Neutral Citation Number: [2024] EWHC 3014 (Admin)

Case No: AC-2023-BHM-000206

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

Birmingham Civil and Family Justice Centre
33 Bull Street,
Birmingham, B4 6DS

Date: 28/11/2024

Before:

MR JUSTICE EYRE

- -

Between :

THE KING **(on the application of)** **RAJAB ZAFARI**	**Claimant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

- -
- -

Ben Blades (instructed by **WK Solicitors**) for the **Claimant**
Dilpreet Dhanoa (instructed by **HMRC Solicitor's Office**) for the **Defendants**

Hearing date: 5th November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday, 28th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. In the summer of 2022 the Claimant discovered that the tax returns which had been filed on his behalf for the years ended 5th April 2014, 2015, 2017, and 2018 had overstated his taxable income. He submitted amended returns for those years on 20th January 2023. That was outside the 12 month period for the filing of amended returns set out in section 9ZA of the Taxes Management Act 1970. By its letter of 27th February 2023 the Defendants refused to accept the returns and confirmed that refusal in their letter of 12th July 2023. The Claimant challenges that refusal pursuant to permission I gave on 15th March 2024.

2. The sole ground of challenge is that the Defendants' earlier actions and in particular their letter of 30th September 2022 had given rise to a legitimate expectation that the amended returns would be accepted. The Claimant says that in refusing to accept those returns the Defendants were unlawfully and unfairly resiling from that legitimate expectation.

3. That single ground of challenge has given rise to two groups of sub-issues. I will consider the first group together in the context of determining whether a legitimate expectation had arisen. The sub-issues to be considered under this heading are those of the correct interpretation of the correspondence between the parties and whether, in light of that, fairness precluded the Defendants from declining to accept the amended returns (assuming they had power lawfully to accept them) such that they were acting unfairly in doing so. In this context I will also address the question of the authority of the author of the letter of 30th September 2022. However, that question will only become relevant if the letter, when properly interpreted, is to be read as amounting to a representation potentially capable of creating a legitimate expectation. The second group of sub-issues involve consideration of whether the Defendants had power to accept the amended returns as a matter of law. It is common ground that no legitimate expectation could arise if the Defendants did not have such power. It will be necessary to consider whether it is open to the Defendants to advance the argument that they did not have power as the Claimant says that the Defendants are not entitled to invoke that line of defence. If the Defendants are permitted to rely on the argument it will then become necessary to consider the extent of their power to accept late returns.

4. In their Detailed Grounds of Resistance the Defendants contended that the Claimant had an adequate alternative remedy to judicial review and that relief was precluded on that basis. That contention was not relied upon before me and Miss Dhanoa accepted that if relief was otherwise appropriate it was not to be refused on that basis.

The Factual Background.

5. The Claimant derived income from two commercial properties in Birmingham. In his tax returns for the relevant years the Claimant had declared the rental income he had received from those properties but he had failed to include, as a sum to be set against that income, the expenses incurred in respect of the properties.

6. On 15th July 2022 the Claimant received a demand for unpaid tax. That caused his accountants to review the earlier returns (which had been prepared by different accountants). On 10th August 2022 the Claimant's accountants wrote two letters to the

Defendants. The letter sent to the Defendants' "Debt Management, Enforcement & Insolvency Service" was expressed to be in response to the demand and said:

> "I had the opportunity to review the years in question and it has come to light that the years 5th April 2014, 5th April 2015, 5th April 2017 and 5th April 2018, the income from property has not been accounted for correctly by the previous accountant.
>
> In all the above 4 years total rent has been included without taking into account of property expenses. Forms SA302 are enclosed for your kind perusal
>
> In view of the above, I wish to request your kind authorities to allow us to make changes to the above 4 years. Upon your agreement, I will furnish the amended tax returns for 2014, 2015, 2017 and 2018. This letter has also been sent to Indv and small Business Compliance."

7. The letter sent to the "Indv and Small Business Compliance" team was in identical terms save for pointing out that the Claimant had also written to the Debt Management team.

