TC03505

Appeals numbers: TC/2012/8177 & 8178 and TC/2013/1826 & 1827

PROCEDURE – Application by HMRC to strike out part of proceedings – earlier judicial review proceedings – whether res judicata – whether abuse of process – whether any reasonable prospect of success – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR IAN SHINER **Appellants**
MR DAVID SHEINMAN

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
MR ANTHONY HUGHES

Sitting in public at Bedford Square, London on 27 September 2013

Mr Conrad McDonnell of counsel, instructed by Cawdery Kaye Fireman & Taylor, for the Appellants

Mr James Rivett of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. Both Appellants have appealed to the Tribunal against income tax closure notices issued in respect of the tax years 2005-06, 2006-07 and 2007-08. The Respondents ("HMRC") applied pursuant to Tribunal Procedure Rule 8(3)(c) for the Tribunal to strike out those appeals insofar as each appeal consisted of a claim that the provisions of s 58 Finance Act 2008 are in some way incompatible with any rights enjoyed by the relevant Appellant under EU law ("the Application").

2. Also listed to be determined at this hearing were appeals against refusals of requests for postponement of payment of taxes in dispute (being the taxes assessed by the disputed closure notices). Mr Rivett for HMRC informed the Tribunal that, having reviewed what HMRC considered to be new arguments advanced by the Appellants in relation to that dispute, HMRC had now decided to agree the postponement requests. Thus that matter was no longer before the Tribunal.

Background

3. The self-assessment tax returns of both Appellants for the tax years 2005-06, 2006-07 and 2007-08 claimed exemption from income tax in respect of certain income derived from a partnership. Both Appellants had entered into tax planning structures designed to ensure that that income was exempt by virtue of the provisions of the UK/Isle of Man Double Taxation Agreement. The workings of the structures are set out in paragraphs 21-32 of Mummery LJ's judgment in *R (ex parte Shiner and another) v RCC* [2011] STC 1878 ("the CA JR Decision").

4. In June 2012 HMRC issued closure notices to both Appellants in respect of the tax years 2005-06, 2006-07 and 2007-08. The conclusion stated in the closure notices was that by virtue of the provisions of s 858 ITTOIA 2005 the claimed exemption was not available to the Appellants. The relevant part of s 858 relied on by HMRC was introduced by s 58 FA 2008 (which received Royal Assent in July 2008) which, unusually and controversially, applied the amendments with retrospective effect.

5. The conclusions in the closure notices were in line with the contents of a letter sent in August 2008 by HMRC to taxpayers who had used the scheme, including the Appellants. In November 2008 the Appellants sought permission to apply for judicial review and in November 2010 that claim eventually (for the intervening events see paragraphs 14-16 of the CA JR Decision) came before the Court of Appeal (sitting, unusually, as a court of first instance). As summarised by Mummery LJ in the CA JR Decision:

> "[17] In a tiny nutshell the main point forcefully advanced by Mr David Goldberg QC on the claimants' behalf is that the retrospective effect of s 58 is contrary to, and incompatible with, art 56 EC [Treaty]. The reason for incompatibility is that the amendments made by s 58 are capable of preventing, restricting or discouraging commercial investment of capital in foreign partnerships by means of unjustified

discrimination between an investment of capital in a foreign partnership and an investment of capital in a UK partnership. It is argued that s 58 favours investment in a UK partnership by imposing an incremental domestic tax charge on income, which may already have borne tax in another jurisdiction. Its retrospectivity is an infringement of the EU principles of legal certainty and legitimate expectation. There is no justification for its retrospective and discriminatory effects. If this court has any doubt on this matter contrary to the claimants' contentions, then it ought to refer the questions of interpretation raised for rulings by the Court of Justice.

[18] The substance of HMRC's comprehensive response, also shrunk to nutshell size, is that, on the particular facts as they appear in this case, the claimants' main argument has no possible foundation in EU law. The claimants' case on EU law is described as so hypothetical that the court should not entertain it. In so far as the claimants may be affected by EU law on the actual facts of their case, they have failed entirely to address their effects, or the particular steps needed to establish that s 58 falls within the scope of application of art 56 EC and other provisions and principles of EC law; or that s 58 amounts to a restriction on the free movement of capital; or that its provisions are discriminatory, or are incapable of justification, or are disproportionate, or offend the principle of legal certainty."

