Neutral Citation Number: [2017] EWHC 1476 (Admin)

Case No: CO/631/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2017

Before :

MR JUSTICE GREEN

- -

Between :

Glencore Energy UK Ltd	**Claimant**
- and -	
Commissioners of HM Revenue and Customs	**Defendant**

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- -

Sam Grodzinski QC, James Henderson and James Segan (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Timothy Brennan QC and Georgia Hicks (instructed by the **General Counsel and Solicitor to HMRC**) for the **Defendant**

Hearing date: 11th May 2017

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Approved Judgment

MR JUSTICE GREEN :

A. Introduction

1. The present application concerns a narrow issue: should the Claimant ("the Claimant" or "GENUK") be required to pursue alternative remedies before or instead of being permitted to apply for judicial review? The Defendant (HMRC) has issued a notice (a "Charging Notice") to the Claimant, purportedly in accordance with section 95 Finance Act 2015 ("FA 2015"), imposing a charge for Diverted Profits Tax ("DPT") for £21,129,349 plus interest of £218,221.14 in relation to the nine month accounting period of 1st April 2015 to 31st December 2015.

2. Pursuant to sections 101 and 102 FA 2015, where a Charging Notice is issued to a company for an accounting period, a designated HMRC officer (the "Designated Officer") is under a duty ("*must*") to carry out a review of the amount of diverted profits tax charged on the company for the accounting period and such officer is empowered ("*may*") to carry out more than one such review. If the review does not lead to an outcome satisfactory to the taxpayer, then a person to whom a Charging Notice is issued may appeal against the Notice. It follows that, in principle, the Claimant in the present case is now entitled to enter into the review process contemplated by section 101 FA 2015; and if this produces a result which is considered to be unsatisfactory, it has a right of statutory appeal under section 102 FA 2015 to a First-tier Tribunal ("FtT"), which may confirm, amend or cancel the Charging Notice or any supplementary Charging Notice.

3. The Claimant now seeks judicial review upon the basis:

   a) that the Designated Officer in the Charging Notice applied a test which is not in accordance with relevant statutory requirements;

   b) that the Designated Officer failed to take account of the Claimant's representations;

   c) that the Designated Officer failed to give any or any adequate reasons for the calculation of DPT; and,

   d) that the calculation of DPT is, in any event, irrational.

4. HMRC (which bears legal responsibility for the conduct and decisions of the Designated Officer) disputes these allegations both as to their substance but also as to their materiality. HMRC also contends that it is not open to the Claimant to apply for judicial review because there are other, alternative, remedies available to the Claimant which must be exhausted first. HMRC therefore says that even if, *ex hypothesi*, the Claimant's Grounds are arguable, nonetheless they should be ventilated through the designated statutory remedies under sections 101 and 102 FA 2015, and not through judicial review.

5. For its part, the Claimant says that the statutory process is slow, inappropriate and ineffective and does not oust judicial review.

6. By Order of the 27th March 2017, Mrs Justice Whipple adjourned the application for permission to apply for judicial review to an oral hearing at which the parties were invited specifically to address the question of alternative remedy.

7. For the reasons set out below I have decided to refuse permission to claim judicial review. In my judgment the FA 2015 provides a comprehensive, two-stage, dispute resolution mechanism which first facilitates and encourages negotiation between the taxpayer and HMRC and then, if this is unproductive, allows for an appeal to a specialist tribunal. The proposed Grounds of Judicial review are carefully crafted in public law garb but when the outer garments are peeled back the true substance is revealed. And that true substance is the meat and drink of the statutory review and appeal procedure. The public law grounds conceal the real dispute between the parties and a determination of those public law issues would almost certainly leave the true issues unresolved. Moreover, on the facts of the case, and as confirmed orally during the hearing, HMRC and the taxpayer have now engaged in a re-consideration of the disputed issues arising and HMRC accepts that if GENUK presents evidence that satisfies it then HMRC will amend or revoke the Charging Notice. I therefore refuse permission because there are alternative remedies available to the Claimant which are in substance adequate and appropriate. On ordinary principles of discretion I also refuse permission upon the basis that because HMRC has embarked upon a review and reconsideration the Claim has become academic and / or is premature. In arriving at these conclusions I have considered the merits of the proposed Grounds. I consider them all to be weak. I have not however formally decided this case upon the basis that the Grounds are unarguable. Finally, I have considered the position under section 31(3C) Senior Courts Act 1981. Applying that test I have concluded that this is a yet further basis for refusing permission. In short, the Claimant has a perfectly proper case to advance in the statutory review and appeal process and that is where this dispute should be resolved.

B. Summary of Statutory Framework

8. To explain the context to the present application, it is necessary to summarise: the statutory framework for the imposition of DPT; the nature of the transactions put into place by the Claimant, which HMRC has concluded are relevant to the analysis of liability to DPT; and, the principal steps in the investigatory procedure conducted by HMRC into the Claimant's tax affairs.

9. With effect from the 1st April 2015, and pursuant to the FA 2015, provisions were introduced aimed at countering the use of aggressive tax planning deployed by multinational corporate groups to divert from the United Kingdom profits which would otherwise have been subject to corporation tax. This is the object and purpose behind DPT. It is intended to target particular types of arrangements designed to erode the UK tax base. The principal aim is to ensure that profits taxed in the UK fully reflect the economic activity here, consistent with the aims of the G20 / OECD Base Erosion and Profit Shifting Project ("the BEPS Project"). The types of regulatory arrangements addressed concern internationally accepted taxation rules on permanent establishments and transfer pricing. In their Summary Grounds, HMRC observes that at the time DPT was introduced in the UK, the effectiveness of these rules was being reviewed by the BEPS Project as set out in an "*Action Plan*" published by the OECD on 19th July 2013. The Summary Grounds state as follows:

> "16. The Action Plan identified a major issue concerning transfer pricing and the enforcement of the 'arm's length' principle. Transfer pricing rules serve to allocate income earned by a multinational enterprise among those countries in which the company does business. In some instances, multinationals have been able to use and/or misapply the transfer pricing rules to separate income from the economic activities that produce that income and to shift it to low-tax environments, such as regimes that have been available in Switzerland.
>
> 17. One of the ways in which profits are shifted, to the detriment of the UK tax base, is by (what the OECD describes as) '*contractual allocations of risk to low-tax environments in transactions that would be unlikely to occur between unrelated parties*' [i.e. unlikely to occur at 'arm's length']."

10. As set out in greater detail below, it is the position of HMRC that the agreements entered into between GENUK and other companies within the same group, amount to just such an arrangement designed to divert otherwise taxable profits away from the UK.

11. In brief DPT operates in the following way. DPT, as a new tax, was created pursuant to Part 3 FA 2015. It is a tax charged on "*taxable diverted profits*" arising to a company in a relevant accounting period (section 77(1)). Taxable diverted profits arise if one or more of sections 80, 81 and 86 FA 2015 apply. In the present case, the provision identified by HMRC as directly relevant is section 80 which concerns "*UK company: involvement of entities or transactions lacking economic substance*". Pursuant to this section there has to be a provision (in effect a supply of goods or services) between a relevant company (here GENUK) and another person connected with it (often a parent company) by means of a transaction or series of transactions. The provision must result in an "*effective tax mismatch outcome*" during the relevant accounting period (cf. sections 80(1)(d), and 107 – 108). Further, there must be established "*insufficient economic substance*" (cf. sections 80(1)(f), and 110).

12. There will only be an "*effective tax mismatch outcome*" if particular conditions are satisfied, including a condition relating to the "*80% payment test*" as set out in section 107(3)(d) and section 107(7). In essence, if the consequential increase in tax payable by the second party, taking into account any non-qualifying losses and deductions, is at least 80% of the reduction in the relevant tax payable by the first party, then the 80% payment test is met and there will not be an "*effective tax mismatch outcome*". As to the "*insufficient economic substance condition*", this is met where it is reasonable to assume that the transaction was designed to secure the relevant tax reduction, unless it was reasonable to assume that for the first party (i.e. here GENUK) and the second party, taken together and taking account of all accounting periods for which the transaction was to have effect, the "*non tax benefits*" referable to the arrangements would exceed the financial benefits of the tax reduction. The alternative condition is that "*it is reasonable to assume*" that the involvement of a person in a transaction was designed to secure the relevant tax reduction unless it was reasonable to assume that for the first party and the second party taken together and taking account of all accounting periods for which the transaction was to have effect, the "*non tax benefits*" referable to the contribution made to the transaction by that

person's staff, would exceed the financial benefit of the tax reduction or, in the accounting period, the income attributable to that person's staff in terms of their contribution to the transaction, exceeded the other income attributable to the transaction.

13. Where section 80 applies, DPT is charged, *prima facie*, in an amount equal to 25% of the "*taxable diverted profits*", as specified by HMRC through the Designated Officer in a Charging Notice plus interest.

14. Sections 82 – 85 FA 2015 address the calculation of taxable diverted profits in section 80. As part of this process, HMRC must identify "*the relevant alternative provision*" ("the RAP"). This is defined in section 82(5) as the alternative provision which it is just and reasonable to assume would have been made or imposed as between the relevant company and one or more companies connected with the company instead of the material provision, had tax (including any non-UK tax) on income not been a relevant consideration for any person at any time.

15. As to the procedure, in summary, there are six stages in the statutory procedure governing the imposition of DPT. First, where a "*designated HMRC officer*" has "*reason to believe*" that the statutory provisions apply, that officer must give a "*preliminary notice*" (the "Preliminary Notice") under section 93. The notice must, *inter alia*, set out the basis upon which the officer has "*reason to believe*" that one or more of the relevant sections apply and explain the basis upon which the proposed charge is to be calculated (cf. section 93(3)). Pursuant to section 93(4), where the Designated Officer has insufficient information to determine or identify any of the relevant matters, it is sufficient if the Preliminary Notice sets out the matters determined "*to the best of the officer's information and belief*". Second, pursuant to section 94, the taxpayer has 30 days, beginning with the date of the issue of the Preliminary Notice, to make written representations which are to be considered by the Designated Officer, but only where they are made on the grounds set out in section 94(3). These include arithmetical errors in the calculation of the amount of the DPT or the taxable diverted profits or an error in a figure on which an assumption in the notice is based. Representations may also be made upon the premise that the 80% payment test is met. Third, having considered the representations, the Designated Officer must either issue a Charging Notice or confirm that no such notice will be issued. This must be done within 30 days from the end of the 30-day period for representation. The Charging Notice must set out, *inter alia*, "*... the basis on which the officer considers that section 80, 81 or 86 applies*" (section 95(5)(b)). Fourth, the DPT charged by the Charging Notice must be paid within 30 days from the issue of the notice. It may not be postponed notwithstanding any review on the part of HMRC or future appeal. Fifth, a Designated Officer of HMRC must review the amount of DPT charged within 12 months from the end of the 30 day payment period. The officer may issue an amending notice reducing the DPT or a supplementary Charging Notice increasing the DPT. Sixth, and finally, the taxpayer has 30 days from the end of the review period to give notice to HMRC of any appeal of the DPT. Any appeal lies to the FtT which is empowered to, *inter alia*, "*cancel*" a Charging Notice. The Claimant observes, in its skeleton argument, that: "*The ordinary function of a FtT on such an appeal is to identify the correct amount of tax due*".

