



TC04537

Appeal number: TC/2014/3536

VAT – online filing – obligation to tick a box stating taxpayer had read HMRC’s terms and conditions for online filing – whether Tribunal had jurisdiction to consider whether lawful for HMRC to impose the obligation – whether it was lawful – no – penalty for not filing online discharged

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL GARROD

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

**Sitting in public at Royal Courts of Justice, the Strand, London on 14 April 2015
with written submissions received on 13 May from HMRC and on 3 June from
the appellant**

The Appellant in person

**Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. The appellant is a barrister in practice. He is required to submit VAT returns.
5 He failed to submit an electronic VAT return by the due date for the VAT quarter 06/12, but did submit it by paper. This led to correspondence with HMRC but he continued to refuse to make online returns making paper returns instead. Ultimately HMRC imposed a penalty of £100 on him 16 July 2013 for failure to make an online return in the period 03/13. Mr Garrod requested a review of the penalty; one was
10 carried out but upheld the issue of the penalty. This appeal is against that review decision dated 6 January 2014.

2. The appeal was lodged late because Mr Garrod initially sent it to HMRC rather than HMCTS; HMRC did not object to the appeal being lodged late and I admitted it at the hearing.

15 3. Briefly, the dispute between the parties was this. Mr Garrod is prepared to use the internet to submit his returns online; what he would not do was to submit his return online because he was unable to do so without signing up to the ‘Government Gateway’ which required him (electronically) to tick a box stating that he had read HMRC’s terms and conditions for online filing.

20 **The facts**

The evidence

4. Mr Garrod gave evidence in the form of a witness statement; it was largely untested but in cross examination he stated that he had a computer and was able to use it. Mr Garrod filed his own VAT returns. He had an adviser who filed his income tax
25 returns online and he assumed that his adviser did sign up to the terms and conditions in the Government Gateway that he himself had refused to be a party to when filing his VAT returns.

5. A significant part of Mr Garrod’s witness statement outlined various letters and conversations between himself and HMRC over this issue, which caused him to make
30 complaints to HMRC over what he considered to be unprovoked abuse. It is no part of Tribunal’s remit to consider whether his complaints were justified and I did not do so. I make no findings in respect of that part of his witness statement.

6. He also expressed opinions in his witness statement. I do not accept these as
35 evidence. In so far as his evidence was factual and relevant to the issue before me, it was accepted.

7. Apart from Mr Garrod’s written and oral testimony, the evidence before the Tribunal comprised print outs of the terms and conditions in the Government Gateway and copies of letters between the parties.

8. There was little dispute on the facts. I find that the only reason that Mr Garrod had not filed his VAT return online was that he was first required to sign up to the Government Gateway, and that to do so, he had to (electronically) tick a box indicating that he had read HMRC's terms and conditions for online filing. Mr Garrod had refused to do so. I find as a fact that the reason and only reason Mr Garrod failed to file online was because he refused to tick the box stating he had read HMRC's terms and conditions for online filing.

9. His objection was to the terms and conditions; he did not object to online filing.

Was reading the terms and conditions optional?

10. It was agreed that Mr Garrod (and any other taxpayer) were unable to submit online tax returns in the form required by HMRC unless they first ticked a box on the Government Gateway to state that he had read HMRC's 'terms and conditions'.

11. It was also agreed that the 'terms and conditions' were made available to users of the online service to be read on the Government Gateway website.

12. I find that as a matter of fact HMRC had in effect made ticking the box to say that the terms and conditions had been read a compulsory part of filing an online return, including VAT returns. Therefore, HMRC had made ticking the box compulsory for all taxpayers who were obliged to file online returns, which included virtually all VAT registered traders. This is because (it was agreed) a taxpayer could not submit an online return unless the box was ticked. Ticking the box was compulsory to enable a taxpayer to use the Government Gateway to file a VAT return online. The vast majority of VAT registered taxpayers, which included Mr Garrod, were therefore obliged to tick the box in order to fulfil their legal requirement to file online.

The terms and conditions

13. Mr Garrod's objection was to the terms and conditions in principle; he did not object to any specific term of condition because (surprisingly) he had not read them. He objected to *any* terms and conditions being imposed. He also objected to the quantity of them: he said they would be burdensome to read.

14. Ms Nathan's position was that the terms and conditions imposed no additional obligations on the taxpayer: firstly, the taxpayer was only required to read them; secondly, they were, in fact, summaries of the applicable law or informed the taxpayer of procedural matters.

15. I was shown the terms and conditions as at 23 September 2014. There was no suggestion from either party that they were materially different at the time the penalised failure to file online took place in early 2013 and I proceed on the assumption that they were identical.

16. They amounted to the equivalent of twelve and a half A4 pages of fairly close print. Only a third of the twelve pages applied to the appellant: the last two thirds were repetitions with minor details of the first third, the middle third applying to registrations by organisations and the last third applying to registration by agents.

5 17. In my opinion, many of the terms, as Ms Nathan said, amounted to no more than a restatement of the regulatory position. However, I find that some sections of the terms and conditions went further than this.

18. At least one obligation was (purportedly) imposed:

10 “You must always keep your user ID and password (or Digital certificate) safe and secret.”

19. The terms and conditions also (purportedly) dealt with future communications by HMRC:

“Your email address, if provided, may be used by the Government Gateway to communicate with you

15 20. Another ‘term’ was that HMRC would set up for each taxpayer a secure mailbox within the Government Gateway system. Paragraph 7.1 went on to provide:

“Some online services may make use of the secure mailbox to send you communications....”

20 “You should regularly check your mailbox and delete old messages...”

It also stated that read messages would be deleted after 3 months and unread messages after 12 months, and further:

25 “Some online services may be used, or may make use of the secure online mailbox, to issue statutory notices and reminders to you....Statutory notices made available in this way by HMRC will have the same legal validity and implications as a paper statutory notice sent to you by post.” (term 8.1)

30 21. I suggested to Ms Nathan at the hearing that if the terms and conditions gave HMRC the right to use the taxpayer’s mailbox within the Government Gateway for communications, this was potentially very onerous on the taxpayer. He would have to check his mailbox regularly instead of relying on receiving important communications from HMRC by post or email. If he failed to check his mailbox, he risked overlooking something with time-limits or otherwise important. And HMRC would
35 delete messages after 12 months in any event.

40 22. However, I find paragraph 8.1 was qualified by the next which stated that (a) the taxpayer would be asked for consent in advance for use of the mailbox in this way and (b) he would have to provide an email address so that HMRC could tell him they have sent something to his mailbox. But that qualification in 8.2 related only to statutory notices, reminders and certificates. Other communications were covered by

the general statement in paragraph 7.1 (above) which was not qualified by the requirement for the taxpayer's consent.

23. The terms and conditions also dealt with limitations on HMRC's liability. Clause 12.1 provided that even if the online service was disrupted, the taxpayer remained responsible for complying with statutory time limits for filing; clause 14.2 provided that HMRC was not liable for any loss resulting from reliance on information published on the website; clause 14.4 provided that HMRC would not be liable for any disruption or failure to make the online service available.

24. Another term allowed HMRC to change the terms and conditions at any time.

10 *Were the terms and conditions binding on taxpayers who ticked the box?*

25. Mr Garrod's view was that by ticking to say he had read the 'terms and conditions' he would have been agreeing that he was bound by them. Alternatively, he suggested that even if he was not bound by them in contract law, HMRC were wrong to insist on the box being ticked as it was left unclear to taxpayers whether they were bound by them. He also objected to the fact HMRC did not allow him to modify the terms and conditions or agree to alternatives.

26. Ms Nathan's case was that many of the terms and conditions were binding on taxpayers as they were statements of the law and regulations; but they were binding because they were statutory law and not because the taxpayer ticked the box to say he had read them. Ms Nathan said there could be no question of the 'terms and conditions' forming a contract between HMRC and the taxpayer. HMRC's intention, she suggested, could only have been to ensure that taxpayers were better informed by requiring them to read a summary of the regulations.

