Special Purposes Commissioners v. *Pemsel* [1891] A.C. 531, or under the Recreational Charities Act 1958, and I reserve my opinion on these matters.

My Lords, I would allow the appeal.

Appeal allowed. Order of Court of Appeal set aside and declared that objects of The Football Association Youth Trust regulated by deed dated October 30, 1972, exclusively legally charitable and that trust properly registered by Charity Commissioners for England and Wales as a charity under section 4 of Charities Act 1960.

Inland Revenue Commissioners to pay costs of trustees and Attorney-General in House of Lords and Court of Appeal.

Solicitors: *Chethams; Solicitor of Inland Revenue; Treasury Solicitor.*

M. G.

[HOUSE OF LORDS]

CUSTOMS AND EXCISE COMMISSIONERS . . APPELLANTS

AND

J. H. CORBITT (NUMISMATISTS) LTD. . . . RESPONDENTS

1978 June 12, 13; 1979 Feb. 27, 28; March 1; 1980 Feb. 19, 20; April 1

Neill J. Lord Denning M.R., Eveleigh L.J. and Sir Stanley Rees Lord Diplock, Lord Simon of Glaisdale, Lord Salmon, Lord Scarman and Lord Lane

Revenue—Value added tax—Assessment—Appeal against assessment—Scheme for reducing tax on sale of secondhand goods—Scheme not applicable unless dealer's records such as commissioners "may recognise as sufficient"—Records not accepted as sufficient—Tax assessed—Whether commissioners' decision open to review on appeal—Finance Act 1972 (*c.* 41), *ss.* 31 (1), 40 (1) (*b*)—*Value Added Tax (Works of Art, Antiques and Scientific Collections) Order* 1972 (*S.I.* 1972 *No.* 1971), *art.* 3 (5)

A dealer in antique coins sought to remit value added tax pursuant to a scheme contained in the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972, whereby value added tax was chargeable on the

difference between the purchase and resale prices of certain goods. Under article 3 (5) of the Order the scheme was not applicable unless the dealer kept such records and accounts as the Customs and Excise Commissioners "may specify in a notice published by them for the purposes of this Order or may recognise as sufficient for those purposes." Following an examination of the dealer's records, the commissioners found that records had not been kept in accordance with Notice No. 712 published by them pursuant to article 3 (5) of the Order, refused to recognise them as sufficient for the purposes of the Order and made an assessment of value added tax under section 31 of the Finance Act 1972 [1] on the basis that the scheme did not apply. The dealer appealed against the assessment pursuant to section 40 (1) (*b*) of the Act, and, on a contention by the commissioners that their refusal to recognise the dealer's records as sufficient for the purposes of the Order was a matter entirely within the exercise of their discretion and not subject to review, the value added tax tribunal held, by a majority, that it had power to go into all matters relating to the appeal de novo and to substitute its own decision for that of the commissioners. On an appeal by the commissioners Neill J. upheld their contention and reversed the decision of the tribunal. The Court of Appeal by a majority (Lord Denning M.R. and Sir Stanley Rees, Eveleigh L.J. dissenting) allowed an appeal by the dealer.

On appeal by the commissioners: —

Held, allowing the appeal (Lord Salmon dissenting), that, on the true construction of the relevant provisions of the Act and Order of 1972, the jurisdiction of the value added tax tribunal on an appeal from the commissioners under section 40 (1) (*b*) of the Act was confined to the question whether as a matter of fact the trader had kept the records and accounts specified by the commissioners in Notice No. 712 (or, *per* Lord Simon of Glaisdale and Lord Scarman, had deviated from them only de minimis) or records and accounts recognised by them as sufficient; and that the tribunal had not been entitled to substitute their own discretion for that of the commissioners as to what records and accounts should be recognised as sufficient under article 3 (5) of the Order (post, pp. 51F–G, 52B, 57C, 60B–D).

Per curiam. There is no obligation on the trader under the first half of article 3 (5) to have the necessary records and accounts made out before supply to his customer, nor need he under the second half obtain in advance the approval of records and accounts that do not comply with the requirements of Notice No. 712 (post, pp. 51F–G, 57A, C, 59E–G).

Per Lord Simon of Glaisdale and Lord Scarman. The normal judicial review of the High Court would be available where the commissioners exercised their discretion improperly (post, pp. 52B–C, 57C).

Decision of the Court of Appeal, post, p. 33A; [1979] 3 W.L.R. 291 reversed.

The following cases are referred to in their Lordships' opinions:

Blunt v. *Blunt* [1943] A.C. 517; [1943] 2 All E.R. 76, H.L.(E.).

Evans v. *Bartlam* [1937] A.C. 473; [1937] 2 All E.R. 646, H.L.(E.).

[1] Finance Act 1972, s. 31 (1): see post, pp. 58H–59A.
S. 40 (1) (*b*): see post, p. 59B.

Miller v. *Customs and Excise Commissioners* [1977] V.A.T.T.R. 241.
Osenton (Charles) & Co. v. *Johnston* [1942] A.C. 130; [1941] 2 All E.R. 245, H.L.(E.).
Shiloh Spinners Ltd. v. *Harding* [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.).

The following additional cases were cited in argument in the House of Lords:

Callaghan v. *Customs and Excise Commissioners*, February 9, 1978; MAN/77/187.
Cannock Chase District Council v. *Kelly* [1978] 1 W.L.R. 1; [1978] 1 All E.R. 152, C.A.
Hookings v. *Director of Civil Aviation* [1957] N.Z.L.R. 929.
Minister of National Revenue v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109, P.C.
Moss (Henry) of London Ltd. v. *Customs and Excise Commissioners* [1979] S.T.C. 657.
Reg. v. *Ashford District Inspector of Taxes, Ex parte Frost* [1973] S.T.C. 579, D.C.

The following cases are referred to in the judgments in the Court of Appeal:

Barton Townley (Barrow) Ltd. v. *Customs and Excise Commissioners* (unreported), February 5, 1976, MAN/75/10/.
Miller v. *Customs and Excise Commissioners* [1977] V.A.T.T.R. 241.
Reg. v. *Inspector of Taxes, Ex parte Clarke* [1974] Q.B. 220; [1973] 3 W.L.R. 673; [1972] 1 All E.R. 545, C.A.
Sagnata Investments Ltd. v. *Norwich Corporation* [1971] 2 Q.B. 614; [1971] 3 W.L.R. 133; [1971] 2 All E.R. 1441, C.A.
Stepney Borough Council v. *Joffe* [1949] 1 K.B. 599; [1949] 1 All E.R. 256, D.C.

The following additional cases were cited in argument in the Court of Appeal:

Cannock Chase District Council v. *Kelly* [1978] 1 W.L.R. 1; [1978] 1 All E.R. 152, C.A.
Customs and Excise Commissioners v. *Cure & Deeley Ltd.* [1962] 1 Q.B. 340; [1961] 3 W.L.R. 798; [1961] 3 All E.R. 641.
Jackson (Francis) Developments Ltd. v. *Hall* [1951] 2 K.B. 488; [1951] 2 All E.R. 74, C.A.
Minister of National Revenue v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109, P.C.
Padfield v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Reg. v. *Ashford District Inspector of Taxes, Ex parte Frost* [1973] S.T.C. 579, D.C.
Reg. v. *Value Added Tax Tribunal Centre (Belfast), Ex parte Customs and Excise Commissioners* [1977] S.T.C. 323, C.A. (N.I.)
Roberts v. *Hopwood* [1925] A.C. 578, H.L.(E.).

The following cases are referred to in the judgment of Neill J.:

Minister of National Revenue v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109, P.C.

A *Reg.* v. *Value Added Tax Tribunal Centre (Belfast), Ex parte Customs and Excise Commissioners* [1977] S.T.C. 323, C.A. (N.I.)
Sagnata Investments Ltd. v. *Norwich Corporation* [1971] 2 Q.B. 614; [1971] 3 W.L.R. 133; [1971] 2 All E.R. 1441, C.A.
Stepney Borough Council v. *Joffe* [1949] 1 K.B. 599; [1949] 1 All E.R. 256, D.C.

B No additional cases were cited in argument before Neill J.

APPEAL from decision of value added tax tribunal sitting at Newcastle-upon-Tyne.

The Customs and Excise Commissioners appealed against the decision of a value added tax tribunal notified to the respondent dealer, J. H. Corbitt (Numismatists) Ltd., on October 21, 1977, whereby the tribunal C held that it had jurisdiction to decide with reference to supplies which were the subject matter of an assessment by the commissioners, whether the dealer kept such records and accounts as were required by article 3 (5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972. The grounds of appeal were that a value added tax tribunal had no jurisdiction to recognise as sufficient for the purposes of article 3 (5) and article 4 of the Order, records and accounts which D were not as specified in a notice published by the commissioners for the purposes of the Order or recognised by them as sufficient for those purposes; and article 4 of the Order could only apply to supplies by the dealer if such records and accounts had been kept as the commissioners had specified in Notice No. 712 published by them for the purposes of the Order or such records and accounts as the commissioners had E recognised as sufficient for the purposes of the Order prior to the time of the respective supplies and the dealer did not contend that such records or accounts had been kept.

The facts are stated in the judgments of Neill J. and Lord Denning M.R.

F *Harry Woolf* for the commissioners.
David Goldberg for the dealer.

NEILL J. This is an appeal from a decision of the value added tax tribunal sitting at Newcastle in April 1977, the decision being notified by a notice dated October 21, 1977. The decision under appeal is a decision by the tribunal that it had jurisdiction to decide, with reference G to supplies which were the subject matter of an assessment made by the Customs and Excise Commissioners on November 26, 1976, whether the respondent dealer kept such records and accounts as were required by article 3 (5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972. The tribunal decided that it had jurisdiction to consider the records and accounts to see whether they H did comply with that statutory order. From that decision the Customs and Excise Commissioners appeal to this court.

Value added tax is imposed under the Finance Act 1972. It is, as its name implies, a tax which is a multi-stage tax; that is to say, it is

imposed at each stage of production on the value which is added at the relevant stage. A taxable person is required to account for tax on all the supplies which he makes to his customers but is allowed to set against the tax which he has to account for, such tax as may be included in the prices which are charged to him by his suppliers. Those two types of tax which he charges himself and the amount which he is allowed to deduct, are described in the Finance Act 1972 as respectively "output tax" and "input tax."

In the ordinary way where a registered retailer is dealing in manufactured goods, the retailer is able to set off against the tax for which he has to account the amount of tax which is included in the prices which are charged to him. In other words, if he is supplied with goods by a wholesaler or manufacturer then he can set off such element in the price as represents tax, the reason being that the supplier will, in the ordinary way, be a registered trader and therefore himself be accountable for tax. But where one is dealing with secondhand goods a special problem exists. Thus a person dealing in secondhand goods, whether they be collectors' items or not, is likely to obtain his supplies not only from people who are registered traders but to a very considerable extent from private people who are not registered and not accountable for value added tax on what they sell. And so, to deal with that situation a scheme has been devised which, to put it in simple terms, enables the trader dealing as a dealer in secondhand goods to be accountable for tax not on the total amount for which he sells the goods to the public but on the margin, the margin being the difference between the price which he has had to pay for the goods in the first place and the sum which he receives upon sale. The scheme as devised is set out in a statutory instrument to which I have been referred: the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972. That Order applies to works of art, antiques and collectors' pieces of the various categories which are set out in article 3 of that Order.

The dealer in this case carries on business as, inter alia, a numismatist, selling, as I understand it, antique coins. The business and the nature of the goods in which he deals fall within article 3 (1) (*e*) of the Order and possibly also within article 3 (1) (*d*), so there is no doubt that the goods are of a kind which is capable of coming within the scheme to which the Order applies.