6. Mummery LJ cautioned that:

> "**[42]** … a judicial review court has a job description: adjudication of challenges by citizens to the lawfulness of acts and omissions of public authorities *affecting them*. Its job description does not extend to chairing seminars on EU law, or income tax law, or giving general advice on those areas of law to taxpayers, tax planning bodies or fiscal authorities."

7. Mummery LJ identified the issues before the court as follows:

> **"[36]** Within the overall context of the retrospective effect of s 58 the following issues were canvassed on the appeal. The first two depend very much on the particular facts of this case. The remaining issues are more wide-ranging.
>
> (1) Was there a relevant 'movement of capital' or a payment within the meaning of art 56 EC?
>
> (2) If so, was the transfer or payment made between a member state and a third country? That would involve deciding whether, within the meaning of art 56 EC, the Isle of Man is a 'third country' to which there has been a movement of capital from the UK.
>
> (3) If so, how wide can the inquiry then range beyond the particular facts of this case into the realm of hypothetical situations to which s 58 and art 56 EC might relate?
>
> (4) Does s 58 restrict transfers of capital to a foreign partnership, but not those to a UK partnership? If so, is that precluded by art 56 EC (subject to the defence of justification)?

(5) If s 58 is precluded by art 56 EC, can it be justified in whole or in part, so that the retrospective aspect of s 58 is valid, despite the breach of the article?

(6) Is there a doubt whether s 58 is precluded by art 56 EC or whether it can be justified?

(7) If so, should there be a reference of questions of interpretation of art 56 EC to the Court of Justice?

(8) Are the claimants' proceedings an abuse of rights under EU law?"

8. The (unanimous) decision of the court was as follows:

"**[69]** I would dismiss the claimants' application for judicial review on the grounds that (a) it does not appear from the facts before the court that there has been any 'movement of capital' falling within art 56 EC; and (b) for the reasons given in the judgments handed down in [*R (on the application of Huitson) v RCC* [2010] STC 715] the retrospective provisions of s 58 are proportionate and compatible with art 1 of the First Protocol to the Convention.

[70] The remaining issues do not need to be decided for the disposition of the claimants' application for judicial review. They can be decided by a higher court, if and when it reaches the conclusion that the facts of the case disclose a 'movement of capital' within art 56 EC. Otherwise, it is advisable for those issues to be left for decision by another court in another case which could not be determined without deciding them.

[71] Finally, I do not consider it necessary, in order to decide this judicial review application, to refer any questions to the Court of Justice for preliminary rulings on the interpretation of art 56 EC."

9. By an Order dated 7 February 2012 ("the Supreme Court Order") the Supreme Court (Lords Walker, Kerr and Wilson) refused permission for an onward appeal stating:

"THE COURT ORDERED that

(1) permission to appeal BE REFUSED because the application does not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time, bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal.

(2) in relation to the point of European Community law raised in the application, the application is also refused because the correct application of Community law is so obvious as to leave no scope for reasonable doubt"

Respondents' Case

10. Mr Rivett for HMRC submitted as follows.

11. HMRC wished to emphasise that the extent of the Application was limited to a strike out of the appeal proceedings only insofar as the grounds of appeal argued that s 58 was contrary to EU law. Other grounds of appeal (for example, the deductibility of interest in calculating the disputed liability) were unaffected by the Application.

12. The substantive appeal was against closure notices issued to assess the tax charged by s 58. It was beyond doubt that s 58 had targeted effectively the scheme employed by the Appellants – see CA JR Decision at [4]. Throughout the proceedings HMRC had favoured litigating the EU law point before the Tax Tribunal but the Appellants had chosen to proceed instead by way of an application for judicial review. That matter had been decided against the Appellants by the Court of Appeal, and the Supreme Court had refused permission for onward appeal. The matter is now settled. What the Appellants now seek, in effect, is to relitigate the same issue before the Tax Tribunal. The Appellants' attempts to pursue these proceedings before the Tribunal were in substance an abuse of process intended either to circumvent the consequences of the CA JR Decision, or to delay the payment of the tax due pursuant to the terms of the closure notices. The Tribunal should strike out the proceedings for the following reasons.