8. The SA302 forms were documents which had been sent by the Defendants to the Claimant's former accountants. They were headed "Tax Calculation (Summary)" and set out the amount of tax due based on the original returns.

9. On 30th September 2022 Miss M Rafiq, a Debt Enforcement Officer in the Debt Management team, replied saying:

> "Thank you for your letter dated 10/08/2022, the contents of which I have noted.
>
> I apologise for the delay in response.
>
> I have forwarded the attached SA302 calculations to the relevant Self-Assessment department to deal with.
>
> We will hold recovery action on the account unit 20th October 2022 for the taxpayers Income Tax Returns to be amended.
>
> If the tax returns have still not been amended by this date, please give us a call on 0300 3229 226."

10. The bundle contains a letter dated 16th December 2022 to the Claimant's accountants from Amrik Kaur, a Technical Support Inspector in the Defendants' "Pay As You Earn and Self Assessment" team. I accept that Miss Kaur prepared that letter on or around 16th December 2022. However, in their letter of 10th February 2023, to which I will refer below, the Claimant's accountants said that the letter had not been received until 9th February 2023. That comment was made contemporaneously and Miss Dhanoa accepted that I was to proceed on the basis that this was correct and that the Defendants' letter had not been received until then. In the 16th December letter Miss Kaur said that the accountants' letter had been received on 15th August 2022 "which is too late for you to amend [the Claimant's] Self Assessment for those years". Miss Kaur set out in a table the time limits for submitting amended returns for each of the years ending 5th April 2014, 2015, 2016, and 2018 together with the time limit for making claims outside the tax returns. She then said, "as these time limits have passed, I'll not be taking any further action with [the Claimant's] proposed amendments".

11. I have already noted that the Claimant's accountants did not receive that letter until 9th February 2023. In the meantime, there had been two further events. On 13th January 2023 the Defendants presented a bankruptcy petition against the Defendant. The

petition debt included, but was not limited to, the tax due on the basis of the unamended returns. On 20th January 2023 the Claimant's accountants wrote to Miss Rafiq at the Debt Management team saying that the content of her letter of 30th September 2022 was "noted and appreciated" and enclosing amended tax returns for the years ending 5th April 2014, 2016, 2017, and 2018.

12. On 10th February 2023 the Claimant's accountants wrote to Miss Kaur at the Pay As You Earn and Self Assessment team in response to the letter of 16th December 2022. They referred to their letter of 10th August 2022 and to the reply of 30th September 2022 and said:

> "From this, I have assumed that the outstanding tax return will be accepted and you will do the necessary. Now, your letter dated 16/12/2022 received on 09/02/2023, stating that you are unable to amend the return as it is too late for the years in question. This letter is to inform you that there are exception circumstances in which my client was unable to deal with his affairs within the time limit.
>
> During this time my client's previous accountant … were looking after my client's affair and now it has transpired that they have omitted the important information on my tax payer's returns (05/04/2014, 2016, 2017, 2018).
>
> I wish to request to your authorities to reconsider your decision dated 16/12/2022 and allow us to have those years in question amended and hope that I do not have to approach the tribunal.
>
> Lastly it is no fault of our client that because of his family involvements, sadly the father passed away last year after 10 years illness, now the client is looking after his mother who is also poorly and disabled."

13. Miss Kaur replied on 27th February 2023 saying:

> "…
>
> I cannot refer to any previous letters you have received as these have not been issued by me and it is possible, the letters may have been Issued to you by a different department. I will however refer to my letter dated 16 December 2022.
>
> You have requested I reconsider my decision of 16 December 2022 and to consider the exceptional circumstances your client has been faced with. You have also advised me that your client's previous accountant has omitted Important Information from the above tax returns.
>
> I have considered your request under the Self-Assessment Claims Manual SACM10040-Unsuccessful Attempts to make a Claim or Election: Late Claims and have reached the following decision:
>
> **My Decision**
>
> I cannot accept a late claim or election where It Is substantially due to an oversight or negligence on the part of the person, or their agent. You did not tell us within the normal time limit, that you intended to make these amendments and I do not believe your client had reasons beyond their control.
>
> …
>
> I can fully appreciate and empathise the position that Mr Zafari is in at present regarding the time limits. It might appear unfair to deny a customer the opportunity to recover amounts of tax that may not have been due. Statutory time limits are a legitimate and proportionate means of ensuring fiscal finality and control over public finances.