27. As I have said, I do not accept that the terms and conditions were no more than a summary of the statutory/regulatory position. I have outlined matters above in §§17-23 where they go further and purport to create (a) obligations on the taxpayers, (b) the right for HMRC to communicate with the taxpayer by means of a mailbox hosted on HMRC's website and (c) a restriction on HMRC's liability. So the question is, to the extent they go beyond stating the regulatory position, is the taxpayer bound by them? To the extent they do go further, the question whether they are binding on taxpayers is very relevant. But to the extent they do go further than stating the law and regulatory position, they could only be binding if they created a contract with HMRC. So, are they binding as a matter of law *because* the taxpayer ticked the box?

28. On the one hand, HMRC appeared to have the intention to create a binding obligation on taxpayers as they labelled them 'terms and conditions' and required the taxpayer to read them. On the other, there was no statement that they were binding, let alone contractually binding (such as 'by ticking this box you agree to be bound by these terms and conditions'). Moreover, a taxpayer was given no choice but to tick the box if he wished to comply with his obligation to file online and not be liable to a £100 penalty every quarter. As I have found, ticking the box so they could join the

Government Gateway was compulsory for anyone making an online return, and many taxpayers, including Mr Garrod, were legally bound to make an online return.

29. Contracts are not normally binding where one party puts the other under duress (eg discussion in *Chitty on Contracts* at Vol 1, Part2, Chapter 7 section 2). Nor are
5 contracts binding where no consideration is given, and it is difficult to see how there could be consideration where the taxpayer is obliged to file online, and HMRC (impliedly) obligated to permit the taxpayer to do so.

30. This situation can be contrasted with the more normal one of a person who wishes to make a purchase online, where the purchase cannot be completed unless the
10 buyer ticks a box saying he agrees to the seller's terms and conditions. There is no duress in such a situation. The buyer has the option of making the purchase on the seller's terms and conditions, or walking away from the transaction. In contrast, on the Government Gateway, the taxpayer had no real option: he is obligated to file online. He cannot walk away. Mr Garrod attempted to do so; he refused to tick the
15 box which meant he was unable to comply with his online filing obligations. The result was that HMRC imposed a penalty of £100. The threat of a penalty for refusing to enter into a contract would be in my view duress.

31. Moreover, with an internet purchase there is consideration: the buyer pays and the supplier supplies whatever it was that was purchased. With the Government
20 Gateway there is no transaction: the taxpayer does nothing voluntarily. He is merely fulfilling his legal obligation to file online. Nor does he get anything in return. There is no consideration.

32. So taking into account this duress on the taxpayer, the lack of consideration, and that there was no clear statement the terms were intended to be binding, I find that
25 ticking the box to say that he had read them did not make the terms and conditions contractually binding on a taxpayer. Some of the 'terms and conditions' may have been binding in the sense they were accurate statements of the law, but that is not in issue. Ticking the box would not have caused the terms and conditions to be binding on Mr Garrod.

30 33. The requirement to 'tick the box' may of course have been initiated by HMRC when all online filing was optional. Whether it is binding on taxpayers who have the option not to file online is perhaps a different matter: I do not need to decide that here as online filing was compulsory for Mr Garrod.

The letter of 12 October 2012

35 34. HMRC relied on a letter written to Mr Garrod by an HMRC officer on 12 October 2012 which addressed Mr Garrod's concerns about signing up to the terms and conditions.

35. In so far as relevant it said:

“To proceed with registration for HMRC Online Services, you do not have to ‘agree’ to the terms and conditions of use, you are only required to confirm that you have read them.

...

5 The specific terms and conditions for the online services tend to be a mixture of sub-delegated legislation and informational material drawn from primary and secondary legislation. As part of the general law they therefore automatically apply. Whilst not legally bound to show the public its online service terms and conditions, HMRC has been
10 advised by its legal department to do so in order to meet a constitutional assumption that relevant law will be made accessible to the public....”

36. My reading of the first paragraph is that the writer here was informing Mr Garrod that the terms and conditions would not be binding on him. For the reasons
15 given above, I consider that that is correct. The second paragraph, however, was not correct: I have found the ‘terms and conditions’ went beyond being a recital of the law as set out above.

The statutory provisions on online filing

37. Section 135 FA 2002 provided:

20 **s 135 Mandatory e-filing**

(1) The Commissioners for Her Majesty’s Revenue and Customs (“the Commissioners”) may make regulations requiring the use of electronic communications for the delivery by specified persons of specified information required or authorised to be delivered by or under
25 legislation relating to a taxation matter.

(2) Regulations under this section may make provision -

(a) as to the electronic form to be taken by information delivered to the Revenue and Customs using electronic communications;

....

30 (d) as to conditions that must be complied with in connection with the use of electronic communications for the delivery of information;

(e) for treating information as not having been delivered unless conditions imposed by any of the regulations are satisfied;

.....

35 (4) Regulations under this section may –

(a) allow any authorisation or requirement for which the regulations may provide to be given or imposed by means of a specific or general direction given by the Commissioners;

40 (b) provide that the conditions of any such authorisation or requirement are to be taken to be satisfied only where the Revenue and Customs are satisfied as to specified matters;

(c) allow a person to refuse to accept delivery of information in an electronic form or by means of electronic communications except in such circumstances as may be specified in or determined under the regulations;

5

....

(7) The power to make provision by regulations under this section includes power –

10

(a) to provide for a contravention of, or any failure to comply with, the regulations to attract a penalty of a specified amount not exceeding £3,000;

....

(8) References in this section to the delivery of information include references to any of the following (however referred to) –

15

(a) the production or furnishing to a person of any information, account, record or document;

....

(d) the making of any return, claim, election or application.

.....

20

(9) Regulations under this section shall be made by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons.

(10) In this section –

“the Revenue and Customs” means-

25

(a) the Commissioners,

(b) any officer of Revenue and Customs, and

(c) any other person who for the purposes of electronic communications is acting under the authority of the Commissioners;

....

30 38. The regulations made under these statutory provisions were contained in article 25A of the VAT Regulations 1995/2518 (as amended). Art 25A provided at the relevant time (VAT quarter 06/12) and in so far as relevant as follows:

25A

35

(1) Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an ‘electronic return system’.

(2) Where a person makes a return ... such a method of making a return shall be referred to in this Part as a ‘paper return system’.

40

(3) Subject to paragraph (6) below, a person who is registered for VAT must make a return required by regulation 25 using an electronic return system whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern).

- (4) In any case where an electronic return system is not used, a return must be made using a paper return system.
- (6) A person -
 - (a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or
 - (b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act is applied,
 is not required to make a return required by regulation 25 using an electronic return system.
- (8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.
- (9)
- (10) A direction under paragraph (8) above may in particular –
 - (a) modify or dispense with any requirement of the relevant form specified in a notice published by the Commissioners,
 - (b) specify circumstances in which the electronic return system may be used, or not used, by or on behalf of the person required to make the return.
 For the purposes of sub-paragraph (b), the direction may specify different circumstances for different cases.

.....
- (13) No return shall be treated as having been made using an electronic return system unless it is in the form required by paragraph (8) above.
- The requirement in paragraph (8) above incorporates the matters mentioned in paragraph (10) above.
- (15) Subject to paragraph 15A, in relation to returns made for prescribed accounting periods which end on or after 31 March 2011, a specified person who fails to comply with paragraph (3) above is liable to a penalty.
- (16) But a person who has a reasonable excuse for so failing to comply is not liable to a penalty.
- (17) The table below sets out the penalties depending on the level of turnover.

.....”
- (18) A person may appeal against the Commissioners’ decision to impose a penalty only on the ground that –
 - (a) that person is not a person required to make a return required by regulation 25 using an electronic return system,
 - (b) the amount of the penalty is incorrect,
 - (c) paragraph (3) above was complied with, or

(d) paragraph (16) above applies.