Article 4 of that Order, which is the article which enables the taxable person to be charged or accountable for tax only on the margin, is in the following terms:

> "(1) Where this article applies to a supply of goods by any person, tax shall be chargeable as if the supply were for a consideration equal to the excess of—(*a*) the consideration for which the goods are supplied by him; over (*b*) the consideration for which the goods were acquired by him; and accordingly shall not be charged unless there is such an excess."

And there one sees what I have described earlier as the margin whereby the trader or dealer only has to account for tax on the margin between the two prices. But the problem with which I am concerned is whether

the dealer in this case is entitled to take advantage of that margin scheme; and that involves the specific question as to whether or not the tribunal is entitled to look at the records which the dealer kept in order to decide whether they complied with the scheme. The records are relevant because article 3 (5) says:

> " Article 4 does not apply to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purposes of this Order or may recognise as sufficient for those purposes."

That being the general scheme, it is necessary for me to look at some of the sections of the Act and see under what provisions the Order was made. Value added tax is imposed by section 1 of the Finance Act 1972. Mr. Woolf, who has appeared before me on behalf of the commissioners, has referred me to section 1 (2) of the Act whereby it is provided that the tax shall be under the care and management of the commissioners, and he draws attention to that subsection as showing that under this Act, in contrast to the position under some of the revenue statutes, the commissioners have got specific authority and power to exercise discretions, and this subsection is an indication that they are discretions which may not be subject to appeal elsewhere. The main provisions with which I am concerned, however, are the ones which deal with this particular Order. The Order itself is expressed to have been made by the Treasury in exercise of the powers conferred by sections 3 (6) and 14 of the Finance Act 1972. (I may note in passing that section 3 (6) has now been replaced because the whole of section 3 has been replaced by later legislation, but for the purposes of this case I must look at the original section.) Section 3 (6) provides:

> " The Treasury may by order make provision for excepting from the preceding provisions of this section input tax chargeable on such supplies and importations as may be specified in the order, and any such provision may be framed by reference to the description of goods or services supplied or goods imported, the persons by whom they are supplied or imported or to whom they are supplied, the purposes for which they are supplied or imported, or any circumstances whatsoever; and any such order may contain provision for consequential relief from output tax."

Then and more immediately important for my consideration are the terms of section 14 (1) of the Act of 1972:

> " The Treasury may by order make provision for securing a reduction of the tax chargeable on the supply of goods of such descriptions as may be specified in the order in cases where no tax was chargeable on a previous supply of the goods and such other conditions are satisfied as may be specified in the order or as may be imposed by the commissioners in pursuance of the order."

Those final words of section 14 (1), for reasons which I shall come to in a little more detail later, seem to me of great importance in this case.

The Order of 1972 was made under sections 3 (6) and 14 of the

Finance Act 1972. The Order itself is short and in quite general terms. But in pursuance of that Order, and by powers which they were plainly entitled to exercise under the terms of section 14 (1) itself, the commissioners, in February 1973, published a notice which is called Notice No. 712 which laid down in considerable detail not only the general outline of what I have called the margin scheme but also gave, particularly in paragraph 18 and in the accompanying appendices to the notice, very precise details as to the records which a dealer would have to maintain in order to come within the scheme and to be able to satisfy its conditions.

It is, as I understand it, common ground that those terms of Notice No. 712 are conditions imposed by the commissioners in pursuance of the Order, and that those conditions are therefore statutory conditions or conditions imposed in accordance with the statute and the Order made thereunder. No problem in fact arises as to the terms of Notice No. 712.

The question which has been debated before me, however, is not the terms of Notice 712, but what effect is to be given to the concluding words of article 3 (5) which were as follows: ". . . or [the commissioners] may recognise as sufficient for those purposes." Thus the crux of this appeal is whether it is possible for the tribunal, which has an appellate jurisdiction under the Finance Act 1972, to substitute its view for that of the commissioners with regard to records and accounts which do not fall within the terms of Notice No. 712 but may nevertheless be sufficient for the purposes of the Order.

The contentions which have been put forward on behalf of the commissioners can be summarised in this way. Mr. Woolf's primary submission is that the power which is given to the commissioners under section 14 (1) is a statutory power—in effect a power of delegated legislation—giving the commissioners the right to impose conditions which have to be complied with by the trader if he is to fall within the terms of the scheme. That being a power which is given to the commissioners, it is plain from the terms of section 14 itself that that is not something which is subject to review by the appellate body. He says that these are conditions which may be imposed by the commissioners and that it is clear that the criteria which they lay down in, for example, Notice No. 712, are not amenable to any review by anybody else. Moreover, that principle applies not only to the general notice but also to any discretion which the commissioners may exercise under the concluding words of article 3 (5). Thus the question as to whether they recognise other records as sufficient is a matter entirely for them. He says that this authority is not one which one could expect to be subject to an appeal and he drew my attention to other provisions of section 40, to which I must come in a moment, where, he says, there may be a general right of appeal to the tribunal which does not exist in the case of this particular provision.

Against that, Mr. Goldberg says that you have only got to look at section 40 itself to see the very wide terms of the tribunal's jurisdiction. Section 40 is in these terms:

A "(1) An appeal shall lie to a value added tax tribunal constituted in accordance with Schedule 6 to this Act against the decision of the commissioners with respect to any of the following matters: —(*a*) the registration or cancellation of registration of any person under this Part of this Act; (*b*) an assessment under section 31 of this Act or the amount of such an assessment; (*c*) the tax chargeable on the supply of any goods or services or, subject to subsection (5) of this B section, on the importation of any goods; . . ."

and there are other sub-paragraphs going down to sub-paragraph (*i*) of that subsection.

This appeal concerns an assessment and, says Mr. Goldberg, if you read only the relevant words in section 40, they are as follows:

C "An appeal shall lie to a value added tax tribunal . . . against the decision of the commissioners with respect to any of the following matters:— . . . (*b*) an assessment under section 31 . . . or the amount of such an assessment; . . ."

He draws attention to the fact that the words are "with respect to any of the following matters" and in the present case it was a decision with D respect to one of "the following matters." He says that clearly here we have got a decision of the commissioners with respect to an assessment or the amount of an assessment. You have only got to look at the documents which are before the court to see that an assessment has been made under section 31. So, he says, the right of appeal must necessarily involve not only the decision to make the assessment itself, but also any ancillary decisions or prior decisions which have been come to by the E commissioners, such as that the records were not sufficient for the purposes of the Order. That decision that the records were not sufficient was a decision they would have had to have come to before they made the assessment itself, and was therefore a decision with "respect to an assessment." Therefore, he says, on that construction of section 40, the decision as to the records must be something which the value added F tax tribunal is entitled to look at and, if it is entitled to look at that decision, it must be entitled to look at the records themselves.

Finally, he says that even if there is no complete right of appeal, nevertheless the tribunal is entitled to look at the records and documents to see whether there was material on which the commissioners could properly come to the conclusion that they did. It cannot be right, says Mr. Goldberg, if you have got a tribunal of this nature which G is set up by statute to oversee the workings of the value added tax system, that such a body should not be able to make certain that the commissioners are acting properly. The tribunal should not be deprived of the power of seeing whether in any particular case the commissioners may not be acting partially or arbitrarily by not recognising as sufficient something which fails to comply with the terms of Notice No. 712 in H merely minor and unimportant respects.

Those are the main submissions that have been put before me. In support of those submissions I have been helpfully referred to two authorities in particular dealing with the question of the circumstances

in which a discretion can be reviewed by a higher tribunal: *Stepney Borough Council* v. *Joffe* [1949] 1 K.B. 599 and the more recent decision in the Court of Appeal of *Sagnata Investments Ltd.* v. *Norwich Corporation* [1971] 2 Q.B. 614. In the *Stepney Borough Council* case, the Divisional Court was concerned with section 21 (3) of the London County Council (General Powers) Act 1947, which gave a borough council the authority to revoke a licence granted to a street trader if "the licensee is on account of misconduct or for any other sufficient reason in their opinion unsuitable to hold such a licence." Those words might on the face of it suggest that the opinion should be that of the borough council alone, and, it could be argued, the only matter for the appellate body to consider would be whether as a matter of fact that opinion was indeed held by the borough council. But Lord Goddard C.J. said that that was the wrong way of construing such a provision. He said, at p. 602:

> "It is said that, on an appeal under section 25 (1) of the London County Council (General Powers) Act 1947 against the revocation of a licence under section 21 (3) (*a*) of that Act on account of misconduct or for any other sufficient reason rendering the licensee unsuitable to hold such licence, the magistrate is not entitled to substitute his opinion for the opinion of the borough council; that all he can decide is whether there was evidence upon which the council could come to that conclusion. I find myself quite unable to accept that argument. If that argument be right, the right of appeal, which is given by section 25 against the revocation of a licence on any ground mentioned in section 21 (3) (*a*) would be purely illusory."

Mr. Goldberg has very naturally and properly relied on that case, which was applied by the Court of Appeal in *Sagnata Investments Ltd.* v. *Norwich Corporation* [1971] 2 Q.B. 614. He has submitted that where you have got, in an order such as this, words which indicate that there is a discretion granted to a particular body and then there is a wide right of appeal (as he contends there is in section 40) to some other body, it is right that that appellate body should in fact be able to consider the whole circumstances of the case and to decide whether the discretion was properly exercised and though paying no doubt attention to what had been decided below, to substitute its own discretion if it thinks it proper to do so.

At first sight, there is something to be said for that argument. But it seems to me that, though it has been helpful to look at other provisions of the Act to see whether there are limited rights of appeal under other parts of section 40 (1), and though it has been helpful to look at the cases to which I have been referred to give me some guidance as to the correct method of approach, at the end of the day I have got to come back and consider the actual terms of the provisions which are directly relevant to the instant appeal. I have come to the conclusion that if I look at article 3 (5) against the background of the wording of section 14, as I think is the right approach, the right of appeal, granted by section

A 40 (1), does not enable the tribunal to impose its own discretion or substitute its own discretion for that which the commissioners have exercised. Section 14 (1) gives the Treasury power to make provision for securing a reduction of tax in certain circumstances, where such conditions are satisfied as are either specified in the Order or may be imposed by the commissioners in pursuance of the Order.

It is common ground between the commissioners and the dealer that B in so far as conditions are imposed in Notice No. 712 itself, they are not conditions which the appellate body, the tribunal, can interfere with in the sense that it can substitute its view as to what were the appropriate conditions for the view of the commissioners. The tribunal can certainly consider whether or not those conditions have as a matter of fact been complied with. That is something which would be a suitable subject C of an appeal. But what it cannot do is to say, "We do not think that Appendix A or Appendix B, or whatever it may be, ought to be in that form; it should be in some other form." Once it is conceded, as I think rightly, that the commissioners are empowered, subject to the control of the Treasury, to lay down the conditions in a general notice such as Notice No. 712 in such a form as they consider proper and that that power is not subject to appeal, it seems to me impossible to contend D that the discretion given by the final words of article 3 (5) "or may recognise as sufficient for those purposes" is a different kind of discretion which is subject to appeal.

Mr. Goldberg's argument necessarily implies, and he concedes, that had article 3 (5) finished at the words "for the purposes of this Order" he would not be able to put forward these contentions. He says, in E effect, that as the article has given the commissioners a discretion to waive the terms in the general notice in particular cases, the appellate tribunal can investigate the exercise of *that* discretion.