13. The issue is *res judicata.*

(1) The EU law point has been determined by the Court of Appeal and is thus *res judicata* so far as the Appellants are concerned. Thus the Appellants are estopped from reopening the same point before the Tribunal.

14. The proceedings are an abuse of process.

(1) Even if the issue is not formally *res judicata*, it is so close to the matter determined by the Court of Appeal as to constitute abusive relitigation.

(2) Lord Bingham in *Johnson v Gore Wood* [2001] 1 All ER 481 stated (at 491):

> "This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V C in *Henderson v Henderson* (1843) 3 Hare 100 at 114–115, [1843–60] All ER Rep 378 at 381–382, where he said:
>
> > 'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly

> belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'
>
> Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell LJ put it in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257) may cover—
>
> > 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'"

15. The proceedings have no reasonable prospect of success.

(1) Even if the issue is not formally *res judicata*, the Tribunal is bound by the doctrine of precedent and the point argued in the substantive appeal is indistinguishable from that determined in the judicial review proceedings.

(2) Under the doctrine of *stare decisis* the decision of the Court of Appeal cannot be impugned by a lower court. The Tribunal is obliged to proceed on the basis that the judgment in the CA JR Decision is correct. It followed that the EU law point was bound to fail if argued again before the Tribunal.

(3) The Tribunal had reached a similar conclusion in *Mark Allan* [2013] UKFTT 142 (TC).

16. There is no merit in the Appellant's contention that the Court of Appeal was not in possession of sufficient facts.

(1) The facts relied upon by the Court of Appeal were the facts as asserted by the Appellants in support of their application for judicial review, and their evidence as to the underlying accuracy of those facts was supported by evidence that was subject to a statement of truth, but yet untested by cross-examination. The Appellants could not now properly or sensibly suggest that the facts on which the CA JR Decision was based were inaccurate.

17. There is no merit in the Appellant's contention that the CA JR Decision was *per incuriam*.

(1) Even if, which was not the case, the CA JR Decision had been decided *per incuriam*, it was still binding on the Tribunal.

(2) However, the CA JR Decision was not *per incuriam*. There was no doubt as to the consistency of the CA JR Decision with the relevant EU law. The Supreme Court had refused permission to appeal against the CA JR Decision, holding "…the correct application of Community law is so obvious as to leave no scope for reasonable doubt".

18. For all the above reasons the Tribunal should exercise its powers under Tribunal Procedure Rule 8(3)(c) to strike out the case of each Appellant insofar as it consists of

a challenge to the CA JR Decision or includes a claim that the provisions of s 58 are in some way incompatible with any rights enjoyed by that Appellant under EU law.

Appellant's Case

19. Mr McDonnell for the Appellants submitted as follows.

20. On HMRC's *res judicata* point:

(1) *Res judicata* can only apply to the same type of proceedings. The judicial review proceedings are different from the appeal to the Tribunal. The Tribunal appeals are different proceedings in a different jurisdiction to establish a different point.

(2) The Court of Appeal explained the purpose of the judicial review proceedings:

> "[38] This court is not on this occasion sitting as an appellate court hearing an appeal from a decision of the Administrative Court on a judicial review application: it is itself sitting as a court of first instance hearing a judicial review application. Judicial review procedure is not best suited for deciding disputed questions of fact, or for deciding the tax liabilities of taxpayers in a dispute that is fact-sensitive. Nor is judicial review available for rulings of the court on hypothetical or academic questions. The proper function of judicial review proceedings is to determine whether there has been an abuse or excess of power by a public authority, or whether its acts or omissions affecting the claimants are lawful."

(3) The Court of Appeal was not determining the tax liabilities of the Appellants; it was arbitrating a dispute between the Crown and citizens. The only outcome of the CA JR Decision was that the request for a judicial review remedy was refused.

21. On HMRC's abuse of process point:

(1) The CA JR Decision did not decide the question of whether s 58 is incompatible with EU law. The CA JR Decision was limited to what the Court called (at [52]) "the narrow movement of capital point". The Court expressly gave no decision on any other aspect of the case: see [56]. The Court's decision on "the narrow movement of capital point" was a finding of fact, on the evidence in the case – that was emphasised throughout the CA JR Decision, including its conclusion at [69]. The Court acknowledged (at [38]) that "Judicial review procedure is not best suited for deciding disputed questions of fact, or for deciding the tax liabilities of taxpayers in a dispute that is fact-sensitive." The CA JR Decision is a decision of the Court of Appeal sitting as a court of first instance, on a question of fact decided solely on the particular facts of the case, based on limited evidence, and without the benefit of any oral evidence.