16. On the 30th November 2015, HMRC provided updated interim guidance on the application of the DPT regime, introduced by the FA 2015. Chapter 5 of the Guidance

entitled "*Imposing a Charge: Procedure and governance*" provides guidance on the "*HMRC process*" for the imposition of a charge. It is explained that the DPT legislation provides a structured process which includes strict time limits (*ibid*, page 102). In relation to the process of submission of written representations, the Guidance states:

> "The company can make any representations it wants but the designated HMRC officer can only consider a restricted number of objective and easily verifiable matters… Consequently, unless there has been a straightforward misunderstanding, a preliminary notice will usually be followed by a charging notice in the 12-month review period."

17. In the earlier chapter 4 (*ibid* page 92) the reason for this is explained:

> "The representations that HMRC can consider are therefore limited to factual matters that it should be possible to establish relatively quickly. Matters which require more in-depth exploration and detailed analysis, such as transfer pricing and profit attribution, should be considered during the 12 month review period following the issue of a Charging Notice."

18. In chapter 5 under the heading "*Engagement during the review period*", the following is stated:

> "HMRC expects that customers will want to work collaboratively during the review period as they have to pay the DPT upfront and will want to obtain certainty and have any excess DPT repaid. Although the company cannot postpone the DPT and must pay it in full, HMRC can issue amending notices during the review period to reduce the DPT charged and repaying the resulting overpayment. If a group does not collaborate with HMRC during the review period, the required information can be sought using formal powers in Schedule 36 FA 2008…"

19. It is apparent from the Guidance (*ibid* page 103) that, although the review period lasts for 12 months it may end earlier if, following issuance of a supplementary Charging Notice, the company notifies HMRC that it wishes to terminate the review or the company and the Designated Officer agree in writing to terminate the review.

20. In relation to "*Governance*", it is made clear (*ibid*, page 105) that the conclusion of the review does not, necessarily, imply cessation of dialogue between HMRC and the tax payer, including following receipt of an appeal:

> "At the conclusion of the review period, the case team will make a report to the board of senior officers. Where the report recommends continuing the dialogue with the business following receipt of an appeal against the Charging Notice, it should include a commitment to resubmission with a progress report at a specified future date or when settlement proposals

are made, if earlier. Otherwise, the senior officers will review the risk(s) and decide on the recommendation to be made to the appropriate dispute resolution board(s)."

21. If the matter proceeds to an appeal, then pursuant to section 102(4) FA 2015, the FtT is to determine whether the taxable diverted profit, in respect of which a charge is imposed, has "*... been correctly calculated*". The FtT may confirm, amend or cancel the relevant Charging Notice: section 102(5).

22. Pursuant to section 102(6) FA 2015, for the purposes of Part 5 of the Taxes Management Act 1970 ("*TMA 1970*"), an appeal under section 102 is to be treated as if it were an appeal under the Taxes Act and for that purpose reference to an assessment includes any Charging Notice or supplementary Charging Notice. Section 49D(3) TMA 1970 (which is within Part 5) stipulates that the jurisdiction of FtT is to decide "*the matter in question*", which, in the context of sections 101 and 102 FA 2015, is the correct amount of DPT chargeable upon the taxpayer.

C. The Agreements and Transactions under Challenge

23. I now turn to summarise the agreements and transactions which it is said by HMRC give rise to liability to DPT. I take my account largely from the witness statement of Mr Timothy Scott, Tax Manager for the Glencore group of companies. The principal activity of the Claimant, Glencore Energy UK Limited ("GENUK"), is trading in oil and gas. In order to trade profitably, GENUK must transport oil from producers to consumer, store oil so as to benefit from mismatches in supply and demand, and transform the form of oil products through a refining and blending operations. GENUK is incorporated in the United Kingdom and is an indirect subsidiary of Glencore International ("GIAG"). According to Mr Scott, GENUK employs circa 41 traders. GENUK seeks profit by exploiting market pricing inefficiencies between geographical markets, spot and forward markets and different oil-derived commodities. Mr Scott says that GIAG enables GENUK to be profitable by providing to it such facilities as storage, pipeline transportation, shipping and terminals to load and unload vessels. GIAG also provides financing and risk assumption to GENUK. The Claimant's, in their written submissions, argue that GIAG is "*... nothing like the kind of brass plate company which does very little, has few (if any) employees, and is simply incorporated in a low tax jurisdiction so as to shelter taxable profits diverted from other countries. On the contrary, GIAG is the most significant company in the Glencore Group in terms of the combination of revenue, staff, assets and the extent of its operations*". It apparently employs approximately 800 staff in Switzerland and its 2015 profit and loss account shows revenues of approximately CHF 51.4bn (i.e. circa £35bn).

24. During the period relevant to the Charging Notice, the relationship between GENUK and GIAG was partially regulated by a "*Trading Facilitation, Risk Management and Risk Assumption Agreement*" (30th December 2013), referred to as the "*Risk and Services Agreement*" or "*RSA*". Pursuant to this agreement, GIAG provides to GENUK working capital financing, the assumption of net losses suffered by GENUK that remain after GENUK has hedged and insured trading transactions, and a range of other services including priority access to the worldwide network of fuel offices of GIAG and subsidiaries, storage and transportation facilities and regular detailed

consultation and advice relating to market risk, counter-party credit risk and financing matters.

25. In return for these services, GENUK pays to GIAG a sum equal to 80% of GENUK's net profits.

D. Facts: Procedure Adopted

26. Discussions focussing upon transfer pricing have been ongoing between GENUK and HMRC for about 6 years. Following the coming into force of the DPT provisions in the FA 2015, on 5th April 2016, HMRC requested additional information relevant to the analysis of the arrangements pursuant to the RSA. In particular HMRC sought information concerning whether the "*insufficient economic substance*" test in section 80(1)(f) FA 2015 was met. Correspondence ensued in the course of which (in a letter of 27th April 2016) GENUK did not dispute that there was an effective tax mismatch outcome. GENUK concentrated in this exchange upon the insufficient economic substance condition and why, in the view of GENUK, it was not possible to hypothesise the existence of RAP. The correspondence was between Mr Scott (for GENUK) and Ms Elba Virto (for the Designated Officer).

27. On 6th September 2016, the Designated Officer issued a Preliminary Notice to GENUK for the relevant accounting period. This stated that in accordance with the correct test under section 93(1) and section 93(3)(b) the Designated Officer had "... *reason to believe that section 80 Finance Act 2015 applies*" in relation to GENUK for the relevant accounting period. The Designated Officer also stated that she considered that section 80 FA 2015 applied. The Designated Officer observed that based upon the understanding of HMRC, GIAG was liable to relevant tax in Switzerland at a rate of approximately 11% and, in consequence, the resulting reduction of corporation tax payable by GENUK exceeded the resulting increase in relevant tax payable by GIAG for its corresponding accounting period. The Designated Officer observed that GIAG did not meet the 80% payment test set out in section 107(7) FA 2015 and the exemption in section 107(6) did not apply. The Officer also relied upon the confirmation set out in the letter from GENUK to HMRC of the 27th April 2016 that an effective tax mismatch outcome did arise. The Designated Officer calculated a proposed DPT on the basis of a RAP by reference to the period 1st January 2015 to 31st December 2015. Following apportionment for the relevant period, DPT was assessed at £21,332,538.08 representing 25% of the taxable diverted profits of £84,517,396 plus interest.

28. On the 5th October 2016, GENUK responded to the Preliminary Notice with representations. Mr Scott now argued that, contrary to the view expressed in the letter of 27th April 2016, GENUK took the position that there was no effective tax mismatch outcome. In other words, the concession made earlier was withdrawn. The representations now challenged the conclusion of HMRC that GIAG did not meet the 80% payment test. If this was correct then there would be no effective tax mismatch outcome and no Charging Notice could be issued. The letter of representation also explained in greater detail why in the submission of GENUK no DPT was payable.

29. On the 13th October 2016, HMRC sent an email to GENUK asking it to provide evidence in support of its representations relating to the 80% payment test and as to errors alleged by GENUK to have been made in the calculation of DPT by HMRC.

30. On the 14th October 2016, GENUK and HMRC held a conference call to discuss the representations.

31. By letter dated the 21st October 2016, GENUK provided further information and submissions, including, in particular, as to the tax payable by GIAG under relevant cantonal and federal Swiss tax.

32. On the 3rd November 2016, the Designated Officer issued the Charging Notice in dispute. This was, with very minor changes, identical in substance to the Preliminary Notice. In a covering email, GENUK was told that a detailed letter would be sent imminently, setting out in greater detail the position of HMRC on GENUK's representations.

33. On the 9th November 2016 the letter containing the additional analysis was sent to GENUK by Ms Virto ("the 9th November Letter"). The letter is detailed, comprising 75 paragraphs. It sets out reasons for rejecting the representations made by GENUK. It provided additional detail supporting the Charging Notice. In paragraph 9 Ms Virto, having set out the matters which she considered required explanation, invited GENUK to let her know if she had "*missed any points*". She observed that in relation to a number of key matters a significant amount of information had not been provided by GENUK. She gave the following, in paragraph [14], as an example:

> "14. For example, I refer you to my letter of 5 April 2016 where I requested information on UK and Swiss Based employees which to this date has not been provided. Without this information, it is not possible to assess the level of substance present in Switzerland (relevant to the insufficient economic substance test in section 110), the level of risk management functions provided by GIAG's personnel/absence of key risk management functions in the UK (relevant to RAP) or an understanding of whether services have been provided to GENUK (relevant to calculation of DPT charge), amongst other areas. Each of these points are covered in more detail below."