.....

(22) In this regulation –

(b)

5 (c) ‘reasonable excuse’ shall have the same limitation as it does in section 71(1)(b) of the Act.

Issues and the Tribunal’s jurisdiction

39. Exactly what the parties considered to be in issue was not entirely clear at the outset of the hearing, but it was then accepted that the appellant was effectively putting his appeal on two basis:

10 (a) Either HMRC had no power to require him to read ‘terms and conditions’ before he could file online and that doing so was unlawful and that therefore he was not in breach of any lawful requirement and a penalty should not have been imposed; and/or

15 (b) The appellant had a reasonable excuse for failing to submit an electronic return in that it was (he said) reasonable to refuse to agree to read the terms and conditions because HMRC had no power to make this a pre-condition of online filing and the penalty should be discharged.

40. I will refer to the first of these propositions as “alleged breach of public law” and the second as the “reasonable excuse defence”.

41. Both these propositions required some consideration of public law matters. On the basis that the parties were not fully prepared to argue such issues, I directed submissions after the hearing on the following questions:

25 (a) Whether HMRC accept as a matter of principle that it would be a reasonable excuse for failing to do something required by law if, in order to do that thing, the taxpayer was first required by HMRC to do something which HMRC should not have required the taxpayer to do;

30 (b) Whether HMRC accepts that the Tribunal would have jurisdiction to discharge a penalty for failing to file a return as required by law on the grounds (if it is shown to be the case) that as a matter of public law HMRC acted unlawfully in imposing a pre-condition on the taxpayer before the taxpayer was able to file the return

35 (c) Whether, when primary legislation enables a government body to make regulations to implement an obligation on the public, and that legislation does not specifically anticipate that that obligation could be imposed by that government body by other means such as ‘directions’ or so-called ‘tertiary’ legislation, the implementing regulations are lawful if the regulations specify that the rule making power may be exercised by the government body merely by ‘directions’.

42. However, before dealing with the ‘public law’ and ‘reasonable excuse’ defences, I mention two other defences on which the appellant relied, as they can be dealt with more briefly.

Liability already discharged?

5 43. Mr Garrod had received some communications from HMRC which confused him as to whether HMRC had deducted the £100 penalty from a repayment of tax owed to him, or whether it was still outstanding.

44. I am not in a position to resolve this; I have neither the information necessary to do so nor the jurisdiction. In summary, this Tribunal determines *liability*; the County Court deals with *enforcement*. I will determine whether Mr Garrod is liable to the £100 penalty; whether he has already paid this money he will need to discuss with HMRC and (if the parties cannot resolve it) take the matter to the courts to determine.

Mr Garrod had been relieved from liability to file online

15 45. Mr Garrod relied on Regulation 25A(10)(b) set out above which provided, in paraphrase, that HMRC could make a direction specifying circumstances in which a person did not have to make electronic returns. One of his submissions was that, because HMRC had decided that only a person who ticked the box to say he had read the terms and conditions could register with the Government Gateway and therefore make an online return, this amounted to a direction that a person who refused to so tick the box was not entitled to register with the Government Gateway and should not make an electronic return.

46. Therefore, he submitted, he was entitled to make a paper return and could not be penalised for so doing.

25 47. I am unable to accept this submission. Whatever power HMRC were purporting to exercise in requiring taxpayers filing online to tick the box confirming they had read the terms and conditions, HMRC were not purporting to exercise their power under Regulation 25A(10)(b) to specify circumstances in which persons did not have to make electronic returns. If they had intended to do so, they would have needed to make this clear, such as with a term saying that if a taxpayer did not wish to read the terms and conditions, the taxpayer would be permitted to file by paper. On the contrary, as Mr Garrod said, ticking the box was made compulsory.

48. So Mr Garrod was not made exempt from the obligation to file online.

Alleged breach of public law defence

35 49. Logically, the question of whether HMRC were in breach of the law in requiring Mr Garrod and all other taxpayers filing online to tick the box comes before consideration of the question of whether Mr Garrod had a reasonable excuse. It also makes sense to consider it first because the question of whether HMRC were acting in

breach of public law might well be relevant to the question of reasonable excuse in any event.

50. Mr Garrod's public law defence raised two basic issues:

- (1) Did the Tribunal have any jurisdiction to consider public law issues;
- 5 (2) And if it did, was HMRC actually acting in breach of public law?

The Tribunal's public law jurisdiction

51. HMRC's position was that the Tribunal had no jurisdiction to hear any of the possible public law arguments in this case and in particular it had no jurisdiction to
10 consider whether Regulation 25A went beyond what was permitted by s 135 Finance Act 2002.

52. HMRC's post hearing submissions on the jurisdictional point seemed only to address the issue of the Tribunal's jurisdiction to consider the validity of secondary legislation, which was not entirely helpful as the questions on which I had asked for
15 submissions (in particular (b) at §41 above) went wider. It asked simply if HMRC were acting unlawfully.

53. HMRC's submissions, however, presupposed that in imposing the requirement to tick the box, HMRC were acting in accordance with regulation 25A so the submissions assumed that the question of legality centred entirely on the issue of the
20 legality of Reg 25A(8). The submissions did not address the possibility that HMRC may have acted without any authority at all, and if so, what jurisdiction did the Tribunal have to consider this.

Jurisdiction to consider the legality of the imposition?

54. So does the Tribunal have jurisdiction to consider whether HMRC acted
25 lawfully in imposing this condition? As I have said, HMRC did not really address me on this despite the invitation to do so. Nor was the issue really explored by the appellant. However, it seems to me that, putting aside the defence of reasonable excuse, where a government department unlawfully prevents compliance by citizens with the law, then there is no non-compliance by the citizen. To me this seems
30 comparable to the rule of public law that a member of the public has no liability where liability depends on the prior unlawful act of a public authority, as explained by the House of Lords in *Wandsworth LBC v Winder* [1985] AC 461 and also in *Boddington v British Transport Police* [1999] 2 AC 143.

55. Or put another way, I consider there is no non-compliance where the failure to
35 comply was due to the prior unlawful act of a public authority. In this case I have found that the imposition of the requirement to tick the box was the cause of Mr Garrod's non-compliance (§8).

56. The question whether the imposition of the tick box was unlawful is one of public law. A statutory tribunal has no inherent jurisdiction and cannot therefore

carry out judicial review of the actions of a public body. However, that does not mean that it was not given jurisdiction to consider public law issues when carrying out the functions assigned to it by Parliament. Nevertheless, it is clear that it has no jurisdiction to consider certain matters of public law.

5 57. The most important instance of this is where a taxpayer has a tax liability of some sort or another, which was not caused by any intervening act of HMRC, but which the taxpayer asks to be relieved from on the grounds that HMRC ought, in the particular circumstances of the case, to have used its general discretion to discharge the liability. It is well established that the Tribunal has no jurisdiction to consider
10 such a claim: see the House of Lords in *J H Corbitt (Numismatists) Ltd* [1980] STC 231. More recent examples of this type of situation are *Hok* [2012] UKUT 363 (TCC) and *National Westminster Bank* [2003] STC 1072. This is not surprising: when bestowing jurisdiction on the Tribunal it cannot be supposed Parliament intended the Tribunal to consider whether the imposition of tax on a taxpayer was fair.

15 58. Nevertheless, it is clear that in some cases the Tribunal does have jurisdiction to consider public law in some situations (this was recognised in *JH Corbitt* ([61]) and *Noor* [2013] UKUT 71 (TCC) at [87], and applied in the case of *Oxfam* [2009] EWHC 2078). This is not surprising: Parliament intended the Tribunal to carry out its function by applying the law of the land.

20 59. Does the Tribunal have jurisdiction to consider public law in this case? Mr Garrod's case in essence is that the imposition of the penalty was unlawful because his failure to file online was caused by an (allegedly) intervening unlawful act of HMRC (the requirement to tick the terms and conditions box).

