review on the grounds that a suitable alternative remedy exists.

72. Notwithstanding this conclusion, I will turn now to consider the grounds of judicial review advanced by GENUK on the substantive merits, since we have heard full argument on them. As a further reason for dismissing GENUK's judicial review claim, in my view none of them is made out.

Ground (1): application of the correct test under section 95 FA 2015

73. Mr Grodzinski points to the similarities in the drafting of the Preliminary Notice and the Charging Notice and to the use of the phrase "I have reason to believe that section 80 applies" in the Charging Notice, which corresponds with the phraseology of section 93(1) and section 93(3)(b) FA 2015 governing the issue of a Preliminary

Notice. He submits that this is a case in which the Designated Officer has gone wrong by applying the wrong legal test when she decided to issue the Charging Notice. She improperly applied the less demanding test for issuing a Preliminary Notice when she decided to issue the Charging Notice in this case, i.e. a test of "reason to believe" that section 80 FA 2015 applied as set out in section 93(1) and (3)(b) rather than a test whereby the Designated Officer is able to say that she "considers that section 80 … applies" in accordance with section 95(5)(b) FA 2015.

74. I do not accept this submission. Although, given the difference in the language used in section 93(1) and (3)(b) and section 95(5)(b), it was perhaps unfortunate that the drafter of the Charging Notice used the same "reason to believe" phraseology as is used in section 93(1) and had been used in the Preliminary Notice, in that it has encouraged GENUK to try to mount this argument, the fact is that the Charging Notice also states in terms that the conditions of section 80(1) "are considered to be met". It thus appears from the face of the Charging Notice that the Designated Officer considered at the time of issuing it that they were met and that section 80 did indeed apply in this case. This is also confirmed (if it were necessary to do so) by the evidence given by Ms Parsons.

75. It is true that the Preliminary Notice also says that the conditions of section 80(1) "are considered to be met", but it cannot be inferred from this that when the same language is used in the Charging Notice that the Designated Officer has incorrectly applied the "reason to believe" test in section 93(1). In fact, the dichotomy between the language in section 93(1) and the language in section 95(5)(b) is not as strong as Mr Grodzinski suggests. I can see no difficulty in the Designated Officer saying at the time of issuing a Preliminary Notice, as in this case, that she has reason to believe on the information then available to her that section 80 applies and also saying that on that information she "considers" that it applies, rather than again repeating that she merely has "reason to believe" that it applies. If anything, this indicates that the Designated Officer felt able to go somewhat further when issuing the Preliminary Notice in this case than was strictly required by section 93(3)(b), which only stipulated that it was necessary for the Preliminary Notice to "state the basis on which the officer has reason to believe" that section 80 applied to GENUK in the relevant period. The statements made in the Preliminary Notice were all in advance of, and subject to, any further information and explanations given by GENUK pursuant to section 94. In some cases, a Designated Officer's state of mind at the Preliminary Notice stage might be no further advanced than having "reason to believe" that section 80 applies, but in other cases it may be an accurate description of her state of mind to say also at that stage that she "considers" that it applies, as Ms Parsons did here.

76. By the time the Charging Notice was issued, Ms Parsons had received more information and accordingly her state of consideration of the case was more advanced. In the Charging Notice she was obliged to set out the basis on which she "considers" that section 80 applies (see section 95(5)(b)) and she did so. Again, it is consistent with her considering that section 80 applies, as the Charging Notice says she did, that she should have reason to believe that it applies. In the Charging Notice, Ms Parsons was saying that she had reasons to believe that section 80 applies and also that such reasons as she had at that time were sufficient to lead her to consider that it did apply.