> Parliament has determined that it is reasonable to set time limits without regard to the cause of the error or the point at which a taxpayer might have realised that error.
>
> I know my decision will be disappointing and this is not the answer you were looking for. As per my previous letter the time limits have passed, I'll not be taking any further action with your proposed amendments."

14. The Claimant then engaged solicitors. On 16th June 2023 his solicitors wrote to the Defendants. The solicitors contended that the Defendants had a discretion to extend the time limit for submitting an amended return. They said that the discretion should be exercised in the Claimant's favour because of his personal circumstances and because there had not been any oversight or negligence on his part. The letter went on to say that the Defendants' letter of 30th September 2022 had given the Claimant a legitimate expectation that he would be permitted to amend the tax returns and that there was no proper basis upon which the Defendants could resile from the expectation.

15. The Defendants replied on 12th July 2023. They rejected the contention that the Claimant's personal circumstances had prevented him from dealing with his tax affairs and maintained the refusal to accept the amended returns. That reply did not address directly the contention that there was a legitimate expectation which prevented such a refusal.

The Circumstances in which a Legitimate Expectation can arise.

16. The actions or statements of a public body can give rise to a legitimate expectation that it will act in a particular way, and in appropriate circumstances the court will intervene to prevent such a body acting in a different way so as to frustrate that expectation.

17. The principle underlying the court's intervention in such circumstances has been expressed as being because it is an abuse of power for a public body unfairly to frustrate a legitimate expectation (per Laws LJ in *R v Secretary of State for Education ex p Begbie* [2000] 1WLR 1115 at 1129H) alternatively as being that good standards of public administration preclude a public body as resiling from an undertaking where there is legitimate expectation that it will act in a particular way (*Re Finucane's Application for Judicial Review* [2019] UKSC 7, [2019] HRLR 7 per Lord Kerr at [72]). The crucial point is that the court will intervene to prevent the authority resiling from a legitimate expectation where to do so would amount to the authority acting unfairly (see *Re Finucane's Application* at [62] and *R v Board of Inland Revenue ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 per Bingham LJ, as he then was, at 1567F – 1570B).

18. There can be no legitimate expectation that a public body will take action which it has no power to take as a matter of law (see *Begbie* at 1125D per Peter Gibson LJ and at 1129E per Laws LJ and *MFK* per Judge LJ, as he then, was at 1573G-H).

19. In order to give rise to a legitimate expectation the public body's promise that it will act in a particular way must be "clear, unambiguous and devoid of relevant qualification" (per Bingham LJ in *MFK* at 1569 as approved by Lord Hofmann in *R(Bancoult) v Foreign Secretary (No 2)* [2009] 1 AC 453 at [60]).

20. It was common ground before me that a representation can only give rise to a legitimate expectation if the person making the representation on behalf of the relevant public body has the necessary actual or ostensible authority. For the Claimant, Mr Blades

initially contended that it sufficed if the person in question had actual or ostensible authority to speak on behalf of that body generally. Mr Blades founded that submission on the judgment of Keene LJ (with whom Sumner J agreed) in *South Bucks DC v Flanagan* [2002] EWCA Civ 690, [2002] 1 WLR 2601 at [18]. In the course of his submissions Mr Blades accepted that this was a misreading of Keene LJ's comments. Instead, what is necessary is that the representation in question is made by a person with actual or ostensible authority to make such a representation. Fairness does not require a public body to be held to a representation made by a person who did not have authority to make the representation. Conversely, fairness to the representee may, in an appropriate case, require that a wide view is taken of who has ostensible authority to make a particular representation.