34. The letter went on to analyse the insufficient economic substance condition in section 110 FA 2015 and whether it was met or not and the RAP and whether it was reasonable or not. In paragraphs [44] – [48] GENUK's arguments and evidence which were tendered to substantiate its revised case on the 80% payment test were summarised, and criticised. In paragraphs [57ff] Ms Virto engaged in the nuts and bolts of the calculation, addressing such matters as the downward adjustment of working capital funding costs; the calculation of working capital funding costs and whether it took account of the RAP; whether the calculation of working capital funding assumed a constant thin capitalisation; and, whether the zero dollar allocation to the service fee was supportable.

35. In paragraph [71] Ms Virto stated that once GENUK had had an opportunity to consider the Charging Notice and the contents of the letter GENUK should meet with HMRC "*... to discuss the areas that need further informational work during the review period that starts on 3 December 2016, and agree a work plan to undertake this work*". Various dates for meetings were then proposed. In paragraph [72] Ms

Virto set out, in tabular form, an overview of the areas that it was anticipated would be needed to be worked upon during the review period. In paragraph [73] Ms Virto welcomed the thoughts of GENUK on these "... *and other areas you would like us to consider during the review period*". Paragraphs [74] and [75] stated:

> "74. I and my colleagues welcome your offer to explore potential changes to the RSA arrangements going forward and suggest this is included as an agenda item for our next meeting.
>
> 75. Likewise, HMRC is happy to discuss any concerns you have regarding the use of information provided on a without prejudice basis."

36. On the 2nd December 2016, Ms Virto sent a further letter in relation to the "*Transfer Pricing Model*" addressing points raised by GENUK in a letter dated 27th April 2016 on that issue. The letter extends to 55 paragraphs and provides a detailed response to the points raised by GENUK. At the conclusion of the letter under the heading "*Next Steps*", Ms Virto suggested a meeting between HMRC and GENUK. She stated as follows: "*Given the overlap between transfer pricing and DPT risks, I suggest that we aim to develop this work plan together to address both risks and make the best use of time we have available in the review period*".

37. GENUK did not respond to these invitations. Instead on 15th December 2016, Freshfields, for the Claimant, sent a Letter before Claim to the Defendant, setting out its grounds for judicial review of the Charging Notice imposing DPT. The letter identified four grounds: failure to apply the correct test in section 95 FA 2015; failure to take into account representations; failure to address the 80% payment test; and, the adoption of an irrational approach to the calculation of DPT. Freshfields concluded that the Charging Notice was unlawful and should be withdrawn forthwith, failing which GENUK would issue judicial review proceedings.

38. On the 6th January 2017, HMRC responded challenging the claim in its entirety. In paragraph [49] HMRC stated that the case was inappropriate for judicial review and should be left for the operation of the statutory review process and, if appropriate, the statutory appeal which would then be available. Further, it was stated that an application for judicial review had no utility:

> "If any of its points have real substance, this will be exposed in the course of this statutory review and then remedied, or on appeal if appropriate. This would provide GENUK with (at least) as speedy a resolution as would a judicial review challenge to the charging notice. But even a successful judicial review challenge to the charging notice would not relieve GENUK from the possibility of a charge to DPT, which may be imposed, if appropriate, by reference to the timescales identified in s 93(6)(b)."

E. Analysis

39. I turn now to the analysis of the issues arising. I address the issues in the following order: (i) the law on alternative remedies; (ii) the statutory review procedure as an

alternative remedy; (iii) the non-statutory duties of HMRC to reconsider; (iv) the statutory appeal procedure as an alternative remedy; and (v), materiality under section 31(3C) and (3D) Senior Courts Act 1981.

(i) The law on alternative remedies

(a) The basic principle

40. The basic principle is that judicial review is a remedy of last resort such that where an alternative remedy exists that should be exhausted before any application for permission to apply for judicial review is made. Case law indicates that where a statutory alternative exists, granting permission to claim judicial review should be exceptional. The rule is not however invariable and where an alternative remedy is nonetheless ineffective or inappropriate to address the complaints being properly advanced then judicial review may still lie.

(b) The first issue: Is there an alternative at all?

41. The first question will always be to determine whether the forum identified as the appropriate "*alternative*" is capable of amounting to a substitute for judicial review. To decide this, the Court has to (a) work out the scope and effect of the jurisdiction of the postulated "*alternative*" (which is a question of statutory construction) and then (b) work out whether the proposed Grounds for judicial review are capable of being adjudicated upon in that alternative forum. This second issue has two main strands to it which are whether the issues in dispute can be determined either in the public law form set out in the proposed grounds for judicial review *or* in their pith and substance.

(c) The second issue: If there is an alternative, is it effective and appropriate?

42. If the issues in dispute can in principle be determined in the "*alternative*" forum then there is a yet further stage in the analysis which is to determine, qualitatively, whether the alternative is as effective and appropriate as a judicial review in the High Court. There is no fixed or canonical list of criteria which apply to this exercise which by its nature is fact and context sensitive but, from case law, the following have been identified as potentially relevant to this comparative evaluation:

a) The existence of non-judicial alternatives.

b) Speed and expedition.

c) Costs and expense.

d) The need for fact finding.

e) Utility and finality.

f) The desirability of an authoritative ruling on the points of law arising.

g) The strength of the issues.

43. Before addressing these criteria in the context of the facts I address below some of the legal arguments raised by the parties as to the test to be applied at the first stage.

(d) Existence of the alternative jurisdiction: The process of statutory construction

44. There is no dispute between the parties as to the fact that the starting point is an exercise of statutory construction. In the present case the postulated alternative (under sections 101 and 102 FA 2015) is a statutory remedy involving a review and an appeal to a specialist tribunal. As creatures of statute, tribunals are not, absent express statutory provision, seised of a judicial review jurisdiction. This does not however, without more, strip them of the duty to resolve disputes which have a "*public law*" element to them if that falls within the proper ambit of their statutory jurisdiction.

45. Parliament has been singularly inconsistent in its choice of language to describe the scope of the jurisdictions of specialist tribunals. In some cases Parliament has conferred a wide jurisdiction on the alternative decision maker which might overlap, at least in part, with the normal terrain of judicial review. For instance, in *CC&C Ltd v Revenue and Customs Commissioners* [2014] EWCA Civ 1653 ("*CC&C*") the relevant tribunal had a power to determine the reasonableness of the decision impugned. There Customs revoked the Claimant's registration as a registered "*excise dealer and shipper*" on the basis that it was no longer a fit and proper person. The revocation was a "*relevant decision*" under section 13A(2) Finance Act 1994 and the Claimant was thereby entitled to a review of the decision under sections 15A – 15F and an appeal to the FtT under section 16. The Claimant lodged a statutory appeal and simultaneously sought judicial review including for an interim order that its registration be restored pending the determination of the statutory review and appeal. The first instance judge refused relief. The appeal was dismissed though the Court accepted that in principle there were cases where the High Court could entertain an application for judicial review (and consequential interim relief). The applicable statutory powers of the FtT were engaged only where "*the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it*". The conferral of a reasonableness threshold as the precondition for the grant of relief meant that the FtT had a statutory jurisdiction which, in some respects, was akin to the reasonableness or rationality jurisdiction in a judicial review. But the statutory reasonableness test would not cover *all* public law grounds that could arise which would thereby fall outside of the statutory jurisdiction of the FtT.

46. In paragraph [43] of his judgment Underhill LJ sought, in broad terms, to indicate the territory of judicial review by reference to the hypothetical conduct of HMRC acting in "*abuse of power*", "*capriciously*", "*outrageously*", in "*bad faith*", or with "*impropriety*" or "*unfairness*". Although not stated explicitly he was seeking to describe a category of judicially reviewable grounds which could not be said to be technical and which in large measure focused upon the conduct of the decision maker as opposed to the underlying merits of the decision taken and which met a threshold of seriousness. He accepted though that the divide between cases which the High Court would accept or would refuse was "*elusive*". He described the difficulties in the following way:

> "43. I do not therefore believe that the Court is entitled to intervene to grant interim relief where the registration of a

> trader in duty-suspended goods is revoked simply on the basis that there is a pending appeal with a realistic chance of success. But it does not follow that there are no circumstances in which the Court may grant such relief; and, as noted above, HMRC do not in fact so contend. The correct principle seems to me to be this. If a 'relevant decision' is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 of the Act, and the Court should not intervene. However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the Court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes. The authorities cited in *Harley Development* refer to 'abuse of power', 'impropriety' and 'unfairness'. Mr Brennan referred to cases where HMRC had behaved 'capriciously' or 'outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about 'capricious' and 'unfair'. A decision is sometimes referred to rhetorically as 'capricious' where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for 'unfair', I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the Court: Mr Brennan submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in *Preston* – which is the source of the use of the term in *Harley Development* – were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further."

47. The scope of the relevant statutory language is not however always clear or unambiguous. An example of this is the jurisdiction of the tax tribunals to consider public law arguments about legitimate expectations said to have been engendered by the decision maker which could, if respected, result in a lower or different or even no tax liability. *Oxfam v HMRC* [2009] EWHC 3078 (Ch) ("*Oxfam*") was concerned with the apportionment of Oxfam's input tax for VAT purposes between taxable and exempt supplies. Oxfam argued that it had formally agreed on a method of apportionment with HMRC who subsequently applied a different test of apportionment. Oxfam appealed to the (then) VAT and Duties Tribunal claiming the benefit of an enforceable contract with HMRC. The statutory appeal under section 83(1)(c) of the Value Added Tax Act 1984 (VATA) provided that an appeal should lie to the tribunal: "*with respect to... (c) the amount of any input tax which may be credited to a person*". Oxfam lost. It appealed to the High Court seeking to contend,

in the alternative to contract, a legitimate expectation in public law. The argument failed. Sales J held however that the Tribunal had jurisdiction to consider the legitimate expectation argument (*ibid* at paragraphs [61] – [80]) though he acknowledged that he was departing from a widely held and narrower view of the Tribunal's jurisdiction (*ibid* at paragraph [80]). The Judge held that the wording of section 83 VATA was wide enough to include any legal question capable of being determinative of the issue of the amount of input tax that should be credited to a taxpayer, including the question whether HMRC had erred by failing to respect an alleged legitimate expectation. Although section 83 VATA did not confer a general supervisory jurisdiction it did not follow that the Tribunal was precluded from applying public law grounds which fell within its statutory remit. This conclusion was however subjected to detailed scrutiny and criticism in *Revenue and Customs Commissioners v Noor* [2013] STC 998 (Warren J and Judge Bishop) where the Upper Tribunal disagreed with the analysis of Sales J in *Oxfam* and between paragraph [35] – [95] dissected his judgment and then rejected it. The present case does not turn upon alleged legitimate expectations so that I do not have to express a view on this conundrum. These cases do however show that the task of construing statutory language on jurisdiction to decide to what extent public law grounds may be justiciable in the alternative forum can be far from straight forward.

