TC03502

Appeal number: TC/2012/08649

JURISDICTION – application for permission to appeal FTT decision – right to appeal abolished by secondary legislation - whether FTT has jurisdiction to consider vires of secondary legislation – yes* - Foster *and* EN (Serbia) *applied – whether secondary legislation ultra vires – yes* - To Tel Ltd *applied

FIRST-TIER TRIBUNAL
TAX CHAMBER

GUI HUI DONG — **Second Appellant**

- and -

NATIONAL CRIME AGENCY — **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers with written submissions from both parties

Mr O Connolly, Counsel, instructed by the Cavendish Legal Group, for the Appellant

Mr C Stone, Counsel, instructed by the Legal Department to the NCA, for the Respondents

DECISION

1. On 21 May 2012 SOCA (now NCA) raised various assessments on Mr Dong and Ms Fang. Mr Dong and Ms Fang applied under s 55(3) Taxes Management Act 1970 ("TMA") for postponement of the tax assessed and appealed the assessments to the Tribunal. NCA determined the amount to be postponed to be nil and the appellants referred their application to the Tribunal. On 27 January 2014 I determined that the amount to be postponed on Ms Fang's appeal was 100% but on Mr Dong's appeal was 0%: *Dong and Fang v NCA* [2014] UKFTT 128 (TC). This was because I determined that the case put forward by Mr Dong to defend the assessment did not amount to reasonable grounds for believing that any part of the assessment overcharged him to tax and that therefore none of it should be postponed.

2. Mr Dong was not notified any right to appeal my decision because of the provisions of s 55(6A) TMA which says:

> "Notwithstanding the provisions of section 11 and 13 of the TCEA 2007, the decision of the tribunal shall be final and conclusive."

3. The 'TCEA 2007' is the Tribunal Courts and Enforcement Act 2007 and it would give me the jurisdiction to grant Mr Dong permission to appeal were it not for the above provision.

4. It appears to be agreed that if s 55(6A) is effective it does mean that my decision in January is final. While s 55(6A) refers to 'the tribunal' I consider that this means the FTT and does not include the Upper Tribunal. This is because I note that section 47C TMA provides:

> "In this Act 'tribunal' means the First tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal."

It has not been suggested to me that there is any provision in any of the Tribunal Procedure rules that would bring in to the definition of 'tribunal' in s 55(6A) the Upper Tribunal so my interpretation is that s 55(6A) must be read as providing that the First Tier Tribunal's decision is final and conclusive. If that provision applies, therefore, it ousts the jurisdiction of the Upper Tribunal to consider an appeal from my decision. It would mean that the only way Mr Dong could challenge my decision on postponement would be by judicial review.

5. Nevertheless, Mr Dong did apply for permission to appeal on 7 February 2014 which was well within the 56 day time limit for appeal if he has the right to appeal. He contended that s 55(6A) does not apply on the basis that it was inserted by paragraph 34(8) of Schedule 1 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ('the 2009 Order) and that that provision of the 2009 Order was beyond the scope of ('ultra vires') its enabling Act and therefore unlawful.

6. The other party has no right to make representations to the Tribunal on the merits of whether the Tribunal should grant permission to appeal. However, I took the view that the question of whether the Tribunal had *jurisdiction* to grant permission to appeal was a matter on which both parties had the right to make representations. Therefore I invited submissions with a view to resolving this point of law on the papers. This decision is made on the papers after consideration of both parties' representations including the appellant's reply to NCA's submissions.

Application for permission to appeal

7. Whether the Upper Tribunal has jurisdiction to hear an appeal from my determination of Mr Dong's postponement application is not a hypothetical question in this case because, if it does, I would grant permission to appeal.

Extent of FTT's jurisdiction

8. Whether the Upper Tribunal has jurisdiction to hear an appeal against a decision made by the FTT under s 55(3) TMA depends on whether paragraph 34(8) of the 2009 Order, which removed the pre-existing right of appeal, was lawful. But NCA's position is that that is a question which this Tribunal has no jurisdiction to determine.

9. So the first question I have to decide is not whether paragraph 34(8) was lawful, but whether I have jurisdiction to determine whether it is unlawful.