21. The authorities emphasise that the crucial question is whether it is unfair for the public body to act contrary to the statement, representation, or policy which is said to have given rise to a legitimate expectation (see in particular *Re Finucane's Application* and *MKF* above). Moreover, as was emphasised in *MKF*, "the factual context … is all important" (per Bingham LJ at 1569B). Thus, in that case the court took particular account of the fact that the relevant dealings were between the Inland Revenue and a taxpayer and regarded the former's obligation to collect in such tax as was lawfully due as a significant feature of the context.

Did the Correspondence give rise to a Legitimate Expectation on the part of the Claimant?

22. How is the correspondence and in particular the letter of 30th September 2022 to be interpreted when read in context? Did that letter amount to a clear representation that the Defendants would accept the amended returns when they were filed by the Claimant?

23. The key factor supporting the Claimant's interpretation is that the letter of 30th September 2022 was a reply to that of 10th August from his accountants. The Defendants' letter has to be seen in light of the letter to which it was replying. In the August letter the Claimant's accountants had requested the Defendants' "kind authorities to allow us to make changes" and they said that the amended returns would be provided "upon your agreement". Although the letter was triggered by the demand of 15th July 2022 it was not expressly seeking a stay in enforcement but was asking for permission to file amended returns. The 30th September letter said that recovery action would be stayed for a period to allow the amended returns to be filed. In support of the Claimant's case the point can be made that there would be little point in doing this if the amended returns were to be rejected.

24. There are a number of factors operating against the Claimant's interpretation.

    i) The letter of 30th September 2022 does not expressly say that the amended returns would be accepted. It is a short letter and says expressly that the SA302 forms have been forwarded elsewhere; that recovery action will be put on hold for a specified period of time; and that a phone call should be made if the returns had not been amended by the end of that period. On a natural reading the letter was saying that enforcement action would be stayed to allow the amended returns to be prepared and submitted but was not saying that they would be accepted when submitted.

ii) It is very significant that the Claimant's accountants wrote to two separate departments of the Defendants. That is an indication that it was understood that different departments or teams would be concerned with different aspects of the Defendants' dealings with the Claimant. In that regard the Debt Management Enforcement and Insolvency Service were to be regarded as responsible for the recovery of sums due while others were responsible for determining the amount due. Miss Rafiq was herself a Debt Enforcement Officer and is to be taken as writing in that capacity. I take account of the fact that the other team to whom the accountants wrote on 10th August 2022 was also a "compliance" team and the fact of writing to two teams might carry little weight if matters had stood there. However, it is of note that in the 30th September letter Miss Rafiq said that the SA302 calculations had been sent to the Self Assessment team for them to deal with. That is a potent indication to the Claimant that Miss Rafiq's team were not concerned with the calculation of the amount due. That is significant because the whole purpose of submitting amended returns was to achieve a change in the amount of tax said to be due.

iii) The Claimant's case is that the Defendant had a discretion to extend the time for accepting amended returns. The 30th September letter cannot readily be read as an indication that such a discretion would definitely be exercised in a particular way. Still less is it an indication that the discretion had already been exercised and a conclusion reached.

25. I am satisfied that the letter of 30th September cannot properly be read as a clear representation that the amended returns would be accepted when submitted by the Claimant. That is so even when full account is taken of the terms of the letter of 10th August. The 30th September letter was, as it purports to be, an indication that recovery action was being stayed for a period and did not go beyond that. It was not, therefore, a representation capable of giving rise to the legitimate expectation on which the Claimant relies. As a consequence it cannot be said that fairness prevented the Defendants from declining to accept the amended returns in due course. It is not necessary in light of that conclusion to consider the extent of Miss Rafiq's actual or ostensible authority though her role and the team within which she worked are factors I have taken into account when considering the proper interpretation of the 30th September 2022 letter.

Did the Defendant have a Power to accept the Amended Returns?

26. My conclusion that the 30th September 2022 letter was not a representation that the amended returns would be accepted is determinative of the Claimant's challenge. However, as the contention that the Defendants did not have any power to accept the returns was advanced as a separate line of defence and would, if correct, be a complete defence to the claim I must address it. If the Defendants are right and they did not have power to accept the returns then even if the 30th September letter was a representation that the returns would be accepted it could not give rise to a legitimate expectation preventing the Defendants from rejecting them.