(2) The fact-finding process of the Court of Appeal had been limited. The Appellants did not suggest that the Court's findings had been wrong, nor that

the evidence submitted had been in any way incorrect. However, the facts found by the Court were not complete and sufficient to determine the tax liabilities of the Appellants. That was still a task to be achieved and was the purpose of the appeal to the Tribunal. The evidence before the Court of Appeal was limited in scope and was provided mostly by HMRC. The Appellants considered that the Court was missing certain primary facts. There were other relevant factual matters that were not in the mind of the Court when it reached its decision. Such findings of fact as were made by the Court of Appeal were secondary in nature and not binding on any other court. That other court must make its own findings of fact and those further findings may lead to different conclusions.

22. The doctrine of *stare decisis* did not bind the Tribunal to follow the CA JR Decision for three reasons.

(1) The CA JR Decision was a decision on a question of fact, not on a point of law. A decision on a question of fact is not binding on another court in other proceedings, even if that other court is required to decide exactly the same question of fact. In *Hollington* v *F Hewthorn and Co Ltd [1943]* KB 587 a criminal conviction involving the determination of certain facts was not binding on a civil court called upon to determine the same facts - even though in the criminal proceedings the facts had been determined to the criminal standard. The judgment of the earlier court is an opinion and thus inadmissible in evidence. Therefore, a subsequent court, called upon to decide the same questions of fact in other proceedings, must form its own judgment on the evidence which is before that court, and must do so afresh, that is to say without regard to the earlier judgment. This rule is all the more important where the subsequent court will have the benefit of more detailed evidence, including oral evidence, as will plainly be the case here. Here, the parties will be able to adduce to the Tribunal evidence which was not before the Court of Appeal.

(2) The CA JR Decision was *per incuriam*, in that it was reached in material omission of authorities binding on the Court. Three relevant ECJ authorities were not taken into account by the Court of Appeal: *European Commission v Republic of Austria* (Case C-10/10), *Schröder v Finanzamt Hameln* (Case C-450/09), and *Commission of the European Communities v Hellenic Republic* (Case C-406/07) ("*Greece*"). *Austria* and *Schröder* were decided after the hearing in the Court of Appeal but shortly before it gave its judgment. *Austria* specifically stated that gifts could be a movement of capital. *Greece* was an unreported judgment, available only in the Greek and French languages, and it had not been made available to the Court of Appeal. It is reasonable to assume the Court of Appeal did not take any of these three authorities into account, although they were all of course binding on it as regards the interpretation of EU law. All three cases were relevant to determination of the issue of whether a claimant in receipt of income from an overseas structure is outside the scope of the "free movement of capital" rules on the basis that there was no original movement of capital. Given that the authorities had been overlooked, it would be necessary for the Tribunal to resolve the point; that was not a point for

determination now, all the Appellants sought was not to be prevented from raising it in the substantive appeal before the Tribunal.

(3) On questions of EU law, a decision of a national court was, if reached without reference to the ECJ, not binding on a lower national court in that the lower court could itself refer the question to the ECJ: *Elchinov v Natsionalna zdravnoosiguritelna kasa* (Case C-173/09):

> "1. European Union law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law."

23. On the Supreme Court Order, this was flawed in that it maintained that the Appellants had already had the benefit of one appeal (paragraph 1 of the Supreme Court Order) whereas in fact the Court of Appeal had been sitting as a court of first instance – see [1] of the CA JR Decision. That discrepancy had been brought to the attention of the Supreme Court but no reply had been received yet. Paragraph 2 of the Supreme Court Order (quoted at [9] above) could not be read divorced from the incorrect statement in paragraph 1. Paragraph 2 of the Supreme Court Order could be read as referring to the ECHR matter that was also before the Supreme Court (in *Huitson*).

24. Even if the Application is granted, the appeal will progress before the Tribunal on the other grounds pleaded and that will require the Tribunal to make findings of fact. Thus it would not be detrimental for the Tribunal to hear all the evidence and make the relevant findings. Further, there are other taxpayers who have similar arguments as the Appellants and they will progress their appeals to the Tribunal, thus the point will be argued before the Tribunal in due course in one way or another.