77. As a further indication that Ms Parsons had in reality only applied a lower "reason to believe" test when she issued the Charging Notice, Mr Grodzinski pointed to the identical text in relation to section 80(1)(d) (effective tax mismatch outcome) in that notice as in the Preliminary Notice. That text again included the reference to the concession in GENUK's letter of 27 April 2016 on this point, without noting that the concession had been withdrawn in the 5 October representations and GENUK's letter of 21 October 2016 and without giving any reasons why GENUK's later representations had been rejected or why GENUK's previous concession was still thought to be relevant. Mr Grodzinski characterised the Charging Notice as a "cut and paste" transposition of the Preliminary Notice, which showed that the same test had been applied as for issuing the Preliminary Notice.

78. I do not consider that this aspect of the Charging Notice supports such an inference regarding the test which was applied when it was issued. It is directly contrary to the explicit language used in the relevant part of the Charging Notice, corresponding with section 95(5)(b) ("The conditions of s80(1)(a)-(g) are considered to be met as follows …"). Moreover, it remained relevant to HMRC's assessment that sub-paragraph (d) of section 80(1) was satisfied that GENUK – presumably with access to information from GIAG - had for a long period and until the eleventh hour conceded that the effective tax mismatch outcome condition was satisfied as set out in GENUK's letter of 27 April 2016. In HMRC's view, GENUK had not given a convincing explanation of the true position or why that concession had been withdrawn. The Designated Officer was entitled to refer to that letter when setting out the basis on which she considered that sub-paragraph (d) was satisfied.

79. The HMRC evidence which has been filed shows that the correct test was applied in relation to the issue of the Charging Notice and puts the position beyond doubt.

Ground (2): failure to consider GENUK's representations

80. It is clear from the evidence filed by HMRC that the Designated Officer did consider the representations made by GENUK after the Preliminary Notice was issued, as one would expect. In the event, Mr Grodzinski accepted this and said that Ground (2) should now be taken with Ground (3), because it did not appear from the Charging Notice itself that GENUK's representations had been taken into account. In particular, the repetition in the Charging Notice of the text from the Preliminary Notice setting out why the Designated Officer considered that sub-paragraph (d) of section 80(1) was satisfied, with the reference to GENUK's concession in its letter of 27 April 2016, gave GENUK the impression that its 5 October representations and letter of 21 October 2016 had not been taken into account. I therefore turn to consider Ground (3).

Ground (3): Failure to give reasons in relation to the effective tax mismatch outcome and the 80% point

81. There is no statutory duty to give reasons for the decision to issue a Charging Notice. Instead, the statute specifies the information which must be contained in a Charging Notice in section 95(5). The information specified there is designed to afford the taxpayer with clear information about the tax due (which has to be paid promptly) and so that, subject to any amending notice or supplementary notice issued in the course

of the review pursuant to section 101, it has a clear target for any appeal under section 102.

82. Section 95(5)(b) specifies that the Charging Notice must "set out the basis on which the officer considers that section 80 … applies". This requires the Designated Officer to set out her view of the relevant facts which justify the imposition of a charge to DPT. She does not have to give full reasons why she adopts that view of the facts. Her background reasoning would not be relevant on a full merits appeal against the Charging Notice under section 102. In this case, the Designated Officer did set out in the Charging Notice the basis on which she considered that section 80 applies.

83. However, despite the express statutory provision in section 95(5) saying what the Designated Officer must do and the availability of a full merits appeal at the end of the review period, Mr Grodzinski submits that the common law imposes a duty on the Designated Officer to give reasons for deciding to issue the Charging Notice. He says that because GENUK is immediately affected by the Charging Notice itself, in that it has to pay the DPT set out in it and then has to wait before it can appeal, the common law imposes an additional duty to give reasons. He relies in particular on the judgment of Elias LJ (with whom Patten LJ agreed) in *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71; [2017] 2 P&CR 4 at [26]-[33].

84. I do not accept that the common law imposes a duty to give reasons in the present context. Nor do I accept that *Oakley* supports the imposition of such a duty. As Elias LJ observed in that case at [28],

> "Statute frequently, and in a wide range of circumstances, obliges an administrative body to give reasons, although the content of that duty, in the sense of the degree of specificity of the reasons required, will vary from context to context. However, absent some statutory obligation, the question whether reasons are required depends upon the common law."