I do not consider that that is the right approach. Once it is conceded that the commissioners can lay down the rules in a general notice, then it must follow that the way in which in any particular case they modify them and take into account the particular circumstances F of individual traders is also a subject which is entirely within their control and discretion and not something which can be looked at by the appellate tribunal, that is, by the value added tax tribunal.

I have therefore come to the conclusion that Mr. Woolf is right when he says that there is no general right of appeal to the value added tax tribunal in regard to the adequacy of the records.

G But I must deal with Mr. Goldberg's further submission. Mr. Goldberg, who, if I may say so, put his arguments with great clarity and force, said in the alternative, "Even if I am wrong in saying that the matter can be looked at de novo, nevertheless the tribunal ought to have the chance of making certain that nothing odd had been done." He referred me in support of that contention to *Minister of National* H *Revenue* v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109. It is certainly true that there are passages in that decision of the Privy Council which are helpful to Mr. Goldberg's argument, but, although that is a decision to which I must pay regard and careful attention, I do not think

that it helps me to decide the problem I have got to decide in this case. Mr. Woolf put the opposing argument as follows: "It is very unlikely that you are going to have a tribunal such as a value added tax tribunal which is going to be able to discharge two separate kinds of appellate jurisdiction; one where it can hear the matter de novo and one where it is purely supervisory." I think there is force in that contention. But he also referred me to the decision of the Court of Appeal in Northern Ireland in *Reg.* v. *Value Added Tax Tribunal Centre (Belfast), Ex parte Customs and Excise Commissioners* [1977] S.T.C. 323 where the Lord Chief Justice of Northern Ireland, Lowry C.J., said, at p. 328, that in his opinion the tribunal's appellate powers did not include the right of supervision. I respectfully agree with that opinion and I consider, therefore, that this alternative submission also fails.

In those circumstances, the only other matter which I should mention is this. I have been referred in the course of the hearing to a decision reached by the tribunal—the value added tax tribunal for the London Tribunal Centre—presided over by the Chairman himself, Lord Grantchester Q.C., in October 1977. I have paid careful attention to that decision which is contrary to the decision which I have reached, but I have come to a clear conclusion that, as a matter of construction of this legislation, the adequacy of the records is something which falls within the authority of the commissioners and that that authority is not something which is subject to review by the value added tax tribunal. Therefore I so order.

Appeal allowed.

Solicitors: *Gregory Krikorian; Nicholson, Martin & Wilkinson, Newcastle-upon-Tyne.*

[Reported by MRS. RACHEL DAVIES, Barrister-at-Law]

APPEAL from Neill J.

By notice dated November 21, 1978, J. H. Corbitt (Numismatists) Ltd. appealed, leave to do so out of time having been granted by the Court of Appeal, on the grounds, inter alia, that (1) a value added tax tribunal (on a true construction of section 40 of the Finance Act 1972) had jurisdiction to recognise as sufficient for the purposes of article 3 (5) and article 4 of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972 records and accounts which were neither (a) specified in a notice published by the commissioners for the purposes of the Order, nor (b) recognised by them as sufficient for those purposes; and (2) article 4 of the Order could apply to supplies even though records and accounts were not kept which either (a) were such as specified in the notice, or (b) were such as were recognised as sufficient for those purposes, so long as records and accounts were kept which a value added tax tribunal recognised as sufficient for the purposes of article 3 (5) and article 4 of the Order.

Harry Woolf for the commissioners.
David Goldberg for the dealer.

A LORD DENNING M.R. Mr. Corbitt is a numismatist. That means he is interested in old coins. He carries on a one-man business in Newcastle-upon-Tyne under the name of his company J. H. Corbitt (Numismatists) Ltd. He deals in fine coins and military medals. He does a good business, and is registered for the purpose of value added tax. Some of his stock is modern and some is old—more than one hundred years old.

B There is a difference between the value added tax payable on modern and on old. When he sells a modern item he has to pay value added tax at the rate of 8 per cent. on his selling price—that is the "output" tax. But he can take credit for the value added tax which his supplier has included in the price to him—that is the "input" tax. But, when he is selling an article which is an antique more than 100 years old (like C a medal from the Napoleonic Wars or the Crimean War) he is in some circumstances entitled to remit a much reduced amount of value added tax. The reason for that is because many antiques are acquired from private individuals who have not paid value added tax themselves. So the dealer has no credit in those cases by way of an input tax. In order to reduce the burden on secondhand dealers because of that, Parliament has enacted that instead of paying 8 per cent. on his own selling price D the dealer need only pay on his profit margin—that is, the difference between the price he paid and the price at which he sold the item. Thus, if he bought an article from a private individual for £60 and sold it for £100, he does not have to pay the 8 per cent. on the full selling price, which would be £8. He only has to pay value added tax on the profit margin, that is 8 per cent. on £40, which is £3·20.

E Quite a lot of Mr. Corbitt's stock was modern, and he became liable to pay value added tax on it. But quite a good deal of it consisted of antiques: and he claimed a reduction on them. He claimed the reduction which is allowed under section 14 of the Finance Act 1972. Section 14 (1) provides:

> "The Treasury may by order make provision for securing a F reduction of the tax chargeable on the supply of goods of such descriptions as may be specified in the order in cases where no tax was chargeable on a previous supply of the goods and such other conditions are satisfied as may be specified in the order or as may be imposed by the commissioners in pursuance of the order."

That is the legislative provision which enables secondhand dealers to G claim a reduction of tax.

In pursuance of that legislative provision the Treasury made an Order in 1972. It is the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972 which gives relief by way of reduced tax for works of art, antiques and collectors' pieces. The relief with which Mr. Corbitt was particularly concerned was "antiques, of H an age exceeding one hundred years . . ." In respect of articles of that description, article 4 of the Order went on to say that value added tax was only payable on the profit margin. But there are provisions (and these are the important provisions in this case) which have to be satis-

fied before the dealer becomes entitled to this relief. There is a provision about keeping invoices. Then there is the following provision which comes in repeatedly in this case. It is article 3 (5), which provides:

> "Article 4 does not apply to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purposes of this order or may recognise as sufficient for those purposes."

That is the condition imposed by the Treasury under section 14 (1) of the Finance Act 1972.

The conditions imposed by the commissioners were imposed by a notice which was put out by them. It is Notice No. 712. That notice, which was issued in February 1973, contained provisions by which the commissioners insisted that proper books should be kept. Paragraph 18 said:

> ". . . registered dealers and auctioneers of eligible articles must keep a stock book or similar record showing the information in appendix C. The description to be recorded in Part A of the stock record must be sufficiently detailed to identify the individual article and, for antiques, it must include the details indicated in paragraph 5 concerning their age."

In appendix C there is a description of the books which the dealer has to keep and all the items which he has to note down. He has to show the following 13 matters:

> "1. Stock number in numerical sequence. 2. Date of purchase. 3. Purchase invoice number. 4. Seller's name and address. 5. Description of the article (including, for antiques, age details). 6. Date of sale. 7. Sales invoice number. 8. Buyer's name and address. 9. Purchase price (inclusive of any tax). 10. Gross selling price (inclusive of any tax), or method of disposal if not sold. 11. Margin on sale—item 10 less item 9. 12. Tax rate at time of sale. 13. Tax on margin due to Customs and Excise."

It is said that a dealer had to keep a record of all those things as a condition of getting the reduced rate of tax.

I do not know how much Mr. Corbitt understood as regards all those requirements. He is a one-man business. He put in his three-monthly returns, as he was required to do. He entered quite a large amount of money which was payable by him for value added tax. He did this for three years from 1973 to 1976. But then in 1976 Mr. Duffy, an officer of the Customs and Excise, visited his premises and looked at all his books. Mr. Duffy did not think that Mr. Corbitt had kept them properly. He thought that he had claimed for articles which were not eligible for the reduction. He thought that he had claimed for articles which were less than a hundred years old, and so forth. As a result, the officer of the Customs and Excise made an increased assessment. But that is one category which does not arise today.

The other trouble was this. The officer said that the books and the records of account did not comply with the requirements of the notice.

A They did not include all the 13 items which I have mentioned. On that account, the officer of the Customs and Excise said that Mr. Corbitt had not fulfilled the conditions on which he could get a reduction. The commissioners said that, in those circumstances, he was not entitled to any reduction on any items. He would have to pay the 8 per cent. on the full selling price.

There was a lot of to-ing and fro-ing, discussions and looking into B the accounts: and eventually (and I will miss out a good deal) the officers of the Customs and Excise came to the conclusion that Mr. Corbitt had not paid enough. They said that he should pay £770 more because he was not entitled to a reduction. So they made an assessment (and this is important) of the amount which they said he had to pay.

Mr. Corbitt was very upset about this assessment for a further £770. C So he appealed to the value added tax tribunal. The tribunal has been set up by the statute to hear appeals especially on matters of additional assessment like this. It is section 40 (1) (*b*).

When Mr. Corbitt appealed to that tribunal against the additional assessment, the commissioners took an objection. They said that the tribunal could not look into all these books to see whether they had been properly or sufficiently kept so as to correspond with the requirements. D They said that they, the commissioners, had an entire discretion of their own. If they said that the books were not sufficiently kept, their dictum was decisive and could not be made the subject of an appeal. They put in a statement of case in which they said:

> ". . . their refusal to so recognise is a matter entirely within the exercise of their discretion and not subject to review by the E tribunal."

The tribunal heard argument on that point. Having heard argument, they held by a majority that they were not limited in this way. They held that they could look into these records and see whether or not they were properly kept, and the like. I will read a few sentences from the tribunal's decision. They said:

F

> ". . . in this case the tribunal has express jurisdiction over the subject matter of the appeal, namely an assessment and it is but a short step from there to hold, as does the majority of the tribunal, that once we have jurisdiction over the subject matter of the appeal, then we have power to go into all matters relating to that appeal de G novo and to substitute our decision for that of the commissioners."

There was an appeal from that decision of the tribunal to Neill J. On June 13, 1978, Neill J. held that the tribunal was wrong; that it was entirely within the commissioners' discretion to say whether these books and records were properly kept or not; and that the matter could not be inquired into thereafter by the courts of law.

H Mr. Corbitt now appeals to this court from Neill J.'s decision. We are told that he is supported by the National Federation of Self-Employed and Small Businesses Ltd. because they consider this an important case. They regard it as a test case.

I may say incidentally that other tribunals have held the same way as this tribunal. They have held that they do have a power to look into the whole matter again on an appeal. There has been an interesting and valuable decision by the chairman of the London Value Added Tax Tribunal, Lord Grantchester, in *Miller* v. *Customs and Excise Commissioners* [1977] V.A.T.T.R. 241, where the tribunal said, at p. 251:

> "We take the view that, as a trader has the statutory right to appeal to a tribunal against an assessment, and as an assessment can be made on a trader because the commissioners do not regard the records and accounts which he has kept as sufficient, the tribunal can and should itself consider whether it regards the records and accounts kept as sufficient. In other words, we consider that any decision of the commissioners in the exercise of their discretion under the Treasury order is subject to review by a tribunal."

After quoting some cases, they went on to say:

> "Any other conclusion might nullify the jurisdiction of these tribunals for practical purposes because the Act is so worded as to give the commissioners a discretion at some point in relation to each head of appeal to a tribunal."

So the question for us to decide today is whether the tribunals (and I believe there are three of them) were right in saying that they are entitled on appeal to look into all the matters, just as the commissioners did below; or whether they are restricted and limited and cannot look into the question of whether the books and records of account have been properly kept.

The matter has been the subject of considerable debate before us. I will read the relevant sections of the Finance Act 1972. Section 40 says:

> "(1) An appeal shall lie to a value added tax tribunal constituted in accordance with Schedule 6 to this Act against the decision of the commissioners with respect to any of the following matters:— . . . (*b*) an assessment under section 31 of this Act or the amount of such an assessment; . . ."