25 60. In the cases of *Winder* and *Boddington*, the House of Lords decided that where a liability arose due to an allegedly prior unlawful act of a public authority, the County Court, a statutory body, in the first case, and the criminal court, in the second case, had to consider this question of public law in order to carry out its function. The Court of Appeal in *Pawlowski v Dunnington* [1999] STC 550, applied this line of authority in a tax case, albeit one which arose in the County Court.

30 61. As I have said the question in this case is a comparable question of public law to that which arose in *Winder*, *Boddington* and *Pawlowski*. In other words, the question is whether the intervening (allegedly) unlawful act of HMRC, on which depends the tax liability or gave rise to the imposition of the penalty, is a question which this Tribunal has jurisdiction to consider.

35 62. I am aware, as I have discussed in much greater detail and with the benefit of submissions in *L H Bishop* [2013] UKFTT 522 (TC) at §§75-86, that there was a comment by the Court of Appeal in *Thorpe* [2010] EWCA Civ 339 that such jurisdiction, although it extends to the County Court, would not extend to the tax tribunal. I consider that comment to be obiter and not binding because the *Thorpe*
40 case involved alternative assessments: the Court of Appeal had already upheld the first assessment so anything they said in respect of the second assessment was merely in passing ('obiter') and not binding.

63. While a comment, even in passing, by the Court of Appeal, should normally be respected, in this case I am unable to do so. Firstly, the comment was brief; the reason it gave was that the appeal was a ‘statutory’ appeal ([31]). But that begs the question. This is a statutory appeal to a statutory tribunal: but as I have said (§58),
5 that does not automatically mean that public law cannot be considered. Secondly, Lloyd LJ indicated that *Winder* merely meant that a taxpayer could raise issues of public law in the County Court: but the only way a tax dispute could end up in the County Court would be on questions of enforcement. As Parliament clearly intended questions of *liability* to be decided in the Tribunal, and *Pawlowski* was an
10 exceptional case in which liability was in front of the County Court, this gives no justification for excluding the jurisdiction from the Tribunal. Lastly, the point was not fully argued in the Court of Appeal where the argument had centred on the first assessment. The decisions of the House of Lords in *Foster* [1993] AC 794 and the Court of Appeal’s decision in *EN (Serbia)* [2009] EWCA Civ 630 (both discussed
15 below) were not brought to the judges’ attention, yet as they deal with a tribunal’s public law jurisdiction, are clearly relevant. The comment truly was made in passing.

64. Moreover, I consider that the obiter comment was wrong. The Court of Appeal’s comment perhaps reflects a view that it makes a difference whether a taxpayer is an appellant in a tribunal or a defendant in the County Court. This is on
20 the basis a breach of public law can be a defence before any judicial body, whether it has inherent jurisdiction or not, but it cannot be a ground of appeal anywhere but in the High Court, which has inherent jurisdiction. In *Winder*, *Pawlowski* and *Boddington* the respective members of the public complaining of a breach of public law were all defending themselves. They were not appellants. Mr Garrod, on the
25 other hand, is an appellant.

65. But I cannot see that that makes a difference in the tax tribunal. Were it not for Parliament’s decision to create the tax tribunal and require taxpayers to bring disputes here, any dispute between a taxpayer and HMRC would be settled in the courts when HMRC sought to enforce liability and the taxpayer refused to pay. The taxpayer
30 would be a defendant in the courts. I see no reason to suppose that Parliament’s decision to create specialist tribunals included a decision to take away the taxpayer’s right to rely on the illegality of acts of HMRC as a defence. An appellant in this Tribunal in reality is defending himself against an assessment. He is in effect in exactly the same position as the defendants in *Winder*, *Pawlowski* and *Boddington*.
35 He does not, as Lord Frazer said in *Winder*, “select the procedure”. He has no choice but to become an appellant in this Tribunal if he wishes to defend the assessment. A similar comment is made by Lord Bridge in the *Foster* [1993] AC 794:

“there can be no abuse of process by a party who seeks a remedy by the very process which statute requires him to pursue...”

40 66. In conclusion I reject the obiter comment in *Thorpe*.

67. In my view, the requirement to consider public law where liability depends on an allegedly prior unlawful act of a public body applies as much in the tax tribunal as in the County Court. So, I consider I do have jurisdiction to, and indeed must,

consider whether the imposition of the requirement to tick the box was unlawful. If the requirement to tick the box was unlawful I must discharge the penalty.

Jurisdiction to consider legality of secondary legislation?

5 68. That brings me to the second question of public law jurisdiction that arises. I have said this Tribunal can consider the legality of the tick box pre-condition; in doing so can it consider the legality of any secondary legislation under which it was imposed? HMRC's case is that the tick the box condition was imposed under Reg 25A(8) and that that regulation was lawful. But it was also their position I had no jurisdiction to consider whether Reg 25A(8) was lawful and must just presume that it was.

10 69. The question of whether this Tribunal has jurisdiction to consider the legality of secondary legislation has been considered in this Tribunal quite recently, by me, in the case of *Dong* [2014] UKFTT 369 (TC). I decided in that case that this Tribunal did have jurisdiction to consider the legality of secondary legislation. Although 15 HMRC did not appeal that decision, their position in this case is that *Dong* was wrongly decided.

20 70. Was *Dong* wrongly decided on the question of this Tribunal's jurisdiction to consider the legality of secondary legislation? Apart from her submissions on *Noor*, discussed below at §76-80, nothing Ms Nathan says in her submissions in this case raised any point that was not raised before me in *Dong*, and despite considering the matter afresh, I remain of the same view as before.

25 71. My first point is that this is a statutory tribunal: so it seems to me almost bizarre to suggest that in doing the job that Parliament has appointed this Tribunal to do, this Tribunal ought to apply legislation that Parliament had not authorised. On the contrary, Parliament cannot have intended this Tribunal to subvert Parliament's authority by recognising unlawful secondary legislation.

30 72. Ms Nathan relies on s 83(1)(zc) VATA which gives Mr Garrod the right of appeal against the imposition of the penalty in this case. She suggests that the failure to expressly state that such an appeal could be on public law grounds means that it cannot be. But at the same time there is nothing express to prevent consideration of public law issues and for the reason just stated in the above paragraph, every reason to suppose that Parliament did not intend this Tribunal to give effect to unlawful secondary legislation when hearing appeals against the imposition of penalties. If the penalty was not lawfully imposed, the Tribunal's jurisdiction is to discharge it.

35 73. Ms Nathan also relied on what Lord Diplock said in *Hoffman-La Roche (F) & Co v Sec of State for Trade and Industry* [1975] AC 295 to the effect Parliament intended Tribunals to presume secondary legislation was unlawful until the courts had declared otherwise. As I pointed out in *L H Bishop*, that comment was obiter and conflicts with the House of Lords' view expressed in the later case of *Foster* [1993] 40 AC 794, which is to be preferred for the reasons given in §71 above.

74. There seems to be a suggestion from HMRC that this Tribunal is in some way unfit to decide points of public law: yet this Tribunal is regularly entrusted under the European Communities Act 1972 with the task of determining not only the lawfulness of secondary legislation but that of primary legislation. There are good reasons why
5 Parliament may have intended some issues of public law to be restricted to the administrative courts (see §57 above) but they are not, so far as I can see, because the Tribunal lacks the competence to decide them.

75. Restricting all issues of public law to the administrative courts risks a denial of justice. Moreover, there is good sense in asking a specialist Tribunal its views on the
10 legality of secondary legislation. Lord Bridge in *Foster* said in respect of that:

“...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
15 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.”

76. Ms Nathan, however, considers that the Upper Tribunal decision in *Noor*
20 establishes at [87] that appellants cannot question the legality of secondary legislation.