27. Mr Blades contended that it was not open to Defendants to deny that they had power to accept the amended returns outside the 12 month period set out in section 9ZA. In the Summary Grounds of Resistance at [2] and [22] – [25] the Defendants' position had been that they did have discretion to accept such returns but that it was only appropriate

to exercise that in limited circumstances which had not arisen in this case. The stance taken in the Detailed Grounds of Resistance and in Miss Dhanoa's skeleton argument was that the Defendants had no such power. Mr Blades submitted that the points made in the Summary Grounds of Resistance amounted to an admission within the meaning of CPR Rule 14.2; that there had been no application to withdraw that admission; and that, as a consequence, the Defendants were not entitled to argue that they did not have power to accept the amended returns.

28. I do not accept that argument. In my judgement it mischaracterises the stance taken in the Summary Grounds of Resistance. The points made there were simply not an admission of a part of the Claimant's claim or case. The Claimant's claim is for the quashing of the decision of 12th July 2023. He said that decision was to be quashed on the footing that it amounted to the Defendants unfairly resiling from a legitimate expectation which they had created. The Defendants did not in the Summary Grounds of Resistance admit that claim in whole or in part. Rather, they denied the claim in its entirety on the footing that there had been no legitimate expectation and that the decision was not to be quashed. The fact that the Defendants did not in those summary grounds advance the argument that they had no power to accept the amended returns was not an admission of the claim nor was it, when properly analysed, even an admission of part of the Claimant's case. The position is not akin to that where a pleaded defence has admitted certain elements of a pleaded claim while disputing other elements. Instead, it was a failure to raise a separate and different line of defence. This does not preclude the Defendants from advancing that defence once permission has been given and directions made including a direction for the filing of Detailed Grounds of Resistance.

29. If that analysis is wrong and the approach taken in the summary grounds is to be seen as an admission of part of the Claimant's case then I treat the terms of the detailed grounds as an application for permission to withdraw the admission and grant that application. The question is a pure point of law and there is no prejudice to the Claimant in allowing the Defendants to advance the argument. Mr Blades sought to say that the Claimant might have sought to advance evidence on this point if an application to withdraw an admission had been made and granted. There is no substance in that point: evidence would not have affected the question of whether as a matter of law the Defendants have power to accept amended returns after the expiry of the 12 month period. The fact that the Defendants have changed their argument is a point on which the Claimant can rely in support of his argument as to the extent of the Defendants' powers but that is a different matter from the contention that the argument is not open to the Defendants.

30. Section 9ZA of the Taxes Management Act 1970 states:

> "(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.
>
> (2) An amendment may not be made more than twelve months after the filing date.
>
> [(3) In this section "the filing date", in respect of a return for a year of assessment (Year 1), means—
>
> (a) 31st January of Year 2, or
>
> (b) if the notice under section 8 or 8A is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice."

31. The Claimant accepts that a taxpayer has no entitlement to amend a tax return outside the 12 month period laid down in section 9ZA. He does, however, say that the Defendants have a discretion to accept an amended return outside that period. In that regard the Claimant relies on section 5(1)(a) of the Commissioners for Revenue and Customs Act 2005. This states that:

> "(1) The Commissioners shall be responsible for—
>
> (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,"

32. The Claimant says that provision is to be interpreted as giving rise to the discretion by analogy to the approach which has been taken to provisions akin to section 9ZA in other tax statutes where section 1 of the Taxes Management Act 1970 was regarded as giving a power to extend the time limits which statute imposed on taxpayers. Section 1 of the 1970 Act was the predecessor of section 5 of the 2005 Act and both made the Defendants responsible for the collection and management of taxes.

33. The Defendants deny that they have such a power. They say that where statute has set out a time limit within which a particular act must be done then it is not for the Defendants to go beyond Parliament's intention and to extend the time limits. They say that there cannot be extrapolation from decisions concerned with other legislation even from other taxing statutes using language which is similar to that of section 9ZA. Instead, they say that guidance comes from the decisions in which the courts have emphasized the importance of statutory time limits.