That is a perfectly general appeal from a lower tribunal. It is not limited to points of law. The appeal is completely at large. It virtually amounts—as in the case of the old quarter sessions and many other bodies—to a rehearing.

It is an appeal from an assessment or the amount of it. So I turn back to section 31 which deals with assessments. That says:

> "(1) Where a taxable person has failed to make any returns required under this Part of this Act or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the commissioners that such returns are incomplete or incorrect they may assess the amount of tax due from him to the best of their judgment and notify it to him."

It seems to me that under section 31, in making an assessment or the

A amount of it, it is the very function of the commissioners to look into the documents to see whether they are sufficient so as to enable the claim to be verified or not. It seems to me, on the ordinary reading of the Act, that equally on appeal the tribunal can do likewise. There can be no doubt about it, except for the wording of the Order. Mr. Woolf put it exceedingly well before us. So much so that in the beginning he almost persuaded me. He said that the Order is really delegated legis-
B lation—delegated by Parliament itself to the Treasury. It was put into the statutory instrument: and the Treasury delegated a part of it to the commissioners. He said that they delegated the jurisdiction under article 3 (5); and that delegated legislation of this kind is not the subject of an appeal.

I do not think that argument should prevail. In my view, the
C notices issued by the commissioners are not in the nature of legislation at all. They are notices which the commissioners set out in an administrative capacity saying what they want in the records and books. It seems to me that article 3 (5) is directory. It is telling the traders what books they have to keep and what records and accounts they have to keep if they wish to be qualified for this reduction. It is a direction to them, telling them what to do: but a failure to do it is not necessarily
D fatal. If it were mandatory, it might be. But a failure to do it is not necessarily fatal: it does not go to the whole root of the matter or upset it altogether. I would look at it quite broadly. It seems to me that whatever the commissioners do when they are making an assessment, as they did in Mr. Corbitt's case—when they go through the books, the records and accounts—when they say, "You have not got this detail
E in; you have not got the purchaser's name and address in," etc.—they may be making a just criticism. They may disqualify Mr. Corbitt from obtaining a reduction if they so view it, but their decision is not a matter entirely within their discretion. It is a matter which can be reviewed by the tribunal of appeal. In other words, the appeal provisions in section 40 (1) (*b*) coupled with section 31 are so wide that, in my opinion, it enables the tribunal of appeal to look at everything de novo just as
F the commissioners did when they came to make their assessment on Mr. Corbitt.

For these reasons, I find myself in agreement with the three tribunals who have so held in the past, and in particular with the judgment and reasoning of Lord Grantchester in the *Miller* case, to which I have already referred. I would, therefore, be in favour of allowing the appeal
G and holding that the commissioners have not got this unfettered discretion which they sought to raise in the case.

EVELEIGH L.J. As I read article 3 (5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972, it lays down a condition precedent which has to be fulfilled before the taxpayer can
H take advantage of the reduced rate of tax. It shines through, in my opinion, that article 3 (5) is designed to prevent abuse. I am not concerned to consider the question of abuse in the present case. I am concerned to construe an Act of Parliament and statutory instrument

and to answer the stark legal question with which I am faced. I regard it, as I have said, as a condition precedent. It has two limbs. Article 3 (5) reads as follows:

> " Article 4 does not apply to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purposes of this Order or may recognise as sufficient for those purposes."

I would emphasise the repetition of " those purposes," which to my mind equate these two methods of identifying conditions as being those which are imposed in pursuance of section 14 (1). I do not regard the second limb (as I call it) as intended to give power to the commissioners to absolve a trader from the necessity of keeping proper books. Article 3 (5), as I see it, has its eye to the future. It announces to a trader what it will be necessary for the trader to do in order to take advantage of the reduced tax scheme. The main condition is that he shall keep records and accounts. Those records and accounts are then identified. They shall be such as the commissioners may specify in a notice published by them " for the purposes of this Order " or they shall be such as the commissioners " may recognise as sufficient " for the purposes of this Order. Thus, I see them as two limbs playing an equal role. If the first limb is a public announcement by notice to show what will be required, so, too, do I regard the second limb as being notification of that which will be required.

The second limb is designed, as I see it, to give flexibility and to accommodate a trader in somewhat peculiar or special circumstances. Read in this way, article 3 (5) is clearly in conformity with the discretion given to the Treasury and to the commissioners by section 14 (1) of the Finance Act 1972. That subsection reads:

> " The Treasury may by order make provision for securing a reduction of the tax chargeable on the supply of goods of such descriptions as may be specified in the order in cases where no tax was chargeable on a previous supply of the goods and such other conditions are satisfied as may be specified in the order or as may be imposed by the commissioners in pursuance of the order."

Thus, the Treasury have a discretion to choose the kind of goods that shall be subject to the reduced tax, provided those goods of course are such that no tax was chargeable on a previous supplier. The Treasury also are empowered to impose conditions. They are by article 3 (5) imposing an overriding condition that books shall be kept. But the commissioners have the duty and the power to specify what kind of books will suffice; and this they do either by notice or, in a particular case, by recognising a certain bookkeeping system as sufficient for the purposes of the Order. In laying down the conditions which have to be fulfilled for the books to be of the appropriate type the commissioners are, as I see it, acting under the last words of section 14 (1). They are imposing conditions " in pursuance of the order "—that is to say, the Order of 1972.

A I do not myself regard this Order as directory. It is not stating what shall be done in order for accrued rights to be enforced. It is laying down a condition precedent before any right arises. In that connection I would have regard to what Salmon L.J. said in *Reg.* v. *Inspector of Taxes, Ex parte Clarke* [1974] Q.B. 220, 229:

> "The subject, by failing to comply with a directory provision in the statute, cannot be deprived of his right to come to the High B Court by way of case stated; nor can the Crown. This, I think, is of very great importance, because, as I have always understood the law, and indeed as it has been stated in *Howard* v. *Bodington* (1877) 2 P.D. 203 and many other cases, non-compliance with a provision which is merely directory, although, as Mr. Medd pointed out, it may render you, if the statute says so, liable to a C penalty, does not vitiate anything that follows. Compliance with a directory provision cannot be a condition precedent to your rights. If non-compliance with a provision were to take away rights, the provision would necessarily be mandatory."

I appreciate that in quoting that passage I may be accused of arguing in a circle—not putting the egg before the hen or the hen before the egg. D However, that passage does, in my opinion, indicate what a directory provision is, particularly when it refers to not invalidating "that which follows." In the present case "that which follows" is wholly dependent upon that which has gone before; and the statutory instrument, to my mind, is worded in that way.

It is argued by Mr. Goldberg that so to construe it would deprive the E taxpayer of the right of appeal specifically given to him by section 40 of the Finance Act 1972. That section reads:

> "(1) An appeal shall lie to a value added tax tribunal constituted in accordance with Schedule 6 to this Act against the decision of the commissioners with respect to any of the following matters:— . . . (*b*) an assessment under section 31 of this Act or the amount F of such an assessment; . . ."

One can summarise the position by saying that there is power to assess when satisfactory records have not been produced.

I in no way take the view that the tribunal is unable to look at the records in order to decide whether or not they comply with the necessary requirement—whether or not they are satisfactory in the sense G that they are what the statutory instrument requires. Therefore the tribunal is entitled to ask did the dealer keep such records—that is to say, the records specified in the published notice—or, if this be a case where there had been prior recognition of these accounts, did he keep the records which were acknowledged to be sufficient by the recognition that was given? I am not impressed with the argument of Mr. Goldberg where he said that a slight error, a mere omission of some small H matter, would invalidate the whole set of books. I do not believe that that is the proper approach at all. The question is, did he keep the required records and accounts? It does not say did he keep them with

100 per cent. accuracy. It is a question of degree in every case, and a question to be answered in a common sense way as so many such questions are answered in these courts. Can it be said that he kept the records? He either did or he did not. Of course, in relation to one particular item, if the necessary information does not appear in the record, then I would apprehend that the reduced rate of tax would not be allowed in respect of that particular item, but I cannot see that the failure to give the necessary information for one item would invalidate the dealer's claim to the lower rate of tax in respect of other items which have been properly recorded. So I do regard the tribunal as having the power to look at the books, but to look at the books for the purpose I have stated. They have no right, as I see it, to substitute their view for that of the commissioners as to what shall be kept. They can inquire whether that which the commissioners asked for has been kept but they may not substitute their own views as to what is sufficient. I do not regard them as a proper tribunal for such an exercise, at least not without a great deal of evidence as to the pros and cons and to the possible methods of tax evasion and fraud which exist and I assume are known to the commissioners far better than to the tribunal.

Furthermore, one has to bear in mind in a case like this that a great deal of administrative work—an extra heavy load—is placed upon the administration when an exception is made. I am not influenced in my decision by that fact in any way at all. I have tried to approach this case as a simple exercise of the construction of statutory instruments. But, if hardship is invoked, as it was in argument in this case, I would say that there are arguments on both sides.

Finally, one should not lose sight of the fact that it was conceded by the dealer that he did not keep such records as were required. In his case only the published notice was relevant, and he conceded that he did not comply with that. There has been no special recognition of other books which would suffice.

I, therefore, would dismiss this appeal.

SIR STANLEY REES. Unhappily this court is divided in its views as to the answer which should be given to the questions raised in this appeal. The case raises a short but difficult point as to the right of appeal under section 40 (1) of the Finance Act 1972, which provides:

> "An appeal shall lie to a value added tax tribunal constituted in accordance with Schedule 6 to this Act against the decision of the commissioners with respect to any of the following matters:— . . ."

and one of the following matters under the heading "(*b*)" is "an assessment under section 31 of this Act or the amount of such an assessment; . . . ."

The value added tax tribunals are established by the terms of the statute, and their composition and procedure is set out in Schedule 6. It is useful to recall that the chairman of these tribunals is a lawyer appointed by the Lord Chancellor. I also deduce from the evidence placed before us that they have an opportunity, presumably regularly,

of considering assessments and other matters which arise pursuant to the operation of the value added tax system. It is plain that in the course of any hearing which the tribunal may undertake it is open not only to the taxpayer but to the commissioners to put forward detailed arguments as to every matter which is relevant to the appeal before the tribunal. It would, therefore, be readily open to the commissioners fully and at length to present to the tribunal the dangers which might follow if particular courses were taken in regard to books and records and accounts. Therefore, it seems to me that the tribunals which have been set up by the Act are already well qualified to consider every relevant aspect of this particular tax system; or, if they are not, they can be very fully briefed at any hearing before them.

So much for the tribunals. It is not, as I understand it, disputed that the form which a hearing takes before the tribunals is a full rehearing of the whole matter which arises for decision in the appeal.

In this case the matter which arose for decision before the tribunal was an assessment made under section 31 of the Finance Act 1972 by the commissioners and therefore fell precisely within the terms of section 40 (1) of the Act which gave the right of appeal. The subject matter of this appeal being an assessment under section 31, the dealer desired that the tribunal should review and decide the issue between himself and the commissioners with regard to that assessment. I, therefore, approach the short but difficult point in this appeal on the basis that the matter which arises for decision is quite simply an assessment under section 31.

The facts give rise to a presumption, which I accept, that the dealer in this case did not keep books which were prescribed by the statutory instrument enacted by the commissioners, and that such books as he did keep were not kept in conformity with the detailed provisions in appendix C to which Lord Denning M.R. has already referred in detail. I must now turn to the provisions of article 3 (5) of the Order of 1972. Although that article has been read twice already, I feel bound to read it again. It provides in effect that the tax scheme of which the dealer in this case seeks to avail himself under article 4 of the Order shall not apply

> "to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purpose of this Order or may recognise as sufficient for those purposes."

