**[2014] UKUT 0250 (TCC)**

**Appeal number: FTC/74/2013**

***VAT – jurisdiction of Tribunal – appeal by recipient of supply against refusal by HMRC to repay VAT erroneously charged on exempt supply – VATA 1994, section 80 – exercise of Community law right to obtain repayment directly from HMRC – whether Tribunal erred in refusing application to strike out – Appeal allowed.***

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

**ON APPEAL FROM THE**
**FIRST-TIER TRIBUNAL (TAX CHAMBER)**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**

**Appellants**

**v**

**EARLSFERRY THISTLE GOLF CLUB**

**Respondent**

**TRIBUNAL: LORD TYRE**

**Sitting in public at George House, 126 George Street, Edinburgh on 12 May 2014**

**Iain Artis, Advocate, instructed by the Office of the Advocate General for Scotland, for the Appellants (HMRC)**

**The Respondent, Earlsferry Thistle Golf Club, was not represented**

**DECISION**

**LORD TYRE**

## Introduction

1. The respondent ("ET") is a golf club in Elie, Fife, with 60 members. Its premises adjoin those of the Elie Golf House Club ("GC"). ET pays an annual fee to GC in order to permit ET's members to play golf on GC's course at certain restricted times. Between 1990 and 2010, GC charged VAT on ET's annual fee and accounted to HMRC for the VAT collected. ET is not registered for VAT.

2. Following the issue of the judgment of the European Court of Justice in *Canterbury Hockey Club and Canterbury Ladies Hockey Club v HMRC* [2008] ECR I-7821, ET formed the view that the fees it had paid to GC should have been treated as exempt from VAT, and accordingly that VAT had been wrongly charged on them. ET and GC entered into an agreement in terms of which GC would seek repayment by HMRC of the VAT that it had collected from ET and would pass on the sum repaid to ET, subject to indemnification of GC by ET for costs incurred by GC in so doing. A sum of £20,399.97 was subsequently paid by GC to ET.

3. On 11 October 2011, ET made a claim, which it described as a "direct effect claim", to HMRC for VAT said to have been erroneously charged on the supplies by GC to ET. The sums incorrectly charged during the period from 1990 to 2010 were said to amount in total to £41,503.07. ET sought payment from HMRC "under EU law" of the balance of this sum after deduction of the £20,399.97 that it had received from GC.

4. On 6 December 2011, HMRC replied, partly under reference to the terms of a previous letter, as follows:

> "[The VAT Act, section 80(1)] clearly intends that payment of, or credit for, any claim made under section 80 ought only to be made to the person who accounted for the wrongly charged output. The only circumstances where a claim under section 80 would be accepted from any other person other [sic] than the person who made the over declaration would be where the right to make the claim had been assigned e.g. under the provisions of section 136(1) of the Land and Property Act 1925.
>
> You have informed us that [ET] do not have any dispute with [GC] because at the time of the supply VAT was correctly charged under UK law as it stood. There is, of course, no obligation on a person who has over declared his output tax liability e.g. as a result of treating supplies as taxable when they ought to have been treated as exempt, to make a claim to recover the over declared VAT. However, in the event that a business decides to make a claim for over declared output tax, it would be handled under section 80 and in accordance with HMRC Business Brief 28/04.

This information is extant and you should therefore present your claim to [GC] as they are the VAT registered business that you state have incorrectly charged and accounted for the VAT and as such, are the only persons that can make any refund to you."

5. ET appealed to the FTT. The appeal was brought under section 83(1)(b) of the Value Added Tax Act 1994 ("the VAT chargeable on the supply of any goods or services"). The decision appealed against was said to be HMRC's letter of 6 December 2011. On 4 January 2012, ET applied for a direction that the appeal be sisted pending the outcome of litigation then before the Upper Tribunal in the "lead" case of *Bridport and West Dorset Golf Club Limited v HMRC ("Bridport").* On 16 May 2012, HMRC applied to have ET's appeal struck out on the ground that it did not meet the criteria of section 80, for the reasons detailed in the letter of 6 December 2011. Both applications were heard by the FTT on 5 February 2013. By that time the Upper Tribunal had referred the *Bridport* case to the European Court of Justice and the Court's preliminary ruling was awaited.