34. Both Mr Blades and Miss Dhanoa accepted that there was no authority directly addressing the question whether the Defendants have a discretion to accept returns filed outside the section 9ZA period. However, each said that the position for which they contended followed by analogy to the approach taken in relation to other provisions. I turn, therefore, to the authorities on which they relied.

35. In *R v IRC ex p Unilever Plc* [1996] STC 681 it was common ground that the Inland Revenue Commissioners had a discretion to accept late claims for loss relief under the Income and Corporation Taxes Act 1988 and that the power derived from section 1 of the 1970 Act (see at 685e). The Court of Appeal upheld the first instance decision that it was an abuse of power for the defendants to insist on claims for loss relief being made within the period laid down in the 1988 Act. That was in circumstances where the defendants had accepted late claims from the claimant on 30 occasions over a period of 20 years and had not given advance notice that they were changing their approach. The existence of the discretion was not in issue. It follows that other than indicating the understanding of the parties at the time of those proceedings the decision does not advance matters.

36. In *R (Higgs) v HMRC* [2015] UKUT 0092 (TCC) Barling J sitting in the Upper Tribunal (Tax & Chancery Chamber) was concerned with the applicability of the 4 year time limit for the making of an assessment. That limit was set out in section 34 of the 1970 Act. Barling J concluded that the time limit did not apply but went on, in the alternative, to consider the challenge to the defendant's exercise of its discretion to waive the time limit. However, it was again common ground that by virtue of section 1 of the 1970 Act the defendant had such a discretion (see at [53]).

37. Barling J also explained that the claimant had referred to dicta of Lord Hoffmann in *R (Wilkinson) v IRC* [2005] UKHL 30, [2005] 1 WLR 1718 at [21] which were said to "confirm the existence of the discretion". It is relevant to note Lord Hoffmann's description of the discretion's nature and scope. At [20] and [21] he said that the discretion was derived from the wide terms of section 1 of the 1970 Act and explained that:

> "20….Section 1 of TMA gives them what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self−Employed and Small Businesses Ltd* [1982] AC 617, 636 as 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.'
>
> 21. This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time…."

38. Lord Hoffmann gave that explanation in the context of holding that the Commissioners' discretion did not extend to granting by way of extra-statutory concession an allowance against tax which had not been provided for in the relevant legislation. It will be noted that Lord Hoffmann was addressing the discretion in relation to the formulation of policy rather than that of the extension of time limits.

39. In *Merchant v HMRC* [2020] UKFTT 299 (TC) HMRC had extended the time for making an amended return in respect of Stamp Duty Land Tax and had accepted such a return after the period set out in the Finance Act 2003. The taxpayers subsequently contended that this should not have been done and that HMRC had no power to accept a late amendment. HMRC contended that it did have such power (as Mr Blades pointed out this is the reverse of the positions taken by the parties here). In that case HMRC had submitted that it was "well-established" that the Commissioners "have discretion to accept something done late by a taxpayer in appropriate circumstances" (see at [28]). In support of that proposition they cited the decision in *Unilever*. They also relied on the Upper Tribunal decision in *R (Ames) v HMRC* [2018] STC 1704; [2018] UKUT 190 (TCC) as showing that the discretion derived from section 1 of the 1970 Act had been continued by section 5 of the 2005 Act. However, in both those cases the existence of the discretion had been common ground. Judge Brooks noted that the issue was not common ground before him but then dealt with the point very shortly saying, at [30], "I not only consider that HMRC has such discretion but that it is not subject to the jurisdiction of the Tribunal". The decision is not binding on me and in the absence of any more detailed reasoning it assists only to the extent of indicating that Judge Brooks regarded the understanding which had been common ground in the other cases as correct and, perhaps, that he regarded it as being so obviously correct that further explanation of why it was correct was not needed. Miss Dhanoa submitted that the fact that Judge Brooks was concerned with a return made under the SDLT regime further reduced the relevance of the decision. I do not accept that contention. It is apparent that the understanding shown in *Unilever* and in *Ames* and by Judge Brooks was that there was a general discretion ranging over the tax regime generally.