Consideration and Conclusions

25. We take the following questions in turn

(1) Is the CA JR Decision *res judicata* on the Appellants' art 56 argument?

(2) Is the CA JR Decision *stare decisis* in relation to the Tribunal?

(3) Would it be an abuse of process to permit the Appellants' art 56 argument to be run before the Tribunal?

Is the CA JR Decision <u>res judicata</u> on the Appellants' art 56 argument?

26. The parties did not direct us to any specific authorities on this matter but we take the following two authorities to be a fair statement of the legal position.

27. In *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 Lord Guest stated (at 564–565):

> "The doctrine of estoppel per rem judicatam is reflected in two Latin maxims, (i) interest rei publicae ut sit finis litium and (ii) nemo debet bis vexare pro una et eadem causa. The former is public policy and the latter is private justice. The rule of estoppel by res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits. As originally categorised, res judicata was known as "estoppel by record". But as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared and it may be convenient to describe res judicata in its true and original form as "cause of action estoppel". This has long been recognised as operating as a complete bar if the necessary conditions are present. Within recent years the principle has developed so as to extend to what is now described as "issue estoppel", that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per rem judicatam."

28. In *Crown Estate Commissioners v Dorset County Council* [1990] 1 All ER 19, Millett J (as he then was) stated (at 23):

> "Res judicata is a special form of estoppel. It gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by way of appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen any issue which was an essential part of the decision. These two types of res judicata are nowadays distinguished by calling them "cause of action estoppel" and "issue estoppel" respectively."

29. We consider that "cause of action estoppel" does not arise here. The cause of action in the judicial review proceedings was a claim for declaratory relief (see CA JR Decision at [19]) and the proceedings were to adjudicate "challenges by citizens to the lawfulness of acts and omissions of public authorities affecting them" (see CA JR Decision at [42]). It appears to us that an appeal against income tax assessments is sufficiently different from judicial review proceedings so as to not be prevented by cause of action estoppel, at least in respect of the current case.

30. We are more concerned by "issue estoppel". Mummery LJ stated the role of the Court in the judicial review proceedings was "to adjudicate on the lawfulness of the actions of HMRC in their treatment of the claimants' tax affairs on the particular facts of this case" (CA JR Decision at [41]). That seems close to Millett J's "reopen any issue which was an essential part of the decision" (above). Against that, we note that the parties in judicial review proceedings are, strictly, the Crown and the defendant public body (here, HMRC); the taxpayers were only claimants/applicants (see, for example, Administrative Court Practice Direction [2000] 1 W.L.R. 1654). That is, we

appreciate, a technical distinction but it does lead us to conclude that the parties to respectively the judicial review proceedings and the tax appeal proceedings are different from one another. For that reason we are reluctant to conclude that the Appellants are barred from raising their art 56 argument before the Tribunal only because of issue estoppel. We do not expand on that because we consider the other points below (which HMRC pleaded as alternatives to the *res judicata* point) are more pertinent and are determinative of the Application before us.

Is the CA JR Decision stare decisis in relation to the Tribunal?

31. The Appellants make two arguments here. First, that the CA JR Decision is merely a decision of fact rather than one of law. Secondly, that the CA JR Decision was made *per incuriam*.

The fact-not-law argument

32. Our understanding of the *ratio* of the CA JR Decision is that art 56 was not engaged in the circumstances of the Appellant's tax avoidance scheme because there was no "movement of capital" involved in the scheme transactions:

> "**[69]** I would dismiss the claimants' application for judicial review on the grounds that (a) it does not appear from the facts before the court that there has been any 'movement of capital' falling within art 56 EC; …"