6. It may be helpful in understanding the parties' respective positions in these proceedings if I set out briefly the issue arising in *Bridport* and referred to the ECJ for a preliminary ruling. Under VATA 1994, Sch.9, Group 10, item 3, exemption from VAT is conferred upon "the supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part". The question referred to the ECJ was, in essence, whether the exclusion from exemption under item 3 of supplies to non-members was compliant with the relevant provisions of the VAT Directive. The judgment of the Court was issued on 19 December 2013 and is reported at [2014] STC 663; the Court's ruling was that member states were not entitled to exclude from exemption the grant of a right to visiting non-members to use a golf course managed by a non-profit-making body.

**The FTT's decision**

7. On 14 March 2013, the FTT issued its decision refusing HMRC's application for strike-out and directing that the appeal be stood over until 60 days after resolution of the *Bridport* case.

8. With regard to the payment of £20,399.97 made by GC to ET, the FTT made the following observations:

"14. No evidence was led as to how this sum was calculated but it appeared to have been the cash sum, less expenses due by ET to GC, that GC received from HMRC after HMRC had restricted the amount of output tax overpaid by deducting input tax overclaimed.

15. As no evidence was led, it was unclear to the Tribunal whether GC had applied for the full amount of output tax overpaid and, consequently, whether HMRC had considered or not whether GC had been repaid in full by receiving full recovery of

input tax when submitting returns and paid a sum representing the full amount of output tax overpaid less any input tax overclaimed."

9. It is apparent from the terms of the FTT's decision that it regarded itself as hampered by a lack of evidence as to the manner in which the sum repaid by HMRC to GC had been calculated. As regards ET's remedy, the FTT concluded:

> "52. No evidence was led as to what remedies had been considered by ET in relation to demanding all the output tax they had overpaid to GC and, consequently, the Tribunal considered the issue of direct effect.
>
> 53. In the absence of evidence that such a claim was virtually impossible or excessively difficult and, in the light of HMRC's contention that GC continued to be in existence as a functioning golf club, the Tribunal were of the view that HMRC were correct. Section 80 VATA did not apply to ET and the only recourse for a refund, in the absence of evidence that it was either virtually impossible or excessively difficult to do so, lay with the supplier, GC, for a refund of any VAT that ET believed had been overcharged."

(The reference to a claim which is "virtually impossible or excessively difficult" is based upon decisions of the European Court of Justice which I discuss below.)

10. Having reached this conclusion, however, the FTT continued:

> "54. In order, however, for the amount of VAT overcharged to be ascertained with any certainty, a final decision of the *Bridport* case, currently before the ECJ, is required.
>
> 55. Only when the amount of overcharged VAT, if any, is known, can ET ascertain from GC if they have been correctly reimbursed and, if not, and if the circumstances so determine, consider the issue of direct effect."

HMRC now appeal, with the leave of the FTT, against the refusal of its application to have ET's appeal struck out.

**Claims for repayment of overpaid VAT**

*(i) National law*

11. The circumstances in which a claim may be made for repayment of overpaid VAT are set out in detail in VATA 1994, section 80. In its current form, section 80 provides *inter alia* as follows:

> "(1) Where a person—
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
> the Commissioners shall be liable to credit the person with that amount.

…

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

…

(3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.

…

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years after the relevant date.