48. On the other side of the coin *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) ("*Hok*") concerned penalties imposed upon Hok for failing by 5 months to file its employer's end of year annual returns under PAYE regulations. HMRC imposed a penalty of £500 under section 98A TMA. Hok did not dispute the breach but appealed to the FtT based upon alleged unfairness on the part of HMRC whom it was said had not informed the company that they were in default and had they done so the default would have been remedied. The statutory appeal was under section 100B TMA which permits an appeal against the determination of a penalty. In the case of a penalty which was required to be of a particular amount, the FTT might: "*(i) if it appears that no penalty has been incurred, set the determination aside (ii) if the amount determined appears to be correct, confirm the determination, or (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount...*". The Tribunal reduced the penalties to £100. HMRC appealed to the Upper Tribunal who held that the FtT had no jurisdiction to reduce the penalty. The penalties were unarguably due in law and the question whether HMRC was to be prevented from imposing or collecting the penalties on grounds of fairness was not an issue going to whether they were due but went to the question of administration the legality of which could be decided only in judicial review proceedings.

49. *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 ("*BT Trustees*") concerned a claim by pension scheme trustees to entitlement to payment of tax credits on certain dividends not claimable under domestic law but claimed nonetheless under EU law. HMRC disallowed the claims including on limitation grounds. Appeals followed. In the Tribunal the trustees argued that HMRC acted unlawfully in refusing to grant a waiver of time limits by reason of an extra-statutory concession which contemplated repayments outside the statutory time limit in certain circumstances. The Tribunal held that it had no jurisdiction and the Court of Appeal agreed. The appeals were brought under schedule 1A TMA, paragraph 9(7), which provided that: "*If... the tribunal decides that a claim which was the subject of a decision contained in a closure notice... should have been allowed or disallowed to an extent different*

from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good". The Court held that the statutory jurisdiction did not extend to challenges to the fairness of the treatment afforded to the taxpayer (*ibid* at paragraph [142]). The appeals were concerned with whether the trustees were entitled to claim the benefit of the tax credits, not with the trustees' entitlement under the extra statutory concession (at paragraph [143]). The Court did not consider that *Oxfam* was authority for any wider basis for extending the Tribunal's jurisdiction. They expressed no view as to the correctness of the "*interpretation*" of the relevant sections of VATA by Sales J (cf paragraph [141]).

(e) The importance of substance over form

50. Even if, strictly, the grounds of judicial review as formally drafted cannot be advanced in the alternative forum that is not conclusive. What matters is not the label attached to the challenge, but its true substance. So, to take an example, if a ground of judicial review is drafted as an alleged failure to give any or any intelligible reasons or that the computation of a charge is "*irrational*", then assuming that the merits of the true issue which underlies the ground can be determined in the alternative forum then the <u>substance</u> of the judicial review ground is capable of being addressed. An allegation of inadequate reasons may fall away as the decision maker is compelled in the appeal process to spell out its reasons (in pleadings and/or in argument) in a way that enables the taxpayer to mount a challenge. The appeal then proceeds on the merits of the reasoned arguments. An allegation that the computation is "*irrational*" in public law terms will fall away as the logic behind the charge is exposed to scrutiny and its correctness is ruled upon: irrational may mean (very) wrong; but that will be precisely what an appellate tribunal will adjudicate upon and the addition of the epithet "*irrational*" adds little if anything.

51. In *R (Wilford) v Financial Services Authority* [2013] EWCA Civ 677 Moore-Bick LJ at paragraph [37] emphasised, in relation to a complaint of inadequate reasons, that when considering alternative remedies, it was necessary to look at substance (the "*real issue*") and not form:

> "It is true that the tribunal cannot quash the Decision Notice and remit the matter to the RDC for it to give better reasons, but it can reconsider the whole matter afresh and thus deal with the substance of the allegations against him. I agree with Mr. Brindle that, viewed in the context of the statutory scheme as a whole, the 'real issue' (to borrow the phrase used in *Ferrero*) is whether Mr. Willford's conduct fell short of that which was to be expected of him. To quash the Decision Notice and remit the matter to the RDC would not advance the resolution of that issue; it would simply cause delay. Moreover, I am not persuaded that he needs the RDC's reasons to be stated more fully in order for him to make an informed decision whether to refer the matter to the tribunal."

52. At paragraph [38] Lord Justice Moore-Bick also emphasised the importance of identifying the "*legislative intention behind the regulatory scheme embodied in the*

Act" which was necessary to determine whether it was a "*more appropriate means of challenging the Decision Notice*".

(f) Summary of principles

53. The Claimant relies upon the summary of relevant principles set out in *Birkett v HMRC* [2017] UUT 89 (TCC) ("*Birkett*") where the Upper Tribunal (Nugee J and Judge Greenbank) stated in relation to the relationship between the High Court and specialist tribunals at paragraph [30]:

> "Relevant principles
>
> 30. The principles that we understand to be derived from these authorities are as follows:
>
> > (1) The FTT is a creature of statute. It was created by s. 3 of the 40 Tribunals, Courts and Enforcement Act 2007 ('TCEA') 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
> >
> > (2) The FTT has no judicial review function. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
> >
> > (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided

> before that jurisdiction could be properly exercised or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

54. A more detailed summary is set out by Whipple J in *Grace Bay Holdings et ors v Pensions Regulator* [2017] EWHC 7 ("*Grace Bay*") at paragraph [59]. I would add the following points which are significant in the context of the present case:

   a) The starting point is a careful analysis of the statutory language governing the alternative jurisdiction to determine whether the pleaded Grounds are justiciable in the alternative forum or otherwise capable of being resolved.

   b) If the Court concludes that the Grounds as formulated would not, strictly speaking, sound in the alternative forum that is not the end of the analysis. The Court should examine the pith and substance of the Grounds as drafted to determine whether in substance (if not in form) the alternative procedure will nonetheless afford an effective and appropriate remedy.

   c) An appropriate and effective alternative remedy will not necessarily always be an exclusively judicial one and could take the form of a statutory review process standing alone or coupled with (as here) an appeal process.

   d) The Court must ensure that objections that in truth can be addressed in the alternative forum are not dressed up in public law clothes in order to divert attention into the High Court and away from the forum that Parliament has seen fit to allocate for adjudication of the dispute.

   e) As part of the process, the Court should examine the relief that would most likely be granted were the Court to accept the Grounds and see whether the relief grapples with the real issues as between the parties.

(ii) The statutory review under section 101 FA 2015 as an alternative remedy

(a) The review process is capable of amounting to an alternative to judicial review

55. An issue arising is whether in principle section 101 FA 2015 is capable of amounting to an "*alternative remedy*". The Claimant observes that the review process is neither judicial nor independent (of HMRC). I consider that the review procedure <u>is</u> capable of amounting to an alternative remedy for the following reasons. <u>First</u>, the review process is designed to work in conjunction with the statutory appeal procedure. It is a

compulsory (unavoidable) precursor to a right of appeal which can only be triggered upon expiry of the review process. In terms of Parliamentary intent, it is an integral part of the alternative remedy: Parliament has created the review process as a form of mandatory mediation or ADR prior to litigation. I consider that an important purpose behind section 101 is to narrow to the greatest possible degree evidential and legal disputes between the parties prior to the commencement of litigation. The review process could obviate the need for litigation entirely, or, if not, at least focus the issues in dispute which will enhance the efficiency (reducing costs and time) of the appeal and facilitate settlement. Second, the review process has been set by Parliament to work to a fixed timetable. It commences 30 days after the issuance of the Charging Notice and expires 12 months thereafter with the possibility of earlier termination in defined circumstances (cf. sections 101(2) and 98(2)). The duration of the process is not open ended; it reflects Parliament's judgment as to what is reasonable for the resolution of the sorts of issues that might arise in cases involving DPT. Third, section 101 imposes a duty on HMRC to engage in the review. Mr Grodzinski QC, for the Claimant, complained that it was not an exercise conducted by an independent party and could not therefore be impartial. In one sense he is correct but I do not accept that this is an answer. Although not express in the FA 2015, it is implicit (and in any event a duty imposed by the common law) that the process must be pursued in good faith by HMRC. The review process is a species of mandatory *inter-partes* mediation. HMRC is incentivised to act sensibly by the fact that otherwise it faces a statutory appeal within a short time frame. To criticise the process for not having the hallmarks of judicial of independence and impartiality is to miss the point of the exercise. Section 101 was never intended by Parliament to have those hallmarks. It is created as a more informal dispute resolution mechanism which takes account of the fact that the process leading up to the imposition of the Charging Notice was a "*summary*" procedure (to adopt Mr Brennan QC's terminology) which permitted the taxpayer to make representations in response to a Preliminary Notice only on limited and constrained grounds. I endorse the observation of Lord Justice More-Bick in *Wilford* (see paragraph [52] above) that it is important to bear in mind Parliament's intent.

56. More broadly, non-judicial alternatives can suffice as an adequate and effective alternative remedy. A review of the case law is set out in *De Smith's Judicial Review* (7th ed.) at paragraph [16-21]. Case law shows that the following have been treated as alternatives: a statutory complaints procedure; an express right to make objections to a Minister proposing to issue a penalty; the possibility of bringing a private prosecution; and the ability to make a request to a Minister to exercise default powers.

57. In *CC&C* (*ibid*) paragraph [47] the Court commented, albeit *obiter*, upon the practical importance of a power of fulsome non-judicial review which, it was felt, would mitigate the potential harshness of the operation of Revenue rules whereby they could revoke a person's right to trade causing uncompensatable and possibly fatal loss. It is right to recognise that the observations related to the period prior to the administrative decision in question, whereas in the present case the review post-dates the decision in the Charging Notice. But the observations still resonate in this case because under the FA 2015 HMRC can, in the light of submissions made during the statutory review process, amend the Charging Notice and in my judgment even withdraw it.