77. However, I find nothing in [87] of *Noor* to indicate that this Tribunal would not have jurisdiction to question the lawfulness of secondary legislation. Paragraph [87] actually dealt with the quite different issue with which the *Noor* case was concerned which was whether an appellant could rely in this tribunal on legitimate expectations
25 arising out of HMRC’s unlawful acts. The Upper Tribunal said in [87]:

“...in contrast a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectations is a matter for remedy by judicial review in the
30 Administrative Court...”

This is nothing to do with the enforceability of unlawful secondary legislation in this Tribunal. Nor is the appellant who claims secondary legislation is unlawful relying on legitimate expectations. While it is true that the decision in *Noor* was that an appellant cannot rely in this Tribunal on legitimate expectations arising out of
35 HMRC’s unlawful acts (such as in that case, giving wrong advice to a taxpayer), an appellant challenging the allegedly unlawful secondary legislation is not seeking to rely on any unlawful act by HMRC. So he has no expectations arising out of it and what was said in *Noor* is irrelevant. The Upper Tribunal in *Noor* said a taxpayer could not rely on unlawful acts of HMRC; they did not seek to prevent a taxpayer
40 challenging unlawful acts of HMRC.

78. In any event, even if the Upper Tribunal had sought to address the issue, despite it being irrelevant in that case, as the decisions in *Foster* and *EN (Serbia)* were not brought to the Upper Tribunal’s attention, what it could have said on the subject

would have been per incuriam. But it did not seek to say anything on the subject of the Tribunal’s jurisdiction over allegedly unlawful secondary legislation. *Noor* is simply not in point.

79. I note in passing that I cannot accept as right a number of Ms Nathan’s statements about *Oxfam* and *Noor* in any event. Firstly, she said the ruling in *Oxfam* on legitimate expectations was ruled to be obiter in *Hok*, overlooking that that comment in *Hok* was made in passing and was itself obiter, and that the same panel in the later case of *Noor*, after detailed consideration came to the view that the ruling in *Oxfam* was probably not obiter (see [50]); Secondly she considered *Noor* had chosen not to follow *Oxfam*, which again seems wrong. *Noor* simply considered that the doctrine in *Oxfam* was more limited than Sales J had perhaps expressed it to be and in particular *Noor* decided that the Tribunal had no jurisdiction to consider legitimate expectation arising from unlawful acts of HMRC. *Noor* appeared in [87] to agree that *Oxfam* was rightly decided in that it held this tribunal did have jurisdiction to consider the legitimate expectations of taxpayers arising out of lawful acts of HMRC (so, for instance, this Tribunal could rule on the meaning and effect of a partial exemption method agreed by a taxpayer with HMRC).

80. I cannot accept her analysis of *Noor* which I consider to be irrelevant to the question of this Tribunal’s jurisdiction to decide whether secondary legislation was outside the scope of (“*ultra vires*”) the primary legislation

81. Of far more relevance is the decision of the Court of Appeal in *EN (Serbia)* which indicated that tribunals must, in order to make decisions in accordance with the law, take into account the lawfulness of any secondary legislation:

“[84] Does it follow that the tribunal...erred in law [in failing to consider the legality of secondary legislation]? 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.

82. Ms Nathan’s stand is that that decision does not authorise or require a first tier tribunal to consider the legality of secondary legislation. She says that the reference to ‘in accordance with the law’ was used because that in that case the Tribunal was constrained to consider whether the public body’s decision was in accordance with the law. But, as I said in *Dong*, whether that phrase is expressly used or not, Parliament clearly intended this Tribunal to consider whether the decision appealed against was one which was in accordance with the law.

83. Then Ms Nathan says that Parliament cannot have intended to give a first tier tribunal any such jurisdiction because an Upper Tribunal has the jurisdiction and could always overturn an FTT decision which was based on *ultra vires* secondary

legislation. But this is wrong too. The Upper Tribunal is an appeal court; if the FTT was right in law to give effect to ultra vires secondary legislation then its decision is not wrong in law and can't be overturned. So, if the FTT does not have jurisdiction to consider the legality of secondary legislation, an appeal from the FTT will not give
5 the Upper Tribunal jurisdiction to consider that question: if Ms Nathan was right, the Upper Tribunal would only have jurisdiction to consider whether secondary legislation was lawful if a judicial review case was transferred to it from the administrative court.

84. Ms Nathan also says that the FTT has no jurisdiction to declare secondary
10 legislation unlawful and that is true as it has no inherent jurisdiction: but it can, as the Court of Appeal in *EN (Serbia)* said that it should, refuse to apply unlawful secondary legislation.

85. Ms Nathan then says that the Court of Appeal considered that the FTT ought to have stayed the FTT case while referring the matter to the administrative court. I
15 agree that the Court of Appeal considered that in some cases this might be the most appropriate course but the Court did not say that the FTT must do this. The clear implication of the decision is that if it did not chose to do this, it had to decide the question of legality of the secondary legislation for itself.

86. In this case the issue is a £100 penalty. It is clearly a case where legal fees
20 alone would prevent a transfer to the administrative court. So as this Tribunal has the jurisdiction, it must decide the point for itself.

87. I reject HMRC's case that this tribunal is unable to address the legality of
25 secondary legislation. So I move on to consider whether the secondary legislation was unlawful in the sense that (in so far as the form of the online VAT return was concerned) it was not in a form authorised as envisaged by Parliament in FA 2002.

The Tribunal's jurisdiction to determine validity of tertiary legislation?

88. It was not suggested to me that this Tribunal did not have jurisdiction to
30 determine the validity of tertiary legislation. All the reasons given above in respect of secondary legislation apply with even greater force to tertiary legislation: this is a statutory Tribunal required to apply the law as given by Parliament in statutes. Directions made by public bodies do not amount to 'law' unless authorised by statute.

89. So in the context of an imposition of a penalty imposed because of a refusal to
35 comply with the tick box pre-condition, the Tribunal can consider the vires for the tick box. I can consider whether HMRC could properly impose the tick box pre-condition and in doing so can consider the legality of any secondary legislation they rely on as authority for imposing that pre-condition.

Was the tick box pre-condition lawful?

90. To decide this question, I have first to decide what, if any, authority HMRC had to impose the tick box pre-condition. As I have said, HMRC's submissions assumed

that regulation 25A gave HMRC the power to require taxpayers to tick the box before they could fulfil their statutory obligation to file online. I have set out the legislation above but the relevant part is short:

5 25(8) “Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.”

 25(13) “No return shall be treated as having been made using an electronic return system unless it is in the form required by paragraph (8) above.”

10 91. Ms Nathan also relied on S 135(2)(d) FA 2002, to which I will return.

92. In so far as HMRC relied on reg 25A(8) as the vires for the tick box pre-condition, there are really two issues:

15 (1) Was the tick box pre-condition within the scope of Reg 25A(8)? And that raises two sub-issues: (a) was there a specific or general direction as required by Reg 25A(8); and (b) if there was, was it one permitted by Reg 25A(8)?;

 (2) If the tick-box pre-condition was within the scope of Reg 25A(8), was Reg 25A(8) itself lawful? In other words, was Reg 25A(8) authorised by statute?

Was the tick box pre-condition within the scope of Reg 25A(8)?

20 93. Was there a direction? To be within Reg 25A(8), the tick box pre-condition has to be a part of a form approved by HMRC in a specific or general direction. So was there a direction?

25 94. By implication, HMRC’s case was that there was a direction of some kind by HMRC that the form of an online return would require the prior ticking of the box by the taxpayer. There was no suggestion by HMRC that there was any kind of published direction: the only public notification of the (assumed) direction was the fact that the online system actually did require the prior ticking of the box.

30 95. I am not aware that a direction must take a particular form; HMRC effectively directed that an online return take a particular form merely by making the online return service available in the form that it actually took. I cannot see that the legislation would have required them to, somewhat pointlessly, set out that what that form would be in another document called a direction. Taxpayers knew they were required to tick the box merely by attempting to join the Government Gateway.