The Tribunal's public law jurisdiction

10. It is crystal clear that the Tribunal has no inherent jurisdiction. It is a statutory body and only has the jurisdiction conferred on it by Parliament. For a recent re-statement of this see *Hok* [2012] UKUT 362 (TCC) at §§36 and 41. Therefore, the FTT has no powers of judicial review (*Hok* at §41) and in particular no power to quash secondary legislation (*EN (Serbia)* [2009] EWCA Civ 630 at §87).

11. However, whether the Tribunal can take public law issues into account when reaching decisions on which it does have jurisdiction is a different question. The answer may well be that Parliament did confer on first instance tribunals some jurisdiction to take some issues of public law into account when making certain decisions. Certainly there is authority to that effect: see the House of Lords decision in *Foster* (discussed below), its decision in *Wandsworth LBC v Winder* [1985] AC 461, and the High Court decision in *Oxfam* [2009] EWHC 2078 in a tax context. There is also obiter dicta from the House of Lords in the oft cited case of *J H Corbitt (Numismatists) Ltd* [1980] STC 231 that the tax tribunal has jurisdiction to apply tertiary legislation.

12. I consider NCA are wrong to say that Parliament never intended to confer any jurisdiction to consider public law issues on any first tier tribunal.

13. The question in this case is whether Parliament intended to confer on the FTT jurisdiction to take into account the lawfulness of secondary legislation when exercising its discretion to grant permission to appeal.

14. What is my jurisdiction where a party seeks permission to appeal? This is contained in TCEA 2007 which provides:

> **11 Right to appeal to Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the [FTT]….
>
> (2) Any party to a case has a right of appeal…..
>
> ….
>
> (4) Permission (or leave) may be given by
>
> (a) the [FTT], or
>
> (b) the Upper Tribunal,
>
> on an application by the party.

Parliament clearly intended the FTT to have jurisdiction to determine whether leave to appeal should be given to a party on a point of law. But did Parliament intend the FTT to have jurisdiction to determine whether s 11 had been lawfully overridden by secondary legislation?

15. The view of what Parliament intended the tribunal's jurisdiction to be in the face of ultra vires secondary legislation has perhaps developed over time. In *Hoffman-La Roche (F) & Co v* Sec *of State for Trade and Industry* [1975] AC 295, although actually a case about whether an undertaking for damages should be given before an injunction was imposed, the House of Lords made an obiter statement that ultra vires statutory instruments were valid unless challenged by due process (ie by judicial review). Apart from being strictly unnecessary to its decision in that case and therefore not binding on me, it seems to me that the House of Lords' view has moved on as demonstrated by its decision in the later case of *Foster*.

Foster v Chief Adjudication Officer [1993] AC 754

16. This case concerned entitlement to social security benefit. The appellant appealed against a decision of the relevant Government department that she was not entitled any longer to receive a benefit known as the severe disability premium. The basis of her claim was that the decision depended on a change to secondary legislation that was beyond the scope of the primary legislation.

17. The House of Lords decided that the tribunal did have jurisdiction to decide this matter of public law, although on the particular facts of the case, ruled that the secondary legislation was not ultra vires the statute.

18. Lord Bridge said:

> "(page 762) …. It is common ground that the principle of *O'Reilly v Mackman* [1982] 3 All ER 1124 … has no application, since there can be no abuse of process by a party who seeks a remedy by the very process which statute requires him to pursue. It was further rightly accepted by [counsel] before your Lordships that a decision giving effect to secondary legislation which is ultra vires is, indeed, in the ordinary meaning of the words 'erroneous in point of law'….
>
> (page 766) My conclusion is that the commissioners have undoubted jurisdiction to determine any challenge to the vires of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already over-burdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the commissioners, who have great expertise in this somewhat esoteric area of the law.

19. The Court of Appeal has more recently also had to consider a tribunal's jurisdiction in the face of unlawful secondary legislation.

EN (Serbia) and another

20. The *EN (Serbia)* case concerned, amongst other things, the lawfulness of secondary legislation. The relevant European Convention permitted member States to deport refugees irrespective of danger to life in the territory to which they were deported if they had been convicted of a 'particularly serious offence'. The UK Act created a presumption that a person had been convicted of a 'particularly serious crime' if (amongst other things) he had been convicted of an offence specified by an Order of the Home Secretary. The Home Secretary had made such an order and it was the legality of that Order which was one of the issues in the appeals.