58. In *R (Davies and ors) v Financial Services Authority* [2003] EWCA Civ 1128 ("*Davies*") Mummery LJ observed, in the context of a regulatory decision adopted in the financial services sector, that alternative remedies might include the ability to make representations to the decision maker:

> "The legislative purpose evident from the detailed statutory scheme was that those aggrieved by the decisions and actions of the authority should have recourse to the special procedures and to the specialist tribunal rather than to the general jurisdiction of the Administrative Court. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the authority, **which are amenable to the procedures for making representations to the authority, for referring matters to the tribunal and for appealing direct from the tribunal to the Court of Appeal**."
>
> (Emphasis added)

59. *Davies* was cited with approval by Whipple J in *Grace Bay* at paragraph [45].

(b) The section 101 FA 2015 review process covers liability to tax as well as the quantum of tax to be paid

60. A second legal issue concerns the scope of section 101. Mr Grodzinksi QC, for the Claimant, drew a distinction between (i) issues going to the liability to pay DPT and (ii) the quantification of the sum to be paid as tax. I refer to these as the "*liability issue*" and the "*quantum issue*". It was argued that properly construed section 101 FA 2015 went to quantum but not liability. Accordingly, the review process could not amount to a remedy (never mind an adequate one) in relation to the first three of the grounds for judicial review, which were liability issues.

61. Section 101 FA 2015 governs the scope of the review process and imposes a duty on HMRC to "*carry out a review of the amount of diverted profits tax charged*". The function is a "*review*" not a judicial determination and the focus is on the "*amount*".

62. The review is intended to extend to matters extending beyond the more limited range of matters about which persons potentially subject to tax might make representations prior to the issuance of the Charging Notice: See paragraphs [15] – [17] above. Under section 101(14) when determining on a review whether the total amount of tax charged is excessive or insufficient "*nothing in section 94 applies to restrict the representations which the officer may consider*". Section 94 is concerned with the "*representations*" that may be made prior to the Charging Notice and these are statutorily limited to the matters set out in section 94(3)(a) – (e). There is no such limitation imposed on the representations which can be made during the review period.

63. Mr Brennan QC, for HMRC argued that "*amount*" was a broad term and when viewed in the statutory context covered liability to pay <u>any</u> tax (i.e. a zero sum) *and* the computation of the figure to be paid once liability to pay something had been established. I agree with this analysis.

64. Mr Grodzinksi QC argued to the contrary that the expression "*amount*" could only refer to the quantum of a tax which had already been held to apply. He cited the judgment of the Upper Tribunal in *Birkett* (*ibid*) at paragraph [48] where the Tribunal stated:

> "In the present case, the complaint of the appellants is not that the amount of the penalty, assuming one to be imposed, was excessive; it is that no penalty should have been imposed at all. It seems to us that raises the question whether this can be said to be an appeal against the decision of an HMRC officer 'as to the amount of such a penalty'. We do not think it can. An appeal under para 47(b) assumes that the penalty has been incurred and challenges the amount, or to use terminology familiar in litigation generally, it is concerned with quantum rather than liability. If the basis of the appeal is that no penalty should have been imposed at all, that is a challenge to liability not quantum, and cannot we think be characterised as an appeal against a decision as to the *amount* of such a penalty."

65. This is not dispositive for 2 reasons. First, the statutory language in *Birkett* specifically differentiated between liability and quantum appeals. Paragraph [47] of Schedule 36 Finance Act 2008 conferred a right of appeal against a penalty: "*A person may appeal against any of the following decisions of an officer of Revenue and Customs– (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or (b) a decision as to the amount of such a penalty*". The Notices of Appeal in that case had not stated in terms whether the appellants were appealing under (a) or (b). The Tribunal considered that there were legal and practical consequences which flowed from the choice of head of ground of appeal (see judgment paragraphs [37ff]). The statutory context is thus quite different to the present case where the Parliamentary draftsman has <u>not</u> drawn any distinction between liability and quantum in section 101 FA 2015. Second, the statutory appeal in *Birkett* concerned the amount of a "*penalty*" and the Tribunal was of the view that it was inconsistent with the very notion or purpose of a "*penalty*", which was to penalise and punish, to set it at zero (see paragraph [49]). Section 101 FA 2015 is not concerned with an intent to punish and its effectiveness is not nullified by permitting liability issues to be reviewed.

66. In my view section 101 must be construed by reference to both its language and the Parliamentary intent which underlies it. The following points concerning Parliament's intent, which flow from the structure of the regime created by the FA 2015, influence my view of the interpretation of section 101.

67. <u>First,</u> the review process is designed to remedy what are acknowledged limitations in the procedure leading to the issuance of the Charging Notice. That notice may be issued (i) upon an estimate made by HMRC and (ii) with the taxpayer having only a circumscribed right to submit representations in response to the Preliminary Notice: This is why Mr Brennan QC, for HMRC, described the DPT charging procedure as a "*summary*" process. In this context the review, which follows hot on the heels of the Charging Notice, is a form of statutory *quid pro quo* for the taxpayer which seeks to remedy the limitations of the earlier procedure. It would make no sense if the taxpayer was forced to go into the review upon the basis that its hands were tied and it could

not argue that there was simply no tax to pay at all because none was in principle due. It does however make sense if the taxpayer can remedy the limitations of the pre-notice period by submitting its full case on all issues, including liability.

68. Second, section 101 FA 2015 is also intended to encourage and facilitate a narrowing down of any subsequent statutory appeal. It is common ground that the FtT has the jurisdiction to rule on both liability and quantum issues. Insofar as the review process is a species of mandatory mediation designed to enable the taxpayer to present its full case and thereby come to a settlement or at least narrow the compass of the dispute then, once again, it makes no sense if during that period the taxpayer is precluded from submitting its full case and must instead argue about facts and matters that it considers are irrelevant because they go to quantum and not liability.

69. Third, the Claimant's argument that there is no jurisdiction during the review period to consider liability would have an additional unfair consequence were it to be correct, namely that a taxpayer who had a serious liability case to advance would be prevented from bringing an appeal on liability for 13 months from the issuance of the Charging Notice. Nothing in the FA 2015 creates a logic for deferring this important right of appeal. The conferring of a limited right of review to consider quantum would not amount to a justification because, on the taxpayer's case, there is no tax to pay at all so that a period in which to address quantum is irrelevant. The illogical deferral of liability appeals only arises as a consequence of the Claimant's premise that the review process excludes liability. But this is in reality a further reason indicating that the premise is not correct and that Parliament's intent was not to create such an illogical result.

70. The Guidance issued by HMRC is not, of course, relevant to the correct interpretation of the statute. It is nonetheless informative that HMRC adopts the wider construction of section 101 FA 2015. The HMRC updated interim Guidance (see paragraphs [16ff] above) explains that the right of the taxpayer to make representations and the subsequent right of review are intended to complement each other. The former is intended to be confined to straightforward and limited issues; but the latter is intended to be open ended. The approach adopted by HMRC as set out in correspondence with GENUK is also consistent with this analysis and may be taken as characteristic of the normal approach adopted by HMRC.

71. I observe that in its skeleton argument the Claimant also proceeded upon the basis that the issue of "*substantive liability to DPT (if any)*" would be considered during the review process, and as set out at paragraph [7] above, in fact GENUK has submitted a detailed submission as to why the 80% payment test is met and HMRC is considering the submission (i.e. it has not refused to address the question of liability). In their skeleton argument GENUK stated:

> "By the time a taxpayer can bring an appeal to the FTT in respect of a charging notice, there will have been detailed discussions between the taxpayer and HMRC as to the taxpayers' substantive liability to DPT (if any). Such discussions will not have concerned the subject matter of the present judicial review, namely whether the charging notice in question falls to be quashed because of public law wrongs by HMRC."

72. This acknowledged the breadth of the review process but argued only that the public law grounds were discrete from the substance of the liability and quantum tax disputes.

73. In my judgment section 101 FA 2015, properly interpreted in the light of its Parliamentary purpose, includes a duty on the part of HMRC to consider liability issues.

(c) Time and expense

74. I turn now to the facts. The question is whether the statutory review process would be an effective and an appropriate alternative to judicial review. The Claimant argues that judicial review will save a great deal of time and expense. The Claimant can, according to the timetable in the FA 2015 (and assuming the review process is not brought to an end earlier), appeal only as from December 2017. A judicial review would be well advanced by then and capable of being resolved within a relatively short time frame thereafter. A statutory appeal is (in practice) notoriously a long-winded and cumbersome procedure with long preparation times and long waits for judgments. The difference, so it is argued, is stark and a judicial review would entail substantial savings in time and expense.

75. I am not persuaded that the analysis is this simple. If the Claimant wins in the judicial review this will not necessarily or even likely obviate the need for the statutory review procedure and/or the statutory appeal.

76. This is because the grounds of judicial review as formulated do not address the merits of the dispute and these would remain live and would need to be resolved under the statutory process regardless of the outcome of a judicial review. I must form a view now as to the sorts of remedies that would be granted at the culmination of what would, *ex hypothesi*, be a successful claim for judicial review. I then have to consider whether, on the basis of such remedies, this would do away with the need for a yet further review process and/or statutory appeal. If, for instance, the ground of review advanced was a complete show-stopper and served to bring, once and for all, administrative proceedings to an end then, obviously, the saving in time and expense could be considerable: for example, a ruling that on the construction of the statute there was simply no jurisdiction on the part of HMRC to investigate the Claimant or take any further action whatsoever. But there is no such decisive construction or show-stopper point arising here. The High Court would not in a judicial review engage with the merits (for instance the 80% payment test) and the remedies would be traditional process-driven remedies largely based around (i) a declaration as to the nature and extent of reasons to be set out in Charging Notices; (ii) observations about the distinction if any between "*reasons to believe*" and "*consider*" and (iii) remission to set out in the Charging Notice additional reasons etc. The judicial review would leave all of the disputed issues as live and awaiting resolution.

77. As such judicial review would not guarantee savings in time or expense and could even serve to defer and extend the inevitable ensuing statutory review and appeal.

(d) The substance of the proposed Grounds of Judicial review

78. In this section I examine each proposed Ground to see whether its real pith and substance can be effectively determined in the statutory process. I have also set out my views on the relative merits of the Grounds.

Ground 1 – "consider" and "reasons to believe"

79. This ground concerns an allegation that HMRC wrongly applied the statutory test. It focuses upon a perceived difference between the phrases "*consider*" and "*reason to believe*". I have set out at paragraphs [27] – [32] above the applicable facts. These show that the Designated Officer in the Preliminary Notice <u>and</u> in the Charging Notice HMRC used <u>both</u> expressions. I have also explained how, as foreshadowed in the email communicating the Charging Notice (dated 3rd November 2016) it was explained that a "*detailed explanation and response*" was being worked on and would be sent imminently. It was in fact sent, some 6 days following the Charging Notice (on 9th November 2016 see paragraph [33ff] above).