It is conceded that the dealer did not in this case keep records which conformed to the conditions specified in the notice published by the commissioners. It is his case that the commissioners' decision not to recognise as sufficient such records as he did keep is properly the subject of review by the tribunal. The commissioners contend that that is not a matter which is the subject of a proper review by the tribunal and, in effect, on a proper consideration of the statutory instrument and the relevant section, that is a matter exclusively within the jurisdiction of the commissioners.

As Neill J. plainly indicated there is a powerful argument in favour of that view. Nevertheless, I am unfortunately unable to share the view of Eveleigh L.J. that no recognition may be given to any books, records and accounts unless the recognition has taken place prior to the claim by the dealer for relief of value added tax. This led Eveleigh L.J. to the conclusion that no dealer could claim exemption under the provisions of article 4 unless the system of books which he kept either precisely matched the system laid down by the commissioners or that he followed a system which differed from that prescribed but which had previously been recognised and approved by the commissioners. Unhappily, I find myself unable to share that opinion. In my view, article 3 (5) would enable the commissioners to inspect a set of records, accounts and books which have been kept by the registered dealer but not in the prescribed form, but which in the view of the commissioners was sufficient for the purposes of article 3 (5). It would not, in my judgment, be right to confine the construction of the second limb of article 3 (5) to recognition which precedes the claim for exemption. I think that would be putting too much of a fetter upon the discretion of the commissioners. Regretfully, therefore, I am not able to share the opinion of Eveleigh L. J. upon that point.

In the instant case, as I have stated, it is accepted that the dealer did not keep such records and accounts as were specified in the appendix to the commissioners' notice and that the commissioners were not prepared to recognise such records and accounts as he did keep when they were presented to the commissioners' representative when the claim for relief was made. The commissioners took the view that those records were not sufficient. The argument for the commissioners, if I may say so, was summarised most usefully by Neill J. in these terms, ante, p. 28E–H;

> "The contentions which have been put forward on behalf of the commissioners can be summarised in this way. Mr. Woolf's primary submission is that the power which is given to the commissioners under section 14 (1) is a statutory power—in effect a power of delegated legislation—giving the commissioners the right to impose conditions which have to be complied with by the trader if he is to fall within the terms of the scheme. That being a power which is given to the commissioners, it is plain from the terms of section 14 itself that that is not something which is subject to review by the appellate body. He says that these are conditions which may be imposed by the commissioners and that it is clear that the criteria which they lay down in, for example, Notice No. 712, are not amenable to any review by anybody else. Moreover, that principle applies not only to the general notice but also to any discretion which the commissioners may exercise under the concluding words of article 3 (5). Thus the question as to whether they recognise other records as sufficient is a matter entirely for them. He says that this authority is not one which one could expect to be subject to an appeal and he drew my attention to other provisions of section 40, to which I must come in a moment, where,

A he says, there may be a general right of appeal to the tribunal which does not exist in the case of this particular provision."

I, like Lord Denning M.R., was much impressed by the arguments of Mr. Woolf. Mr. Woolf strongly argued that the commissioners were exercising a legislative function not only in drawing up the notice but also in deciding upon the second limb of article 3 (5) as to whether B books which did not precisely match the prescribed ones were sufficient for the purpose of the Order. I am not able to accept that view. I think it is too narrow. He also argued that the trade which is carried on by some of the persons who deal in coins, medals and similar articles is open to abuse, and particularly to tax abuse; and he argued, therefore, that the bookkeeping requirements are vital and that the duty of considering in any particular case whether books and accounts are C sufficient for the purpose of the article should not be at the discretion of the tribunal but should remain the exclusive right of the commissioners.

I have already indicated some factors which have driven me to the conclusion that all matters of importance in regarding any system of accounts which is the subject of an appeal would either be known by the tribunal from previous experience or could be put forcibly before D them point by point in regard to any system of records which is the subject of an appeal. For that reason, I think the tribunal would be as qualified as the commissioners, with the aid of the evidence and arguments placed before them, to decide the question.

Mr. Woolf argued that the records kept by a dealer must either match those set out in the order or, if different, have been approved in advance. That view is one which has been accepted by Eveleigh L.J., E and I have already indicated that I am not able to share or accept it.

Mr. Woolf also submitted that it would be undesirable to permit the tribunal to specify what records would be sufficient to satisfy the terms of the Order if they were not precisely kept in the prescribed form. In my view, if there is an appeal and the matter is fully argued on both sides, the tribunal would answer the question before it on the facts F before it and give its opinion.

It may not be irrelevant, perhaps, to observe in this case that so far as I know in those cases in which the tribunal thought it right to examine the books of an appellant dealer the tribunal has held in each case to which we have been referred that the books were insufficient for the purposes of the Order. Having some knowledge now of the G requirements of the commissioners which appear to me to be fully justified, it may well be that the number of occasions on which any tribunal would find that the books kept which did not match those prescribed, but should be recognised, are likely to be few.

In my judgment, the question which is presented to this court can be stated very simply, namely, is there to be any restriction upon the right H of appeal to the tribunal in respect of an assessment which arises under section 31 in the circumstances of the present case? In my judgment, the approach to that question should be to have regard to the intentions of the legislature as derived from the legislation which is before us and

to consider whether the grounds of appeal which are permitted by section 40 should be restricted in the way argued on behalf of the commissioners. In my judgment, it should not. I think as a matter of policy it is valuable to bear in mind the words of Lord Goddard C.J. in *Stepney Borough Council* v. *Joffe* [1949] 1 K.B. 599. This passage has been referred to on a number of occasions, and was also considered by Neill J. in his judgment. The passage, at p. 602, is in these terms:

> "It is said that, on an appeal under section 25 (1) of the London County Council (General Powers) Act 1947 against the revocation of a licence under section 21 (3) (*a*) of that Act on account of misconduct or for any other sufficient reason rendering the licensee unsuitable to hold such licence, the magistrate is not entitled to substitute his opinion for the opinion of the borough council; that all he can decide is whether there was evidence upon which the council could come to that conclusion. I find myself quite unable to accept that argument. If that argument be right, the right of appeal, which is given by section 25 against the revocation of a licence on any ground mentioned in section 21 (3) (*a*) would be purely illusory."

In the instant case, if the commissioners are right, if a trader did not keep his books in the form prescribed by the Order and the commissioners decided that they would not recognise the books and accounts which he did keep as being sufficient for the purposes of the Order, then the tribunal would be prohibited from considering the facts at all. In my judgment, that does not accord with what I deduce is the policy of the Act in setting up the tribunal.

I consider also that the approach to this problem to which I have been driven is also given support by *Sagnata Investments Ltd.* v. *Norwich Corporation* [1971] 2 Q.B. 614 in the judgment of the majority of that court and in particular in the judgment of Edmund Davies L.J., which I need not read.

The chairman of the tribunal from which this appeal comes distinguished the decision in *Barton Townley (Barrow) Ltd.* v. *Customs and Excise Commissioners* (unreported), February 5, 1976, in these terms, with which I agree:

> "The majority of the tribunal, however, while accepting the principle underlying the *Barton Townley* decision considers that it is distinguishable. The ratio of the decision in that appeal was that by refusing to sanction a belated claim, which was itself the disputed decision, the commissioners had prevented any question of the 'amount of input tax' from arising at all for the purposes of section 40 (1) (*d*) of the Finance Act 1972. Since the matter never got into section 40, which alone defines the appellate jurisdiction of these tribunals, the tribunal did not have jurisdiction. The tribunal arrived at this conclusion by asking itself the question: What is the decision of the commissioners against which this appeal is brought? The majority considers that this is a question which may usefully be asked in the instant appeal: and the answer, quite

clearly, is that it is an assessment for £3,389·65 reduced to £2,646·85. And that is an appealable matter under section 40 (1) (*b*) of the Finance Act 1974."

I also think that the decision of the London Value Added Tax Tribunal in *Miller* v. *Customs and Excise Commissioners* [1977] V.A.T.T.R. 241 was well-founded for the reasons stated by Lord Grantchester.

In those circumstances, I find myself driven to the conclusion that this appeal should be allowed.

Appeal allowed with costs.
Leave to appeal on undertaking as to costs.

Solicitors: *Kingsley, Napley & Co. for Nicholson, Martin & Wilkinson, Newcastle-upon-Tyne; G. F. Gloak.*

C. N.

APPEAL from the Court of Appeal.
The commissioners appealed.

Peter Scott Q.C., *Simon D. Brown* and *Andrew Collins* for the commissioners. (1) The provisions of article 3 (5) of the Order of 1972 and Notice No. 712 constitute requirements the compliance with which is a condition precedent to the right of a taxable person to take advantage of the scheme set out in the Order. (2) The tribunal had no power to determine in an appeal brought under section 40 (1) (*b*) of the Act of 1972 whether the commissioners ought to have permitted the taxable person to take advantage of the "margin" scheme notwithstanding that the records and accounts kept by him did not comply with their requirements and the commissioners had not recognised those records and accounts as sufficient for the purposes of the scheme. (3) The tribunal had only the power conferred on it by section 40 (1) (*b*) and did not have a general power to review all the requirements or decisions of the commissioners that had preceded the assessment made under section 31 of the Act of 1972.

Section 14 (1) of the Act of 1972 envisages that the conditions will either be specified in the order or imposed by the commissioners in pursuance of the order. A condition specified in the order and one imposed by the commissioners in pursuance of the order therefore have equal effect. Each is a mandatory requirement and has the force of legislation, which Parliament has delegated to the commissioners.

Since the primary system of collecting value added tax is one of self assessment, and "margin" schemes such as the one in issue in the present case involve reliefs that may be improperly claimed, it is necessary in fairness to all that proper records and accounts should be kept by the taxable person of all transactions that may give rise to a claim for relief. So the detailed requirements as to keeping of records and accounts are specified by the commissioners in Notice No. 712 as a condition precedent to taking advantage of the scheme in question. The words "or may

recognise as sufficient for those purposes," which constitute the second limb of article 3 (5) of the Order of 1972, in their context are intended to provide in any particular case a modification of a specification in a notice and must, therefore, like the general specification in the notice, refer to advance approval by the commissioners of a method of keeping records and accounts. Article 4 (1) of the Order of 1972 provides that, where it applies to a supply of goods, " tax shall be chargeable " on the margin. Article 3 (5) provides that article 4 (1) does not apply unless the taxable person keeps the necessary records and accounts. Since by virtue of sections 2 (2) and 7 of the Act of 1972 tax becomes chargeable on the supply of the goods at the time when that supply is made, the terms of articles 3 (5) and 4 (1) preclude any recognition of records or accounts for the purposes of eligibility for the " margin " scheme after the supply has been made. By that time tax has already become chargeable. Notice No. 712 makes plain to the taxable person what is required and that failure to comply may make him accountable for tax on the value of his sales. Even if Sir Stanley Rees's construction of the second limb of article 3 (5) is correct and it does empower the commissioners to give retrospective recognition to records or accounts in a particular case, such recognition is still a condition precedent to the right to take advantage of the " margin " scheme.

The tribunal was created by the Act of 1972 and its powers are limited and defined by that Act. It is not, as suggested by Lord Denning M.R., ante p. 36F, a true analogy to liken its powers to those that used to be exercised by quarter sessions on an appeal. Parliament could have provided, but did not provide, that there should be a right of appeal to the tribunal against the commissioners' decisions made in pursuance of section 14 (1) or article 3 (5). In order to arrive at its decision on the appeal, the tribunal was entitled to look at the records kept by the taxable person to see if he had kept records that either (a) complied with the requirements of Notice No. 712 or (b) had been recognised by the commissioners as sufficient.