…

(4ZA) The relevant date is—

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection…

…

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

12. The effect of section 80(1) is that a claim for repayment may only be made by a person who has accounted for output tax to HMRC: in other words, by a supplier who has charged VAT to the recipient of its supply. Section 80 makes no provision for a claim to be made to HMRC by the recipient of a supply who has borne the burden of tax on that supply. Taken on its own, that would not exclude the possibility that a claim by the recipient of a supply could be made by means of an ordinary action for payment founded upon a non-statutory remedy such as recompense for unjustified enrichment. However, section 80(7) creates a difficulty for such an action because it provides that HMRC are not liable to repay any amount accounted for or paid to them by way of VAT "except as provided by this section". In *Investment Trust Companies (in liquidation) v HMRC* [2012] EWHC 458 (Ch), Henderson J held (at paragraphs 103-105) that section 80(7) must be construed as excluding all actions for repayment by a person who was not the taxable person who paid or accounted for the overpaid VAT.

*(ii) Community law*

13. That, however, is not necessarily the end of the matter. The availability of a claim by the recipient of a supply against the tax authorities for repayment of erroneously-charged VAT has been considered in two decisions of the European Court of Justice. In *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* [2008] STC 3448, the Court ruled that the principle of effectiveness did not preclude a national law which permitted only the supplier to seek reimbursement from the tax authorities of VAT

unduly paid, if it also permitted the recipient of the supply to bring a civil action against the supplier for recovery of a sum mistakenly charged by the supplier and paid by the recipient. However, where recovery by the recipient was impossible or excessively difficult (e.g. where the supplier was insolvent), the principle of effectiveness required member states to provide the necessary means to enable the recipient to recover the wrongly-charged tax. The issue which arose in *Danfoss A/S v Skatteministeriet* [2013] STC 1651 was similar except that it concerned duty charged by a member state in breach of EU law as opposed to tax wrongly paid due to an error by the supplier. The Court ruled as follows:

> "A member state may oppose a claim for reimbursement of a duty unduly paid, brought by the purchaser to whom that duty has been passed on, on the ground that it is not the purchaser who has paid the duty to the tax authorities, provided that the purchaser is able, on the basis of national law, to bring a civil action against the taxable person for the recovery of the sum unduly paid and provided that the reimbursement, by that taxable person, of the duty unduly paid is not virtually impossible or excessively difficult."

14. Applying these two ECJ judgments, Henderson J held in the *Investment Trust Companies* case, to which I have already referred, that despite the terms of section 80(7), the principle of effectiveness required the admission of a claim by the recipient of a supply directly against HMRC for wrongly-paid tax which could not be recovered without excessive difficulty from the supplier. Henderson J also held, however, that the principle of effectiveness did not require the admission of any claim by the recipient of a supply which, had it been made by the supplier under section 80, would have been precluded by the limitation period contained in section 80(4), i.e. by the 4-year (formerly 3-year) cap. It should be emphasised that the claim with which Henderson J was dealing was not an appeal under the VAT Act but a common law action for payment based upon the (English) law of restitution. I was informed that Henderson J's decision has been appealed by HMRC and that the appeal, with a cross-appeal by the claimants, is set down for hearing in October 2014.

**Argument for HMRC**

15. On behalf of HMRC, it was submitted that the FTT ought not to have refused HMRC's application to strike out the appeal. The FTT had failed to appreciate:

- that it had no jurisdiction under VATA 1994, section 83 to entertain the present appeal;
- that any claim by ET directly against HMRC could only be made by means of an ordinary action based on unjustified enrichment or by application for judicial review;

- that the "decision" of 6 December 2011 was not an appealable decision in terms of section 83; and

- that the outcome of the *Bridport* reference, and its consequences for the substantive issue of whether VAT had been wrongly charged by GC, had no bearing on the preliminary question of whether the FTT had jurisdiction to entertain the appeal by ET.

16. As regards ET's argument (below) that the FTT had erred in failing to hold that ET was entitled to full repayment from HMRC, it was submitted that I had no jurisdiction to hear such a contention because ET would have required the leave of the FTT to argue it. No such leave had been sought.