85. In our case, section 95(5)(b) does impose an obligation on the Designating Officer to state the reasons why the Charging Notice has been issued, in the sense of stating the basis on which she considers that that section 80 applies. GENUK's objection is as to the degree of specificity required under section 95(5)(b). But Parliament considered that this was sufficient to satisfy the powerful reasons for having a duty to give reasons identified by Elias LJ at [26]: to improve the quality of decisions by focusing the mind of the decision-maker; promoting public confidence in the decision-making process; "providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, thereby facilitating the process of judicial review or the exercise of any right of appeal"; and respecting the taxpayer's interest in understanding why a decision affecting it has been made. In this statutory context, as explained above, Parliament's principal focus is on ensuring that the taxpayer has the information available to allow it eventually to challenge a Charging Notice on appeal, which the limited statement of reasons required by section 95(5)(b) achieves. Parliament's objective has not been to facilitate judicial review of the issue of the Charging Notice at the earlier stage when the tax collection process is initiated. As Elias LJ indicates, it is usually only absent a relevant statutory obligation that the common law will itself impose a duty to give reasons, which is not this case. There is no lacuna in the statutory scheme which provides a compelling reason why in fairness

the common law should step in to supplement the procedures which Parliament has set out.

86. Moreover, in this context, imposition of a duty to give full reasons for a decision to issue a Charging Notice would tend to undermine the intended operation of the procedural system put in place by Parliament, which is directed to an appeal on the merits. If a duty were imposed to give full reasons, that would tend to lead to a focus on HMRC's reasons for issuing such a notice rather than the underlying merits whether the tax is due or not and would promote resort to judicial review to attack HMRC's reasoning process rather than progressing to the review under section 101 and appeal thereafter to establish the underlying merits as to whether tax is due or not. This would be an unhelpful and, in this context, unwarranted distraction, using up the limited resources of HMRC to try to meet judicial review challenges as well as dealing with the underlying merits on the question whether tax is due or not. Excessive recourse to judicial review may unduly impede HMRC in fulfilling its primary function of assessing what tax is lawfully due and ensuring that the correct amount is collected when due. That is especially so in the present context, where strict time limits for issuing a Charging Notice have to be met and the opportunity to collect tax which is in fact properly due may be lost if a taxpayer is successful in attacking the issue of one or more Charging Notices in judicial review proceedings - rather than contesting their merits in an appeal - and HMRC run out of time to collect the DPT which is due.

87. The duty to give reasons at common law blends with the common law duty to act fairly and is dependent on context. "[W]hat the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates": *Lloyd v McMahon* [1987] 1 AC 625, 702H per Lord Bridge; see also *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531, 560D-G per Lord Mustill. These factors point against the imposition of a wider duty to give full reasons as proposed by Mr Grodzinski in this case. Under the statutory scheme in the FA 2015, HMRC and the Designated Officer are concerned with the proper collection of tax which is truly due; the taxpayer is most directly affected by the decision to issue a Charging Notice because it says that an amount of tax is due to be paid; the Designated Officer explains the basis why she considers that such an amount is due, as the statutory scheme requires; and the taxpayer is able to challenge that assessment on its merits through the statutory review and appeal process.

88. Even if I were wrong about this, and a fuller statement of reasons was required, application of section 31(2A) of the Senior Courts Act 1981 would still lead me to refuse to quash the Charging Notice. It is highly likely the outcome for the applicant, GENUK, would not have been substantially different if the conduct complained of had not occurred and full reasons had been given. The Designated Officer had full and proper reasons in mind when deciding to issue the Charging Notice and could have set them out. In fact, full reasons why it was issued were supplied by HMRC in the 9 November letter and, as noted above, those reasons were in substance the reasons the Designated Officer had for issuing the notice. The reasoning process has also been explained in the evidence filed by HMRC. GENUK has not been prejudiced in any way by the non-inclusion of full reasons in the Charging Notice itself. If they had

been set out there rather than in, say, the 9 November letter, the process for imposition and collection of the tax would have proceeded in the same way.