33. Mummery LJ stated:

> "**Conclusion**
>
> [52] I am in complete agreement with the submissions of HMRC on the narrow 'movement of capital' point arising on the facts of this case.
>
> [53] The payment of £10 had nothing to do with the funding of the Manx partnership structure: it was put into a trust for the claimant and not into the Manx partnership, which was a distinct and separate entity from the Manx trust established by each claimant. Putting £10 each into Manx trusts, which the claimants have created and under which they are also entitled to a life interest, is not in itself a 'movement of capital' within the meaning of art 56 EC. It does not become so, because the Manx trustee of the Manx trust is a member of a Manx partnership that uses the services of the settlor/beneficiary, or chooses to pay the profits of the partnership into the trust for onward transmission to the principal beneficiary.
>
> [54] If there is no 'movement of capital' at all within the meaning of art 56 EC, then it is not necessary for the decision of the claimants' income tax case on their past assessments, or even appropriate, for this court to embark on the general and larger constitutional question whether the Isle of Man is 'a third country' within the meaning of art 56 EC, or any of the other issues identified below. On those issues many of the arguments deployed in fact overlap with the opposing arguments on the Convention which are discussed and resolved in the judgments in *Huitson*."

34. In describing the movement of capital point as a "narrow" one, we do not interpret the Court of Appeal to have been implying that the point was a minor or incidental one. On the contrary, the Court determined that without a movement of capital within the meaning of art 56 no relevant EU rights were in point and thus any argument of incompatibility of s 58 was futile. The Court then decided (unanimously and unambiguously) that art 56 was not engaged. We consider that is a decision on a point of law that is binding on this Tribunal. Mummery LJ stated:

> "[70] The remaining issues do not need to be decided for the disposition of the claimants' application for judicial review. They can be decided by a higher court, if and when it reaches the conclusion that the facts of the case disclose a 'movement of capital' within art 56 EC. Otherwise, it is advisable for those issues to be left for decision by another court in another case which could not be determined without deciding them."

35. This Tribunal is not, of course, such a "higher court" and cannot reach a different conclusion. We acknowledge that the decision on the point of law was made in the context of the facts of the particular case, but that does not detract from it being a decision on a point of law. That was also the view of the Supreme Court when it refused permission for an onward appeal: "in relation to the point of European Community law raised in the application, the application is also refused because the correct application of Community law is so obvious as to leave no scope for reasonable doubt".

The per incuriam argument

36. In relation to the concept of *per incuriam* generally, in *Mark Allan* this Tribunal stated:

> "14. Mr Rivett [for HMRC] submits that there are only limited circumstances in which a decision of the Court of Appeal can be regarded as *per incuriam*, and cited to us paragraph 96(2009) of Halsbury's Laws (at page 110):
>
> > "A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own, or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or a rule having statutory force, or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to the House of Lords. A decision should not be regarded as given *per incuriam* simply because of a deficiency of parties, or because the court had not the benefit of best argument, and, as a general rule, the only cases in which decision should be held to be given *per incuriam*, are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous

> decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.""

37. We note that the above Halsbury's Laws extract was also cited by this Tribunal in *David Baxendale Limited & Susan Murray* [2013] UKFTT 377(TC) (at [8]) and we too adopt it as a convenient summary of the relevant law on the point.

38. The Appellants submit two possible grounds for the CA JR Decision being *per incuriam*. First, that the CA JR Decision is contrary to relevant ECJ decisions. Secondly, that the Court of Appeal was in some way not able to reach its findings on the facts available to it.

The ECJ cases

39. The suggestion is that the Court of Appeal did not consider certain ECJ caselaw that would have steered the Court of Appeal to a different conclusion, or that the CA JR Decision is somehow unsafe given subsequent ECJ caselaw.

40. The only one of the three cases that had been decided before the Court of Appeal hearing was *Greece*. Counsel's recollection was that *Greece* was not cited to the Court – it was an unreported judgment, available only in the Greek and French languages. So far as we can tell from the papers made available to us, the cases of *Austria* and *Schröder* were cited to the Supreme Court in the application for permission for onward appeal but they were referred to in parentheses and without any particular emphasis. There was no argument made to the Supreme Court that those cases rendered the CA JR Decision *per incuriam* or otherwise unsafe. *Greece* does not appear to have been raised at all. If the Appellants considered that any of those cases called into question the correctness of the CA JR Decision then the application to the Supreme Court was, of course, the ideal opportunity to do so in terms. No suggestion was made to the Supreme Court that those cases cast any doubt on the legal reasoning of the Court of Appeal. The conclusion of the Supreme Court was (as already quoted): "in relation to the point of European Community law raised in the application, the application is also refused because the correct application of Community law is so obvious as to leave no scope for reasonable doubt".