**Argument for ET**

17. ET was not represented at the hearing of the appeal. A full written submission was, however, submitted on its behalf by Mr Stuart Bruce, VAT Consultant, who had appeared on behalf of ET before the FTT. It was contended that the FTT had acted correctly in sisting the appeal to await the judgment of the Court in *Bridport* for the following reasons:

    - section 83(1)(b) conferred an entitlement upon ET to contest the substantive issue of exemption of fees from VAT, and in particular the disapplication of the exception under item 3 of fees paid by non-members;

    - section 83(1)(b) also gave the FTT jurisdiction to hear an appeal by ET on that basis;

    - because ET was asserting directly effective rights, the decision of the ECJ in *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 (paragraphs 23-25) required its appeal to be heard and did not permit it to be struck out;

    - *Bridport* and the present appeal concerned the same substantive issue of whether supplies of facilities to play golf by a non-profit-making club to non-members were properly chargeable to VAT or were exempt.

18. It was further contended that the FTT had erred in deciding that ET's remedy lay against GC. The error in treating the supply as taxable lay with the state and not with GC, and HMRC were not permitted to transfer responsibility for any redress to GC. Reference was made to *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraphs 48-49 and to *Francovich v Italian Republic* [1991] ECR I-5357, paragraphs 33ff. There was no basis in law for restricting the state's obligation to repay VAT wrongly paid; in particular the obligation could not depend upon ET proving how the sum paid to it by agreement with GC had been calculated. It was submitted that I

should find, contrary to the decision of the FTT, that ET was entitled to full repayment from HMRC subject only to verification of the claim.

**Decision**

19. It was not disputed by Mr Artis, who appeared on behalf of HMRC, that there are circumstances in which an appeal may competently be made to the FTT by the recipient of a supply of goods or services. This seems to me to be clear from the observations of Simon Brown LJ in *C&E Commrs v Cresta Holidays Ltd* [2001] STC 386 at paragraphs 9 and 10 where he declined to interpret certain statutory provisions as overturning two "longstanding Tribunal decisions" to that effect. Indeed, *Canterbury Hockey* is an example of an appeal under section 83(1)(b) by a recipient rather than by a supplier.

20. The present appeal bears to be brought under section 83(1)(b) which, as I have noted, provides for an appeal to be made to the FTT with respect to "the VAT chargeable on the supply of any goods and services". The difficulty for ET, in my opinion, is that HMRC's letter of 6 December 2011 contains no decision on the substantive issue of whether VAT was chargeable on the fees paid by ET to GC. Instead, HMRC declined to deal with ET's claim on the ground that it should have been directed to GC. As the letter does not bear to convey any decision by HMRC as to whether VAT was properly chargeable on supplies of services by GC to ET, there is in my opinion no basis in law for an appeal under section 83(1)(b).

21. It was argued on behalf of HMRC that the letter of 6 December 2011 conveyed no decision at all, but merely contained advice or guidance about the correct procedural route for ET to follow in order to pursue its claim for reimbursement. It seems to me to be more in accordance with commercial reality to treat the letter as conveying a decision by HMRC to refuse to meet ET's claim, on the ground that it ought to have been addressed to GC. The FTT has jurisdiction under section 83(1)(t) to entertain an appeal with respect to "a claim for the crediting or repayment of an amount under section 80". I have already noted, however, that a claim for repayment under section 80 may only be made by the person who has accounted for and paid to HMRC the tax now being reclaimed. That is no doubt why ET does not seek to assert a claim under section 80 but instead describes its claim for repayment as a "direct effect claim". The question is whether the FTT has jurisdiction to entertain such a claim.