Ground (4): irrationality in the calculation of DPT due – deduction (i) and deduction (ii)

89. I do not consider that this ground of claim is made out in relation to either deduction (i) (the assessment of working capital) or deduction (ii) (nil value for non-routine services from GIAG).

90. HMRC contend that GENUK's objections to both deduction (i) and deduction (ii) do not qualify as an arithmetical error in the calculation of the amount of the DPT or the taxable diverted profits within section 94(3) FA 2015. Rather, in each case the objection is to the principle of the approach adopted by HMRC - the rate at which it was considered it would be reasonable for GENUK to be capitalised in the counterfactual scenario, in the case of deduction (i); the principle for valuation of the non-routine services in the absence of detailed information about what they were, in the case of deduction (ii). In my view, that is correct, but it does not take HMRC very far.

91. Mr Brennan submits that section 94(3) limits the representations received in the 30 day period specified in section 94(2) which the Designated Officer is *obliged* to consider before issuing the Charging Notice, but he also says that the Designated Officer has a discretion to take into account other representations which the taxpayer (or, I would add, anyone else) might make in the 30 day period for representations before she issues the Charging Notice and a discretion to take into account any other information which comes to her at any time before such issue. The taxable diverted profits for the purposes of the Charging Notice are to be determined by her "on the basis of the best estimate that can reasonably be made at that time [i.e. when the Charging Notice is issued]": see section 96(2). The language of section 96(2) is general and does not limit the material to which the Designated Officer may have regard. Consistently with giving section 96(2) its ordinary meaning, the words in section 94(3), "are to be considered by the officer", can be read to mean "must be considered by the officer" and the word "only" can be read as qualifying the circumstances in which that mandatory duty applies. Read in this way, section 94(3) does not preclude the Designated Officer from deciding in her discretion to have regard to other representations and information.

92. Although this is a slightly awkward reading of section 94(3) I consider that it is the correct one. It is justified by reading that provision alongside section 96(2) and also having regard to the general desirability that a Charging Notice should assess DPT in the correct amount on the Designated Officer's best estimate at the time of issuing it, particularly since it is the trigger for the obligation of the taxpayer to pay the sum set out in it. The effect of this reading of these provisions is that the representations identified in section 94(3) are mandatory relevant considerations which the Designated Officer must take into account whereas other representations and information brought forward after the Preliminary Notice is issued are discretionary relevant considerations, to be taken into account or not as the Designated Officer (rationally) thinks fit (compare *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756 at [40] per Lord Bingham). This also provides a satisfactory basis to explain how it was lawful for HMRC to continue

to seek information from GENUK and take it into account in the period after the 30 days for representations had expired, as was obviously sensible for them to do.

93. In relation to both deduction (i) and deduction (ii) the Designated Officer had already provisionally decided the relevant points when she issued the Preliminary Notice, on the information available at that stage, and she and the HMRC team clearly did choose to have regard to arguments from GENUK to question that provisional assessment when reviewing the 5 October representations and then deciding to include the same deduction values in the Charging Notice. In my view, if GENUK has a good irrationality argument in relation to either of these deductions it is not prevented from mounting it just because the argument is not one of arithmetic but of principle. In each case, if the Designated Officer was irrational to include the deduction value in the Preliminary Notice then that irrationality followed through into the Charging Notice; and if the Designated Officer was irrational in rejecting GENUK's representations on that question, to which she chose to have regard, then that irrationality also affected the Charging Notice. Either way, and subject to the alternative remedy issue above, the court has to engage with GENUK's irrationality argument.

94. In relation to deduction (i), I think it is impossible to sustain the contention of irrationality without close attention to the PwC report of July 2015, the analysis set out in it and the characteristics of the comparators reviewed in it. Mr Grodzinski took us to none of this. The PwC report was not even included in the evidence before us.