41. For completeness, we do not accept the suggestion that the Supreme Court Order is referring to ECHR matters (ie the *Huitson* point) rather than the art 56 point that was before the Court of Appeal. Paragraph 2 of the Supreme Court Order clearly refers to "the point of European Community law raised in the application".

42. Accordingly we do not accept the Appellants' contention that the CA JR Decision is in some way *per incuriam* as being contrary to ECJ caselaw.

Inadequate facts

43. The Appellants' submission is that the Court of Appeal was in some way not able to reach its findings on the facts available to it. The Court commented:

> "[20] It is vital to be clear about the facts relied on by the claimants to found real, not just hypothetical, issues of incompatibility with EU law. There is no agreed statement of facts. Very few facts are set out in the 'Statement of Facts relied upon' in s 8 of the claim form. The claimants' skeleton argument refers to hardly any facts. A brief draft statement has been supplied to the court. I will summarise the facts, as they at present appear from the papers, to see whether they lay a possible foundation for the claimants' legal submissions on the application of art 56 EC regarding the movement of capital."

44. Even if it is a matter on which our view has any relevance, we do not accept the Appellants' contentions that the Court of Appeal did not have sufficient evidence before it.

(1) It was the Appellants' application for judicial review; they put forward the evidence they wished to rely upon. Both parties were represented by leading counsel.

(2) In the Appellants' grounds of application to the Supreme Court there was no suggestion that the Court of Appeal had made an unsupportable or erroneous finding of fact.

(3) The Court could have required further evidence or submissions from the Appellants (or indeed HMRC) if it felt that was necessary but there is no indication anywhere in the CA JR Decision that the Court felt it was not in possession of *sufficient* facts, even it made what might be acerbic comments on the *presentation* of that evidence (at [20], quoted above).

45. It follows from our conclusions on both the "ECJ cases point" and the "inadequate facts point" that we do not accept that the CA JR Decision is in some way *per incuriam.*

Would it be an abuse of process to permit the Appellants' art 56 argument to be run before the Tribunal?

46. Having found that the CA JR Decision is a decision of law that is binding on this Tribunal, and that it is not in some way *per incuriam*, we now consider whether the art 56 point should be allowed to stand in the Appellants' pleadings (ie grounds of appeal) in their appeal to this Tribunal.

47. Our conclusion is that it should not be so allowed to stand, for two reasons.

48. First, as – for the reasons already set out above – the CA JR Decision is binding authority (for this Tribunal) on the art 56 point, any debate before this Tribunal on the point would be a foregone conclusion. Thus that aspect of the Appellants' case can, we consider, have no reasonable prospect of success. That is grounds for the art 56 ground to be struck out under Tribunal Procedure Rule 8(3)(c).

49. Secondly, in deciding whether to exercise the power of strike out under Rule 8(3)(c) (and it is a power rather than an obligation – unlike, say Rule 8(2)) we have regard to the overriding objective (Rule 2 refers) to deal with cases fairly and justly. We conclude that it would be an abuse of the Tribunal appeal process to allow the art

56 point to stand. It would be relitigation of a point which has already been aired before and concluded on by the Court of Appeal, and we cite without repetition the words of Lord Bingham in *Johnson v Gore Wood*, quoted at [14(2)] above.

50. Accordingly, we agree with HMRC that the art 56 ground of appeal should be struck out.

Decision

51. The Application is GRANTED.

52. The Tribunal DIRECTS:

(1) Pursuant to Tribunal Procedure Rule 8(3)(c) that part of the Appellants' case that argues that the provisions of s 58 Finance Act 2008 are incompatible with any rights enjoyed under art 56 EU Treaty is now STRUCK OUT.

(2) No later than 60 days after the date of issue of this decision notice the Appellants shall by written notice to the Tribunal (with a copy to the Respondents) restate their grounds of appeal in accordance with the preceding Direction. For the avoidance of doubt, that restatement of grounds of appeal shall be without prejudice to the Appellants' rights of appeal against this decision notice.

(3) No later than 60 days after the date on which the Appellants comply with the preceding Direction the Respondents shall by written notice to the Tribunal (with a copy to the Appellants) restate their statement of case to address the Appellants' restatement of grounds of appeal.

(4) Leave to apply.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 23 April 2014