40. Miss Dhanoa referred me to the First Tier decision in *Byrne v HMRC* [2017] UKFTT 144 (TC). At [39] the Tribunal emphasised that a taxpayer's right to file an amended

return is limited to the 12 month period provided in section 9ZA and that there is no right to file such a return outside that period. That approach was approved, again in the First Tier Tribunal, in *Kuteh v HMRC* [2018] UKFTT 253 (TC) at [12]. Those decisions do not assist in the question I have to address. It is common ground here that the Claimant had no right to file amended returns out of time. The question, at this point, is whether the Defendants had a discretion to accept amended returns submitted out of time. The fact that the taxpayer does not have a right to file in those circumstances does not assist with the question of the Defendants' discretion. Indeed, if a taxpayer had such a right there would be no question of the Defendants having a discretion because there would be no need for any extension of time by them.

41. In *Dillon v HMRC* [2019] UKFTT 545 (TC) the First Tier Tribunal was concerned with an appeal against the imposition of penalties for the late filing of a self-assessment tax return and against the amount charged. The taxpayer had submitted an amended tax return outside the 12 month period provided in section 9ZA. The tribunal noted that it had no inherent jurisdiction and that it had only the powers given by statute. It then said, at [37], "we have no power to extend the time limits provided in section 9ZA…". The fact that the tribunal has no such power does not assist with the question of whether the power given to the Defendants by section 5 of the 2005 Act includes a discretion to accept amended returns out of time.

42. Miss Dhanoa relied particularly on the decisions of the Court of Appeal in *HMRC v Raftopoulou* [2018] EWCA Civ 818 and *Candy v HMRC* [2022] EWCA Civ 1447. However, those decisions do not assist here to the extent for which Miss Dhanoa contended.

43. In *Raftopoulou* the Court of Appeal rejected an interpretation of section 118 of the 1970 Act which had been adopted by the Upper Tribunal and which would have meant that a taxpayer would be entitled to make a repayment claim after the 4 year time limit laid down in paragraph 3(1) of schedule 1AB of the Act. In rejecting that interpretation Richards LJ, with whom Arden LJ agreed, said, at [70]:

> "I accept the submission of [counsel for HMRC] that Parliament has set down in the self-assessment system carefully defined time limits for enquiries, assessments and claims which balance the need to give finality and certainty to taxpayers and the Exchequer, with the need to provide sufficient flexibility to ensure fairness in the system. It has created a specific statutory procedure for the extension of certain of those time limits where it has considered it appropriate. The UT's construction cuts across this balance without a clear warrant for doing so in the section."

44. In *Candy* the Court of Appeal was concerned with the construction of the provision for making an amended return in respect of SDLT. The First Tier Tribunal had held that even though the legislation laid down a 12 month period for making such returns the provisions could be interpreted so as to entitle the taxpayer to make an amended return at any time and in particular even after that period. The court rejected that argument and held that there was no right to submit a return after that period. At [50] and [51] Simler LJ, as she then was, with whom Arnold and Nugee LJJ agreed, explained why hard-edged time limits were appropriate and warned against interpretations which would subvert such limits saying:

> "50. Nor can I see any rational reason why Parliament would have wished to dispense altogether with the generally applicable time limit in paragraph 6(3), enabling taxpayers to make claims for repayment without any time limit, even decades later when memories