21. The Court noted that the Order made by the Home Secretary which specified 'particularly serious crimes' specified many crimes which could not sensibly be described as serious (such as stealing a milk bottle). The Court considered that the power of the Home Secretary to make an Order had to be read as limited to including crimes which could reasonably give rise to the statutory presumption that it was a particularly serious crime. As the Order did not do so, the Court ruled that the entire Order was therefore ultra vires and unlawful: §83.

22. But the case was on appeal from a first instance tribunal and the question was therefore whether that tribunal had erred in law in applying the Order. Stanley Burnton LJ (with whom the other Lords Justices agreed) in the Court of Appeal said:

> "[84] Does it follow that the tribunal…erred in law? The conventional view used to be that a subordinate judicial body, and especially an

> administrative tribunal, did not have jurisdiction to question the validity of delegated legislation….
>
> [86]….It seems to me that both the decision of the House of Lords in *Boddington's* case, as well as that in *Foster's* case, point powerfully to the conclusion that a tribunal decision that depends on the lawfulness of the ultra vires subordinate legislation is 'not in accordance with the law', and is liable to be set aside on appeal or reconsideration. ….
>
> [87] However, a tribunal cannot quash delegated legislation. Its decision is not binding on the courts. It may not command universal agreement. Where a tribunal considers that there is a real prospect of a statutory instrument being ultra vires or unlawful, it should give serious consideration to adjourning its proceedings in order to give the party challenging its lawfulness an opportunity to issue judicial review proceedings before the Administrative Court, if necessary seeking an expedited hearing. It is far more appropriate that such issues be litigated before and decided by the courts. However, this is likely to change if and when the AIT become part of the new tribunal structure…."

No jurisdiction to disapply ultra vires legislation?

23. NCA contend that the effect of this decision is that the appropriate course for me is to adjourn the application for permission to appeal to permit the appellant the opportunity to test the vires of s 55(6A) in judicial review proceedings. Indeed it is their position that I cannot determine the lawfulness of s 55(6A) and cannot effectively grant permission to appeal.

24. I consider this to be a complete misunderstanding of what Burnton LJ said. At §86 he said that a tribunal decision which depends on the lawfulness of ultra vires subordinate legislation is not in accordance with the law and could be set aside on appeal. In other words, on the assumption paragraph 34(8) is ultra vires, I would be wrong in law to refuse Mr Dong permission to appeal on the basis it removed his right of appeal. If it is unlawful, I am not entitled to apply paragraph 34(8) unless and until it is quashed by a court with inherent jurisdiction.

25. What Burnton LJ said in §87 was simply that a tribunal decision that particular secondary legislation was unlawful was not the same as a decision by the Administrative Court to quash the legislation. He suggested that, for the AIT which had not been brought into the new tribunal structure (of which this tribunal is a part), it might be more appropriate for it to stay its proceedings and let the Administrative Court make the decision, which the AIT could then apply. The implication of his decision is that he did not think that adjourning was the most appropriate course for a tribunal within the new structure where there was an appeal to an Upper Tribunal in which High Court judges could sit.

26. In conclusion, it seems to me that *EN (Serbia)*, so far from supporting NCA's case, clearly states that a tribunal must not apply unlawful secondary legislation. Either it must make that determination itself (in which case of course the secondary legislation is not actually quashed although it has been disapplied) or it can adjourn its

proceedings to permit the parties take the issue to the Administrative Court, which does have power to quash the secondary legislation once and for all.

27. The dicta of *EN (Serbia)* is clearly that a first instance tribunal, such as the FTT, would be wrong in law to apply unlawful secondary legislation. Therefore, I consider that when Parliament enacted s 11 TCEA it must have intended the FTT to act lawfully when making a decision whether or not to grant permission to appeal. Therefore, it therefore must have intended the Tribunal to consider the vires of secondary legislation and refuse to apply any which was unlawful. Indeed, it would be a bizarre position if the FTT were, on the basis of an Order which Parliament had not authorised to be made, to refuse to recognise a right of appeal granted by Parliament by statute.

First instance tribunals cannot consider vires?

28. Another point made by NCA was that they considered, while *Foster* may mean that the Upper Tribunal has jurisdiction to determine questions of ultra vires of secondary legislation, a first tier tribunal does not. In that case, the original tribunal had decided against the appellant. The secondary legislation was declared unlawful by the Social Security Commissioners (effectively in the same position as the Upper Tribunal) on an appeal against that decision.