95. Just because, in the counterfactual world envisaged by Part 3 of the FA 2015, GENUK would have had more working capital than it had in real life, it does not follow without more that the thinly capitalised comparators in the PwC report were inappropriate and that it was irrational for HMRC to have regard to them. A more capitalised GENUK might still have been thinly capitalised by the standards used by PwC. On the materials we have been shown and the arguments we have heard it is not possible to say that this was not a possible legitimate view for HMRC to take.

96. Nor does the acceptance in the 9 November letter that GENUK had made a "potentially valid point" about the working capital fee in the counterfactual scenario help GENUK to establish its case that the fee chosen was irrational. It simply indicated that further consideration could be given to this issue and fell short of saying that an irrational error has been made. Moreover, the time factor is relevant to the question of irrationality here. HMRC only had 30 days from receipt of the 5 October representations to make decisions across a wide range of contentious topics in the light of what GENUK said about them and they were entitled to consider that in the short time available for consideration of the issue of deduction (i) there remained in place a sufficient justification to continue to include it in the Charging Notice, particularly in view of the very summary argumentation in the 5 October representations.

97. As regards deduction (ii), in my view the decision to include a nil value for it in the Charging Notice was clearly a rational one. HMRC had pressed GENUK for full details about the non-routine services provided by GIAG in the relevant period, but the only information that GENUK provided was in the appendix to the 5 October representations. That gave no concrete and detailed information about what non-routine services GIAG had provided, let alone providing a basis for giving any

determinate value to them. In those circumstances, the Designated Officer was entitled to give a nil value to this deduction. The lawfulness and rationality of doing so is reinforced by the fact that this was likely to be the best way to encourage GENUK to provide detailed information to inform the valuation process during the review period, so that eventually the most accurate assessment of DPT could be made.

Conclusion

98. For the reasons given above, I would dismiss GENUK's application for judicial review on the grounds that a suitable alternative remedy is available in the form of the review under section 101 FA 2015 in conjunction with the right of appeal to the FTT under section 102 FA 2015. I would also hold that, upon examination, GENUK's grounds for seeking judicial review are not made out on their merits.

Lord Justice Singh:

99. I agree that this application for judicial review should be dismissed for the reasons given by Sales LJ. I add a few words of my own only in relation to the point relating to alternative remedies.

100. During the course of his submissions Mr Grodzinski sought to maintain that the right of appeal to the FTT in tax cases generally is not a suitable and effective alternative remedy where the FTT could not adjudicate on the public law grounds of challenge. It was for this reason that he took us to many authorities which have considered the issue of alternative remedies in a range of other contexts which had nothing to do with tax appeals. However, it seems to me that, in the context of tax appeals, the starting point must be the decision of the House of Lords in *Preston* [1985] AC 835, to which Sales LJ has referred. Although that decision recognised that there may be exceptional cases even in the tax context where it would be appropriate for an application for judicial review to be entertained, I agree with Sales LJ, for the reasons he has given, that the present case is not one of those exceptional ones.

101. But Mr Grodzinski may have been trying to prove too much in making the submission referred to above. He did not need to go that far because, as his submissions also made clear, there is potentially a point of distinction between tax appeals generally and the present context. The potential distinction is that, in the present context, an appeal under section 102 is not available until the internal review procedure in section 101 has been exhausted and there is a period of a delay of 12 months built into the procedure. It was for that reason that Mr Grodzinski submits that the alternative remedy of an appeal to the FTT is not, in the present context, suitable because the courts have said that one of the factors to be taken into account in assessing the suitability of alternative remedies is "whether the statutory procedure will be quicker, or slower, than [the] procedure by way of judicial review": see *R v Hallstrom, ex p. W* [1986] QB 824, at 852 (Glidewell LJ). However, for the reasons given by Sales LJ, I am not persuaded by Mr Grodzinski's submissions.

Lady Justice Gloster:

102. I agree with both judgments.