For that purpose it could naturally inspect such records and accounts as had been kept by the dealer. The purpose of such inspection could only be to determine whether those records and accounts did in fact conform to the requirements that had been made by the commissioners or were such as had been recognised by the commissioners as sufficient even though they might contain clerical or minor errors.

The tribunal could not decide that records and accounts that did not conform to such requirements nevertheless gave sufficient information and should have been recognised by the commissioners. There is a distinction between the keeping of the requisite records and the keeping of the requisite records properly. The tribunal has no power to substitute its own decision as to what records should be required for that of the commissioners who rely on the judgment of Eveleigh L.J. If Parliament had intended the tribunal to have the wide powers suggested to review all decisions of the commissioners, it would have said so in clear terms. Section 40 of the Act of 1972 makes plain that the tribunal's powers are confined to the various specific matters set out in subsection (1). Even

A if Lord Denning M.R., ante, p. 37C–D, was correct in deciding that the requirements of Notice No. 712 were directory, in the sense that failure to comply with them was not fatal to advantage being taken of the "margin" scheme, it was for the commissioners and no one else to decide whether they would recognise such records and accounts as had been kept as sufficient. Section 40 (1) does give rights of appeal against certain specified exercises by the commissioners of their discretion: see, B for example, section 40 (1) (*f*), (*g*), (*gg*), (*h*) and (*i*) as added by Finance Act 1978, s. 11 (4). No such right is given under section 40 (1) (*b*), and no general power is given to the tribunal to substitute its own discretion for that of the commissioners in every case and in respect of every appeal. It can only enter on that exercise if section 40 (1) specifically confers that power. Otherwise, it is limited to determining C whether what was done or omitted to be done by the taxable person falls within or without the particular requirement of the commissioners in question.

The wording of the Order of 1972 is entirely consistent with section 14 of the Act. It is conceded that a decision of the commissioners under the second limb of article 3 (5) would be subject to review on the principles in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury* D *Corporation* [1948] 1 K.B. 223. The commissioners do not seek to argue that there can be no challenge to what the Treasury does by statutory instrument, or to what the commissioners do by notice. These can be challenged on well-recognised principles. The present case is not, however, about such a challenge. It is attempt to take advantage of the "margin" scheme despite the mandatory requirements (in the sense E that any condition precedent is mandatory) of article 3 (5). As to section 40, there will be cases—see, for example, paragraph 7 of Schedule 1—where there will be an appeal against the exercise by the commissioners of their discretion. The question then is: on what basis can the tribunal substitute its discretion for that of the commissioners? The right to appeal would not be nugatory if the commissioners are right: there are F many things that can be examined on appeal.

It would be odd if the commissioners' decision with regard to records under Notice No. 712 were to be regarded as *the* decision with regard to the amount of assessment when no assessment had at that stage been made.

Neill J. and Eveleigh L.J. were right. Lord Denning M.R., gives no G reason for saying that the words of article 3 (5) are directory except to say that failure to comply does not go to the whole root of the matter, ante, p. 37D. It is clear, however, that those words are an essential part of the statutory scheme. The fact that the commissioners may have a discretion cannot alter the character of the statutory instrument from mandatory to directory. It is important that the appellate and supervisory H jurisdictions should be kept distinct, otherwise the appellate jurisdiction is misused. It may be attractive to combine them, but it is not permitted by the statute. One cannot get away from the opening words of article 3 (5): "Article 4 *does not* apply . . . *unless*. . ."

The commissioners maintain their submission that recognition of the sufficiency of records must predate the supply in question. Section 14 concentrates on the supply of goods, and tax is chargeable at that time. There must always come a point, whether the provisions as to records are mandatory or directory, when they have an effect on whether the dealer can take advantage of the margin scheme.

The commissioners adopt what Eveleigh L.J. said, ante, p. 39A.

David Goldberg and *John Walters* for the dealer. When the officer of the customs and excise called on the dealer and inspected his records, he made two decisions: (i) under the first limb of article 3 (5) of the Order of 1972, that they were not records that complied in every detail with the terms of Notice No. 712; (ii) under the second limb of article 3 (5), that they were not such as the commissioners should accept as sufficient for the purposes of the Order. It was not until the second decision was made that the commissioners could decide to assess the dealer under section 31. Accordingly, the decision that the records were not good enough for the second limb of article 3 (5) was necessarily a decision with respect to the assessment subsequently made under section 31 against which the dealer appealed.

As to the first decision of the commissioners that the records were not Notice No. 712 records, it has been conceded at all stages of the case that the dealer could appeal against that decision. Because of the form that the case has taken, that was not the appeal that was brought. The appeal was against the second decision: not to accept the records as sufficient. If the dealer had considered the matter more carefully before the tribunal, he might have said: "these are Notice No. 712 records—albeit not perfect in form—and you should accept them as such." It is conceded by the commissioners on this appeal that there could be an appeal against that. That is the background against which the right of appeal that the dealer seeks to exercise should be considered. The commissioners' argument on this appeal starts from a premise of sophistry that, in the context of value added tax, which is an everyday matter, cannot be right. In substance the jurisdiction that the dealer is contending for is the same as if he had said that his records should be accepted as being of the right type even though not perfect in every detail. It cannot be right, in the context of a tribunal where there is no obligation to have legal representation, that the taxpayer must be careful how he puts his case, yet that is the result of the commissioners' argument.

The second limb decision is of the same character as the first. If there is an appeal against the first, it must follow that there is an appeal against the second.

The commissioners say that they never made the second decision, because the ability to operate a margin scheme depends on a condition precedent. Secondly, they say that there can be no appeal against a delegated legislative decision. But these arguments are wrong. There is no condition precedent, first because this does not accord with what actually happens in fact in these cases. That was the reason why this argument was not put before the tribunal. Secondly, it leads to the concept of a retrospective condition precedent, which is a contradiction

A in terms. Thirdly, the condition precedent argument is inconsistent with and repugnant to the whole scheme of value added tax. Fourthly, it leads to an argument in a circle, viz., that there can be no appeal because satisfaction of article 3 (5) is a condition precedent; satisfaction of article 3 (5) is a condition precedent because there can be no appeal. Fifthly, if article 3 (5) were a condition precedent it would be ultra vires.

As to the legislative decision argument, first, neither Notice No. 712 B nor the recognition of records, in specific cases is legislative in character. Secondly, even if these are legislative in character, nothing as a matter of general law or in any other way prevents there being an appeal against a legislative act. Thirdly, if that is wrong, one cannot characterise an act as administrative or legislative until one has decided whether there is an appeal from it.

C Once it is seen that the commissioners' arguments are wrong, one has the situation that they decided not to accept the dealer's records; that was a decision with respect to an assessment; therefore, there is a right of appeal.

As to whether article 3 (5) is a condition precedent, first, the argument that it is a condition precedent does not accord with what really happened, certainly not with what happened in the present case. The officer took D the view that he could allow the retrospective assembly of records.

The concept of a decision of the commissioners goes right through their case. Article 3 (5) was not regarded as a condition precedent. That is right, and, on the plain wording of section 40, there is an appeal. It is again found in Notice No. 712 that the provisions of article 3 (5) are not considered to be a condition precedent: see paragraph 1 and the last E subparagraph of paragraph 18: " If a taxable person fails to comply with this paragraph or with any other condition of this notice, he *may* be held accountable for tax on the value of his sales." If article 3 (5) is a condition precedent, it will inevitably almost never be complied with. The dealer will have to keep records before the tax point. What is much more likely to happen is that he jots down the details of sales on pieces F of paper and enters them in his stock-book at the end of the day. The commissioners say that that is all right if it is done within a reasonable time afterwards. The concept of a condition precedent to be satisfied within a reasonable time afterwards is so difficult that article 3 (5) cannot be a condition precedent. *Mead* v. *Customs and Excise Commissioners,* December 13, 1977; CAR/77/344 shows how difficult it is to comply if article 3 (5) is a condition precedent. Article 4 does not apply unless G certain conditions precedent are satisfied, and also certain conditions subsequent.

It is conceded that the contents of Notice No. 712 cannot be the subject of appeals to tribunals. An appeal is not given at large, but with respect to an assessment: a particular assessment. Notice No. 712 cannot be called a decision with respect to an assessment.

H The Commissioners have conceded on this appeal that at the very least a decision of the commissioners under the second limb of article 3 (5) could be subject to review on the principles in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

What decision? Where is the duty positively to act if there is a condition precedent? The difficulties that might arise are legion. What, for instance, happens if records are lost or stolen? *Callaghan* v. *Customs and Excise Commissioners*, February 9, 1978; MAN/77/187 (see p. 9) is to the same effect as *Mead.*

It is also to be noted that, in all cases, value added tax is not a burden that falls on the dealer: it is passed on to the ultimate consumer who pays it to the dealer when buying the asset. The margin scheme accordingly does not give any tax benefit to the dealer who uses it. The benefit that he obtains is solely that he may keep his prices lower than he would be able to do if he had to charge value added tax on the full selling price of an item.

Article 3 (4) is obviously a condition precedent, but it is also a condition subsequent. To construe it as a condition subsequent accords with common sense. There is another context that shows that subsequent events can affect the tax point: see *Henry Moss of London Ltd.* v. *Customs and Excise Commissioners* [1979] S.T.C. 657, 658, 659 (under appeal). Liability arises, but quantum may be determined by a condition subsequent. That is coherent and in accordance with common sense; it does not require any sophistry, and it works.

The result of article 3 (5), if it is a condition precedent, is that it would effectively shut out the right of appeal on a matter of charge to tax. It would be ultra vires the commissioners under the order or ultra vires the Treasury under section 14 to lay down conditions that had that effect. The charge to tax arises from a form-filling error. There is no effective right of appeal. That must be ultra vires. The dealer adopts what Sir Stanley Rees said, ante, p. 44D.

The dealer's second basic submission as to whether or not article 3 (5) is a condition precedent is that the provisions of article 3 (5), properly construed, are to be construed as directory and not mandatory and, therefore, cannot be a condition precedent. One should look at the 13 columns of Appendix C to Notice No. 712: not all of them are necessary for the operation of the margin provision. All that is really necessary for the commissioners is that they should be able to ascertain from the dealer's records what the margin was and so on. Of the 13 columns, all that are really necessary for the operation of the margin provisions are 4, 5, 6, 8, 9 and 10. The others are of concern to the commissioners, but not directly relevant to the margin scheme. It would, therefore, be wrong to construe the provisions of article 3 (5) as mandatory. That puts too much reliance on the filling in of forms, not all of which is necessary to the margin scheme.

The Commissioners then say that the decision taken not to accept the dealer's records, or that they were not records as required by Notice No. 712, was a legislative decision. It was not a legislative decision at all. See the judgment of Neill J., ante, pp. 28E–G, 31B–D, where there is a non sequitur between the concession that Notice No. 712 is not appealable and the conclusion (expressed in the passage beginning " . . . it seems to me impossible to contend. . . ." ante, p. 31D) that the decision in this case was not appealable. The reason why an appeal is allowed against

a particular decision is because that appeal is given by section 40: Notice No 712 is not a particular decision and so there is no appeal against it. It is not because the one is legislative and, therefore, so also is the other.

There is no English authority for the proposition that these decisions are administrative and not legislative, but there is Commonwealth authority *Hookings* v. *Director of Civil Aviaion* [1957] N.Z.L.R. 929. The decision being adminisrative, it is not impossible for the tribunal to substitute its discretion for that of the commissioners.