80. It is argued by the Claimant that "*consider*" implies some higher standard of proof or evidential threshold than "*reason to believe*" and that since HMRC used the expression "*reason to believe*" in the Charging Notice there was a clear misdirection of law on the part of the Designated Officer. This is argued even though in the same notice HMRC also expressly stated that "*The conditions s 80(1)(i) – (g) FA 2015 are considered to be met*". I consider that the proposed Ground is very weak. It necessarily proceeds upon the premise that the Designated Officer did not in fact do what she has expressly said she has done in the Charging Notice. Moreover, based on the 9th November Letter which exposes fully the reasoning behind the Charging Notice and reflects a self-evidently considered view, such criticism seems far-fetched.

81. In any event, when the pith and the substance of the issue, as set out in the proposed Ground, is examined the arguments are said to concern whether one or more of the substantive tests in sections 80, 81 or 86 FA 2015 apply. Sections 80 and 81 focus upon whether the Claimant is involved in transactions with other entities which lack economic substance and in turn this involves examining a series of factual and evidential issues addressing such matters as: residence; the existence and nature of any transaction between the company in the UK and another person; whether the participation condition in section 106 FA 2015 is met; whether the material provision results in an effective tax mismatch as between the UK company and the other persons; whether the effective mismatch is an excepted loan relationship outcome or not; whether the insufficient economic substance conditions in section 110 FA 2015 is met; and, whether the UK company and the third party are small or medium-sized enterprises during the relevant accounting period. These are the very matters that HMRC through the Designated Officer has expressed an open-ended willingness to "*consider*" with the Claimant during the review process.

82. If HMRC did indeed wrongly only have a "*reason to believe*" that these tests were met when it should have "*considered*" them to be met (and assuming that there is some material difference between the two) then to argue that the review process will not suffice strikes me as elevating to Olympian heights form over substance. I do not in fact believe that GENUK is in truth really exercised about the fine gradations of mental gymnastics performed by the Designated Officer in the time elapsing between

the Preliminary Notice and the Charging Notice, as opposed to the real issue which is whether HMRC has a proper, lawful, evidential basis for its conclusion that DPT should be paid. The review process will suffice for the examination of the real issue and during that process the Designated Officer will examine all arguments and evidence to a high standard sufficient to enable a concluded view to be reached on the taxpayer's liability.

Ground 2 – Failure to consider representations

83. Ground 2 is closely allied to the substance of Ground 1 and concerns an alleged failure on the part of the Designated Officer to consider representations contained in two letters dated 5th October 2016 since it is said that the Charging Notice made no reference whatever to them. It is pointed out (with some justification) that the similarities between the Preliminary Notice and the Charging Notice are such that it can properly be inferred that the latter is a cut and paste of the former. In the Preliminary Notice it is recorded that GENUK conceded that in principle there was an effective tax mismatch outcome and that therefore tax was payable in principle (the liability issue). But subsequently, the Claimant withdrew the concession and gave reasons for its recantation (see paragraph [28] above). The reasons given were based upon a letter said to be from the Swiss tax authorities which sought to confirm various questions of Swiss tax law which, if correct, showed that there was no tax liability. But it is said there is not even a hint of the recantation in the (cut and paste) Charging Notice and the inevitable inference is that the Designated Officer simply failed to have regard to the representations made by GENUK. It is argued, in consequence of this, that this is not an argument that could be addressed in the statutory review process, not the least because it goes (i) to liability and (ii) is a classic public law failure to address a relevant matter.

84. HMRC responds to this by pointing out that the 9th November Letter addressed in considerable detail these very points and did so in a manner which (i) made it transparently clear that the points and representations were considered to a high level of detail and (ii), invited GENUK to engage in a detailed review of these very matters during the review process.

85. In my judgment this proposed Ground is very weak but, more importantly, its true substance can be addressed in the statutory review and appeal procedures.

86. The evidence makes it plain that GENUK's representations were as a matter of fact considered. Paragraph [4] of the 9th November 2016 Letter refers to the telephone conference of 14th October 2016 during which GENUK and the Designated Officer's appointees discussed the sorts of evidence that GENUK would tender in support of its representations. The letter states: "*Given your request to provide any evidence by 21 October 2016, you said you were going to focus on obtaining evidence in relation to your representations on the 80% test*". Paragraph [5] acknowledges receipt of evidence in relation to the 80% test. Paragraph [7] states that the remainder of the letter would respond to the representations and "*provide additional details on the Charging Notice*".

87. Paragraphs [44] – [48]: (i) acknowledge receipt of the Swiss tax documentation; (ii) explain however that it fails to provide sufficient information or evidence to (in effect) alter the existing conclusion that the 80% payment test was met; and (iii) offer

to reconsider the issue during the review process. The letter raises questions and queries about the substance of the service fees in issue and the actual rates at which tax would be payable and how Swiss tax is actually calculated. It also states that HMRC wishes to understand how GENUK comes to the conclusion that the combined rate of tax payable in Switzerland is 16.92%. In particular officials wished to understand how deduction of income taxes applied and whether that would have an effect on the 16.92% figure advanced by GENUK as the effective rate of Swiss tax. It is worth explaining that in practical terms if the effective tax rate is below 16% then there will be a liability to tax but not if it is higher than 16%. The 9th November Letter refers (in footnote 3) to published literature (for instance emanating from a Swiss tax law firm) to the effect that the effective corporate profits tax rate in Switzerland is 14.6%. It is hence plain that the recantation was considered in detail at the time of issuance of the Charging Notice.

88. A second aspect of this Ground is the argument that the only person who in law, under section 95 FA 2015, can issue a Charging Notice is the Designated Officer (Ms Maura Parsons). But, it is said, she is conspicuously absent from the correspondence relating to this matter and there is no evidence to suggest that she has actually addressed herself to the representations made by GENUK on the issues arising. In fact, Ms Parsons was the signatory of the Preliminary Notice dated 6th September 2016 and the Charging Notice dated 3rd November 2016. Mr Grodzinski did not argue that persons within her office or under her control were not entitled to act on her behalf when communicating on a day to day, administrative, level with the Claimant; for instance, during teleconferences at which HMRC discussed with GENUK what additional evidence was required. This objection boiled down to an inference the Claimant invites the Court to draw from (i) the fact that the Charging Notice was silent as to the Claimant's representations including in particular the recantation of the concession and (ii) the fact that the 9th November Letter was signed by Ms Virto and not the Designated Officer. This proposed ground is highly technical and artificial, given that the Designated Officer did meet her statutory obligation personally to issue the two notices in question. Over and above that there is no evidence to suggest that the present position of HMRC as set out in its Summary Grounds for Contesting the Claim is incorrect when it is said that Ms Parsons "*was the decision maker but that she relied on evidence and analysis of other officers in reaching her decision*". It is also explained that two officials (Ms Virto and Mr Cartwright) were appointed as the Claimant's points of contact within HMRC and that they made it clear to GENUK that they were acting on the Designated Officer's behalf. Thus in an email of 13th October 2016 when referring to a deadline for the submission by GENUK of evidence it was explained that this was to "*allow the Designated Officer to consider the representations within the statutory deadline*". Similar points are made in other emails exchanges between HMRC and the Claimant.

89. In these circumstances, the inference that the Designated Officer had, prior to the Charging Notice, focussed upon the Claimant's recantation and considered it is overwhelming. The contrary argument can only be made by ignoring the 9th November 2016 Letter, which at the least is admissible and relevant evidence as to what was in the Designated Officer's mind when she signed the Charging Notice.

90. This proposed ground is very weak. But in any event – once again – it falls away once the review process commences. If there is any submission which GENUK now wishes

to place before the Designated Officer it has the right to do so under section 101 FA 2015, and the Designated Officer in fact encourages GENUK to do so. The review process is the forum in which representations to her can and should now be made. Indeed GENUK has now addressed the queries raised in the Letter in a detailed submission dated 17th January 2017, i.e. during the review process. Put another way, what started as a public law complaint has already merged into the review process: substance is now prevailing over form.

Ground 3 – Failure to give reasons

91. This is a variant of Ground 2. It focuses upon the formal omission from the Charging Notice of any reference to the Claimant's representations. GENUK argues that accordingly the Charging Notice fails to set out the reasons for rejecting its representations and that the Designated Officer was under a duty in common law to give full reasons in the Charging Notice for rejecting their contentions. It is said that the 9th November Letter is an *ex post facto* and inadmissible attempt to remedy the unlawful failure to give proper reasons in the Notice. I do not accept that in law HMRC or the Designated Officer was under a duty to set out in the Notice facts and matters not specified in the legislation. The contents of a Charging Notice are governed by section 95(5) FA 2015. This requires the notice to: (a) state the amount of the charge to diverted profits tax imposed by the notice; (b) set out the basis on which the officer considers that sections 80, 81 or 86 apply; (c) state the accounting period of the company to which the notice applies; (d) set out an explanation of the basis on which the charge is calculated (including how the taxable diverted profits to which the charge relates have been determined, and where relevant, details of the relevant alternative provision (see section 82(5) or 88(7)) by reference to which those profits have been determined, and how the amount of interest comprised in the charge under section 79(2)(b) has been calculated; (e) state who is liable to pay the diverted profits tax; (f) state when the tax is due and payable; and (g), explain how interest is applied in accordance with section 101 FA 2009 (late payment interest on sums due to HMRC) if the diverted profits tax is not paid, the period for which interest is charged and the rate at which it is charged. Parliament has considered that provided a taxpayer is given this information, it is suitably and adequately armed to engage upon the statutory review process if it disagrees with the DPT demanded.

92. The Charging Notice does contain these particulars, and the Claimant does not suggest otherwise. Mr Brennan QC submitted that this being so there was no additional duty (whether in statute or common law) to set out incremental reasons why HMRC rejected submissions made by the taxpayer which were to the contrary. A reason for the duty only to give the specified reasoning is that a disgruntled taxpayer can (after 30 days) challenge all of the stated reasons in the review process and in addition make any other points it wishes. This argument seems to me to be compelling. Again, I view the proposed ground as very weak.