29. So far as the case law is concerned, NCA's submission is based on a false premise. It is clear that Lord Bridge, giving the decision of the Lords in *Foster*, considered that his decision applied to first instance tribunals because otherwise what he said about the desirability of expert tribunals making such decisions rather than compelling the parties to take judicial review proceedings would make no sense.

30. Further, as a matter of logic, on appeal against an FTT decision, the jurisdiction of the Upper Tribunal cannot be more extensive that the jurisdiction of the first instance tribunal as it has to decide whether the FTT decision was wrong in law. NCA do not appear to agree with this. NCA consider that s 15 and 18 TCEA gives the Upper Tribunal wider jurisdiction on an appeal than the FTT has at first instance and could in some cases exercise judicial review powers on an appeal from the FTT.

31. I am far from certain NCA are right in what they say on this but I do not need to decide it: the case of *EN (Serbia)* clarifies the position that first instance tribunals would be wrong in law to apply ultra vires secondary legislation. Whether or not the Upper Tribunal has power to actually quash unlawful secondary legislation on an appeal from the FTT is a matter for that tribunal to decide.

Foster only applies where FTT considering decisions of a public officer?

32. NCA's next objection to reliance on the principle in *Foster* was that it was limited to situations where Parliament has conferred on the first instance tribunal jurisdiction to determine whether a whether a decision by a public authority is "erroneous in law". That was the provision which gave jurisdiction to the first instance tribunal in *Foster.*

33. In this case, however the appellant complains that it would be erroneous in law for the FTT to refuse him permission to appeal because, he says, paragraph 34(8) is ultra vires. This is a rather different situation to the one considered in *Foster*. NCA say that I cannot disapply paragraph 34(8) as that would be tantamount to quashing secondary legislation.

34. As I have said, the question of FTT's jurisdiction in the face of ultra vires secondary legislation was considered more recently by the Court of Appeal in *EN (Serbia)*. While it is entirely true that this tribunal, having no inherent jurisdiction cannot quash legislation, that does not mean, as Burnton LJ explained, that we are bound to apply unlawful secondary legislation. Indeed, applying unlawful secondary legislation would wrong in law. Therefore, neither this Tribunal nor a government official, can apply unlawful secondary legislation when making their decisions.

35. Parliament must have intended the first tier tribunal to have jurisdiction to determine the vires of secondary legislation: to do otherwise would require the Tribunal to apply 'laws' which Parliament has not authorised.

Should I adjourn?

36. It is clear that if I consider paragraph 34(8) to be ultra vires the enabling Act, I cannot refuse Mr Dong's application for permission to appeal on the basis that of paragraph 34(8). However, the Court of Appeal recognised that the first instance Tribunal does not necessary have to make the decision on vires itself: it could adjourn proceedings to enable the appellant to take the matter to the Administrative Court.

37. In this case, putting the parties to the expense and delay of an approach to the Administrative Court seems inappropriate. Indeed, as NCA concede paragraph 34(8) is unlawful, it appears likely that they would not even defend the proceedings in the Administrative Court.

38. Further, this tribunal is part of the new structure. An appeal from the FTT goes to the Upper Tribunal, and a High Court judge (sitting as a judge of the Upper Tribunal) can be allocated to hear it. This was a factor which the Court of Appeal considered in *EN (Serbia)* indicated that an adjournment was not necessary.

39. Further, the tax chamber of the FTT, throughout its existence, has had jurisdiction to determine the vires of both primary and secondary legislation under EU law and is therefore experienced in making such determinations.

40. Lastly, I have the benefit of the Court of Appeal's reasoning in *To Tel Ltd* (discussed below) in a very similar case.

41. For these reasons, I consider that, rather than adjourning, the most appropriate course is for me to determine the lawfulness of paragraph 34(8) for the purpose of this application for permission of appeal. I recognise I have no jurisdiction to quash the legislation.

The vires of s 55(6A)?

42. The NCA intimated that they considered paragraph 34(8) was unlawful. Nevertheless, although the point was conceded, the parties cannot confer jurisdiction on this Tribunal by agreement. I have to satisfy myself that I have jurisdiction to grant permission to appeal and therefore I have to consider whether paragraph 34(8) is actually ultra vires its enabling Act.