35 96. I do not have to decide this in view of the next paragraph but on balance it seems to me that in these circumstances that was a sufficient direction as envisaged by Reg 25A(8).

97. Did Reg 25A(8) authorise the tick box pre-condition? By implication, it was also HMRC’s case that the direction was permitted as the requirement to tick the box was to do with the ‘form’ of an ‘electronic return system’. I find this problematic.

98. While any kind of return, including an electronic return system, might well require boxes to be ticked, it seems to me that to be a part of the electronic return form, the purpose of the tick box must be something to do with the making of the return.

5 99. Yet by ticking the box, the taxpayer conveyed nothing to HMRC in the way of a return: it conveyed no information about its VAT supplies, inputs, VAT status or VAT liability. The only information conveyed was that the taxpayer said that it had read the terms and conditions. And the terms and conditions were nothing to do with the VAT return. Some of the ‘terms and conditions’, and in particular those listed at
10 §§17-24 above, are not really anything to do with the making a return; they concern the form of future communications with HMRC, such as statutory reminders, which is clearly much wider than any communication concerning the particular return; they also concern HMRC’s desire to limit its liability for failures in the electronic filing service.

15 100. Moreover, the requirement to tick the box was in order to join the Government Gateway. Having ticked the box, the taxpayer could potentially make other kinds of online returns, not just VAT ones. The requirement to tick the box was not a part of the VAT online form; I find it was merely a precondition to being in a position to file a VAT online form.

20 101. So I reject regulation 25A(8) as the authority (“vires”) for the tick box precondition. This conclusion seems to make it unnecessary for me to consider the legality of Reg 25A(8) itself, but as it was argued, and it has some relevance (see §126 below) I go on to consider the vires of Reg 25A(8) itself.

The legality of Reg 25A(8)

25 102. At the hearing I raised the question whether Reg 25A(8) was lawful. This was because a quick glance at the statute shows that it confers power on HMRC to make regulations:

S 135 FA 2002

(2) Regulations under this section may make provision -

30 (a) as to the electronic form to be taken by information delivered to the Revenue and Customs using electronic communications;

103. But regulations do not make provision as to the electronic form of the VAT return. Rather they provide, as I have said, as follows:

Reg 25A(8)

35 (8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.

104. My question at the hearing, and for submissions after the hearing (see (c) at §41 above), was whether s 135(2)(a) permitted HMRC to ‘sub-delegate’ to themselves. In other words, the statute gave them power to make regulations; did this empower
40 HMRC simply to authorise themselves in regulations to make directions which were

not comprised in regulations? Another way of putting this is that primary legislation empowered HMRC to do something by regulation; HMRC used this authority to make a regulation empowering itself to do that something by tertiary legislation. Was this lawful?

5 105. Ms Nathan's proposition was that Reg 25A(8), or at least the terms and conditions tick box was permitted by s 135 FA 2002 because of s 135(2)(d) which provided (as set out above) that

10 'Regulations ...may make provision (d) as to conditions that must be complied with in connection with the use of electronic communications for the delivery of information'

106. However, that begs the same question: regulations may make provision; but all regulation 25A(8) did was 'delegate' the power to make provisions to directions (so called 'tertiary legislation').

15 107. Parliament authorised the form of the regulations? Ms Nathan's reply to this was that Parliament authorised the form of the regulations, as they were, like all regulations, subject to resolution in the House, and therefore, she implied, Parliament authorised this 'sub-delegation' by HMRC to itself.

20 108. But I consider this to be no answer. If it was an answer, it would be an answer to all challenges to any secondary legislation which exceeds the scope given to it by primary legislation. The lack of opposition to the regulations in the House did not make them lawful if they exceeded the scope of the governing statute.

25 109. Express authority to put detail in tertiary legislation? Ms Nathan's next point was that s 135 did contemplate that the details of online filing would be spelt out in tertiary legislation so that Reg 25A(8) was not beyond the scope given by s 135 FA 2002. For this HMRC rely on s 135(4)(a); (6)(a); and (4)(c) FA 2002. These provide:

S 135 FA 2002

Regulations under this section may –

30 (4) (a) allow any authorisation or requirement for which the regulations may provide to be given or imposed by means of a specific or general direction given by the Commissioners;

(c) allow a person to refuse to accept delivery of information in an electronic form or by means of electronic communications except in such circumstances as may be specified in or determined under the regulations;

35 ...

(6) Regulations under this section may provide –

(a) that information delivered by means of electronic communications must meet standards of accuracy and completeness set by specific or general directions given by the Commissioners, ...

110. The difficulty for HMRC is that s 135 allows regulations to do a number of things but only in 4(a),(c) and 6(a), in the specific contexts of

- (a) Authorisations and requirements (S135(4)(a));
- (b) Refusals to accept delivery of information electronically (S135(4)(c)); and
- (c) Standards of accuracy and completeness (S 135(6)(a)),

does the statute expressly contemplate regulations which permit the detail being set out in tertiary legislation. The *form* of the online VAT return is dealt with in s 135(2) and nothing in s 135 expressly contemplates that it could be given effect by anything other than secondary legislation. If s 135(4)(a),(c) and (6)(a) were intended to apply to the whole of s 135(2), that subsection would have been worded differently. It would have said something along the lines of “HMRC may by or under regulations” do the following....On the contrary it says “Regulations under this section may make provision” as to the following....

111. S 135(2) considered as a whole provides as follows:

(2) Regulations under this section may make provision -

(a) as to the electronic form to be taken by information delivered to the Revenue and Customs using electronic communications;

(b) requiring person to prepare and keep records of information delivered to Inland Revenue by means of electronic communications;

(c) for the production of the contents of records kept in accordance with the regulations;

(d) as to conditions that must be complied with in connection with the use of electronic communications for the delivery of information;

(e) for treating information as not having been delivered unless conditions imposed by any of the regulations are satisfied;

(f) for determining the time at which and person by whom information is to be taken to have been delivered;

(g) for authenticating whatever is delivered. (my emphasis)

112. In particular, the *form* of the online VAT return is not an ‘authorisation’; and while filing online could be described as a ‘requirement’, the *form* of the VAT online return is not (s 135(4)(a)); nor is the *form* anything to do with refusals to accept online delivery of information (s 135(4)(c)) and while the form’s required standard of accuracy and completeness could be dealt with by directions (s 135(6)(a)), that provision does not permit the *form* itself to be dealt with by directions.

113. So there is nothing in s 135 which permits the form of a VAT online return to be specified by anything other than Regulations.

114. Implicit authority to put detail in tertiary legislation? It was, as I understood it, also HMRC’s position, that even if there was nothing express in s 135 which permitted the tick box condition to be imposed, nevertheless it was a very minor

matter and there was always implicit authority for minor matters to be contained in tertiary legislation.

115. Consideration of this strand of argument raised two questions: (3) was the proposition right as a matter of law and (2) was the pre-condition a minor matter?

5 116. As a matter of law, Ms Nathan relied on *Global Vision College*, which I discuss below. First she drew my attention to the decision in *Alvi* [2012] UKSC 33 which was a decision in an immigration appeal. The applicable law permitted the relevant Secretary of State to set ‘Rules’ on who would be considered to be a skilled worker. The legislation required the Rules to be laid before Parliament. Over the years many
10 changes were made to the Rules and the complete set of Rules became very large indeed. The appellant was refused permission to stay in the UK as he did not meet the Rules’ definition of a skilled worker in his particular area of employment: but that particular section of the Rules had not been laid in Parliament. The House of Lords ruled that, therefore, that section of the Rules could not be used on which to base a
15 decision whether or not the appellant could stay in the UK. He won his appeal.

117. “Regulations” in s 135 FA 2002 are clearly defined as secondary legislation that is laid in Parliament and therefore this case appears to be highly relevant: where primary legislation says something must be done by secondary legislation, then that is what it means.