> may have faded and documents relating to the original land transaction may have been lost. There is nothing inconsistent in Parliament providing a right to reclaim tax paid as a safeguard for innocent taxpayers caught by the widely worded charge in section 44(4), but at the same time making that right subject to clear procedural rules, including time limits on the right to reclaim payment. It is of the essence of a self-assessment system that tax effects can be undone by administrative failure and merely meeting the substantive conditions for the grant of a relief is rarely enough to secure that a taxpayer receives the relief in question. Where the relief requires a claim, and the claim is not made in accordance with any procedural requirements, the taxpayer will not be given the relief.
>
> 51. Moreover, hard-edged time limits are a common feature of the self-assessment scheme. Where they govern the availability of a relief, they have the inevitable potential to cause hardship. In the case of section 44(9), a balance between the competing objectives of preventing tax avoidance on the one hand, and relieving innocent transactions caught by section 44(4) on the other, was clearly intended by Parliament. Since the longer the period of substantial performance lasts without completion of the contract, the more likely it is the purchaser will have obtained benefits under the contract in a way that justifies maintaining the SDLT charge, it was rational to strike that balance with a time limit of 13 months for amending the return from the effective date of the transaction giving rise to substantial performance (in other words, 12 months after the filing date). This limits the scope for avoidance but is simple to operate (for both HMRC and taxpayers). I can see no good reason why the unambiguous, hard-edged time limit in paragraph 6(3) should yield to section 44(9) as Mr Thomas contended. The consequence of Mr Thomas' construction is to dispense with certainty and finality in the sound administration of SDLT. That would be a surprising result."

45. In both those cases the court was concerned with the interpretation of the tax legislation with a view to determining whether a taxpayer had a right to make a claim or submit a return outside the period set out in the legislation. They were concerned with the taxpayer's rights and entitlements and not with the extent of the Defendants' discretion.

46. The position, therefore, is that a taxpayer has no right to submit an amended return outside the 12 month limit contained in section 9ZA. Regard is also to be had to the repeated judicial emphasis on the validity of hard-edged time limits for actions in relation to the tax regime and the repeated warnings against interpreting the relevant legislation in a way which would subvert such limits. Against that is to be set the longstanding understanding that section 5 and its predecessor gave the Defendants a discretionary power which extended to the acceptance of late returns of various kinds. It is of note that such was the understanding of the Defendants as is shown by their stance in *Unilever, Higgs,* and *Merchant.* It is, moreover, the position that the Defendants' guidance to their own decision-makers is predicated on the existence of a power to accept late returns.

47. Miss Dhanoa does not contend that the stance which the Defendants took in *Unilever, Higgs,* and *Merchant* was mistaken nor does she suggest that the Defendants have reflected and concluded that they were wrong to accept (and in the case of *Merchant* assert) the existence of a power in those cases. Instead, she submits that the approach which was applicable to other tax legislation is not applicable in respect of the amendment of returns under section 9ZA. I am not persuaded by that submission. The previous understanding was that the discretion was derived from section 1 of the 1970 Act and then section 5 of the 2005 Act and that it extended across the tax regime generally. It was those provisions which were the source of the power rather than

provisions relating to particular taxes. As a consequence it is of significance that Miss Dhanoa did not seek to argue that there was some particular feature of the income tax regime or of section 9ZA which meant that the power which could be exercised in respect of other taxes and similar provisions was not applicable.

48. In addition the contrast which Miss Dhanoa sought to draw between the approach taken in *Raftopoulou* and *Candy* and the discretion for which the Claimant contended is apparent rather than real. The existence of a power whereby the Defendants can accept late returns is not incompatible with the rule that a taxpayer has no right to make a return outside the prescribed period. As noted above such a power is only needed if the taxpayer has no such right.

49. I am satisfied that the Defendants did have a power to accept the amended returns submitted by the Claimant. The existence of such a power not only accords with the stance consistently taken by the Defendants in the past but is also based on the language of section 5 of the 2005 Act. A discretion to accept a late return is very different from the granting of allowances by extra-statutory concession in the way which Lord Hoffmann said was to be impermissible in *Wilkinson*.

50. It is doubtless necessary for the Defendants to take account of the purpose of the statutory regime and the importance of the time limits contained in legislation when exercising their discretion but that is a very different question from that of the existence of the discretion.

51. It follows that if I had found that the 30th September 2022 letter had been a representation that the amended returns would be accepted I would not have refused relief on the footing that the Defendants had no power to act in that way.

Conclusion.

52. The claim, therefore, fails.