If the keeping of Notice No. 712 records is not an essential condition, and if the commissioners' decision is administrative, not legislative, the commissioners, when they came to inspect the dealer's records, made a decision not to accept them; not to recognise them as sufficient for the purposes of the Order. It is that decision against which the dealer wishes to appeal. The only question that one has to ask is: is that decision a decision with respect to an assessment under section 31 or not? Section 40 (1) (*b*) must include matters anterior to the assessment. A decision "with respect to" the assessment means all decisions inherent in the making of the assessment.

Even if the dealer is wrong on the appellate jurisdiction point, there is a power of review. *Henry Moss of London Ltd.* v. *Customs and Excise Commissioners* [1979] S.T.C. 657; *Cannock Chase District Council* v. *Kelly* [1978] 1 W.L.R. 1 and *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109 show that there may be a right of review where an appeal is given by statute and that that review may be carried out by the appellate tribunal created by statute to which the appeal lies. As to the difficulties that might arise if it were said that any right of review should be exercised by the Divisional Court of the Queen's Bench Division, see *Reg.* v. *Ashford District Inspector of Taxes, Ex parte Frost* [1973] S.T.C. 579.

Scott Q.C. in reply referred to the Tribunals and Inquiries (Value Added Tax) Order 1972, paragraphs 1 (3) and (2) (*a*).

He was not required to reply on the substantive points argued by the dealer.

Their Lordships took time for consideration.

April 1. LORD DIPLOCK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lane. I agree with it and for the reasons which he gives I, too, would allow this appeal.

LORD SIMON OF GLAISDALE. My Lords, I have had the privilege of reading in draft the speech about to be delivered by my noble and learned friend, Lord Lane. I agree with it; and for the reasons which he gives I would allow the appeal.

I only wish to add, my Lords, that this does not mean that the Customs and Excise Commissioners have an unquestionable discretion whether to permit the operation of the "margin" scheme or that the taxpayer is without remedy in the face of an assessment by the commis-

sioners under section 31 of the Finance Act 1972. Parliament has expressly given the commissioners, in effect, the power to lay down the conditions which must be fulfilled if the taxpayer is of right to take advantage of the margin scheme. It has also, in effect, given the commissioners a discretion to allow the taxpayer to take advantage of the margin scheme notwithstanding that those conditions have not been satisfied, provided that his records are, in the opinion of the commissioners, " sufficient."

The taxpayer can appeal to the value added tax tribunal against an assessment under section 31 on the ground that he has, contrary to the conclusion of the commissioners, in fact complied with the stipulated conditions; and, in my view, this would extend to a contention that any deviation from those conditions was de minimis. Moreover, he can, in my judgment, invoke the jurisdiction of the High Court against the exercise of the commissioners' discretion refusing to " recognise " his records as " sufficient "—on the ground, for example, that no reasonable body of commissioners could so exercise their discretion (or that the discretion was otherwise improperly exercised): this is the normal judicial review, within the strict limits which are inherent in such a jurisdiction, of the exercise of a legal discretion by any body whether judicial, quasi-judicial or administrative.

It was part of the argument on behalf of the respondent that not only was the exercise of the discretion which was given expressly to the commissioners by the last words of article 3 (5) of the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972 appealable to the value added tax tribunal, but also that the tribunal was entitled on review to substitute its own discretion for that of the commissioners. The decisions establishing that this is not the correct approach to the review of a discretion and that the jurisdiction is far more limited are so numerous and authoritative that it is not necessary to refer to more than *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, 138 and *Blunt* v. *Blunt* [1943] A.C. 517, 526, 527; see also *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691, 727, 728. It would require clear words to abrogate such a well-established rule of law: *Maxwell on Interpretation of Statutes*, 12th ed. (1969), pp. 116ff. and cases there cited. There are no such words in section 40 (1) of the Act of 1972, which in any case gives the value added tax tribunal a delimited, not a general, appellate jurisdiction. For this reason also I would allow the appeal.

LORD SALMON. My Lords, I have the very greatest respect for the speech of my noble and learned friend Lord Lane. I have the misfortune, however, to be unable to agree as all your Lordships have done with the conclusion that, in the circumstances of this case, the value added tax tribunal (" the tribunal ") had no jurisdiction to entertain the appeal brought by J. H. Corbitt (Numismatists) Ltd. (which I shall call " the taxpayer ") against an assessment made by the Customs and Excise Commissioners. In the ordinary class of case trader A buys goods from trader B who is liable to pay value added tax. A would have to pay B the price of those goods plus the value added tax for which B is liable.

A The goods are then resold by A to his customer C. In such a case A is liable to pay value added tax on the price he obtains for the goods on their resale to C, the price and the value added tax being charged by A against C. A is, however, then allowed to set off against the amount of that value added tax the value added tax which had been charged against B and paid by A. In the not uncommon class of case, however, in which trader A buys from a non-taxable person, A would be at a B serious disadvantage when he sold the goods which he had purchased. He would be liable to pay value added tax with no opportunity to set off against it the value added tax paid by the person from whom he had bought the goods since that person, being untaxable, would have paid no value added tax. Parliament recognised that it would be unfair that a trader who had bought goods from an untaxable person should be in a worse financial position than a trader who had bought goods from C a supplier who was liable to pay value added tax. Accordingly Parliament sought to overcome this anomaly by section 14 (1) of the Finance Act 1972 which reads as follows:

> " The Treasury may by order make provision for securing a reduction of the tax chargeable on the supply of goods of such descriptions as may be specified in the order in cases where no tax was charge- D able on a previous supply of the goods and such other conditions are satisfied as may be specified in the order or as may be imposed by the commissioners in pursuance of the order."

The order made under this section is the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972, which I shall refer to as the Order of 1972. That order introduced what is known E as the " margin scheme " by article 4 (1) which reads as follows:

> " Where this article applies to a supply of goods by any person, tax shall be chargeable as if the supply were for a consideration equal to the excess of—(*a*) the consideration for which the goods are supplied by him; over (*b*) the consideration for which the goods were acquired by him; and accordingly shall not be charged unless F there is such an excess."

Article 3 (5) of the Order of 1972 reads as follows:

> " Article 4 does not apply to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purposes of this Order or may recognise as sufficient for those purposes." G

In my view, although article 3 (5) is in two parts which no doubt may be examined separately, it may and indeed should also be looked at as a whole to ascertain its object. Its object, in my opinion, is to ensure that the taxpayer should keep proper records and accounts for the purposes of this Order, for example, to show that the goods which H the taxpayer bought and then sold were bought from a person who was not liable to pay any value added tax.

I think that the first part of article 3 (5) means that if the taxpayer keeps such records and accounts as the commissioners may specify in a

notice, it could not be argued against him that his records and accounts were inadequate. This, however, could not prevent the point being taken against the taxpayer that his entries in those records and accounts were inaccurate and wrong. Undoubtedly the commissioners did specify, in great detail, by Notice No. 712 the records and accounts which should be kept. It is common ground that this notice was not complied with by the taxpayer. It seems to me that the first part of article 3 (5) may well benefit the taxpayer. If he complies with it by keeping the records and accounts specified in the notice to which it refers and makes the entries in his books accurately and honestly, article 3 (5) will operate in his favour. With very great respect, I think it incredible that any taxpayer would ever ask the tribunal to review the requirements of the commissioners in respect of the records and accounts referred to in the first part of section 3 (5), particularly as the tribunal has no jurisdiction to do so. It seems obvious that no sensible taxpayer, should he appeal against an assessment for value added tax, would seek to rely on the first part of article 3 (5), when, as in the present case, it would be useless to do so, whilst his appeal might well succeed under the second part of that article. I do not think that there is any magic in the word "recognise." In my view, the last eight words in article 3 (5) mean the same as "or may decide is sufficient for those purposes." This is, in reality, a decision on a matter of fact. The question which the commissioners had to decide under the second part of article 3 (5) was a question of fact—were the taxpayer's records and accounts sufficient for the purposes of the Order? The commissioners decided that they were not. The taxpayer contended that they were. If the commissioners were wrong, their assessment against which the taxpayer appeals could not survive. Section 40 (1) of the Act of 1972 gives the taxpayer an absolute right to appeal ". . . against the decision of the commissioners with respect to . . . (*b*) an assessment under section 31 of this Act or the amount of such an assessment; . . ."

A decision of fact, although it may depend to some extent upon an exercise of discretion, is still a decision of fact. If discretion played any part in the decision of the commissioners, which I am prepared to assume without deciding the point, the tribunal would, on an appeal, no doubt ask themselves the question—could any reasonable panel of commissioners have arrived at such a decision? For myself, I do not agree that such a case calls for what is sometimes referred to as supervisory jurisdiction in the High Court. The jurisdiction of an appellate court or tribunal is to decide whether the judgment or decision appealed from is right or wrong. The principles to be applied when a question arises as to the exercise of discretion are well established but do not alter the nature of an appeal court's or an appeal tribunal's jurisdiction. In my opinion, it would be quite unnecessary and wrong for the taxpayer to take the extravagant course of invoking the High Court's jurisdiction to review what the commissioners had done since he has the statutory right of appealing to the tribunal against the assessment and therefore against the commissioners' decision under the second part of article 3 (5).

We are not concerned in the present case to form any view as to whether or not the commissioners or taxpayer will succeed in the appeal before the value added tax tribunal. It has been argued on behalf of the commissioners that they have much experience of tax evasion and the like. No doubt they have, but there is no evidence to suggest that the tribunal has not a like experience. In any event, the criticism of the tribunal made on behalf of the commissioners could not take away the jurisdiction conferred on the tribunal by statute.

I entirely agree with what Lord Grantchester Q.C., the chairman of the London value added tax tribunal said in *Miller* v. *Customs and Excise Commissioners* [1977] V.A.T.T.R. 241, 251:

> "We take the view that, as a trader has the statutory right to appeal to a tribunal against an assessment, and as an assessment can be made on a trader because the commissioners do not regard the records and accounts which he has kept as sufficient, the tribunal can and should itself consider whether it regards the records and accounts kept as sufficient. In other words, we consider that any decision of the commissioners in the exercise of their discretion under the Treasury Order is subject to review by a tribunal . . . Any other conclusion might nullify the jurisdiction of these tribunals for practical purposes because the Act is so worded as to give the commissioners a discretion at some point in relation to each head of appeal to a tribunal."

In the present case, the assessment which the taxpayer wishes to appeal may be based solely on the ground that the commissioners had decided that the records and accounts which the taxpayer had kept were not sufficient. The taxpayer, however, had an absolute right to appeal to the tribunal against that assessment. His only chance of succeeding was to persuade the tribunal that the decision of the commissioners was wrong since the records and accounts the taxpayer had kept were sufficient within the meaning of that word in article 3 (5). For the tribunal to decide the appeal, it would have to examine the taxpayer's relevant records and accounts, and hear the evidence tendered by both sides. The commissioners are no doubt most fair and competent, but sometimes they make mistakes in their assessment. They are also the tax collectors. It would seem to me to be very odd if, in a free society, the tax collector was the sole arbiter of whether his assessment was right and the amount payable by the taxpayer was left solely to his discretion.

For the reasons I have given, I do not believe that the Customs and Excise Commissioners have any such power. I think that they are in much the same position as the income tax collectors. They make the assessments but the income taxpayer has an absolute right of appeal to the special commissioners (an entirely independent body similar to the value added tax tribunals). The decision of tax collectors, whatever the tax is never final and binding, but can always be appealed and dealt with by an entirely independent superior body such as the special commissioners and the value added tax tribunals.