22. In my opinion, it does not have jurisdiction. The rulings of the ECJ in *Reemtsma* and *Danfoss* make clear that member states must provide a means by which the recipient of a supply can recover VAT wrongly paid to the supplier. If a member state provides for recovery of such tax by civil proceedings against the supplier to whom it was erroneously paid, it must provide a means of seeking repayment directly from the state only in so far as recovery from the supplier is impossible or excessively difficult. The method by which this result is to be achieved is, however, a matter for the member state to determine. As one might expect, there is nothing in the judgments of the Court to suggest

that the result must be achieved by means of an appeal to a tax tribunal. The principle of effectiveness is satisfied if the claimant can bring an ordinary action for payment against HMRC. It does not require the conferring of a jurisdiction upon the Tax Chamber of the First-tier Tribunal which has not been conferred upon it by national VAT legislation.

23. It was accepted on behalf of HMRC that the recipient of a supply does, in principle, have a right of action in the ordinary courts to recover any VAT paid by it to its supplier which it cannot recover from the supplier without excessive difficulty, and that to that extent section 80(7), which would otherwise exclude such an action, must be disapplied. It was not contended on behalf of ET that no right exists in principle. The appeal against Henderson J's decision in the *Investment Trust Companies* case does not, as I understand it, seek to take issue with this principle, but rather challenges certain views of Henderson J as to the conditions which must be met before an action can be brought. Applied to the circumstances of the present case, this means that ET would, in principle, have a right of action against HMRC in the sheriff court or (possibly) the Court of Session for repayment of VAT which it has not recovered and cannot without excessive difficulty recover from GC. On the information before me, I see no reason why such an action could not competently be raised. However, as the FTT observed, it is impossible to ascertain from the material before the tribunal whether any sum is in fact due by HMRC to ET or, if so, how much. The uncertainties include:

    - the method by which the payments made by HMRC to GC and by GC to ET were calculated;
    - the extent, if any, to which the amount calculated to be due by HMRC to GC was reduced by input tax overclaimed;
    - the extent, if any, to which a claim by GC was excluded by the 4-year (formerly 3-year) cap;
    - the circumstances, if any, which render any further claim by ET against GC impossible or excessively difficult.

    The ruling by the ECJ in *Bridport* may have removed one potential obstacle to such a claim. But that ruling has no bearing upon the preliminary question of whether the FTT has jurisdiction to hear a claim for payment made outwith the statutory appeal regime by the recipient of a supply. In my opinion it does not, and for that reason the application by HMRC to strike out the appeal ought to have been granted.

24. In the light of my decision, it is unnecessary for me to address ET's contention that the FTT erred in failing to hold that it was entitled to repayment by HMRC, subject only to verification of the claim. I can, however, express my view briefly. In my opinion, HMRC are clearly correct in their submission that I could not have entertained this contention because leave was not sought from the FTT. Rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) states:

"A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if –

(a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and

(b) that application has been refused or has not been admitted or has been granted only on limited grounds."

Rule 24(3) requires the respondent in an appeal to the Upper Tribunal to specify *inter alia* the grounds on which the respondent relies, including any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal. In *EG and NG* [2013] UKUT 00143 (IAC), the Immigration and Asylum Chamber of the Upper Tribunal considered a submission that rule 24(3) allowed a respondent to argue, without seeking permission of the FTT, any point decided by it against the respondent. The Upper Tribunal disagreed, observing that

"…If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal."

25. In the present appeal to the Upper Tribunal, it appears that ET would have wished to submit not only that the FTT ought to have reached a materially different conclusion on the parties' applications, but also, in effect, that it should have decided the appeal in principle in favour of ET. In my view that would have required the leave of the FTT and, as no such application was made, I would have had no jurisdiction to address the submission or even to grant leave to argue it.

**Disposal**

26. HMRC's appeal against the FTT's refusal to strike out the appeal is allowed. In terms of rule 8(2)(a) of the 2008 Rules, the Upper Tribunal must strike out the whole of proceedings if it does not have jurisdiction in relation to them. The appeal is hereby struck out.

**Signed:** **Release date 02 June 2014**

**LORD TYRE**

**SITTING AS A JUDGE OF THE UPPER TRIBUNAL**