43. The enabling Act was the Finance Act 2008. Section 124 gave the Treasury power to make orders by statutory instrument:

> "(1) (a) for and in connection with reviews by the Commissioners, or by an officer of Revenue and Customs, of HMRC decisions, and
>
> (b) in connection with appeals against HMRC decisions.
>
> (2) An order under subsection (1) may, in particular, contain provisions about –
>
> (a) the circumstances in which, or the time within which –
>
> (i) a right to a review may be exercised, or
>
> (ii) an appeal may be made, and
>
> (b) the circumstances in which, or the time at which, an appeal or review is, or may be treated as, concluded.
>
> (3) An order under subsection (1) may, in particular, contain provison about payment of sums by, or to, the Commissioners in case where –
>
> (a) a right to a review is exercised, or
>
> (b) an appeal is made or determined.
>
> …."

44. Under this provision the Treasury made paragraph 34(8) of Schedule 1 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ('the 2009 Order') under which s 55(6A) was inserted into the Taxes Management Act.

45. Paragraph 221(5) of Schedule 1 of the 2009 Order introduced a similar provision into the Value Added Tax Act 1994 with the effect (if lawful) that there was no right to appeal against a decision of the FTT that a taxpayer should not be relieved from the requirement to pay the tax pending an appeal on the grounds of hardship.

46. The hardship application of an appellant called To Tel Ltd was refused by the FTT. The applicant then took judicial review proceedings to challenge the FTT decision refusing hardship (presumably on the assumption that paragraph 221(5) meant that it had no right of appeal against the FTT decision.) The Administrative Court held that the FTT's decision was not erroneous in law. The Court of Appeal (on appeal from the Administrative Court) held at *oao To Tel Ltd* [2013] QB 860 that the first question it had to determine was not whether the FTT had made an erroneous decision, but whether paragraph 221(5) had lawfully removed the pre-existing right to appeal first instance determinations of hardship applications. Logically, this must be so, because if the appellant had had a right of appeal to the Upper Tribunal, then that

would oust the jurisdiction of the Administrative Court to judicially review the FTT's decision on hardship.

47. The Court of Appeal decided that paragraph 221(5) was ultra vires. The effect was that the Court ruled that the appellant did have a right of appeal to the Upper Tribunal (§37). Therefore, the Court of Appeal could not go on to determine whether the Tribunal's decision was erroneous in law.

48. NCA submit, and I agree, that the Court of Appeal's decision quashed Paragraph 221(5) of Schedule 1 of the 2009 Order with the effect that s84 of VATA applied as before the purported amendment. It did not quash paragraph 34(8) of Schedule 1 of the 2009 Order.

49. Nevertheless, I must of course apply the principles of interpretation of the enabling Act (s 124 FA 2008) identified by the Court of Appeal when it was considering the vires of paragraph 221(5) when I am considering the vires of the very similar provision in paragraph 34(8) of the same secondary legislation. So, applying the principles identified by the Court of Appeal in *ToTel*, is paragraph 34(8) ultra vires the enabling Act?

50. Rules on the interpretation of enabling powers are set out by Moses LJ at §17 of *ToTel Ltd.* Moses LJ cited *ex parte Spath Holme Ltd* [2001] 2 AC 349:

> "Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinised, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach."

51. So the question is whether paragraph 34(8) <u>strictly construed</u> is a 'provision… in connection with appeals against HMRC decisions' as that is the limit of the enabling provision.

52. Moses LJ considered the meaning of s 124(1) of the Finance Act 2008 in the light of the paradigm such provision (§21) which is at s 124(2)(a)(ii) a provision about the circumstances 'in which an appeal may be made'. While he accepted that that clearly included the hardship provisions of s 84 VATA (and this is clear from s 124(3) in any event) he held that strictly construed it could not include a provision which abolished a right of appeal.

53. His decision was that a provision which removed a right of appeal was not a provision in connection with an appeal even though a benevolent construction might have been that as hardship itself is a provision in connection with an appeal, the removal of a right to appeal a decision on hardship could be seen as being in connection with an appeal. But strictly construed, it was not. See §§24-26. Arden LJ and Lord Neuberger agreed with Moses LJ.

54. <u>Postponement of tax and s 124:</u> The postponement provisions are rather different to the hardship provisions. The hardship provisions of s 84 VATA really are

about the circumstances in which an appeal may be brought (s 124(2)(1)(ii)) as s 84(3) provides an appeal:

> "shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them."