I cannot agree that, because a taxpayer has no appeal against his assessment in respect of what the commissioners may have done under the first part of article 3 (5), it follows that he has no appeal against his assessment in respect of what the commissioners do under the second part of that paragraph. Under that part, they have to decide whether the entries in the taxpayer's books are sufficient notwithstanding that he has not complied with the first part of this article. It may well be that, as I have already indicated, discretion played a part in the decision at which the commissioners arrived on this point. But I do not understand how this could or should deprive the taxpayer of his statutory right to appeal to the tribunal.

I would entirely agree with my noble and learned friend Lord Simon of Glaisdale that it is part of a trite rule of law that on an appeal against a decision which is based on an exercise of discretion, the appellate court or tribunal cannot allow the appeal by substituting its own discretion merely because it prefers its own discretion to that exercised below. But there is also another part of that rule, laid down very clearly by Viscount Simon L.C. in *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, 138:

> "In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified."

Viscount Simon then went on to quote with approval from Lord Wright's speech in *Evans* v. *Bartlam* [1937] A.C. 473, 486, 487:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order . . . Thus in *Gardner* v. *Jay* (1885) 29 Ch.D. 50, 58, Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: 'That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed.'"

The value added tax tribunal would certainly have to apply the whole of the principle to which I have referred in deciding the appeal against the assessment made on the point that the entries in the taxpayer's books were not sufficient. It is impossible even to guess at what conclusion the tribunal might arrive on this point since no one except the commissioners knows what the evidence was upon which they relied. If,

however, the commissioners had made their assessment on the point I am about to mention, it is obvious that the appeal would succeed.

I should mention that the commissioners may have made their assessment not only because they had decided that the taxpayer's records and accounts were not sufficient within the meaning of article 3 (5) but because the taxpayer had failed to do what the commissioners alleged he should have done before tax point. This latter ground upon which the commissioners strenuously relied in this House is fully explained and completely demolished in the speech of my noble and learned friend Lord Lane.

My Lords, I would dismiss the appeal.

LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Simon of Glaisdale and Lord Lane. I agree with them. I would, therefore, allow the appeal.

LORD LANE. My Lords, this is an appeal by the Customs and Excise Commissioners from an order of the Court of Appeal (Lord Denning M.R. and Sir Stanley Rees, Eveleigh L.J. dissenting) which in its turn reversed an order of Neill J. in the Queen's Bench Division. Neill J. found in favour of the commissioners; the Court of Appeal in favour of J. H. Corbitt (Numismatists) Ltd. ("Corbitts"), who deal inter alia in antique coins and medals.

We are here concerned to determine what powers a value added tax tribunal has to review the exercise of the commissioners' discretion under the value added tax legislation contained in the Finance Act 1972 and the regulations and notices made and issued thereunder.

To understand the case it is necessary to give a brief description of the relevant principles of value added tax. In ordinary cases the tax is charged on the supply of goods by a trader as a percentage of the value of the supply by him to his purchaser. That amount of tax is paid by the trader to the commissioners. But he is allowed to set off against the tax so payable the amount of tax previously charged on the goods supplied to him—the "input tax." That works fairly, provided that the person selling to the trader is himself a taxable person. If he is not, then there is no input tax of which the trader can take advantage. Thus in trades where purchases are often made from non-taxable persons (as in the present case) the trader may suffer a disadvantage. His selling price on to his customer for the same article (in the absence of special rules) would have to vary according to whether he had bought from a taxable or a non-taxable person. This would result in unfair anomalies.

The Act of 1972 recognised this difficulty. By section 14 (1) it provided:

> "The Treasury may by order make provision for securing a reduction of the tax chargeable on the supply of goods of such descriptions as may be specified in the order in cases where no tax was charge-

able on a previous supply of the goods and such other conditions are satisfied as may be specified in the order or as may be imposed by the commissioners in pursuance of the order."

Observe that these words expressly provide for two stages of delegated direction: the first under the order itself, the second by the commissioners in pursuance of such order.

One of the orders made under this section was the Value Added Tax (Works of Art, Antiques and Scientific Collections) Order 1972 which gave concessions to traders in the position of Corbitts by means of what has come to be known as a " margin scheme." It is contained in article 4 (1):

> " Where this article applies to a supply of goods by any person, tax shall be chargeable as if the supply were for a consideration equal to the excess of—(*a*) the consideration for which the goods are supplied by him; over (*b*) the consideration for which the goods were acquired by him; and accordingly shall not be charged unless there is such an excess."

Such a scheme is obviously open to abuse, hence the requirement that a trader should keep certain specified records before he can take advantage of it. Article 3 (5) of the Order of 1972 provides as follows:

> " Article 4 does not apply to any supply by a person unless he keeps such records and accounts as the commissioners may specify in a notice published by them for the purposes of this Order or may recognise as sufficient for those purposes."

The commissioners, no doubt aware of the opportunities to abuse the system, did in fact specify their requirements in a notice published by them. This was Notice No. 712 (" the Blue Book "). It is couched in disarmingly simple language and describes the margin scheme and the accounts and records required to be kept to bring a trader within the scheme's ambit. By paragraph 18, if a person fails to comply with any condition of the notice he " may be held accountable for tax on the value of his sales." Corbitts, who are registered dealers, admittedly did not keep the records which are required by the Blue Book (that is, they were in breach of the first half of article 3 (5)). The commissioners, moreover, did not recognise the records in fact kept by Corbitts as being sufficient for the purposes of the Order of 1972 in the exercise of the discretion given to them by the second half of article 3 (5). This is the crux of the appeal. Was this failure or refusal by the commissioners to exercise their discretion in favour of Corbitts something which the value added tax tribunal were entitled to review, or was it an exercise of discretion which was subject to review, if at all, only by way of judicial review in the High Court? The commissioners contend that their discretion is not subject to review by the value added tax tribunal and that accordingly they are entitled to assess the trader for tax pursuant to their powers under section 31 (1) of the Act of 1972:

> " Where a taxable person has failed to make any returns required under this Part of this Act or to keep any documents and afford

A the facilities necessary to verify such returns or where it appears to the commissioners that such returns are incomplete or incorrect they may assess the amount of tax due from him to the best of their judgment and notify it to him."

They did so assess the tax they considered to be due from him.

The relevant provisions as to appeal are to be found in section 40 (1) B of the Act of 1972 as follows:

"An appeal shall lie to a value added tax tribunal . . . against the decision of the commissioners with respect to any of the following matters:—. . . (*b*) an assessment under section 31 of this Act or the amount of such an assessment."

C The value added tax tribunal by a majority came to the conclusion that those provisions entitled them to inquire into all matters leading up to the assessment and consequently to substitute their own views for those of the commissioners as to what records should be recognised as sufficient under the second half of article 3 (5). As already mentioned, Neill J. disagreed with that conclusion, but the majority of the Court of Appeal held that the views of the tribunal were correct.

D A great deal of time was taken up before your Lordships' House with argument as to whether compliance with the provisions of article 3 (5) was a "condition precedent" to taking advantage of the margin scheme, as the commissioners contended. It transpired that the term "condition precedent" was being used to mean that to be effective the records required by article 3 (5) must have come into existence E before the supply of the goods by the trader to his customer (the tax point). Moreover, it was further contended by the commissioners that if a trader required the commissioners to "recognise as sufficient" his records, such recognition to be effective must take place before the tax point.

First of all, that is an unhappy use of the term "condition precedent," F a use which is to be discouraged. Secondly, on the wording of article 3 (5) there is no obligation on the trader under the first half of the paragraph to have the necessary records made out before supply to his customer takes place (even if that were possible, which it probably is not); nor need he under the second half of the paragraph obtain in advance the approval of records which do not comply with the requirements of the Blue Book. His primary obligation is to have the required G records available for inspection when called upon to produce them. If he does not, then the commissioners may in their discretion at any time recognise such records as are in fact available as sufficient for the purposes of the margin scheme.

There were other arguments advanced by Mr. Scott on behalf of the commissioners, no doubt as a result of the judgments of the Court of H Appeal: first, that the provisions of article 3 (5) of the Order were mandatory rather than directory; secondly, that the decision of the commissioners whether or not to recognise a trader's records as satisfactory was in the nature of delegated legislation. I agree with Mr.

Goldberg's contentions on these points. The right question is not whether the order is mandatory or directory, and not whether the commissioners' decision is in the nature of delegated legislation; it is whether upon a true construction of the various provisions which I have already set out the trader is given a right of appeal to the tribunal against an exercise of the commissioners' discretion.

The answer to that question can be briefly stated. It cannot be and is not disputed that the value added tax tribunal has no jurisdiction to review the requirements as to books and records which the commissioners have laid down (as the Act of 1972 authorises them to do) in the various appendices to the Blue Book. Their task on an appeal is confined on this aspect to an inquiry as to whether the trader's books and records in fact comply with the requirements of the Blue Book. That being so, it seems to me to be inconceivable that any different powers should be given to the tribunal in respect of the second half of article 3 (5), namely, the discretion in the commissioners to recognise or not recognise records actually kept as being sufficient. The two halves of the paragraph are part of the same system of approval or non-approval of records, the first set out in terms in the Order, the second in the shape of a more flexible discretion. In neither case is there room for review by the tribunal except on matters of fact as I have indicated. The matter was expressed by Neill J., ante, p. 31B–D in words which I am unable to better as follows:

> "It is common ground between the commissioners and the dealer that in so far as conditions are imposed in Notice No. 712 itself, they are not conditions which the appellate body, the tribunal, can interfere with in the sense that it can substitute its view as to what were the appropriate conditions for the view of the commissioners. The tribunal can certainly consider whether or not those conditions have as a matter of fact been complied with. That is something which would be a suitable subject of an appeal. But what it cannot do is to say, 'We do not think that Appendix A or Appendix B, or whatever it may be, ought to be in that form; it should be in some other form.' Once it is conceded, as I think rightly, that the commissioners are empowered, subject to the control of the Treasury, to lay down the conditions in a general notice such as Notice No. 712 in such a form as they consider proper and that that power is not subject to appeal, it seems to me impossible to contend that the discretion given by the final words of article 3 (5) 'or may recognise as sufficient for those purposes' is a different kind of discretion which is subject to appeal."

There is another aspect of the matter. Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown that the commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to

the tribunal one would have expected clear words to that effect in the Act. But there are no such words to be found. Section 40 (1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction.

I would for these reasons allow the appeal and restore the order of Neill J. The question of costs is governed by the appellants' undertaking to the Court of Appeal to pay Corbitts' costs in this House in any event. There should be no order as to the costs of the hearing in the Court of Appeal.

Appeal allowed.
Commissioners to pay dealer's costs in House of Lords.
No order as to costs in Court of Appeal.

Solicitors: *G. F. Gloak; Kingsley, Napley & Co. for Nicholson, Martin & Wilkinson, Newcastle-upon-Tyne.*

M. G.

[PRIVY COUNCIL]

TERENCE THORNHILL . . . . . APPELLANT

AND

ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO . . . . . RESPONDENT

[ON APPEAL FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO]

1979 Oct. 2, 3; Nov. 27

Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Scarman and Lord Lane

Trinidad and Tobago—Constitution—Human rights and fundamental freedoms—Arrest and detention of suspect—Police refusal to allow detainee to communicate with lawyer—Whether contravention of constitutional rights—Trinidad and Tobago (Constitution) Order in Council 1962 (*S.I.* 1962 *No.* 1875), *Sch.* 2, *ss.* 1, 2 (*c*) (ii), 3

Section 1 of the Constitution of Trinidad and Tobago of 1962 provided:

"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist . . . the following human rights and fundamental freedoms, namely, (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due