20 118. Ms Nathan nevertheless sought to persuade me that *Alvi* was not fatal to HMRC’s position. She drew my attention to Lord Dyson’s judgment in *Alvi*; much of what he said was the difficulty of deciding which criteria were “rules” (which had to be laid in Parliament) and which were merely guidance to immigration officers (which could be given direct by the Secretary of State – in other words tertiary
25 legislation). From this she drew the proposition that there is a distinction between matters which must be in the Regulations and minor matters which do not have to be: when granting power to HMRC to do something by secondary legislation, Parliament was impliedly granting HMRC the power to sort out the details by direction and tertiary legislation. Firstly, I do not consider Lord Dyson was making any such
30 proposition. The legislation in *Alvi* provided for some matters to be dealt with by regulations and some by ‘tertiary legislation’; and in any event, even if the tick box pre-condition was a minor adjunct to the form of the online return, the form of the VAT online return had to be contained in regulations and it was not.

35 119. Ms Nathan relied on *Global Vision College* [2014] EWCA Civ 65. In that case the court had to consider whether a check undertaken by immigration officers was one which should have been contained in the Rules (because it wasn’t). The Court of Appeal concluded that it fell on the non-Rule side of the line (because the applicants’ responses to the check were not criteria they must meet to be given leave to stay in the UK [66]).

40 120. I don’t find this case helpful to HMRC either. The problem for HMRC is that in *Alvi* and *Global Vision College* the Courts had to decide whether a check on a person amounted to a ‘Rule’ (which required secondary legislation) or was merely guidance

applied by immigration officers (which by statute was authorised to be by tertiary legislation). The cases really concern the dividing line and that part of the decisions is specific to the immigration rules and irrelevant here where there was no express authority for the form of the online VAT return to be contained in tertiary legislation.

5 121. There is nothing in either case that supports the proposition that minor aspects of a delegated power could be dealt with by tertiary legislation where statute only authorised the exercise of the power by regulations.

10 122. Secondly, I do not accept that the tick box pre-condition was a minor matter in any event. It included matters (see §§17-24 above) that might reasonably be of concern to taxpayers. In particular, clause 7.1 was not modified by 8.2 so the 'terms and conditions' included a term that HMRC were allowed to communicate with the taxpayer via the online mailbox whether or not he consented. The same was also true if the taxpayer provided his email address: HMRC stated that it was allowed to communicate with the taxpayer via email whether or not he consented. This is of concern. Taxpayers might not want to receive HMRC communications via a mailbox on the Government Gateway. I cannot agree that this is a minor matter. The method of communication from HMRC is likely to be very important to any taxpayer who wants to ensure he complies with his tax obligations. Some might welcome email communication; others may not. Many might have justifiable concerns with communications simply going to a mailbox they might not remember to check. In addition, there was HMRC's attempt to limit its liability. Very little was said about this at the hearing. It is difficult to envisage what liability HMRC had in mind: nevertheless, HMRC do seek to exclude liability, and taxpayers were obliged to 'tick the box' to say that they had read this condition if they wished to fulfil their obligation to file online. I cannot agree that this is a minor matter either.

15 123. HMRC also regarded the tick box precondition as a minor matter not requiring legislative sanction as the terms and conditions which the taxpayer had to read were not binding. But it seems to me that that misses the point. HMRC imposed a penalty on the taxpayer for (in effect) refusing to tick a box which HMRC had no legislative sanction to require him to tick. The terms and conditions behind the tick box were not binding, but the requirement to tick the box was effectively compulsory. And in any event, the terms and conditions were presented to taxpayers as if they were binding, even though (I have found) they were not. So I cannot accept the tick box precondition was a minor matter, even though the terms and conditions were not binding.

20 124. Unlike the immigration rules, there is no dichotomy between rules and guidance. The legislation here quite clearly requires the form of the online VAT return to be specified in secondary legislation. Yet the secondary legislation does not specify the form of the online VAT return. It provides that the form will be specified in directions. FA 2002 gave HMRC no power to do that, so the online form of the VAT return, as it was not specified in Regulations, was not within s 135(2)(a). HMRC have not, in other words, actually exercised the power given by Parliament to specify the form of an online VAT return.

125. I make the point in passing that FA 2002 appears to mirror the provisions which allowed HMRC to specify the form of the paper return in Regulations. The VAT regulations to this day contain the form of the paper returns. It may well be the case that it is not so easy to set out the form of an online return in a Regulation and that is why Reg 25A(8) was made; but while reg 25A(8) may have been a practical solution, it was not one which Parliament had authorised.

126. Conclusion: This case is not about the entire online VAT return form. It is about the tick box pre-condition, which, as I have said, I do not consider to be a part of the form of the online return at all. But putting aside that issue, HMRC's case is that the requirement to tick a box was (they said) so minor a part of the form that it couldn't be seen as a part of the form that had to be contained in Regulations. But that overlooks a number of factors, perhaps the most important of which is that the form on HMRC's website for online returns is not a form authorised by Parliament, as it was not made by Regulations. So it seems any taxpayer, including Mr Garrod, bound to make an online return, could do it by any electronic means and was not required to do it via the Government Gateway.

127. Really HMRC's case on this amounted to saying that it was implied that HMRC could implement s 135(2)(a) by means of secondary legislation authorising tertiary legislation as it would be too cumbersome to do otherwise. I do not agree. The statute required the VAT online return form to be specified in secondary legislation: there was no implied authority to 'sub-delegate' this to tertiary legislation. And if the tick box pre-condition was a part of the form, there was no implied authority to do this by direction.

128. But as I have said, I think this discussion is beside the point, because, for the reasons given at §§97-100, the tick box pre-condition was a *condition* for filing online but not actually a part of the VAT online return form. Was there any authority for HMRC to create such a pre-condition other than by regulations?

Was s 135(2)(d) FA 2002 the vires for the tick box?

129. Ms Nathan's proposition was that Reg 25A(8), or at least the terms and conditions tick box, was permitted by s 135 FA 2002 because of s 135(2)(d) which provided (as set out above) that :

(2) Regulations under this section may make provision -

....

(d) as to conditions that must be complied with in connection with the use of electronic communications for the delivery of information;

130. This then could be the vires for the pre-condition for ticking the box before a taxpayer could join the Government Gateway and file online returns. However, it suffers from the difficulty that no regulations were made (or none that were drawn to my attention) requiring this box to be ticked as a pre-condition. In other words, had HMRC made regulations requiring the box to be ticked as a pre-condition, this subsection of the Act might have authorised them to do so. But there were no such

regulations. (And even if there were, there might still be a question whether those terms and conditions outlined at §§17-24 went beyond what Parliament contemplated by (d)).

5 131. Again, as with s 135(2)(a), was there anything in s 135 which permitted s 135(2)(d) to be dealt with by directions, despite the statement at the start of s 135(2) that it must be dealt with by Regulations? As I have said the only sub-sections of s 135 which contemplated tertiary legislation were s 135(4)(a) and (c) and (6)(a).

10 132. So could the tick box pre-condition be described as “any authorisation or requirement” within s 135(4)(a)? A condition is not an authorisation. Is it a requirement? Yet s 135(2) itself draws a distinction between requirements and conditions: contrast s 135(2)(b) and s 135(2)(d). It seems a requirement is an obligation on a taxpayer; whereas a condition is a pre-condition to a taxpayer being able to do something. So my conclusion is that s 135(4)(a) does not permit HMRC to implement s 135(2)(d) by regulations permitting directions: but it does not matter
15 anyway as, unlike with the form of a VAT e-return, HMRC did not even purport to make a regulation which permitted it to set conditions by direction. S 135(4)(c) and s 135(6)(a) are equally inapplicable.

20 133. So there is nothing in s 135(4) that would allow HMRC to set the form of the VAT online return, or the pre-conditions as to using such a return, in anything other than regulations. Yet at best the tick the box pre-condition could be seen as done under an (unwritten) direction given by HMRC. There was nothing in the regulations. So neither the form of the online VAT return nor the tick box pre-condition, with which this appeal is concerned, were authorised by statute.