93. But in any event the Claimant's argument ignores the 9th November Letter. That letter, as both parties well knew, was an explanation of the Designated Officer's reasons for rejecting GENUK's arguments and was issued as a contemporaneous complement to the Charging Notice. Whilst I accept that GENUK takes issue with the reasons set out therein, this particular ground of challenge is about an alleged failure to give reasons and not the correctness of such reasons as have been given. So, in this case GENUK has the statutory section 95(5) reasons and it has the detailed reasons in

the 9th November 2016 Letter and it can now seek further and better reasons in the review process. It is not in any way prejudiced as it proceeds through the review process armed with the existing reasons and it has the ability to seek further reasons. I can see no sensible argument to say that the review process will not provide a full opportunity for GENUK to present its case upon the basis of the reasons in the Charging Notice and in the 9th November Letter.

Ground 4 – The maths is irrational

94. This proposed Ground complains of an irrational approach taken to the calculation of the DPT in relation to matters such as the calculation of working capital funding costs and the zero-dollar allocation for the value of the services provided by GIAG under the RSA. These are matters addressed in the 9th November Letter. Mr Scott, Tax Manager for the Claimant, in his evidence says that in the letter (at paragraph [60]) Ms Virto concedes that GENUK had a "*potentially... valid point*". In fact in the relevant section of the letter Ms Virto goes on to seek additional information about the matter and records that GENUK had asked for more time to collect and present data and information. But be that as it may this is plainly an issue which can be discussed during the review process and Ms Virto's acceptance that there may be some validity in the Claimant's arguments simply underlines the importance of the review process. In argument Mr Grodzinski QC accepted that this Ground was a quantum matter and he did not seriously contend that it could not be addressed during the review process and / or on appeal.

95. In considering the merits of this as a ground of judicial review the context is important. The FA 2015 does not require the amount specified in the Charging Notice to be exact or correct. It is an estimated amount decided following a summary and abbreviated procedure. It reflects the policy behind the law which is "*pay now negotiate later*". In any dispute the state holds the money whilst the details are thrashed out. It is not therefore a necessarily valid criticism to say that the figure in the Charging Notice is incorrect since the statutory scheme assumes that such a figure might well be inexact but will be subsequently negotiated down and any overcharge repaid together with interest. The public law issue is therefore, bearing in mind this context, whether the sums included in the Charging Notice are so irrational that even bearing in mind the margin of appreciation that this system accords to the Designated Officer, they are outwith that (generous) margin. In the present case I can see the force in the complaint that, for instance, the attribution of a zero-dollar sum for the value of services rendered under the RSA may be questionable. But that alone does not, in this particular context, make the point susceptible to judicial review. The reasons why HMRC take the view that a zero figure is appropriate pending receipt of additional evidence from GENUK are set out in the 9th November Letter and include the absence of evidence provided by GENUK. I therefore view the ground of challenge as very weak whilst still recognising that there may still be real force behind the mathematical or logic based criticism which is made.

96. What this, ultimately, highlights is that the ground of challenge is exactly the sort of issue that the review process is designed to address and, if not that, then the statutory appeal procedure which follows.

(e) Intrinsic strength of the Grounds

97. In *R v Falmouth and Truro Port Health Authority ex parte South West Water* [2001] QB 445 at page 473D Simon Brown LJ suggested that "*perhaps*" the "*apparent*" strength of the substantive challenge was relevant. My ultimate conclusion in this case stands independent of my conclusion as to the merits of the grounds. Nonetheless for the reasons set out above in my view the Grounds are weak. This conclusion is of course limited to the specific public law formulation of the Claimant's objections. In contrast I would not say the same about the underlying merits of GENUK's objections. These could well be stronger and, in some respects, HMRC accepts that there may well be scope for it to reconsider its position. In short the Claimant's case is weak in a formal judicial review but might be materially stronger in the context of the statutory alternative remedies when the substance of the complaints is addressed.

(f) Important issues of law?

98. Notwithstanding the considerable persuasive skills of Mr Grodzinski QC in seeking to weave forensic excitement into the legal issues set out in the Grounds I am unable to accept his submission that there would be some overriding public benefit in the points of law arising being determined by the High Court as a free-standing reason to grant permission. I accept of course that the cognoscenti of the tax world might consider that matters such as the difference between "*reason to believe*" and "*consider*" to be of deep fascination and I also accept that construction points, even of a highly technical nature, can, especially in fields such as tax, often raise issues of real practical importance. But on the facts of *this case* the public law points are too intertwined with the factual answers to them to make them of wide significance and they are not in any event of such broad significance as to warrant granting permission and thereby ignore the alternative remedies.

(g) Utility

99. I can see no practical utility in permitting these grounds to proceed to a full judicial review. A way to measure the practical advantage of the review process is to compare the relief which GENUK would obtain from the High Court after a successful claim with the practical advantages arising from the alternative review process. The Court might quash the Charging Notice and remit the exercise to be re-performed taking into account the reasons in the judgment. But the Court would not seek to determine, on a substantive basis, whether tax was payable and, if so, the quantum. The Claimant has not sought to injunct the review process (which would be very difficult since its operation is governed by primary legislation) and is in fact engaging in it. The alternative remedy is live and ongoing. It seems to me inevitable (or at worst highly likely) that once the review process is completed the Grounds as presently framed will be subsumed under evolving thinking. Issues such as the distinction between "*consider*" and "*reasons to believe*" or the alleged failure to give reasons would become irrelevant. If issues and disputes subsist upon the culmination of the review they are likely to be quite different to those presently drafted. Disagreements over calculation or evidence will evolve and either fall away or transmogrify into other, more refined, disputes. The grounds of judicial review would on this basis quite rapidly become (if they have not <u>already</u>) of historical interest only.

(h) Conclusion

100. In conclusion, the true substance of each of the Grounds can be raised during the review process. This is a statutory procedure which Parliament has introduced as a precursor to any appeal upon the basis that disputes and disagreements can and should be thrashed out between the taxpayer and HMRC during this period. By this process disputes remaining at the end of the process should be more refined and focused than would otherwise be the case. The review process thus helps streamline the appeal to the FtT making that a more efficient appellate jurisdiction. To permit judicial review in this case at this stage would undermine Parliament's intent. There is no prejudice to the taxpayer in requiring adherence to the statutory procedure. The review process follows on from issuance of the Charging Notice so is intended to be expeditious. It has a fixed duration so cannot be dragged out and it can be brought to a speedier end thereby bringing forward the right to appeal. There is no real utility in this case proceeding to a judicial review and I consider GENUK's case to be stronger under the statutory procedure than under judicial review. There is no clear saving in time or expense. There are no really important points of law arising which justify a judgment of the High Court.

101. I therefore refuse permission upon the basis that the statutory review process is a perfectly adequate alternative remedy.

(iii) The non-statutory duties of HMRC to reconsider submissions

102. During the hearing the issue arose as to the obligation of HMRC, more generally, to consider submissions made to it which would include the position if the section 101 FA 2015 review did not include questions as to liability (as the Claimant contends – see paragraphs [60] – [73] above). At the end of the oral hearing I invited HMRC to set out, having given the matter due thought, its considered response to the following question: "*If the statutory obligation to review 'amount' under s 101 does not extend to the question of liability to DPT, does HMRC nonetheless have any obligation to give consideration, within the review period, to a taxpayer's formal submissions about liability to DPT?*".

103. In answer HMRC submitted as follows:

> "HMRC considers itself always under an obligation to consider formal submissions from a taxpayer about the liability to tax.
>
> HMRC is subject to a number of internal and external standards of conduct. HMRC has to act with integrity, fairly, objectively, promptly, and to rectify mistakes. HMRC operates an internal complaints-handling process and is subject to supervision by several external bodies.
>
> HMRC accepts its duty to fulfil its statutory functions to a high standard. This duty exists regardless of whether on a particular occasion a person may have an actionable claim for judicial review.
>
> HMRC cannot simply ignore correspondence.

> The answer to the Court's question is therefore Yes, HMRC would be under a duty at least to give consideration to the formal submission mentioned.
>
> Internal standards include: a. HMRC's Charter: which comprises a list of rights and obligations accorded to users of HMRC's services. b. HMRC's service standards. c. HMRC's internal complaints processes. d. HMRC's published Litigation and Settlement Strategy, under which the department will not pursue litigation that it believes the taxpayer is more likely than not to win.
>
> External standards and bodies include: a. The comments and recommendations of committees of Parliament, for example the Public Accounts Committee and the Public Administration and Constitutional Affairs Committee. b. The Parliamentary Ombudsman, which will consider complaints, referred by an MP, by reference to published principles of good administration. Amongst these are included "getting it right", and being "customer focused", both of which would seem to preclude ignoring correspondence. c. The recommendations of the Adjudicator's Office, which independently reviews complaints against the department, including for mistake and delay."

104. For the record HMRC did not concede that in all cases (necessarily fact sensitive) a failure to meet the above duty would give rise to a claim for judicial review.

105. The Claimant, in response, pointed out the following. First, that HMRC was careful not to accept that a failure to meet such a duty would afford a taxpayer a claim for judicial review. Rather, HMRC referred to the "*external standards*" of various bodies, and in particular Parliamentary committees, the Parliamentary Ombudsman, and the recommendations of the Adjudicator's Office. As such it was not clear whether HMRC was arguing that such bodies would provide an adequate alternative remedy to judicial review for a failure to take into account submissions made outside the formal process of a section 101 FA 2015 review. If that were HMRC's case it would be unfounded not least because the alternatives identified would not have jurisdiction over many complaints. For example, the Adjudicator's Office "*cannot look at... Complaints about an ongoing investigation or enquiry*". The position is no better in relation to the Ombudsman. Still less would such bodies have powers akin to the remedies available to the High Court. If HMRC's case was simply that there was a non-enforceable duty to give consideration to submissions made by a taxpayer during the one year review period that could not afford an alternative remedy. The remedy would be "*the non-independent review by the decision maker him/herself*".

106. No case law has been referred to indicating that a common law duty on a decision maker, post-decision, to reconsider if new and fuller evidence is placed before it amounts to a recognised adequate alternative remedy. On the other hand, I am not convinced that the case law on alternative remedies exhausts the ways in which the issue may be relevant. Judicial review is a discretionary remedy and may be refused if a decision maker has accepted that the challenged decision is to be reconsidered. A

Court might then conclude that the Claim was premature (pending reconsideration) or it might be stayed pending the outcome of the reconsideration since the reconsideration could render the claim academic. Equally, where the ultimate relief which would be granted following a successful claim for judicial review was remittal of the decision for reconsideration then the early acceptance by the decision maker of the need to reconsider could sound under section 31(3C) – (3D) Senior Courts Act 1981. The acknowledged duty to consider is thus not irrelevant to whether permission should be granted.