Postponement of tax, however, is a standalone provision. The outcome (in law at least) has no bearing on whether an appeal against an assessment can be entertained. I discussed this at §§66-68 of my decision in *Hong and Fang*.

55. Nevertheless, both postponement of tax and issues of hardship are brought to the FTT as standalone applications following HMRC determinations refusing (as the case may be) postponement or hardship, albeit the determination on hardship additionally can affect whether the appeal against the assessment can be entertained by the FTT. S 55(3) TMA provides:

> "....,the appellant may -
>
> (a) first apply by notice in writing to HMRC within 30 days of the specified date for determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;
>
> (b) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed."

Section 84(3B) similarly provides that the appellant can (only) apply to the FTT to determine hardship where its application has first been refused by HMRC.

56. Therefore, while the VAT hardship provisions could be within s 124(2)(a)(ii) as concerning the 'circumstances in which…an appeal may be made', postponement of tax is not. Nevertheless, that does not preclude s 55, and in particular s 55(6A) being within other sub-sections of s124 and in particular:

- S 124(1)(b) 'in connection with appeals against HMRC decisions' in general; and/or
- S 124(2)(b) 'the circumstances in which…an appeal is… concluded'; and/or
- S 124(3) 'a provision about the payment of sums..to [HMRC] …where…an appeal is made….'

57. Moses LJ considered the limit of s 124(1) at §23 where he said:

> "…Section 124(1) may have a wider reach [than s 124(2)]. But [paragraph 221(5)] is not a provision *in connection* with appeals against HMRC decisions. The impact of the meaning of 'in connection' is reinforced by the contrast with the preceding subsection section 124(1)(a) where the phrase '*for* and in connection with' is used. …That contrast suggests that that which is envisaged in section 124(1)(b), where the word *for* is omitted, is provision as to the

> circumstances in which an appeal may be entertained rather than provisions which create or remove rights of appeal."

58. The decision of Moses LJ was that in so far as the hardship provisions were within the scope of s 124(1)(b), that provision did not authorise an Order which created or removed appeal rights in respect of hardship determinations. It follows, therefore, that applying the identical logic to postponement applications, that even if s 55 in general is a provision 'in connection with appeals against HMRC decisions', paragraph 34(8) is not. The Treasury was not authorised by s 124(1)(b) to remove a right of appeal against an FTT decision on postponement of tax.

59. Moses LJ considered the limits of s 124(2)(b) at §25. He said:

> "…Since the decision of the FTT is not an appeal, the provision in paragraph 221(5) which makes the decision final is not a provision about the circumstances in which an appeal is or may be treated as concluded. …."

Moses LJ's reasoning here seems equally applicable to postponement applications as to hardship applications. He regards the appeal as the one against the assessment; the application for hardship (or in this case postponement) is not an *appeal* on a strict construction (merely an application during the course of an appeal) and therefore the decision of the FTT on that application is not itself an appeal. So s 124(2)(b) did not, on a strict construction, confer on the Treasury power to limit an appeal against a determination by the FTT of an application in the course of an appeal.

60. Moses LJ did not appear to specifically consider s 124(3)(b). That may simply have been because it was obvious. While the hardship and postponement provisions are both provisions about the payment of sums to HMRC where an appeal is made, on a strict interpretation, this provision, like the others already discussed, confer no power to limit a right of appeal against an FTT determination on the matter.

Conclusion

61. While the Court of Appeal's decision in *ToTel Ltd* is not strictly binding on me in result, I am bound by its reasoning. Applying that reasoning to paragraph 34(8), I find for the above reasons that paragraph 34(8) is ultra vires the enabling Act and is therefore unlawful.

62. As I have explained at §27 above, the FTT must not apply unlawful secondary legislation. As I have chosen not to adjourn to enable the parties to request the Administrative Court to quash paragraph 34(8), the outcome is that I apply s 55 without the amendment made by paragraph 34(8). That means under s 11 TCEA I do have power to grant Mr Dong permission to appeal. I have set out my decision on Mr Dong's application for permission to appeal in a separate document.

63. The parties should note that whether or not NCA appeals this decision on jurisdiction, the Upper Tribunal will obviously decide for itself whether it has jurisdiction to hear an appeal from Mr Dong.

64. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 23 April 2014