Is the tick box condition unlawful?

25 134. HMRC did not appear to recognise that there might be something objectionable, even unlawful, in a public authority trying to impose conditions on a citizen before the citizen was able to fulfil its legal responsibilities. HMRC did not appear to consider that it might be objectionable for HMRC to impose pre-conditions on a taxpayer being able to file online where that taxpayer has no choice but to file online
30 if they wish to comply with the law and avoid a penalty.

35 135. It seems to me that nothing in s 135 contemplated the possibility of HMRC both imposing a compulsory obligation to file online but at the same time making it a precondition of a taxpayer doing so that he had to tick a box to say he had read conditions HMRC chose to present as binding. While s 135(2)(a) gave HMRC the power to set out the form of the VAT online return in Regulations, and while s 135(2)(d) gave HMRC the power to set out pre-conditions to online filing in Regulations, HMRC did not exercise that power. Neither the form of the VAT online return nor any pre-conditions, and in particular the requirement to tick the box, was set out in Regulations.

40 136. While HMRC has general care and management powers as a tax collecting authority, Parliament has only permitted it to set out the form of the VAT online

return and any pre-conditions to its completion in Regulations, Regulations which are subject to resolution in Parliament. HMRC did not therefore have the power to set out a compulsory VAT online return nor a compulsory pre-condition to online filing by any means other than by Regulation.

5 137. HMRC made it compulsory for taxpayers to tick the terms and conditions box before they could use the Government Gateway to file their online VAT return. So while it is true that this pre-condition, firstly, did not import any liability on the taxpayer as it was not binding in law and, secondly, was largely but not entirely rather innocuous, nevertheless HMRC had no power to impose it at all.

10 138. Perhaps curiously, because HMRC did not exercise the power it had under s 135(2)(a) to set the form of the VAT online return in Regulations, it seems to me that there was no lawfully imposed form for a VAT online return. So any means of electronic communication could have been utilised by taxpayers to file online. So it could be said that the tick box was not compulsory because a taxpayer (following the
15 line of reasoning set out above and concluding the VAT online return form was not properly imposed) could have filed online without using the Government Gateway and could have avoided ticking the box. Mr Garrod did not. He filed by paper.

139. So what about the penalty? Did Mr Garrod's liability to the penalty depend upon a prior unlawful act by HMRC? HMRC clearly purported to make the tick box
20 condition compulsory before completing the online return form which they also maintained was compulsory. Yet HMRC did not have the statutory authority to make either compulsory without a Regulation, and there was no Regulation. Reg 25A neither set out the form of the VAT online return nor the pre-conditions to completing it. So seeking to impose the tick the box pre-condition was in these circumstances
25 unlawful. As the failure to tick the box was the cause of Mr Garrod's failure to file online, it seems to me that under *Winder, Boddington* etc, the penalty was not lawfully imposed and must be discharged.

140. That concludes the appeal in the appellant's favour.

The reasonable excuse defence

30 141. In view of that conclusion there is no need for me to address the reasonable excuse defence, but in case this goes higher I make the following comments.

142. HMRC cited various authorities on what amounted to a reasonable excuse, and in particular the following:

35 A reasonable excuse "is a matter to be considered in the light of all the circumstances of the particular case" *Rowland* [2006] STC 536

"an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act" *B&J Shopfitting Services* - [2010] UKFTT 78 (TC)

And from *Perrin v HMRC* [2014] UKFTT 488 that the test is an objective test.

143. The appellant's case that his behaviour was reasonable particularly in view of the (alleged) unhelpful and abusive contact with HMRC. As I have said I make no findings about whether individual HMRC officers were abusive towards him: certainly there was nothing in the claimed interactions with HMRC that would justify a failure to comply with an otherwise lawful obligation. Indeed, the original failure to comply occurred before any contact with HMRC officers over it and such contact was not, I find, the reason why Mr Garrod did not comply. He did not comply, as I have said, as he considered HMRC had no right to require him to tick the terms and conditions box in order to file online.

144. It was also his case that he behaved reasonably in refusing to tick the box when faced with an unlawful attempt by HMRC to impose unlawful terms and conditions on him.

145. HMRC's case is that the requirement to tick the box was lawful; it was unreasonable to refuse to tick the box particularly in view of the innocuous nature of the terms and conditions; and that Mr Garrod had not behaved like a taxpayer who wished to honour his tax liabilities would act.

146. Are public law matters relevant to the question of reasonable excuse? HMRC's view is that they are irrelevant. I am unable to agree. On the contrary it seems to me that the Tribunal has always acted on the understanding that Parliament granted it unfettered jurisdiction to consider matters of public law when considering the question of reasonable excuse. *Noor* is authority that this Tribunal was not given unlimited jurisdiction to consider a taxpayer's legitimate expectations when deciding liability/entitlement to tax/tax repayment: in particular, it cannot consider legitimate expectations arising from incorrect advice given by HMRC. However when it comes to a question of a *penalty* for failure to comply with an obligation, the Tribunal has regularly found (relevant) incorrect advice by HMRC to amount to a reasonable excuse for failure to comply. *Noor* was not a penalty case and there is nothing in that case which would suggest its decision was intended to extend to penalty cases. And I think that all relevant matters of public law were intended by Parliament to be considered by this Tribunal when considering whether the taxpayer has a reasonable excuse in penalty matters.

147. I consider that, on one level, it could be said that Mr Garrod did not behave like taxpayers "who seriously intends to honour their tax liabilities and obligations would act" in the sense, so far as I understand it, most taxpayers obliged to file online have done so, which means that they must have ticked the box without the qualms suffered by Mr Garrod.

148. But that is confusing subjective with objective. The question is not how taxpayers in general behaved but with objectively how it was reasonable to behave.

149. In refusing to do something which in law HMRC could not compel him to do Mr Garrod cannot be criticised as someone who did not intend to honour his liabilities. He did not have a duty to tick the box; he was entitled not to tick it. He did not even have to submit his online return in the form dictated by HMRC.

5 150. While it is true that he should have submitted an online return in some form or another, whereas in fact he did so by paper, HMRC had represented to him that the online form via the Government Gateway was the only way of making an online return. That was also a misrepresentation by HMRC. He was entitled to rely on that
10 obliged to tick, was to file by paper.

151. There are two qualifications to this. Mr Garrod admitted that he did not read the terms and conditions before refusing to sign up to them. This doesn't appear to be reasonable conduct: if the terms and conditions had been entirely innocuous surely a reasonable taxpayer would have ticked the box? But, as I have said, the test of
15 reasonable excuse is *objective* so the question is not whether he read the conditions, but if he had read the conditions, would he, as a reasonable taxpayer mindful of his obligation to pay tax, still refuse to sign up to them?

152. Bearing in mind HMRC had no right to insist on any pre-conditions that were not enshrined in Regulations, and this pre-condition was not, objectively I consider it
20 reasonable for a taxpayer to refuse to tick the box the terms and conditions did include matters to which he might reasonable object and as set out at §§17-24. They might be relatively minor matters in the scheme of things but the point is that HMRC had no right to insist on them.

153. The second qualification is that the penalty was imposed for a failure which
25 occurred after Mr Garrod had received HMRC's letter of 12 October 2012 (§34-36). So Mr Garrod knew at the time he failed to file the relevant online form that HMRC considered that ticking the box did not bind Mr Garrod to the terms and conditions. Was it reasonable to continue to refuse to tick the box in these circumstances? On balance, I consider that the unlawfulness of the tick box precondition was a
30 reasonable excuse because the letter of 12 October 2012 made no sense of the situation: if the terms and conditions were not binding, why did HMRC require him to tick the box to say he had read them? The terms and conditions tick box precondition to filing an online return was unlawful and therefore Mr Garrod had a reasonable excuse for refusing to tick it and filing by another means.

35 154. Appeal allowed.

155. 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
40 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 15 JULY 2015

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