107. I certainly do not rule out the possibility that a breach of the obligations identified by HMRC might sound in public law, for example, as a breach of the principle of good administration and in principle warrant a claim for judicial review in a proper case. In *Bank Mellat v HM Treasury* [2014] AC 700 Lord Sumption linked the right to be consulted and to make representations prior to a decision to elementary principles of fairness and it was "*... also a principle of good administration*" (*ibid*, paragraph [32]). This principle was applied to taxpayer's rights in *Walapu v HMRC* [2016] EWHC 658 (Admin) at paragraph [64]. In *R (Justice for Health Limited) v Secretary of State for Health* [2016] EWHC 2338 (Admin) the Court held that a component of the principle of good administration was the obligation to rectify errors: see paragraphs [141] – [150]. HMRC accepts that it has an obligation of rectification (*supra*). This judgment is not however the place to delve into the consequences of such an alleged breach of a general duty to reconsider since the possibility is academic and premature on the present facts at this stage. What <u>is</u> in my view relevant is that the Claimant has engaged with HMRC on a review, including in relation to liability, and HMRC has accepted the task of considering the Claimant's liability in good faith. Given that if the Claimant was to prevail in this Claim the most likely remedy would be remittal, then the fact that there is an ongoing reconsideration into all matters seems to me to give the Claimant what it wishes and renders the Claim academic and premature. In my judgment these are separate and additional reasons for my conclusion that permission should be refused.

(iv) The statutory appeal under S.102 FA 2015

108. I can deal with the statutory appeal remedy more briefly because (a) in some measure I have dealt with the issue as part of the analysis of the review process and (b) pending the review it is hypothetical.

(a) Statutory scope

109. The jurisdiction of the FtT under section 102 FA 2015 is to determine "*whether the taxable diverted profits in respect of which a charge is imposed has been correctly calculated*". It is common ground between the parties that this includes challenges to liability and to quantum.

(b) Does the statutory appeal cover the proposed grounds of judicial review?

110. In my view the statutory appeal does not cover the proposed grounds, so far as their <u>formal</u> drafting and articulation is concerned. Mr Brennan QC did not demur from this proposition. It is not, for instance, said that the FtT can declare that the conduct of the Designated Officer was or was not in breach of public law principles in relation to the

considering of representations prior to the Charging Notice. Nonetheless, the substance of all of the proposed grounds *can* be adjudicated upon by the Tribunal. This is for the reasons given in relation to the review process.

(c) Timing

111. Mr Grodzinski QC objected to the fact that an appeal could only be lodged following the review process which deferred the right to appeal by 13 months from the date of the issuance of the Charging Notice. He argued that a judicial review could be heard or even determined or at worst would be approaching a hearing by the end of the 2017, just about when the right of appeal to the FtT would first arise. He accordingly contended that a judicial review was a far more expeditious route to resolution of the issues. I do not accept this analysis. I repeat my reasons at paragraphs [60] – [77] above.

112. Parliament has granted the right of appeal only upon expiry of the review process by effluxion of time or early termination under section 101(12) FA 2005. The longest period that may elapse from issuance of the Charging Notice to the arising of a right of appeal is 13 months; but the right could arise earlier. Parliament's logic in deferring the right of appeal is to facilitate a narrowing of the issues for appeal and to make it a more focused and efficient appellate hearing. These characteristics of the statutory appeal process are relevant to the assessment of the relative merits of judicial review against appeal to the FtT. They support the conclusion that the statutory appeal process is an efficient and streamlined process which forces the parties to address the real issues in dispute. Judicial review in contrast lacks the streamlining process.

(d) Specialist judicial determination

113. The real issues in this case are heavily fact sensitive. The Tribunal is a (the) proper forum for the resolution for these matters. The statutory procedure taken in the round is designed to enable experts (i.e. HMRC officials and the specialist tribunal) to grapple with what may be complex evidential and economic issues. The High Court does not have these specialist skills. For instance, I doubt it is controversial to say that (institutionally) HMRC and a FtT are better equipped to address arguments about the calculation of working capital funding costs and the zero-dollar allocation for the value of the services provided by GIAG under the RSA than would be the typical Administrative Court Judge sitting alone. The same can be said about the merits of the Claimant's arguments in relation to the 80% payment test, which may entail an assessment of the effective corporation tax rate in Switzerland.

(e) Utility

114. If the review process works as intended there is a real possibility that the arguments in due course advanced to the FtT would bear no relation to the arguments now presented to the High Court. This makes this case unusual. In other cases the working assumption has been that the grievance of the Claimant for judicial review remains outstanding at the time of the Tribunal hearing and that there could be injustice if a genuine public law ground could not be adjudicated upon by the Tribunal. But that assumption does not hold true here, in view of the amount of water that would have passed under the review bridge by the time the appeal right is engaged.

(f) Conclusion

115. In my judgment the section 102 FA 2015 appeal procedure is an adequate alternative to judicial review.

(v) Materiality of relief: Section 31(3C) – (3D) Senior Courts Act 1981

116. I turn now to HMRC's alternative argument. HMRC argues that relief must be refused under section 31(3C) – (3D) Senior Courts Act 1981 upon the basis that "*the outcome for the applicant would [not] have been substantially different if the conduct complained of had not occurred*". Under this provision the Court is duty bound to consider the issue if a Defendant asks it to do so. If, on considering that question, it appears to the Court to be "*highly likely that the outcome for the applicant would not have been substantially different*" then the Court "*must*" refuse to grant permission to apply for judicial review save where the Court considers that it is appropriate to do so for reasons of "*exceptional public interest*". The logic of the provision is that there are some cases, usually raising objections of a technical nature, where even if the decision maker is found to have erred it can readily be shown that this would have had no impact upon the end decisions taken. For instance: the decision maker adopts a final decision upon the basis of three stated reasons. There is a challenge to the third and least important reason. In such a case if the decision can be sustained on the two other reasons then it will not fail because the decision maker might have erred in relation to the least important reason. If this can be identified and determined at the outset there is no reason to grant permission because the outcome (i.e. the continued validity of the impugned decision) will not alter.

117. Before applying this provision, I set out some preliminary observations about the approach to be taken.

118. First, it may be relevant to form a view as to the arguability of the grounds. Where the grounds are clearly <u>not</u> arguable then the materiality exercise is otiose. I do not read the duty in the Act as requiring Courts to form a conclusion when the grounds are unarguable so that no question of relief could ever arise. In the present case however I propose to err on the side of caution and assume that all Grounds *are* arguable.

119. Second, the logic of the statutory provision is also that (in relation to arguable claims) the Court must assume that the Grounds will succeed so that the appropriate relief is granted to quash the conduct objected to. Again, if this assumption is not made then there is no purpose in the statutory exercise.

120. Third, the Court must bear in mind the high standard of proof set by the Act which is designed to ensure that the Court refuses permission only where it has a high degree of confidence that the relief it would grant would not alter the outcome (see to similar effect Elizabeth Laing J in *LB Enfield v Secretary of State for Transport* [2015] EWHC 3758 (Admin) ("*LB Enfield*") at paragraph [106]).

121. Fourth, the present case is unlike the typical or paradigm case where the decision maker has taken a final decision and given reasons and those reasons are then challenged. The difference here is that the "*decision*" as reflected in the Charging Notice (i.e. the sum to be paid) is not a final figure since, in accordance with the scheme laid down in the FA 2015, the Charging Notice is a staging post which

Parliament has said can be uprooted and moved. The difficulty GENUK faces is that its claim for judicial review is backwards looking whereas GENUK's actual liability is in the process of being determined by a forward looking and ongoing process. Accordingly, if the complained of conduct had not occurred the question is whether GENUK would now be in a different position.

122. Bearing these considerations in mind I conclude that if the complained of conduct had not occurred GENUK's position would not be materially different. This is for the following (interrelated) reasons.

123. In my judgment, the grant of relief would not alter the present *status quo* which is that the Defendant has issued a Charging Notice which is under review and HMRC stands ready and willing to reconsider the Charging Notice without limitation (whether under section 101 FA 2015, through extra-statutory concession or by reason of common law principles). The most that the Claimant could realistically hope for is that the Charging Notice be quashed and the matter remitted to HMRC to be reconsidered. But a remission requiring HMRC and/or the Designated Officer to go back to the drawing board, for instance to "*consider*" the Claimant's case and not act upon only "*a reason to believe*"; or to set out fuller reasons in the Charging Notice or to address its representations, or to review the maths and evidence, would be wholly irrelevant to the position GENUK is presently in and the grant of relief would not bring to an end the HMRC enquiry or determine whether DPT is payable and if so how much.

124. Indeed, by the time the Court ordered relief the very remedy likely to be granted would have been substantially or even fully implemented by the Defendant, namely full reconsideration.

125. For these reasons any relief in relation to the conduct complained of would have no or no material effect on the outcome of the case. It is an obvious point, but nonetheless of significance, that GENUK is not challenging the statutory review or appeal procedure as unlawful nor is it is seeking to injunct or stay those procedures. During those procedures GENUK and HMRC will consider GENUK's tax liability in detail and this process will continue unaffected by the judicial review. No ruling or remedy granted in a judicial review will affect that process going forward.

126. GENUK objects to HMRC raising this point. They cite the observations of Laing J in *LB Enfield* at paragraphs [1103] – [106] and Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin) at paragraphs [55] – [57], to the effect that arguments based upon section 31(3C) should be based upon material in existence at the time of the decision and by a witness statement with a statement of truth to support the contention that the decision would not have been materially different. I see the force of this submission from the perspective of practical evidence collection. But these authorities were not intending to lay down an invariable rule applicable in every single case regardless of context. In the present case the application of section 31(3C) is in large measure a matter of logical inference to be drawn from the statutory structure and from facts which are not in dispute. The decision that the Court is taking is one to be made on the material before the Court which assists the Court to form a prospective evaluation. This would include material available at the time of the decision but might include material arising later. For example in this case I have taken account of the new facts that GENUK and HMRC are, as a matter of fact, now

engaged in a review process and HMRC is reconsidering its decision. It would have been wholly artificial to ignore this reality.

127. Given my conclusion on alternative remedy it has not been strictly necessary to consider section 31(3C) – (3D) Senior Courts Act 1981. But, in the alternative, I refuse permission on this ground as well.

F. Conclusion

128. For all the above reasons I refuse permission to apply for judicial review.